ABA PROJECT EU ADMINISTRATIVE LAW

SECTION STATE AID

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1. INTRODUCTION

1.1 STATE AID RULES—THE OVERALL CONTEXT

One of the goals of the TEC is the establishment of a "system ensuring that competition in the internal market is not distorted."[1] The main rules of the TEC dealing with State aid are part of the chapter entitled "rules on competition". While the traditional anti-trust rules aim at protecting competition against undue private action, the State aid rules aim at protecting competition against one of the most important threats resulting from government action. These rules aim at regulating distortions of competition resulting from selective government support being granted to certain market participants. The rules on State aid in the TEC are thus an important cornerstone of the EU's policy in the field of competition law,[2] reflecting the original concern that rivalry between, in particular, the larger Member States as regards key industries would risk not only a coherent competition policy, but could risk the very existence of the Community.[3]

The TEC's traditional anti-trust rules[4] — like the prohibition of anti-competitive agreements between undertakings and the prohibition of the abuse of a dominant position — are directly addressed to undertakings. State aid rules,[5] by contrast, are addressed mainly to Member States as they regulate their behavior. Nevertheless, private parties and, in particular, beneficiaries have a strong interest in ensuring compliance with such State aid rules, in so far as they will be able to rely on commitments by the Member States (or their subdivisions) to grant aid only if the rules have been complied with. A Member State breaching such rules may end up in the somewhat paradoxical situation, of benefiting from its own failure to comply with the rules, as any state aid found to be

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1 Article 3(g) TEC.

2 There is a vast body of literature on State aid law in the European Union; cf., e.g., CONOR QUIGLEY & ANTHONY COLLINS, EC STATE AID LAW AND POLICY (2003); LEIGH HANCHER, TOM OTTERVANGER & PIET JAN SLOT, E.C. STATE AIDS (2nd ed. 1999); ROSE M. D'SA, EUROPEAN COMMUNITY LAW ON STATE AID (1998); ANDREW EVANS, EUROPEAN COMMUNITY LAW OF STATE AID (1997); […].

3 It is against this background that the ECSC Treaty (signed in 1953 as the first founding Treaty) contained a much more stringent outright prohibition on State aid as regards the steel and coal industries, at that time thought to be "key" sectors of the economy. The 1957 EEC Treaty allowed for more flexibility, but reinforced the "supranational" control powers of the European Commission as regards essentially all sectors of the economy, which are the subject of this chapter.

4 In particular, Articles 81 and 82 TEC. Articles 83 to 85 TEC mainly deal with procedural questions, Article 86 TEC concerns public undertakings and undertakings having been granted special or exclusive rights.

5 In particular, Articles 87 to 89 TEC.

incompatible with the substantive state aid rules will have to be returned to the Member State in question at the expense of the beneficiary.

1.2 A BRIEF IDEA ON SUBSTANCE –-WHAT IS STATE AID AND WHEN IS IT PERMISSIBLE

The State Aid rules do not only deal with cash subsidies which a Member State may be willing to pay to a particular company. Rather, the term "State aid" is used in the broadest possible sense. Any "gratuitous advantage" (and including non collection of state revenues otherwise due, the granting of guarantees, etc.) at the expense of the state is covered, provided that the advantage is made available to only certain companies, in certain regions or to certain sectors of the economy. Measures that apply indiscriminately to all sectors and regions within the jurisdiction of the authority in question are typically not state aid, they are considered "general measures" (such as the setting of applicable tax rates) which fall outside the EU's powers to regulate State aid.[6]

The TEC generally prohibits such State aid unless it is authorized by the Commission pursuant to certain criteria that are provided for in the TEC or secondary legislation.[7] The TEC declares certain types of aid compatible with the TEC, including, e.g., aid to make good the damage caused by natural disasters or exceptional occurrences (but the application of the exceptions is still subject to the supervision of the Commission). The Commission, in its discretion, can declare other types of aid to be compatible with the common market (ranging from aid to promote the economic development of underdeveloped areas to aid to promote the execution of an important project of common European interest.[8]

Any aid that can not be authorized on such bases is incompatible with the common market. Member States, which are prevented from actually granting aid, before it is authorized, must not make such aid available to beneficiaries. The Commission will typically order a Member State that granted such aid to recover it from the beneficiaries and may adopt injunctions to stop any further aid payments.

1.3 PROCEDURAL BASICS: SOME IMPORTANT CONCEPTS

1.3.1 *State aid can only by paid out after it has been approved by the Commission*

The most important procedural concept, on which the State aid rules are based, is the idea that State aid may only be granted after it has been approved by the Commission. The underlying "stand-still" obligation for the Member States is provided for in Article 88 (3)

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6 For more details, see below, chapter 3. __■■.

7 Article 87(1) TEC.

8 Articles 87(2) and (3) TEC.

TEC. This stand-still obligation can be relied upon by third parties, and including by competitors requesting national courts to quash decisions, by which national authorities seek to (prematurely) grant aid before the Commission has taken a decision.

1.3.2 *The Procedure is between the Commission and a Member State*

State aid proceedings were designed as bilateral proceedings between the Commission and the Member State concerned, and not between the Commission and the undertaking having received State aid. Only the Member State in question can notify State aid to the Commission for approval, and all administrative procedures regarding State aid (even if initiated on the basis of a complaint of a private party) are procedures between the Commission and that Member State and dealing with the behavior of the Member State.

Undertakings that receive aid, the competitors of the undertaking receiving aid (even in their role as complainants) and the local authorities (within the Member State) which grant the aid only have the statues of 'interested parties' in this procedure, and only as of a certain stage in the procedure.[9]

Nevertheless, adverse consequences resulting from the procedure mainly affect the beneficiary. It is the beneficiary who will not receive the State aid deemed to be incompatible with the Common market, and it is the beneficiary who has to pay back amounts he received if the aid was (illegally) paid prior to an authorization decision by the Commission. In fact, it is the Member State that illegally paid aid, which will have the economic benefit of a Commission decision requiring a repayment, because the money is to be returned to the authority making the payment (and not to the European Union, or the Commission).

This procedural setting has led to certain difficulties (and criticism) since it limits the procedural position and margin of maneuver for the party, whose economic interest are most affected by it.

1.3.3 *"New Aid" vs. "Existing Aid"*

If a Member States intends to grant State aid it first needs to notify such "new" aid to the Commission for approval. Once the Commission approves the aid, the aid becomes "existing aid" but the Commission retains a certain amount of supervisory powers as regards such "existing aid" (such as the power to order that it be modified for the future). The difference is important, because only new aid is subject to the stand-still obligation and because the Commission retains much more draconian powers (including the power to demand restitution) over new aid, than over existing aid.

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[9] *See*, e.g., *Acciaierie di Bolzano SpA v. Commission*, Case T-158/96, 1999 E.C.R. II-3927, para. 42; *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, Joined Cases T-228/99 & T-233/99, 2003 E.C.R. I-435, para. 122.

The concept of new aid also applies to "modifications" of existing aid (i.e., in cases were after the Commission approved an aid, the legal framework for granting it is changed in favor of the beneficiary (e.g. by increasing the aid amount or intensity)). The concept of existing aid also comprises situations in which a particular aid was granted before the relevant rules of the TEC became applicable (i.e. aid granted before the TEC entered into force in 1957 (not very relevant in practice) or before a Member State acceded to the EC (very relevant for the ten new Member States who joined on May 1, 2004).[10]

1.3.4 *"Ad-hoc aid" or "Individual aid" vs. "Aid schemes"*

State aid may be granted either "*ad-hoc*" in a particular case to address specific needs, or on the basis of a general aid scheme. An "aid scheme" is a general legislative or administrative measure by which a Member State defines the under which aid may be granted to undertakings that are defined in the scheme in general, abstract terms. Aid that is not granted on the basis of an aid scheme is "individual aid"[11] (sometimes also referred to as "*ad-hoc*" aid).

The importance of the difference relates to the fact, that once an aid scheme has been authorized, no instance of individual aid granted pursuant to the scheme requires individual notification to or approval by the Commission.[12] By contrast individual (*ad-hoc*) aid always requires individual notification and approval by the Commission. In practice most aid is granted on the basis of approved aid schemes.

1.3.5 *"Unlawful aid" vs. "Incompatible aid"*

State aid that is put into effect without having been authorized by the Commission is granted in contravention of procedural rules and is referred to in Community parlance as (procedurally) "unlawful aid".[13] Aid therefore will be "unlawful" if the procedural requirement to notify was violated, irrespective of whether the aid would be compatible with the substantive State aid rules in the TEC.

By contrast, "incompatible aid" is State aid that is "incompatible with the common market" pursuant to Article 87 (1) TEC, i.e. aid which cannot be approved on the basis of any of the categories of permissible aid identified in the TEC.[14] Incompatible aid can not be authorized by the Commission, and can therefore not be paid to the beneficiary. In case "incompatible" aid, has been "unlawfully" granted, it must (almost invariably) be repaid by the beneficiary to the authority granting it.

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10 The rules applicable to State aid granted in the ten new Member States prior to accession have, however, been the subject of very detailed rules in the Accession Treaties, based on prior contractual commitments by the ten new Member States under the socalled "Europe Agreements". These rules are fairly complex (to say the least).

11 Article 1(d) and (e) of Regulation 659/1999.

12 Subject to a certain exceptions referred to below, see ■■

13 Article 1(f) of Regulation 659/1999.

14 *See* Articles 87(2) and (3) TEC.

1.4 OVERVIEW OF THE PROCEDURE

The procedure followed by the Commission in State aid cases can divided into two phases, Phase 1 being a *prima-facie* examination of the aid measure in question, and Phase 2 being the formal investigation procedure.

1.4.1 *"Phase 1" triggered by Notification or Complaint*

As soon as the Commission has received a notification of a State aid measure by a Member State, the Commission is obliged to initiate Phase 1, the preliminary examination of the aid measure. Similarly, the Commission is obliged to examine "without delay" any information it obtains regarding alleged non-notified aid. Often, the source of any such information would be a complaint by a private party, but the Commission is also monitoring press reports regarding instances of State aid being granted by the national authorities.

At the end of Phase 1, the Commission will adopt a decision stating either that

- the measure does not constitute State aid; or
- the measure constitutes State aid and is compatible with the common market; or
- the measure raises doubts as to its compatibility with the State aid rules. In this latter case, the Commission will open a formal investigation procedure, i.e., Phase 2.[15]
- In Phase 1, the Commission cannot declare a measure to be aid that is incompatible with the common market. Any such negative decision can only be adopted after a full formal investigation procedure has been conducted.

1.4.2 *"Phase 2" triggered by Commission Decision, based on "serious doubts" as regards the Compatibility of an Aid Measure*

The formal investigation procedure, or Phase 2, can only be triggered by a Commission decision, if the Commission has (serious) doubts about the compatibility of the aid measure with the common market. During the formal investigation procedure, the Member State concerned and any other interested parties, including any other Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of the aid, are invited to submit comments. The Member State concerned has the opportunity to reply to any of the comments submitted to the Commission. The formal investigation procedure is closed by a Commission decision stating that either

- the measure does not constitute State aid; or
- the measure is authorized as it is ("positive decision") or subject to conditions ("conditional decision"); or
- the measure is not authorized ("negative decision"). In this case, the Member State is prohibited from putting the measure into effect and must typically recover any aid already ("unlawfully") granted to the beneficiary.[16]

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[15] Article 4(2), (3) and (4) of Regulation 659/1999.

2. EXAMPLES OF CASES

2.1 INVESTMENT AID

A typical example is the granting of investment aid. Aid might be granted in order to support an undertaking's initiative to set up a production plant in an economically disfavored region, for example with a view to create new employment for the local population, or to support investments in new infrastructure.

In practical terms, any undertaking that wishes to receive such investment aid will have to turn itself to the competent national authorities that administer the national aid scheme according to which this undertaking seeks to be awarded aid. The national authorities will then initiate their proceedings pursuant to their national procedural rules. Part of this procedure will be the notification to the Commission of the plan to grant aid to a certain undertaking. The notifying Member State can only pay the aid to the undertaking concerned once the Commission has authorized this aid. If the Member State decides to award the aid nonetheless, this aid will be illegal under Community law and will trigger the obligation on the side of the Member State concerned to recover the aid. In a situation where a Member State intends to award aid prior or without the Commission's authorization, competitors of the recipient undertaking may file an application with national courts seeking an injunction against the award of the aid before the Commission's authorization. It will be upon national courts to hinder national authorities to proceed with the paying out of the aid.

An undertaking may be the recipient of various State aid payments at the same time (e.g., on the basis of two or more different aid schemes) by the same Member State. It could also be that subsidiaries of an undertaking which are located in different Member States receive aid simultaneously from the Member States where they are located. In such scenarios, situations might arise where one of the different aids granted are not in conformity with the Community rules on State aid, e.g., if a Member State decided to award the aid without prior notification to the Commission or did not wait until the Commission gave its approval. Then, the Commission will authorize further aid only under the condition that the illegal aid was recovered first: The Member State concerned will have to suspend the payment of any additional aid to the extent that illegal aid has not yet been recovered.[17] If two Member States are involved—i.e., if one Member State has granted illegal aid and another Member State wishes to grant aid that has been authorized by the Commission—the second Member State will be obliged to suspend payment even though it did not violate the State aid rules.

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16 Article 7(2), (3), (4) and (5) of Regulation 659/1999.

17 An example for such a decision is Commission Decision 94/1074/EC *Textilwerke Deggendorf GmbH*, O.J. 1994 (L 386) 13.

When an undertaking wishes to be granted investment aid, legal advice might be necessary at various stages: The undertaking might need assistance when determining which national scheme or which type of aid it might be eligible for; this will very often involve negotiations between the undertaking and the national authorities, particularly where the undertaking plans to make very large investments which will have many collateral effects, ranging from the redevelopment of industrial regions, the creation of new employment, the de-pollution of land in order to construct a new industrial site, etc. In such cases it will be necessary to convince the national authorities that the investment will be of considerable importance to the local or regional economic development and that it would not be appropriate that the undertaking should bear all the costs related to the investment. Particularly, where also other undertakings or the general public as a whole will benefit from an investment, the authorities will be much more inclined to contribute public money. Legal advice will then often be needed in order to determine the maximum amount of permissible aid. This assessment usually involves an interplay between national rules on aid schemes and the relevant Community legislation and Community frameworks on various types of aid.

Furthermore, in the notification process advisers might have to watch out that the Member State concerned complies with the Community rules on State aid as otherwise the prospective recipient of the aid might face the risk to be obliged to pay back the aid. Even though the undertaking will not be a party in the proceeding before the Commission—only the Member State concerned enjoys this privilege—the undertaking has also certain limited procedural rights, like the right to be informed of various procedural steps or to submit observations. Here, representation by legal advisers will often be useful and necessary.

Also undertakings not receiving aid might be in need of legal guidance, e.g., if they wish to prevent a competitor from receiving aid. They might wish to lodge a complaint with the Commission, so that the Commission will initiate a State aid investigation, or they might wish to rely on national procedures and ask a national court to order a stay of payment of aid.

2.2 PUBLIC PRIVATE PARTNERSHIP ARRANGEMENTS (TRANSPORT FOR LONDON)

In 2002, the UK government implemented its plan to modernize and partly privatize London's underground rail system through a Public Private Partnership (the "PPP").[18] To implement this plan, the London underground was divided into an operating company, London Underground Limited ("LUL"), responsible for providing transport services to the public, and three infrastructure companies (the "Infracos") responsible for maintaining and

[18] Cf. Adrian Brown & Christos Golfinopoulos, *Case Comment – The Permissibility of Post Selection Modifications in a Tendering Procedure: Decision by the European Commission that the London Underground Public Private Partnership does not involve State Aid*, PUB. PROCUREMENT L. REV., NA 47 (2003).

upgrading the underground's rail network on the basis of 30-year contracts signed between LUL and each of the three Infracos. The Infracos would receive four-weekly payments of an Infrastructure Service Charge over the life of the 30-year contracts. All four companies, LUL and the three Infracos, were originally established as entities within the public sector. In a subsequent step, ownership in the Infracos would be transferred to private investors by a public tendering procedure, while LUL would remain publicly owned. Eventually, control over LUL was to be transferred to a public body called Transport for London ("TfL"), which was created in 1999 and is controlled by the elected Greater London Authority and chaired by the Mayor of London.

In selecting the contractors, the UK government proceeded as follows: Initially, it published various periodic indicative notices informing about its intention to publish, at a later stage, a formal call for competition for the London Underground PPP. The formal call for competition invited potential bidders to attend a briefing meeting and to obtain briefing packs containing all the relevant information on the project. Following the formal call for competition, LUL started to evaluate offers from the bidders. LUL took into account a number of factors including the cash price, but also other factors relating to the scope of services offered, or the likely quality of the level of performance. On the basis of this evaluation, LUL selected a limited number of preferred bidders with whom it would enter into more detailed negotiations. After the selection of the preferred bidders, various modifications in the proposed contract terms were made. The modifications included changes in the timing and sequencing of the work, changes to the performance regime and the methods of performance measurement, and changes to provisions dealing with the Infracos' remuneration.

Also in 2002, the three Infracos were transferred to private investors. Two of these transfers fell within the scope of the EC Merger Regulation[19] and had to be notified with the European Commission. The Commission cleared the transactions June 2002 because it found that they did not give rise to any relevant anti-competitive concerns.[20]

The Greater London Authority and TfL were highly critical of the PPP proposed by the UK government. In particular the Mayor of London, Ken Livingston, was a vociferous opponent of the plan. This is why in February 2002, TfL, backed by Mr. Livingston, submitted a complaint to the European Commission claiming that the PPP arrangements infringed EU rules on State aid. The UK government formally notified its plans to set up this PPP to the Commission also in February 2002 in order to obtain confirmation that the proposed arrangement did not infringe EU rules on State aid.

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19 At the time, Regulation 4068/89, O.J. 1989 (L 395) 1, as amended.

20 Commission Decision IV/M.2694, O.J. 2002 (C 164) 15 (*Metronet/Infraco*).

Finally, in October 2002, the Commission decided that the PPP arrangement did not involve the granting of State aid to the parties acquiring the Infracos. In reaching this conclusion, the Commission relied on the observation that

> "after the observance of an open, transparent and non-discriminatory procedure, it is, in principle, presumed that the level of any public sector support can be regarded as representing the market price for the execution of a project. This conclusion should lead to the assumption that, in principle, no State aid is involved."[21]

The Commission found that the bidding procedure conducted by LUL fulfilled these criteria. The award of the PPP contracts had been advertised and adhered to the procedure provided for in the relevant public procurement directive, which allowed the narrowing down to a limited number of preferred bidders and to enter into negotiations with only a limited number of bidders ("negotiated procedure"). The Commission rejected the claim that the modification of the contract terms after the selection of the preferred bidders had been discriminatory. The possibility of post-selection changes had been known to all bidders and the complex nature of the infrastructure contracts required a flexible approach. The changes made did not affect the scope and characteristics of the PPP beyond what had originally been communicated to the interested bidders in the advertisements. The reasons that triggered the changes like affordability constraints, an improved understanding of the requirements of London Underground, and changes in circumstances—the Commission notably referred to the "events of September 11, 2001"—were all "factors which would have had an impact not only on the bids of the preferred bidders, but also on the bids of the non-preferred bidders if those bids had remained in the competition."[22] For these reasons the Commission concluded that the tendering procedure had been open, transparent and non-discriminatory which meant that the PPP contracts reflected a market price and thus did not involve elements of State aid.

3. SUBSTANTIVE STATE AID RULES

3.1 INTRODUCTION AND BASIC RULE: STATE AID IS UNLAWFUL UNLESS AUTHORIZED

The central substantive provision on State aid in Community law is Article 87(1) TEC, which in principle prohibits State aid to the extent that it distorts or threatens to distort competition in the common market. Article 87(1) EC provides as follows:

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[21] Commission Decision IV/M.2694, O.J. 2002 (C 164) 15 (*Metronet/Infraco*), para. 79. The Commission referred to a number of previous decision, and also to its Communication on State aid elements in sales of land and buildings by public authorities, O.J. 1997 (C 209) 3.

[22] Commission Decision IV/M.2694, O.J. 2002 (C 164) 15 (*Metronet/Infraco*), para. 88.

> "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."

Member States must not put any aid into effect until the Commission has adopted a final decision authorizing the aid (the "standstill" obligation of Member States).[23]

3.2 STATE AID DEFINED

The ECJ has adopted a broad view of what constitutes State aid measures and defined them by reference to their effects, not to their causes or aims.[24] State aid will be present, if (a) the "state" grants (b) a "specific benefit" to an undertaking which (c) "distorts or threatens to distort competition" and (d) "affects trade between Member States". State measures that do not meet these criteria cannot be qualified as State aid, even though they might have equivalent effects to State aid: The Treaty rules on State aid "*leave no scope for a parallel concept of 'measures equivalent to aid' which are subject to different rules from those which apply to aid properly so-called*."[25]

3.2.1 *State measure – State resources.*

For a measure to qualify as "State" aid it must be imputable to a Member State or any of its subdivisions[26] (states, provinces, counties, municipalities[27]). The notion of State is wide and not only comprises central government authorities, but also other public authorities and public bodies, including publicly owned companies, provided that the company is acting

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23 Article 88(3) TEC.

24 E.g. *Italy v. Commission*, Case 173/73, 1974 E.C.R. 709, para. 13; *Deufil v. Commission*, Case C-310/85, 1987 E.C.R. I-901, para. 8; *France v. Commission*, Case C-241/94, 1996 E.C.R. I-4551, para. 20; *Belgium v. Commission*, Case C-75/97, 1999 E.C.R. I-3671, para. 25.

25 *Commission v. France*, Case 290/83, 1985 E.C.R. 439, para. 18.

26 *Van der Kooy v. Commission*, Joined Cases 67/85, 68/85 & 70/85, 1988 E.C.R. 219, para. 35; *Italy v. Commission*, Case C-303/88, 1991 E.C.R. I-1433, para. 11; *Italy v. Commission*, Case C-305/89, 1991 E.C.R. 1603, para. 13; *France v. Commission*, Case C-482/99, 2002 E.C.R. I-4397, para. 24.

27 *Germany v. Commission*, Case 248/84, 1987 E.C.R. 4013, para. 17.

under State influence.[28] However, measures enacted, undertaken or exclusively financed by the European Communities themselves are not "State" aid.[29]

To be categorized as State aid, the measure must be granted directly or indirectly through State resources.[30] For example, a statutory obligation for private and public energy companies to purchase electricity from those generating electricity from renewable energy sources at minimum prices was not considered to be State aid because this measure did not involve any direct or indirect transfer of State resources.[31] By contrast state resources are involved if revenues that would normally be due are not collected. Therefore, a measure whereby the public authorities grant to certain undertakings a favorable tax treatment also constitutes State aid.[32]

3.2.2 ***Conferring a selective benefit.***

A measure will only be State aid if it confers a "benefit" to only certain undertakings.

A measure leads to a "*benefit*" (i.e. a gratuitous advantage) if the recipient "*receives an economic advantage which it would not have obtained in normal market conditions*".[33] This test, often referred to as the "market investor test" or "market operator test", compares

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28 Whether in such cases measures granted by the undertaking are imputable to the State has to be determined by all the circumstances of the case and in its context; *see France v. Commission*, Case C-482/99, 2002 E.C.R. I-4397, paras. 38 and 56-57; cf., e.g., also *Van der Kooy v. Commission*, Joined Cases 67/85, 68/85 & 70/85, 1988 E.C.R. 219, para. 36.

29 *Norddeutsches Vieh- und Fleischkontor and others v. Bundesanstalt für landwirtschaftliche Marktordnung*, Joined Cases 213/81, 214/81 & 215/81, 1982 E.C.R. 3583, paras. 22-23; (note that state measures co-financed by the Community are state aid).

30 *Sloman Neptun v. Bodo Ziesemer*, Joined Cases C-72/91 & C-73/91, 1993 E.C.R. I-887, para. 19; *Kirsammer-Hack v. Sidal*, Case C-189/91, 1993 E.C.R. I-6185, para. 16; *Viscido and others v. Ente Poste Italiane*, Joined Cases C-52/97 to C-54/97, 1998 E.C.R. I-2629, para. 13; *Ecotrade v. Altiformi e Ferriere di Servola*, Case C-200/97, 1998 E.C.R. I-7907, para. 35; *Piaggio v. International Factors Italia (Ifitalia) and other*s, Case C-295/97, 1999 E.C.R. I-3735, para. 35; *PreussenElektra v. Schleswag*, Case C-379/98, 2001 E.C.R. I-2099, para. 58; *France v. Commission*, Case C-482/99, 2002 E.C.R. I-4397, para. 24.

31 *PreussenElektra v. Schleswag*, Case C-379/98, 2001 E.C.R. I-2099, paras. 59-60; for a critique, *see*, e.g., Marco Bronckers & Rosalinde van der Vlies, *The European Court's PreussenElektra Judgment: Tensions Between EU Principles and National Renewable Energy Initiatives*, 22 EUR. COMP. L. REV. 458 (2001).

32 *Banco Exterior de España v. Ayuntamiento de Valencia*, Case C-387/92, 1994 E.C.R. I-877, para. 14; *Italy v. Commission*, Case C-6/97, 1999 E.C.R. I-2981, para. 16.

33 *Enirisorse SpA v. Ministero delle Finanze*, Joined Cases C-34/01 & C-38/01, 2003 E.C.R. n.y.r., para. 30; *see* also *Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, 2003 E.C.R. I-7747, para. 84; *Syndicat français de l'Express international (SFEI) and others v. La Poste and others*, Case C-39/94, 1996 E.C.R. I-3547, para. 60; *DM Transports SA*, Case C-256/97, 1999 E.C.R. I-3913, para. 22.

the State measure to the hypothetical conduct of a private investor in a like transaction.[34] The test asks whether the benefit could also have been obtained from a rational private investor acting with a view to obtaining a financial return: If a private investor would not have entered into the transaction in question on the same terms, there will be a benefit.[35]

A benefit can be granted "in any form whatsoever",[36] *i.e.*, it need not necessarily consist in the transfer of cash. Typically there will be State aid where the State or public authorities sell goods (such as publicly owned land and buildings)[37] at a reduced price[38]; through the acquisition of a shareholding in a company at above market prices,[39] through a loan at an interest rate below normal market rates,[40] through a reduction in social security chargers,[41] or by an exemption from the application of insolvency rules.[42] However, the acquisition of goods or services by and from the State does not include State aid where the contract is awarded (from the states perspective) to the "best" bidder as a result of an open, non-discriminatory and transparent bidding procedure, because the price resulting from such a procedure will be deemed to reflect the market value for the goods or services acquired.[43]

The benefit is "*selective*" if it does not apply generally to all undertakings in a Member State; by contrast, general measures of economic policy applicable to all undertakings on the basis of objective, non-discriminatory criteria do not constitute State aid. Measures that only apply, in practice, to some undertakings or only to a specific economic sector will constitute State aid, unless there is a justification for granting the advantage only to a selected category of undertakings on the basis of the nature or general scheme of this

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34 E.g. *Belgium v. Commission*, Case, 234/84, 1986 E.C.R. 2263, para. 14; *Belgium v. Commission*, Case 40/85, 1986 E.C.R. 2321, para. 13; *Belgium v. Commission*, Case, C-142/87, 1990 E.C.R. I-959, para. 26; *Italy v. Commission*, Case C-261/89, 1991 E.C.R. I-4437, para. 8.

35 Cf., e.g., *Citiflyer Express v. Commission*, Case T-16/96, 1998 E.C.R. II-757, paras. 44-51.

36 That is the wording used by Article 87(1) TEC itself.

37 Cf. the Commission Communication on State aid elements in the sale of land and buildings by public authorities, O.J. 1997 (L 209) 3.

38 *Produits Bertrand v. Commission* Case 40/75, 1976 E.C.R. 1, para. 2; *Van der Kooy v. Commission*, Joined Cases 67, 68 & 70/85, 1988 E.C.R. 219, para. 28.

39 *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, para. 31.

40 *Steinike und Weinlig v. Germany*, Case 78/76, 1977 E.C.R. 595, para. 1; *SFEI and others v. La Poste and others*, Case C-39/94, 1996 E.C.R. I-3547, para. 62.

41 *Italy v. Commission*, Case 173/73, 1974 E.C.R. 709, para. 17.

42 *Ecotrade Srl v. AFS*, Case C-200/97, 1998 E.C.R. I-7907, para. 45; *Piaggio v. Ifitalia*, Case C-295/97, 1999 E.C.R. I-3735, para. 43, *Spain v. Commission*, Case C-480/98, 2000 E.C.R. I-8717, para. 21.

43 Commission Communication on State aid elements in sales of land and buildings by public authorities, O.J. 1997 (C 209) 3; Commission Decision IV/M.2694, O.J. 2002 (C 164) 15 (*Metronet/Infraco*), para. 79.

system.[44] More specifically, tax rules that deviate from the general tax rules in favor of specific regions or economic sectors, may well constitute State aid, unless they are justified by reasons relating to the logic of the tax system."[45] A measure that does apply across the board may still be selective where the public authorities enjoy discretion in choosing the beneficiaries or the conditions under which the benefit is provided.[46]

3.2.3 *Distortion of competition.*

To fall within the scope of Article 87(1) TEC, aid must distort or threaten to distort competition by favoring certain undertakings or the production of certain goods. As it is sufficient to that a measure threatens to distort competition, it is not necessary to show that the measure at issue actually does have a distorting effect.[47] As a result, and in light of the distortive nature of State aid, this criterion will almost invariably be met in cases, where the beneficiary is an undertaking that is in actual or potential competition with other undertakings in the Community.

3.2.4 *Effect on trade between Member States.*

Article 87(1) TEC furthermore requires that the measure in question affects trade between Member States. This is an expression of the subsidiarity principle in the rules on State aid, as the Community does not have competence to deal with aid measures whose effects are confined to the borders of a Member State.[48] It is, however, not necessary that the State aid recipient does itself export products to other Member States: Trade between Member States will be affected already where an aid measure granted by one Member State will have as its effect the reduction of export opportunities for undertakings established in other Member States.[49] Even aid granted for exports to third countries does not normally fall short of this criterion. For example, in a case relating to a company exporting 90% of its production to outside the EC the ECJ held that trade between Member States was

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44 *Italy v. Commission*, Case 173/73, 1974 E.C.R. 709, para. 33; *Germany v. Commission* Case 248/84, 1987 E.C.R. 4013, para. 18; *Belgium v. Commission*, Case C-75/97, 1999 E.C.R. I-3671, para. 33.

45 *Ferring SA v. ACOSS*, Case C-53/00, 2001 E.C.R. I-9067, para. 17.

46 *France v. Commission*, Case C-241/94, 1996 E.C.R. I-4551, paras. 23 and 24; *Ecotrade Srl v. AFS SpA*, Case C-200/97, 1998 E.C.R. I-7907, para. 40; *Déménagements-Manutention Transport SA*, Case C-256/97, 1999 E.C.R. I-3913, para. 27.

47 Cf., e.g., *Regione Autonoma Friuli Venezia Giulia v. Commission*, Case T-288/97, 2001 E.C.R. II-1169, paras. 49-50; *Alzetta v. Commission*, Case T-23/98, 2000 E.C.R. II-2319, para. 80.

48 Cf. Asger Petersen, *State aid and European Union: State aid in the Light of Trade, Competition, Industrial and Cohesion Policies*, *in* STATE AID: COMMUNITY LAW AND POLICY 20 at 22 (Ian Harden ed., 1993).

49 Cf., e.g., *France v. Commission*, Case 102/87, 1988 E.C.R. 4067, para. 19; *Spain v. Commission*, Joined Cases C-278, 279 & 280/92, 1994 E.C.R. I-4103, para. 40; *Belgium v. Commission*, Case C-75/97, 1999 E.C.R. I-3671, para. 47; *Italy v. Commission*, Case C-310/99, 2002 E.C.R. I-2289, para. 84.

affected.[50] Hence, in practice, it is typically sufficient to show that goods or services of the kind produced by the recipient undertaking are actually traded between Member States.

3.2.5 *De minimis aid.*

The ECJ consistently held that even aid of a small amount could be capable of affecting trade between Member States.[51] However, by Regulation 69/2001,[52] the Commission has now determined by legislation that aid in an amount of up to € 100,000 granted to any one enterprise over a period of three years will be deemed not to constitute State aid.[53] However, not all forms of State aid are covered by this exemption (e.g., export aid does not benefit from this block exemption regulation).

3.2.6 *Cost compensation for public service obligations*

The Court of Justice has recently recognized that cost compensations paid to Companies honoring certain public service obligations under Article 86(2) TEC [54] may not constitute state aid, if certain criteria for determining the level of cost compensations are satisfied.[55]

3.3 LEGAL BASES FOR AUTHORIZATION IN THE TEC

If a measure constitutes State aid, it needs to be justified pursuant to criteria set forth in the TEC or "secondary legislation" (i.e., legislation adopted by the Community Institutions on the basis of powers conferred by the TEC). These rules are the basis for the compatibility decisions of the Commission. They can be found both in the competition chapter of the TEC and in other parts, dealing with specific policies (such as transport and agriculture, for

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50 *Belgium v. Commission*, Case C-142/87, 1990 E.C.R. I-959, para. 38.

51 Cf., e.g., *France v. Commission*, Case 259/85, 1987 E.C.R. 4393, para. 24; *Italy v. Commission*, Case C-303/88, 1990 E.C.R. I-1433, para. 27; *Spain v. Commission*, Joined Cases C-278, 279 & 280/92, 1994 E.C.R. I-4103, paras. 41-42; *Germany v. Commission*, Case C-156/98, 2000 E.C.R. I-6857, para. 32; *Italy v. Commission*, Case C-310/99, 2002 E.C.R. I-2289, para. 86.

52 Commission Regulation 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, 2001 O.J. (L 10) 30.

53 Regulation 69/2001 was adopted on the basis of a Council Regulation 994/1998 that explicitly gave the Commission competence to determine by regulation what aid it would consider to be *de minimis* and thus not covered by Article 87(1) TEC; see Council Regulation 994/98 of 7 May 1998 on the application of Articles 92 and 93 [now 87 and 88] of the Treaty establishing the European Community to certain categories of horizontal State aid, 1998 O.J. (L 142) 2.

54 Such "public service obligations" related for example to the keeping of certain stock piles of medicine for distribution to pharmacies in France or to the provision of transport services by bus in a relatively scarcely populated area in Germany.

55 *Ferring v. Acoss*, case C-53/00, 2001 E.C.R. I-9067; *Altmark Trans v. Nahverkehrsgesellschaft Altmark*, C-280/00, 2003 E.C.R. I-7747. See also overview given by Phedon Nicolaides, *Compensation for Public Service Obligations: The Floodgates of State Aid?*, 24 EUR. COMP. L. REV. 561 (2003); cf. also, e.g., Phedon Nicolaides, *The Distortive Effects of Compensatory Aid Measures: A Note on the 'Ferring' Judgment*, 23 EUR. COMP. L. REV. 313 (2002).

example). Moreover, the Commission has adopted various forms of "soft-law" (frameworks or communications) in which it explains how it intends to exercise its discretion in particular as regards cases, in which it directly applies the rules set forth in the TEC.

Article 87(2). The TEC provides that certain types of aid are deemed to be compatible with the common market:[56]

- 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; or
- aid to make good the damage caused by natural disasters or exceptional occurrences. [57]

Nevertheless, the Commission is entitled to review proposed aid measures with an aim of determining whether the measures are limited to dealing with the situation that is described in the mandatory exception provisions.[58]

Article 87(3). More important in practical terms are the discretionary exemptions under Article 87(3) TEC. The Commission can decide to authorize the following types of aid :

- aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
- 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;
- 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;
- aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;
- such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

Article 86 TEC. Article 86(1) TEC provides that public undertakings and undertakings to which Member States grant special or exclusive rights are subject to the competition rules, and including the State aid rules. Article 86(2) provides for a limited exception insofar as the Competition (and State aid) rules do not apply "in so far as the application of such rules does not obstruct the performance (…) of the particular tasks assigned to them." It is for

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56 Article 87(2) TEC.

57 An additional exception dealing with "aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that divisions" is of very limited relevance, after the reunification of Germany.

58 **[Add reference]**

the Commission to determine, whether public financing of certain public service obligations is necessary in order for such services to be provided.[59]

Article 36 TEC (Agriculture). The TEC's competition rules, and thus also the State aid rules, do not apply to the production of and trade in agricultural products, unless the Council adopts legislation to that effect. On the basis of Article 36 TEC, the Council may, in particular, authorize the granting of aid:

- for the protection of enterprises handicapped by structural or natural conditions; and
- within the framework of economic development programs.

Article 73 TEC (Transport). According to Article 73 TEC, aid measures shall be compatible with the TEC if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Article 88(2) TEC (Special Circumstances). On the basis of Article 88(2) TEC and in derogation of Article 87 TEC and of secondary legislation in relation to State aid, the Council may authorize State aid if this "is justified by exceptional circumstances." To that end the Council can only act upon application by a Member State and must take its decision to authorize the aid unanimously. If prior to the Member State's application to the Council, the Commission has already initiated an investigation procedure, the Member State's application to the Council will suspend the Commission's investigation.[60]

Euratom Treaty. The Treaty establishing the European Atomic Energy Community (the "Euratom Treaty") does not contain specific provisions on State aid. Pursuant to Article 305(2) TEC, which stipulates that the provisions of the TEC shall not derogate from those of the Euratom Treaty, the State aid rules of the TEC also apply to the nuclear sector.[61]

ESCS Treaty. The ESCS Treaty originally prohibited "subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever,"[62] in a form that was much stricter than the EC Treaty rules. Although the ESCS Treaty and the rules adopted there

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59 There is, moreover, a rather complex debate as to when cost compensation for the performance of public service obligation constitutes state aid, see point **[3.2.6]** above.

60 *See* Article 88(2), second and third subparagraph, TEC. **[Add reference to case law limiting use by Council of the provision, French Trucker tax exemption case]**

61 *See France and others v. Commission*, Joined Cases 188-190/80, Opinion of GA *Reischl*, 1982 E.C.R. 2545.

62 Article 4(c) of the ESCS Treaty.

under are no longer applicable (the ECSC Treaty expired in 2002[63]) the Community adopted (on the basis of the EC Treaty rules special rules) for the coal and steel sector.[64]

3.4 LEGAL BASES FOR AUTHORIZATION IN "SECONDARY LEGISLATION"

3.4.1 *Article 89 TEC grants power to adopt secondary legislation*

Pursuant to Article 89 TEC, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, has the competence to adopt any appropriate regulations for the application of Articles 87 and 88 TEC. The Council and may in particular determine the conditions in which the notification obligation pursuant to Article 88(3) TEC applies and the categories of aid exempted from this procedure. The regulations adopted on the basis of Article 89 TEC are Regulation 994/98, which defers certain legislative competences in the State aid field to the Commission, and Regulation 659/1999, which is the basic procedural regulation in the State aid sector.

3.4.1.1 Regulation 994/98 as the Basic Regulation for adopting "Block Exemption Regulations"

Council Regulation 994/98[65] gives the Commission the power to adopt rules of general application in the field of state aid (therefore Regulation 994/98 is usually referred to as the "Enabling Regulation").

First, the Commission is empowered to adopt so-called group (or block) exemption regulations. By the adoption of group exemption regulations the Commission can declare that certain categories of aid are compatible with the common market and are not subject to the notification requirements of Article 88(3) TEC. Article 1 of Regulation 994/98 confers to the Commission the power to adopt such exemption regulation and specifies the categories of aid that might be the subject of a group exemption regulation. These categories are aid in favor of (i) small and medium-sized enterprises, (ii) research and development, (iii) environmental protection, (iv) employment and training, and (v) certain types of regional aid.

So far, the following block exemption regulations have been adopted.

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63 The ESCS Treaty expired on July 23, 2002. Article 97 of the ESCS Treaty provided that the ESCS Treaty would expire 50 years after its entry into force.

64 See, for example Council Regulation 1407/2002 on State aid to the coal industry, 2002 O.J. (L 205) 1. Council Regulation 1407/2002 was adopted on the basis of Article 87(3)(e) and Article 89 TEC (See also the prohibition of State aid to the steel sector contained in the Multisectoral Framework [■■] and as regards rescue and restructuring aid in the Steel sector [■■].

65 Council Regulation 994/98 of 7 May 1998 on the application of Articles 92 and 93 [now 87 and 88] of the Treaty establishing the European Community to certain categories of horizontal State aid, 1998 O.J. (L 142) 2.

- Block Exemption Regulation 70/2001 for aid in favor of small and medium-sized enterprises,[66]
- Block Exemption Regulation 364/2004 for aid in favor of research and development (if conducted by small and medium-sized enterprises);[67]
- Block Exemption Regulation 2204/2002 for aid in favor of employment;[68]
- Block Exemption Regulation 68/2001 for aid in favor of and training;[69] and
- Block Exemption Regulation 1/2004 for aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products.[70]

3.4.1.2 Regulation 659/1999

Council Regulation 659/1999[71] is as the basic procedural regulation for State aid matters. It is complemented by Commission Regulation 794/2004,[72] which includes, e.g., the forms to be used for the notification of State aid, explains the calculation of time limits, sets out the method for fixing the interest rate to be applied for the recovery of aid, *etc*.

3.4.2 ***Article 36 TEC grants special powers in connection with agricultural products***

Article 36 TEC provides that the State aid rules apply to the agricultural sector only if and to the extent the Council adopts implementing legislation to that effect.

The Council has adopted a vast body of legislation in this regard. First, the Council has adopted a number of so-called "market organizations", which after provide for Community aid (which is <u>not</u> state aid) and which invariably also provide for restrictions on (additional)

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66 Commission Regulation 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, 2001 O.J. (L 10) 33, as amended by Commission Regulation 364/2004 of 25 February 2004, 2004 O.J. (L 63) 22.

67 Commission Regulation 364/2004 of 25 February 2004 amending Regulation 70/2001 as regards the extension of its scope to include aid for research and development, 2004 O.J. (L 63) 22, corrected version in 2004 O.J. (L 349) 126.

68 Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment, 2002 O.J. (L 337) 3.

69 Commission Regulation 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, 2001 O.J. (L 10) 20, as amended by Commission Regulation 363/2004 of 25 February 2004, 2004 O.J. (L 63) 20.

70 Commission Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products, 2004 O.J. (L 1) 1.

71 Council Regulation 659/1999 laying down detailed rules for the application of Article [88] of the Treaty, 1999 O.J. (L 83) 1.

72 Commission Regulation 794/2004 implementing Council Regulation 659/1999 laying down detailed rules for the application of Article [88] of the Treaty, 2004 O.J. (L 140) 1.

national state aid. Moreover, they expressly provide that Articles 87 – 89 TEC are applicable to the agricultural products covered by the marketing organization in question.[73]

Moreover, Council Regulation 26/1962 ("Regulation 26")[74] declared Article 88(1) TEC and the notification obligation (but not the stand-still obligation![75]) laid down in Article 88(3) TEC applicable to aids granted for the production of or the trade in agricultural products not covered by a market organization.[76] There exists an array of specific regulatory frameworks.

3.4.3 *Article 73 TEC grants special powers in connection with transport*

Article 73 TEC permits the adoption of implementing legislation relating to state aid in the framework of the Community's transport policy. Council Regulation 1192/69 and Council Regulation 1107/70 were adopted on this basis.[77]

3.5 RELEVANCE OF "GUIDELINES" AND "FRAMEWORKS" ADOPTED BY THE COMMISSION

The Commission enjoys a wide margin of discretion when authorizing state aid on the basis of the various Treaty provisions outlined above.

The broad scope of this discretion made it difficult to predict how the Commission would deal with certain recurring fact patterns. [78] For example, state bail outs for large failing companies have occurred many times over , but the criteria for approval were unclear. Similarly the conditions for approval investment aid in disadvantaged areas, the maximum aid intensity, etc. are issues which are not addressed with any degree of predictability in the Treaty.

The Commission could have proposed implementing legislation to deal with the perceived lack of legal certainty. However, the Commission's initial attempts to propose legislation (to be adopted by the Council, *i.e*. the representatives of Member States') were

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73 See Borchardt, in Lenz, EU- und EG Vertrag, 3rd ed. 2003 Art. 36 para. 10.

74 Council Regulation No 26 applying certain rules of competition to production of and trade in agricultural products 1962 O.J. (30) 993.

75 **[check!]**

76 Agricultural products within the meaning of the TEC are all those products listed in Annex I to the TEC.

77 Council Regulation 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings, O.J. 1969 (L 156) 8, Council Regulation 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway, O.J. 1970 (L 130) 1.

78 *Keller SpA and Keller Meccanica SpA v. Commission*, Case T-35/99, 2002 E.C.R. II-261, para. 77.

unsuccessful, because the Council either failed to act upon the proposals or threatened to change the substance so significantly that the Commission withdrew the proposals.[79]

The Commission therefore resorted to a form of "soft law", by essentially adopting policy statements (after discussion with the Member States, but adopted independently by the Commission). Many of the policy statements (often called guidelines[80]) relate to the future treatment of general cases and the approval conditions for future aid schemes (e.g. the Guidelines on national regional aid[81] describe which areas the Commission will consider as "disadvantaged areas" for purposes of Article 87(3) a) and c) TEC, based on economic indicators such as the gross domestic product of such area or the unemployment rate in such area).

Other policy statements (often called "Frameworks" [82]) deal with the approach to be taken vis-à-vis cases of individual aid. In the adoption of these frameworks the Commission had to take account of the fact that individual cases of aid granted pursuant to approved aid schemes do not require individual notification to the Commission.[83] To make frameworks an effective tool, the Commission therefore used the procedures to modify existing aid, requiring Member States to conform preexisting aid schemes to (in particular) the notification requirements set forth in the frameworks.

The "soft law" thus became a little "harder" and led to disputes , in which the Court affirmed the right of the Commission to adopt frameworks and to enforce them against Member States.[84] For example, the Commission adopted a "Multisectoral Framework"[85] which was intended to ensure that the aid intensity for very large investment projects in disadvantaged regions is reduced compared with the aid intensity for smaller projects, on the theory that the aid to larger, more capital intensive projects had a stronger distortive effect on competition. When Germany objected, the Commission adopted a formal decision on the basis of Article 88(2) TEC[86] which the Court upheld[87] against a challenge by Germany. As a result, Germany was required (as all Member States) to individually

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79 The Council can only adopt legislation if the Commission makes a proposal, by withdrawing the proposal the Commission effectively blocks the Council's power to legislate.

80 Cf., e.g., Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, 2002 O.J. (C 119) 22; Communication from the Commission – Services of general interest in Europe, 2001 O.J. (C 17) 4; Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, 2000 O.J. (C 71) 14; or Commission communication on State aid and risk capital, 2001 O.J. (C 235) 3.

81 Guidelines on national regional aid, OJ 1998 C74/9.

82 Like, e.g., the Community framework for state aid for research and development, 1996 O.J. (C 45) 5.

83 **<Add reference>**

84 <to follow>

85 <to follow>

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notify certain larger investment aid projects even if the aid was granted under an otherwise approved aid scheme.

There is a significant number of such policy statements, and a non-exhaustive list of the more note worthy of such lists is reproduced below:

<to follow>

Generally, the case law of the ECJ acknowledges that Member States and private parties may entertain legitimate expectations in relation to what the Commission expressed in guidelines or frameworks.[88] Legitimate expectations, however, cannot be founded on statements by the Commission that attempt to derogate from provisions contained in the TEC.[89]

Specifically in relation to the area of supervision of State aid, the ECJ ruled that the Commission is bound by the guidelines and notices that it issues where they do not depart from the rules in the TEC and are accepted by the Member States.[90] Equally, the Member States having accepted the guidelines or frameworks are bound by them as well.[91]

4. APPLICATION AND INVESTIGATION

Most State aid is granted pursuant to an authorization of the Commission based upon an application by the Member State concerned (generally referred to as the "notification" of an aid measure). Such notifications are mandatory for new aid. The second significant source of the Commission's docket are complaints by third parties, which may relate both to new and existing aid. Finally, the Commission can decide to consider aid, and including existing aid, on its own motion. The initial procedure the Commission follows to deal with these cases depends on the nature of the aid: new aid is treated differently from existing aid. Other procedural consequences also depend on the nature of the aid and the question of whether it was voluntarily notified (such as the applicability of deadlines).

However, once the Commission decides to initiate a formal investigation (a "2nd phase"), the procedure becomes essentially uniform. This is a reflection of the structure of the procedural Treaty rules, which deals in Article 88(1) TEC with existing aid, in Article 88(2) with the 2nd phase investigation and in Article 88(3) TEC with new aid, referring as regards an in depth analysis back to Article 88(2) TEC.

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88 Cf., e.g., *ABB v. Commission*, Case T-31/99, 2002 E.C.R. II-1881, paras. 120 and 126; *LR AF 1998 A/S v. Commission*, Case T-23/99, 2002 E.C.R. II-1705, para. 360.

89 Expressly held by the ECJ in *Deufil v. Commission*, Case 310/85 1987 E.C.R. 901, para. 22; *Keller SpA and Keller Meccanica SpA v. Commission*, Case T-35/99, 2002 E.C.R. II-261, para. 77.

90 *Spain v. Commission*, Case C-351/98, 2002 E.C.R. I-8031, para. 53; *CIRFS and others v. Commission*, Case C-313/90, 1993 E.C.R I-1125, para. 35; *IJssel-Vliet Combinatie BV v. Minister van Economische Zaken*, Case C-311/94, 1996 E.C.R I-5023, para. 43.

91 *CIRFS and others v. Commission*, Case C-313/90, 1993 E.C.R I-1125, para. 36.

4.1 APPLICATIONS ("NOTIFICATIONS") UNDER ARTICLE 88(3) TEC

4.1.1 *Legal Framework and Principle – Notification required for new Aid, not for existing aid.*

Article 88(3) TEC obliges Member States to inform the Commission of any plans to grant or alter aid and to not implement such aid before the Commission has taken a decision. This obligation is reinforced and clarified by secondary legislation, i.e. Regulation 659/1999 and Regulation 794/2004. According to Article 2 of Regulation 659/1999 "*any plans to grant new aid shall be notified to the Commission*" [emphasis supplied]. In the notification the Member State must provide all necessary information in order to enable the Commission to assess the conformity of the aid with the State aid rules.

We have already briefly outlined the concept of "new aid" above (see para. **). Regulation 659/1999 defines "new" aid in Article 1 c) as "*all aid*[92]*, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid*". Existing aid is also defined,[93] and includes cases of (i) aid existing at the time the TEC entered into force for a particular Member State, (ii) aid that was approved by the Commission (or the Council) and (iii) aid that is deemed to have been approved, as a result of inaction by the Commission following a notification or as a result of the ten year statue of limitation having lapsed.

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92 "Aid" means State aid within the meaning of Article 87 (1) TEC, a concept described in Chapter 3 above.

93 The technical definition in Article 1 b) also deals with some counter-exceptions under the accession treaties adopted prior to its entry into force, and some exceptional cases (see indent 5) which we do not think require further analysis here, even though these rules raise complex issues. Article 1 b) of Regulation 659/1999 reads as follows: "*'existing aid` shall mean:*

(i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalization."

Existing aid need not be notified to the Commission.[94] By contrast, alterations to existing aid must be notified because the alteration causes such aid to be considered again as "new" aid.[95] An alteration to existing aid is any change in the existing aid other than modifications of a purely formal or administrative nature.[96] The increase of the original budget of an existing aid scheme by up to 20%, however, does not constitute an alteration of existing aid.[97]

Once an aid scheme[98] has been approved, the individual implementing measures do not need to be notified to the Commission separately, unless the Commission has issued certain reservations to that effect.[99]

4.1.2 *Notification in borderline cases.*

Notifications can also be made voluntarily for the avoidance of doubt. Whether a Member State is granting state aid or not can be difficult to determine. Practical examples for uncertainty relate to investments made by the State in the share capital of companies and the sale of state owned assets to companies. [Possible reference to the TfL case]

There are certain procedures the state can follow to ensure that a particular transaction does not involve state aid, such as the sale of assets in an open, transparent and unconditional bidding procedure if the contract is awarded to the highest bidder, or the sale or purchase of company shares through the stock exchange. However, there may be cases in which the transactions can not be structured so as to come within the "safe harbor" principles applied by the Commission. In such a case a Member state can notify a measure, indicating that it believes the measure not to be state aid, requesting the Commission's confirmation that the measure does not involve state aid.

The notification form in Annex I of Regulation 794/2004 expressly provides that the form can also be used *"when a non-aid measure is notified to the Commission for reasons of legal certainty."*

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94 Article 2(1) of Regulation 659/1999 only sets out the notification obligation with regard to new aid, and thus excludes existing aid from the notification obligation.

95 Article 2(1) of Regulation 659/1999.

96 Article 4(1) of Regulation 794/2004.

97 Article 4(1) of Regulation 794/2004.

98 The concept of aid schemes (as opposed to individual aid) was introduced at para __ above. The actual definition of the term "aid scheme" is in Article 1 d) of Regulation 659/1999: "*d) 'aid scheme` shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount*".

99 *Italy v. Commission*, Case C-47/91, 1994 E.C.R. E-4635, para. 21, *ARAP and others v. Commission*, Case C-321/99 P, 2002 E.C.R. I-###, para. 60.

Similarly (although rarely used in practice) it would be possible to notify measures considered to be existing aid, for example in light of minor modifications which could lead to uncertainty whether such a modification must be characterized as an "alteration" of existing aid.

4.1.3 *Legal Consequences Attached to the Notification Requirement – The "Standstill Obligation"*

The Member State concerned must not put notified new state aid measures into effect until the measure has been authorized by the Commission.[100] Any aid granted in contravention of the standstill obligation is "unlawful" aid.[101] The Commission can order the Member State to stop any further aid payments and may even order the Member State to provisionally recover the aid from the beneficiaries.[102]

Moreover, this so called "standstill obligation" contained in Article 88(3) TEC is "directly applicable".[103] Therefore, it can be relied upon directly by Member States and private parties, and including in the courts of the Member States to obtain an injunction against the authorities granting the aid or the aid beneficiary receiving it (and possibly requesting temporary or permanent court orders to repay the aid and to be awarded damages).

[Add paragraph on limited experience in this regard, and the Commissions recent studies on the application of state aid rules by national courts, which focus on this point]

4.1.4 *How a Notification is Submitted (Addressee and Notification Forms)*

Notifications of new aid have to be made on specific notification forms set out in Annex I to Regulation 794/2004.[104] There is (i) a general form, (ii) a form in which the notifying Member States suggest how a notice regarding the approval may be published in the Official Journal, and (iii) a variety of supplemental forms to be used according to the type of aid envisaged. For the notification of certain alterations to existing aid, there is a simplified notification form set out in Annex II of Regulation 794/2004.[105]

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100 Article 88(3) TEC and Article 3 of Regulation 659/1999; there are only very few statutory exceptions, such as the ones provided for in Regulation 26 for agricultural products not covered by a market organization and certain transport aids.

101 Article 1 (f) of Regulation 659/1999 provides that "*'unlawful aid` shall mean new aid put into effect in contravention of Article 93(3) of the Treaty*".

102 See Articles 11 and 12 of Regulation 659/1999.

103 [Add references to the concept of direct applicability]

104 This form is set out in Annex I to Regulation 794/2004.

105 This simplified form is set out in Annex II of Regulation 794/2004.

Notifications have to be addressed to the Secretary General of the Commission and are normally transmitted to the Commission by the Permanent Representative of the Member State concerned.[106] Until the end of 2005 notifications have to be transmitted to the Commission on paper, but Member States are encouraged also to submit the notification in electronic from. A transmission by fax is also possible.[107] From January 1, 2006, notifications should only be transmitted to the Commission electronically; details of the arrangements for the electronic transmission have yet to be published.[108]

Neither the general public, competitors nor other Member States are informed of the notification. Only the Member State that submitted the notification will receive an acknowledgement of receipt.[109]

4.1.5 *Initial Contacts with the Commission (Pre-notification Phase)*

[Add one paragraph, dealing with the fact that in more complex cases of individual aid, Member States, the beneficiary and the Commission engage in pre-notification discussions, typically aimed at identifying the information that the Commission is likely to focus on in its analysis]

4.2 **COMPLAINTS**

4.2.1 *Introduction*

A second significant source of information, triggering a number of proceedings, are complaints. A complaint can be submitted by anyone and may relate to any sort of aid, i.e. both new aid (often in the form of unlawful aid), the improper implementation of aid ("misuse of aid") and even difficulties arising from existing aid, with an aim of having such aid modified for the future. Nevertheless only complainants which fall within the definition of an interested party under Article ____ of Regulation 659/1999 (i.e. in particular competitors, not ???? any undertaking) are entitled to the procedural benefits offered to complainants. [elaborate]

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106 Article 3(1) of Regulation 794/2004; nevertheless a Commission Regulation of this kind is unlikely to have the effect of barring the Member State from acting directly (for example through its Ministry of Foreign Affairs) since the Commission must respect the Member States internal attribution of competences.

107 A notification by fax is considered to be a transmission on paper as of the date of the receipt of the fax, if at the latest ten days after the receipt of the fax the Commission also receives the signed original.

108 Article 3(4)-(6) of Regulation 794/2004.

109 Article 2(1) and Article 1(c) of Regulation 659/1999.

4.2.2 *Initial Contacts with the Commission or informal complaints (Pre-complaint Phase)*

Prospective complainants often establish contacts with the Commission informally, prior to submitting a complaint. There can be several reasons for such contacts. In some cases the complainant would prefer to remain anonymous (at least vis-à-vis the beneficiary and the Member State in question). Informal contacts allow to provide the Commission with the relevant information for it to act on its own motion, and in a number of cases no "formal" complaint is ever brought, even though the informal discussions have had a similar effect. The drawback is, that the procedural benefits for the complainant resulting from a (formal) complaint, are then lost.

Another reason can be to first discuss the case with the Commission informally to determine, what information and supporting documents the Commission is most interested in, so as to be able to focus a complaint in accordance with the Commission's needs. The Commission is generally open to discussions of this kind.

The risk sometimes associated with establishing pre-complaint contacts is "the-genie-is-out-of-the-bottle" problem. The Commission is entitled to act on its own motion,[110] and often does so, so that initial contacts may trigger an investigation. A complainant can not "control" the further process by not submitting the formal complaint (or by withdrawing it, if it was filed).

4.2.3 *Submission of a Complaint*

A formal complaint must be submitted to the Commission in writing. The complaint should be submitted on the basis of a form for the submission of complaints which the Commission has published.[111] However, a complainant is free to provide additional information to the Commission, in the covering letter, in the form of a memorandum or by attaching relevant documents. The complaint should be addressed to the Directorate-General which will be competent to deal with the complaint depending on to what sector the aid measures relates to (i.e. DG COMP in most cases, but DG AGRI in agricultural cases and DG TREN in transport cases).

The complaint should include the following information:

- information on the complainant, i.e., name, contact details, a brief description of how the aid award affects the complainants interest, etc., and information on the complainant's representative including a proof of authorization to act;

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110 Article 10(1) of Regulation 659/1999

111 O.J. 2003 C 116/3.

- indication of which Member State is concerned and at which level of government the alleged unlawful State aid has been granted (i.e., by the central government, or a region or another subunit of the Member State);
- information on the alleged aid measure complained of, i.e., whether it is an aid scheme, individual aid, to which economic sector it applies, who the beneficiaries are, etc.;
- the grounds of the complaint
- information on other procedures, like national court proceedings, that are pending with regards to the same aid measures;
- any supporting documents.

The complainant can decide to remain anonymous. A complaint can, for example, be submitted through a lawyer, without identifying the complainant. However, in such a case, the complainant will not normally be considered as having participated in the proceeding as an interested party, which may have repercussions on its standing to take the Commission to Court for not having acted on the complaint.[112] It may also be taken less serious and be less effective.

A complainant can also submit a complaint in such a way that it will identify itself to the Commission, but request that its identify be withheld from the Member State and the beneficiary in question.

4.2.4 *Legal Consequences of a Complaint*

The legal consequences of a State aid complaint depend on the nature of the aid complained about.

4.2.4.1 New Aid, in particular unlawful aid or misuse of aid

If the Commission obtains information on new aid (in particular new aid that is about to be implemented, or has already been implemented (unlawful Aid)), it is required to examine such information without delay.[113] If the complaint concerns new aid, the complaint will trigger a Phase 1 investigation. At the initial stage of this procedure, the Commission would address an information request to the Member State concerned, [114] and the Member State would, if so requested, have to submit the equivalent of the notification form under Regulation 794/2004.[115]

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112 See BP Chemicals/Commission **[add reference].**

113 Article 10(1) of Regulation 659/1999.

114 Article 10(2) of Regulation 659/1999.

115 See the second sentence of Annex I to Regulation 794/2004.

If the complaint is made by an "interested party" concerning alleged unlawful aid or alleged misuse of aid the Commission the Commission must act on such complaint, because such complainants have the right to be informed if the Commission intends not to act on the complaint and on any other decision the Commission takes on the substance of the case.[116] Interested parties are defined as any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid. They include in particular the beneficiary of the aid, competing undertakings and trade associations.[117]

With regard to the examination of unlawful aid or cases of misuse of aid, the time limit of two months to complete the first phase investigation (which applies in cases of properly notified aid) does not apply.[118] There is one exception to this rule: If unlawful aid has already been done, the Commission is bound to take a phase 1 decision within two months after the recovery was effected by the Member State.[119]

4.2.4.2 Existing Aid

On the basis of Article 88(1) TEC, the Commission has to keep the Member States' systems of aid existing under constant review. Member States are obliged to cooperate with the Commission in this effort. If a complaint relates to existing aid (as opposed to unlawful, i.e., non notified new aid), the Commission will inform the Member State concerned and request information. Eventually, it will inform the Member State of its preliminary views and give it the opportunity to submit comments.[120] The Member State should respond within one month, but this time limit may be extended by the Commission if this is duly justified.

However, a complainant has no procedural rights under Regulation 659/1999 which he could use to force the Commission to look into the matter. The reason for the differentiation relates to the nature of existing aid. Such aid has been approved or is deemed to have been approved, and as a result the Commission's powers are generally limited to request the Member State to make future changes. More importantly, the Commission enjoys a broad margin of discretion as regards the question whether it wants to reopen past approvals (or to raise an issue as regards state aid that existed before a Member State jointed the EC).

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116 Article 20(2) of Regulation 659/1999.

117 Article 1(h) of Regulation 659/1999.

118 Article 13(2) and Article 16 of Regulation 659/1999.

119 Article 11(2) of Regulation 659/1999, see LEIGH HANCHER, TOM OTTERVANGER & PIET JAN SLOT, E.C. STATE AIDS, 373 (2nd ed. 1999)..

120 Article 13(2) of Regulation 659/1999.

4.3 INVESTIGATIONS ON THE COMMISSION'S OWN MOTION

The Commission can at any time decide on its own motion to initiate state aid proceedings to determine, whether a measure is state aid, whether the measure is compatible with the common market or whether a measure was implemented in accordance with state aid approval decisions.

Its decision can relate to new aid. There are, in fact, cases in which the Commission heard of investment projects or restructuring cases which are expected to involve State aid even before they are notified by the Member State, and the Commission has sometimes asked questions as regards the status of such cases. As long as the aid has not been prematurely implemented, such a request for information will not affect the normal notification process. More typically for this category are, however, cases in which unlawful aid was granted, and the Commission hears of that (through "informal" complaints, or simply press reports). For these cases, Article 10 of Regulation 659/1999 provides that "*where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay*".

The decision to initiate an investigation on its own motion can also relate to existing aid. Under Article 88(1) TEC the Commission has to keep the Member States' systems of existing aid under constant review. Where the Commission considers that an existing individual aid is not (or no longer) compatible with the common market, it will usually be unable to do very much, because legitimate expectations of the beneficiary will typically prevent it from requiring changes. In cases however, in which Commission approval has been obtained as a result of fraud or by providing wrong or misleading information, the Commission may withdraw its original approval decision. [expand by reference to Regulation 659/1999 and some cases].

Where the Commission considers that an existing aid scheme is not or no longer compatible with the TEC, the Commission it can issue a recommendation to the Member State in which it will propose appropriate measures.[121] To prepare for such a recommendation, the Commission can open proceedings and request, inter alia, information from the Member State concerned.[122]

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[121] If these are not accepted the Commission can open a phase 2 investigation and can eventually decide that the Member state must accept the requested modifications.

[122] Article 17 of Regulation 659/1999.

4.4 OPENING OF AN INVESTIGATION

4.4.1 *Triggering Event*

4.4.1.1 Triggering Event for a Phase 1 Investigation

A Phase 1 investigation can be triggered by either of the following three instances:

- a notification of an aid measure to the Commission by a Member State;[123]
- a complaint to the Commission by any person or company;[124] or
- by the Commission out of its own motion.[125]

4.4.1.2 Triggering Event for a Phase 2 Investigation – Only a Commission Decision

The formal investigation procedure—in difference to the preliminary examination—is opened by a formal Commission decision ("decision to initiate the formal investigation procedure"). It is always preceded by a preliminary examination of the notification and/or, the other pertinent information in the possession of the Commission. There is a number of instances when the Commission must initiate the formal investigation procedure:

- where, after the preliminary examination of new aid, the Commission concludes that there are (at least) doubts as to the compatibility of the measure with the common market;[126]
- where, in cases of misuse of aid, the Commission concludes after the preliminary examination of the information in its possession that there are (at least) doubts as to whether there is a misuse of aid;[127]
- where the Commission considers that existing aid is not compatible with the common market and the Member State concerned does not accept the Commission's proposals to abolish or alter the aid in question;[128] or
- where the Commission decides to revoke a decision because the decision was based on incorrect information provided during a previous examination or investigation procedure.[129]

The decision to open the formal investigation procedure (or 2nd phase procedure) will set forth the reasons for the Commission's doubts and concerns, and it will provide a summary

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123 Article 2 of Regulation 659/1999.

124 Articles 10(1) and 20(2) of Regulation 659/1999.

125 Article 10(1) of Regulation 659/1999.

126 Article 4(4) and Article 13(1) of Regulation 659/1999. See also *Germany v. Commission*, Case 84/82, 1984 E.C.R. 1451, para. 13.

127 Article 16 of Regulation 659/1999.

128 Article 88(2) TEC; Article 19(2) of Regulation 659/1999.

129 Article 9 of Regulation 659/1999.

of the facts and the legal consequences to be drawn from the facts. It will invite interested parties to submit comments.

The full decision to open the Phase 2 investigation is published in the C-series of the Official Journal only in its authentic language version, coupled with the publication of a summary in the other official Community languages.[130]

4.4.2 *Checks and balances as regards the initiation of proceedings*

4.4.2.1 As regards phase 1

[Obligation to deal with notifications and complaints, time constraints as a factor encouraging a diligent process. Man power limitations.]

4.4.2.2 As regards phase 2

[Need for a formal decision initiating a phase 2 investigation, involvement of the "hierarchy", involvement of the Commissioner and his cabinet, need to summarize the initial findings and the legal analysis, need to consult the legal service, political attention which phase 2 decisions draw]

4.4.3 *Pushing forward or slowing down Investigation*

[Parties have limited opportunity to speed up or slow down the initiation of an investigation.

Member States can determine the timing of their notification, and are known to have sped up notifications to avoid the application of newly enacted frameworks or guidelines.

Complaints will typically filed as early as possible, but again there have been instances were complaints were carefully timed to maximize their impact (e.g. in large rescue and restructuring aid cases, the filing of a complaint (and leaking the information to the press) may be a powerful tool to influence or complicate the refinancing of the company in difficulty that counts on a partial state bail out).

The timing of own initiative investigations can not normally be influenced by parties, except in case of "informal" complaints]

4.5 **PERSONNEL AND COMMITTEES**

4.5.1 *Case Attribution within the Commission*

State aid notifications have to be addressed to the Secretary-General of the Commission, and if the Member State intends to make use of any sector-specific procedure, a copy of the

[130] Article 26(2) of Regulation 659/1999.

notification should also be addressed to the Director General responsible. The Secretary-General will forward the notification to the Directorate-General that is most appropriate to handle the case. The Secretary-General of the Commission and the Directorates-General can also chose to designate contact points for the receipt of notifications and for any subsequent correspondence.[131]

4.5.1.1 Identification of the Competent Directorate General

The Commission is assisted by a number of Directorates-General, which in turn are divided into directorates; Directorates are composed of a number of units.[132] The Directorate-General for Competition is responsible to deal with the majority of State aid cases, the Directorate-General for Agriculture handles cases in the agricultural sector, the Directorate-General for Fisheries handles cases in the fisheries sector, and the Directorate-General for Transport and Energy deal with cases relating to transport aid and aid in the energy sector.

4.5.1.2 Identification of Case Team within a Directorate General

Upon attribution of a notification to a specific Directorate-General, a case team will be formed usually comprising one or two case handlers who report to their Head of Unit. The case team will conduct the investigation and draft a first proposal for a decision to be adopted by the Commission. The officials of the Member State concerned, as well as the complainants or any persons submitting comments will be in direct contact with the members of the case team.

4.5.2 *Requirements of Consultation on (Internal) Draft Decision*

Before the draft decision is submitted to the college of Commissioners for their approval, the Commission's services will consult internally on the draft decision. This "inter-service" consultation is coordinated by the Secretary-General of the Commission and will normally involve all those Directorate-Generals whose fields of competences relate to the substance of the draft decision.[133] As a matter of law, any proposal will be subject to review by the Commission's Legal Service, which is organized as a Directorate-General of its own. **[check difference between.**

(i) approval decisions at the end of phase 1,

(ii) decisions to initiate the formal investigation procedure,

(iii) a phase 2 discussion]

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131 Article 3(1) and (2) of Regulation 794/2004.

132 The legal basis for these subdivisions is Article 19 the Rules of Procedure of the Commission, 2000 O.J. (L 308) 26, as amended.

133 *See* Article 17 of the Rules of Procedure of the Commission, 2000 O.J. (L 308) 26, as amended.

4.5.3 *No requirement of "External" Consultation (Advisory Committee or Member States)*

During the preliminary examination of notified aid, there is no obligation of the Commission to consult other Member States or interested parties, including complainants.[134] The preliminary stage of the procedure for reviewing aid under Article 88(3) TEC is intended merely to allow the Commission to form a *prima facie* opinion on the partial or complete conformity of the aid in question.[135] It is only in connection with the examination under Article 88(2) TEC, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments.[136]

Nevertheless, in accordance with the objectives of Article 88(3) TEC and its duty of good administration, the Commission may engage in talks with the notifying State or with third parties in an endeavor to overcome, during the preliminary procedure, any difficulties encountered.[137] When determining whether or not the circumstances of the case present serious difficulties, the Commission enjoys a certain margin of discretion.[138] For these reasons, not consulting with a Member State or with interested parties at this stage of the procedure cannot be construed as an infringement of their right to be heard.[139]

Furthermore, according to the Court in *Commission v. Sytraval and Brink's France*, the Commission is not obliged to examine on its own initiative any potential objections which a complainant might have raised had it been given the opportunity of taking cognizance of the information obtained by the Commission in the course of its investigation.[140] However, the Court went on to say that this

> does not mean that the Commission is not obliged, where necessary, to extend its investigation of a complaint beyond a mere examination of the facts and points of law brought to its notice by the complainant. The Commission is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint, which

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134 *Government of Gibraltar v. Commission*, Joined Cases T-195/01 & T-207/01, 2002 E.C.R. II-2309, para. 144; *Commission v. Sytraval and Brink's France*, Case C-367/95 P, 1998 E.C.R. I-1719, para. 58; *Germany v. Commission*, Case 84/82, 1984 E.C.R. 1451, para. 13; *Heineken Brouwerijen v. Inspecteurs der Vennootschaapsbelasting*, Joined Cases 91/83 & 127/83, 1984 E.C.R. 3435, para. 15.

135 *Lorenz v. Germany*, Case 120/73, 1973 E.C.R. 1471, para. 3; *Matra v. Commission*, Case C-225/91, 1993 E.C.R. I-3203, para. 16.

136 *Matra v. Commission*, Case C-225/91, 1993 E.C.R. I-3203, para. 16.

137 *Société Chimique Prayon-Rupel SA v. Commission*, Case T-73/98, 2001 E.C.R. II-867, para. 45.

138 *Société Chimique Prayon-Rupel SA v. Commission*, Case T-73/98, 2001 E.C.R. II-867, para. 45.

139 *Matra v. Commission*, Case C-225/91, 1993 E.C.R. I-3203, paras. 53-54.

140 *Commission v. Sytraval and Brink's France*, Case C-367/95 P, 1998 E.C.R. I-1719, para. 60.

may make it necessary for it to examine matters not expressly raised by the complainant.[141]

Besides this fairly restricted obligation to consult with Member States and complainants, there are no additional obligations to consult with committees established within the Community framework. In difference to Regulation 1/2003,[142] which requires the Commission consult with the Advisory Committee on Restrictive Practices and Dominant Positions prior to taking a decision,[143] the Advisory Committee on State aid, as established by Article 28 of Regulation 659/1999, will not be consulted on individual decisions, neither during the preliminary examination nor at any later stage of the procedure. This is not surprising as these advisory committees are composed of representatives of the Member States; as a consequence, Members States would advise on their own notifications of proposed aid if the respective Advisory Committee had to be consulted.[144] In State aid matters, comitology only comes into play in the course of the adoption of provisions implementing the basic procedural regulation, i.e. Regulation 659/1999.[145] **[Check role of advisory committee in adoption of frameworks and guidelines].**

4.5.4 *Decision taken by the College of Commissioners*

The final decision will be taken be the entire college of Commissioners. For this purpose, the final proposal for the decision will be introduced by one Member of the Commission to the college of Commissioners, who will vote on the proposal. The proposal will be adopted if a majority of the total number of Commissioners – not of the number of Commissioners present in the meeting – vote in favor of the proposal.[146] **[Check role of advisory committee in adoption of frameworks and guidelines].**

4.5.5 *Exceptional Circumstances: Decision by the Council preempting a Commission Decision (Article 88(2)(3) TEC)*

In exceptional cases state aid can also be approved by the Council. On the basis of Article 88(2), third subparagraph, TEC the Council may, upon application by a Member State, unanimously authorize State aid if this "is justified by exceptional circumstances." If prior to the Member State's application to the Council, the Commission has already initiated an

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141 *Commission v. Sytraval and Brink's France*, Case C-367/95 P, 1998 E.C.R. I-1719, para. 62; *see* also *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, Joined Cases T-228/99 & T-233/99, 2003 E.C.R. I-435, para. 167.

142 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

143 Article 14 of Regulation 1/2003.

144 Adinda Sinnaeve & Piet Jan Slot, *The New Regulation on State Aid Procedures*, 36 COMMON MKT. L. REV. 1153, 1192 (1999).

145 Article 29 of Regulation 659/1999.

146 Article 213 TEC.

investigation procedure, the Member State's application to the Council will suspend the Commission's investigation.[147] Only if the Council has not made its attitude known within three months of the Member State's application, the Commission will again retain competence to adopt a decision on that case. **[Add recent case law on limitations to the powers of the Council [Belgian coordination center case Commission v. Council]]**

4.6 NOTICE

4.6.1 *Phase 1 Investigations*

4.6.1.1 If triggered by Notification, No Notice

A Member State that notified State aid to the Commission will receive an acknowledgment of receipt of the notification.[148] The preliminary examination of the notification begins as soon as the notification was received by the Commission, and the Member State or any other interested party is not specifically notified of this fact.

4.6.1.2 If triggered by Complaint, Commission informs Member State and asks Questions

If the Commission's investigation has been triggered by a complaint, the Commission will inform the Member State concerned of this complaint and will usually address a request for information to this Member State.[149]

4.6.1.3 If triggered *ex-officio,* Commission informs Member State and asks Questions

Similarly, if the Commission initiated its investigation by its own motion, it will inform the Member State concerned of this fact and will also address a request for information to this Member State.[150]

4.6.2 *Phase 2 Investigation is triggered by a Decision that is notified to Member State and published in OJ, inviting third party comments.*

Should the Commission decide to initiate the formal investigation procedure, the decision will be notified to the Member State concerned (the addressee of the decision). Moreover, this decision is published in the Official Journal (albeit often with a significant delay) and therefore accessible to anyone who is interested.[151]

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147 *See* Article 88(2), second and third subparagraph, TEC.

148 Article 2(1) of Regulation 659/1999.

149 *See* Article 10(2) and Article 5 of Regulation 659/1999.

150 *See* Article 10(2) and Article 5 of Regulation 659/1999.

151 *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, para. 16.

The decision to initiate the formal investigation procedure must summarize the relevant issues of fact and law, include a preliminary assessment of the Commission as to the aid character of the measure, and set out the Commission's doubts as to the compatibility with the common market. The decision has to call upon the Member State concerned and upon other interested parties to submit comments to the Commission within a period prescribed by the Commission which should normally not exceed one month—in duly justified cases, this period can be extended by the Commission.[152]

[SHOULD NOT INCLUDE THIS:] The Official Journal contains the full text of a decision to initiate the formal investigation procedure in its authentic language version. In the Official Journal published in languages other than the authentic language version of the decision, the authentic language version is accompanied by a meaningful summary in the language of that Official Journal.[153] State aid decisions, like any other Commission decisions, are published in the L-series of the Official Journal.[154] [**Check: I think, the opening of the formal procedure is published in the C-series, only final decisions are then published in "L".]**

Third parties are not specifically notified of the decision to initiate the formal investigation: The fact that the Commission initiated a formal investigation is published in the Official Journal, which is an appropriate means of informing all the parties interested that a procedure has been initiated. It follows that the Commission is not obliged to give individual notice to particular persons.[155]

The purpose of this publication is to ensure that all persons who may be concerned are notified and given an opportunity of putting forward their arguments[156] in order to defend their interests,[157] and to obtain from these persons all information required for the guidance of the Commission's future action.[158] It should guarantee the other Member States and the sectors concerned an opportunity to make their views known and allows the Commission to be fully informed of all the facts of the case before taking its decision.[159]

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152 Article 6(1) of Regulation 659/1999.

153 Article 26(2) of Regulation 659/1999.

154 *See* also below Section 7.6.

155 *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, para. 16; concerning the publication of the final decision *Weyl Beef Products BV and others v. Commission*, Joined Cases T-197/98 & T-198/98, 2001 E.C.R. II-303, para. 48.

156 *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, para. 17.

157 With regard to the undertaking concerned: *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, para. 21.

158 *Commission v. Germany*, Case 70/72, 1973 E.C.R. 813, para. 19.

159 *Germany v. Commission*, Case 84/82, 1984 E.C.R. 1451, para. 13; *Foreningen af Jernskibs- og Maskinbyggerier i Danmark, Skibsværftsforeningen, and others v. Commission*, Case T-266/94, 1996 E.C.R. II-1399, para. 256.

Only in cases, where the Commission takes a decision concerning the subject matter of information supplied by an interested party involving alleged unlawful aid or an alleged misuse of aid, the Commission is obliged to send a copy of that decision to the interested party.[160] Since there is no counter-exception to this rule, it also appears to apply to decision to initiate the formal investigation procedure, even though this decision is published in the Official Journal anyway.[161]

The fact that a formal investigation has been initiated, is not subject to any confidentiality requirements. This is different with the identity of third parties who decide to submit comments to the Commission: The Commission must withhold the identity of such interested parties from the Member State concerned upon request on grounds of potential damage.[162]

4.6.3 *Lack of Notice has no Effect on Statute of Limitations*

A lack of any of the notifications required under Regulation 659/1999 has no effect on the statue of limitations under Article 10 of Regulation 659/1999. This is because the statute of limitations begins on the day the unlawful aid is awarded and does not depend on the date when the Commission notifies the Member State concerned about the initiation of the investigation procedure.[163] **[Clarify that the investigation interrupts the limitation period, even if MS or beneficiary were unaware of the investigation, include reference to recent case law].**

4.7 CONDUCT OF INVESTIGATION

4.7.1 *The Investigation process in phase 1 (preliminary investigation procedure)*

4.7.1.1 Fact finding process

[paragraph outlining that COM and MS exchange information, that normally no information is exchanged with outside world, except in case of complaints [informal contact, no formal rights]]

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160 Article 20(2) of Regulation 659/1999

161 The judgment in *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, does not provide guidance on this point because it was adopted before Regulation 659/1999 had been enacted.

162 Article 6(2) of Regulation 659/1999.

163 Article 10(2) of Regulation 659/1999.

4.7.1.2 Duration of a Phase 1 Investigation

4.7.1.2.1 Time Limits

Decisions following the notification of State aid to the Commission must be taken within two months of the day following the receipt of a complete notification.[164] The decision that must be taken within these two months can either be a decision (i) that the notified measure does not constitute aid, or (ii) that the measure notified is compatible with the common market and that, therefore, no objections are raised, or (iii) that the Commission will initiate formal investigations.[165]

A notification will be considered as complete if within two months from its receipt, or from the receipt of additional information requested, the Commission does not request any further information.[166] The period within which the Commission is obliged to take its decision can be extended if both the Commission and the Member State concerned agree on such an extension. The Commission also has the power to fix shorter time limits unilaterally, where this is "appropriate".[167]

4.7.1.2.2 Approval presumption if time limit is not respected

If the Commission fails to take a decision within two months after a "complete" notification was submitted, there is a presumption that the aid has been authorized by the Commission.[168] For this presumption to have an effect and before the Member State proceeds to implement the notified measure, it has to give the Commission prior notice of its intention to implement the aid in question, and upon receipt of this notice, the Commission has another 15 working days to take a decision (i.e. to open a phase 2 investigation).[169]

4.7.1.2.3 Triggering the time limit

The time limit starts to run after the notification is complete. It is complete, if the Commission does not request additional information. Hence, it would be easy for the Commission to extend the time-limit by asking further questions. There are three reasons which make it difficult for the Commission to abuse these powers:

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164 Article 4(5) of Regulation 659/1999.

165 Article 4(2), (3) and (4) of Regulation 659/1999.

166 Article 4(5) of Regulation 659/1999.

167 Article 4(5) of Regulation 659/1999. [Refer to Regional aid guidelines and check clock exemption Regulations for examples].

168 Article 4(6) of Regulation 659/1999.

169 Article 4(6) of Regulation 659/1999. [This legislative rule changes earlier case law by the ECJ to the contrary, Spain v. Commission] ■■

- The Court[170] has held (albeit with respect to a case prior to the entry inter force of the procedural regulation) that by repeatedly asking the exact same question, even though the Member State already responded, the Commission can not extend the time-limit.
- The procedural Regulation provides that a Member State must in principle respond to requests for information from the Commission, and that if it does not respond, the notification will be deemed to have been withdrawn.
- To counterbalance that, the Member State in question has the right rather than to answer the question to explain to the Commission (in a reasoned statement) that either the Commission is already in possession of the information requested or that it is not possible for the Member State to provide the information. The Member state can then state for the record that the Commission is, in its view, in possession of all the information it needs, and the 2 month time limit starts one day after the Commission received such statement. Further question will no longer interrupt the 2 month period (but the Member State and the Commission will retain the possibility to extend the 2 month period by mutual consent).

4.7.1.2.4 No fixed time-limit absent a notification

In the examination of unlawful (i.e., non-notified) aid or if the Commission initiates a phase 1 investigation on its own motion, the Commission is not bound by any express time limits (as opposed to the examination of notified aid, where strict time limits apply[171]). Nonetheless, the Commission may not prolong the investigation of non-notified aid indefinitely as it is bound to take a decision within a reasonable time limit.[172]

4.7.1.2.5 Case Law Suggesting that a Long Delay in the Phase 1 Decision indicates "Serious Doubts" and requires the Opening of a Phase 2 Investigation

[In practice, irrespective of theoretical time limits, there is a lot of back and forth, the Commission asking questions and the Member State answering them. In practice this delays the first phase investigations much beyond the 2 month time limit envisaged in the legislation (and based on the *Lorenz* case law).

The Court has suggested, in its case law, that if there are too many rounds of questions and answers, that the resulting delay may be an indication that the Commission faces "serious

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170 Spain v. Commission and Commission v Austria (Siemens?) suggesting that COM can not extend the deadline by asking repeatedly the same question. [check and add reference ■■]

171 Council Regulation 659/1999/EC provides for a time frame of 2 months for the Commission's preliminary examination and another 18 months for the formal investigation procedure.

172 *Gestevision Telecinco v. Commission*, Case T-95/96, 1998 E.C.R. II-3407, paras. 74 and 75; *Télevision Française 1 v. Commission* Case T-17/96, 1999 E.C.R. II-1757, para. 74.

doubts" as regards the compatibility of the aid, and that the Commission may be required at that point to initiate the 2nd phase investigation][173]

4.7.1.3 Possible Findings of a Phase 1 Investigation

The preliminary examination can lead to three different outcomes: First, the Commission might find that the notified measure does not constitute aid, or, second, it might come to the conclusion that no doubts are raised as to the compatibility of the notified measure with the common market. The third possible outcome is the opening of the formal investigation procedure in cases where after the preliminary examination doubts are raised as to the compatibility of the notified measure with the common market. [174]

The preliminary examination can never result in a decision that the new aid in incompatible with the Common market. Such a negative decision can only be adopted after the formal investigation procedure has been conducted.[175]

4.7.2 *The investigation process in phase 2 (formal investigation procedure)*

4.7.2.1 Fact finding process

[Add paragraph]

4.7.2.2 Duration of a Phase 2 Investigation

Phase 2 investigations rare take, in practice, less than one year. The delay is caused by many factors, including the delay in publishing the initiation decision in the Official Journal.

The time the Commission may need to reach a final decision is partially regulated by three criteria: First, a decision closing the formal investigation procedure has to be taken as soon as the doubts that prompted the Commission to initiate the procedure have been removed.[176] Second, the Commission should endeavor—as far as possible—to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.[177] Third, general principles of law (such as, estoppel or the protection of

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173 **ADD Reference ■■**

174 Article 4(2), (3) and (4) of Regulation 659/1999.

175 Article 7(4) of Regulation 659/1999. Cf. in this regard Recital 8 of Regulation 659/1999, which states in relevant part that "in all cases where, as a result of the preliminary examination, the Commission cannot find that the aid is compatible with the common market, the formal investigation procedure should be opened in order to enable the Commission to gather all the information it needs to assess the compatibility of the aid […]."

176 Article 7(6) of Regulation 659/1999.

177 Article 7(6) of Regulation 659/1999.

legitimate expectations), will prevent the Commission's from dragging out a phase II investigation indefinitely.[178]

What constitutes a reasonable length of time depends on the particular circumstances of the case and, in particular, its context, the complexity of the case and its importance to the parties involved.[179]

If the Commission has initiated a formal investigation into an aid scheme which has already been implemented, subsequent amendments to this aid scheme by the Member State do not affect the time-limit with regard to the original scheme.[180] Instead of taking the amendments into account in the ongoing procedure, the Commission can decide to open a separate procedure dealing with the aid scheme in its amended version.[181]

Once the time limit of 18 months has expired, and if the Member State concerned so requests,[182] the Commission must take its decision within two months on the basis of the information available to it. Where the information available is not sufficient to establish compatibility of the aid with the common market, the Commission will typically take a (partially) negative decision declaring the aid in question as incompatible with the common market.[183]

When the Commission is investigating possible unlawful aid, the Commission is not bound by this time limit.[184] *Mutatis mutandis* this also applies to investigations of alleged misuse of aid.[185] The time limit, however, applies if the Commission ordered the provisional recovery of unlawful aid by means of a recovery injunction and the unlawful aid has effectively been recovered by the Member State concerned. In such a case, the Commission is bound to take the final decision within the time limits applicable to notified aid.[186] It is unclear if the Commission is also bound by the time limits if the Member State

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178 Add case law incl. RSV that a 38 months duration was excessive and gave the beneficiary the right to assume that he could keep the aid. ■■ Opinion of Advocate General Slynn, *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission*, Case 223/85, 1987 E.C.R. 4617, 4644.

179 *Gestevisión Telecinco SA v. Commission*, Case T-95/96, 1998 E.C.R. II-3407, para. 75.

180 *Italy v. Commission*, Joined Cases C-15/98 & C-105/98, 2000 E.C.R. I-8855, paras. 42-43.

181 *See* above Section 4.4.3.

182 Article 7(7) of Regulation 659/1999.

183 Article 7(7) of Regulation 659/1999.

184 Article 13(2) of Regulation 659/1999.

185 Article 16 of Regulation 659/1999, which refers to Articles 7 and 13.

186 Article 11(2) of Regulation 659/1999.

concerned recovers the aid even without a prior recovery injunction being issued by the Commission.[187]

4.7.2.3 Possible findings of a phase 2 investigation

The formal investigation procedure is closed by a Commission decision stating that either

- the measure does not constitute State aid; or
- the measure is authorized as it is ("positive decision") or subject to conditions ("conditional decision"); or
- the measure is not authorized ("negative decision"). In this case, the Member State is prohibited from putting the measure into effect and must recover any aid already granted to the beneficiary.[188]

4.7.2.4 "Legitimate Expectations" on the part of the beneficiary to keep the aid in case of non-action by the Commission?

The initiation of the formal investigation procedure usually excludes legitimate expectation by the Member State authority granting the aid or the beneficiary that the aid measure in question was compatible with the TEC. The Commission's investigation is suspensory in nature, and therefore, it is only once such a decision has been adopted by the Commission, and the period for bringing an action against that decision has expired, that a legitimate expectation as to the lawfulness of the aid concerned can be pleaded.[189] The mandatory nature of the supervision of State aid by the Commission is a further reason to normally exclude legitimate expectations that aid granted in violation of the stand-still obligation was lawful.[190] In that regard, the case law affirms that a "diligent businessman should normally be able to determine whether that procedure has been followed."[191]

However, the procedural regulation does not prevent situations (in particular as regards unlawful aid (non-notified aid)) that the case is not actively pursued. It is possible that the Commission (perhaps as a result of the political unpopularity of the decision it ought to take) stops to actively pursue a case. The Court has therefore held that if the Commission remains inactive for a long period of time after it opened the formal investigation procedure, the beneficiary may rely on the Commission's failure to diligently pursue the matter, and his expectations that the aid will not be questioned can be protected by the

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187 Cf. above Section 4.3.

188 Article 7(2), (3), (4) and (5) of Regulation 659/1999.

189 *See*, e.g., *Graphischer Maschinenbau v. Commission*, Case T-126/99, 2002 E.C.R. II-2427, para. 42; *Regione autonoma della Sardegna, v. Commission*, Case T-171/02, n.y.r., para. 65.

190 *See*, e.g., *Daewoo Electronics Manufacturing España SA (Demesa) and others v. Commission*, Joined Cases C-183/02 P and C-187/02 P, n.y.r., para. 45; *Land Rheinland-Pfalz v. Alcan Deutschland*, Case C-24/95, 1997 E.C.R. I-1591, paras. 30-31.

191 *See*, e.g., *Land Rheinland-Pfalz v. Alcan Deutschland*, Case C-24/95, 1997 E.C.R. I-1591, para. 25; *Spain v.Commission*, Case C-169/95, 1997 E.C.R. I-135, para. 51.

European Courts. In RSV the Court held, that by waiting 26 months after it had opened proceedings before adopting a negative decision, the Commission had exceeded any reasonable limit and the Court annulled the Commissions decision on that basis.[192]

4.7.3 *Statute of Limitation*

The recovery of State aid by the Commission is subject to a 10 year limitation period.[193] The limitation period begins to run on the day that the unlawful aid is awarded to the beneficiary.[194] Any action taken by the Commission or by a Member State with regard to unlawful aid interrupts the limitation period.[195] The term "any action" is interpreted widely by the Community courts, e.g., a formal request to provide information is sufficient.[196] After each interruption, the limitation period starts to run afresh. Moreover, the period is suspended while appeals are pending in the Community Courts concerning the aid in question. Aid in relation to which the limitation period has expired, is deemed to be existing aid.[197]

4.7.4 *Investigation Techniques*

As the investigation of State aids by the Commission is construed as a procedure between the Commission and one or more Member States, it is not surprising that the investigative instruments that are at the Commission's disposal are in principle directed against Member States, not against private parties.

4.7.5 *Very limited Means of Compulsion*

In investigation procedures, the Commission can request all necessary additional information from the Member State concerned.[198] Where the Member State responds to such a request, the Commission must inform the Member State of the receipt of the response. On the other hand, where the Member State does not respond within the period specified by the Commission or provided incomplete information, the Commission must

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192 Case 223/85, *RSV v. Commission*, 1987 ECR 4617, para 17.

193 Article 15(1) of Regulation 659/1999.

194 Article 15(2) of Regulation 659/1999.

195 Article 15(2) of Regulation 659/1999.

196 Cf., e.g., *Scott SA v. Commission*, Case T-366/00, 2003 E.C.R. II-1763, paras. 15-16.

197 Article 15(3) of Regulation 659/1999.

198 Article 5(1) and Article 10(2) of Regulation 659/1999. With regard to the misuse of aid, this follows from the fact that Article 16 of Regulation 659/1999 refers to Article 10, which in turn refers to Article 5(1) and (2). This style of consecutive cross-references helps to make the text of Regulation 659/1999 concise, but does not always enhance clarity.

first send a reminder, allowing an appropriate additional period of time for the provision of the additional information.[199]

If the Member States fails to comply with this reminder, there are different consequences, depending if the investigation involves the notification of aid or a case of alleged unlawful aid. In case of a notification, the notification is deemed withdrawn if the information is not provided within the prescribed period.[200] If alleged unlawful aid is the subject of the investigation and a Member State does not reply to a reminder, the Commission can require the information by means of a formal decision (Regulation 659/1999 refers to these decisions as "information injunctions").[201] If the Member State fails to comply also with this injunction, the final decision can be taken on the basis of the information available to the Commission.[202]

There is only one area, where the Commission is entitled to take investigative actions that directly involve private parties, as regards its compliance monitoring (i.e. after aid was authorized and granted) the Commission can proceed on-site monitoring visits on premises and land of an undertaking concerned: Where the Commission has serious doubts as to whether its decisions with regard to individual aid are complied with, the Member State concerned must allow the Commission to undertake on-site monitoring visits.[203] The details are described below.[204]

Apart from this, Regulation 659/1999 does not provide for other investigative techniques vis-à-vis private parties like subpoenas or other procedural orders to force individuals to provide documents or give testimony. This, as has been noted above, is explained by the administrative setting of State aid investigations, which in principle serve the purpose to ensure that Member States comply with the relevant State aid rules in the TEC, and not to monitor private undertakings (this is perhaps the most obvious and surprising difference to the Commission's powers under Articles 81 and 82 TEC and Regulation 139/2004, the Merger Regulation).

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199 Article 5(2), Article 10(2) and Article 16 of Regulation 659/1999.

200 Article 5(3) of Regulation 659/1999 (There are exceptions to this rule: It does not apply, if prior to the expiry of the prescribed period, the period has been extended by mutual consent between the Commission and the Member State; furthermore, it does not apply if the Member State informs the Commission in a duly reasoned statement that the additional information requested is not available or has already been provided.) Article 5(3) of Regulation 659/1999.

201 Article 10(3) of Regulation 659/1999.

202 Article 13(1) of Regulation 659/1999.

203 Article 22(1) of Regulation 659/1999.

204 ***see chapter 4.7.5.2.2. [page 46)***

Moreover, the Member State providing state aid to the beneficiary will typically have powers vis-à-vis the beneficiary to obtain the information the Commission requests. EU state aid procedures respect this two tiered system.

4.7.5.1 Injunctions to Member States

The Commission has competence to address so called information injunctions to a Member State in order to require additional information from that Member State.

Information injunctions can be adopted if a Member State—despite a reminder according to Article 10(2) of Regulation 659/1999—does not comply with an information request issued by the Commission: Should the Member State in question still not comply with the request, the Commission may then adopt a formal decision, the "information injunction", to oblige the Member State to provide the information asked for.[205] If the Member State refuses to comply with the information injunction, the Commission may then take the substantive decision on the basis of the information available.[206] Before having issued an information injunction, the Commission is not entitled to rely on the fragmentary nature of the information sent to it because it is obliged to use all the powers available to it to require the Members State concerned to provide it with the relevant information.[207] As soon as the Commission has the necessary information and hence is a position to make a definitive assessment as to the compatibility of the disputed aid with the common market, the Commission is barred from requiring the Member State concerned, by means of an injunction, to provide it with further information.[208]

4.7.5.2 Involvement of Aid Beneficiary

4.7.5.2.1 No right to Direct Access to Aid Beneficiary

The Commission does not have competence to directly investigate the beneficiary of alleged unlawful aid. This results from the fact that the procedure relating to non-notified aid is technically confined to the Member State concerned and the Commission. There is no legal basis that would allow the Commission to directly involve the aid beneficiary into the investigative proceedings.

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205 Article 10(3) of Regulation 659/1999.

206 Article 11(1) of Regulation 659/1999.

207 *Germany and Pleuger Worthington v. Commission*, Joined Cases C-324/90 & C-342/90, 1994 E.C.R. I-1173, para. 29; referring to this case, e.g., *Industrie Navali Meccaniche Affini SpA (INMA) and others v. Commission*, Case T-323/99, 2002 E.C.R. II-545, para. 91; *P & O European Ferries (Vizcaya), SA and others v. Commission*, Joined Cases T-116/01 and T-118/01, 2003 E.C.R. II-2957, para. 173.

208 *France v. Commission*, Case C-17/99, 2001 E.C.R. I-2481, para. 28; *Valmont Nederland BV v. Commission*, Case T-274/01, n.y.r., para. 58.

Nevertheless, in practice, the central administration of the Member State in question often consents to the beneficiary taking a somewhat active role in the proceeding. Most questions of fact can typically not be answered by the administration of the Member State concerned and require the involvement of the beneficiary . Rather than channeling all questions through the Member States' administration, Member States are quite happy to accept that factual issues are discussed directly with the beneficiary and beneficiaries typically are interested in direct contact with the Commission, as is the Commission. The tricky part in practice is linked to the question that Member States insist on controlling the process, because they insist that beneficiaries do not contradict the legal position (and the practice as regards the level of information provided) the Member state wishes to take generally in its dealings with the Commission.

4.7.5.2.2 Direct Access only as regards *ex post*-Monitoring

The Commission, however, does have competence to take direct investigative actions vis-à-vis the aid beneficiary in the *ex post*-monitoring of whether its decisions are complied with:

Where the Commission has serious doubts as to whether its decisions with regard to individual aid are complied with, the Member State concerned must allow the Commission to undertake on-site monitoring visits.[209] In order to verify compliance with the decisions concerned, the Commission can authorize officials to enter any premises and land of the undertaking concerned, to ask for oral explanations on the spot, and to examine books and other business records and take, or demand, copies. The Commission can also seek assistance of independent experts, if necessary.[210] The Member State concerned is obliged to afford the necessary assistance to the Commission officials and experts to enable them to carry out the monitoring visit when an undertaking opposes a monitoring visit.[211]

On the site to be inspected, the officials and experts have to produce an authorization in writing specifying the subject-matter and purpose of their visit. Additionally, officials authorized by the Member State concerned may be present at the monitoring visit.[212] Before the on-site monitoring visit is conducted, the Commission must inform the Member State concerned in good time and in writing and must also inform it of the identities of the authorized officials and experts.[213] If the Member State has duly justified objections to the Commission's choice of experts, new experts must be appointed in common agreement

[209] Article 22(1) of Regulation 659/1999.

[210] Article 22(2) of Regulation 659/1999.

[211] Article 22(6) of Regulation 659/1999.

[212] Article 22(4) of Regulation 659/1999.

[213] Article 22(3) of Regulation 659/1999.

between the Commission and the Member State.[214] After the visit, the Commission has to prepare a report, a copy of which it must provide to the Member State concerned.[215]

4.8 RIGHTS AND DUTIES

4.8.1 *Duty of Cooperation of Parties*

4.8.1.1 Member State Granting Aid

A general duty on Member States to cooperate in good faith with the Commission arises from Article 10 TEC.[216] This article imposes on Member States the duty to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the TEC. In addition to this, Article 88 TEC requires Member States to cooperate with the Commission in the constant review of existing systems of aid and to inform the Commission of any plans to grant or alter aid.[217] Regulation 659/1999 elaborates on these treaty provisions and lays down more detailed rules on the Member States' obligation to cooperate, and specifically, to provide information to the Commission: The duty to notify new aid and plans to alter existing aid is complemented by the duty to provide additional information, if the Commission considers the information provided to be incomplete.[218] Similar duties to provide information exist with regard to the investigation of alleged unlawful aid,[219] the investigation of misuse of aid,[220] and the investigation of existing aid.[221] These cooperation obligations, however, relate specifically to the Member State concerned, and not to all other Members States.

Even though Regulation 659/1999 imposes a specific duty on Member States to cooperate with the Commission, and in particular to provide information necessary for the Commission's investigation, the Commission has no power to directly enforce its requests against a Member State that does not comply with its duty to cooperate. If a Member State does not comply with a request to provide information even after the Commission has used all its procedural instruments at its disposal to induce the Member State to comply—i.e. the issuance of a reminder or the adoption of an information injunction—the only

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214 Article 22(3) of Regulation 659/1999.

215 Article 22(5) of Regulation 659/1999.

216 E.g. *Commission v. Greece*, Case 192/84, 1985 E.C.R. 3967, para. 19; *Commission v. Luxembourg*, Case C-478/01, 2003 E.C.R. I-2351, para. 24; *Commission v. Italy*, Case C-82/03, 2004 E.C.R. n.y.r., para. 15.

217 Article 88(1) and (3) TEC.

218 Articles 2 and 5 of Regulation 659/1999.

219 Article 10(2) of Regulation 659/1999.

220 Article 16 of Regulation 659/1999.

221 Article 17(1) of Regulation 659/1999.

possibility for the Commission is to resort to the procedure available under Article 226 TEC. Under this procedure, the Commission first has to deliver a reasoned opinion and give the non-complying Member State an opportunity to submit observations. Only if the Member State does not comply with this opinion within the period specified by the Commission can the matter be taken to the Court. Derogations from this procedure exist if a Member State fails to comply with a suspension or a recovery injunction,[222] and if it fails to comply with conditional or negative decisions.[223] In these situations, the Commission can take the case to the Court direct without having to follow the procedure outlined in Article 226 TEC.

4.8.1.2 Other Member States

Other Member States are bound by the general obligation to cooperate with the Community institutions. They must not hinder the Commission's investigation of State aid granted by other Member States, and would also be bound to provide the Commission with any useful information they have in regard to investigations relating to other Member States.[224]

4.8.1.3 Private Parties

Regulation 659/1999 concerns the examination of measures undertaken by Member States. For this reason, the regulation does not lay down any specific duties on private parties to cooperate, and only does so with regard to the Member State concerned.[225] It is for the Member State concerned, based on the powers under its administrative law to ensure cooperation of the beneficiary with the Member State.

The Commission inability to force private third parties to provide evidence also extends to complainants and other parties (such as trade associations) which often have valuable information (such as statistics, or raw data on which statistics are based). The lack of powers of compulsion of the Commission in this regard causes difficulties in practice, because the Member State concerned will have similarly limited powers vis-à-vis non-beneficiary third parties.

4.8.2 ***Privileges of Parties***

The Commission has only (limited) powers to compel the Member State granting aid to provide information to it. In practice, the Commission describes the information by means

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222 Article 12 of Regulation 659/1999.

223 Article 88(2) TEC and Article 23(1) of Regulation 659/1999.

224 *See* Article 6(1) of Regulation 659/1999.

225 If an undertaking opposed a monitoring visit ordered by the Commission, Regulation 659/1999 does not impose a direct cooperation obligation on the undertaking, but on the Member State concerned to afford the necessary assistance to the officials to enable them to carry out the monitoring visit, Article 22(6) of Regulation 659/1999.

of a factual description, only exceptionally will the request relate to specific documents (such as the text of an administrative act granting the aid, or that of a contract on the basis of which an "advantage" may have been conveyed to the beneficiary).

As a result, the issue of claiming privilege against discovery (for example as regards documents containing legal advice) has not really arisen in practice.[226] Whether the limited privilege accepted in anti-trust cases[227] would apply is unclear, but the Member State in question should be expected to be able to provide the information requested without having to disclose privileged documents.

4.8.3 *No Information on Evidence taken from Third Parties*

The Commission is not empowered to question third parties like undertakings or other interested parties. Nevertheless, any interested party is invited to submit comments at the beginning of the formal investigation procedure, when the decision to initiate the formal investigation procedure has been published.[228] The Member State will be informed if third parties have submitted comments, but not necessarily about the third party's identity: The Commission will forward the comments received to the Member State concerned, but if the commenting party requests so on grounds of potential damage, its identity will be withheld from the Member State.[229] Moreover, third parties have been allowed to submit information and to submit a "non-confidential" version from which certain business secrets are removed, before only the non-confidential version is being submitted to the Member State concerned.

4.8.4 *No Right of Appeal against Initiation or Conduct of Investigation*

There are no specific defenses against the initiation of State aid investigations available. All the Member State concerned might do is to show the measure at issue does not constitute aid, or if it does, that it is not incompatible with the common market or that it falls within one of the exceptions provided for in Article 87(1) TEC.

[Add paragraph on the few cases in which Member States have [successfully] appealed the initiation of the formal investigation procedure].

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226 The Commission has to date not used its powers to force on site inspections under Article 22 of Regulation 659/1999 site visits have usually been undertaken upon invitation of the beneficiary and the Commission never exercised search and seizure rights in this regard.

227 **footnote A M & S, + follow-up case law**

228 Article 6(1) of Regulation 659/1999.

229 Article 6(2) of Regulation 659/1999.

4.9 ACCESS TO THE FILE

4.9.1 *Who has Access?*

The procedural rights of these interested parties are laid down in Regulation 659/1999, and the Court does not see itself in a position to extend, on the basis of the general legal principles such as those of the right to due process, the right to be heard, sound administration or equal treatment, the procedural rights which the Treaty and secondary legislation confer on interested parties in procedures for reviewing State aid.[230]

4.9.1.1 Member State granting Aid has Limited Access to the File

Even though there is no such express provision in Regulation 659/1999, the Members State concerned is in a position to rely on a right to participate in an adversarial procedure with the Commission, which comprises certain rights of access to the file.[231]

In practice the Commission will inform the Member State of relevant information it has on file, it will however not accept that the Member State physically inspects a copy of the entire file.

4.9.1.2 Aid Beneficiary has No Access to the File

Contrary to the situation under Regulation 1/2003,[232] which expressly grants the parties access to the Commission's file,[233] no such right is provided for in Regulation 659/1999. This corresponds to the practice of the Commission not to grant access to its file for (potential) aid beneficiaries, although in practice the Commission will (as a matter of courtesy, but not as a matter of right) discuss with the beneficiary the issues it considers relevant and the factual information it has on file supporting its concerns.

4.9.1.3 Complainant has No Access to the File

Other interested parties do not have an explicit right to access to the file. The Commission will also not grant access to the physical file in its administrative practice. However, the Commission will make certain information available to third parties. Third parties only have the right to be involved in the administrative procedure to the extent appropriate in the

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230 *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-198/01, 2004 E.C.R. n.y.r., para. 194.

231 *See*, e.g., *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-198/01, 2004 E.C.R. n.y.r., para. 197, where the CFI said that "*since the interested parties other than the Member State concerned cannot rely on a right to participate in an adversarial procedure with the Commission, it cannot be held that the applicant ought to have been granted access to the non-confidential part of the file on the administrative procedure* […]" (emphasis added).

232 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

233 Article 27(2) of Regulation 1/2003.

light of the circumstances of the case.[234] During a first phase investigation the Commission will normally not provide any information. However, in the case of complainants the Commission may provide them with an opportunity to clarify their submission and/or discuss the matter. The information provided to the complainants will generally be limited to what the Commission considers useful for its investigation, the information is not provided in response to a right of the complainant.

4.9.1.4 Case Summary is provided to All Interested Parties in Case Phase 2 Investigation is launched

When the Commission adopts a decision to open a Phase 2 investigation, this decision is published in the Official Journal in its authentic language version. The publication has to be accompanied by a case summary in all other Community languages in the other language versions of the Official Journal.[235] The Commission considers that the information it provides in describing the case and its initial assessment suffices to satisfy third parties legitimate interests in knowing about the content of the file. The Court seems to support that position.[236] A restriction on the amount of information that can be provided to interested parties results from the Commission's and the Member States' obligation to safeguard professional secrecy.[237]

4.9.1.5 General "transparency" rights

Private parties may rely on Article 255 TEC, which grants "*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents*," subject to general principles and limits on grounds of public or private interest. Article 255 TEC was further elaborated in Council Regulation 1049/2001.[238] Member States cannot rely upon Article 255 TEC or Regulation 1049/2001 as they are not included in the personal scope of either Article 255 TEC or Regulation 1049/2001.

It is important to note that the right of access is limited to documents emanating from the Community institutions and does not extend to documents prepared by Member States, the beneficiary or other third parties (although such other documents usually make up to bulk of the case file).

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234 *British Airways v. Commission*, Joined Cases T-371/94 & T-394/94, 1998 E.C.R. II-2405, para. 60; *Ufex v. Commission*, Case T-613/97, 2000 E.C.R. II-4055, para. 89; *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-198/01 R I, 2002 E.C.R. II-2153, para. 81.

235 Article 26(2) of Regulation 659/1999.

236 Cf., e.g., *British Airways v. Commission*, Joined Cases T-371/94 & T-394/94, 1998 E.C.R. II-2405, para. 62.

237 Article 24 of Regulation 659/1999; *see* below Section 4.9.4.

238 *See* Council Regulation 1049/2001 of May 30, 2001, regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 145) 43.

Also excluded from the right to access are draft documents (like draft decisions and comments thereon). Hence, only a small portion of the case file is covered by Regulation 1049/2001.

In addition, the Commission's obligation to safeguard business secrets also applies to the information requested 1049/2001, documents containing business secrets can not be made available, nor documents which are by nature confidential (such as the opinion of the Commission's legal service on a draft decision).[239]

Regulation 1049/2001 lays down detailed rules governing the right to exercise the right to access to documents. First this right is subject to an application in writing.[240] Within 15 working days from registration of the application, the institution must either grant access to the document requested or, in a written reply, state the reasons for the total or partial refusal.[241] In the latter case, the applicant has the possibility to lodge a so called confirmatory application. Should the institution also refuse access following such a confirmatory application, the applicant may either institute court proceedings against the institution and/or make a complaint to the European Ombudsman.[242]

4.9.2 *Grant of Access*

In practice, access to the file is granted in a rather informal way by making copies of certain documents available or by summarizing their substance. Moreover, the Commission would inform the Member State concerned of any complaints filed and would provide the Member State with copies of any observations submitted by third parties in Phase 2 proceedings. A physical inspection of the Commissions substance file is not permitted.

4.9.3 *Protection of Confidential Information*

According to Article 287 TEC, the Commission and its officials are not allowed to disclose information of the kind covered by the obligation of professional secrecy.[243] Regulation 659/1999 extends this obligation to Member States and their officials: In State aid proceedings, information that is covered by the obligation of professional secrecy must not be disclosed by the Commission, the Member States, their officials and other servants,

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239 (see further below ■■)

240 Article 6 of Regulation 1049/2001.

241 Article 7 of Regulation 1049/2001.

242 Article 8 of Regulation 1049/2001.

243 Article 287 TEC provides as follows: "*The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*"

including independent experts appointed by the Commission.[244] It follows that third parties are not entitled to receive documents containing business secrets.[245]

The publication of the final State aid decision must not lead to the disclosure of information covered by professional secrecy either. Prior to publication, the decision must therefore be notified to the Member State concerned which must be given the opportunity to indicate to the Commission which information it considers to be covered by professional secrecy.[246] There is also a Commission notice on professional secrecy in State aid decisions, which provides some further detail on the issue of professional secrecy.[247]

Also, on the basis of Article 255 TEC and Regulation 1049/2001, access to the Commission's documents is not unrestricted: In general, access to documents can be refused where disclosure would undermine the protection of the public interest or privacy and the integrity of the individual,[248] and also where disclosure would undermine the protection of, *inter alia*, commercial interests of a natural or legal person, or the purpose of inspections, investigations and audits, unless there is an overriding public interest.[249] Apart from these general limitations to the right to access to documents, there are further limitations: Access to documents, drawn up by the Commission for internal use or received by it, which relate to a matter where the decision has not been taken by the Commission, can "*be refused if disclosure of the document would seriously undermine the institution's* [*i.e., the Commission's*] *decision-making process, unless there is an overriding public interest in disclosure.*"[250] Under the same conditions, access to documents containing opinions for internal use as part of deliberations and preliminary consultations within the Commission can be refused even after the decision has been taken.[251]

Member States, moreover, have the right to request the Commission not to disclose a document originating from them without their prior agreement.[252] This limitation seems to be of particular relevance in State aid proceedings as in such proceedings many documents presumably originate from Member States.

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244 Article 24 of Regulation 659/1999.

245 This had been established by the case law before Regulation 659/1999 entered into force; *see*, e.g., *British Airways v. Commission*, Joined Cases T-371/94 & T-394/94, 1998 E.C.R. II-2405, para. 63; cf. also *BAT and Reynolds v. Commission*, Joined Cases 142/84 & 156/84, 1987 E.C.R. 4487, para. 21.

246 Article 25 of Regulation 659/1999.

247 Commission communication of 1 December 2003 on professional secrecy in State aid decisions, 2003 O.J. (C 297) 6.

248 Article 4(1) of Regulation 1049/2001.

249 Article 4(2) of Regulation 1049/2001.

250 Article 4(3), first subparagraph, of Regulation 1049/2001.

251 Article 4(3), second subparagraph, of Regulation 1049/2001.

252 Article 4(5) of Regulation 1049/2001.

4.9.4 *Legal Consequences of Failure to provide Limited Access to File or Information*

If the Commission fails to grant access to relevant information received from third parties, this may vitiate the Commission's final decision and may lead to its annulment by the Court of Justice on the basis of Article 230 TEC. The decision will however only be annulled if the applicant can establish that absent this infringement the outcome of the procedure might have been different.[253] This is not the case, for example, if the Member State had no opportunity to submit comments on observations submitted by third parties, where these observations did not contain any new information.[254]

4.10 SETTLEMENT OR COMPROMISE

The procedural rules do not provide for a formal settlement opportunity, but in practice the Commission and the Member State concerned almost invariably seek to reach a compromise solution. In fact, many of the cases in which an approval decision is adopted with considerable delay relate to the fact that the Commission and the Member State concerned explore compromise solutions. The political nature of many cases and the stakes involved for the Member States to demonstrate that they can deliver on aid promises, is such that considerable time and energy is spent on finding a compromise in difficult cases, both at a political and at a "technical" level.

What constitutes a compromise is difficult to describe in abstract terms, but a reduction of aid or aid intensity, a deferral of aid payments until justifying subsequent events have occurred, etc. are typical elements of "solutions".

Only in extreme cases will a notification be withdrawn.[255] Where the Commission has already initiated the formal investigation procedure, it must close that procedure by a formal decision.[256] There is obviously no possibility of withdrawal when the Commission is investigating alleged instances of unlawful aid and misuse of aid. As investigations into

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253 *Germany v. Commission*, Case C-288/96, 2000 E.C.R. I-8237, paras. 101 et seq.; *France v. Commission*, Case C-301/87, 1990 E.C.R. I-307, para. 31; *Belgium v. Commission*, Case 40/85, 1986 E.C.R. 2321, para. 31.

254 *Germany v. Commission*, Case C-288/96, 2000 E.C.R. I-8237, para. 102.; *France v. Commission*, Case C-301/87, 1990 E.C.R. I-307, para. 31; cf. also *Belgium v. Commission*, Case 234/84, 1986 E.C.R. 2263, para. 30.

255 The Member State can withdraw the notification "in due time" before the Commission has taken a decision to conclude the preliminary examination or before the Commission has taken a decision after the formal investigation procedure. See article 8(1) of Regulation 659/1999.

256 Article 8(2) of Regulation 659/1999.

unlawful aid and misuse of aid are *ex officio* procedures, there is no notification or application by the Member State concerned that could be withdrawn.[257]

When the Commission is investigating existing aid because it considers an existing scheme no longer compatible with the common market, the procedure facilitates a settlement. In such cases the Commission "*shall issue a recommendation proposing appropriate measures to the Member State concerned.*"[258] This non-binding recommendation allows the state to discuss the matter, or to accept the recommendation only in part and the Commission can react to that reaction, all within the framework of a first phase investigation.

5. ADMINISTRATIVE/LEGISLATIVE FUNCTIONS OF THE COMMISSION

5.1 GENERAL

The Commission is a hybrid body which has both administrative and legislative functions. On the one hand the Commission is called to enforce a number of provisions of the TEC, most prominently the rules on competition and on State aid. At the same time, the Commission is also competent to adopt legislation upon prior authorization by the Council.[259] In the field of State aid, the Council authorized the Commission to adopt implementing rules to Regulation 659/1999[260] and to adopt group exemptions and a regulation on *de minimis* aid.[261] The adoption of legislation by the Commission typically involves the so called "comitology" procedure, whereby the Commission is assisted by committees composed of representatives of the Member States.[262] The Commission is obliged to consult this committee and to take account of the opinion delivered by the committee when it adopts a legislative measure.[263]

State aid investigation proceedings on the basis of Articles 87 and 88 TEC are administrative rather than legislative: They only involve one party—the Member State

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257 Chapters III and IV of Regulation 659/1999, which deal with unlawful aid and misuse of aid respectively, therefore do not contain cross-references to Article 8 of Regulation 659/1999, which only applies to the notification procedure laid down in Chapter II of Regulation 659/1999.

258 Article 18 of Regulation 659/1999.

259 *See* Article 211 TEC, according to which the Commission "exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter"; these powers regularly include powers to enact legislation.

260 Article 27 of Regulation 659/1999.

261 *See* Council Regulation 994/98, O.J. 1998 (L 142) 1.

262 *See* Article 29 of Regulation 659/1999; cf. also Council Decision 1999/468/EC (usually referred to as the "Comitology Decision") laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. 1999 (L 184) 23.

263 *See* Article 27 of Regulation 659/1999.

concerned—in relation to which the Commission is called to decide whether the State aid measure that this Member State grants or intends to grant is compatible with the rules of the TEC or not. The procedure is bilateral and adversarial; it will always result in the adoption of an individual decision binding upon the Member State concerned, but not in a general legislative measure.[264]

In its administrative function, the Commission has a policy to adopt guidelines or frameworks explaining how it intends to apply the State aid rules of the TEC with regard to certain industrial sectors or certain specific types of potential State aid measures. Such guidelines are not formulated in individualized terms, but are intended to cover a broader category of potential State aid measures.[265] The Commission would submit such State aid guidelines or frameworks to Member States for their acceptance. If a Member State refuses to adhere to such guidelines or frameworks, the Commission could always commence a formal investigation against this Member State which in the end would be bound to succumb to the Commission's guidelines or frameworks on the basis of the outcome of the investigation.

5.2 DIFFERENCES IN THE APPROVAL PROCESS BETWEEN INDIVIDUAL AID AND AID SCHEMES

Certain differences relate to the nature of the aid reviewed by the Commission. The review of individual aid (i.e. concrete instances in which aid may be granted) is clearly an administrative function, in which the Commission assesses the consequences of a particular aid against a well defined, rather concrete factual background.

When assessing aid schemes, the Commission is faced with a different type of analysis since the scheme is designed to be applied in many future cases, in various sectors of the economy, and approval decision takes on a different character, because the prognostic element and the underlying general policy objectives play a very different role. Moreover, it is much less common, that third parties intervene in proceedings relating to aid schemes, because the beneficiaries and the competitors are (normally) not yet known in the course of the procedure.

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264 Cf. *Acciaierie di Bolzano SpA v. Commission*, Case T-158/96, 1999 E.C.R. II-3927, para. 42; *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-198/01, 2004 E.C.R. n.y.r., para. 197.

265 E.g. Guidelines on regional aid O.J. 1998 (C 74) 6; Multisectoral framework on regional aid for large investment projects, O.J. 2002 (C 70) 8; Community framework for State aid for Research and Development, O.J. 1996 (C 45) 5, as amended by a subsequent Commission Communication, O.J. 1998 (C 48) 2; Community Guidelines on State aid for environmental protection , O.J. 2001 (C 37) 3; Community Guidelines on State aid for rescuing and restructuring firms in difficulty, O.J. 1999 (C 288) 2; Commission Communication on State aid elements in sales of land and buildings by public authorities, O.J. 1997 (C 209) 3.

6. HEARING PHASE

6.1 RIGHTS TO AN ADMINISTRATIVE HEARING

6.1.1 *No Formal "Hearing"*

In the investigative procedure does not provide for a formal hearing of the Member State concerned or any other interested parties. This is largely due to the fact that the TEC fashions the procedure in State aid matters as one between the Commission on the one side an the Member State concerned on the other, without any kind of hearing of the Member State. Even though there is no hearing, the Member State concerned and interested parties are entitled to submit comments.[266] In addition, the Community Courts ruled that the Commission is obliged to allow the undertakings concerned to submit their comments in the context of the examination pursuant to Article 88(2) TEC.[267]

6.1.1.1 Comments by Member State Concerned

The Member State concerned can submit comments to the Commission in the following instances: First, the Member State concerned has the right to submit comments to the Commission once the Commission opened the Phase 2 investigation.[268] Further, the Member State concerned will have the opportunity to reply to any comments submitted to the Commission by interested parties.

Second, the Member State concerned can submit comments when the Commission decides to revoke a positive or conditional State aid decision because the decision was based on incorrect information provided to the Commission.[269]

Third, the Commission will invite the Member State concerned to submit comments where it is of the view that an existing aid is not, or is no longer, compatible with the common market.[270]

6.1.1.2 Comments by "Interested Parties"

Interested parties may submit comments after the Commission adopted a decision to initiate a Phase 2 investigation.[271] Any comments that the Commission receives from an interested

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266 Expressly confirmed in *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-198/01, 2002 E.C.R. II-2153, para. 82 (note that the reference to Article 21 of Regulation 659/1999 obviously is erroneous).

267 *Matra v. Commission*, Case C-225/91, 1993 E.C.R. I-3203, para. 16.

268 Article 6(1) of Regulation 659/1999.

269 Article 9 of Regulation 659/1999.

270 Article 17(1) of Regulation 659/1999.

271 Article 6(1) and Article 20 of Regulation 659/1999.

party will be transmitted to the Member State concerned. An interested party can request that its identity be withheld from the Member state concerned in case it fears to incur damage from its identity being revealed.[272] The Member State concerned will have the possibility to reply to such comments from interested parties, normally within a time period of one month, which may be extended by the Commission.[273]

6.1.2 *Timing of Possibility to give Comments*

In the decision to open Phase 2, the Commission prescribes a period within which the Member State concerned or other interested parties may submit their comments, which normally does not exceed one month. The Commission may extend this time period in duly justified cases.[274] In practice, the Commission often accepts comments after the original deadlines have long expired, in particular in cases which continue for a long time after the procedure was imitated.

6.2 PROCEDURAL DUTIES OF THE COMMISSION—INDEPENDENCE OF THE COMMISSION

6.2.1 *Duty to Impartiality*

The Commission is under a duty to examine a case diligently and impartially, in particular in the context of Article 88 TEC.[275] Moreover, the Commission is obliged to apply certain "principles of sound administration", which is one of the general principles that are "observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States".[276] Moreover, Article 213(2) TEC states that the Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties. Regarding Commission staff, the Rules of Procedure of the Commission, in the Code of Good Administrative Behavior, which are attached to the Rules of Procedure as an Annex, require Commission staff to "*always act objectively and impartially, in the Community interest and for the public good.*"[277]

There is no express rule providing for disqualification of officials involved in the preparation of a State aid decision. **[Add a sentence or two on the Commission code of**

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272 Article 6(2) of Regulation 65/1999.

273 Article 6(2) of Regulation 65/1999.

274 Article 6(1) of Regulation 659/1999.

275 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, Joined Cases T-228/99 & T-233/99, 2003 E.C.R. I-435, para. 167.

276 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, Joined Cases T-228/99 & T-233/99, 2003 E.C.R. I-435, para. 167; *max.mobil Telekommunikation Service v. Commission*, Case T-54/99, 2002 E.C.R. II-313, paras. 48-49.

277 Section 2. of the Code of Good Administrative Behavior, which is annexed to the Rules of Procedure of the Commission, 2000 O.J. (L 308) 26, as amended.

conduct adopted following the Bangemann case which provides for the exclusion of Members of the Commission in case of a conflict of interest]

If it can be shown that an official involved in the preparation of a State aid decision, or a Member of the Commission did not abide by the obligation to complete impartiality, the resulting State aid decision will be flawed and subject to judicial review. A violation of the obligation to impartiality is a serious infringement of the principle of sound administration.[278] As a consequence, it should be expected that the State aid decision challenged on the ground of a violation of the principle of impartiality will be annulled by the Community Courts.

6.2.2 *Duty to Objectivity*

The Commission and its officials have to perform their duties in complete independence.[279] They are not allowed to succumb to any such pressure from third parties. If they do, the Commission's decision will be flawed due to a violation of the principle of sound administration.[280]

[Add paragraph summarizing the criticism that the Commission acts, also in state aid cases, as prosecutor, judge and jury].

6.2.3 *No Specific Separation of Functions*

A State aid case will be handled by one of the units that make up the Directorate-General that deals with the case (e.g., the Directorate-General for Competition). Commission officials working in the Directorates-General will have different specializations and accordingly are grouped into units. There are no specific internal rules attributing certain specific functions to the various officials working in a Directorate-General.

6.3 CONDUCT OF HEARING

6.3.1 *Submission of Comments*

As explained above,[281] there is no formal hearing, but a possibility for the Member State concerned and interested parties to submit comments. If meetings are organized they are informal in that the Commissions' case team (or one of its members) meets with the

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278 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, Joined Cases T-228/99 & T-233/99, 2003 E.C.R. I-435, para. 167; *max.mobil Telekommunikation Service v. Commission*, Case T-54/99, 2002 E.C.R. II-313, paras. 48 and 49 [under appeal].

279 Article 213(2) TEC.

280 *See* below Section 11.3.

281 *See* Section 6.1.1.

representatives of a Member State or any other interested party. Such meetings are possible at any time of the procedure.

6.3.2 *Time Limits*

The statutory time within which comments may be submitted is normally limited to one month after the opening of the formal investigation procedure. As mentioned above, comments are, however, typically taken into account, even if they are submitted later.

7. DECISIONAL PHASE [SEE ABOVE SECTION 4.5.]

7.1 DECISION MAKING

7.1.1 *Case handler drafts decision*

[add short paragraph]

7.1.2 *Internal inter-service consultations*

[add short paragraph on the Commission's Rules of Procedure and the interservice consultation practice, differentiate by decision type (i.e. procedural decisions (request for information, information injunctions) end of phase 1 decisions, decisions to open the formal investigation procedure and end of phase 2 decisions).

7.1.3 *Commission adopts decision*

[add short paragraph, differentiating between decisions taken by the responsible Member of the Commission alone ("Habilitation") and decisions adopted by the college of Commissioners]

7.2 STRUCTURE OF THE DECISION

7.2.1 *Obligation to set out the Facts*

A decision has usually four parts: a heading, which identifies the measure as a Commission decision, the reasoning (setting out the procedure , the factual background and the legal analysis), (iii) the operative part (i.e. the "holding" of the decision) and finally (iv) the signature line setting forth who acted in adopting the decision.

The Commission is obliged to impartially and diligently examine the facts of the case.[282] According to Article 253 TEC decisions adopted the Commission must state the reasons on

[282] To that effect, *see*, e.g., *Gestevision Telecinco v. Commission*, Case T-95/96, 1998 E.C.R. II-3407, para. 72.

which they are based. The obligation to state reasons comprises the obligation to "clearly and coherently" indicate the considerations of fact on which the decision is based.[283]

The Court held that, in imposing upon the Commission the obligation to state reasons for its decisions, Article 253 TEC

> seeks to give an opportunity to the parties defending their rights, to the court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.[284]

The Court went on to say in the same judgment that

> to attain these objectives, it is sufficient for the decision to set out, in a concise but clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood.[285]

7.2.2 *Obligation to state Reasons*

The Commission is not only obliged to set out the facts of the case, but also to explain on which legal basis it adopted the operative part of the decision based on the facts of the case. The statement of reasons must be "appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question."[286] For the assessment whether the statement of reasons meets the requirements of Article 253 TEC, not only to its wording is of relevance but also to its context and to all the legal rules governing the matter in question.[287]

The Commission acknowledges this duty also in its Code of Good Administrative Behavior, where it is said that a Commission decision should clearly state the reasons on which it is based.[288]

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283 Cf., e.g., *ACF Chemiefarma NV v. Commission*, Case 41/69, 1970 E.C.R. 61, para. 78.

284 *Germany v. Commission*, Case 24/62, 1963 E.C.R. 63, 69.

285 *Germany v. Commission*, Case 24/62, 1963 E.C.R. 63, 69.

286 *Ferriere Nord SpA v. Commission*, Case T-176/01, 2004 E.C.R. n.y.r., para. 106.

287 *Delacre and others v. Commission*, Case C-350/88, 1990 E.C.R. I-395, paras. 15-16, *Spain v. Commission*, Case C-114/00, 2002 E.C.R. I-7657, paras. 62-63; *Ferriere Nord SpA v. Commission*, Case T-176/01, 2004 E.C.R. n.y.r., para. 106.

288 Section 3. of the Code of Good Administrative Behavior.

7.3 NO DIALOGUE REQUIREMENT

In its case law the Court consistently held that, even though Article 253 TEC imposed a duty to state the reasons on which its decisions are based, the Commission "is not required to discuss all the issues of fact and law raised by every party during the administrative proceedings."[289] Therefore, the Commission is not obliged to enter into a genuine "dialogue" with the parties. The unwillingness of the Court to accept a fully fledged dialogue requirement, moreover, may be based on the concern that such a requirement would lead to a "more and more cumbersome administrative process because the parties will be encouraged to raise more and more arguments to which the agency will have to respond."[290]

Irrespective of the fact that there is no "dialogue requirement", the Commission is obliged to consider all relevant submissions by the Member State and any other parties to a State investigation. At the same time, the reasons given must be at least so comprehensive to allow the Court to exercise its function of judicial review.[291]

7.4 PROPORTIONALITY

Article 87(3) TEC confers a wide margin of discretion on the Commission to allow aid by way of derogation from the general prohibition laid down in Article 87(1) TEC, inasmuch as the determination in such cases of whether State aid is compatible with the common market raises problems which make it necessary to examine and appraise complex economic facts and conditions.[292] The Court is willing to accept that review by the Court is restricted in cases where a complex economic appraisal is involved.[293] In such a case the Court is prepared not to encroach upon the Commission's economic appraisal and does not

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289 *Stichting Sigarettenindustrie v. Commission*, Joined Cases 240-242, 261, 262, 268 & 269/82, 1985 E.C.R. 3831, para. 88; cf. also *Remia BV and Nutricia BV v. Commission* , Case 42/84, 1985 E.C.R. 2545, para. 26; *Vereniging ter Bevordering van het Vlaamse Boekweze (VBVB) and Vereniging ter Bevordering van de Belangen des Boekhandel (VBBB) v. Commission*, Joined Cases 43 & 63/82, 1984 E.C.R. 19, para. 22; *NV Nederlandsche Banden Industrie Michelin v. Commission*, Case 322/81, 1983 E.C.R. 3461, para. 14.

290 Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F., 179, at 204 (1992).

291 *Germany v. Commission*, Case 24/62, 1963 E.C.R. 63, 69; *Roquette Frères v. Council*, Case 110/81, 1982 E.C.R. 3159, para. 20; *Vereniging ter Bevordering van het Vlaamse Boekweze (VBVB) and Vereniging ter Bevordering van de Belangen des Boekhandel (VBBB) v. Commission*, Joined Cases 43 & 63/82, 1984 E.C.R. 19, para. 22; *see* also, e.g., *La Cinq SA v. Commission*, Case T-44/90, 1992 E.C.R. II-1, para. 42; *Asia Motor France SA v. Commission*, Case T-7/92, 1993 E.C.R. II-669, para. 30.

292 *Keller SpA and Keller Meccanica SpA v. Commission*, Case T-35/99, 2002 E.C.R. II-261, para. 77.

293 *Belgium v. Commission*, Case C-56/93, 1996 E.C.R. I-723, para. 11; *Italy and SIM 2 Multimedia v. Commission*, Joined Cases C-328/99 & C-399/00, 2003 E.C.R. I-4035, para. 39.

substitute its economic assessment for that of the Commission.[294] Rather, the Court limits its judicial scrutiny to checking that the procedural rules have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers.[295]

[Shorten prior paragraph and add a paragraph outlining that there is a proportionality analysis as regards the substance of the aid (aid can be granted to the extent needed to achieve the objective that is the basis for its authorization) and as regards the procedure (information requests must be limited to what is necessary to be able to analyze the case, other examples). However, as regards recovery of unlawful aid the principle is that full recovery is required , because only that recovery will reestablish the competitive balance].

7.5 SUBSTANCE OF THE DECISION

7.5.1 *Regarding Notified Aid*

As explained above, after the Phase 2 procedure has been concluded, the Commission decision regarding notified aid may come to one of the following conclusions:

- the measure does not constitute State aid; or
- the measure is authorized as it is ("positive decision") or subject to conditions ("conditional decision"); or
- the measure is not authorized ("negative decision"). In this case, the Member State is prohibited from putting the measure into effect and must recover any aid already granted to the beneficiary.[296]

7.5.2 *Regarding Unlawful Aid*

Similarly, proceedings in relation to unlawful aid will be closed by one of these decisions, i.e., a decision that the measure does not constitute State aid, by a positive or a conditional decision, or by a negative decision. A negative decision will be accompanied by a recovery decision in case the unlawful aid had already been awarded to a beneficiary.

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294 *Matra v. Commission*, Case C-225/91, 1993 E.C.R. I-3203, para. 23; *Ducros v. Commission*, Case T-149/95, 1997 E.,C.R. II-2031, para. 63.

295 *Roquette Frères v. Council*, Case 138/79, 1980 E.C.R. 3333, para. 25; *BAT and Reynolds v. Commission*, Joined Cases 142/84 & 156/84, 1987 E.C.R. 4487, para. 62; *Matra v. Commission*, Case C-225/91, 1993 E.C.R. I-3203, para. 25.

296 Article 7(2), (3), (4) and (5) of Regulation 659/1999.

7.5.3 *Regarding Misuse of Aid*

Regarding alleged misuse of aid by the recipient, the same procedural rules apply as with regard to unlawful aid. *Mutatis mutandis* the Commission may adopt a decision finding that there was no misuse of aid or that aid was misused.

7.5.4 *Regarding Existing Aid*

When the Commission concludes in an examination of existing aid that the aid is not, or no longer, compatible with the common market can normally only act as regards the future and only as regards and schemes.[297] It will issue a recommendation to the Member State concerned proposing appropriate measures. The recommendation may propose, in particular,

- a substantive amendment of the aid scheme;
- the introduction of new procedural requirements; or
- the abolition of the aid scheme.[298]

In case the Member State accepts the proposed measures, the Member State will be bound by the Commission's proposal and must implement the appropriate measures.[299] In case the Member State does not accept the proposed measures and if the Commission still considers these measures necessary, the Commission will initiate the formal investigation proceedings, i.e., a Phase 2 investigation,[300] at the end of which the Commission can take a binding decision enforcing its recommendation vis-à-vis the Member State.

7.6 PUBLICATION OF THE COMMISSION'S DECISIONS

7.6.1 *Publication in the Official Journal*

The official gazette for publication of legal acts in the EU is the Official Journal.[301] The Official Journal is organized in two "series": the L-series, where legally binding acts are published (particularly directives, regulations and decisions), and the C-series for legally non-binding acts (e.g. recommendations or Commission notices). There is a separate edition of the Official Journal in each official Community language. Unless explicitly provided otherwise, publication must be effectuated in all language versions.

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297 Normally, existing individual aid will have created a legitimate expectation on the part of the beneficiary to be entitled to such aid, which the Commission can not undo ex-post-facto (see above, ■■)

298 Article 18 of Regulation 659/1999.

299 Article 19(1) of Regulation 659/1999.

300 Article 19(2) of Regulation 659/1999.

301 See Article 254 TEC.

7.6.1.1 Publication of legal acts

The Commission (or the Council) are obliged to publish legislative acts, in particular the various regulations, implementing regulations and amendments thereto in all official languages in the L-series of the Official Journal.

7.6.1.2 Publication of Guidelines and Frameworks

To the extend the Commission adopts Guidelines and Frameworks indicating how it will exercise its discretion in future cases, there is technically no publication requirement, since these documents are normally communicated to the Member States in writing. Nevertheless, the Commission has, at least since the late 1980's begun to systematically publish such documents both in the "C" series of the Official Journal in all languages and to post these texts on the internet.

7.6.1.3 Publication of decision relating to cases.

Decisions that close a formal investigation must be published in the Official Journal in full and in all official languages of the EU.[302] For all other decisions, the significant administrative burden to publish the full text of these decisions in all language versions is alleviated.

Decisions pursuant to Article 4(2) and (3), i.e. decisions under the preliminary procedure finding that a measure does not constitute aid or that the measure can be exempted, and decisions pursuant to Article 18 in conjunction with Article 19(1) need only be published in the form of a summary notice.[303] Copies of the decision in full text, but only the authentic language version or versions, may be obtained upon request and are, moreover posted on the internet.

Recommendations for appropriate measures are published in the form of a summary notice once they have been accepted by the Member State concerned, and the recommendation that was accepted is than posted on the internet (in the language of the procedure only).[304] If the recommendation is not acceptable the Commission can decide to open a formal investigation procedure.

Decisions to open the formal investigation procedure, must be published in full in the authentic language version only, but only "a meaningful summary" must be published in the Official Journal in the other official languages.

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302 Article 26(3) of Regulation 659/1999.

303 Article 26(1) of Regulation 659/1999.

304 **[Add footnote]**

Finally, in cases where Article4(6) and Article 8(2) apply (i.e. where there is an assumption that an aid has been authorized by the Commission because it did not take a formal decision within the prescribed time frame, and where the procedure is closed by the Commission after the withdrawal of the notification by the Member State concerned), only a short notice of these circumstances needs to be published in the Official Journal.

If the Council takes a decision pursuant to the third subparagraph of Article 88(2) TEC, it may decide to publish this decision in the Official Journal, but is not obliged to do so.[305]

Regulation 659/1999 does not specify when the respective decisions have to be published. In practice, it is not uncommon that decisions are published only months after the actual date of their adoption.[306] Article 20 of Regulation 659/1999 helps to remedy this shortfall as it gives interested parties the right to obtain a copy of Commission decisions even before their publication in the Official Journal.

These delays have serious repercussions on the legal position of the beneficiary of the state aid. He will only have legal certainty that no one instituted proceedings for annulment before the Community Courts when the two months deadline for an action for annulment, which is triggered by publication of the decision in the Official Journal,[307] has expired.[308]

7.6.2 *Transmission of Decision to Interested Parties*

The Commission is obliged to send a copy of its decision ending the formal procedure to any interested party who has submitted comments and to any beneficiary of individual aid.[309] In addition any interested party—even those who did not submit comments—has the right to request a copy of any decision taken pursuant to Articles 4 and 7, Article 10(3) (information injunction) and Article 11 (suspension injunction and recovery injunction) of

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305 Article 26(5) of Regulation 659/1999. Article 26(5) requires that the Council act unanimously when deciding to publish its decision in the Official Journal. This requirement must not be confounded with the requirement that the Council must take the decision pursuant to Article 88(2) TEC unanimously as well. The reiteration of the unanimity-requirement is explained by the fact that two distinct decisions are the subject of the two rules: Article 88(2) TEC deals with the decision on the compatibility of the aid, and Article 26(5) of Regulation 659/1999 with a separate decision on the publication of the former. Similarly, LEIGH HANCHER, TOM OTTERVANGER & PIET JAN SLOT, E.C. STATE AIDS, 379, footnote 6 (2nd ed. 1999).

306 Cf. e.g. Commission Decision 98/665, 1998 O.J. (L 316) 25, which was published only on November 25, 1998, although the decision had already been adopted on February 25, 1998; or Commission Decision 1999/142, 1999 O.J. (L 46) 52, published on February 20, 1999, while the decision had been taken on February 25, 1998, too.

307 *See* Article 230 TEC.

308 Adinda Sinnaeve & Piet Jan Slot, *The New Regulation on State Aid Procedures*, 36 COMMON MKT. L. REV. 1153, 1190 (1999). **[Add case law: BP chemicals v. Commission, Kneissl Dachstein v. Commission, other recent cases]. [Note also the debate whether publication on the internet triggers the appeal deadline]**

309 Article 20(1) of Regulation 659/1999.

Regulation 659/1999.[310] These rules should enable parties who are entitled to appeal a decision before the Community courts to have a proper document upon which to base their appeals.

7.6.3 *Other Commission Publications in the Field of State Aid*

Apart from the Official Journal, there are other sources of information about EU State aid policy and the Commission's activities: the Annual Reports on Competition Policy, the State Aid Scoreboard, and the State Aid Register. The Commission publishes Annual Reports on Competition Policy, which cover all aspects of European competition policy, ranging from Articles 81 and 82 TEC to merger control, and to State aid.[311] The Annual Reports are organized in two parts, and in each part, section III deals with State aid. Part 1 provides a general overview of the legal regime, and Part 2 provides an overview of state aid cases decided in any given year. The so-called State Aid Scoreboard, first launched by the Commission in 2001 and updated twice a year, gives information on the overall situation of State aid in the EU and on the Commission's current State aid activities.[312] Finally, the State Aid Register also provides information on State aid cases.[313] Part I of the State Aid Register presents aggregated data on all cases under preliminary examination that were registered after January 1, 2000 in tabular form, and Part II contains information on cases which have been the object of a final Commission decision since January 1, 2000 and group exemption cases published in the Official Journal.

8. ADMINISTRATIVE RECONSIDERATION

Regulation 659/1999 does not provide for the possibility to seek reconsideration of the Commission's decision. This holds true for all types of decisions that the Commission can take under this regulation, i.e. decisions after the preliminary examination as well as decisions to close the formal investigation procedure (see Articles 4 and 7 of the regulation). As a result, neither a Member State which was a party to the proceedings before the Commission, nor any interested party (i.e. other Member States, or any other third party, as defined in Article 1(g) of Regulation 659/1999) may seek reconsideration.

8.1 REVOCATION OF A DECISION

The Community Courts have accepted that a general principle of Community administrative law permits that an unlawful administrative act may be revoked even if there

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310 Article 20(3) of Regulation 659/1999.

311 Available at http://europa.eu.int/comm/competition/annual_reports/

312 Available at http://europa.eu.int/comm/competition/state_aid/scoreboard/

313 Available at http://europa.eu.int/comm/competition/state_aid/register/

is no explicit statutory basis for this possibility,[314] as long as certain legitimate expectations of the addressee are respected. In contrast to this, the revocation of a lawful administrative acts is possible only in exceptional cases, because this would allow the Community institutions to take away vested rights from individuals, which would be contrary to the protection of legitimate expectations and legal certainty.[315]

As regards certain cases Article 9 of Regulation 659/1999 provides a statutory basis for the Commission to revoke certain decisions where the decision was based on incorrect information provided during the procedure, under the condition that this information was "a determining factor" for the decision. The decisions that might be revoked are decisions to close the preliminary examination and decisions to close the formal investigation procedure. Before revoking a decision, the Commission must give the Member State concerned the opportunity to submit comments and must open the formal investigation procedure pursuant to Article 4(4) of Regulation 659/1999.

The only category of decisions that is not expressly mentioned in Article 9 is negative decision, i.e. decision declaring the notified aid as not compatible with the common market. Nevertheless it would appear that even such a decision, if it was based on fraudulent information provided by the third party complainant, could be modified by the Commission, in particular since legitimate expectations of a beneficiary would not be affected.

8.2 APPEAL TO COMMUNITY COURTS (NO ADMINISTRATIVE APPEAL)

There is no possibility to appeal any decision in the field of state aid to another administrative body before seeking judicial review before the Community Courts. State aid decisions may, however, be appealed to the Community Courts (see below at Section 11.).

9. ENFORCEMENT ACTIONS

The Commission has no competence to enforce a decision against a Member State.[316] If a Member State does not comply with a Commission decision declaring aid incompatible with the common market, this does not affect the procedure in other State aid cases involving the same Member State. Subsequent State aid procedures are not linked and stand on their own because the effects of the State aid in issue needs to be assessed in each case individually according to the criteria set out in the TEC and in implementing Community legislation. This holds also true if a Member State decides to contest the

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314 *Algera and others v. Common Assembly*, Joined Cases 7/56 & 3-7/57, 1957-1958 E.CR. 39.

315 *Algera and others v. Common Assembly*, Joined Cases 7/56 & 3-7/57, 1957-1958 E.CR. 39.

316 *See* Article 256 EC: "Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, shall be enforceable" (emphasis added).

Commission's decision before the Community courts. The Court proceedings have no influence on how the Commission will assess a different case of State aid granted by the same Member State.

The situation can be different if aid is granted subsequently to the same beneficiary: It might be that in one instance the aid granted will be found incompatible with the common market while in a subsequent instance the aid granted in addition will be found compatible with the common market. If the incompatible aid has already been paid out to the beneficiary, the Commission will oblige the Member State to recover this aid. If the aid has not yet been recovered when the second decision approving the additional aid is adopted, the Commission will oblige the Member State to suspend payment of the difference between the aid to be recovered and the aid authorized by the subsequent decision.[317] Payment will have to be suspended until the Member State has complied with the previous decision to recover the incompatible aid.

9.1 RECOVERY OF AID

Where the Commission adopted a negative decision with regard to non-notified aid, it will also decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary (a "recovery decision"). The Commission is not authorized to take a recovery decision if the recovery of the aid would be contrary to a general principle of Community law.[318]

The aid to be recovered pursuant to a recovery decision includes interest at an appropriate rate fixed by the Commission. Interest is payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.[319]

The modalities of the recovery are (in principle) governed by the national law of the Member State concerned. However, rules of national law must be interpreted in such a way as to not prevent that enforcement can be actually effected.[320] **[Add paragraph explaining the consequences]**

The Member State concerned is obliged recover the unlawful aid without delay and to take all necessary steps which are available in its legal system, including provisional measures.[321]

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317 *See*, e.g., Commission Decision 94/1074/EC *Textilwerke Deggendorf GmbH*, O.J. 1994 (L 386) 13.

318 Article 14(1) of Regulation 659/1999.

319 Article 14(2) of Regulation 659/1999.

320 **Add reference to ECJ in Alcan (and other subsequent case law)**

321 Article 14(3) of Regulation 659/1999.

9.2 INJUNCTION DECISIONS

The Commission can adopt certain injunctions (interim orders) as regards unlawful aid,[322] cases of misuse of aid,[323] but not regarding normally notified aid and existing aid.[324]

Two types of enforcement injunctions are provided for in Regulation 659/1999: suspension injunctions and recovery injunctions.[325] Once the Commission has identified that a Member State may have the intention to grant unlawful aid, it may adopt a "suspension injunction", which is a decision requiring the Member State concerned to suspend any unlawful aid or aid that is being misused until the Commission has taken a decision on the compatibility of the aid with the common market.[326]

The Commission can also adopt a "recovery injunction" to require the Member State to provisionally recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market.[327] The Commission is only authorized to order provisional recovery of unlawful aid, not of aid that is allegedly being misused.[328] A recovery injunction can only be adopted if the following cumulative criteria are fulfilled: (i) there must be no doubt about the aid character of the measure in question; (ii) there must be an urgency to act; and (iii) there must be a "serious risk of substantial and irreparable damage to a competitor".[329] No such recovery injunction has been adopted to date.

9.3 ACTION AGAINST MEMBER STATE FOR FAILURE TO FULFILL TREATY OBLIGATIONS

9.3.1 *Non-observance of State Aid Decision by Member State*

Where the Member State concerned does not comply with conditional or negative decisions, the Commission or any other interested State may refer the matter directly to the

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322 Article 10 of Regulation 659/1999.

323 Article 16 of Regulation 659/1999, which refers to Article 10.

324 The relevant Articles do not refer to Article 10 of Regulation 659/1999.

325 The other form of an injunction (the information injunction) is part of the fact finding exercise and is thus a separate type of injunction (see above ??).

326 Articles 11(1) and 16 of Regulation 659/1999.

327 Article 11(2) of Regulation 659/1999.

328 This is because Article 16 of Regulation 659/1999 only refers to Article 11(1), but not to Article 11(2).

329 Article 11(2) of Regulation 659/1999.

Court of Justice of the European Communities direct, in derogation from the provisions of Articles 226 and 227.[330]

9.3.2 *Non-observance of Suspension or Recovery Injunction*

Similarly, if a Member State does not observe a suspension of a recovery injunction, the Commission may in derogation of Article 226 TEC refer the matter to the Court of Justice direct and apply for a declaration that the failure to comply constitutes an infringement of the TEC.[331]

9.3.3 *Enforcement of a Court order establishment a failure to comply with the Treaty*

If a Member State fails to comply with a decision of the Community Courts holding that it failed to comply with the Treaty, the Commission can refer the matter to the Court a second time. In such a case the Court can impose periodic penalty payments until the Member state complies. The periodic penalty payments can be significant **[Add sentence with recent examples from the Court's practice]**

10. **STRATEGIC CONCERNS**

Notifications of State aid measures have to be made to the Commission (not to Member State authorities), i.e., there are no strategic issues as to where to file a notification. The question, whether or not a notification should be made or not, does not give rise to such issues either because the obligation to notify State aid does not allow for discretion.[332]

A notification can be made in any of the official Community languages and naturally, a Member State will chose its own official language. The choice of the language is of no strategic concern because the language chosen will not have an influence on how the Commission deals with a case or which staff members will handle the case.

Although not set forth in legislation or judicial decisions, in practice informal contacts with the Commission prior to notification of the intended measure are encouraged by the Commission and do actually take place. This will allow the Commission a better understanding of the specific circumstances of the case at issue and will result in a more rapid and effective decision making process after the formal notification has been filed.

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330 Article 88(2) TEC, Article 23(1) of Regulation 659/1999. According to Article 226 TEC, the Commission first would have to deliver a reasoned opinion and give the non-complying Member State an opportunity to submit observations. Only if the Member State does not comply with this opinion within the period specified by the Commission could the matter be taken to the Court.

331 Article 12 of Regulation 659/1999.

332 Article 2(1) of Regulation 659/1999.

These first contacts can take the form of correspondence in writing or pre-notification meetings with the Commission.[333]

Undertakings might always turn to the Commission and complain about State aid granted to other undertakings that they think was not compatible with the Treaty rules. They can also initiate proceedings before national courts on the basis of the standstill obligation in Article 89(3) TEC. According to this standstill obligation, a Member State is barred from putting into effect State aid before the Commission has taken a decision authorizing the aid.[334] The standstill obligation is directly applicable, which means that it can be enforced directly by Member State authorities, including courts.[335] A competitor of the beneficiary could try to obtain an injunction before a national court in order to prevent the actual payment of the aid until the Commission has adopted its decision. Likewise, the competitor could ask a national court to declare aid granted before the adoption of a Commission decision unlawful and to order the recovery of this aid.

There is no possibility to preempt Commission action with a declaratory judgment action in a Member State.

11. RELATED QUESTIONS

11.1 JUDICIAL REVIEW BY THE COMMUNITY COURTS

11.1.1 *Judicial Review of Legislative acts*

[Add a paragraph outlining the legislative acts can be challenged by all Member States and the other Institutions without the need to show a specific interest in the matter. Actions can be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings must be instituted within two months of the publication of the decision, or of its notification to the plaintiff.

But a challenge on the merits is difficult in light of wide discretion for Council, also wide discretion for Commission, but limited by the framework of the enabling legislation on which legislative powers of the Commission are based.

Add paragraph the private parties only have standing to challenge legislative acts, if the have the legislation has essentially the character of a "decision in disguise", i.e. affects the

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333 Cf., e.g., the Commission's invitation to submit comments pursuant to Article 88(2) EC concerning aid C 35/2001, O.J. 2001(C 231) 2.

334 Article 3 of Regulation 659/1999.

335 E.g., *Lorenz v. Germany*, Case 120/73, 1973 E.C.R. 1471, para. 7; *Adria-Wien Pipeline GmbH and others v. Finanzlandesdirektion für Kärnten*, Case C-143/99, 2001 E.C.R. I-8365, paras. 26-27.

plaintiff directly and individually much as a decision would have. Hence a private party will not normally have standing for a direct challenge.

Lack of standing as regards direct challenge is mitigated by the right under Art __ (ex-184)] to indirectly challenge legislative acts, which the plaintiff could not challenge directly, in litigation challenging a decision that is based on such legislation].

11.1.2 *Judicial Review of frameworks and guidelines*

[To the extent guidelines and frameworks are adopted as Commission decisions (and in particular in the framework of proceedings under Art 88(2) EC, they are decisions that Member States and the other institutions can challenge under Art. 230, without having to show any specific interest in the matter. Wide discretion of the Commission (at least in theory, the Court is increasingly interpreting guidelines and frameworks as if they were legislative acts, not expressions of the Commissions intention to exercise its discretion (which should allow the Commission more flexibility in explaining how it wants its guidelines interpreted).]

[Private parties only have standing to challenge such decisions if they affect the plaintiff directly and individually. This requirement will typically not be fulfilled. Lack of standing as regards direct challenge is mitigated by the right to indirectly challenge such guidelines or frameworks, because such measures do not modify the law and can always be measured against the law (i.e. the Treaty and implementing legislation proper). Hence, the issue can be raised in litigation challenging a decision that is based on such guidelines or frameworks].

11.1.3 *Judicial Review of Commission decisions dealing with the substance of a case*

State aid decisions by the Commission, like any other decision adopted by the Community institutions, are subject to judicial review by the Community Courts.

Member States and the other institutions have standing to challenge them under Art. 230, without having to show any specific interest in the matter.

On the basis of Article 230(4) TEC, any natural or legal person can institute proceedings against a decision addressed to that person or is directly and individually concerned by it.

Actions can be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. A violation of the right to be heard or the duty to provide reasons for a decision is one example of a violation of an essential procedural requirement that could lead to the annulment of a decision. An infringement the right to be heard, however, will only result in the annulment of the State aid decision, if it can be established by the applicant before the ECJ that absent this infringement the outcome of the procedure

might have been different.[336] This is not the case, for example, if the Member State had no opportunity to submit comments on observations submitted by third parties, where these observations did not contain any new information.[337] The burden of proof that the decision would have been different is upon the applicant in the annulment proceedings before the Court.

11.1.4 *Judicial review of procedural decisions*

[Add paragraph outlining that purely procedural decisions can normally not be appealed independently, but only in the framework of an appeal of the resulting substantive decision. Outline also, that there a few exceptions, if the procedural decision (for example to initiate the formal investigation procedure in some cases) modifies the substantive legal position of the applicant]

11.2 **RES IUDICATA**

EC administrative law knows the principle of *res judicata*. The principle of *res judicata* extends to matters of fact and law actually or necessarily dealt with by a decision (or a Court judgment).[338] It means that a Member State or a private party, that has failed to appeal a Commission decision (or a legislative act open to appeal) within the two months time period, can not question the original decision, even indirectly.

The Commission itself can only modify an otherwise unassailable decision, if the conditions for modifying a lawful (or unlawful) administrative act are fulfilled. Moreover, the Commission may reconsider a decision, if new facts come to light that were not dealt with in a previous decision.[339] However, Member States and private parties are not normally entitled to such a review, as a result of the *res judicata* principle.

A limited exception is contained in Article 88(2) TEC, which provides that the Commission must keep existing aid under constant review. This relates mainly to existing aid schemes,

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336 *Germany v. Commission*, Case C-288/96, 2000 E.C.R. I-8237, paras. 101 et seq.; *France v. Commission*, Case C-301/87, 1990 E.C.R. I-307, para. 31; *Belgium v. Commission*, Case 40/85, 1986 E.C.R. 2321, para. 31.

337 *Germany v. Commission*, Case C-288/96, 2000 E.C.R. I-8237, para. 102.; *France v. Commission*, Case C-301/87, 1990 E.C.R. I-307, para. 31; cf. also *Belgium v. Commission*, Case 234/84, 1986 E.C.R. 2263, para. 30.

338 With regard to Court judgments, *Italy v. Commission*, Case C-281/89, 1991 E.C.R. I-347, para, 14; *Lenz v. Commission*, Case C-277/95, 1996 E.C.R. I-6109, para. 50; *Limburgse Vinyl Maatschappij NV and others v. Commission*, Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P & C-254/99 P, 2002 E.C.R. I-8375, para. 44.

339 Cf. e.g. Commission Decision 94/1074/EC *Textilwerke Deggendorf GmbH*, O.J. 1994 (L 386) 13, which was the fourth in a row a decisions concerning different aids granted by Germany to *Textilwerke Deggendorf GmbH*, a producer of synthetic fibers.

and the interests of legal certainty are safeguarded by the fact, that changes to existing aid apply only for the future.

Moreover. the principle of *res judicata* does not apply where the there is an express provision that allows for the revocation of a decision and the subsequent adoption of a new decision in the same case.[340] Regulation 659/1999 gives the Commission competence to revoke a decision where it was based on incorrect information provided during the procedure which was a determining factor for the decision.[341]

11.3 CONSISTENCY–-LEGITIMATE EXPECTATIONS

The Commission is obliged to adhere to the rules of Regulation 659/1999 and apply the substantive standards enunciated in the Treaty rules on State aid. This in itself should ensure consistency in the Commission's decisional practice. In addition, the Court has developed in its case law the principle of the protection of legitimate expectations:[342] In a situation where the Community authorities have caused an economic actor or any other person to entertain legitimate expectations, the individual has the right to rely on the principle of the protection of legitimate expectations.[343] For example, the publication of guidelines or notices, where the Commission summarizes its past decisional practice and sets out its policy position, will be a source of legitimate expectations.[344] In order to provide guidance, the Commission published a number of guidelines and communications also in the field of State aid.[345]

[Expand with some practical examples from case law]

11.4 NO PUBLIC ACCESS TO PROCEDURE

Proceedings before the Commission are not public, and discussions among the Commissioners are confidential. This is explicitly laid down in the Rules of Procedure of the Commission.[346] [Add reference to transparency regulation, which excludes access to draft decisions and internal deliberations, also at the staff level].

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340 *See* above Section 7.6.

341 Article 9 of Regulation 659/1999.

342 Cf., e.g., *Töpfer v. Commission*, Case 112/77, 1978 E.C.R. 1032, para. 19.

343 *Van den Bergh and others v. Commission*, Case 265/85, 1987 E.C.R. 1155, para. 44; *Sofrimport v. Commission*, Case C-152/88, 1990 E.C.R. I-2477, para. 26.

344 Cf., e.g., *ABB v. Commission*, Case T-31/99, 2002 E.C.R. II-1881, paras. 120 and 126; *LR AF 1998 A/S v. Commission*, Case T-23/99, 2002 E.C.R. II-1705, para. 360.

345 *See* above Section [3.5].

346 Article 9 of the Rules of Procedure of the Commission, 2000 O.J. (L 308) 26, as amended.

11.5 PRINCIPLE OF EQUITABLE ESTOPPEL

EC administrative law does not recognize the concept of equitable estoppel as such, but there are a number of instances in which similar results are achieved in practice.

The perhaps clearest examples relates to cases, in which the Commission had qualified, outside a proper proceeding, that a certain measure did not constitute state aid. [add recent example of steel cases][347]. The Commissions statements, made in its annual competition reports and in response to parliamentary questions, could not affect the law and the legal qualification of the measures as (non-notified, new) state aid. When the Commission did open an investigation, it determined that the measures were aid, and that they were both unlawful and incompatible with the common market. Normally that would have required the Commission to order their repayment. The Commission, with reference to its own acts (and referring also to the principle that legitimate expectations must be respected, decided however, to limit its decision to a finding that the state aid was incompatible with the common market, and expressly did not order recovery. A similar case would have been considered, in an Anglo-Saxon setting, as an example of applying an equitable estoppel principle.

Moreover, one might consider a (rather exceptional) decision awarding damages because erroneous advice (regarding advice given by the Commission in its official function) was given and this advice had not been corrected immediately to fall within a similar category: While the adoption of an incorrect interpretation of a Community regulation by a Commission department and its communication to the applicant does not constitute in itself a wrongful act and therefore does not entail the Community's liability,[348] the Community institution having provided incorrect information is under a duty to rectify that information as soon as it has become aware of its incorrectness.[349] Any "failure to make such a correction is […] of such a nature as to render the Communities liable."[350] The legal basis for such non-contractual liability is Article 288(2) TEC, which obliges the Community to "make good any damage caused by its institutions or by its servants in the performance of their duties."

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347 ADD FOOTNOTE

348 Joined Cases 19, 20, 25 & 30/69 *Denise Richez-Parise and others v. Commission* [1970] ECR 325, para. 38.

349 Cf. Joined Cases 19, 20, 25 & 30/69 *Denise Richez-Parise and others v. Commission* [1970] ECR 325, paras. 36 and 37.

350 Joined Cases 19, 20, 25 & 30/69 *Denise Richez-Parise and others v. Commission* [1970] ECR 325, para. 41; similarly, Case 23/69 *Anneliese Fiehn v. Commission* [1970] ECR 547, para. 22; Case 79/71 *Alo Heinemann v. Commission* [1972] ECR 579, para. 12.

12. OTHER REMEDIES FOR PRIVATE PARTIES

12.1 COMPLAINT TO SECRETARY GENERAL OF THE COMMISSION

In general, complaints about alleged mal-administration can be lodged with the Secretariat-General of the Commission and with the European Ombudsman.

A complaint with the Secretariat-General of the Commission can be lodged whenever there has been a violation of the of the principles set out in the "Code of Good Administrative Behavior", which is annexed to the Rules of Procedure of the Commission.[351] The Secretariat-General has to forward the complaint to the relevant department. Within two months, the Director General or head of Department must reply to the complainant in writing. After this, the complainant can apply to the Secretary-General to review the outcome of the complaint; the Secretariat-General has to reply to this request within one month.[352]

12.2 COMPLAINT TO OMBUDSMAN

Any citizen of the Union,[353] and any natural or legal person residing or having its registered office in a Member State have the right to complain to the European Ombudsman.[354] The performance of the Ombudsman's duties is governed by the respective regulations and general conditions (the "Statute of the European Ombudsman")[355] adopted by the European Parliament pursuant to Article 195(4) EC.

The subject of complaints to the European Ombudsman can be "instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role."[356] The Ombudsman has defined the term "maladministration" as follows: "Maladministration occurs when a public body fails to act in accordance with a rule or a principle binding upon it."[357] In order to determine what is an instance of

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351 *See* Annex 1 of the Rules of Procedure of the Commission., 2000 O.J. (L 308) 26, as amended.

352 *See* Section 6. of the Code of Good Administrative Behavior.

353 *See* Articles 17 and 21(1) EC.

354 The legal bases for the right to complain to the European Ombudsman is Article 195 EC. By way of reference to Article 195 EC, the right to apply to the European Ombudsman is also stipulated in Article 21(1) EC as a right of each citizen of the Union.

355 Decision by the European Parliament of March 9, 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, O.J. 1994 (L 113) 15, as amended by the Decision by the European Parliament of March 14, 2002, O.J. 2002 (L 92) 13. The Statute of the European Ombudsman is also available at http://www.euro-ombudsman.eu.int/lbasis/en/statute.htm.

356 Article 195(1) EC.

357 The European Ombudsman, Annual Report for 1997, p. 23 (available at http://www.euro-ombudsman.eu.int/report97/pdf/en/rap97_en.pdf).

maladministration, the Ombudsman is called to apply the "Code of Good Administrative Behavior", which is annexed to the Rules of Procedure of the Commission. This "Code of Good Administrative Behavior" sets out certain principles (like lawfulness, proportionality, impartiality and independence, and objectivity) that the Community institutions and bodies must pay respect to.

Following a complaint—but also upon his own initiative—the Ombudsman is obliged to conduct enquiries to clarify any suspected maladministration. He will inform the institution or body concerned thereof, and these are invited to submit any useful comment to the Ombudsman.[358] The institutions and bodies, but also the Member States' authorities are obliged to supply the Ombudsman with any information he has requested of them and give him access to the file concerned, unless there are "duly substantial grounds of secrecy" or unless such information is covered by laws or regulations on secrecy.[359] The Ombudsman and his staff are obliged not to reveal any information or documents which they obtain in the course of their inquiries.[360]

As far as possible, the Ombudsman should seek a solution with the institution or body concerned to eliminate the instance of maladministration and to satisfy the complaint.[361] If the Ombudsman finds that there has been maladministration, he will inform the institution or body concerned and might make draft recommendations. The institution or body concerned then has three months within which to prepare a detailed opinion. Thereafter, the Ombudsman will issue a detailed report and send it to the European Parliament and the institution or body concerned. In this report, the Ombudsman may make pertinent recommendations.

The person having lodged the complaint will be informed of the outcome of the inquiries, of the opinion expressed by the institution or body concerned and of any recommendations made by the Ombudsman.[362]

12.3 **ACTION FOR DAMAGES**

According to Article 288(2) TEC, the Community is obliged to make good any damage caused by its institutions or by its servants in the performance of their duties. Liability of the Community has to be determined alongside the general principles common to the laws of the Member States and requires proof of (i) unlawful conduct on the side of a

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358 Article 3(1) of the Statute of the European Ombudsman.

359 *See* Article 3(2) and (3) of the Statute of the European Ombudsman.

360 Article 4(1) of the Statute of the European Ombudsman. The notable exception are facts that might relate to criminal law, where the Ombudsman must notify the competent national authorities (Article 4(2) of the Statute of the European Ombudsman).

361 Article 3(5) of the Statute of the European Ombudsman.

362 Article 3(6) and (7) of the Statute of the European Ombudsman.

Community institution, (ii) damage, and (iii) a causal link between the breach of Community law and the damage.[363] In the context of State aid, the Community might incur liability, for example, if the Commission wrongfully approves aid, or if it negligently does not prosecute the implementation of unlawful aid. If a competitor of the recipient of such unlawful aid can prove damage and to establish a causal link between the Commission's unlawful conduct and damage suffered, the Community will be liable on the basis of Article 288(2) TEC.[364]

Where it is not the Community who is guilty of unlawful conduct, but a Member State, competitors may bring an action for damages only in a national court against a Member State and only pursuant to national law.

It is not excluded outright that a competitor might also sue the aid recipient for damages under national law. Community law cannot serve as a basis for the recipients liability because the standstill obligation in Article 88(3) TEC is directed to Member States and does not impose any specific obligation on the recipient (like to verify whether the aid granted to him has been duly notified to the Commission).[365] That does not, however, prejudice the possible application of national law concerning non-contractual liability of the recipient. A national court might hold a recipient of aid paid in breach of the standstill obligation liable if under national law "the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators" is a valid cause of action.[366]

12.4 ACTION FOR FAILURE TO ACT

A complaint by the Member State concerned that the Commission has not started investigations against other Member States which maintained or introduced similar measures as the ones the Commission is investigating will in itself not render the investigations against the Member State concerned illegal. Nonetheless, as far as the measures applied by the other Member State which is not the subject of Commission investigations, the Member State concerned (but also any other Member State and any

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363 *See*, e.g., *Lütticke v. Commission*, Case 4/69, 1971 E.C.R. 325, para. 10; *Aktien-Zuckerfabrik Schöppenstedt v. Council*, Case 5/71, 1971 E.C.R. 976, para. 11; *Zuckerfabrik Bedburg AG and others v. Council and Commission*, Case 281/84, 1987 E.C.R. 49, para. 17; *Briantex and Di Domenico v. Commission*, Case 353/88, 1989 E.C.R. 3623, para. 8.

364 In *Société des Produits Bertrand v. Commission*, Case 40/75, 1976 E.C.R. 1, the action for damages was dismissed because the applicant failed to prove a causal link between the aid granted to its competitors and a decline in its own sales. Further judgments rendered upon applications for damages in the context of State aid are *Bretagne Angleterre Irlande (BAI) v. Commission*, Case T-230/95, 1999 E.C.R. II-123, and *Société d'Initiatives et de Coopération Agricole and others v. Commission*, Case 114/83, 1984 E.C.R. 1984 2589; in both judgments the applications were dismissed because the conditions for liability had not been fulfilled.

365 *SFEI and others v. La Poste and others*, Case C-39/94, 1996 E.C.R. I-3547, paras. 73 and 74.

366 *SFEI and others v. La Poste and others*, Case C-39/94, 1996 E.C.R. I-3547, para. 75.

Community institution) could bring an action against the Commission before the ECJ or CFI for failure to act.[367] An action against the Commission for failure to act is only admissible (i) if there is a duty upon the Commission to act, and (ii) if it has first been called upon to act and it had not defined its position within two months after having been called upon.[368]

The situations where the Commission is obliged to take a decision are defined in Regulation 659/1999. One of these situations includes when the Commission is in possession of information about alleged unlawful aid.[369] It has to examine that information without delay and must take a decision either that the measure in question does not constitute aid, that it is compatible with the common market, or that the formal investigation procedure will be opened.[370]

The Commission first must be called upon to act. If the Member State, which wishes the Commission to investigate another Members State, has not called upon the Commission to act, the action for failure to act will be declared inadmissible.[371] The applicant in the action for failure to act would have to call upon the Commission to address an act to the applicant: Someone might, for example, lodge a complaint with the Commission alleging that State aid granted by a Member State was not compatible with the common market and request the Commission to decide accordingly under Article 88 TEC. If the complainant does not specifically ask for an answer to be addressed to him, the fact that the Commission does not reply to this complaint can be no ground for an action for failure to act.[372]

Article 232 TEC applies only where the Commission failed to act, i.e. failed to take a position. If the Commission takes a decision different from the one the applicant desired, this cannot be the basis for an action for failure to act. Similarly, if the Commission rejects a complaint, it has taken a position so that an action for failure to act cannot be upheld.[373]

12.5 QUASHING OF EVIDENCE

The "quashing" of evidence is not a distinct administrative remedy known in Community administrative law. It will of course always be admissible to rebut factual evidence

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367 Article 232(1) TEC.

368 Article 232(2) TEC.

369 Article 10(1) of Regulation 659/1999.

370 Article 13(1) of Regulation 659/1999.

371 *Germany v. Commission*, Case 84/82, 1984 E.C.R. 1451, para. 23.

372 *Fédération Nationale des Producteurs de Vins de Table et Vins de Pays v. Commission*, Case 59/79, 1979 E.C.R. 2425, para. 2.

373 *Deutscher Komponistenverband v. Commission*, Case 8/71, 1971 E.C.R. 705, para. 2; *Irish Cement Ltd. v. Commission*, Joined Cases 166/86 & 220/86, 1988 E.C.R. 6473, para. 17; *Pantochim SA v. Commission*, Case T-107/96, 1998 E.C.R. II-311, para. 30.

advanced by the Commission in State aid proceedings. As the procedure is one between the Commission and the Member State concerned, it is upon the Member State to demonstrate that the evidence adduced by the Commission is unsound or unconvincing. The undertakings to whom the Member State intends to grant aid might assist the Member State in that regard and also submit relevant observations to the Commission. Undertakings might also support the Commission and try to provide it with information that corroborates the Commission's views; particularly, competitors of the undertakings who will be the beneficiaries of the aid granted, will have an incentive to support the Commission in this way.

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