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PROPOSAL

from: European Commission
dated: 6 December 2012

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Subject: Proposal for a COUNCIL REGULATION amending Regulation (EC)
No 659/1999 laying down detailed rules for the application of Article 93 of
the EC Treaty

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

Encl.: COM(2012) 725 final



Brussels, 5.12.2012
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2012/0342 (NLE)

Proposal for a

COUNCIL REGULATION

**amending Regulation (EC) No 659/1999 laying down detailed rules for the application of
Article 93 of the EC Treaty**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The European State aid rules were first introduced in the Treaties establishing the European Coal and Steel Community in 1952 and the European Economic Community in 1957. They are currently enshrined in the Treaty on the Functioning of the European Union (hereinafter: "TFEU" or "the Treaty").

Article 107 TFEU contains the definition of State aid and the grounds on which aid may be considered to be compatible with the internal market, while Article 108 TFEU sets out the main procedural principles governing the Commission's action to ensure Member States' compliance with the substantive State aid rules. Article 109 TFEU allows the Council, acting upon a proposal from the Commission and after consulting the European Parliament, to make any appropriate regulations for the application of Articles 107 and 108 TFEU.

In 1999, the Council adopted Regulation (EC) No 659/1999¹ (hereinafter, the "Procedural Regulation"), setting out in more details the rules of procedure governing the enforcement of Articles 107 and 108 TFEU, which have been applied until today without any significant modifications.

State aid procedures, as laid down by Article 108 TFEU and further detailed by the Procedural Regulation, are built around three main axes:

- Prior notification by Member States of all planned aid measures is compulsory, except in cases covered by a block exemption regulation or a decision, and the Member State concerned may not put the measure into effect until a Commission decision authorising that aid is taken; to that end, following an essentially bilateral (Member State/Commission) preliminary investigation ("first phase"), limited in principle to two months, the Commission may either approve the aid or open a formal investigation ("second phase"), subject to a best endeavour deadline of 18 months, with a view to thereafter approving (if necessary, subject to conditions) or prohibiting the aid;
- The Commission is required to conduct a diligent and impartial examination of complaints submitted from interested parties and take a decision thereon without undue delay. Where the Commission takes a decision finding that there exists no State aid as alleged by a complainant, the Commission must at least provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid;
- Finally, the Commission must keep under constant review all existing aid systems in Member States and may propose to them any appropriate measures required by the progressive development of the functioning of the internal market.

¹ Council Regulation (EC) N° 659/1999 of 22 March 1999 laying down detailed rules for the application Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

Those main features of the State aid procedure are a direct consequence of the system of State aid control foreseen in the Treaty, which is based on the Commission's exclusive competence to assess the compatibility of State aid measures with the internal market.

More than 13 years after its entry into force, a modernisation of the Procedural Regulation is needed to adapt State aid procedure in a European Union of 27 Member States, 500 million inhabitants, and 23 official languages.

The economic and financial crisis has threatened the integrity of the internal market and shown the importance of streamlined and efficient State aid control and enforcement. That experience pointed out the need for the Commission to have better tools in order to intervene within business-relevant timeframes and promote sound use of public resources for growth-oriented policies.

On 8 May 2012, the Commission therefore adopted the Communication on "*EU State aid modernisation (SAM)*"² which launches a comprehensive reform of the State aid framework. It will ensure that State aid policy contributes both to the implementation of the Europe 2020 agenda³ which is Europe's growth strategy for the current decade, and to budget consolidation.

The revision of the Procedural Regulation is one of the elements that should allow the Commission to achieve the objectives of that initiative. Reforming the State aid procedures should primarily improve the effectiveness of State aid control⁴.

The need to reform State aid procedures has also been emphasised by the Court of Auditors in its Special Report n°15/2011 "*Do the Commission's procedures ensure effective management of State aid control?*"⁵. With the proposed reform of the State aid procedural framework, the Commission will in particular respond to the recommendations of the Court of Auditors to:

- minimise the number of requests for information sent to Member States;
- deal swiftly with unfounded complaints, in order to provide more legal certainty to all stakeholders;
- periodically inform the complainant, the Member State and the beneficiary about the progress of each case and about the outcome of the investigation;
- improve the efficiency and reliability of its data-gathering process.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU State Aid Modernisation (SAM)*, 8.05.2012, COM(2012) 209 final.

³ Paragraph 23b, Communication from the Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, 3.3.2010, COM(2010) 2020 final.

⁴ Paragraph 23b, Communication "*EU State Aid Modernisation (SAM)*", cited above in footnote 2.

⁵ European Court of Auditors, "*Do the Commission's procedures ensure effective management of State aid control?*", Special Report n°15, 15.12.2011: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SRCA:2011:15:FIN:EN:PDF>

Those recommendations were explicitly endorsed by the Council⁶ and the European Parliament⁷.

2. OVERVIEW OF THE PROPOSED AMENDMENTS

Against that background, the proposed reform of the Procedural Regulation will focus on two areas, as announced in the SAM Communication⁸: improving the handling of complaints (2.1) and ensuring effective and reliable gathering of information from the market (2.2).

2.1. IMPROVING THE HANDLING OF COMPLAINTS

Complaints are in principle a very useful source of information to direct Commission investigations towards those economic sectors where unlawful State aid hampers competition at the level of the EU. However, the Commission receives on average more than 300 complaints every year, whether lodged by interested parties⁹ or not, among which many are either not motivated by genuine competition concerns or not sufficiently substantiated. Most complaints are not treated as a priority and the average duration of those cases therefore tends to increase¹⁰. Therefore, the complaints handling procedure is sometimes perceived by Member States and complainants as unpredictable and lacking transparency.

In 2009, the Best Practices Code for the conduct of State aid procedures¹¹ set out a staged and transparent procedure to handle complaints. Two years into its application, however, experience shows that the benefits it sought – of shorter duration, increased efficiency and greater predictability – have not fully materialised. Best Practices could not address some of the main shortcomings of the current system, since they directly stem from the Procedural Regulation. That is why a reform of the Procedural Regulation itself is proposed to address those issues.

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In that respect, the proposed amendments to the Procedural Regulation aim at improving the quality of the information received by clarifying the requirements to lodge a complaint and formalising a staged, predictable and transparent procedure.

Currently, the Commission has to investigate every alleged infringement of the State aid rules received from whatever source. Unlike the competition rules laid down in Articles 101 TFEU and 102 TFEU, in relation to which the lodging of a complaint is regulated by Regulations

⁶ Council of the European Union, Conclusions on Special report n°15/2011 by the European Court of Auditors: "*Do the Commission's procedures ensure effective management of State aid control?*"- Adoption, 2.5.2012, 9149/12.

⁷ European Parliament, Resolution on the Court of Auditors' special reports in the context of the 2010 Commission discharge, 10.5.2012, Paragraphs 116 to 125, 2011/2225(DEC).

⁸ Paragraph 23b, Communication "*EU State Aid Modernisation (SAM)*", cited above in footnote 2.

⁹ Within the meaning of Article 108(2) TFEU and Article 1(h) of the Procedural Regulation.

¹⁰ As of 31 March 2012, the average duration of pending complaint cases in DG COMP was 17 months.

¹¹ Communication from the Commission, *Best Practices Code for the conduct of State aid procedures*, OJ C 136, 16.06.2009, p. 13.

1/2003¹² and 773/2004¹³, no specific formal requirement is attached to the lodging of a State aid complaint. In the absence of any concrete rules in the Procedural Regulation, the General Court consequently considered, in the *Ryanair* judgment of 29 September 2011¹⁴, that there are currently no formal requirements to be met in order to put the Commission in possession of a State aid complaint.

In the interests of transparency and legal certainty, the conditions to lodge a complaint which put the Commission in possession of information regarding alleged unlawful aid and thereby set in motion the preliminary examination should therefore be clarified (Amendment to Article 10). Indeed it is appropriate to require that:

- complainants submit a certain amount of compulsory information. To that end, it is appropriate to empower the Commission to adopt implementing provisions to define the form and the content of a complaint (Amendment to Article 27).
- complainants demonstrate that they are interested parties within the meaning of Article 108(2) TFEU¹⁵ and Article 1(h) of the Procedural Regulation¹⁶ and that they therefore have a legitimate interest to lodge a complaint. To reach that objective, it is proposed to specify in Article 20(2) on the "rights of interested parties" that "*any interested party may lodge a complaint*".

In cases where the information received will not be classified as a complaint since it will not have passed the admissibility criteria, the Commission will no longer be under an obligation to adopt formal decisions. Those submissions will be registered as market information and could be used at a later stage to conduct *ex officio* investigations.

To complete the staged procedure introduced by the Best Practices Code¹⁷, the Procedural Regulation should formalise the possibility for the Commission to deem complaints withdrawn if the complainant does not return to it with meaningful information or otherwise fails to cooperate during the procedure. In that way, the treatment of complaints could be streamlined and improved (Amendment to Article 20(2)).

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Complainants mainly draw the attention of the Commission to aid which has already been granted and therefore constitutes potential illegal aid. In 2009, the Commission adopted a Notice on the enforcement of State aid law by national courts¹⁸ in order to inform national courts and interested parties about the remedies available and has sought to develop its

¹² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

¹³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p.18.

¹⁴ Case T-442/07 *Ryanair v Commission* [2011], not yet published, paragraph 33.

¹⁵ See Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraph 16.

¹⁶ Article 1(h) of Council Regulation 659/99: "*interested party*" shall mean *any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.*"

¹⁷ Communication from the Commission, *Best Practices Code for the conduct of State aid procedures*, cited above footnote 11.

¹⁸ *Commission notice on the enforcement of State aid law by national courts*, OJ C 85, 09.04.2009, p. 1.

cooperation with national courts by introducing more practical tools for supporting national judges in their daily work.

It is proposed to expressly provide that national courts have the right to obtain from the Commission information for the purpose of applying Articles 107(1) and 108 TFEU and to ask for an opinion of the Commission on questions related to the application of State aid rules (New Article 23a(1)).

It is also proposed to introduce the right for the Commission to make submissions to national courts in written or oral form (New Article 23a(2)). The Commission may act under that provision only in the Union public interest (as *amicus curiae*), i.e. not in support of one of the parties. That proposed provision aims in particular at permitting the Commission to draw the attention of Member States' courts to issues of considerable importance for the consistent application of EU State aid law across the internal market. The national courts are not bound to follow an opinion of the Commission. The new Article 23a is also without prejudice to the right or duty of national courts to request preliminary rulings from the Court of Justice under Article 267 TFEU.

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The above proposals should ensure that the Commission receives better substantiated complaints and will therefore have a positive impact on all the actors involved in the handling of State aid complaints.

The compulsory use of the complaints form will facilitate the work of the Commission to identify whether a complaint involves State aid issues and to determine the degree of priority which should be given to each complaint, without having to send iterative information requests to the Member State concerned or the complainant. Given that the Member States are entitled to comment upon and react to each complaint, a possible reduction in the number of complaints would moreover reduce the workload for the Member State concerned.

Where complainants also lodge actions before national courts based on claims of breaches of EU State aid law, national courts will find in the Procedural Regulation the tools at their disposal to obtain the Commission's support. That cooperation which will take place within an appropriate timeline should facilitate the implementation of EU State law by national courts. The fact that the Commission can also offer its assistance on its own initiative to national courts will also be useful to raise national courts and litigants' awareness of the cooperation mechanisms between the Commission and the national courts, demonstrate their usefulness and foster their use.

Since complainants are not always aware of the information that the Commission needs to be able to swiftly assess a State aid complaint, a compulsory complaints form will guide complainants in the process of collecting and presenting the information needed for the Commission to conclude on the existence of aid in a given case. This should significantly reduce the need to send subsequent information requests to complainants, since they will have provided all the necessary information at their disposal from the start. The increased transparency and predictability of the procedure will in itself give complainants a clearer view on the state of play and progress of the investigation, thereby avoiding unnecessary correspondence.

2.2. ENSURING AN EFFECTIVE AND RELIABLE GATHERING OF INFORMATION FROM THE MARKET

Over the last years, there has been a significant refinement in the compatibility assessment of State aid measures. The Commission relies on an effects-based approach which seeks to balance the positive and negative effects of State aid measures under assessment. The compatibility assessment of an aid measure depends on the design of the measure and its impact on the market. A proper facts-based assessment has therefore become more important, in particular for complex cases.

To meet the Commission's needs in terms of information gathering, it is therefore proposed to introduce market information tools (MIT) (2.2.1) and a legal basis for conducting investigations into particular sectors of the economy and into particular aid instruments (2.2.2) in order to enable the Commission to obtain timely, reliable, factually correct and complete information directly from the market.

2.2.1 Market information tools (MIT)

The current procedural framework as regards the Commission's powers to obtain information during State aid proceedings gives rise to a number of difficulties. Where the Commission is dependent on information provided by the Member State, delays can arise when the information is not readily available to the national authorities and can place a significant burden on those authorities in certain cases.

The Commission tried to tackle some of those issues in the Best Practices Code¹⁹. It was in particular formalised that the Commission services can send, in the context of the formal investigation procedure, a copy of the decision to initiate the formal investigation procedure to interested parties and invite them to comment on specific aspects of the case. By introducing the possibility to impose sanctions for submitting incomplete or incorrect information in replying to an information request, it will be possible to improve the quality of information received by the Commission.

To improve the efficiency and transparency of the procedure, it is proposed to go a step further and codify the power that the European Court of Justice recognised to the Commission on multiple occasions to consult the market²⁰.

It is proposed that the Commission may require information via simple request for information or by decision from entities other than the Member State concerned in notified and unlawful aid procedures after the opening of the formal investigation (New Article 6a and amended Article 10).

As in antitrust and mergers, those market information tools would consist in the possibility to request information from any undertaking, association of undertakings or Member State (New Article 6a), coupled with the possibility to sanction the companies concerned through fines or penalty payments (New Article 6b) if they fail to respond or to provide complete information.

¹⁹ Point 34, Communication from the Commission, *Best Practices Code for the conduct of State aid procedures*, cited above footnote 11.

²⁰ Case 84/82 Germany v Commission [1984] ECR 1451; Case T-198/01 Technische Glaswerke Ilmenau v Commission [2004] ECR II-2717; Case T-73/98 Prayon-Rupel v Commission [2001] ECR II-867; Case T-304/08 Smurfit Kappa v Commission [2012], not yet published;.

This would deter third parties from submitting biased information. Furthermore, the fact that the same question will be asked to different companies and the replies received submitted to the Member State for comments would allow the Commission to cross check the information and ensure the reliability of the data received.

In setting the amount of fines and periodic penalty payments, the Commission would take into account the experience gathered in the field of mergers and antitrust. Therefore, the pecuniary sanctions would be in line with the existing values under Council Regulation 139/2004²¹ and Council Regulation 1/2003²². The values chosen offer sufficient incentives for parties concerned to comply, being proportionate as to the potential gravity of the offence:

- fines not exceeding 1% of the total turnover for supplying incorrect or misleading information in response to simple requests or requests made by decisions or for not replying to requests made by decisions (New Article 6b(1)).
- periodic penalty payments not exceeding 5% of the average daily turnover for each working day of delay, calculated from the date set in the decision in order to compel them to supply complete and correct information which has been requested by decision (New Article 6b(2)).

In line with the principle of sincere cooperation enshrined in the Treaty on the European Union, requests sent to Member States and public authorities would not entail the possible imposition of fines or periodic penalty payments under the Procedural Regulation.

For reasons of legal certainty, it is appropriate to establish limitation periods for the imposition and enforcement of fines or periodic penalty payments which are in line with the provisions of Council Regulation 1/2003²³ (New Articles 15a and 15b).

Market information tools would be mostly used in complex individual cases requiring an in-depth assessment, in order to tackle a series of issues as regards the qualification of aid or its compatibility assessment. The following examples may serve to illustrate the future use of the instrument: assessing normal market practice (e.g. State aid element in guarantees/loans), market failures and/or incentive effect benchmarking. Selecting the addressees of the information requests will be based on objective criteria depending on each case. For example, besides the aid beneficiary, requests could be sent to competitors, customers, consumer associations, etc., while ensuring that within each category the sample of respondents is representative.

The information sought will be readily available to the market actors concerned and consist in particular in:

- Factual market data (e.g. market size, market shares, level of imports etc.) and company data (e.g. cost structure, profits, ownership and control, participations in other companies, etc.);

²¹ Articles 13 and 14, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

²² Articles 22 and 23, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1.

²³ Articles 25 and 26, Council Regulation (EC) No 1/2003 of 16 December 2002 cited above footnote 22.

- Facts-based analysis of the functioning of the market (e.g. entry barriers, cost of entry, regulatory barriers, growth rate of the market and growth perspectives, overcapacity), likely impact of the aid on the beneficiary, assessment of proposed remedies or compensatory measures.

Confidentiality of the sensitive information provided by the Member States will be fully guaranteed when using MIT. The opening decision already aims at informing third parties of the main features of a case in a manner that protects potentially sensitive information. The Commission will also ensure that no sensitive information is disclosed when drafting requests to third parties.

When replying to a request for information, market participants will be invited to provide the Commission with the non-confidential version of their reply. If certain data are considered confidential, the Commission will ensure that they are adequately protected (for example, by aggregating data or providing a range in which the figures fall).

If the Commission wants to use confidential information provided by third parties which cannot be aggregated or otherwise be anonymised, it will have to obtain their agreement before it discloses that information to the Member State to be able to use it in the Decision.

In cases where the information marked as confidential does not seem to be covered by obligations of professional secrecy, it is appropriate to establish a mechanism by which the Commission can decide the extent to which such information can be disclosed. Any such decision not to accept a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the third party concerned can make use of any judicial protection available to it, including any interim measure (New Article 7(9)).

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Introducing MIT should lead to a reduction of the administrative burden for Member States. By allowing the Commission to relieve the national authorities of some of the burden of information-gathering, especially in cases where the information is not at the disposal of the Member State and obtaining it would entail significant additional efforts from its part, and to directly tap into already existing information at companies' level (e.g. for market shares, market structure etc.), a better balance between the aid grantor and the final aid beneficiary could ultimately be achieved.

However, the Member State's obligation to provide all evidence demonstrating the compatibility of an aid measure will not be modified under the modernised rules. Nor will they alter the bilateral nature of the State aid procedure. MIT would duly associate Member States to the procedure, by giving them the possibility to present their comments on the replies to information requests (New Article 7(8)). In that way, their rights of defence will be upheld and the transparency of the procedure guaranteed.

Direct correspondence between the aid beneficiary and the Commission services would help better identify what is truly needed to conclude the compatibility assessment in a timely manner, which would be beneficial for the aid recipient and the Member State. That development would also improve the predictability of the beneficiary's situation. The targeted factual data requested will be readily available to the beneficiary and should entail only a

fairly limited effort from its part, which it will be ready to exert swiftly in order to demonstrate that the aid it seeks to obtain is actually justified.

The use of MIT by the Commission will also be in the interest of competitors and complainants, as it will allow the Commission to more carefully assess the compatibility of the aid in question, thereby preventing or remedying the undue distortions of competition stemming from incompatible aid.

By using MIT, the Commission will be able to reach the appropriate third parties directly and simultaneously. This will contribute to more transparent, accurate, and swift information flows, which should reduce the number for repetitive and successive information requests, thereby shortening the duration of the investigation. The Commission will apply a proportionality criterion when requesting information from the market. Thereby, the burden on the companies concerned will be reduced to the minimum necessary for the Commission to complete its assessment of a State aid measure. Small and medium-sized enterprises (SMEs) will only be exceptionally concerned by MIT, given that MIT would be mostly used in complex individual cases requiring an in-depth assessment, while most of the aid SMEs receive is granted through schemes, either approved or blocked-exempted²⁴. In the very rare cases where MIT could concern SMEs, the Commission will adapt its requirements in light of the above-mentioned principle of proportionality.

Introducing MIT after the opening of the formal investigation would not change the role of third parties as a source of information which is already currently foreseen and confirmed by clear case-law of the Court of Justice. Nevertheless, the addressees of decisions imposing fines and/or penalty payments will have the right to make their views known (New Article 6b(5)) and to challenge such decisions (New Article 6b(6)).

The new rules regarding information-gathering are necessary in order to ensure that the Commission adopts sound and substantiated decisions within business-relevant timelines. In that way, the Commission will increase legal certainty for Member States and companies, while at the same time making the State aid policy more efficient and transparent.

2.2.2 Investigations into sectors of the economy and into aid instruments

In accordance with the objectives of the State Aid Modernisation initiative, the Commission is committed to focusing its efforts on the most distortive cases for the functioning of the internal market. By applying an enhanced horizontal approach in its investigations, the Commission would be in a better position to detect aid in a particular sector or based on a particular instrument which may restrict or distort competition.

The need for reinforced horizontal information is particularly manifest in cases where the data in the possession of the Commission (whether obtained via complaints, notifications or market information) would raise issues linked to a specific sector in several Member States and there are indications that similar problems may exist in other Member States.

²⁴ According to the data published in the latest State aid Scoreboard (SEC(2011) 1487 final), in 2010 88.5% of the total amount of aid granted by Member States was done through approved schemes or blocked-exempted measures. Moreover, 100% of the aid for the horizontal objective SMEs was granted through schemes or block exempted measures.

Following the recommendations of the Court of Auditors that the Commission should step up its monitoring activities both in terms of sample size and of scope²⁵, the Commission has already increased the use of its currently existing powers to monitor approved aid measures and exempted schemes ex-post. By so doing, it can collect horizontal information from Member States on specific economic sectors or the use of particular aid instruments in several Member States. To increase its knowledge of a particular sector of the economy or State aid issue, the Commission may also send questionnaires, address requests to Member States or order expert reports and in the future address information requests to market participants.

To complete the existing powers of the Commission and to obtain an *ex ante* holistic view of the market, it is proposed to introduce a specific legal basis to launch investigations into sectors of the economy and into types of aid measures (New Article 20a).

The Commission would carry out that activity by using its power to send requests for information to the Member States and to any relevant market players. At the end of its inquiry, the Commission may publish a report on the results of the inquiry into particular sectors of the economy.

Before formally launching a sector inquiry, the Commission would have to analyse all information which is already at its disposal or available in the public domain. For proportionality reasons, launching a sector inquiry will therefore require indications from publicly available sources that State aid issues in a particular sector or concerning the use of a particular aid instrument exist in several Member States: e.g. that existing aid measures in a particular sector or based on a particular aid instrument in several Member States are not, or no longer, compatible with the internal market.

Sector inquiries would entail a limited initial effort from some market players to which requests for non-public information will be addressed in the first place. The Commission will then also ask the Member States for information and invite them to comment and give their views on its findings. The impact of that initial workload would however be outweighed by a significant reduction in the workload involved in the future investigation of individual cases for all concerned (Member States, beneficiaries, market players and the Commission) via a reduction of the number of requests for information needed, and the efficiency gains to be expected in the enforcement of State aid rules through greater transparency and speed.

3. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation of interested parties and use of expertise

The reform of State aid procedures was presented to and discussed with the Member States at high level meetings organised on 6 March, 11 July 2012. In addition, a technical workshop on market information tools and sector inquiries took place on 19 September 2012.

A public consultation on the handling of State aid complaints and on information gathering in State aid investigations was carried out from 13 July 2012 to 5 October 2012. The replies to this public consultation are available on the DG Competition website and the results were presented to the Member States at a high level meeting organised on 9 November 2012.

²⁵ Special report n°15/2011, European Court of Auditors, p. 41, cited above footnote 5.

Impact assessment

Not applicable

4. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

The proposal consists in amending the provisions of Council Regulation (EC) No 659/99 laying down the rules of procedure in State aid investigations as regards the handling of complaints and the gathering of information from the market.

Legal basis

The legal basis of the proposal is Article 109 of the Treaty on the Functioning of the European Union.

Subsidiarity and proportionality

The proposed amendments to the Procedural Regulation aim at making State aid procedures more efficient, thereby contributing to maintaining the integrity of the internal market and achieving the objectives of the State aid modernisation initiative and more generally the Europe 2020 strategy. They will inter alia also alleviate the administrative burden put on Member States and third parties. Therefore, the present proposal of the Commission is proportionate to the political objective pursued.

The present proposal concerns the application of State aid rules, which falls within the exclusive competence of the European Union. Therefore the principle of subsidiarity does not apply.

Choice of instrument

Council Regulation amending Council Regulation (EC) No. 659/99 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

5. BUDGETARY IMPLICATION

This proposal for an amendment has no impact on the EU budget (Articles 28 of the Financial Regulation and 22 of the implementing rules).

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 109 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament²⁶,

Whereas:

- (1) In the context of a thorough modernization of State aid rules to contribute both to the implementation of the Europe 2020 strategy for growth²⁷ and to budgetary consolidation, Article 107 of the Treaty should be applied effectively and uniformly throughout the Union. Council Regulation (EC) No 659/1999 of 22 March 1999 codified and reinforced the Commission's previous practice to increase legal certainty and to support the development of State aid policy in a transparent environment. However, in the light of the experience gained in its application and of recent developments such as enlargement and the economic and financial crisis, certain aspects of that Regulation should be amended in order to enable the Commission to be more effective.
- (2) In order to assess the compatibility with the internal market of any notified or unlawful State aid, for which the Commission has exclusive competence under Article 108 of the Treaty, it is appropriate to ensure that the Commission has the power, for the purposes of enforcing the State aid rules, to request all necessary information from any undertaking, association of undertakings or Member State whenever it has doubts as to the compatibility of the measure concerned and has therefore opened the formal investigation.

²⁶ OJ C [...], [...], p.

²⁷ Communication from the Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, 3.3.2010, COM(2010) 2020 final.

- (3) For the purpose of assessing the compatibility of an aid measure after the opening of the formal investigation procedure, in particular as regards novel or technically complex measures subject to detailed assessment, the Commission should be able, by simple request or by decision, to require any undertaking, association of undertakings or Member State to provide all information necessary for completing its assessment, if the information at its disposal is not sufficient, taking due account of the principle of proportionality, in particular for small and medium-sized enterprises.
- (4) The Commission should be able to enforce compliance with requests for information addressed to any undertaking or association of undertakings, as appropriate, by means of proportionate fines and periodic penalty payments. The rights of the parties requested to provide information should be safeguarded by giving them the opportunity to make their views known before any decision imposing fines or periodic penalty payments. The Court of Justice of the European Union should have unlimited jurisdiction with regard to such fines and periodic penalties pursuant to Article 261 of the Treaty.
- (5) Fines and periodic penalty payments are not applicable to Member States since they are under a duty to cooperate sincerely with the Commission in accordance with Article 4 of the Treaty on European Union, and to provide it with all information required to allow the Commission to carry out its duties under Regulation (EC) No 659/1999.
- (6) In order to safeguard the rights of defence of the Member State concerned, they should be informed of the content of requests for information sent to undertakings, associations of undertakings or Member States and be able to submit their observations on the comments received that raise doubts as regards the compatibility of the aid measure at stake.
- (7) The Commission should take due account of the legitimate interest of undertakings in the protection of their business secrets. The Commission should not be able to use confidential information provided by respondents, which cannot be aggregated or otherwise be anonymised, in any decision unless it has previously obtained their agreement to disclose that information to the Member State concerned.
- (8) In cases where that information marked as confidential does not seem to be covered by obligations of professional secrecy, it is appropriate to establish a mechanism by which the Commission can decide the extent to which such information can be disclosed. Any such decision not to accept a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the third party concerned can make use of any judicial protection available to it, including any interim measure.
- (9) The Commission may, on its own initiative, examine information from whatever source on unlawful aid, in order to ensure compliance with Article 108 of the Treaty, and in particular with the notification obligation and standstill clause laid down in Article 108(2) of the Treaty, and to assess their compatibility with the internal market. In that context, complaints are an essential source of information for detecting infringements of Union State aid rules.

- (10) To improve the quality of the complaints submitted to the Commission and at the same time increase transparency and legal certainty, it is appropriate to define the conditions that a complaint should fulfil in order to put the Commission in possession of information regarding alleged unlawful aid and set in motion the preliminary examination.
- (11) Complainants should be required to demonstrate that they are interested parties within the meaning of Article 108(2) TFEU and of Article 1(h) of Regulation 659/99. They should also be required to provide a certain amount of information in a form that the Commission should be empowered to define in an implementing provision.
- (12) For reasons of legal certainty, it is appropriate to establish limitation periods for the imposition and enforcement of fines and periodic penalty payments.
- (13) In order to ensure that the Commission addresses similar issues in a consistent manner across the internal market, it is appropriate to complete the existing powers of the Commission by introducing a specific legal basis to launch investigations into sectors of the economy or into certain aid instruments across several Member States. For reasons of proportionality, sector inquiries should be based on a prior analysis of publicly available information pointing to the existence of State aid issues in a particular sector or concerning the use of a particular aid instrument in several Member States, for example, that existing aid measures in a particular sector or based on a particular aid instrument in several Member States are not, or no longer, compatible with the internal market. Such inquiries would enable the Commission to deal in an efficient and transparent way with horizontal State aid issues.
- (14) Consistency in the application of State aid rules requires that arrangements be established for cooperation between the courts of the Member States and the Commission. Such cooperation is relevant for all courts of the Member States that apply Article 107(1) and Article 108 of the Treaty, in whatever context. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of State aid law. The Commission should also be able to submit written or oral observations to courts which are called upon to apply Article 107(1) or Article 108 of the Treaty. Those observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties.
- (15) In the interests of transparency and legal certainty, information on Commission decisions should be made public. It is therefore appropriate to publish decisions to impose fines or periodic penalty payments, given that they affect the interests of the sources concerned. The Commission, when publishing its decisions, should respect the rules on professional secrecy, in accordance with Article 339 of the Treaty.
- (16) The Commission, in close liaison with the Advisory Committee on State aid, should be able to adopt implementing provisions laying down detailed rules concerning the form, content and other criteria of the complaints submitted in accordance with Article 10(1) and Article 20 of Regulation (EC) No 659/1999.
- (17) Council Regulation (EC) No 659/1999 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 659/1999 is amended as follows:

(1) The title of Article 5 is replaced by the following:

"Request for information made to the notifying Member State";

(2) The following Articles 6a and 6b are inserted:

"Article 6a

Request for information made to other sources

1. After the initiation of the formal investigation procedure provided for in Article 6, the Commission may, if it considers it to be relevant, require an undertaking, an association of undertakings or another Member State to provide all information necessary to enable it to complete its assessment of the measure at stake, if the information available to it is not sufficient.

2. Member States shall provide the information on the basis of a simple request and within a time limit which should normally not exceed one month.

3. The Commission may require an undertaking or an association of undertakings to provide information by simple request. Where the Commission sends a simple request for information to an undertaking or an association of undertakings, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided. It shall also refer to the fines provided for in Article 6b(1) for supplying incorrect or misleading information.

4. The Commission may require an undertaking or an association of undertakings to provide information by decision. Where the Commission requires an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis, the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided. It shall also indicate the fines provided for in Article 6b(1) and indicate or impose the periodic penalties payments provided for in Article 6b(2). It shall further indicate the right for the undertaking or association of undertakings to have the decision reviewed by the Court of Justice.

5. The Commission shall inform the Member State concerned of the content of requests for information sent pursuant to paragraphs 1 to 4.

6. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

Article 6b

Fines and periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 6a(3);

(b) they supply incorrect, incomplete or misleading information in response to a decision adopted pursuant to Article 6a(4), or do not supply the information within the specified time limit.

2. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year for each working day of delay, calculated from the date established in the decision, until they supply complete and correct information as requested by the Commission by decision adopted pursuant to Article 6a(4).

3. In fixing the amount of the fine or periodic penalty payment, regard shall be had to the nature, gravity and duration of the infringement.

4. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision imposing periodic penalty payments.

5. Before adopting any decision in accordance with paragraphs 1 and 2, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of making known their views.

6. The Court of Justice of the European Union shall have unlimited jurisdiction within the meaning of Article 261 of the Treaty on the Functioning of the European Union to review fines or periodic penalty payments imposed by the Commission. It may cancel, reduce or increase the fine or periodic penalty payment imposed.";

(3) In Article 7, the following paragraphs 8 to 10 are added:

"8. Before adopting any decision in accordance with paragraphs 2 to 5, the Commission shall give the Member State concerned the opportunity of making known its views on the information received by the Commission pursuant to Article 6a, to the extent that such information raises doubts as to the compatibility of the measure.

9. The Commission shall not use confidential information provided by respondents, which cannot be aggregated or otherwise be anonymised, in any decision taken in accordance with paragraphs 2 to 5 unless it has obtained their agreement to disclose that information to the Member State concerned. The Commission may take a reasoned decision, which shall be notified to the undertaking or association of undertakings concerned, finding that information marked as confidential provided by a respondent is not protected and fixing a period at the end of which the information will be disclosed. That period shall not be less than one month.

10. The Commission shall take due account of the legitimate interest of undertakings in the protection of their business secrets. If an undertaking or association of undertakings providing information pursuant to Article 6a so requests, on grounds of potential damage, its identity shall be withheld from the Member State concerned.";

(4) Article 10 is amended as follows:

Paragraphs 1 and 2 are replaced by the following:

"1. Without prejudice to Article 20, the Commission may on its own initiative examine information from whatever source regarding alleged unlawful aid.

The Commission shall examine without undue delay any complaint submitted by any interested party in accordance with Article 20(2).

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

After the initiation of the formal investigation procedure, the Commission may also request information from other sources. The provisions of Article 6a and 6b shall apply *mutatis mutandis*.";

(5) The following chapter heading is inserted after Article 14:

**"CHAPTER IIIA
LIMITATION PERIODS"**;

(6) The title of Article 15 is replaced by the following:

"Limitation period for the recovery of aid";

(7) The following Articles 15a and 15b are inserted:

"Article 15a

Limitation period for the imposition of fines and periodic penalty payments

1. The powers conferred on the Commission by Article 6b shall be subject to a limitation period of three years.

2. Time shall start running on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments, with effect from the date on which the action is notified to the undertaking or association of undertakings concerned.

4. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which the limitation period is suspended in accordance with paragraph 5.

5. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 15b

Limitation periods for the enforcement of fines and periodic penalty payments

1. The powers of the Commission to enforce decisions taken pursuant to Article 6b shall be subject to a limitation period of five years.

2. Time shall start running on the day on which the decision becomes final.

3. The limitation period for the enforcement of fines or periodic penalty payments shall be interrupted:

(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;

(b) by any action of the Commission or of a Member State, acting at the request of the Commission, intended to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of fines or periodic penalty payments shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.";

(8) Article 16 is replaced by the following:

"Article 16

Misuse of aid

Without prejudice to Article 23, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 6a and 6b, Article 7(1) to (5), Articles 9 and 10, Article 11(1) and Articles 12 to 15 shall apply *mutatis mutandis*." ;

(9) In Article 20, paragraph 2 is replaced by the following:

"2. Any interested party may submit a complaint to inform the Commission of any alleged unlawful aid and any alleged misuse of aid. To that effect, the interested party shall duly complete a form that the Commission should be empowered to define in an implementing provision and provide all the mandatory information requested in it.

Where the Commission considers that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a first examination, the existence of unlawful aid or misuse of aid, it shall inform the interested party thereof and call upon it to submit comments within a prescribed period which shall not normally exceed one month. If the interested party fails to make known its views within the prescribed period, the complaint shall be deemed to have been withdrawn.

The Commission shall send a copy of the decision on a case concerning the subject matter of the complaint to the interested party.";

(10) The following Chapter VIa is inserted after Article 20:

"CHAPTER VIa

INVESTIGATIONS INTO SECTORS OF THE ECONOMY AND INTO AID INSTRUMENTS

Article 20a

Investigations into sectors of the economy and into aid instruments

1. Where the information available suggests that State aid measures in a particular sector or based on a particular aid instrument may restrict or distort competition within the internal market in several Member States, or that existing aid measures in a particular sector or based on a particular aid instrument in several Member States are not, or no longer, compatible with the internal market, the Commission may conduct its inquiry into the sector of the economy or the use of the aid instrument concerned across various Member States. In the course of that

inquiry, the Commission may request the Member States, or the undertakings or associations of undertakings concerned to supply the necessary information for the application of Articles 107 and 108 of the Treaty, taking due account of the principle of proportionality.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular aid instruments across various Member States and invite the Member States and any undertakings or associations of undertakings concerned to submit comments.

2. Articles 5, 6a and 6b shall apply *mutatis mutandis*.";

(11) The following Chapter VIIa is inserted after Article 23:

" CHAPTER VIIA

COOPERATION WITH NATIONAL COURTS

Article 23a

Cooperation with national courts

1. For the application of Article 107(1) and Article 108 of the Treaty, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules.

2. Where the coherent application of Article 107(1) and Article 108 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of its observations only, the Commission may request the relevant court of the Member State to transmit or ensure the transmission to it of any documents necessary for the assessment of the case.";

(12) Article 25 is replaced by the following:

"Article 25

Addressee of decisions

1. Decisions taken pursuant to Article 6a(4) and Article 6b(1) and (2) and Article 7(9) shall be addressed to the undertaking or association of undertakings concerned. The Commission shall notify them to the addressee without delay and give the addressee the opportunity to indicate to the Commission which information it considers to be covered by the obligation of professional secrecy.

2. All other decisions taken pursuant to Chapters II, III, IV, V and VII shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay and give that Member State the opportunity to indicate to the Commission which information it considers to be covered by the obligation of professional secrecy.";

(13) In Article 26, the following paragraph 2a is inserted :

"2a. The Commission shall publish in the *Official Journal of the European Union* the decisions which it takes pursuant to Article 6b(1) and (2).";

(14) Article 27 is replaced by the following:

"Article 27

Implementing provisions

The Commission, acting in accordance with the procedure laid down in Article 29, shall have the power to adopt implementing provisions concerning:

- (a) the form, content and other details of notifications,
- (b) the form, content and other details of annual reports,
- (c) the form, content and other details of complaints submitted in accordance with Article 10(1) and Article 20(2),
- (d) details of time-limits and the calculation of time-limits,
- (e) the interest rate referred to in Article 14(2)."

Article 2

This Regulation shall enter into force on the on the twentieth day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels,

*For the Council
The President*

LEGISLATIVE FINANCIAL STATEMENT

This proposal for an amendment has no impact on the EU budget.