



**COUNCIL OF
THE EUROPEAN UNION**

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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

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

COUNCIL REGULATION (EU) No .../2013

of

**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 Parliament¹,

¹ Opinion given (not yet published in the Official Journal).

Whereas:

- (1) In the context of a thorough modernisation of State aid rules, to contribute both to the implementation of the Europe 2020 strategy for growth¹ and to budgetary consolidation, Article 107 of the Treaty on the Functioning of the European Union (TFEU) should be applied effectively and uniformly throughout the Union. Regulation (EC) No 659/1999 codified and reinforced the Commission's previous practice of increasing legal certainty and supporting 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 the enlargement of the Union and the economic and financial crisis, certain aspects of Regulation (EC) No 659/1999 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 TFEU, it is appropriate to ensure that the Commission has the power, for the purposes of enforcing the State aid rules, to request all necessary market information from any Member State, undertaking or association of undertakings whenever it has doubts as to the compatibility of the measure concerned with the Union rules, and has therefore initiated the formal investigation procedure. In particular, the Commission should use this power in cases in which a complex substantive assessment appears necessary. In deciding whether to use this power, the Commission should take due account of the duration of the preliminary investigation.

¹ 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 initiation of the formal investigation procedure, in particular as regards technically complex cases subject to substantive assessment, the Commission should be able, by simple request or by decision, to require any Member State, undertaking or association of undertakings to provide all market information necessary for completing its assessment, if the information provided by the Member State concerned during the course of the preliminary investigation is not sufficient, taking due account of the principle of proportionality, in particular for small and medium-sized enterprises.
- (4) In the light of the special relationship between aid beneficiaries and the Member State concerned, the Commission should be able to request information from an aid beneficiary only in agreement with the Member State concerned. The provision of information by the beneficiary of the aid measure in question does not constitute a legal basis for bilateral negotiations between the Commission and the beneficiary in question.
- (5) The Commission should select the addressees of information requests on the basis of objective criteria appropriate to each case, while ensuring that, when the request is addressed to a sample of undertakings or associations thereof, the sample of respondents is representative within each category. The information sought should consist, in particular, of factual company and market data and facts-based analysis of the functioning of the market.

- (6) The Commission, as the initiator of the procedure, should be responsible for verifying both the information transmission by the Member States, undertakings or associations of undertakings, and the purported confidentiality of the information to be disclosed.
- (7) The Commission should be able to enforce compliance with the requests for information it addresses to any undertaking or association of undertakings, as appropriate, by means of proportionate fines and periodic penalty payments. In setting the amounts of fines and periodic penalty payments, the Commission should take due account of the principles of proportionality and appropriateness, in particular as regards small and medium-sized enterprises. The rights of the parties requested to provide information should be safeguarded by giving them the opportunity to make known their views before any decision imposing fines or periodic penalty payments is taken. 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 TFEU.
- (8) Taking due account of the principles of proportionality and appropriateness, the Commission should be able to reduce the periodic penalty payments or waive them entirely, when addressees of requests provide the information requested, albeit after the expiry of the deadline.
- (9) 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 (TEU), and to provide the Commission with all information required to allow it to carry out its duties under Regulation (EC) No 659/1999.

- (10) In order to safeguard the rights of defence of the Member State concerned, it should be provided with copies of the requests for information sent to other Member States, undertakings or associations of undertakings, and be able to submit its observations on the comments received. It should also be informed of the names of the undertakings and the associations of undertakings requested, to the extent that these entities have not demonstrated a legitimate interest in the protection of their identity.
- (11) The Commission should take due account of the legitimate interests of undertakings in the protection of their business secrets. It 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.
- (12) In cases where 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 to reject a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the respondent can make use of any judicial protection available to it, including any interim measure.

- (13) The Commission should be able, on its own initiative, to examine information on unlawful aid, from whatever source, in order to ensure compliance with Article 108 of the TFEU, and in particular with the notification obligation and standstill clause laid down in Article 108(3) of the TFEU, and to assess the compatibility of an aid with the internal market. In that context, complaints are an essential source of information for detecting infringements of the Union rules on State aid.
- (14) 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. Submissions not meeting those conditions should be treated as general market information, and should not necessarily lead to *ex officio* investigations.
- (15) Complainants should be required to demonstrate that they are interested parties within the meaning of Article 108(2) of the TFEU and of Article 1(h) of Regulation (EC) No 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. In order not to discourage prospective complainants, that implementing provision should take into account that the demands on interested parties for lodging a complaint should not be burdensome.
- (16) For reasons of legal certainty, it is appropriate to establish limitation periods for the imposition and enforcement of fines and periodic penalty payments.

- (17) 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 and in the light of the high administrative burden entailed by such investigations, sector inquiries should be carried out only when the information available substantiates a reasonable suspicion that State aid measures in a particular sector could materially restrict or distort competition within the internal market in several Member States, or that existing aid measures in a particular sector in several Member States are not, or are 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 and to obtain an *ex ante* overview of the sector concerned.
- (18) Consistency in the application of the 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 TFEU. 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 rules. 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 TFEU. When assisting national courts in this respect, the Commission should act in accordance with its duty to defend the public interest.

- (19) Those observations and opinions of the Commission should be without prejudice to Article 267 of the TFEU and not legally bind the national courts. They should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties, in full respect of the independence of the national courts. Observations submitted by the Commission on its own initiative should be limited to cases that are important for the coherent application of Article 107(1) or Article 108 of the TFEU, in particular to cases which are significant for the enforcement or the further development of Union State aid case law.
- (20) 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, including the protection of all confidential information and personal data, in accordance with Article 339 of the TFEU.
- (21) 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 Regulation (EC) No 659/1999.
- (22) 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 the Regulation is replaced by the following:

**"Council Regulation (EC) No 659/1999 of 22 March 1999
laying down detailed rules for the application of Article 108
of the Treaty on the Functioning of the European Union"**

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

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

- (3) The following Articles 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, in particular as regards technically complex cases subject to substantive assessment, the Commission may, if the information provided by a Member State concerned during the course of the preliminary investigation is not sufficient, request any other Member State, an undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete its assessment of the measure at stake taking due account of the principle of proportionality, in particular for small and medium-sized enterprises.

2. The Commission may request information only:
 - (a) if it is limited to formal investigation procedures that have been identified by the Commission as being ineffective to date; and,
 - (b) in so far as aid beneficiaries are concerned, if the Member State concerned agrees to the request.

3. The undertakings or associations of undertakings providing information following a Commission's request for market information based on paragraphs 6 and 7 shall submit their answer simultaneously to the Commission and to the Member State concerned, to the extent that the documents provided do not include information that is confidential vis-à-vis that Member State.

The Commission shall steer and monitor the information transmission between the Member States, undertakings or associations of undertakings concerned, and verify the purported confidentiality of the information transmitted.

4. The Commission shall request only information that is at the disposal of the Member State, undertaking or association of undertakings concerned by the request.

5. Member States shall provide the information on the basis of a simple request and within a time limit prescribed by the Commission which should normally not exceed one month. Where a Member State does not provide the information requested within that period or provides incomplete information, the Commission shall send a reminder.

6. The Commission may, by simple request, require an undertaking or an association of undertakings to provide information. 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 prescribe a proportionate 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.
7. The Commission may, by decision, require an undertaking or an association of undertakings to provide information. Where the Commission, by decision, requires an undertaking or an association of undertakings to supply information, it shall state the legal basis, the purpose of the request, specify what information is required and prescribe a proportionate time limit within which the information is to be provided. It shall also indicate the fines provided for in Article 6b(1) and shall indicate or impose the periodic penalties payments provided for in Article 6b(2), as appropriate. In addition, it shall indicate the right of the undertaking or association of undertakings to have the decision reviewed by the Court of Justice of the European Union.
8. When issuing a request under paragraph 1 or 6, or adopting a decision under paragraph 7, the Commission shall also simultaneously provide the Member State concerned with a copy thereof. The Commission shall indicate the criteria by which it selected the recipients of the request or decision.

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

Article 6b

Fines and periodic penalty payments

1. The Commission may, if deemed necessary and proportionate, impose by decision on undertakings or associations of undertakings fines not exceeding 1 % of their total turnover in the preceding business year where they, intentionally or through gross negligence,:
 - (a) supply incorrect or misleading information in response to a request made pursuant to Article 6a(6);
 - (b) supply incorrect, incomplete or misleading information in response to a decision adopted pursuant to Article 6a(7), or do not supply the information within the prescribed time limit.

2. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments where an undertaking or association of undertakings fails to supply complete and correct information as requested by the Commission by decision adopted pursuant to Article 6a(7).

The periodic penalty payments shall not exceed 5 % of the average daily turnover of the undertaking or association concerned in the preceding business year for each working day of delay, calculated from the date established in the decision, until it supplies complete and correct information as requested or required by the Commission.

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, taking due account of the principles of proportionality and appropriateness, in particular for small and medium-sized enterprises.
4. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may reduce the definitive amount of the periodic penalty payment compared to that under the original decision imposing periodic penalty payments. The Commission may also waive any periodic penalty payment.

5. Before adopting any decision in accordance with paragraph 1 or 2, the Commission shall set a final deadline of two weeks to receive the missing market information from the undertakings or associations of undertakings concerned and also give them 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 TFEU to review fines or periodic penalty payments imposed by the Commission It may cancel, reduce or increase the fine or periodic penalty payment imposed.";

(4) In Article 7, the following paragraphs 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, within a time-limit that shall not normally exceed one month, on the information received by the Commission and provided to the Member State concerned pursuant to Article 6a(3).

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 provided by a respondent and marked as confidential is not protected, and setting a date after 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 interests of undertakings in the protection of their business secrets and other confidential information. An undertaking or an association of undertakings providing information pursuant to Article 6a, and which is not a beneficiary of the State aid measure in question,, may request, on grounds of potential damage, that its identity be withheld from the Member State concerned.";

(5) In Article 10 paragraphs 1 and 2 are replaced by the following:

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

The Commission shall examine without undue delay any complaint submitted by any interested party in accordance with Article 20(2) and shall ensure that the Member State concerned is kept fully and regularly informed of the progress and outcome of the examination.

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 any other Member State, from an undertaking, or association of undertakings in accordance with Article 6a and 6b, which shall apply *mutatis mutandis*."

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

**"CHAPTER IIIA
LIMITATION PERIODS";**

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

"Limitation period for the recovery of aid";

(8) The following Articles 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. The period provided for in paragraph 1 shall start on the day on which the infringement referred to in Article 6b is committed. However, in the case of continuing or repeated infringements, the period shall begin 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 referred to in Article 6b 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. After each interruption, the limitation period shall start running afresh. However, the limitation period shall expire at the latest on the day on which a period of six years 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 of the European Union.

Article 15b

Limitation periods for the enforcement of fines and periodic penalty payments

1. The powers of the Commission to enforce decisions adopted pursuant to Article 6b shall be subject to a limitation period of five years.
2. The period provided for in paragraph 1 shall start on the day on which the decision taken pursuant to Article 6b becomes final.
3. The limitation period provided for in paragraph 1 shall be interrupted:
 - (a) by notification of a decision modifying the original amount of the fine or periodic penalty payment or refusing an application for modification;
 - (b) by any action of a Member State, acting at the request of the Commission, or of the Commission, intended to enforce payment of the fine or periodic penalty payment.
4. After each interruption, the limitation period shall start running afresh.

5. The limitation period provided for in paragraph 1 shall be suspended for so long as:
- (a) the respondent is allowed time to pay;
 - (b) the enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Union.";

- (9) 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, initiate the formal investigation procedure pursuant to Article 4(4). Articles 6, 6a, 6b, 7, 9 and 10, Article 11(1) and Articles 12 to 15 shall apply *mutatis mutandis*.";

- (10) 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 or any alleged misuse of aid. To that effect, the interested party shall duly complete a form that has been defined in an implementing provision referred to in Article 27 and shall provide the mandatory information requested therein.

Where the Commission considers that the interested party does not comply with the compulsory complaint form, or 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 *prima facie* 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 inform the Member State concerned when a complaint has been 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 complainant";

(11) The following Chapter 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 substantiates a reasonable suspicion that State aid measures in a particular sector or based on a particular aid instrument may materially restrict or distort competition within the internal market in several Member States, or that existing aid measures in a particular sector in several Member States are not, or no longer, compatible with the internal market, the Commission may conduct an inquiry across various Member States into the sector of the economy or the use of the aid instrument concerned. In the course of that inquiry, the Commission may request the Member States and/or the undertakings or associations of undertakings concerned to supply the necessary information for the application of Articles 107 and 108 of the TFEU, taking due account of the principle of proportionality.

The Commission shall state the reasons for the inquiry and for the choice of addressees in all requests for information sent under this Article.

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

2. Information obtained from sector inquiries may be used in the framework of procedures under this Regulation.
3. Articles 5, 6a and 6b shall apply *mutatis mutandis*."

(12) The following Chapter 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 TFEU, 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) or Article 108 of the TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.

The Commission shall inform the Member State concerned of its intention to submit observations before formally doing so.

For the exclusive purpose of preparing its observations, the Commission may request the relevant court of the Member State to transmit documents at the disposal of the court, necessary for the Commission's assessment of the matter.";

- (13) Article 25 is replaced by the following:

"Article 25

Addressee of decisions

1. The decisions taken pursuant to Article 6a(7), Article 6b(1) and (2), and Article 7(9) shall be addressed to the undertaking or association of undertakings concerned. The Commission shall notify the decision to the addressee without delay and shall 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 of the Commission 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 shall give that Member State the opportunity to indicate to the Commission which information it considers to be covered by the obligation of professional secrecy.";

(14) In Article 26, the following paragraph 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).";

(15) 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; and
- (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
