

COMMUNICATION FROM THE COMMISSION

concerning the amendment of the Code of Best Practices for the conduct of State aid control procedures DRAFT

1. INTRODUCTION

1. The European Union is a party to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters the ‘Convention’). The Convention is implemented by the Union regarding the Union institutions through Regulation (EC) No 1367/2006 of the European Parliament and of the Council¹ (‘Regulation No 1367/2006’).
2. State aid decisions adopted by the Commission are exempt from the scope of Regulation No 1367/2006. In case ACCC/C/2015/128, the Aarhus Convention Compliance Committee found the Union to be in breach of the Convention for failing to provide members of the public with access to administrative or judicial procedures to challenge decisions on State aid measures taken by the Commission under Article 108(2) TFEU that contravene Union law relating to the environment².
3. As laid down in Commission Regulation [xx]³, to follow up on these findings, the Union is to set up an internal review mechanism. That mechanism is to apply to final Commission State aid decisions closing the formal investigation procedure under Article 108(2) TFEU, in accordance with Articles 9(3) and (4) of Council Regulation (EU) 2015/1589⁴, where those State aid decisions have as their legal basis Article 107(3), points (a), (c), (d) and (e), as well as the first part of point (b)(aid to promote the execution of an important project of common European interest), TFEU. As set out in Commission Regulation [xx], the notifying Member State is to be requested to provide a confirmation that neither the activity subject to State aid, nor any aspects of the notified State aid measure that are indissolubly linked to the object of the aid, contravene Union environmental law⁵.
4. This Communication amends the Code of Best Practices for the conduct of State aid control procedures (the ‘Best Practices Code’). It lays down the internal review

¹ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13, ELI: <http://data.europa.eu/eli/reg/2006/1367/oj>.

² See: https://unece.org/env/pp/cc/accc.c.2015.128_european-union.

³ Commission Regulation [xx] amending Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

⁴ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9, ELI: <http://data.europa.eu/eli/reg/2015/1589/oj>.

⁵ Ex multis Judgment of 22 March 1977, *Iannelli & Volpi SpA v Ditta Paolo Meroni*, Case, 74/76, EU:C:1977:51, paragraph 14: ‘Those aspects of aid which contravene specific provisions of the Treaty (...) may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 93’.

procedure, and sets out which entities are entitled to lodge a request for internal review (the ‘request’) with the Commission, the conditions for such request, the scope of the request and the applicable deadlines.

5. Moreover, the Commission’s experience with the pre-notification phase set out in Section 3 of the Best Practices Code has broadened, and shows that pre-notification contacts with Member States tend to last longer, in particular in complex cases. The six-month duration of the pre-notification phase should therefore be adjusted accordingly to 12 months.
6. Finally, the Commission acknowledges that the Streamlined procedure in straightforward cases laid down in Section 6 of the Best Practices Code has never been used by the Commission. This procedure should therefore be removed.

2. AMENDMENTS TO THE BEST PRACTICES CODE:

7. A new **Section 11** is inserted, after the current Section 11 (‘Monitoring’), with the wording below:

‘11. Internal review mechanism following the Aarhus Convention Compliance Committee findings in ACCC/C/2015/128’

78. Following the Aarhus Convention Compliance Committee findings in ACCC/C/2015/128, the Commission will handle requests for an internal review lodged by eligible entities using the mechanism described below.

11.1 Entities eligible to request an internal review

79. Any non-governmental organisation that meets the criteria set out below shall be eligible to request an internal review with the Commission in respect of the State aid decisions listed in Section 11.4, on the grounds that the activity subject to State aid and/or any of the aspects of the State aid measure approved by that decision that are indissolubly linked to the object of the aid⁶, contravene a specific rule or rules of Union environmental law, which is defined in Article 2, 1, (f) of Regulation No 1367/2006.

80. A non-governmental organisation should be eligible to request an internal review in accordance with paragraph 79, provided that:

- (a) it is an independent, non-profit legal person in accordance with a Member State's national law or practice;
- (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

⁶ See above, Ex multis Judgment of 22 March 1977, *Iannelli & Volpi SpA v Ditta Paolo Meroni*, Case, 74/76, EU:C:1977:51, paragraph 14.

11.2 Evidence to be provided to determine whether non-governmental organisations are eligible to request an internal review

81. Any non-governmental organisation that submits a request for internal review of a State aid decision in accordance with paragraph 79 should provide evidence that it meets the criteria set out in paragraph 80, in form of the documents listed below:

- (a) statutes or by-laws of the non-governmental organisation, or, in the case of Member States where national law does not require or provide for a non-governmental organisation to adopt statutes or by-laws, any other document fulfilling the same role under national practice;
- (b) annual activity reports of the non-governmental organisation for the last two years;
- (c) a copy of the legal registration with the national authorities in the case of non-governmental organisations established in countries where registering with the national authorities is a prerequisite for a non-governmental organisation to obtain legal personality;
- (d) where relevant, and without prejudice to requirement to provide the documents mentioned in points (a) to (c) above, information and documentation showing that the non-governmental organisation has previously been acknowledged by the Commission as being eligible to make a request for internal review according to paragraph 79, along with a declaration by the non-governmental organisation that the conditions for eligibility continue to be met.
- (e) where any of those documents cannot be provided for reasons not attributable to the non-governmental organisation, that organisation may provide evidence in the form of any other equivalent document.
- (f) where it is not clear from the documents that the non-governmental organisation has the primary stated objective of promoting environmental protection in the context of environmental law, that it has existed for more than two years and that it is actively pursuing this objective, or that the subject matter in respect of which the request for internal review is made is covered by the objectives and activities of the non-governmental organisation, that organisation shall submit any other document providing evidence that it meets this criterion.

11.3 Representation by a non-governmental organisation or a lawyer

82. Where non-governmental organisations are represented by a non-governmental organisation, paragraph 81 applies.

83. Where non-governmental organisations are represented by a lawyer, the request should include documents and data proving that the lawyer is authorised to practise before a court of a Member State. Those documents may include a certificate issued by a bar association in a Member State or any other document fulfilling the same purpose under national rules. The lawyer should also provide as evidence a power-of-attorney that they can represent his or her client.

11.4 State aid decisions in respect of which a request for internal review may be submitted

84. Eligible non-governmental organisations may make a request for internal review of the Commission's final State aid decisions closing the formal investigation

procedure initiated under Article 108(2) TFEU, in accordance with Articles 9(3) and (4) of Council Regulation (EU) 2015/1589, where the legal basis for such decision is:

- (i) Article 107(3), point (a), TFEU;
- (ii) Article 107(3), point (b), first part, TFEU;
- (iii) Article 107(3), point (c), TFEU;
- (iv) Article 107(3), point (d), TFEU;
- (v) Article 107(3), point (e), TFEU.

11.5 Content of a request for internal review

85. The request for an internal review of a Commission decision in accordance with paragraph 79 should be made in writing, using the form in Annex III to Regulation [xx] and it should:

- (a) specify the Commission final State aid decision for which a review is sought;
- (b) indicate the specific provisions of Union environmental law that are alleged to have been breached by the aided activity or by any aspects of the notified State aid measure that are indissolubly linked to the objective of the aid;
- (c) state the grounds on which the request is made;
- (d) provide relevant and structured information and documentation as well as facts or legal arguments supporting each of those grounds;
- (e) specify the name and contact details of the person empowered to represent the requesting party vis-à-vis third parties for the internal review;
- (f) provide evidence that the requesting party is eligible to make the request in accordance with the criteria and conditions set out in paragraphs 79 to 81.

86. The request for internal review should not exceed 10 pages (not including documents to provide evidence that the eligibility criteria set out in paragraph 80 have been met and other annexes to support the request).

87. Annexes should be numbered, should have clearly marked headings, and should be referenced in the request for internal review, to provide evidence on specific factual and/or legal arguments raised by the non-governmental organisation.

88. For the purpose of point (e) of paragraph 85, where a joint request is made by several non-governmental organisations, a single contact point should be designated.

89. To speed up the internal review procedure, the Commission strongly encourages the use of the following language waiver, which should be dated and signed by the non-governmental organisation and submitted with the request:

‘The undersigned, representing the requesting non-governmental organisation lodging the request concerning [specify the number and title of the State aid decision], agrees exceptionally to waive their rights under Art. 342 of the Treaty on the Functioning of the European Union in conjunction with Article 3 of EEC Council Regulation No 1/1958 and for the Commission reply adopted and notified under Article 297 of the Treaty to be drafted in English.’

11.6 Assessment by the Commission

90. The Commission should consider a request if it is lodged by eligible entities, if it is submitted using the form mentioned in paragraph 85, unless it is manifestly unfounded or clearly unsubstantiated.

91. Where several requests for internal review are submitted in connection with one State aid decision, the Commission may decide to combine the review requests and treat them as one.

92. The Commission should verify that the evidence put forward by the non-governmental organisation shows that one or several specific provisions of Union environmental law have been breached by the aided activity or by any aspects of the notified State aid measure that are indissolubly linked to the objective of the aid.

93. If, on the basis of the information provided in accordance with paragraphs 79 to 81, it is not possible for the Commission to fully assess whether the criteria or conditions are met, it should invite the requesting party to provide additional documentation or information, as well as a non-confidential version of such documentation or information, if the case. The requesting party should reply within a reasonable period to be specified by the Commission, not exceeding 30 days. During that period, the time limits laid down in paragraphs 107 and 108 should be suspended.

94. The Commission will send the request for internal review to the Member State whose measure was approved by the State aid decision under review so that it may respond with comments, as well as a non-confidential version of those comments, if the case. During this consultation period, which should not exceed 30 days, the time limits laid down in paragraphs 107 and 108 should be suspended.

95. Where relevant, the Commission may consult other relevant national authorities in any Member State to verify and assess the information provided by the non-governmental organisation or lawyer concerned regarding the eligibility criteria set out in paragraph 80 or the grounds of the request. The national authorities consulted should provide a non-confidential version of their comments, if the case. During this consultation period, which should not exceed 30 days, the time limits laid down in paragraphs 107 and 108 should be suspended.

11.7 Time limits

96. The request for internal review should be made by the non-governmental organisation within a time limit not exceeding eight weeks after the Commission State aid decision has been published.

97. The Commission should state its reasons in a reply as soon as possible, but no later than 16 weeks after the expiry of the eight-week deadline set out in the paragraph 96.

98. Where, despite exercising due diligence, the Commission is unable to meet the deadline set out in paragraph 97, it should as soon as possible and at the latest within the period indicated in the previous paragraph, inform the non-governmental organisation that made the request of when it intends to do so. In any event, the Commission should act within 22 weeks of the expiry of the eight week deadline set out in paragraph 96.

11.8 Proceedings before the Court of Justice

99. The non-governmental organisation that made the request for internal review in line with paragraph 79 may institute proceedings before the Court of Justice in accordance with the TFEU.

11.9 Electronic submission of requests for internal review

100. Requests for an internal review of a State aid decision in accordance with paragraph 79 should be submitted via the designated online system publicly accessible on the Commission's website.

11.10 Publication and online systems for receipt of requests

101. The Commission should publish all requests on a designated website as soon as possible after receiving them, as well as the Commission replies as soon as possible after their adoption.'

8. **Section 3** ('Pre-notification'), paragraph 16 of the Best Practices Code is amended as follows:

'The timing and format of pre-notification contacts largely depend on the complexity of the case. Although these contacts may last several months, they should, as a general rule, not last more than 12 months.'

9. **Section 6** ('Streamlined procedure in straightforward cases') of the Best Practices Code is deleted.

10. Applicability

9.1 The Commission is to apply the amendments concerning Section 3 ('Pre-notification') and Section 6 ('Streamlined procedure in straightforward cases') after publication in the *Official Journal of the European Union*.

9.2 The Commission will apply the new Section 11 ('Internal review mechanism following the Aarhus Convention Compliance Committee findings in ACCC/C/2015/128') to final Commission decisions under the new Section 11.4. These decisions are based on notifications where Member States confirmed that neither the aided activity nor any aspects of the notified State aid measure that are indissolubly linked to the object of the aid are in breach of Union environmental law, according to Regulation [xx].

9.3 For non-notified aid, the Commission will apply the new Section 11 to final Commission decisions closing the formal investigation procedure mentioned under the new Section 11.4 in cases where the decision to initiate proceedings under Article 108(2) TFEU was adopted after the publication of Regulation [xx] in the *Official Journal of the European Union*.

11. Renumbering

Following the amendments above, the current Sections 7 ('The Formal investigation procedure'), 8 ('Investigations into sectors of the economy and into aid instruments'), 9 ('Formal complaints'), 10 ('Evaluation plans') and 11 ('Monitoring') will be renumbered as Sections 6, 7, 8, 9 and 10 respectively.