

COUNCIL REGULATION (EC) No 3604/93

of 13 December 1993

specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 104a (2) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,In cooperation with the European Parliament ⁽²⁾,

Whereas the prohibition of privileged access to financial institutions, as laid down in Article 104a of the Treaty, forms an essential element of the submission of the public sector in its financing operations to the discipline of the market mechanism and so makes a contribution to the strengthening of budgetary discipline; whereas, moreover, it places the Member States on an equal footing as regards public sector access to financial institutions;

Whereas the Council must specify definitions for the application of such prohibition;

Whereas the Member States and the Community must act with due regard for the principle of an open market economy in which there is free competition;

Whereas, in particular, this Regulation cannot affect the methods for organizing markets complying with that principle;

Whereas this Regulation does not seek to interfere with any operation of public financial institutions complying with the same principle;

Whereas Article 104a of the Treaty prohibits measures establishing privileged access; whereas the types of acts concerned by this prohibition should be specified; whereas the commitments freely made by financial institutions in the framework of contractual relations unquestionably cannot be affected;

Whereas the same Article provides that prudential considerations may justify departure from the principle of this prohibition; whereas laws, regulations or administrative actions may not, however, under the cover of prudential consideration, be used to establish disguised privileged access;

Whereas public undertakings are covered by the same prohibition; whereas they are defined in Commission

Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between the Member States and public undertakings ⁽³⁾;

Whereas, for reasons of monetary policy, financial institutions and, in particular, credit institutions may be obliged to hold claims against the European Central Bank and/or national central banks;

Whereas the European Central Bank and national central banks may not, as public authorities, take measures establishing privileged access; whereas the rules on mobilization or pledging of debt instruments enacted by the European Central Bank or by national central banks must not be used as a means of circumventing the prohibition of privileged access;

Whereas, in order to avoid any circumvention of the prohibition, the definitions in Community law of the various types of financial institution should be supplemented by a reference to those institutions engaging in financial activities which have not yet been harmonized at Community level, such as, for instance, branches of third-country establishments, holding and factoring companies, uncoordinated undertakings for collective investment in transferable securities (UCITS), institutions for retirement provision, etc.,

HAS ADOPTED THIS REGULATION:

Article 1

1. For the purposes of Article 104a of the Treaty, 'any measure establishing privileged access' shall be defined as any law, regulation or any other binding legal instrument adopted in the exercise of public authority which:

— obliges financial institutions to acquire or to hold liabilities of Community institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law or public undertakings of Member States (hereinafter referred to as 'public sector'), or

⁽¹⁾ OJ No C 324, 1. 12. 1993, p. 7; and
OJ No C 340, 17. 12. 1993, p. 6.

⁽²⁾ OJ No C 329, 6. 12. 1993 and Decision of 2 December 1993 (not yet published in the Official Journal).

⁽³⁾ OJ No L 195, 29. 7. 1980, p. 35. Directive as last amended by Directive 93/84/EEC (OJ No L 254, 12. 10. 1993, p. 16).

— confers tax advantages which may benefit only financial institutions or financial advantages which do not comply with the principles of a market economy, in order to encourage the acquiring or the holding by those institutions of such liabilities.

2. Privileged access shall not be regarded as being established by those measures which give rise to:

— obligations for funding social housing under special terms such as, *inter alia*, an obligation to centralize funds with public financial institutions, when the funding terms prevailing for the public sector are identical to those for funding of the same nature granted to private borrowers for the same purposes,

— the obligation to centralize funds with a public credit institution, in so far as such a constraint is an integral part, as at 1 January 1994, of the organization of a particular network of credit institutions or of specific savings arrangements designed for households and intended to provide the whole of the network or the specific arrangements with financial security. The use of such centralized funds must be determined by the management bodies of the public credit institution concerned and comply with the principle of a market economy where there is free competition,

— obligations to finance the repair of disaster damage, provided that the conditions for financing repairs are not more favourable when damage is sustained by the public sector than when it is sustained by the private sector.

Article 2

For the purposes of Article 104a of the Treaty, 'prudential considerations' shall be those which underlie national laws, regulations or administrative actions based on, or consistent with, EC law and designed to promote the soundness of financial institutions so as to strengthen the stability of the financial system as a whole and the protection of the customers of those institutions.

Article 3

1. For the purposes of Article 104a of the Treaty, 'public undertaking' shall be defined as any undertaking over which the State or other regional or local authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it.

A dominant influence on the part of the State or other regional or local authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

- (a) hold the major part of the undertaking's subscribed capital;
- (b) control the majority of the votes attaching to shares issued by the undertaking; or
- (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

2. Without prejudice to their obligation as public authorities not to take measures establishing privileged access within the meaning of Article 104a of the Treaty, the European Central Bank and the national central banks shall not, for the purposes of this Article, be considered as forming part of the public sector.

3. 'National central banks' means the central banks of the Member States and the Luxembourg Monetary Institute.

Article 4

1. For the purposes of Article 104a of the Treaty, 'financial institutions' means:

- credit institutions as defined in the first indent of Article 1 of Directive 77/780/EEC ⁽¹⁾,
- insurance undertakings as defined in Article 1, point (a) of Directive 92/49/EEC ⁽²⁾,
- assurance undertakings as defined in Article 1, point (a) of Directive 92/96/EEC ⁽³⁾,
- UCITS as defined in Article 1 (2) of Directive 85/611/EEC ⁽⁴⁾,
- investment firms as defined in Article 1 (2) of Directive 93/22/EEC ⁽⁵⁾,

⁽¹⁾ Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions (OJ No L 322, 17. 12. 1977, p. 30). Directive as last amended by Directive 89/646/EEC (OJ No L 386, 30. 12. 1989, p. 1).

⁽²⁾ Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance (third Directive on insurance other than life insurance) (OJ No L 228, 11. 8. 1992, p. 1).

⁽³⁾ Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance (third Directive on life insurance) (OJ No L 360, 9. 12. 1992, p. 1).

⁽⁴⁾ Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ No L 375, 31. 12. 1985, p. 3). Directive as amended by Directive 88/220/EEC (OJ No L 100, 19. 4. 1988, p. 31).

⁽⁵⁾ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ No L 141, 11. 6. 1993, p. 27).

- other undertakings the activities of which are similar to those of the undertakings referred to in the previous indents or the principal activity of which is to acquire holdings of financial assets or to transform financial claims.
2. The following institutions do not form part of the financial institutions defined in paragraph 1:
- the European Central Bank and national central banks,
 - post office financial services when they form part of the general government sector defined in accordance

- with the European System of Integrated Economic Accounts or when their main activity is to act as the financial agent of government, and
- the institutions which are part of the general government sector defined in accordance with the European System of Integrated Economic Accounts or the liabilities of which correspond completely to a public debt.

Article 5

This Regulation shall enter into force on 1 January 1994.

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

Done at Brussels, 13 December 1993.

For the Council
The President
Ph. MAYSTADT
