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Information and Notices

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Court of Auditors

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(Information)

COMMISSION

Ecu (1)

12 November 1993

(93/C 307/01)

Currency amount for one unit:

Belgian and Luxembourg franc	40,8980	United States dollar	1,12923
Danish krone	7,63983	Canadian dollar	1,48325
German mark	1,91913	Japanese yen	120,342
Greek drachma	275,014	Swiss franc	1,69893
Spanish peseta	154,649	Norwegian krone	8,33544
French franc	6,67151	Swedish krona	9,31279
Irish pound	0,807115	Finnish markka	6,58456
Italian lira	1878,37	Austrian schilling	13,4966
Dutch guilder	2,15401	Icelandic krona	80,7176
Portuguese escudo	196,272	Australian dollar	1,71825
Pound sterling	0,763615	New Zealand dollar	2,09700

The Commission has installed a telex with an automatic answering device which gives the conversion rates in a number of currencies. This service is available every day from 3.30 p.m. until 1 p.m. the following day.

Users of the service should do as follows:

— call telex number Brussels 23789;

— give their own telex code;

— type the code 'cccc' which puts the automatic system into operation resulting in the transmission of the conversion rates of the ecu;

— the transmission should not be interrupted until the end of the message, which is marked by the code 'ffff'.

Note: The Commission also has an automatic telex answering service (No 21791) and an automatic fax answering service (No 296 10 97) providing daily data concerning calculation of the conversion rates applicable for the purposes of the common agricultural policy.

(1) Council Regulation (EEC) No 3180/78 of 18 December 1978 (OJ No L 379, 30. 12. 1978, p. 1), as last amended by Regulation (EEC) No 1971/89 (OJ No L 189, 4. 7. 1989, p. 1).

Council Decision 80/1184/EEC of 18 December 1980 (Convention of Lomé) (OJ No L 349, 23. 12. 1980, p. 34).

Commission Decision No 3334/80/ECSC of 19 December 1980 (OJ No L 349, 23. 12. 1980, p. 27).

Financial Regulation of 16 December 1980 concerning the general budget of the European Communities (OJ No L 345, 20. 12. 1980, p. 23).

Council Regulation (EEC) No 3308/80 of 16 December 1980 (OJ No L 345, 20. 12. 1980, p. 1).

Decision of the Council of Governors of the European Investment Bank of 13 May 1981 (OJ No L 311, 30. 10. 1981, p. 1).

Communication of Decisions under sundry tendering procedures in agriculture (cereals)

(93/C 307/02)

(See notice in Official Journal of the European Communities *No L 360 of 21 December 1982, page 43)*

Standing invitation to tender	Weekly invitation to tender	
	Date of Commission Decision	Maximum refund
Commission Regulation (EEC) No 1279/93 of 27 May 1993 opening an invitation to tender for the refund for the export of barley to all third countries (OJ No L 131, 28. 5. 1993, p. 19)	11. 11. 1993	ECU 67,98/tonne
Commission Regulation (EEC) No 1278/93 of 27 May 1993 opening an invitation to tender for the refund for the export of common wheat to all third countries (OJ No L 131, 28. 5. 1993, p. 16)	11. 11. 1993	ECU 52,87/tonne
Commission Regulation (EEC) No 1286/93 of 27 May 1993 opening an invitation to tender for the refund for the export of rye to all third countries (OJ No L 131, 28. 5. 1993, p. 48)	—	No tenders received
Commission Regulation (EEC) No 2147/93 of 30 July 1993 on a special intervention measure for barley in Spain (OJ No L 191, 31. 7. 1993, p. 109)	11. 11. 1993	ECU 77,90/tonne
Commission Regulation (EEC) No 2774/93 of 8 October 1993 opening on invitation to tender for the reduction in the levy on maize imported from third countries (OJ No L 252, 9. 10. 1993, p. 3)	—	No tenders received

COMMISSION COMMUNICATION TO THE MEMBER STATES

(93/C 307/03)

Following the annulment of the Commission's communication, concerning the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, by the Court of Justice of the European Communities, in June 1993, the Commission has decided to adopt as a directive, the obligation for Member States to provide the Commission with financial data on an annual basis. This Directive has been forwarded to Member States and has been published (1).

At the same time the Commission readopted the above communication omitting the reporting requirement that was contained in paragraphs 45 to 53, and references thereto, previously set out in paragraphs 2, 27, 29, 31 and 54.

This revised text is reproduced below:

(1) OJ No L 254, 12. 10. 1993.

Commission communication to the Member States

Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector

I. INTRODUCTION

1. A reinforced application of policy towards State aids is necessary for the successful completion of the internal market. One of the areas identified as worthy of attention in this respect is public undertakings. There is need for both increased transparency and development of policy for public undertakings because they have not been sufficiently covered by State aid disciplines:

— in many cases only capital injections and not other forms of public funds have been fully included in aid disciplines for public undertakings,

— in addition, these disciplines in general only cover loss-making public undertakings,

— finally it also appears that there is a considerable volume of aid to public undertakings given other than through approved aid schemes (which are also availabe to private undertakings) which have not been notified under Article 93 (3).

2. This communication is designed to remedy this situation. In the first place it explains the legal background of the Treaty and outlines the aid policy and case-law of the Council, Parliament, Commission and Court of Justice for public enterprises. This will, in particular, focus, on the one hand, on Directive 80/723/EEC on the transparency of the financial relationship between public undertakings and the State, and, on the other hand, it will develop the well established principle that where the State provides finances to a company in circumstances that would not be acceptable to an investor operating under normal market economy conditions, State aid is involved. The communication then explains how the Commission intends to increase transparency by applying this principle to all forms of public funds and to companies in all situations.

3. This communication does not deal with the question of the compatibility under one of the derogations provided for in the EEC Treaty because no change is envisaged in this policy. Finally, this communication is limited to the manufacturing sector. This will not, however, preclude the Commission from using the approach described by this communication in individual cases or sectors outside manufacturing to the extent that the principles in this communication apply in these excluded sectors and where it feels that it is essential to determine if State aid is involved.

II. PUBLIC UNDERTAKINGS AND THE RULES OF COMPETITION

4. Article 222 states: 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. In other words the Treaty is neutral in the choice a Member State may make between public and private ownership and does not

prejudice a Member State's right to run a mixed economy. However, these rights do not absolve public undertakings from the rules of competition because the institution of a system ensuring that competition in the common market is not distorted is one of the bases on which the Treaty is built (Article 3 (f)). The Treaty also provides the general rules for ensuring such a system (Articles 85 to 94). In addition the Treaty lays down that these general rules of competition shall apply to public undertakings (Article 90 (1)). There is a specific derogation in Article 90 (2) from the general rule of Article 90 (1) in that the rules of competition apply to all public undertakings including those entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the application of such rules does not obstruct the performance in law or in fact of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community. In the context of the State aid rules (Articles 92 to 94), this means that aid granted to public undertakings must, like any other State aid to private undertakings, be notified in advance to the Commission (Article 93 (3)) to ascertain whether or not it falls within the scope of Article 92 (1), i. e. aid that affects trade and competition between Member States. If it falls within Article 92 (1), it is for the Commission to determine whether one of the general derogations provided for in the Treaty is applicable such that the aid becomes compatible with the common market. It is the Commission's role to ensure that there is no discrimination against either public or private undertakings when it applies the rules of competition.

5. It was to ensure this principle of non-discrimination, or neutrality of treatment, that the Commission adopted in 1980 a Directive on the transparency of financial relations between Member States and public undertakings (1). The Commission was motivated by the fact that the complexity of the financial relations between national public authorities and public undertakings tended to hinder its duty of ensuring that aid incompatible with the common market was not granted. It further considered that the State aid rules could only be applied fairly to both public and private undertakings when the financial relations between public authorities and public undertakings were made transparent.

6. The Directive obliged Member States to ensure that the flow of all public funds to public undertakings and the uses to which these funds are put are made transparent (Article 1). Member States shall, when the Commission considers it necessary so to request, supply to it the information referred to in Article 1, together with any necessary background information, notably the objectives pursued (Article 5). Although the transparence in question applied to all public funds, the following were particularly mentioned as falling within its scope:

— the setting-off of operating losses,

— the provision of capital,

— non-refundable grants or loans on privileged terms,

— the granting of financial advantages by forgoing profits or the recovery of sums due,

— the forgoing of a normal return on public funds used,

— compensation for financial burdens imposed by the public authorities.

7. The Commission further considered that transparency of public funds must be achieved irrespective of the manner in which such provision of public funds is made. Thus, not only were the flows of funds directly from public authorities to public enterprises deemed to fall within the scope of the Transparency Directive, but also the flows of funds indirectly from other public undertakings over which the public authority holds a dominant influence (Article 2).

8. The legality of the Transparency Directive was upheld by the Court of Justice in its judgment of 6 July 1982 (2).

8.1. On the argument that there was no necessity for the Directive and that it infringed the rule of proportionality, the Court held as follows (paragraph 18): 'In view of the diverse forms of public undertakings in the various Member States and the ramifications of their activities, it is inevitable that their financial relations with public authorities should themselves be very diverse, often complex and therefore difficult to supervise, even with the assistance of the sources of published information to which the applicant governments have referred. In those circumstances there is an undeniable need for the Commission to seek additional information on those relations by establishing common criteria for all the Member States and for all the undertakings in question'.

(1) Directive 80/723/EEC (OJ No L 195, 29. 7. 1980, p. 35), as amended by Directive 85/413/EEC (OJ No L 229, 28. 8. 1985, p. 20), which included previously excluded sectors.

(2) Joined Cases 188 to 190/80, *France, Italy and the United Kingdom* v. *Commission* [1982] ECR 2545.

8.2. On the argument that the Directive in question infringed the principle of neutrality of Article 222 of the Treaty, the Court held that (paragraph 21), 'it should be borne in mind that the principle of equality, to which the governments refer in connection with the relationship between public and private undertakings in general, presupposes that the two are in comparable situations. ... private undertakings determine their industrial and commercial strategy by taking into account in particular requirements of profitability. Decisions of public undertakings, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions. The economic and financial consequences of the impact of such factors lead to the establishment between those undertakings and public authorities of financial relations of a special kind which differ from those existing between public authorities and private undertakings. As the Directive concerns precisely those special financial relations, the submission relating to discrimination cannot be accepted.'

8.3. On the argument that the Directive's list of public funds to be made transparent (Article 3) was an attempt to define the notion of aid within the meaning of Articles 92 and 93, the Court stated as follows (paragraph 23): 'In relation to the definition contained in Article 3 of the financial relations which are subject to the rules contained in the Directive, it is sufficient to state that it is not an attempt by the Commission to define the concept of aid which appears in Articles 92 and 93 of the Treaty, but only a statement of the financial transactions of which the Commission considers that it must be informed in order to check whether a Member State has granted aids to the undertakings in question, without complying with its obligation to notify the Commission under Article 93 (3)'.

8.4. On the argument that the public enterprises on which information was to be provided (Article 2) was an attempt to define the notion of public undertakings within the meaning of Article 90 of the Treaty, the Court stated that (paragraph 24), 'it should be emphasized that the object of those provisions is not to define the concept as it appears in Article 90 of the Treaty, but to establish the necessary criteria to delimit the group of undertakings whose financial relations with the public authorities are to be subject to the duty laid down by the Directive to supply information'. It continued in paragraph 25 as follows: 'According to Article 2 of the Directive, the expression "public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence. According to the second paragraph, such influence is to be presumed when the public authorities directly or indirectly hold the major part of the undertaking's subscribed capital, control the majority of the votes, or can appoint more than half of the members of its administrative, managerial or supervisory body'. It continued in paragraph 26 as follows: 'As the Court has already stated, the reason for the inclusion in the Treaty of the provisions of Article 90 is precisely the influence which the public authorities are able to exert over the commercial decisions of public undertakings. That influence may be exerted on the basis of financial participation or of rules governing the management of the undertaking. By choosing the same criteria to determine the financial relations on which it must be able to obtain information in order to perform its duty of surveillance under Article 90 (3), the Commission has remained within the limits of the discretion conferred upon it by that provision'.

9. The principles developed by the Court of Justice with respect to the Transparency Directive are now part of the established jurisprudence and of particular importance is the fact that the Court has confirmed that:

— making financial relations transparent and the provision, on request, of information under the Directive is necessary and respects the principle of proportionality,

— the Directive respects the principle of neutrality of treatment of public and private undertakings,

— for the purposes of monitoring compliance with Articles 92 and 93 the Commission has a legitimate interest to be informed of *all the types of flows of public funds* to public enterprises, and

— for the purposes of monitoring compliance with Articles 92 and 93 the Commission has a legitimate interest in the flows of public funds to public undertakings that come either *directly* from the public authorities or *indirectly* from other public undertakings.

III. PRINCIPLES TO BE USED IN DETERMINING WHETHER AID IS INVOLVED

10. Having established over which enterprises and over which funds the Commission has a legitimate interest for the purposes of Articles 90 and 92, it is necessary to examine the principles to be used in determining whether any aid is involved. Only if aid is involved is there any question of any prior notification. Where aid is involved it is necessary to then examine whether any of the derogations provided for in the Treaty are applicable ([3]). This analysis of determining on the one hand whether aid is involved and on the other whether the aid is compatible under one of the derogations of the Treaty, must be kept as a two stage process if full transparency is to be assured.

([3]) See also points 32 and 33 below.

11. When public undertakings, just like private ones, benefit from monies granted under transparent aid schemes approved by the Commission, then it is clear that aid is involved and under what conditions the Commission has authorized its approval. However, the situation with respect to the other forms of public funds listed in the Transparency Directive is not always so clear. In certain circumstances public enterprises can derive an advantage from the nature of their relationship with public authorities through the provision of public funds when this latter provides funds in circumstances that go beyond its simple role as proprietor. To ensure respect for the principle of neutrality the aid must be assessed as the difference between the terms on which the funds were made available by the State to the public enterprise, and the terms which a private investor would find acceptable in providing funds to a comparable private undertaking when the private investor is operating under normal market economy conditions (hereinafter 'market economy investor principle'). As the Commission points out in its communication on 'Industrial policy in an open and competitive environment' (COM(90) 556) 'competition is becoming ever more global and more intense both on the world and on Community markets'. This trend has many implications for European companies, for example with regards to R&D, investment strategies and their financing. Both public and private enterprises in similar sectors and in comparable economic and financial situations must be treated equally with respect to this financing. However if any public funds are provided on terms more favourable (i.e. in economic terms more cheaply) than a private owner would provide them to a private undertaking in a comparable financial and competitive position, then the public undertaking is receiving an advantage not available to private undertakings from their proprietors. Unless the more favourable provision of public funds is treated as aid, and evaluated with respect to one of the derogations of the Treaty, then the principle of neutrality of treatment between public and private undertakings is infringed.

12. This principle of using an investor operating under normal market conditions as a benchmark to determine both whether aid is involved and if so to quantify it, has been adopted by the *Council* and the *Commission* in the steel and shipbuilding sectors, and has been endorsed by the *Parliament* in this context. In addition the Commission has adopted and applied this principle in numerous individual cases. The principle has also been accepted by the *Court* in every case submitted to it as a yardstick for the determination of whether aid was involved.

13. In 1981 the Council adopted the principle of the market economy investor principle on two occasions. Firstly it approved unanimously the Commission decision establishing Community rules for aids to the steel industry (4), and secondly it approved, by a qualified majority, the Shipbuilding Code (5). In both cases the Council stated that the concept of aid includes any aid elements contained in the financing measures taken by Member States in respect of the steel/shipbuilding undertakings which they *directly or indirectly control* and which do not count as the provision of equity capital *according to standard company practice in a market economy.* Thus not only did the Council approve or adopt the market economy principle, it went along the same lines as the Commission in the abovementioned Transparency Directive, which brought within its scope not only the direct provision of funds but also their indirect provision.

14. The Council has maintained this general principle, most recently in 1989 in the case of steel (6), and in 1990 in the case of shipbuilding (7). In fact in the 1989 steel aid code the Council agreed to prior notification of all provisions of capital or similar financing in order to allow the Commission to decide whether they constituted aid, i.e. could 'be regarded as a genuine provision of risk capital *according to usual investment practice in a market economy*' (Article 1 (2)). The Council also reaffirmed and approved unanimously this principle in Commission Decision 89/218/ECSC concerning new aid to Finsider/ILVA (8).

15. The Parliament has been called upon to give its opinion on the market economy investor principle contained in the Shipbuilding Directives. For these Directives the Parliament agreed to the Commission drafts which included this principle (9).

16. The Commission adopted the same market economy investor principle when it laid down its position in general on public holdings in company capital which still remains valid (10). It stated 'where it is apparent that a public authority which injects capital . . . in a company is not merely providing equity capital under normal market economy conditions, the case has to be assessed in the light of Article 92 of the EEC Treaty' (para-

(4) Decision 81/2320/ECSC of 7 August 1981 (OJ No L 228, 13. 8. 1981, p. 14). See, in particular, the second recital and Article 1.

(5) Council Directive 81/363/EEC of 28 April 1981 (OJ No L 137, 23. 5. 1981, p. 39). See, in particular, the last recital and Article 1 (e).

(6) Commission Decision 322/89/ECSC of 1 February 1989 (OJ No L 38, 10. 2. 1989, p. 8).

(7) Council Directive 90/684/EEC of 21 December 1990, (OJ No L 380, 31. 12. 1990, p. 27).

(8) OJ No L 86, 31. 3. 1989, p. 76.

(9) See for example OJ No C 28, 9. 2. 1981, p. 23, and OJ No C 7, 12. 1. 1987, p. 320.

(10) Communication to the Member States concerning public authorities holdings in company capital. (Bulletin EC 9 — 1984).

graph 1). It considered in particular that State aid was involved 'where the financial position of the company, and particularly the structure and volume of its debts, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested'.

17. The Commission has moreover applied this market economy investor principle in many individual cases to determine whether any aid was involved. The Commission examined in each case the financial circumstances of the company which received the public funds to see if a market economy investor would have made the monies available on similar terms. In the Leeuwarden decision the Commission established that the capital injections constituted aid because 'the overcapacity in the ... industry constituted handicaps indicating that the firm would *probably* have been unable to raise on the private capital market the funds essential to its survival. The situation on the market provides *no reasonable grounds* for hope that a firm urgently needing large-scale restructuring could generate sufficient cash flow to finance the replacement investment necessary ...' ([11]). This policy has been applied consistently over a number of years. More recently in the CdF/Orkem decision ([12]), the Commission established that the public authority 'injected capital into an undertaking in conditions that are not those of a market economy'. In fact, the company in question 'had very little chance of obtaining sufficient capital from the private market to ensure its survival and long-term stability'. In the ENI-Lanerossi decision ([13]), the Commission stated that 'finance was granted in circumstances that would not be acceptable to a private investor operating under normal market economy conditions, as in the present case the financial and economic position of these factories, particularly in view of the duration and volumes of their losses, was such that a normal return in dividends or capital gains could not be expected for the capital invested' ([14]). There have also been a number of cases where the Commission has clearly stated that capital injections by the State have not constituted aid because a reasonable return by way of dividends or capital growth could normally be expected ([15]).

18. The Commission has also applied the market economy investor principle to many individual cases under the shipbuilding Directives and steel aid codes. In shipbuilding, for example in Bremer Vulkan ([16]), the Commission considered that a bridging loan and the purchase of new shares constituted State aid because it did 'not accept the argument put forward by the German Government that [it] ... only acted like a private investor who happened to be better at foreseeing future market developments than anyone else.' In steel, for example, it took decisions in several individual cases where capital injections were considered as aid ([17]).

19. It is noteworthy that in many of the above described cases the capital injected into the public undertaking came not directly from the State but indirectly from State holding companies or other public undertakings.

20. The Court has been called upon to examine a number of cases decided by the Commission in its application of the market economy investor principle set out in the 1984 guidelines. In each case submitted to it, the Court accepted the principle as an appropriate one to be used to determine whether or not aid was involved. It then examined whether the Commission decision sufficiently proved its application in the specific circumstances of the case in question. For example, in its judgment in Case 40/85 ([18]) (Boch), the Court stated (paragraph 13):

([11]) OJ No L 277, 29. 9. 1982, p. 15.

([12]) OJ No C 198, 7. 8. 1990, p. 2.

([13]) OJ No L 16, 20. 1. 1989, p. 52.

([14]) Decisions Meura (OJ No L 276, 19. 10. 1984, p. 34), Leeuwarden (OJ No L 277, 29. 9. 1982, p. 15), Intermills I (OJ No L 280, 2. 10. 1982, p. 30), Boch/Noviboch (OJ No L 59, 27. 2. 1985, p. 21), Boussac (OJ No L 352, 15. 12. 1987, p. 42), Alfa-Fiat (OJ No L 394, 31. 5. 1989, p. 9), Pinault-Isoroy (OJ No L 119, 7. 5. 1988, p. 38), Fabelta (OJ No L 62, 3. 3. 1984, p. 18), Ideal Spun (OJ No L 283, 27. 10. 1984, p. 42), Renault (OJ No L 220, 11. 8. 1988, p. 30), Veneziana Vetro (OJ No L 166, 16. 6. 1989, p. 60), Quimigal (OJ No C 188, 28. 7. 1990, p. 3) and IOR/Finalp (not yet published) where the same reasoning can be found.

([15]) Decisions CDF/Orkem, in parts, (op. cit.), Quimigal, in parts, (op. cit.), Intermills II (Bulletin EC 4-1990, point 1.1.34) and Ernaelsteen (18th Competition Report, points 212 and 213).

([16]) Not yet published.

([17]) OJ No L 227, 19. 8. 1983, p. 1. See also, in particular, cases relating to Arbed, Sidmar, ALZ, Hoogovens, Irish Steel, Sacilor/Usinor and British Steel where the same reasoning can be found. In all these steel cases the aid was held to be compatible. More recently, the Council unanimously approved this principle in the Finsider/ILVA case — see point 26 below.

([18]) *Belgium* v. *Commission* [1986] ECR 2321.

'An appropriate way of establishing whether [the] measure is a State aid is to apply the criterion, which was mentioned in the Commission's decision and, moreover, was not contested by the Belgian Government, of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is almost entirely held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the forseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have subscribed the capital in question'.

The Court has recently reaffirmed this principle in the Boussac judgment ([19]), where it stated (paragraphs 39 and 40): 'In order to determine if the measures constitute State aid, it is necessary to apply the criterion in the Commission's decision, which was not contested by the French Government, whether it would have been possible for the undertaking to obtain the funds on the private capital market', and 'the financial situation of the company was such that it would not except an acceptable return on the investment within a reasonable time period and that Boussac would not have been able to find the necessary funds on the market' (unofficial translation) ([20]). The Court has recently further refined the market economy investor principle by making a distinction between a private investor whose time horizon is a short-term even speculative one, and that of a private holding group with a longer-term perspective (Alfa/Fiat and Lanerossi ([21]). 'It is necessary to make clear that the behaviour of a private investor with which the intervention of the public investor ... must be compared, whilst not necessarily that of an ordinary investor placing his capital with a more or less short-term view of its profitability, must at least be that of a private holding or group of enterprises which pursue a structural, global or sectoral policy and which are guided by a longer-term view of profitability'. On the basis of the facts of the case 'the Commission was able to correctly conclude that a private investor, even if taking decisions at the level of the whole group in a wider economic context, would not under normal market economy conditions, have been able to expect an acceptable rate of profitability (even in the long term) on the capital invested ...' (unofficial translation). 'A private investor may well inject new capital to ensure the survival of a company experiencing temporary difficulties, but which after, if necessary, a restructuring will become profitable again. A mother company may also, during a limited time, carry the losses of a subsidiary in order to allow this latter to withdraw from the sector under the most favourable conditions. Such decisions can be motivated not only by the possibility to get a direct profit, but also by other concerns such as maintaining the image of the whole group or to redirect its activities. However, when the new injections of capital are divorced from all possibility of profitability, even in the long term, these injections must be considered as aid ...' (unofficial translation).

([19]) Case C-301/87 (not yet published).

([20]) See also Intermills Case 323/82, Leeuwarden Joined Cases 296/318/82, Meura Case 234/84 where the same reasoning can be found.

([21]) Cases C-305/89 and C-303/88 respectively (not yet published).

21. The fact that in many of the cases decided by the Court the injections came indirectly from State holding companies or from other public undertakings and not directly from the State, did not alter the aid character of the monies in question. The Court has always examined the economic reality of the situation to determine whether State resources were involved. In the Steinicke and Weinlig judgment ([22]), the Court stated that '... save for the reservation in Article 90 (2) of the Treaty, Article 92 covers all private and public undertakings and all their production' and that 'in applying Article 92 regard must primarily be had to the effects of aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid'. More recently in the Crédit Agricole judgment ([23]), the Court confirmed this and added that '... aid need not necessarily be financed from State resources to be classified as State aid ... there is no necessity to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer aid'.

IV. INCREASED TRANSPARENCY OF POLICY

22. To date most but by no means all of the cases which have come before the Council, the Commission and the Court where the market economy investor principle has been applied have concerned capital injections in loss-making or even near-bankrupt companies. One of the aims of this communication is to increase transparency by more systematically applying aid disciplines

— to public undertakings in all situations, not just those making losses as is the case at present,

— to all the forms of public funds mentioned in the Transparency Directive (Article 3 — see points 6 and 8.3 above), in particular, for loans, guarantees and the rate of return, not just for capital injections as is the case at present.

23. This increased transparency of policy is to be brought about by clearly applying the market economy

([22]) Case 78/76.

([23]) Case 290/83.

investor principle to public undertakings in all situations and all public funds covered by the Transparency Directive. The market economy investor principle is used because:

— it is an appropriate yardstick both for measuring any financial advantage a public undertaking may enjoy over an equivalent private one and for ensuring neutrality of treatment between public and private undertakings,

— it has proved itself practical to the Commission in numerous cases,

— it has been confirmed by the Court (see particularly points 20 and 21 above), and

— it has been approved by the Council in the steel and shipbuilding sector.

Unless this clarification is implemented there is a danger not only of lack of transparency, but also of discrimination against private undertakings which do not have the same links with the public authorities nor the same access to public funds. The current communication is a logical development of existing policy rather than any radical new departure and are necessary to explain the application of the principle to a wider number of situations and a wider range of funds. In fact the Court, the Commission and the Council have already applied the principle of the market economy investor in a limited number of cases to the forms of public funds other than equity which are also the object of this communication — i.e. guarantees, loans, return on capital [24].

24. *Guarantee.* In IOR/Finalp (op. cit.) the Commission considered that when a State holding company became the one and only owner of an ailing company (thereby exposing it to unlimited liability under Italian commercial law) this was equivalent to taking extra risk by giving in effect an open-ended *guarantee.* The Commission using its well established principle stated that a market economy investor would normally be reluctant to become the one and only shareholder of a company if as a consequence he must assume unlimited liability for it; he will make sure that this additional risk is outweighed by additional gains.

25. *Loan.* In Boch (op. cit.) the Court stated (paragraphs 12 and 13): 'By virtue of Article 92 (1) ... the provisions of the Treaty concerning State aid apply to aid granted by a Member State or through State resources in any form whatsoever. It follows ... that no distinction can be drawn between aid granted in the form of *loans* and aid granted in the form of a subscription of capital of an undertaking ... An appropriate way of establishing whether such a measure is a State aid is to apply the criterion ... of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets.'

26. *Return on capital.* When it opened the Article 88 procedure of the ECSC Treaty (letter to the Italian Government of 6 May 1988) in the Finsider/ILVA case, the Commission considered that the loans granted by State credit institutions were not granted to the undertaking in question under conditions acceptable to a private investor operating under normal market conditions, but were dependent on an *(implicit) guarantee* of the State and as such constituted State aid. In fact at a later date this implicit guarantee was made explicit when the debts were honoured. The opening of the procedure led to a decision with the unanimous approval of the Council [25] which imposed conditions on the enterprise in question to ensure that its *viability* would be re-established, and a *minimum return on capital* should be earned.

V. PRACTICALITY OF THE MARKET ECONOMY INVESTOR PRINCIPLE

27. The practical experience gained by the Commission from the application of State aid rules to public enterprises and the general support among the Community institutions for the basic themes of the market economy investor principle confirm the Commission's view that it is as such an appropriate yardstick to determine whether or not aid exists. However it is noted that the majority of cases to which the mechanism has been applied have been of a particular nature and the wider application of the mechanism may appear to cause certain difficulties. Some further explanations are therefore warranted. In addition, the fear has been expressed that the application of the market economy investor principle could lead to the Commission's judgment replacing the investor and his appreciation of investment projects. In the first place this criticism can be refuted by the fact that this principle

[24] It should be noted that this is not an exhaustive list of the different forms of financing which may entail aid. The Commission will act against the provision of any other advantages to public undertakings in a tangible or intangible form that may constitute aid.

[25] OJ No L 86, 31. 3. 1989, p. 76. See also the Commission Communication to the Council of 25 October 1988 — SEC(88) 1485 final and point 207 of the 14th Competition Report. In fact, the whole aim of the Steel Code for all Member States was to restore viability through a minimum return and self-financing according to market principles.

has already shown itself to be both an appropriate and practical yardstick for determining which public funds constitute aid in numerous individual cases. Secondly it is not the aim of the Commission in the future, just as it has not been in the past, to replace the investor's judgment. Any requests for extra finance naturally calls for public undertakings and public authorities, just as it does for private undertakings and the private providers of finance, to analyse the risk and the likely outcome of the project.

In turn, the Commission realizes that this analysis of risk requires public undertakings, like private undertakings, to exercise entrepreneurial skills, which by the very nature of the problem implies a wide margin of judgment on the part of the investor. Within that wide margin the exercise of judgment by the investor cannot be regarded as involving State aid. It is in evaluation of the justification for the provision of funds that the Member State has to decide if a notification is necessary in conformity with its obligation under Article 93 (3). In this context, it is useful to recall the arrangements of the 1984 communication on public authorities' holdings which stated that where there is a presumption that a financial flow from the State to a public holding constitutes aid, the Commission shall be informed in advance. On the basis of an examination of the information received it will decide within 15 working days whether the information should be regarded as notification for the purposes of Article 93 (3) (point 4.4.2). Only where there are no objective grounds to reasonably expect that an investment will give an adequate rate of return that would be acceptable to a private investor in a comparable private undertaking operating under normal market conditions, is State aid involved even when this is financed wholly or partially by public funds. It is not the Commission's intention to analyse investment projects on an *ex-ante* basis (unless notification is received in advance in conformity with Article 93 (3)).

28. There is no question of the Commission using the benefit of hindsight to state that the provision of public funds constituted State aid on the sole basis that the out-turn rate of return was not adequate. Only projects where the Commission considers that there were no objective or bona fide grounds to reasonably expect an adequate rate of return in a comparable private undertaking *at the moment the investment/financing* decision is made can be treated as State aid. It is only in such cases that funds are being provided more cheaply than would be available to a private undertaking, i.e. a subsidy is involved. It is obvious that, because of the inherent risks involved in any investment, not all projects will be successful and certain investments may produce a sub-normal rate of return or even be a complete failure. This is also the case for private investors whose investment can result in sub-normal rates of return or failures. Moreover such an approach makes no discrimination between projects which have short or long-term pay-back periods, as long as the risks are adequately and objectively assessed and discounted at the time the decision to invest is made, in the way that a private investor would.

29. This communication, by making clearer how the Commission applies the market economy investor principle and the criteria used to determine when aid is involved, will reduce uncertainty in this field. It is not the Commission's intention to apply the principles in this communication (in what is necessarily a complex field) in a dogmatic or doctrinaire fashion. It understands that a wide margin of judgment must come into entrepreneurial investment decisions. The principles have however to be applied when it is beyond reasonable doubt that there is no other plausible explanation for the provision of public funds other than considering them as State aid. This approach will also have to be applied to any cross-subsidization by a profitable part of a public group of undertakings of an unprofitable part. This happens in private undertakings when either the undertaking in question has a strategic plan with good hopes of long-term gain, or that the cross-subsidy has a net benefit to the group as a whole. In cases where there is cross-subsidization in public holding companies the Commission will take account of similar strategic goals. Such cross-subsidization will be considered as aid only where the Commission considers that there is no other reasonable explanation to explain the flow of funds other than that they constituted aid. For fiscal or other reasons certain enterprises, be they public or private, are often split into several legally distinct subsidiaries. However the Commission will not normally ask for information of the flow of funds between such legally distinct subsidiaries of companies for which one consolidated report is required.

30. The Commission is also aware of the differences in approach a market economy investor may have between his minority holding in a company on the one hand and full control of a large group on the other hand. The former relationship may often be characterized as more of a speculative or even short-term interest, whereas the latter usually implies a longer-term interest. Therefore where the public authority controls an individual public undertaking or group of undertakings it will normally be less motivated by purely

short-term profit considerations than if it had merely a minority/non-controlling holding and its time horizon will accordingly be longer. The Commission will take account of the nature of the public authorities' holding in comparing their behaviour with the benchmark of the equivalent market economy investor. This remark is also valid for the evaluation of calls for extra funds to financially restructure a company as opposed to calls for funds required to finance specific projects ([26]). In addition the Commission is also aware that a market economy investor's attitude is generally more favourably disposed towards calls for extra finance when the undertaking or group requiring the extra finance has a good record of providing adequate returns by way of diffidends or capital accumulation on past investments. Where a company has underperformed in this respect in comparison with equivalent companies, this request for finance will normally be examined more sceptically by the private investor/owner called upon to provide the extra finance. Where this call for finance is necessary to protect the value of the whole investment the public authority like a private investor can be expected to take account of this wider context when examining whether the commitment of new funds is commercially justified. Finally where a decision is made to abandon a line of activity because of its lack of medium/long-term commercial viability, a public group, like a private group, can be expected to decide the timing and scale of its run down in the light of the impact on the overall credibility and structure of the group.

31. In evaluating any calls for extra finance a shareholder would typically have at his disposal the information necessary to judge whether he is justified in responding to these calls for additional finance. The extent and detail of the information provided by the undertaking requiring finance may vary according to the nature and volume of the funding required, to the relationship between the undertaking and the shareholder and even to the past performance of the undertaking in providing an adequate return ([27]). A market economy investor would not usually provide any additional finance without the appropriate level of information. Similar considerations would normally apply to public undertakings seeking finance. This financial information in the form of the relevant documentation should be made available at the specific request of the Commission if it is considered that it would help in evaluating the investment proposals from the point of view of deciding whether or not their financing constitutes aid ([28]). The Commission will not disclose information supplied to it as it is covered by the obligation of professional secrecy. Therefore investment projects will not be scrutinized by the Commission in advance except where aid is involved and prior notification in conformity with Article 93 (3) is required. However where it has reasonable grounds to consider that aid may be granted in the provision of finance to public undertakings, the Commission, pursuant to its responsibilities under Articles 92 and 93, may ask for the information from Member States necessary to determine whether aid is involved in the specific case in question.

VI. COMPATIBILITY OF AID

32. Each Member State is free to choose the size and nature of its public sector and to vary it over time. The Commission recognizes that when the State decides to exercise its right to public ownership, commercial objectives are not always the essential motivation. Public enterprises are sometimes expected to fulfil non-commercial functions alongside or in addition to their basic commercial activities. For example, in some Member States public companies may be used as a locomotive for the economy, as part of efforts to counter recession, to restructure troubled industries or to act as catalysts for regional development. Public companies may be expected to locate in less developed regions where costs are higher or to maintain employment at levels beyond purely commercial levels. The Treaty enables the Commission to take account of such considerations where they are justified in the Community interest. In addition the provision of some services may entail a public service element, which may even be enforced by political or legal constraints. These non-commercial objectives/functions (i.e. social goods) have a cost which ultimately has to be financed by the State (i.e. taxpayers) either in the form of new finance (e.g. capital injections) or a reduced rate of return on capital invested. This aiding of the provision of public services can in certain circumstances distort competition. Unless one of the derogations of the Treaty is applicable, public undertakings are not exempted from the rules of

([26]) This may be particularly important for public undertakings that have been deliberately under-capitalized by the public authority owner for reasons extraneous to commercial justifications (e.g. public expenditure restrictions).

([27]) Minority shareholders who have no 'inside' information on the running of the company may require a more formal justification for providing funds than a controlling owner who may in fact be involved at board level in formulating strategies and is already party to detailed information on the undertaking's financial situation.

([28]) The provision of this information on request falls within scope of the Commission's powers of investigation of aid under Articles 92 and 93 in combination with Article 5 of the EEC Treaty and under Article 1 (c) of the Transparency Directive which states that the use to which public funds are put should be made transparent.

competition by the imposition of these non-commercial objectives.

33. If the Commission is to carry out its duties under the Treaty, it must have the information available to determine whether the financial flows to public undertakings constitute aid, to quantify such aid and then to determine if one of the derogations provided for in the Treaty is applicable. This communication limits itself to the objective of increasing transparency for the financial flows in question which is an essential first step. To decide, as a second step, whether any aid that is identified is compatible, is a question which is not dealt with because such a decision will be in accordance with the well known principles used by the Commission in the area to which no change is envisaged. (It should be stressed that the Commission is concerned with aid only when it has an impact on intra-Community trade and competition. Thus, if aid is granted for a non-commercial purpose to a public undertaking which has no impact on intra-Community trade and competition, Article 92 (1) is not applicable). This obligation of submitting to Community control all aid having a Community dimension is the necessary counterpart to the right of Member States being able to export freely to other Member States and is the basis of a common market.

VII. DIFFERENT FORMS OF STATE INTERVENTION

34. In deciding whether any public funds to public undertakings constitute aid, the Commission must take into account the factors discussed below for each type of intervention covered by this communication — capital injections, guarantees, loans, return on investment [29]. These factors are given as a guide to Member States of the likely Commission attitude in individual cases. In applying this policy the Commission will bear in mind the practicability of the market economy investor principle described above. This communication takes over the definition of public funds and public undertakings used in the Transparency Directive. This is given as guidance for Member States as to the general attitude of the Commission. However, the Commission will obviously have to prove in individual cases of application of this policy that public undertakings within the meaning of Article 90 and State resources within the meaning of Article 92 (1) are involved, just as it has in individual cases in the past. As far as any provision of information under the Transparency Directive is concerned, these definitions have been upheld by the Court for the purposes of the Directive and there is no further obligation on the Commission to justify them.

Capital injections

35. A capital injection is considered to be an aid when it is made in circumstances which would not be acceptable to an investor operating under normal market conditions. This is normally taken to mean a situation where the structure and future prospects for the company are such that a normal return (by way of dividend payments or capital appreciation) by reference to a comparable private enterprise cannot be expected within a reasonable time. Thus, the 1984 communication on capital injections remains valid.

A market economy investor would normally provide equity finance if the present value [30] of expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains and adjusted for risk) exceed the new outlay. The context within which this will have to be interpreted was explained above in paragraphs 27 to 31.

36. In certain Member States investors are obliged by law to contribute additional equity to firms whose capital base has been eroded by continuous losses to below a predetermined level. Member States have claimed that these capital injections cannot be considered as aid as they are merely fulfilling a legal obligation. However, this 'obligation' is more apparent than real. Commercial investors faced with such a situation must also consider all other options including the possibility of liquidating or otherwise running down their investment. If this liquidation or running down proves to be the more financially sound option taking into account the impact on the group and is not followed, then any subsequent capital injection or any other State intervention has to be considered as constituting aid.

37. When comparing the actions of the State and those of a market economy investor in particular when a company is not making a loss, the Commission will evaluate the financial position of the company at the time it is/was proposed to inject additional capital. On the basis of an evaluation of the following items the Commission will examine whether there is an element of aid contained in the amount of capital invested. This aid element consists in the *cost* of the investment less the *value* of the investment, appropriately discounted. It

[29] This list is not exhaustive — see footnote 24 above.

[30] Future cash flows discounted at the company's cost of capital (in-house discount rate).

is stressed that the items listed below are indispensable to any analysis but not necessarily sufficient since account must also been taken of the principles set out in paragraphs 27 to 31 above and of the question whether the funds required are for investment projects or a financial restructuring.

37.1. *Profit and loss situation.* An analysis of the results of the company spread over several years. Relevant profitability ratios would be extracted and the underlying trends subject to evaluation.

37.2. *Financial indicators.* The debt/equity ratio (gearing of the company) would be compared with generally accepted norms, industry-sector averages and those of close competitors, etc. The calculation of various liquidity and solvency ratios would be undertaken to ascertain the financial standing of the company (this is particularly relevant in relation to the assessment of the loan-finance potential of a company operating under normal market conditions). The Commission is aware of the difficulties involved in making such comparisons between Member States due in particular to different accounting practices or standards. It will bear this in mind when choosing the appropriate reference points to be used as a comparison with the public undertakings receiving funds.

37.3. *Financial projections.* In cases where funding is sought to finance an investment programme then obviously this programme and the assumptions upon which it is based have to be studied in detail to see if the investment is justified.

37.4. *Market situation.* Market trends (past performance and most importantly future prospects) and the company's market share over a reasonable time period should be examined and future projections subjected to scrutiny.

Guarantees

38. The position currently adopted by the Commission in relation to loan guarantees has recently been communicated to Member States ([31]). It regards all guarantees given by the State directly or by way of delegation through financial institutions as falling within the scope of Article 92 (1) of the EEC Treaty. It is only if guarantees are assessed at the granting stage that all the distortions or potential distortions of competition can be detected. The fact that a firm receives a guarantee even if it is never called in may enable it to continue trading, perhaps forcing competitors who do not enjoy such facilities to go out of business. The firm in question has therefore received support which has disadvantaged its competitors i.e. it has been aided and this has had an effect on competition. An assessment of the aid element of guarantees will involve an analysis of the borrower's financial situation (see point 37 above). The aid element of these guarantees would be the difference between the rate which the borrower would pay in a free market and that actually obtained with the benefit of the guarantee, net of any premium paid for the guarantee. Creditors can only safely claim against a government guarantee where this is made and given explicitly to either a public or a private undertaking. If this guarantee is deemed incompatible with the common market following evaluation with respect to the derogations under the Treaty, reimbursement of the value of any aid will be made by the undertaking to the Government even if this means a declaration of bankruptcy but creditors' claims will be honoured. These provisions apply equally to public and private undertakings and no additional special arrangements are necessary for public enterprises other than the remarks made below.

38.1. Public enterprises whose legal status does not allow bankruptcy are in effect in receipt of permanent aid on all borrowings equivalent to a guarantee when such status allows the enterprises in question to obtain credit on terms more favourable than would otherwise be available.

38.2. Where a public authority takes a hold in a public undertaking of a nature such that it is exposed to unlimited liability instead of the normal limited liability, the Commission will treat this as a guarantee on all the funds which are subject to unlimited liability ([32]). It will then apply the above described principles to this guarantee.

Loans

39. When a lender operating under normal market economy conditions provides loan facilities for a client he is aware of the inherent risk involved in any such venture. The risk is of course that the client will be unable to repay the loan. The potential loss extends to the full amount advanced (the capital) and any interest due but unpaid at the time of default. The risk attached to any loan arrangement is usually reflected in two distinct parameters:

(a) the interest rate charged;

(b) the security sought to cover the loan.

([31]) Communication to all Member States dated 5 April 1989, as amended by letter of 12 October 1989.

([32]) See point 24 above.

40. Where the perceived risk attached to the loan is high then *ceteris paribus* both (a) and (b) above can be expected to reflect this fact. It is when this does not take place in practice that the Commission will consider that the firm in question has had an advantage conferred on it, i.e. has been aided. Similar considerations apply where the assets pledged by a fixed or floating charge on the company would be insufficient to repay the loan in full. The Commission will in future examine carefully the security used to cover loan finance. This evaluation process would be similar to that proposed for capital injections (see point 37 above).

41. The aid element amounts to the difference between the rate which the firm should pay (which itself is dependent on its financial position and the security which it can offer on foot of the loan) and that actually paid. (This one-stage analysis of the loan is based on the presumption that in the event of default the lender will exercise his legal right to recover any monies due to him). In the extreme case, i.e. where an unsecured loan is given to a company which under normal circumstances would be unable to obtain finance (for example because its prospects of repaying the loan are poor) then the loan effectively equates a grant payment and the Commission would evaluate it as such.

42. The situation would be viewed from the point of view of the lender at the moment the loan is approved. If he chooses to lend (or is directly or indirectly forced to do so as may be the case with State-controlled banks) on conditions which could not be considered as normal in banking terms, then there is an element of aid involved which has to be quantified. These provisions would of course also apply to private undertakings obtaining loans from public financial institutions.

Return on investments

43. The State, in common with any other market economy investor, should expect a normal return obtained by comparable private undertakings on its capital investments by way of dividends or capital appreciation ([33]). The rate of return will be measured by the profit (after depreciation but before taxation and disposals) expressed as a percentage of assets employed. It is therefore a measure that is neutral with respect to the form of finance used in each undertaking (i.e. debt or equity) which for public undertakings may be decided for reasons extraneous to purely commercial considerations. If this normal return is neither forthcoming beyond the short term nor is likely to be forthcoming in the long term (with the uncertainty of this longer-term future gain not appropriately accounted for) and no remedial action has been taken by the public undertaking to rectify the situation, then it can be assumed that the entity is being indirectly aided as the State is foregoing the benefit which a market economy investor would expect from a similar investment. A normal rate of return will be defined with reference where possible being made to comparable private companies. The Commission is aware of the difficulties involved in making such comparisons between Member States — see particularly point 37. In addition the difference in capital markets, currency fluctuations and interest rates between Member States further complicate international comparisons of such ratios. Where accounting practices even within a single Member State make accurate asset valuation hazardous, thereby undermining rate of return calculations, the Commission will examine the possibility of using either adjusted valuations or other simpler criteria such as operating cash flow (after depreciation but before disposals) as a proxy of economic performance.

When faced with an inadequate rate of return a private undertaking would either take action to remedy the situation or be obliged to do so by its shareholders. This would normally involve the preparation of a detailed plan to increase overall profitability. If a public undertaking has an inadequate rate of return, the Commission could consider that this situations contains elements of aid, which should be analysed with respect to Article 92. In these circumstances, the public undertaking is effectively getting its capital cheaper than the market rate, i.e. equivalent to a subsidy.

44. Similarly, if the State forgoes dividend income from a public undertaking and the resultant retained profits do not earn a normal rate of return as defined above then the company in question is effectively being subsidized by the State. It may well be that the State sees it as preferable for reasons not connected with commercial considerations to forgo dividends (or accept reduced dividend payments) rather than make regular capital injections into the company. The end result is the same and this regular 'funding' has to be treated in the same way as new capital injections and evaluated in accordance with the principles set out above.

45. **Duration**

After an initial period of five years, the Commission will review the application of the policy described in this communication. On the basis of this review, and after consulting Member States, the Commission may propose any modifications which it considers appropriate.

([33]) The foregoing of a normal return on public funds falls within the scope of the Transparency Directive.

Amending ECSC operating budget for 1993

(93/C 307/04)

The Commission's initial estimates of requirements and resources for the ECSC operating budget for 1993 were annexed to Commission Decision No 3799/92/ECSC of 23 December 1992 (¹).

On 10 November 1993, the Commission adopted corrected estimates of resources and their breakdown and established the amending ECSC operating budget shown below.

(¹) OJ No L 384, 30. 12. 1992, p. 5.

(million ECU)

Requirements	Initial forecast		Amended forecast	
Operations to be financed from current resources (non-repayable)				
1. Administrative expenditure	5		5	
2. Aid for redeployment (Article 56)	185		185	
3. Aid for research (Article 55)	123		124,8	
3.1. Steel (¹)		58		58
3.2. Coal (¹)		50		51,8
3.3. Social (¹)		15		15
4. Interest subsidies	125		127	
4.1. Investment (Article 54)		20		—
4.2. Conversion (Article 56) (²)		105		127
5. Social measures connected with restructuring of steel industry	60		60	
6. Social measures connected with restructuring of coal industry (²)	50		50	
7. Damages and interest	—		p.m.	
Total	548		551,8	

Resources	Initial forecast	Amended forecast
Resources for the financial year		
1. Current resources		
1.1. Yield from 0,25 % levy	125	117
1.2. Net balance (³)	269	252
1.3. Fines and surcharges for late payment	2	p.m.
1.4. Miscellaneous	p.m.	p.m.
2. Cancellation of commitments unlikely to be implemented	63	78,7
3. Resources from 1992 not used	40	53,1
4. Exceptional revenue		
Social measures connected with restructuring of steel industry	p.m.	p.m.
5. Drawings on contingency reserve	p.m.	p.m.
6. Exceptional resources	49	51
Total	548	551,8

(¹) Aid for projects with a specific impact on the environment:
Heading: 3.1. 7;
3.2. 16;
3.3. 3.

(²) Amounts for the Rechar programme:
Heading: 4.2. 50;
6: 50.

(³) Initial forecast: net balance 1992;
Amended forecast: net balance 1993.

Commission communication pursuant to Article 9 (9) of Council Regulation (EEC) No 3420/83 of 14 November 1983

(93/C 307/05)

Pursuant to Article 9 (1) of Council Regulation (EEC) No 3420/83 of 14 November 1983 on import arrangements for products originating in State-trading countries, not liberalized at Community level (¹), the Commission adopted the following changes to the import arrangements applied in the United Kingdom with regard to certain State-trading countries on 29 October 1993:

Exceptional opening of import facilities for the following products (October to December 1993):

(¹) OJ No L 346, 8. 12. 1983, p. 6.

PEOPLE'S REPUBLIC OF CHINA

No	CN code	Description	Quantity	Value (ECU 1 000)
1	2	3	4	5
1	3605	Matches (excluding Bengal matches)	6 875 short standards	
2	4203 21 00 4203 29 10 4203 29 91 4203 29 99 ex 6111 90 00 6116 99 00 ex 6209 90 00 ex 6216	Leather gloves, including gloves of leather and furskin or of leather and artificial fur and including gloves of fabric and leather (of which not more than 12 375 pairs for CN codes 4203 21 00, 4203 29 91 and 4203 29 99); gloves, mittens and mitts, woven, knitted or crocheted of flax	55 000 pairs (¹)	
3	6401 10 10 6401 10 90 6401 91 10 6401 91 90 6401 92 10 6401 92 90 6401 99 10 6401 99 90 6402 11 00 6402 19 00 6402 20 00 6402 30 10 6402 30 90 6402 91 10 6402 91 90 6402 99 10 6402 99 31 6402 99 39 6402 99 50 6402 99 91 6402 99 93 6402 99 96 6402 99 98 6403 11 00 6403 19 00 6403 20 00	Footwear (of which not more than ECU 58 797 of leather footwear)		118

(¹) Including textile categories ex 10 and ex 87.

1	2	3	4	5
3 *(cont'd)*	6403 30 00 6403 40 00 6403 51 11 6403 51 15 6403 51 19 6403 51 91 6403 51 95 6403 51 99 6403 59 11 6403 59 31 6403 59 35 6403 59 39 6403 59 50 6403 59 91 6403 59 95 6403 59 99 6403 91 11 6403 91 13 6403 91 16 6403 91 18 6403 91 91 6403 91 93 6403 91 96 6403 91 98 6403 99 11 6403 99 31 6403 99 33 6403 99 36 6403 99 38 6403 99 50 6403 99 91 6403 99 93 6403 99 96 6403 99 98 ex 6404 11 00 6404 19 10 6404 19 90 6404 20 10 6404 20 90 6404 90 10			
4	ex 6505 10 00 6505 90 11 6505 90 19 6505 90 30 6505 90 90 6506 10 10 6506 10 30 ex 6506 10 90 6506 91 10 ex 6506 91 90 6506 92 00 6506 99 00	Headgear, not being wholly or partly of wool or fur felt		951
5	6911 10 00 6911 90 00 6912 00 30 6912 00 50 6912 00 90	Tableware and other articles of a kind commonly used for domestic or toilet purposes, of porcelain or china and of other kinds of pottery (excluding common pottery)		361
6	8528 10 61 8528 10 69 8528 10 71 8528 10 73 8528 10 75 8528 10 78 8528 10 80 8528 10 91 8528 10 98 8528 20 20 8528 20 71 8528 20 73 8528 20 79	Television receivers (colour or monochrome)	5 500 units	

1	2	3	4	5
7	8528 10 61 8528 10 69 8528 10 71 8528 10 73 8528 10 75 8528 10 78 8528 10 80 8528 10 91 8528 10 98 8528 20 20 8528 20 71 8528 20 73 8528 20 79	Television receivers (colour or monochrome) disassembled	6 875 units	

VIETNAM

1	2	3	4	5
1	6911 10 00 6911 90 00 6912 00 10 6912 00 30 6912 00 50 6912 00 90	Tableware and other articles of a kind commonly used for domestic or toilet purposes, of porcelain or china (including biscuit porcelain and parian) Tableware and other articles of a kind commonly used for domestic or toilet purposes, of other kinds of pottery		9
	6913 10 00 6913 90 10 6913 90 91 6913 90 93 6913 90 99	Statuettes and other ornamental articles; articles of furniture		

Textile products

PEOPLE'S REPUBLIC OF CHINA

Category	Units	Quantity
ex 10	1 000 pairs	(1)
ex 18	tonnes	2,5 (2)
ex 72	1 000 pieces	(3)
ex 78	tonnes	(3)
ex 85	tonnes	(3)
ex 87	tonnes	(1)
118	tonnes	1 (4)
120	tonnes	(5)
130A	tonnes	1,75 (6)
ex 136	tonnes	17,5 (7)
ex 161	tonnes	(3)

(1) See quota No 2: gloves, mittens and mitts, woven, knitted or crocheted of flax.
(2) Including ex-categories 72, 78, 85 and 161: woven garments, ties, bow ties and cravats of flax.
(3) See category ex 18.
(4) Including category 120.
(5) See category 118.
(6) Thrown silk yarns.
(7) Woven fabrics of silk of a weight exceeding 58,5 g/m^2 in the gum, or exceeding 48,5 g/m^2 not in the gum, other than woven fabrics of silk containing not less than 50 % by weight of tussah silk.

ARMENIA, AZERBAIJAN, BELARUS, GEORGIA, KAZAKHSTAN, KYRGYZSTAN, MOLDOVA, RUSSIA, TAJIKISTAN, TURKMENISTAN, UZBEKISTAN and UKRAINE

Category	Units	Quantity
1	tonnes	119
2	tonnes	580 (1)
3	tonnes	99
4	1 000 pieces	162
5	1 000 pieces	131
6	1 000 pieces	122
7	1 000 pieces	61
8	1 000 pieces	146
20	tonnes	109
21	1 000 pieces	70

(1) Of which no more than 139 tonnes for category 2 (a).

Commission communication pursuant to Article 9 (9) of Council Regulation (EEC) No 3420/83 of 14 November 1983

(93/C 307/06)

Pursuant to Article 9 (1) of Council Regulation (EEC) No 3420/83 of 14 November 1983 on import arrangements for products originating in State-trading countries, not liberalized at Community level (1), the Commission adopted the following change(s) to the import arrangements applied in Italy with regard to certain State-trading countries on 29 October 1993:

Exceptional opening of import facilities for the following products:

— *People's Republic of China*

— Sewing machines of the household type (CN code ex 8452 10 11) 440 units

— Industrial sewing machines (CN code ex 8452 29 00) 1 500 units

— Ball or roller bearings (CN code 8482) ECU 684 500

— Umbrellas and sun umbrellas (including walking-stick umbrellas, garden umbrellas and similar umbrellas) (CN code 6601) 1 104 526 units

— *Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine*

— Parts suitable for use solely or principally with the engines of heading No 8407 or 8408 (CN code 8409) ECU 26 740

(1) OJ No L 346, 8. 12. 1983, p. 6.

Standing invitation to tender pursuant to Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs

(93/C 307/07)

(See notice in Official Journal of the European Communities *No L 55 of 1 March 1988, page 31)*

Tender No: 125

Date of Commission Decision: 29 October 1993

(ECU/100 kg)

Formula			A/C–D		B	
Incorporation procedure			With tracers	Without tracers	With tracers	Without tracers
Minimum price	Butter ≥ 82 %	Unaltered	—	116	—	—
		Concentrated	100	—	—	—
Processing security		Unaltered	199		—	
		Concentrated	211		—	
Maximum aid amount	Butter ≥ 82 %		134	131	—	131
	Butter < 82 %		—	127	—	—
	Concentrated butter		173	170	173	170
	Cream		—	—	57	—
Processing security	Butter		148	—	—	—
	Concentrated butter		191	—	191	—
	Cream		—	—	63	—

Communication of Decisions under sundry tendering procedures in agriculture (milk and milk products)

(93/C 307/08)

(See notice in Official Journal of the European Communities *No L 360 of 21 December 1982, page 43)*

(ECU/100 kg)

Standing invitation to tender	Tender No	Date of Commission Decision	Maximum buying-in price
Commission Regulation (EEC) No 1589/87 of 5 June 1987 on the sale by tender of butter to intervention agencies (OJ No L 146, 6. 6. 1987, p. 27)	146	29. 10. 1993	252,30

(ECU/100 kg)

Standing invitation to tender	Tender No	Date of Commission Decision	Maximum aid	End-use security
Commission Regulation (EEC) No 429/90 of 20 February 1990 on the granting by invitation to tender of an aid for concentrated butter intended for direct consumption in the Community (OJ No L 45, 21. 2. 1990, p. 8)	85	29. 10. 1993	195	227

(ECU/100 kg)

Standing invitation to tender	Tender No	Date of Commission Decision	Minimum selling price
Commission Regulation (EEC) No 2839/93 of 18 October 1993 on the special sale of intervention butter for export to the Republics of the former Soviet Union	1	4. 11. 1993	Tenders rejected

Communication of decisions under sundry tendering procedures in agriculture

(93/C 307/09)

(See notice in Official Journal of the European Communities *No L 360 of 21 December 1982, page 43)*

Invitation to tender	Tender No	Date of Commission decision	Minimum selling price
Commission Regulation (EEC) No 2823/93 of 15 October 1993 opening an invitation to tender for the sale of olive oil held by the Spanish intervention agency (OJ No L 258, 16. 10. 1993, p. 3)		5. 11. 1993	Ordinary virgin olive oil: ECU 192,50/100 kg
Commission Regulation (EEC) No 2822/93 of 15 October 1993 opening an invitation to tender for the sale of olive oil held by the Italian intervention agency (OJ No L 258, 16. 10. 1993, p. 1)		5. 11. 1993	Ordinary virgin olive oil: tenders rejected Lampante virgin olive oil 3°: tenders rejected
Commission Regulation (EEC) No 2763/93 of 7 October 1993 opening an invitation to tender for the sale of olive oil held by the Italian intervention agency (OJ No L 251, 8. 10. 1993, p. 8)		5. 11. 1993	Extra virgin olive oil: tenders rejected

COURT OF AUDITORS

OPINION No 7/93 OF THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES

on a proposal for a Council Regulation (EEC, Euratom) amending Council Regulation (EEC, Euratom) No 1552/89 implementing Decision No 88/376/EEC, Euratom concerning the system of the Communities' own resources

(93/C 307/10)

THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 209 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 183 thereof,

Having regard to Council Decision No 88/376/EEC, Euratom, of 24 June 1988 (1) concerning the system of the Communities' own resources,

Having regard to Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 (2) implementing Decision No 88/376/EEC, Euratom, concerning the system of the Communities' own resources,

Having regard to Council Regulation (EEC) No 1765/92 of 30 June 1992 (3) establishing a support system for producers of certain arable crops,

Having regard to the proposal submitted by the Commission on 17 May 1993,

Having regard to the request by the Council for the Court's Opinion on this proposal, received by the Court on 18 June 1993,

Whereas, according to the Commission's calculations, refunds to the Member States of the aid laid down in Council Regulation (EEC) No 1765/92 introducing a system of support for producers of certain arable crops are, as a consequence of Article 10 of this Regulation, likely to be concentrated in the initial months of the financial year and the amounts to be paid out are likely to be well in excess of the cash resources available during that period, in the light of the sums of own resources normally made available;

Whereas the provisions of Article 10 (2) of Council Regulation (EEC, Euratom) No 1552/89 authorize the Commission to ask the Member States to enter own resources other than VAT resources and the additional GNP resource one month earlier than usual; but whereas, according to the Commission, this option would not, on its own, be enough to meet the estimated needs;

Whereas the option provided for the Commission in Article 12 (2) of the same Regulation of making drawings over and above the level of total available funds in the own resources accounts referred to in Article 9 (1) could not be systematically made use of in cases of the type envisaged in the Commission's proposal; and whereas, moreover, this option should be subject to stricter control than is the case now,

HAS ADOPTED THE FOLLOWING OPINION:

PART ONE

General observations

1. As part of the reform of the CAP, Council Regulation (EEC) No 1765/92 introduced direct aid to producers of cereals and protein crops and compensation for the set-aside obligation. Arising from the EAGGF-Guarantee, the Commission is required to reimburse Member States for payments they have made in respect of this aid in January and February of each year. The monthly frequency of its payments is thereby seriously affected and this poses a cash-flow problem, the extent of which cannot be accurately calculated.

2. The option of calling up one or two twelfths of the VAT and additional GNP own resources in advance of the due date is, in itself, complementary to the one already existing in respect of the traditional own

(1) OJ No L 185, 15. 7. 1988, p. 24.
(2) OJ No L 155, 7. 6. 1989, p. 1.
(3) OJ No L 181, 1. 7. 1992, p. 12.

resources. The procedures governing such a call should, however, be adjusted, so as to make them more closely adapted to the strict cash-flow needs. For this reason there ought to be an explicit provision allowing the VAT and GNP twelfths to be called up separately, or allowing the Commission to call up only a part of a particular twelfth if it is not needed in its entirety.

3. The Court considers that it would be inappropriate to make use of the provisions of Article 12 (2) to meet cash needs that are structural in nature. It has already stressed, in its Opinion No 5/93 (1), the risk inherent in such facilities, should they be used in the conditions specified in paragraph 3. It ought not normally be possible for these facilities to be combined with the new provisions proposed by the Commission.

4. Regarding the question of cash management, the Court recommends that when estimating monthly liabilities use should be made in future of all existing methods for evening out expenditure before calling up traditional, VAT and GNP resources in advance of the due date. This approach is consistent with sound financial management of the implementation of the budget.

(1) OJ No C 170, 21. 6. 1993, pp. 34 and 36.

5. The Court regrets that the Commission is proposing to draw conclusions from Regulation (EEC) No 1765/92 in respect of the operation of the own resources system after a time lapse of almost a year. The Commission could have included this matter in its previous proposals for an amendment to Regulation (EEC, Euratom) No 1552/89, which would have made it possible to take an overall view and would have led to greater transparency in the own resources system.

PART TWO

Examination of the Articles

In the attached table the Court sets out its amendments to the Commission's proposal, as adumbrated in Part One:

THE COMMISSION'S PROPOSALS	THE COURT'S PROPOSALS	COMMENTS
Article 1		
Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision No 88/376/EEC, Euratom concerning the system of the Communities own resources shall be amended as follows:		
Article 10		
Add after the first subparagraph of paragraph 3 the following text:	Amend this new subparagraph No 2 as follows:	
'For the specific needs of paying EAGGF Guarantee Section expenditure, Member States may be invited by the Commission to bring forward by one or two months the entry of one-twelfth of the amounts in the budget for VAT resources and the additional resource, but excluding own resources to cover the EAGGF (European Agricultural Guidance and Guarantee Fund) monetary reserve, [the reserve for loan guarantees and the reserve for emergency aid].	'For the specific needs of paying EAGGF Guarantee Section expenditure **and in the light of the situation of the Community Treasury,** Member States may be invited by the Commission to bring forward by one or two months the entry **of one twelfth or part of one twelfth of the amounts in the budget for VAT resources and/or the additional resource,** but excluding own resources to cover the EAGGF (European Agricultural Guidance and Guarantee Fund) monetary reserve [the reserve for loan guarantees and the reserve for emergency aid].'	This amendment is intended to give the Commission the power to call up only such amounts as are strictly necessary to meet its cash needs, and not automatically the VAT and GNP twelfths in their entirety.
The sixth subparagraph concerning the amount to be entered in January each year and the seventh subparagraph applicable if the budget has not been finally adopted before the beginning of the financial year shall apply to these advance entries.'		

This opinion was adopted by the Court of Auditors in Luxembourg at the Court meeting of 23 September 1993.

For the Court of Auditors

André J. MIDDELHOEK

President