

Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions

(2003/C 297/03)

1. INTRODUCTION

- (1) This Communication sets out how the Commission intends to deal with requests by Member States, as addressees of State aid decisions, to consider parts of such decisions as covered by the obligation of professional secrecy and thus not to be disclosed when the decision is published.
- (2) This involves two aspects, namely:
 - (a) the identification of the information which might be covered by the obligation of professional secrecy; and
 - (b) the procedure to be followed for dealing with such requests.

2. LEGAL FRAMEWORK

- (3) Article 287 of the Treaty states that: 'The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'.
- (4) This is also reflected in Articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾.
- (5) Article 253 of the Treaty states: 'Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty'.
- (6) Article 6(1), first sentence of Regulation (EC) No 659/1999 further stipulates with regard to decisions to initiate the formal investigation procedures: 'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market [...]'

3. IDENTIFICATION OF INFORMATION WHICH CAN BE COVERED BY PROFESSIONAL SECRECY

- (7) The Court of Justice has established that although Article 287 of the Treaty primarily refers to information gathered from undertakings, the expression 'in particular' shows that the principle in question is a general one which applies also to other confidential information ⁽²⁾.
- (8) It follows that professional secrecy covers both business secrets and other confidential information.
- (9) There is no reason why the notions of business secret and other confidential information should be interpreted differently from the meaning given to these terms in the context of antitrust and merger procedures. The fact that in antitrust and merger procedures the addressees of the Commission decision are undertakings, while in State aid procedures the addressees are Member States, does not constitute an obstacle to a uniform approach as to the identification of what can constitute business secrets or other confidential information.

3.1. Business secrets

- (10) Business secrets can only concern information relating to a business which has actual or potential economic value, the disclosure or use of which could result in economic benefits for other companies. Typical examples are methods of assessing manufacturing and distribution costs, production secrets (that is to say, a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort) and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost price structure, sales policy, and information on the internal organisation of the undertaking.
- (11) It would appear that in principle business secrets can only relate to the beneficiary of the aid (or other third party) and can only concern information submitted by the Member State (or third party). Hence, statements from the Commission itself (for example, expressing doubts about feasibility of a restructuring plan) cannot be covered by the obligation of professional secrecy.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ Case 145/83 *Adams v Commission* [1985] ECR 3539, paragraph 34, and Case T-353/94 *Postbank v Commission* [1996] ECR II-921, paragraph 86.

(12) The simple fact that disclosure of information might cause harm to the company is not of itself sufficient grounds to consider that such information should be considered as business secret. For example, a Commission decision to initiate the formal investigation procedure in the case of a restructuring aid may cast doubt on certain aspects of the restructuring plan in the light of information the Commission has received. Such a decision could (further) affect the credit-position of that company. However, that would not necessarily lead to the conclusion that the information on which that decision was based must be considered as business secrets.

(13) In general, the Commission will apply the following non-exhaustive list of criteria to determine whether information can be deemed to constitute business secrets:

- (a) the extent to which the information is known outside the company;
- (b) the extent to which measures have been taken to protect the information within the company, for example, through non compete clauses or non-disclosure agreements imposed on employees or agents, etc;
- (c) the value of the information for the company and its competitors;
- (d) the effort or investment which the undertaking had to undertake to acquire the information;
- (e) the effort which others would need to undertake to acquire or copy the information;
- (f) the degree of protection offered to such information under the legislation of the Member State concerned.

(14) In principle, the Commission considers that the following information would not normally be covered by the obligation of professional secrecy:

- (a) information which is publicly available, including information available only upon payment through specialised information services or information which is common knowledge among specialists in the field (for example common knowledge among engineers or medical doctors). Likewise, turnover is not normally considered as a business secret, as it is a figure published in the annual accounts or otherwise known to the market. Reasons must be given for requests for confidentiality concerning turnover figures which are not in the public domain and the requests must be evaluated on a case-by-case basis. The fact that information is not publicly available does not necessarily mean that the information can be regarded as a business secret;

(b) historical information, in particular information at least five years old;

(c) statistical or aggregate information;

(d) names of aid recipients, sector of activity, purpose and amount of the aid, etc.

(15) Detailed reasons must be given for any request to derogate from these principles in exceptional cases.

3.2. Other confidential information

(16) In antitrust and merger cases, confidential information includes certain types of information communicated to the Commission on condition that confidentiality is observed (for example a market study commissioned by an undertaking which is party to the procedure and forming part of its property). It seems that a similar approach could be retained for State aid decisions.

(17) In the field of State aid, there may, however, be some forms of confidential information, which would not necessarily be present in antitrust and merger procedures, referring specifically to secrets of the State or other confidential information relating to its organisational activity. Generally, in view of the Commission's obligation to state the reasons for its decisions and the transparency requirement, such information can only in very exceptional circumstances be covered by the obligation of professional secrecy. For example, information regarding the organisation and costs of public services will not normally be considered 'other confidential information' (although it may constitute a business secret, if the criteria laid down in section 3.1 are met).

4. APPLICABLE PROCEDURE

4.1. General principles

(18) The Commission's main task is to reconcile two opposing obligations, namely the requirement to state the reasons for its decisions under Article 253 of the Treaty and therefore ensure that its decisions contain all the essential elements on which they are based, and that of safeguarding the obligation of professional secrecy.

(19) Besides the basic obligation to state the reasons for its decisions, the Commission has to take into account the need for effective application of the State aid rules (*inter alia*, by giving Member States, beneficiaries and interested parties the possibility to comment on or challenge its decisions) and for transparency of its policy. There is therefore an overriding interest in making public the full substance of its decisions. As a general principle, requests for confidential treatment can only be granted where strictly necessary to protect business secrets or other confidential information meriting similar protection.

- (20) Business secrets and other confidential information do not enjoy an absolute protection: this means for example that they could be divulged when they are essential for the Commission's statement of the reasons for its decisions. This means that information necessary for the identification of an aid measure and its beneficiary cannot normally be covered by the obligation of professional secrecy. Similarly, information necessary to demonstrate that the conditions of Article 87(1) of the Treaty are met, cannot normally be covered by the obligation of professional secrecy. However, the Commission will have to consider carefully whether the need for publication is more important, given the specific circumstances of a case, than the prejudice that might be generated for that Member State or undertaking involved.
- (21) The public version of a Commission decision can only feature deletions from the adopted version for reasons of professional secrecy. Paragraphs cannot be moved, and no sentence can be added or altered. Where the Commission considers that certain information cannot be disclosed, a footnote may be added, paraphrasing the non-disclosed information or indicating a range of magnitude or size, if useful to assure the comprehensibility and coherence of the decision.
- (22) Requests not to disclose the full text of a decision or substantial parts of it which would undermine the understanding of the Commission's statement of reasons cannot be accepted.
- (23) If there is a complainant involved, the Commission will take into account the complainant's interest in ascertaining the reasons why the Commission adopted a certain decision, without the need to have recourse to Court proceedings⁽¹⁾. Hence, requests by Member States for parts of the decision which address concerns of complainants to be covered by the obligation of professional secrecy will need to be particularly well reasoned and persuasive. On the other hand, the Commission will not normally be inclined to disclose information alleged to be of the kind covered by the obligation of professional secrecy where there is a suspicion that the complaint has been lodged primarily to obtain access to the information.
- (24) Member States cannot invoke professional secrecy to refuse to provide information to the Commission which the Commission considers necessary for the examination of aid measures. In this respect, reference is made to the procedure set out in Regulation (EC) No 659/1999 (in particular Articles 2(2), 5, 10 and 16).
- considers to be covered by the obligation of professional secrecy. This time period may be extended by agreement between the Commission and the Member State concerned.
- (26) Where the Member State concerned does not indicate which information it considers to be covered by the obligation of professional secrecy within the period prescribed by the Commission, the decision will normally be disclosed in full.
- (27) Where the Member State concerned wishes certain information to be covered by the obligation of professional secrecy, it must indicate the parts it considers to be covered and provide a justification in respect of each part for which non-disclosure is requested.
- (28) The Commission will then examine the request from the Member State without delay. If the Commission does not accept that certain parts of the decision are covered by the obligation of professional secrecy, it will state the reasons why in its view those parts cannot be left out of the public version of the decision. In the absence of an acceptable justification by the Member State for its request (i.e. reasoning which is not manifestly irrelevant or manifestly wrong), the Commission need not further specify the reasons why those parts cannot be left out of the public version of the decision other than by referring to the absence of justification.
- (29) If the Commission decides to accept that certain parts are covered by the obligation of professional secrecy without agreeing in full with the Member State's request, it will notify its decision with a new draft to the Member State indicating the parts which have been omitted. If the Commission accepts that the parts indicated by the Member State are covered by the obligation of professional secrecy, the text of the decision will be published pursuant to Article 26 of Regulation (EC) No 659/1999, with the omission of the parts covered by the obligation of professional secrecy. Such omissions will be indicated in the text⁽²⁾.
- (30) The Member State will have 15 working days following receipt of the Commission's decision stating the reasons for its refusal to accept the non-disclosure of certain parts, to react and provide additional elements to justify its request.

4.2. Procedure

- (25) The Commission currently notifies its decisions to the Member State concerned without delay and gives the latter the opportunity to indicate, normally within a time period of 15 working days, which information it
- (31) If the Member State concerned does not react further within the period prescribed by the Commission, the Commission will normally publish the decision as indicated in its reply to the original request made by the Member State.

⁽¹⁾ Case C-367/95 P *Commission v Sytraval* [ECR] 1998 I-1719, paragraph 64.

⁽²⁾ Using square brackets [...] and indicating in a footnote 'covered by the obligation of professional secrecy'.

- (32) If the Member State concerned does submit any additional elements within the prescribed period, those elements will be examined by the Commission without delay. If the Commission accepts that the parts indicated by the Member State are covered by the obligation of professional secrecy, the text of the decision will be published as set out in paragraph (29).
- (33) In the event that it is not possible to reach agreement, the Commission will proceed with the publication of its decision to initiate the formal investigation procedure forthwith. Such decisions must summarise the relevant issues of fact and law, include a preliminary assessment of the aid character of the proposed measure and set out the doubts as to its compatibility with the common market. Clearly certain essential information must be included in order to enable third parties and the other Member States to comment usefully. The duty of the Commission to provide such essential information will normally prevail over any claim to the protection of business secrets or other confidential information. Furthermore, it is in the interest of the beneficiary as well as interested parties to have access to such a decision as quickly as possible. Permitting any delay in this respect would jeopardise the process of State aid control.
- (34) In the event that it is not possible to reach agreement on requests for certain information in decisions not to raise objections and decisions to close the formal investigation procedure to be covered by the obligation of professional secrecy, the Commission will notify its final decision to the Member State together with the text it intends to publish, giving the Member State another 15 working days to react. In the absence of an answer which the Commission considers pertinent, the Commission will normally proceed with the publication of the text.
- (35) The Commission is currently reviewing its State aid notification forms. In order to avoid unnecessary correspondence with Member States and delay in the publication of decisions, it intends, in the future, to include in the form a question asking whether the notification contains information which should not be published, and the reasons for non-publication. Only if that question is answered in the affirmative will the

Commission enter into correspondence with the Member State in respect of specific cases. Similarly, if additional information is required by the Commission, the Member State will have to indicate at the moment it provides the information requested whether such information should not be published, and the reasons for non-publication. If the Commission uses the information thus identified by the Member State in its decision, it will communicate the adopted decision to the Member State, stating the reasons why in its view these parts cannot be left out from the public version of the decision as laid down in paragraph (28).

- (36) Once the Commission has decided what text it will publish and notified the Member State of its final decision, it is for the Member State to decide whether or not to make use of any judicial procedures available to it, including any interim measures, within the time limits provided for in Article 230 of the EC Treaty.

4.3. Third parties

- (37) Where third parties other than the Member State concerned (for example, complainants, other Member States or the beneficiary) submit information in the context of State aid procedures, these guidelines will be applied *mutatis mutandis*.

4.4. Application in time

- (38) These guidelines cannot establish binding legal rules and do not purport to do so. They merely set out in advance, in the interests of sound administration, the manner in which the Commission intends to address the issue of confidentiality in State aid procedures. As a rule, if agreement cannot be reached, the Commission's decision to publish may be the subject of specific judicial review proceedings. As these guidelines merely pertain to procedural matters (and to a large extent set out existing practice), they will be applied with immediate effect, including for decisions not to raise objections⁽¹⁾ adopted before the entry into force of Regulation (EC) No 659/1999 to which third parties seek access.

⁽¹⁾ Decisions to initiate the formal investigation procedure and final decisions adopted before that date were already published in full in the *Official Journal of the European Communities*. Prior to publication, Member States could indicate whether any information was covered by the obligation of professional secrecy.