



Introduction to State Aid Control: Procedures

21 January 2015

Overview

- formal procedure
- enforcement of state aid decisions – recovery
- DG COMP decision-making process
- Commission decision-making process

Source of Information

- Manual of Procedures (ManProc):
 - details on rules
 - practical guidance
 - fiche pratiques with timetables, circulation lists etc.
- functional mailbox COMP 03 ManProc



Rules

- Article 108 TFEU
- Procedural Regulation 659/1999 (OJ L 83 of 27.3.1999) (as amended)
- Implementing Regulation 794/2004 (OJ L 140 of 30.4.2004)
- Notice on Simplified Procedure (OJ C 136 of 16.6.2009)
- Jurisprudence
- Best Practices Code



Procedural Regulation 1999 (as amended)

Procedural Regulation

Chapter 1: Definitions

Chapter 2: Procedure Notified Aid

Chapter 3: Procedure Unlawful Aid

Chapter 4: Procedure Misuse Aid

Chapter 5: Procedure Existing Aid

Chapter 6: Interested Parties

Chapter 7: Monitoring

Chapter 8: Common Provisions



4 procedures

Definitions

- new aid / existing aid
 - alteration to existing aid = new aid
 - pre-accession/pre-Treaty
 - authorised by Commission or Council
 - Lorenz procedure
 - limitation period
 - has become aid due to evolution of common market
- aid scheme / individual aid
- notified aid / unlawful aid (= illegal = non-notified aid)
- misuse of aid

} existing aid

Procedure: Notified Aid ⁽¹⁾

- notification & standstill obligation (Art. 108(3))
- exceptions:
 - de minimis aid
 - aid covered by an authorised aid scheme
 - aid covered by block exemption

Procedure: Notified Aid (2)

- Phase 1: preliminary examination by Commission
 - time limit: 2 months after complete notification
 - if not complete, information request
 - if no answer after reminder, deemed withdrawn
 - Lorenz procedure:
 - MS gives prior notice that aid will be implemented
 - if no decision within 15 working days, aid is deemed authorised

Procedure: Notified Aid (3)

- Phase 1: decision after preliminary examination (Art. 4)
 - no aid decision
 - no objection decision (compatible aid)
 - opening decision (doubts on compatibility = opening of formal investigation procedure)
- opening of procedure normally not appealable
- no negative decision
- no conditional decision (only commitment by MS)

Procedure: Notified Aid (4)

- Phase 2: formal investigation procedure
 - send letter to MS (Art. 25)
 - publication of opening of procedure (Art. 26(2))
 - MS and interested parties are invited to comment (Art. 20)
 - MS can comment on the observations from interested parties

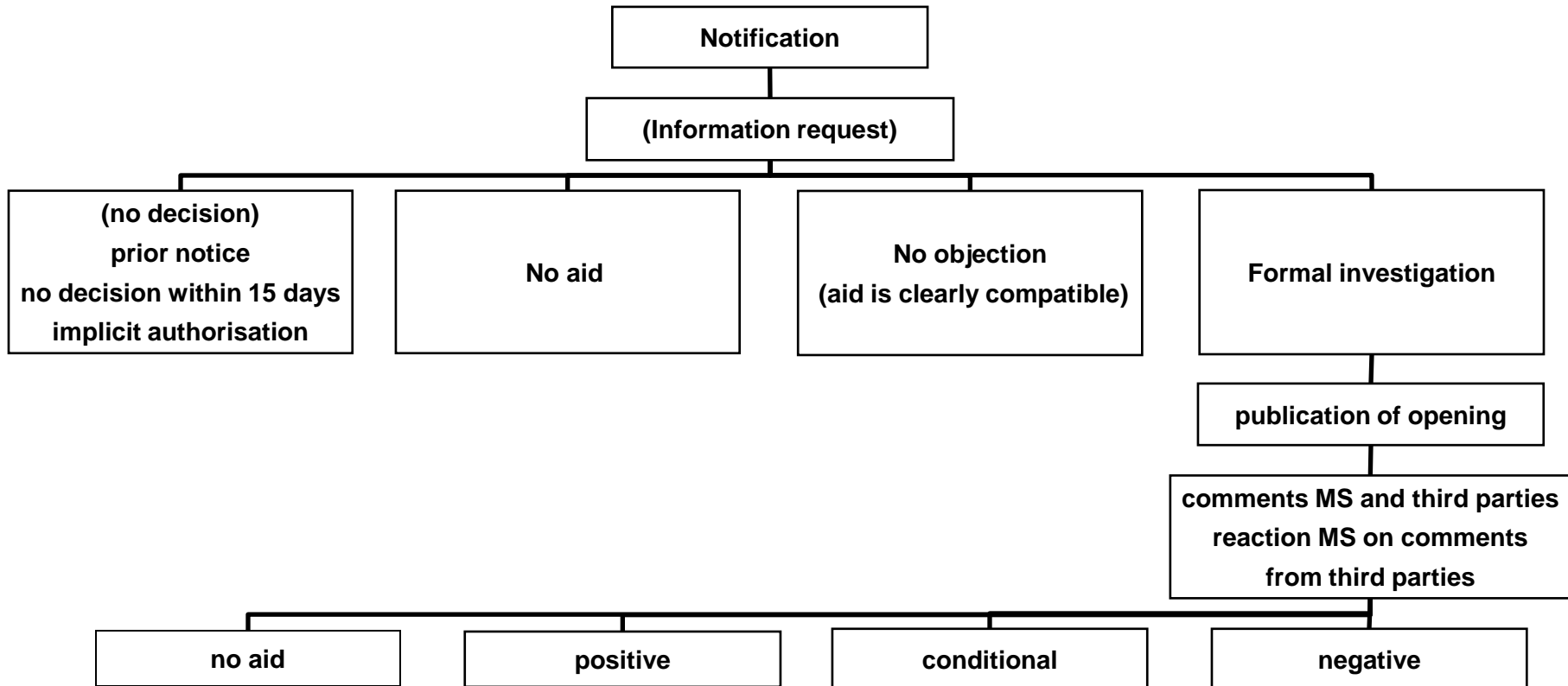
Procedure: Notified Aid (5)

- Phase 2: closure of formal investigation (Art. 7)
 - no aid decision
 - positive decision
 - conditional decision
 - negative decision
- time limit: 18 months (non-binding)
 - "as soon as the doubts have been removed"
 - consequences of non-respect: *Regione Siciliana* (T-190/00)

"Without Object" Decision

- decision type sui generis (rare)
- after opening, situation changes \Rightarrow decision on compatibility not necessary any more
- classic example: withdrawal of notification after opening
- or: beneficiary + effects of aid disappear from market through liquidation process (impact on competition has been removed)
- do not confuse with "no objection" decision!

Procedure: Notified Aid (6)



Procedure: Unlawful Aid

- similar procedure as for notified aid
- differences:
 - Art. 10(1): start of the procedure
 - complaint or *ex officio*
 - Art. 13(2): no time limits
 - use of injunctions
 - Art. 10(3): information injunction
 - Art. 11(1): suspension injunction
 - Art. 11(3): recovery injunction
 - negative Decision leads to recovery

Procedure: Misuse of Aid

- Art. 16
- misuse of aid: used by beneficiary in contravention of the decision authorising the aid
- procedure: as for unlawful aid, but Commission must always open the formal investigation procedure

Procedure: Existing Aid ⁽¹⁾

- definition: Article 1(b) Procedural Regulation
- most common: aid granted before accession
- new Member States: existing aid lists
- in practice almost exclusively schemes

Procedure: Existing Aid (2)

- Art. 18-19: Constant review in cooperation with MS
 - annual reports: Art. 21
 - information requests: Art. 17(1)
- letter explaining preliminary view: Art. 17(2)
- proposal for appropriate measures: Art. 18
 - basic principle: only changes for the future
- MS accepts or rejects proposal (Art.19)
 - acceptance: proposed measure must be implemented
 - refusal:
 - Commission must open the formal investigation procedure
 - after final decision, appropriate measures become binding

Common Provisions

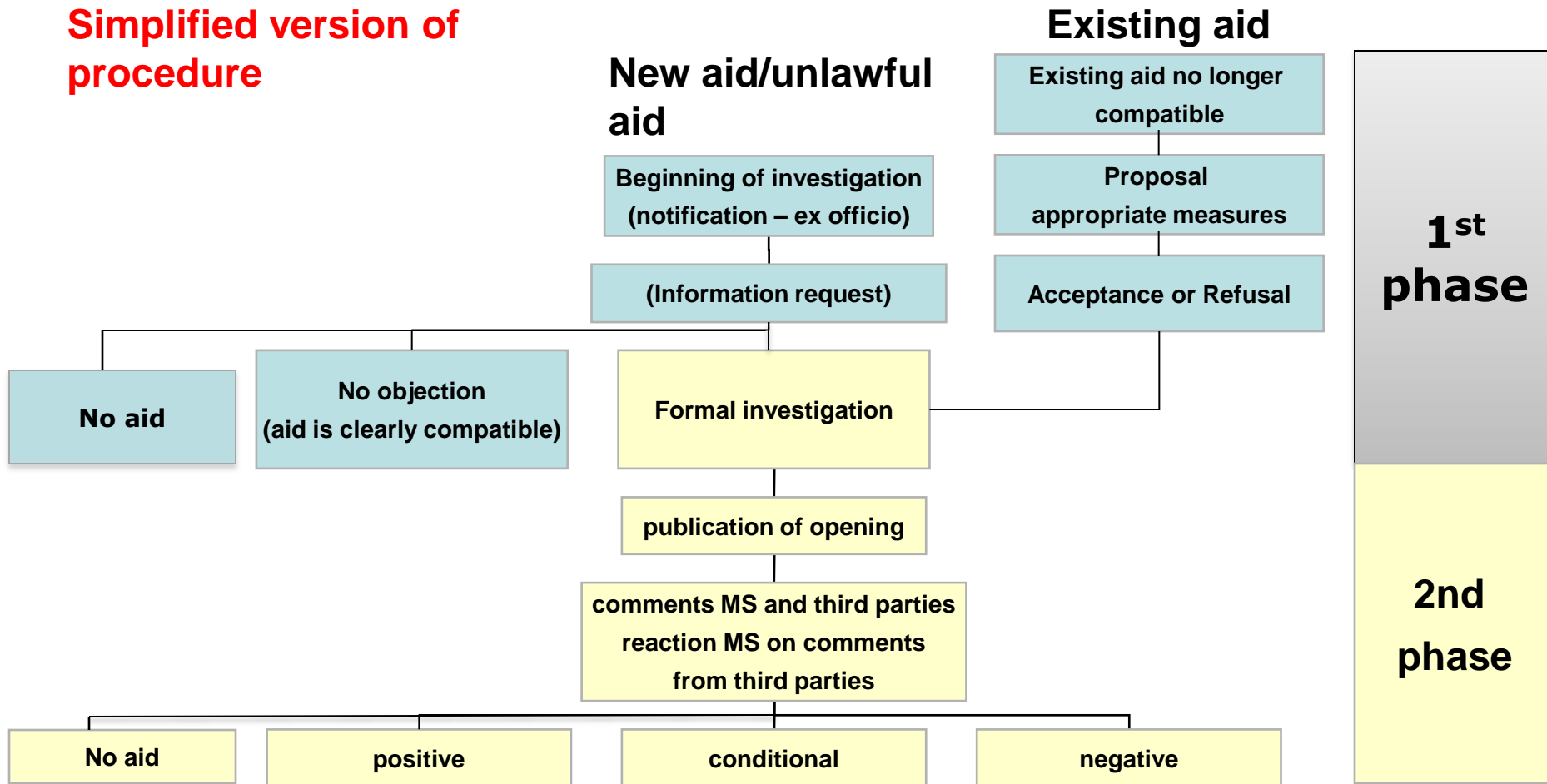
- Art. 24: professional secrecy (Art. 339 TFEU)
 - see also Commission Communication on professional secrecy in State aid decisions
- Art. 25: addressee of decisions = MS
- Art. 26: publication of decisions
 - summary notice in OJ (cartouche)
 - meaningful summary
 - full decision

Additional Procedural Tools

- Market Information Tools (MIT)
 - COM can address questions to third parties
 - only during formal investigation
 - only if procedure so far "ineffective"
 - possibility of fines for providing incorrect information / failing to answer
- Sector Inquiries (SI)
 - investigation of particular issue (aid instrument, sector) in several MS
 - reasonable suspicion necessary
 - final report

Procedure

Simplified version of procedure





Implementing Regulation 2004

Implementing Regulation (1)

- implementing provisions:
 - form, content of notification form
 - form, content of annual reports
 - details of time limits
 - interest rate for recovery

Implementing Regulation (2)

- notification forms:
 - standard part
 - supplementary information sheets per aid type
- notification in practice:
 - notification through electronic validation – shall be considered to be sent by PermRep
 - Commission writes to PermRep
 - MS to identify confidential information

Implementing Regulation (3)

- simplified procedure for certain alterations of approved schemes (Art.4):
 - Increase of budget of more than 20%
 - Prolongation of scheme for max. 6 years
 - Tightening of criteria, reduction of aid intensity, reduction of eligible expenses
- decision within one month (best effort)
- only if annual reports have been submitted



Notice on a Simplified Procedure 2009

Simplified Procedure (1)

- certain types of state aid specified
- straightforward notifications
- different from the “simplified procedure” under the Implementing Regulation!
- decision within one month (best efforts)

Simplified Procedure (2)

- pre-notification phase:
 - draft notification form
 - COMP confirms eligibility and whether information complete
- notification phase:
 - publication of notification summary on COMP website
 - 10 days for 3rd parties to comment
 - if no concerns ⇒ short decision by empowerment



Recovery Policy

Principles and Procedure

DG COMP, Unit H.4 – Enforcement and procedural reform

Purpose of Recovery

- The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid.
- Recovery is not a penalty, but the logical consequence of finding aid illegal and incompatible.
- The aid must be recovered together with recovery interests (Article 14 of the Procedural Regulation 659/1999).
- Recovery is governed by national law (procedural autonomy), provided this allows for immediate and effective recovery.

Early Involvement of H4

- Operative Unit should get in touch with H.4 at a sufficiently early stage of investigation in order to establish the key elements of recovery obligation:
 - Exact identification of the beneficiary, the aid and calculation, its form and date of granting.
 - Identification of the calculation method and other elements necessary for the establishment of the aid amount: not in the operative part, but in the conclusions of the main part of the decision.
 - Discussions on possible “obstacles” to recovery – as the case may be

"...sufficiently early stage..."

- Before NCOM proposing opening formal investigation in case there are indications that a negative decision with recovery is likely.
- At the latest: after comments from Member State in reply to the opening decision (negative decision with recovery likely).

Example of a Standard Recovery Decision

Article 1

The State aid amounting to EUR *<amount>* unlawfully granted by *<Member State>*, in breach of Article 108(3) of the TFEU, in favour of *<identity of the beneficiary>* is incompatible with the internal market.

Article 2

1. *<Member State>* shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. *<Member State>* shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of notification of this decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. *<Member State>* shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, *<Member State>* shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. *<Member State>* shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to *<Member State>*.

Failure to Implement/Deggendorf

- Application of “Deggendorf” case-law (T-244/93 and T-486/93):
 - obligation of Member States to suspend new aid where earlier illegal and incompatible aid has not yet been repaid
 - possibility of conditional approval by the Commission (granting of new aid suspended until previous aid reimbursed)

Role of EU/National Courts

- EU courts:
 - Application for annulment of recovery decisions (Article 263 TFEU)
 - Application for interim relief (Article 278 TFEU)
- national courts:
 - In case appl. for annulment before GC is not possible for the applicant (e.g.: beneficiaries of schemes which normally do not have legal standing)
 - Competent for actions against national acts implementing the recovery decision

Provisional recovery in case of pending (court) proceedings

Failure to Implement/Infringement

- The decision is binding on all organs of the State, including its national courts
- Infringement action against the Member State under Article 108(2) TFEU
 - non-implementation by the Member State of the decision
- Infringement action against the Member State under Article 260 TFEU
 - non-implementation of the Court's judgment
 - preceded by letter of formal notice to the Member State
 - lump sum and/or daily penalty



Monitoring

Monitoring (1)

- *ex post* check of implementation of aid by MS
- 2 types:
 - conditional decisions (MC cases)
 - annual monitoring exercise (MX cases)

Monitoring (2)

- annual monitoring exercise:
 - importance: majority of aid granted through existing schemes (approved or block exempted)
 - control of a sample of existing aid schemes
 - approved and GBER
 - sample across all MS and different types of aid
 - check for compliance with SA rules / decision

Monitoring (3)

- annual monitoring exercise – done in two steps:
 - 1st round: assessment of design of scheme at national level (national legal basis)
 - 2nd round: check at level of individual beneficiaries (individual aid awards)



INTERNAL PROCEDURE

DG COMP and Commission decision-making process

Internal Procedure

- rules of procedure of the Commission:
 - Commission's Rules of Procedure of 24 February 2010 (OJ L55, 5.3.2010)
 - Court of Justice: Commission bound to respect its own rules of procedure; misuse of procedure will make decision liable to annulment on that ground alone



Internal DG COMP decision-making process

Case Allocation

- case (notification, complaint ...) is sent to the Registry
- registry allocates the case to a unit
- HoU designates the case team
- you get an email: "This is your case"

Screening

- initial assessment: as soon as possible
- discussion in team with HoU
- purpose: first evaluation of case
- method: set of tools/criteria in screening checklist
 - priority / enforcement importance
 - degree of distortion of competition
 - need for additional support
- result of screening entered in ISIS; generate PAF (preliminary assessment form)

Screening – Complaints

- formal complaint or market information?
- formal complaint requires:
 - legal standing AND
 - completion of complaints form
- formal complaint: obligation to investigate, but right to prioritise
- market information: discretion whether (and when) to investigate

Investigation Phase (1)

- formal information request (REQ)
- addressed to MS via Perm Rep
- stops and re-sets the clock
- important to get the questions right:
 - normally only 2 REQs
 - 3rd REQ is subject to approval by Director

Investigation Phase (2)

- informal information gathering:
 - can supplement formal REQs
 - e.g. for technical clarification, better factual description in decision
- phone/e-mail
- important: written confirmation / registration in ISIS
- does not stop the clock!

Investigation Phase (3)

- meetings (usually in Brussels):
 - MS authorities + normally Perm Rep
 - sometimes MS + beneficiary
 - sometimes complainant
 - important: written record (internal), written confirmation of information by MS
- cooperation with support units:
 - O3 (legal and policy issues)
 - H4 (recovery issues)
 - CET (economic issues)

Case Shaping Meeting

- decision preparation at in-house level (DG COMP without Commissioner)
- chaired by DDG (or Director)
- tasks:
 - draft issues note before meeting and send to participants
 - circulate record of agreement after the meeting

eCAB - NCOM

- decision preparation at in-house political level (DG COMP with Commissioner)
- important cases → Commissioner → NCOM
- less important cases → Cabinet only → eCAB
- empowerment → neither eCAB nor NCOM
- informal pre-consultation with LS (weekly meetings DDG/LS)
- weekly meeting with Commissioner: A- or B-point



Internal COMM Decision-making Process

Decision: How and By Whom

- written procedure:
 - "virtual" meeting of Commissioners
 - now standard for state aid cases
 - advantage: can be launched at any point
- oral procedure:
 - weekly meeting of Commissioners
 - for state aid cases if objections in written procedure
- empowerment:
 - delegation of power of adoption to Commissioner
 - all minor and routine cases for which empowerment exists

DECISION	Empowerment	Written
Notified aid		
No objections «manifestly compatible»	X	
No objections		X
108(2) proceedings		X
Withdrawal of notification after 108(2) proceedings	X	
Unlawful (non notified)		
No objections «manifestly compatible»	X	
No objections		X
108(2) proceedings		X
Information injunction	X	
Existing aid		
Appropriate measures 108(1)		X
Formal decision –closing 108(2)		X

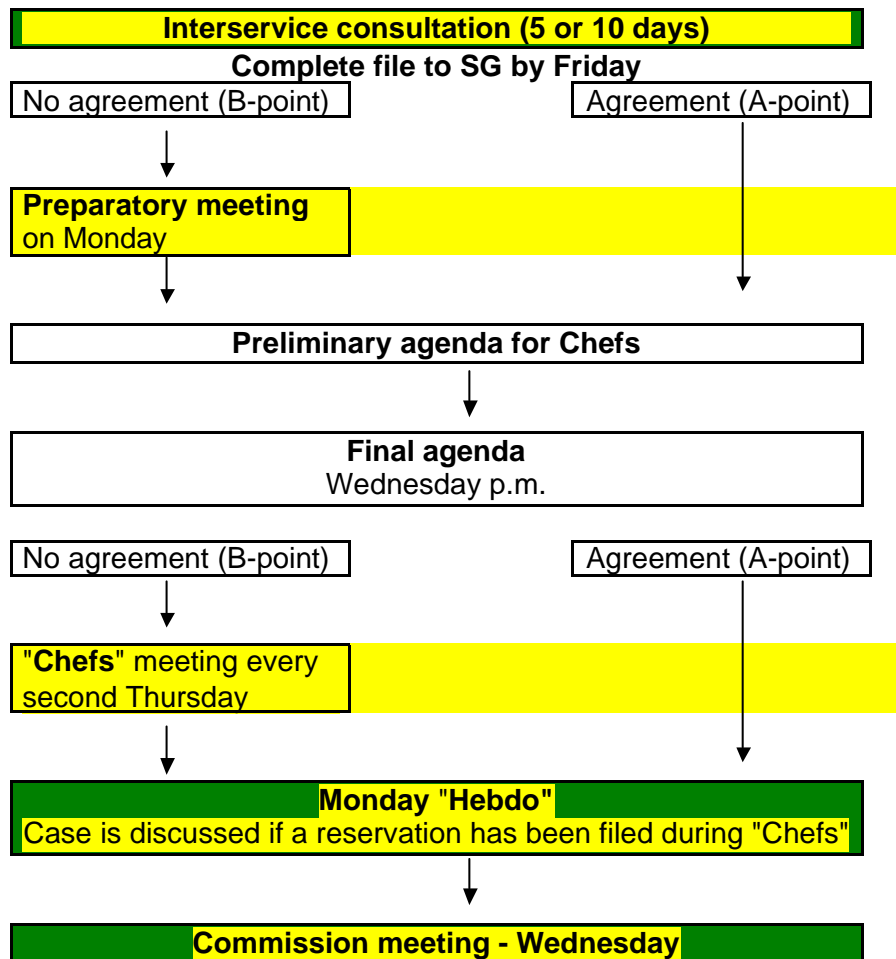
Interservice Consultation (ISC)

- decision preparation at interservice level (other DGs/services)
- draft decision sent to all services potentially concerned (depends on case)
- plus always LS, SG, FISMA, GROW
- purpose: to align positions of various services and work out common approach before proposal is brought before Commission (consistency and transparency)

Basic Processes

- ISC:
 - currently outside CIS-Net: case team sends e-mail to greffe
 - from February (latest March): CIS-Net
- written procedure / empowerment: case secretary uploads in e-greffe
- oral procedure: case team sends e-mail to SG

ORAL PROCEDURE



Languages

- working languages: English, French
 - formal interservice agreement: no decisions in German
- authentic language/langue faisant foi
 - only authentic language version(s) formally adopted and legally binding
- revision by lawyer-linguists necessary for decisions to close formal investigation procedure
- publications of cartouches/meaningful summary/final decisions in all languages

After Commission Decision

- always:
 - transmission of copies
 - deletion of confidential information
 - publication
- sometimes:
 - press release
 - corrigendum (correction)
 - revocation (rare)
 - supervision/monitoring/recovery → H4
 - court procedure → court cellule (03)