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## Legislation

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## II

*(Acts whose publication is not obligatory)*

## EUROPEAN ECONOMIC AREA

## EFTA SURVEILLANCE AUTHORITY

## DECISION OF THE EFTA SURVEILLANCE AUTHORITY

No 4/94/COL

of 19 January 1994

on the adoption and issuing of the Procedural and Substantive Rules in the Field of State Aid

(Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement)

Having regard to the Agreement of the European Economic Area <sup>(1)</sup>, in particular to Articles 61 to 64, points 2 to 37 of Annex XV and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice <sup>(2)</sup>, in particular Articles 5 (2) (b) and 24 and Article 1 of Protocol 3 thereof,

Whereas pursuant to Article 24 of the Surveillance and Court Agreement the EFTA Surveillance Authority shall give effect to the provisions of the EEA Agreement concerning State aid, and, upon the entry into force of this Agreement, adopt acts corresponding to those of the EC Commission listed in Annex I to the Surveillance and Court Agreement;

Whereas pursuant to Article 5 (2) b of the Surveillance and Court Agreement the EFTA Surveillance Authority shall issue notices and guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if the EFTA Surveillance Authority considers it necessary;

Recalling the objective of the acts to provide guidance for governments by indicating the principles and rules which will guide the EFTA Surveillance Authority when applying the EEA Agreement, in particular Articles 49

and 61 to 64, as well as the Surveillance and Court Agreement, in particular Protocol 3 thereof, to a particular case in order to ensure a uniform application of the EEA State aid rules throughout the European Economic Area,

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority adopts and issues the Procedural and Substantive Rules in the Field of State Aid (Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement) annexed to this Decision.

2. These guidelines shall be authentic in the English language and shall be published in the EEA Section of and the EEA Supplement to the *Official Journal of the European Communities*.

Done at Brussels, 19 January 1994.

*For the EFTA Surveillance Authority.*

Knut ALMESTAD,

*President*

<sup>(1)</sup> Hereinafter referred to as the 'EEA Agreement'.

<sup>(2)</sup> Hereinafter referred to as the 'Surveillance and Court Agreement'.

## PROCEDURAL AND SUBSTANTIVE RULES IN THE FIELD OF STATE AID

## Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement

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## PART I

## INTRODUCTION

## 1. INTRODUCTION

- (1) By ratifying the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement) the EFTA States have agreed to establish a Surveillance Authority. The Authority is, pursuant to Article 5 (1) (a) of, and in accordance with Article 1 of Protocol 3 to the Surveillance and Court Agreement, entrusted by the EFTA States to ensure the fulfilment of their obligations pursuant to Article 61 of the EEA Agreement. This Article declares State aid in the meaning of Article 61 (1) to be incompatible with the functioning of this Agreement except in certain circumstances where an exemption is or may be granted (Article 61 (2) and (3) and Article 49).
- (2) When applying these Articles, EFTA Surveillance Authority shall take due account of the principles and rules contained in the acts listed under the third subheading of Annex XV to the EEA Agreement and in Annex I to the Surveillance and Court Agreement respectively ('Acts of which the EC Commission and the EFTA Surveillance Authority shall take due account') <sup>(1)</sup>.
- (3) By listing the relevant acts issued by the EC Commission in the abovementioned Annexes, the Contracting Parties emphasized the relevance of the basic principle of homogeneity for the field of State aid and the need for a uniform State aid control throughout the territory covered by the EEA Agreement in accordance with the substantive and procedural principles set out in these acts. Moreover, the EFTA States committed themselves, pursuant to Article 3 of the EEA Agreement, to contribute to the objectives of the EEA Agreement by taking all appropriate measures to ensure fulfilment of the obligations arising out of the Agreement and to abstain from any measure which could jeopardize their attainment.
- (4) In order to achieve this objective in the field of State aid, the EFTA States undertook, *inter alia*, to notify to the EFTA Surveillance Authority any plans to grant or alter aid as laid down in Article 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement (Article 6 of the EEA Agreement). Provisions on the notification of aid are also contained in the acts listed under the third subheading of Annex XV to the EEA Agreement and in Annex I to the Surveillance and Court Agreement respectively. Under these acts, applied in the EEA context, individual awards of aid as specified in the acts listed in points 15, 16, 30 to 34 and 37 of Annex XV to the EEA Agreement (i.e. points 14, 15, 29 to 33 and 36 of Annex I to the Surveillance and Court Agreement) are to be notified to the EFTA Surveillance Authority as from the entry into force of the EEA Agreement.
- (5) The EFTA Surveillance Authority is obliged, pursuant to Article 24 of the Surveillance and Court Agreement, to adopt acts corresponding to those listed in Annex I to the Agreement. The Authority considers to fulfil this obligation best by adopting and issuing the corresponding acts in a single and consolidated document, the present Procedural and Substantive Rules in the Field of State Aid. Thus, the present guidelines should contribute to the general target of transparency in the field of State aid.
- (6) These guidelines contain all rules corresponding to the acts listed in Annex I of the Surveillance and Court Agreement and all rules corresponding to similar acts adopted by the EC Commission between 1 August 1991 and the entry into force of the EEA Agreement. Their purpose is to provide national administrations and enterprises with information on how the EFTA Surveillance Authority interprets and applies the provisions of the EEA Agreement governing State aid. By adopting these guidelines, the EFTA Surveillance Authority aims at ensuring a uniform implementation, application and interpretation of Articles 61 and 62 of the EEA Agreement as foreseen in Protocol 27 to the EEA Agreement.

<sup>(1)</sup> It shall be noted that these guidelines only contain all non-binding acts corresponding to those issued by the EC Commission before the entry into force of the EEA Agreement. Binding acts in the field of State aid are contained or referred to in the EEA Agreement itself, in particular in Annex XIII, section I (iv) and in the first part of Annex XV thereof.

- (7) Moreover, when applying Articles 61 and 49 of the EEA Agreement, the EFTA Surveillance Authority will have regard to the Joint Declaration on Article 61 (3) (b) of the EEA Agreement, the Joint Declaration on Article 61 (3) (c) of the EEA Agreement and the Joint Declaration on shipbuilding.

## 2. LEGAL BASIS AND GENERAL PROVISIONS

- (1) These guidelines have been adopted by the EFTA Surveillance Authority pursuant to Articles 5 (2) (b) and 24 of the Surveillance and Court Agreement.
- (2) It should be noted that in these guidelines the term 'EFTA States' shall read 'EFTA States contracting parties to the EEA Agreement in respect of which the Agreement has entered into force'.
- (3) These guidelines may be amended or supplemented in the light of experience or to accord with the frameworks and guidelines issued by the EC Commission in the field of State aid. Parts of the guidelines are limited in time<sup>(1)</sup>. Any amendments or supplements will be made by the EFTA Surveillance Authority in accordance with the principles on cooperation with the EC Commission as laid down in Protocol 27 of the EEA Agreement.
- (4) These guidelines and future amendments and additions thereto will be published in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto in accordance with the arrangement with regard to publication of EEA relevant information, referred to in the Final Act of the EEA Agreement.

<sup>(1)</sup> Currently Chapter 15 (Aid for environmental protection — 31. 12. 1999) and Chapter 22 (Aid to the synthetic fibres industry — 31. 12. 1994).

## PART II

PROCEDURES <sup>(1)</sup>

## 3. NOTIFICATION PROCEDURE REGARDING PLANS TO GRANT OR ALTER AID

3.1. *Legal provisions*

- (1) Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement states: 'The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The state concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'.

- (2) This provision essentially places three procedural obligations on the EFTA State concerned:

It is under the obligation:

- (a) to notify any plans to grant or alter aid (first sentence);
  - (b) to do so 'in sufficient time' (first sentence); and
  - (c) not to put the proposed measure into effect until the EFTA Surveillance Authority has taken a decision on the case (third sentence).
- (3) The EFTA Surveillance Authority considers, on the basis of the case-law of the ECJ <sup>(2)</sup>, as its obligation to:
- (a) 'submit its comments', i.e. to take a decision on the case (first sentence). The EFTA Surveillance Authority might at this stage either authorize the aid or open the formal investigation procedure pursuant to Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement. Authorizing decisions taken at this stage shall be known as 'decisions not to raise objections';
  - (b) take a decision without delay (first and second sentences); and
  - (c) initiate the formal investigation procedure pursuant to Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement if it is in any doubt about the compatibility of the aid with the functioning of the EEA Agreement <sup>(3)</sup> (second sentence).

3.2. *Notification arrangements*3.2.1. *Scope of the notification requirement*

- (1) EFTA States are required to notify all planned aid schemes and individual aid cases outside of an existing scheme for approval to the EFTA Surveillance Authority.
- (2) Once a scheme has been authorized by the EFTA Surveillance Authority, individual awards of aid under the scheme need not be notified. However, for particular industries or particular types of aid, individual notification may be required of all awards of aid or of awards exceeding a certain amount. These exceptions are stated either in the substantive part of the guidelines or in a decision authorizing a scheme.

<sup>(1)</sup> This part of the guidelines is a comprehensive set of the procedural rules applied in the field of State aid. It is based on the rules of the European Commission in this field as reflected in the Commission Communications and letters listed in points 2—7 and 10 of Annex XV to the EEA Agreement, on the relevant judgments of the European Court of Justice and on the Commission's practice.

<sup>(2)</sup> ECJ, 20. 3. 1984, Case 84/82, *Germany v. Commission* (1984) ECR 1451, 1488 (paragraphs 12 et seq.), referring to ECJ, 11. 12. 1973, Case 120/73, *Lorenz v. Germany* (1973) ECR 1471, 1481 (paragraph 3).

<sup>(3)</sup> ECJ, 9. 10. 1984, Cases 91 and 127/83, *Heineken Brouwerijen v. Inspecteurs der Vennootschapsbelasting* (1984) ECR 3435, 3452—3453 (paragraphs 16—18).

- (3) The obligation to notify plans to grant or alter aid does not apply solely to the initial plan, but also covers subsequent substantive (not purely administrative) alterations to that plan <sup>(1)</sup>. The notification of the alteration is regarded as a new notification.
- (4) No notification is required for aid falling under the '*de minimis*' rule as explained in Chapter 12.
- (5) When an EFTA State has doubts whether or not a planned measure contains State aid elements, the EFTA Surveillance Authority should be informed of it before the measure is put into effect.

### 3.2.2. Obligation to notify 'in sufficient time'

- (1) The first sentence of Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement provides that the EFTA Surveillance Authority shall be informed of plans to grant new or alter existing aid 'in sufficient time to enable it to submit its comments' i.e., to take a decision on the case. Therefore, except in cases qualifying for the accelerated procedure (see Chapter 11), EFTA States should take into account the period of two months for the EFTA Surveillance Authority to take its decision.

### 3.2.3. Notification formalities

- (1) A notification should refer expressly to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement or to other provisions requiring notification and be sent to the EFTA Surveillance Authority.
- (2) The date of receipt is the reference date for the calculation of the time limit by which the EFTA Surveillance Authority must take a decision on the case.
- (3) The EFTA Surveillance Authority sends the Mission of the EFTA State concerned an acknowledgement which states the date on which the notification was received.
- (4) In order to simplify and to speed up the handling of cases, the EFTA Surveillance Authority recommends the EFTA States to provide in a notification all the items of the information listed in Annex I, Section I, to these guidelines. Section II provides a list of additional information concerning aid to R&D. Any additional information considered necessary by an EFTA State for the assessment of the case, especially in cases of individual aid awards, should also be provided in the notification. A standardized notification form as reproduced in Annex II is to be used for aid qualifying for the accelerated clearance procedure.

### 3.2.4. Requests for additional information

- (1) Should the EFTA Surveillance Authority find the notification to be incomplete, it will endeavour to ask for any further information it may need within 15 working days. A request for further information cancels the start of the period allowed for assessing the notification. The whole period only begins to run again from the date on which the requested further information is received. An acknowledgement is sent by the EFTA Surveillance Authority stating the new effective date of notification.
- (2) The period which will normally be allowed for providing the further information is 20 working days. If there is no answer or the answer is incomplete, the EFTA Surveillance Authority sends a reminder or a request for the missing information, normally allowing 15 working days.

### 3.3. *Prohibition against implementing the proposed aid measure during the EFTA Surveillance Authority's investigation*

- (1) The last sentence of Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement provides that the EFTA State shall not put its proposed measure into effect until the Article 1 (2) procedure

<sup>(1)</sup> ECJ, 9. 10. 1984, Cases 91 and 127/83, Heineken Brouwerijen v. Inspecteurs der Vennootschapsbelasting (1984) ECR 3435, 3452—3453 (paragraphs 16—18).

has resulted in a final decision. This provision implies a general prohibition to implement the aid before the EFTA Surveillance Authority has taken a decision, also in cases where formal proceedings are not opened <sup>(1)</sup>.

- (2) By 'putting into effect' is meant not only the action of granting aid to the recipient. It is sufficient that the conferment of powers enabling the aid to be granted without further formality has taken place.
- (3) If the EFTA State puts the aid measure into effect before the EFTA Surveillance Authority takes a decision, the procedure set out in section 6.2 is applied (see however footnote 1 to 4.1 (1)).

#### 4. DECISIONS NOT TO RAISE OBJECTIONS

##### 4.1. *Time limits*

- (1) The EFTA Surveillance Authority considers as its obligation to take a decision on a notification within a time limit of two months <sup>(2)</sup>. Under exceptional circumstances an extension of this period may be agreed between the EFTA Surveillance Authority and the EFTA State concerned.
- (2) The EFTA Surveillance Authority endeavours to take a decision, in general, within 30 working days.
- (3) In addition, the EFTA Surveillance Authority has set itself a shorter time limit of 20 working days:
  - for new aid schemes for small and medium-sized enterprises which qualify for the accelerated clearance procedure,
  - for amendments of authorized aid schemes qualifying for the accelerated clearance procedure.

If the EFTA Surveillance Authority considers that a case does not fulfil the conditions for accelerated clearance, it informs the EFTA State that the case will be dealt with under the ordinary procedure.

##### 4.2. *Requirements of decisions*

- (1) Before taking a decision on a case without opening proceedings pursuant to Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement, the EFTA Surveillance Authority is under no obligation to inform the other EFTA States and interested parties <sup>(3)</sup>.
- (2) The decision may be on the ground that the proposed measure does not fall within Article 61 (1) of the EEA Agreement at all or that it is eligible for exemption pursuant to Article 61 (2) and (3).

<sup>(1)</sup> See e.g. ECJ, 11. 12. 1973, Case 120/73, *Lorenz v. Germany* (1973) ECR 1471, 1481 (paragraph 4); ECJ, 11. 12. 1973, Case 121/73, *Markmann v. Germany* (1973) ECR 1495, 1506 (paragraph 4); ECJ, 11. 12. 1973, Case 122/73, *Nordsee v. Germany* (1973) ECR 1511, 1522 (paragraph 4); ECJ, 11. 12. 1973, Case 141/73, *Lohrey v. Germany* (1973) ECR 1527, 1538 (paragraph 4); see also ECJ, 15. 7. 1964, Case 6/64, *Costa v. ENEL* (1964) ECR 585, 595—596; ECJ, 21. 5. 1977, Cases 31 and 53/77 R, *Commission v. United Kingdom* (1977) ECR 921, 924 (paragraph 16); ECJ, 3. 5. 1985, Cases 67, 68 and 70/85 R, *Van der Kooy v. Commission* (1985) ECR 1315, 1327 (paragraph 35); and ECJ, 24. 2. 1987, Case 310/85, *Deufil v. Commission* (1987) ECR 901, 927 (paragraph 24).

<sup>(2)</sup> This has been considered as an appropriate period in the jurisprudence of the ECJ. See ECJ, 11. 12. 1973, Case 120/73, *Lorenz v. Germany* (1973) ECR 1471, 1482 (paragraph 4); ECJ, 20. 3. 1984, Case 84/82, *Germany v. Commission* (1984) ECR 1451, 1488 (paragraph 11) and ECJ, 30. 6. 1992, Case No C-312/90, *Spain v. Commission* (1992) ECR I-4117, 4139 and 4142 (paragraphs 18—19). It should be recalled that, at the expiration of this period, the State concerned may grant the proposed aid, provided that it has given prior notice to the EFTA Surveillance Authority. As a consequence, the aid will then come under the system of existing aids. If the EFTA State is implementing the aid without informing the EFTA Surveillance Authority, the aid is treated as aid unlawful on procedural grounds.

<sup>(3)</sup> See ECJ, 20. 3. 1984, Case 84/82, *Germany v. Commission* (1984) ECR 1451, 1488—1489 (paragraph 13); and ECJ, 9. 10. 1984, Cases 91 and 127/83, *Heineken Brouwerijen v. Inspecteurs der Vennootschapsbelasting* (1984) ECR 3435, 3452 (paragraphs 12—15).

- (3) The decision is communicated to the EFTA State concerned by letter.
- (4) Under Protocol 27 (d) to the EEA Agreement, the decision is communicated to the EC Commission.
- (5) To inform the other EFTA States and interested third parties, a notice will be published in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto.
- (6) The published notice usually takes the form of a list of standard items of information.
- (7) If the EFTA State withdraws the aid proposal, the EFTA Surveillance Authority informs it by letter that the file is being closed. The other EFTA States and the EC Commission are not informed, nor is a notice published in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto.

## 5. FORMAL INVESTIGATION PROCEDURE

### 5.1. *Legal provisions*

- (1) Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement states: 'If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.'

### 5.2. *Cases in which the EFTA Surveillance Authority must open an investigation*

- (1) The EFTA Surveillance Authority is obliged to open the procedure provided for in Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement whenever it is in any doubt about the compatibility of the aid with the functioning of the EEA Agreement <sup>(1)</sup>. The procedure is applicable in all types of cases, whether of notified, unnotified or existing aid, although in the latter case it must be preceded by the proposal of 'appropriate measures' <sup>(2)</sup>.
- (2) The decision to open proceedings is without prejudice to the final decision, which may still be to find that the aid is compatible with the functioning of the EEA Agreement. The purpose of proceedings pursuant to Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement is to ensure a comprehensive examination of the case by giving all parties concerned the right to be heard <sup>(3)</sup>.

### 5.3. *Conduct of proceedings*

- (1) When the EFTA Surveillance Authority opens proceedings in a case, the EFTA State concerned and, under Protocol 27 (c) to the EEA Agreement, the EC Commission, are informed of the commencement of proceedings by letter and the other EFTA States and interested parties are informed by notice in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto.
- (2) The proceedings are concluded by a formal decision.

<sup>(1)</sup> ECJ, 20. 3. 1984, Case 84/82, Germany v. Commission (1984) ECR 1451, 1488 (paragraphs 12 et seq.), referring to ECJ, 11. 12. 1973, Case 120/73, Lorenz v. Germany (1973) ECR 1471, 1481 (paragraph 3).

<sup>(2)</sup> See 8.4.2. and ECJ, 30. 6. 1992, Case No C-312/90, Spain v. Commission (1992) ECR I-4117 and ECJ, 30. 6. 1992, Case No C 47/91, Italy v. Commission (1992) ECR I-4145.

<sup>(3)</sup> ECJ, 20. 3. 1984, Case 84/82, Germany v. Commission (1984) ECR 1451, 1488—1489 (paragraph 13); ECJ, 4. 2. 1992, Case C-294/90, British Aerospace and Rover Group v. Commission (1992) ECR I-493, 521—522 (paragraphs 7—14).

**5.3.1. 'Due process' rights of the EFTA State concerned**

- (1) The letter informing the EFTA State concerned of the opening of proceedings states the reasons for the EFTA Surveillance Authority's doubts about the aid and invites the EFTA State to submit its comments within a stated period, usually one month.
- (2) If the EFTA State considers it necessary to make oral observations to the EFTA Surveillance Authority, such meetings should be held within three months after the procedure has been initiated.
- (3) The EFTA State's due process rights include the right to reply to comments and allegations made by the parties concerned (see 5.3.2).
- (4) A letter enclosing all the submissions filed within the time limits is sent to the EFTA State concerned. The EFTA State is given 15 working days to comment on the submissions.

**5.3.2. 'Due process' rights of other EFTA States, the EC Member States, the EC Commission and interested parties**

- (1) After the opening of proceedings a notice to the other EFTA States, the EC Member States, the EC Commission and interested parties is published in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto inviting them to comment on the case within one month from the date of publication. The notice reproduces the letter that the EFTA Surveillance Authority has sent to the EFTA State concerned informing it of the opening of proceedings, with any confidential passages deleted.
- (2) The rights of third parties in the procedure pursuant to Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement flow from the requirement to give 'notice to the parties concerned to submit their comments'. The 'parties concerned' referred to in Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement are not only the enterprise or enterprises receiving aid but also the persons, enterprises or associations whose interests might be affected by the grant of the aid, in particular competing enterprises and trade associations <sup>(1)</sup>.
- (3) The publication of a notice in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto is an appropriate means of informing all the parties concerned that a procedure has been initiated <sup>(2)</sup>. Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement does not require individual notice to be given to particular persons.
- (4) In the notice, the EFTA Surveillance Authority states its doubts about the compatibility of the aid with the functioning of the EEA Agreement <sup>(3)</sup>.

**5.4. Final decision**

- (1) The EFTA Surveillance Authority may take a positive or negative decision or it may take a decision to close the case owing to withdrawal of the proposed aid measure or in applicability of Article 61 (1) of the EEA Agreement.
- (2) A positive decision is a decision to grant authorization for the aid and a negative decision prohibits the aid. A decision can be partially positive and partially negative. Positive decisions may impose conditions.
- (3) If the EFTA State does not reply to the opening of proceedings or does not give all information the EFTA Surveillance Authority requires, the EFTA Surveillance Authority is empowered to take a decision on the basis of the information available to it without having heard any argument from the EFTA State <sup>(4)</sup>.

<sup>(1)</sup> ECJ, 14. 11. 1984, Case 323/82, *Intermills v. Commission* (1984) ECR 3809, 3826 et seq. (paragraph 16).

<sup>(2)</sup> *Ibid.*, 3827 (paragraph 17).

<sup>(3)</sup> *Ibid.*, 3827 et seq. (paragraph 21).

<sup>(4)</sup> See ECJ, 21. 3. 1990, Case C-142/87, *Belgium v. Commission* (1990) ECR I-959, 1010 (paragraph 18); ECJ, 14. 2. 1990, Case C-301/87, *France v. Commission* (1990) ECR I-307, 357 (paragraph 22); ECJ, 13. 7. 1988, Case 102/87, *France v. Commission* (1988) ECR 4067, 4089 (paragraph 27); ECJ, 10. 7. 1986, Case 40/85, *Belgium v. Commission* (1986) ECR 2321, 2346—2347 (paragraphs 20 and 22); ECJ, 10. 7. 1986, Case 234/84, *Belgium v. Commission* (1986) ECR 2263, 2286—2288 (paragraphs 16, 17 and 22).

- (4) The decision states the reasons on which it is based <sup>(1)</sup>. It specifies any obligations imposed on the EFTA State concerned <sup>(2)</sup>. The EFTA Surveillance Authority sets a time limit by which the EFTA States must carry out the obligations <sup>(3)</sup>.
- (5) The EFTA Surveillance Authority will submit to the EFTA State the full text of negative and partially negative decisions and of decisions laying down conditions. As to all other types of decisions, the EFTA State is informed by letter. Under Protocol 27 (d) to the EEA Agreement, the same information is given to the EC Commission.
- (6) The full text of negative decisions, partially negative decisions and decisions laying down conditions, or, in the case of all other types of decisions, a notice reproducing the letter to the EFTA State concerned, is published in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto.

#### 5.5. *Failure of EFTA State to comply*

- (1) If the EFTA State concerned fails to conform to the decision within the period laid down, the EFTA Surveillance Authority may refer the matter directly to the EFTA Court in accordance with the second subparagraph of Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement and apply, if appropriate, for an injunction.

### 6. SPECIFICITIES REGARDING AID UNLAWFUL ON PROCEDURAL GROUNDS

- (1) Apart from special features which are indicated below, the procedure with regard to aid unlawful on procedural grounds follows the same pattern as with notifications.

#### 6.1. *Notion of aid unlawful on procedural grounds*

- (1) As the term 'unnotified aid' would be too narrow to cover all aid put into effect in a way which infringes the last sentence of Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, the EFTA Surveillance Authority decided to use the notion of 'aid unlawful on procedural grounds' (referred to below as 'unlawful aid').

The term covers:

- (a) aid provided without notification;
- (b) aid granted by incorrect application of an approved aid scheme (aid 'being misused' in the meaning of Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement);
- (c) aid that is notified late, i.e. notified after being 'put into effect'; and
- (d) aid notified beforehand but 'put into effect' before the EFTA Surveillance Authority has taken a decision <sup>(4)</sup>.

#### 6.2. *Request for information*

- (1) When the EFTA Surveillance Authority becomes aware of a possibly unlawful aid case, it requests the EFTA State concerned to supply full details on the matter normally within 20 working days. This is the same as the usual period allowed for supplying additional information on notified aid cases (see 3.2.4 (2)). A reminder will be sent if necessary.

<sup>(1)</sup> ECJ, 21. 3. 1990, Case C-142/87, *Belgium v. Commission* (1990) ECR I-959, 1015 (paragraph 40); ECJ, 8. 3. 1988, Cases 62 and 72/87, *Exécutif régional wallon v. Commission* (1988) ECR 1573, 1595 (paragraphs 24 et seq.); ECJ, 2. 2. 1988, Cases 67, 68 and 70/85, *Van der Kooy v. Commission* (1988) ECR 219, 278—279 (paragraphs 69, 76); ECJ, 14. 10. 1987, Case 248/84, *Germany v. Commission* (1987) ECR 4013, 4041—4042 (paragraphs 18, 21—22); ECJ, 13. 3. 1985, Cases 296 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek v. Commission* (1985) ECR 809, 823—825 (paragraphs 19, 22—27); ECJ, 14. 11. 1984, Case 323/82, *Intermills v. Commission* (1984) ECR 3809, 3828, 3831—3832 (paragraphs 23 and 35—39).

<sup>(2)</sup> ECJ, 13. 7. 1988, Case 102/87, *France v. Commission* (1988) ECR 4067, 4090 (paragraphs 32 and 33); ECJ, 2. 2. 1988, Case 213/85, *Commission v. Netherlands* (1988) ECR 281, 299—300, 302 (paragraphs 19 and 29); ECJ, 2. 2. 1988, Cases 67, 68 and 70/85, *Van der Kooy v. Commission* (1988) ECR 219, 277—278 (paragraphs 62—68); and ECJ, 12. 7. 1973, Case 70/72, *Commission v. Germany* (1973) ECR 813, 832 (paragraph 23).

<sup>(3)</sup> Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement.

<sup>(4)</sup> See 3.3 for the interpretation of 'put into effect'.

- (2) It is recalled that the EFTA Surveillance Authority is empowered to proceed and to take a decision on the basis of the information available (see 5.4 (3)), even in the absence of any submission to it from the EFTA State concerned.

#### 6.2.1. Injunction ('interim measures')

- (1) The EFTA Surveillance Authority may request by an interim decision the EFTA State to suspend payment of the aid pending the outcome of the investigation <sup>(1)</sup>. The procedure is as follows:
- (2) Once it has concluded that aid has been granted unlawfully, the EFTA Surveillance Authority must give the EFTA State concerned an opportunity to submit its comments before taking a decision requiring it to suspend immediately the payment of the aid pending the outcome of the investigation <sup>(2)</sup>.
- (3) If the EFTA State fails to suspend payment of the aid, the EFTA Surveillance Authority is entitled, while carrying out the examination on the substance of the matter, to bring the matter directly before the EFTA Court and apply for a declaration that such payment amounts to an infringement of the Agreement <sup>(3)</sup>.

#### 6.2.2. Conduct of proceedings

- (1) In cases of unlawful aid, the EFTA Surveillance Authority endeavours to take a decision within two months after receiving complete information.
- (2) If, in unlawful aid cases, the EFTA Surveillance Authority finds that the aid is compatible with the functioning of the EEA Agreement, it must take a positive decision on the merits of the case.

#### 6.2.3. Recovery orders

- (1) In negative decisions on cases of unlawful aid the EFTA Surveillance Authority orders, as a rule, the EFTA State to reclaim the aid from the recipient <sup>(4)</sup>.
- (2) The recovery is to be effected in accordance with national law including the provisions concerning interest due for late payment of amounts owing to the government, interest which should normally run from the date of the award of the unlawful aid in question. The relevant provisions of national law must be applied in such a way that recovery is not rendered practically impossible <sup>(5)</sup>.

### 7. PROCEDURE IN EXISTING AID CASES

#### 7.1. Legal provisions

- (1) Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement states: 'The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.'
- (2) This provision essentially places three procedural obligations on the EFTA Surveillance Authority and one obligation on the EFTA State concerned. The former are:
- to keep under constant review all systems of aid existing in the EFTA States (first sentence),
  - to do so in cooperation with the EFTA States concerned (first sentence),
- and

<sup>(1)</sup> ECJ, 14. 2. 1990, Case C-301/87, France v. Commission (1990) ECR I-307 (paragraphs 19—20).

<sup>(2)</sup> Ibid., 356 (paragraph 19).

<sup>(3)</sup> Ibid., 357 (paragraph 23).

<sup>(4)</sup> First stated in ECJ, 12. 7. 1973, Case 70/72, Commission v. Germany (1973) ECR 813, 828—829 (paragraphs 10—13); see also ECJ, 21. 3. 1990, Case C-142/87, Belgium v. Commission (1990) ECR I-959, 1020 (paragraphs 65—66) and ECJ, 24. 2. 1987, Case 310/85, Deufil v. Commission (1987) ECR 901, 927 (paragraph 24).

<sup>(5)</sup> See ECJ, 21. 3. 1990, Case C-142/87, Belgium v. Commission (1990) ECR I-959, 1018—1020 (paragraphs 58—63); see also ECJ, 20. 9. 1990, Case 5/89, Commission v. Germany (1990) ECR I-3437, 3456 (paragraph 12); ECJ, 21. 2. 1990, Case C-74/89, Commission v. Belgium (1990) ECR I-491; and ECJ, 2. 2. 1989, Case 94/87, Commission v. Germany (1989) ECR 175, 192 (paragraph 12).

- to propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

The latter is:

- the EFTA State's duty to cooperate with the EFTA Surveillance Authority.

#### 7.2. *Notion of existing aid*

- (1) Existing aid within the meaning of Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement includes:
  - old or 'pre-EEA' aid, i.e. aid schemes in operation at the time of the entry into force of the EEA Agreement and individual awards of aid outside any scheme, which have been decided upon before and foresee payments after the entry into force of the EEA Agreement,
  - and
  - authorized aid, i.e. aid schemes or ongoing provisions of aid that have been authorized (see 4.2 (2) and 5.4 (2)) or are deemed to have been authorized (see footnote 1 to 4.1 (1)) by the EFTA Surveillance Authority.

#### 7.3. *Purpose of the existing aid procedure*

- (1) The purpose of the existing aid procedure is to provide a means of dealing with both categories of existing aid. Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement is designed to enable the EFTA Surveillance Authority to secure the abolition or adaptation of pre-EEA aid that is incompatible with the functioning of the EEA Agreement <sup>(1)</sup> and to review aid schemes or provisions which it authorized in the past but which may no longer be compatible with the functioning of the EEA Agreement under the conditions then prevailing.

#### 7.4. *Procedure*

##### 7.4.1. *Initiation of review*

- (1) Whenever the EFTA Surveillance Authority believes that existing aid may not be compatible with the progressive development or the functioning of the EEA Agreement, it begins a review by writing for information to the EFTA State concerned. The initiation of a review does not require operation of the aid scheme to be suspended.
- (2) So far the EFTA Surveillance Authority has not laid down detailed internal procedural rules for the application of Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement. The only clear requirement that emerges from the paragraph is the obligation to cooperate with the EFTA State. The EFTA Surveillance Authority considers to fulfil this obligation by writing for information to the State concerned before it proposes 'appropriate measures'.
- (3) The EFTA State is under an obligation to provide the information required by the EFTA Surveillance Authority. To enable the review to be carried out with the necessary dispatch, the EFTA Surveillance Authority may set time limits for supplying information similar to those in notified aid cases.

##### 7.4.2. *Proposal of 'appropriate measures'*

- (1) Having considered the existing aid scheme in the light of the information supplied by the EFTA State, the EFTA Surveillance Authority may conclude that no change in the scheme is necessary and to close the file on the case, or it may propose whatever changes are deemed necessary to bring the scheme into line with the Agreement. The proposal may be to:
  - amend the scheme in substance,

<sup>(1)</sup> See ECJ, 15. 7. 1964, Case 6/64, Costa v. ENEL (1964) ECR 585, 595.

- introduce procedural requirements, e.g. advance notification of individual cases under the scheme in question, and/or reporting requirements,
  - or
  - abolish the scheme.
- (2) The EFTA Surveillance Authority must give reasons for the measures it proposes and ask the EFTA State to agree to the measures.

#### 7.4.3. Legal consequences of a proposal of 'appropriate measures'

- (1) If the EFTA State agrees to the proposed measures, the EFTA Surveillance Authority closes the case.
- (2) If the EFTA State declines to carry out the 'appropriate measures' proposed and the EFTA Surveillance Authority, having heard the arguments of the EFTA State concerned, still considers that they are necessary, it may require the EFTA State to comply through the procedure under Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement (see Chapter 5).

### 8. COUNTING OF TIME LIMITS

- (1) Periods expressed in months end the same day of the  $n^{\text{th}}$  month counted from the date correspondence is received. For example, the deadline for deciding on a notification received on 5 May is 5 July. If, in such a period, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month. For example, the deadline for deciding on a notification received on 31 July is 30 September.
- (2) Periods expressed in working days end on the  $n^{\text{th}}$  working day counted from the working day following that on which correspondence is received. 'Working days' means all days other than Saturdays, Sundays and public holidays. Public holidays observed in an EFTA State are taken into account when calculating a time limit for action by the EFTA State concerned. Public holidays observed by the EFTA Surveillance Authority are taken into account when calculating a time limit for it to act.
- (3) For correspondence from an EFTA State to the EFTA Surveillance Authority setting in motion a time limit to be observed by the latter, the date of receipt is stated in the acknowledgment sent to the EFTA State concerned. In the reverse situation, the EFTA Surveillance Authority presumes the date of receipt to be the third working day after the day of mailing, unless a later day of receipt is shown by the State concerned. These arrangements will enable the EFTA Surveillance Authority to calculate in advance all deadlines related to case-handling and help to avoid undue delays in the decision-making process.

### 9. PUBLICATION OF DECISIONS

- (1) Paragraph (d) of Protocol 27 to the EEA Agreement provides that final decisions and decisions to open the formal investigation procedure shall be published. Therefore, EFTA States and interested third parties are informed by a publication in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto on the three following occasions:
- (a) when the aid case is cleared within the two-month period without opening the formal investigation procedure pursuant to Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement (see 4.2 (5));
  - (b) when opening the formal investigation procedure (see 5.3 (1));
  - (c) when terminating the formal investigation procedure (see 5.4 (6)).
- (2) In addition to the publication in the EEA Section of the *Official Journal of the European Communities* and the EEA Supplement thereto, in most cases the EFTA Surveillance Authority issues a press release to inform the public, usually on the date when the decision is taken. Press releases are published in English only.
- (3) All published information on State aid cases omits material regarded as commercially sensitive. This does not include the identity of the aid recipients.

## PART III

## RULES ON HORIZONTAL AID

10. AID TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs) <sup>(1)</sup>

- (1) The principles set out in this chapter apply to aid for SMEs in all sectors except those subject to specific sectoral rules which are currently synthetic fibres, motor vehicle, steel and transport.

10.1. *Introduction*

- (1) Small and medium-sized enterprises (SMEs) play an important role in the economy. First, they play a disproportionate role in employment creation, especially at times when large firms are shedding labour. Secondly, being more exposed to competition but at the same time more flexible and adaptable than large firms, SMEs tend to be in the forefront of innovation. Thirdly, SMEs are a major source of competition in markets and act as the main motor of structural change and regeneration in the economy as a whole: they facilitate the shifts of economic resources from declining to expanding sectors.
- (2) In some parts of the economy, the SME sector is of particular importance. This is true, for instance, of manufacturing industry, in which subcontracting is playing an increasing role. SMEs are also of fundamental importance for regional development.
- (3) SMEs can face certain handicaps when compared to established large firms. For example, they have greater difficulty in raising finance. SMEs also suffer to a greater extent from burdens imposed by government. The compliance costs of small businesses with respect to government regulations on health and safety, financial accounting, etc., may be higher and the tax burden on them may be heavier, both in terms of the rates of tax they pay and the compliance costs of the tax system (e.g., collection of social security contributions and VAT).

10.2. *Definition of SMEs*

- (1) The definition of SMEs, given below for purposes of State aid control, must delimit the SME sector so that the bulk of firms with the beneficial external effects and the handicaps described above are included. It must not be, however, so wide as to include many larger firms that do not necessarily have the beneficial external effects or the handicaps that are characteristic of the SME sector. Aid granted to larger firms on the basis of considerations mainly applicable to smaller enterprises would be more likely to distort competition and affect trade.
- (2) For most purposes there is no need to distinguish between small and medium-sized enterprises. However, such a distinction is necessary in the case of aid for near-market activities, such as investment. Aid to small companies can normally be expected to have a limited impact on trade within the territory covered by the EEA Agreement, whereas aid to medium-sized companies may well have a significant trade-distorting effect.
- (3) 'SME' is defined as an enterprise which:
- has no more than 250 employees, and
    - either,
    - an annual turnover not exceeding ECU 20 million,
    - or
    - a balance sheet total not exceeding ECU 10 million, and
  - is not more than 25 % owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.

<sup>(1)</sup> This chapter corresponds to the Community guidelines on State aid for small and medium-sized enterprises (OJ No C 213, 19. 8. 1992, p. 2).

- (4) Where it is necessary to distinguish between small and medium-sized companies, 'small' is defined as an enterprise which
- has no more than 50 employees, and
  - either,
  - an annual turnover not exceeding ECU 5 million,
  - or
  - a balance sheet total not exceeding ECU 2 million, and
- is not more than 25 % owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.
- (5) The three criteria are cumulative, i.e., a firm is only considered to be an 'SME' or a 'small' enterprise if it fulfils the independence condition, does not exceed the workforce limit and does not exceed at least one of the other limits for either turnover or balance sheet total.

10.3. *SME aid falling within Article 61 (1)*

- (1) In cases where State aid for SMEs falls pursuant to Article 61 (1) of the EEA Agreement because it can have a perceptible impact on interstate trade and competition, it may be eligible for exemption. The broadest exemption clause is Article 61 (3) (c), under which the EFTA Surveillance Authority has discretion to allow aid that facilitates the development of certain economic activities or of certain economic areas in so far as trading conditions are not adversely affected to an extent contrary to the common interest.
- (2) In view of the positive externalities associated with SMEs, their importance for particular sectors of industry and for regional development, and the specific problems they face, there can be no doubt that State aid for SMEs 'facilitates the development of certain economic activities or of certain economic areas'.
- (3) The question remains whether State aid for SMEs affects trading conditions to an extent contrary to the functioning of the EEA Agreement. This depends on the type and intensity of the aid. Aid for activities that are relatively distant from the market-place, such as assistance for obtaining consultancy help to improve general management, affects trade only indirectly and to a comparatively small degree. Aid for near-market activities such as investment arguably affects trade less when it is granted to SMEs than when the beneficiaries are large firms. This is because the sales of individual SMEs are less than those of large firms, a factor accentuated by the often lower turnover per employee in the case of SMEs, and because SMEs are particularly numerous in industries in which there is relatively little intra-EEA trade (e.g., construction, certain food manufacturing, retailing, many services). Even so, the effect of investment aid on trade may rise significantly in the case of medium-sized firms. Provided, however, that certain acceptable intensities of aid are not exceeded, the effect of SME aid on trading conditions is generally not so great as to be against the functioning of the EEA especially if the positive externalities of SME activity are taken into account.

10.4. *Generally acceptable intensities of aid for SMEs*

- (1) The EFTA Surveillance Authority regards State aid for the following purposes and at the following intensities as eligible for exemption pursuant to Article 61 (3) (c) where SMEs, as defined above, are concerned. The EFTA Surveillance Authority expresses a general presumption in favour of the compatibility of such aid with the functioning of the EEA Agreement.

10.4.1. *Aid for general investment*

- (1) General aid schemes as defined in Chapter 29 are incompatible with the functioning of the EEA Agreement and cannot be authorized. However, general aid schemes which are exclusively restricted to SMEs are eligible for exemption provided that the conditions as laid down under paragraph (2) and (3) are met.

- (2) Investment aid is allowed outside assisted areas<sup>(1)</sup> only up to the levels of 15 % gross<sup>(2)</sup> for small companies and 7,5 % gross for medium-sized companies.
- (3) In assisted areas the EFTA Surveillance Authority allows SMEs to receive, on top of the prevailing rate of regional aid authorized by the EFTA Surveillance Authority, an extra 10 percentage points gross of investment aid in Article 61 (3) (c) areas and an extra 15 percentage points gross in Article 61 (3) (a) areas. However, in Article 61 (3) (c) areas the combination of regional and SME aid is subject to an overall ceiling of 30 % net and in Article 61 (3) (a) areas 75 % net. The resulting matrix of rates (see appended table in Annex V to these guidelines) is designed to allow the highest aid levels in the areas of greatest need and to preserve a differential between aided and unaided regions for all but the smallest companies.
- (4) The permissible maximum intensities apply to aid in all forms.

#### 10.4.2. Aid for environmental protection investment

- (1) Investment for environmental protection purposes (see Chapter 15) such as pollution control, CO<sub>2</sub> reduction, protection of the ozone layer, etc., is accorded more favourable treatment than general investment. This applies regardless of the location and size of company, but SMEs in assisted areas can of course claim the rate of aid available (regional and SME supplement) for general investment, which in most cases is higher than the 15 % gross currently allowed under the rules on aid for environmental protection and is not subject to the same strict conditions.

#### 10.4.3. Aid for consultancy help, training and dissemination of knowledge

- (1) For help and advice by outside consultants or for training provided to new or established small or medium-sized business and their staff, in management, financial matters, new technology (especially information technology), pollution control, protection of intellectual property rights or similar fields, or in assessing the feasibility of new ventures, aid of up to 50 % gross is generally accepted. However, each scheme is judged on its merits, with particular reference to the distance of the activity from the market-place, any cash limits on the aid per firm, possibilities of cumulation, and other relevant factors. In certain exceptional circumstances the EFTA Surveillance Authority may allow aid of more than 50 %. Aid for general information campaigns in particular can be assisted up to a higher intensity as the financial benefit to the individual firm is relatively small.

#### 10.4.4. Aid for R&D

- (1) For R&D, aid of up to 10 percentage points higher than that allowed for large firms may be authorized for SMEs (see Chapter 14).

#### 10.4.5. Aid for other purposes

- (1) The EFTA Surveillance Authority may be prepared to authorize aid for other justified means of SME promotion, such as encouraging cooperation.

### 11. CRITERIA FOR APPLYING THE ACCELERATED CLEARANCE PROCEDURE<sup>(3)</sup>

- (1) A special rapid clearance procedure is applied under certain conditions for new aid schemes for SMEs and for modifications of existing schemes. In principle, the EFTA Surveillance Authority

<sup>(1)</sup> The term 'assisted area' means area within an EFTA State eligible for regional aid according to the rules laid down in Part VI of these guidelines.

<sup>(2)</sup> I.e., the nominal (before-tax) value of grants and the discounted before-tax value of interest subsidies as a proportion of the investment cost. Net figures are after tax.

<sup>(3)</sup> This chapter corresponds to the Commission communication to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes (OJ No C 213, 19. 8. 1992, p. 10).

does not object to new or modified existing aid schemes notified pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement meeting the criteria set out below.

#### 11.1. *New aid schemes for SMEs*

- (1) New aid schemes must be limited to small and medium-sized enterprises, as defined for purposes of State aid control above, and satisfy one of the following criteria:
  - where the scheme has specific investment objectives, the aid intensity must not exceed 7,5 % of the investment cost for medium-sized enterprises and 15 % for small enterprises, or
  - where the scheme is designed to lead to job creation, the aid must not amount to more than ECU 3 000 per job created, or
  - in the absence of specific investment or job creation objectives, the total volume of aid a beneficiary may receive must not be more than ECU 200 000.
- (2) All the above figures are before any calculation for tax effects, i.e. gross.
- (3) EFTA States must ensure that the beneficiary does not receive more aid than allowed by the above criteria for the same project through repeated notification of aid schemes meeting these criteria or such schemes being added to any other aid under general, regional or sectoral aid schemes.
- (4) Such aid may be paid on a national, regional or local basis.
- (5) All aid to exports in intra-EEA trade, operating aid, and schemes subject to specific sectoral rules, which currently are synthetic fibres, motor vehicle, steel and transport, are excluded from the procedure.

#### 11.2. *Modifications of existing schemes*

- (1) The procedure also applies to modifications of existing aid schemes, regardless of the size of the firm receiving aid, which the EFTA Surveillance Authority has previously approved, except in specific cases where the EFTA Surveillance Authority strictly limited its authorization to the period, budget and conditions then notified.
- (2) The amendment may involve any of the following:
  - prolongation over time without increase in budgetary resources,
  - budget increases up to 20 % of original sum, with prolongation over time,
  - tightening the criteria of application of the scheme.
- (3) A simplified form for notification to be used for both new and existing schemes is set out in Annex II of these guidelines.

#### 12. APPLICATION AND IMPLEMENTATION OF THE *DE MINIMIS* RULE <sup>(1)</sup>

- (1) The EFTA Surveillance Authority is of the view that aid below a certain amount is considered not to have a perceptible impact on competition and not to affect trade between the contracting Parties. Therefore Article 61 (1) of the EEA Agreement can be said not to apply and notification is not required for payments of aid as defined below.
- (2) Payments of aid of up to ECU 50 000 in respect of one category of expenditure and schemes under which the amount of aid a given firm may receive in respect of one category of expenditure over a three-year period is limited to that figure, need not be notified pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement provided that the conditions laid down below are observed.

<sup>(1)</sup> This chapter corresponds to the Community guidelines on State aid for small and medium-sized enterprises (OJ No C 213, 19. 8. 1992, p. 2) and to the letter from the Commission to Member States IV.E.1 (93) D/06878 of 23 March 1993.

- (3) It should be noted that the *de minimis* rule does not apply to export aid and to the sectors subject to specific sectoral rules which currently are synthetic fibres, motor vehicle, steel and transport.

12.1. *Definition of the categories of expenditure*

- (1) When applying the *de minimis* rule the following categories of expenditure are distinguished:
- investment of any kind and for whatever purpose except R&D, and
  - other expenditure.
- (2) Hence, a given firm may receive a maximum of ECU 100 000 of aid under the two categories over a three-year period without notification.
- (3) The three-year period to which the limit is to be applied should be regarded as beginning on the date the individual firm first receives aid under the *de minimis* rule.
- (4) On the question of cumulation between aid under the *de minimis* rule and aid under an authorized scheme, the following rule should be applied. If a firm that has received aid under the *de minimis* rule in the past three years for one of the abovementioned two categories of expenditure wishes to accept aid under an authorized scheme for expenditure falling within the same category, the *de minimis* and authorized aid combined must not exceed the maximum award authorized by the EFTA Surveillance Authority for the notified scheme if this is above ECU 50 000. This means that the latter award may have to be reduced so that the total remains within the maximum.

12.2. *Principles for calculating the cash grant equivalent of de minimis aid*

- (1) The limit in the *de minimis* rule is expressed as a cash grant of ECU 50 000. In cases where assistance is provided in a form other than as a grant, it must be converted into its cash grant equivalent value for the purposes of applying the *de minimis* limit. The most common other forms in which aid with a low cash value is provided are soft loans, tax allowances and loan guarantees. The conversion of aid in these forms into its cash grant equivalent should be done as follows.
- (2) The cash grant equivalent should be calculated gross, i.e. before tax if the subsidy is taxable. If the subsidy is not taxable, as in the case of some tax allowances, the nominal amount of the subsidy, which is both gross and net, should be taken.
- (3) All aid receivable in the future should be discounted to its present value. Grants, however, should be counted as a single lump sum even if they are paid in instalments. The discount rate used should be the reference interest rate communicated to the EFTA Surveillance Authority each year by the EFTA State concerned.
- (4) The cash grant equivalent of a soft loan in any year is the difference between the interest due at the reference interest rate and that actually paid. All the interest that is saved until the loan has been fully repaid should be discounted to its value at the time the loan is granted and added together. An example of how to calculate the cash grant equivalent of a soft loan is given in section 12.4. Two variants, with and without a grace period on principal repayments, are illustrated.
- (5) The cash grant equivalent of a tax allowance is the saving in tax payments in the year concerned. Again, tax savings to be obtained in the future should be discounted at the reference interest rate to their present value.
- (6) For loan guarantees, the cash grant equivalent in any year can be calculated as the difference between (a) the outstanding sum guaranteed multiplied by the risk factor (probability of default) and (b) any premium paid, i.e. (guaranteed sum X risk)-premium.
- (7) As the risk factor, the experience of default on loans extended in similar circumstances (industry, size of firm, level of general economic activity) should be taken. Discounting to present value should be carried out as before.

### 12.3. *Monitoring of the de minimis rule by the EFTA States*

- (1) Arrangements need to be made in each EFTA State to monitor use of the *de minimis* rule so that the above rules are complied with. This need not involve an elaborate and staff-intensive system, but certain minimum safeguards are required. The SME aid rules (see Chapter 10) state that it has to be an express condition of an aid award or scheme that is not notified that any further aid the same firm may receive from other sources or under other schemes does not take the total aid the firm receives above the ECU 50 000 limit for each type of expenditure as defined in section 12.1. Authorities granting aid under the *de minimis* rule should draw this condition to the attention of applicants and require them to declare any previous awards of aid to ensure that they do not exceed the limit. Similar checks should be made by authorities granting aid under authorized schemes.
- (2) Pursuant to Article 3 of the EEA Agreement, the EFTA States are required to assist the EFTA Surveillance Authority in performing its tasks. Only the EFTA States are in a position to monitor the use of the *de minimis* rule to ensure that they are restricted to aid not exceeding the amounts that the EFTA Surveillance Authority considers not to have a significant effect on trade and competition. Pursuant to Article 3 of the EEA Agreement, therefore, EFTA States are requested to communicate to the EFTA Surveillance Authority their arrangements for monitoring compliance with the rules set out above.

### 12.4. *Calculation of the cash grant equivalent of a soft loan*

- (1) The following gives an example of how the grant equivalent of a soft loan can be calculated.
- (2) A public authority commits itself to paying an interest subsidy on a ECU 500 000 10-year loan to maintain the interest rate to the borrower at 6%. The official reference interest rate accepted by the EFTA Surveillance Authority for the country concerned in that year is 8%. In calculating the cash grant equivalent of the subsidy throughout the term of the loan, it may be assumed that the reference interest rate remains constant over the period. The cash equivalent of the subsidy depends on whether or not a grace period on principal repayments is granted.

#### 12.4.1. *No-grace period*

- (1) The loan is paid off in linear instalments starting in year one. The cash grant equivalent of the interest subsidy in the first year is the principal sum multiplied by the interest subsidy in percent, divided by the reference interest rate, thus:

$$1. \text{ ECU } 500\,000 \times 0,02/1,08 = \text{ ECU } 9\,259$$

The subsidy in years two to 10 is calculated similarly, but at a compound discount rate, i.e.:

$$2. \text{ ECU } 450\,000 \times 0,02/(1,08)^2 = \text{ ECU } 7\,716$$

$$3. \text{ ECU } 400\,000 \times 0,02/(1,08)^3 = \text{ ECU } 6\,351$$

$$4. \text{ ECU } 350\,000 \times 0,02/(1,08)^4 = \text{ ECU } 5\,145$$

$$5. \text{ ECU } 300\,000 \times 0,02/(1,08)^5 = \text{ ECU } 4\,083$$

$$6. \text{ ECU } 250\,000 \times 0,02/(1,08)^6 = \text{ ECU } 3\,151$$

$$7. \text{ ECU } 200\,000 \times 0,02/(1,08)^7 = \text{ ECU } 2\,334$$

$$8. \text{ ECU } 150\,000 \times 0,02/(1,08)^8 = \text{ ECU } 1\,621$$

$$9. \text{ ECU } 100\,000 \times 0,02/(1,08)^9 = \text{ ECU } 1\,000$$

$$10. \text{ ECU } 50\,000 \times 0,02/(1,08)^{10} = \text{ ECU } 463.$$

- (2) The total cash grant equivalent is the sum of the discounted subsidies in each year, i.e. ECU 41 123.

#### 12.4.2. *With-grace period*

- (1) No principal repayments have to be made in the first two years.

- (2) The loan is repaid in linear instalments of ECU 62 500 from the third year onwards. The discounted cash grant equivalent of the interest subsidy in each year is:

1.  $\text{ECU } 500\,000 \times 0,02/(1,08) = \text{ECU } 9\,259$
2.  $\text{ECU } 500\,000 \times 0,02/(1,08)^2 = \text{ECU } 8\,573$
3.  $\text{ECU } 500\,000 \times 0,02/(1,08)^3 = \text{ECU } 7\,938$
4.  $\text{ECU } 437\,500 \times 0,02/(1,08)^4 = \text{ECU } 6\,432$
5.  $\text{ECU } 375\,000 \times 0,02/(1,08)^5 = \text{ECU } 5\,104$
6.  $\text{ECU } 312\,500 \times 0,02/(1,08)^6 = \text{ECU } 3\,939$
7.  $\text{ECU } 250\,000 \times 0,02/(1,08)^7 = \text{ECU } 2\,917$
8.  $\text{ECU } 187\,500 \times 0,02/(1,08)^8 = \text{ECU } 2\,026$
9.  $\text{ECU } 125\,000 \times 0,02/(1,08)^9 = \text{ECU } 1\,251$
10.  $\text{ECU } 62\,500 \times 0,02/(1,08)^{10} = \text{ECU } 579$ .

- (3) In this case the total cash grant equivalent is ECU 48 018.

### 13. RULES APPLICABLE TO CASES OF CUMULATION OF AID FOR DIFFERENT PURPOSES <sup>(1)</sup>

#### 13.1. *Notification of significant cases of cumulation of aid*

- (1) Cumulation of aid is defined as the application of more than one aid scheme to a given investment project, i.e. all investments in fixed assets (whether or not in the same place) necessary to carry out the project.
- (2) In order to enable the EFTA Surveillance Authority to control the cumulative intensity of aid granted under different schemes to a given investment project and to assess its effect on competition and trade between the Contracting Parties, the EFTA States shall notify in advance to the EFTA Surveillance Authority all significant cases of cumulation. These are defined as those projects where the investment exceeds ECU 12 million or where the cumulative intensity of the aid exceeds 25 % net grant equivalent.

#### 13.2. *Derogations*

- (1) The following cases will be exempt from this additional notification requirement:
- cases where the investment does not exceed ECU 3 million, whatever the cumulative intensity of the aid,
  - cases where the cumulative intensity of the aid does not exceed 10 % net grant equivalent, whatever the scale of the investment,
  - cases where the intensity of all the aid to be granted for the investment project remains below the ceiling for any one of the aid schemes under which aid is being awarded to the project, which ceiling has been laid down or approved by the EFTA Surveillance Authority either in these guidelines or by individual decision.
- (2) This exemption is without prejudice to the obligation of EFTA States to remain within the ceiling for each individual scheme.
- (3) The EFTA Surveillance Authority may withdraw these exemptions in cases where it finds evidence of distortions of competition.

#### 13.3. *Aid concerned*

- (1) The aid to be taken into account for the purposes of the notification thresholds laid down above is all aid towards expenditure on fixed assets, whatever form (for example, capital grants, interest subsidies, tax concessions, relief of social security contributions) the aid may take.
- (2) The main types of aid schemes concerned are:
- regional aid,

<sup>(1)</sup> This chapter corresponds to the Commission communication on the cumulation of aids for different purposes (OJ No C 3, 5. 1. 1985, p. 2) (point 34 of Annex XV of the EEA Agreement).

- sectoral aid,
  - aid for small and medium-sized firms,
  - aid for research, development and innovation,
  - aid for energy conservation and environmental protection.
- (3) Where investment aid is supplemented by aid for staff training and the latter is prompted by and thus directly linked to the investment, the two types of aid cannot be divorced in considering the intensity of the aid. Such training aid is therefore also taken into account for the purposes of the notification thresholds laid down above.
- (4) In order for the EFTA Surveillance Authority to be aware of the full circumstances surrounding notified cases of cumulation of aid, it is also informed of any aid granted to rescue a firm in difficulties or for creating jobs or for marketing — although these aids do not count towards the notification thresholds — and of any other financial intervention by State or other public authorities where the intervention can be regarded as aid or there is a presumption that it is aid.
- (5) The EFTA Surveillance Authority is also informed of aid granted of the types listed above where they are not directly linked to the notified investment project.

#### 13.4. *Special rules*

- (1) The cumulation rules are without prejudice to the rules on regional aid contained in 26.4 (4) and to the EFTA States' obligations under existing or future provisions laid down by the EFTA Surveillance Authority in decisions on particular regional or sectoral aid schemes to notify individual cases.

#### 14. AID FOR RESEARCH AND DEVELOPMENT <sup>(1)</sup>

- (1) State aid rules in the EEA Agreement must be applied constructively to encourage cooperation which helps new technology to be disseminated. In the control of State aid, the need for resources to be channelled to the industries contributing to improved competitiveness should be observed.

##### 14.1. *Definition of research and development and applicability of Article 61 of the EEA Agreement to aid for R&D*

- (1) The principles set out below cover aid to R&D directly planned and linked to the ultimate production and marketing of new products, processes or services in as far as they fulfil the conditions of Article 61 (1) of the EEA Agreement.
- (2) The EFTA Surveillance Authority considers it possible to make the distinctions between the types of R&D activities outlined below. These definitions are designed to help EFTA States to formulate their notifications. They are intended to be indicative, not normative.
- By *fundamental research* the EFTA Surveillance Authority understands an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.
  - *Basic industrial research*: is defined as original theoretical or experimental work whose objective is to achieve new or better understanding of the laws of science and engineering as they might apply to an industrial sector or the activities of a particular enterprise.
  - *Applied research and development*: the EFTA Surveillance Authority considers that the former covers investigation or experimental work based on the results of basic industrial research to acquire new knowledge to facilitate the attainment of specific practical objectives such as the creation of new products, production processes or services. It could normally be said to end

<sup>(1)</sup> This chapter corresponds to the Community framework for State aids for research and development (OJ No C 83, 11. 4. 1986, p. 2) and the letter from the Commission to the Member States SG (90) D/01620 of 5 February 1990 (points 30—31 of Annex XV of the EEA Agreement).

with the creation of a first prototype. Development is considered to cover work based on applied research aimed at establishing new or substantially improved products, production processes or services up to but not including industrial application and commercial exploitation. This stage would normally include pilot and demonstration projects and such further development work as necessary, culminating in the production information package or equivalent.

- (3) The EFTA Surveillance Authority uses these working definitions as indicators reflecting the proximity of the activity to the market-place and therefore relates them to the aid intensities being proposed when it examines notifications from EFTA States. However, given the complexities involved in defining R&D activities, it uses the definitions and objectives specified by the EFTA States in their proposals in order to place their action at the correct point of market proximity. It does not demand or seek strict adherence to predetermined categories or definitions of R&D activities.
- (4) State aid for fundamental research, which is normally not carried out in the market sector of the economy, does not constitute aid in the meaning of Article 61 (1) of the EEA Agreement.
- (5) However, in exceptional cases where such research is carried out in or for particular firms, the EFTA Surveillance Authority cannot rule out the possibility that the aid does fall within Article 61 (1) of the EEA Agreement.
- (6) Aid for R&D activities by higher education or research establishments is not covered by Article 61 of the EEA Agreement unless these are conducted on a contract basis or in collaboration with the private sector.
- (7) The EFTA Surveillance Authority takes a favourable view of aid for research and development when it scrutinises individual schemes pursuant to Article 61 of the EEA Agreement. This favourable attitude is justified by several factors: the aims of such aid, the often considerable financing requirements for R&D, the risks attached and, given the distance from the market-place of such projects, the reduced likelihood of distortions of competition or effects on trade between the Contracting Parties to the EEA Agreement.

#### 14.2. *Assessment of aid for R&D under Article 61 of the EEA Agreement*

- (1) Where aid to enterprises for R&D activities falls pursuant to Article 61 (1) of the EEA Agreement and is therefore subject to examination by the EFTA Surveillance Authority, it may be considered compatible with the functioning of the EEA Agreement under one of the exceptions provided for in Article 61 (3).
- (2) Any aid which after examination by the EFTA Surveillance Authority is shown to be designed to promote the execution of an important project of common European interest may qualify for the exception provided for in Article 61 (3) (b). The EFTA Surveillance Authority may consider such aid to be compatible with the functioning of the EEA Agreement solely on that basis.
- (3) All other aid for R&D that falls within Article 61 (1) but does not qualify for the exception provided for in Article 61 (3) (b) may qualify for the exception provided for in Article 61 (3) (c) of the EEA Agreement. In such cases, as well as examining whether the aid facilitates the development of certain economic activities or certain regions, the EFTA Surveillance Authority must also evaluate whether it is likely to adversely affect trading conditions within the territory covered by the EEA Agreement and whether this effect would be contrary to the functioning of the EEA Agreement.

#### 14.3. *Additional notification requirements*

- (1) The EFTA Surveillance Authority aims to obtain the highest possible degree of transparency in the application of aid schemes. This means that there must be a clear statement of the objectives to be achieved, the beneficiaries, etc. All the different categories of costs the aid is designed to reduce must be specified and they must be given in such a form that their intensity in relation to these costs can be calculated.
- (2) In view of their intrinsic importance and the role played by larger companies in competition within the territory covered by the EEA Agreement and in trade between the Contracting Parties, the EFTA States shall notify in advance to the EFTA Surveillance Authority pursuant to Article 1 (3) Protocol 3 to the Surveillance and Court Agreement all individual aid awards under

existing aid schemes where aid is given to an enterprise cooperating with an academic or other public institute in an R&D project or programme involving total expenditure on the project or programme in excess of ECU 20 million. If an R&D project or programme being aided is carried out exclusively by one or more enterprises in the market sector, a lower threshold may be laid down in a decision to authorize such schemes.

- (3) In the case of Eureka, this individual notification will be required only for aid granted to an enterprise participating in a project of more than ECU 30 million, where the contribution of the EFTA State to the project is at least ECU 4 million. The ECU 30 million threshold for significant awards to be notified individually relates to the total cost of the project, including the contribution of all the participants other than the recipients of the aid. This applies only to specific awards of aid granted under existing R&D aid schemes. Any other award of aid must be notified pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, whatever its amount.
- (4) Annex I to these guidelines reproduces the checklist for information to be supplied in State aid notifications. Section II of Annex I lists additional information to be provided concerning aid for R&D.

#### 14.4. *Intensity*

- (1) In assessing whether Article 61 (3) (c) of the EEA Agreement is applicable, the EFTA Surveillance Authority is guided by the following principles with regard to the intensity of the proposed aid.
- (2) The intensity of aid that may be accepted is assessed by the EFTA Surveillance Authority on a case-by-case basis. The assessment takes into consideration the nature of the project or programme, the technical and financial risk involved, overall policy considerations related to the competitiveness of European industry, as well as the risk of distortion of competition and effect on trade between the Contracting parties to the EEA Agreement.
- (3) A general evaluation of such risks leads the EFTA Surveillance Authority to consider that basic industrial research may qualify for higher levels of aid than those for applied research and development activities which are more closely related to the market introduction of R&D results and, therefore, if aided, could more easily lead to distortions of competition and trade.
- (4) Taking account of these factors, and considering that it is necessary to ensure that there is a substantial volume of own funds from the recipient firm involved in the project, the EFTA Surveillance Authority considers that, as a general rule, the level of aid for basic industrial research should not be more than 50 % of the gross costs of the project or programme. As the activity being aided gets nearer to the market-place, i.e. covers the areas of applied research and development, the EFTA Surveillance Authority in its examination and evaluation of national proposals looks in principle for progressively lower levels of aid. It relies on the EFTA State concerned to indicate clearly the type of R&D activity involved and utilizes fully its own expert services in examining these proposals.
- (5) The EFTA Surveillance Authority considers higher aid levels in cases where particular projects are recognised to be of special economic importance, linked to relevant Community programmes in which EFTA States participate, located in the least-favoured areas of the territory covered by the EEA Agreement, related to specific welfare services or which imply a very high specific risk. Availability of the results of the R&D involved on the widest possible basis is also taken into account. Special allowance can also be made for aid directed genuinely at smaller and medium-sized enterprises; in this case for example, aid may be acceptable at levels 10 percentage points higher than in other cases. However, in no case should the total value of aid be so high that the contribution of the recipient firm from its own resources is so reduced as to diminish that firm's commitment to the project in question.

#### 14.5. *Eligible R&D costs for the purpose of calculating the aid intensity*

- (1) The following is considered to be eligible costs for the purpose of calculating the intensity of aid for R&D activities:
  - personnel costs (researchers, technicians, other supporting staff) calculated as a sum of the total amount needed to carry out the project,

- other running costs calculated in the same way (costs of materials, supplies, etc.),
- instruments and equipment, land and buildings. These costs may be taken into consideration only in so far as the assets are used exclusively for R&D. Where necessary, the costs must be assessed *pro rata* between these and other projects or activities for which the assets may be used,
- consultancy and equivalent services including bought-in research, technical knowledge, patents, etc.,
- additional overhead costs incurred directly as a result of the R&D project or programme being promoted.

#### 14.6. *Implementation*

- (1) As part of its programme for implementing these rules, the EFTA Surveillance Authority makes a complete inventory of R&D aid available in each EFTA State. It holds the bilateral discussions necessary to obtain the information required, and examines the aid schemes in cooperation with the EFTA State concerned. As necessary it proposes appropriate measures to solve problems to which existing aid may give rise in view of the implementation of the rules. The complete inventory may, if required, be the subject of a multilateral meeting between the EFTA Surveillance Authority and the EFTA States.
- (2) Aid proposals for R&D must contribute to the objective as set out in Article 61 (3) of the EEA Agreement and have as their effect the encouragement of additional effort in this field over and above the normal operations which firms carry out in any case in their day-to-day operations or to respond to exceptional conditions for which their own resources are too limited. The objective of the aid should be to serve as an incentive and to compensate for special risks and costs. In cases where this incentive effect is not evident, or the research and development activity is too close to the actual production and marketing stage, the general positive attitude held by the EFTA Surveillance Authority towards aid to R&D may not necessarily be applicable. Special attention is given to such aid to ensure that it does not become the equivalent of operating aid.
- (3) The EFTA Surveillance Authority applies the above principles also to companies in the public sector, making full use of the policy instruments it has available.

### 15. AID FOR ENVIRONMENTAL PROTECTION <sup>(1)</sup>

#### 15.1. *Introduction*

- (1) Articles 73 to 75 of the EEA Agreement give the Contracting Parties express powers in the environmental field. These provisions confirm the 'polluter pays' principle but go further calling for the requirements of environmental protection to be included in implementation of other policies of the Contracting Parties and stressing the need for prevention. The theme of integrating the environment into other policies is taken up, along with the concept of 'sustainable development', in the EC's Fifth Programme on the Environment <sup>(2)</sup>. This acknowledges that the integration of environmental policy with other policies has not been wholly satisfactory when relied on the traditional approach, based almost exclusively on regulation and particularly standards. This programme therefore argues for a broadening of the range of policy instruments. Different instruments (regulation, voluntary action and economic measures) or various combinations of these may be the best way of achieving desired environmental objectives in a given situation, depending on the legal, technical, economic and social context. Both positive financial incentives, i.e. subsidies, and disincentives, namely taxes and levies, have their place.
- (2) The application of the EEA provisions on state aid must reflect the role economic instruments can play in environmental policy. This means taking account of a broader range of financial measures in this area. Aid control and environmental policy must also support one another in ensuring stricter application of the 'polluter pays' principle.

<sup>(1)</sup> This chapter corresponds to the Community guidelines on State aid for environmental protection (not yet published).

<sup>(2)</sup> COM(92)23 final, Volume II, 27 March 1992 and Council resolution of 1 February 1993.

- (3) Subsidies may be a second-best solution in situations where the 'polluter pays' principle — which requires all environmental costs to be 'internalized', i.e. absorbed in firms' productions costs — is not yet fully applied. However, such aid, particularly in the most polluting sectors of industry, may distort competition, create trade barriers and jeopardise the functioning of the EEA Agreement. The fact is that firms in all EEA States have to invest to make their plant, equipment and manufacturing processes meet environmental requirements, so gradually internalizing external environmental costs. State aid is liable to give certain firms an advantage over their competitors in other EEA States not receiving such aid, even though subject to the same environmental constraints.

**15.2. *Main types of state aid given for environmental protection***

- (1) A description is given below of the main types of State support for environmental protection that have been notified to the EC Commission in recent years. The various types of aid are divided into the three broad categories: investment aid, horizontal support measures and operating aid.

**15.2.1. *Investment incentives, possibly associated with regulation or voluntary agreements***

- (1) In many areas of environmental policy, firms are required to meet certain standards by law. Such mandatory standards may transpose international agreements or EEA legislation into national law, or they may be set solely on the basis of national, regional or local objectives. The common feature in such situations is that there is a legal requirement.
- (2) However, to achieve or restore a satisfactory quality of the environment in heavily industrialized areas in particular, it is necessary gradually to raise levels of protection and to encourage firms to go beyond legal requirements.
- (3) The ultimate objective of investment incentives in this sphere is to facilitate a gradual raising of the quality of the environment. Support for investment typically has fallen within the EC into one of the following categories:
- aid under programmes designed to help existing firms adapt their plant to new standards or encourage them to reach such standards more rapidly (aid available for a limited period to speed up the process of implementing new standards),
  - aid to encourage efforts to improve significantly on mandatory standards through investment that reduces emissions to levels well below those required by current or new standards,
  - aid granted in the absence of mandatory standards on the basis of agreements whereby firms take major steps to combat pollution without being legally required to do so or before they are legally required to do so,
  - aid for investment in fields in which environmental action is a matter of priority, but benefits the community at large more than the individual investor and is therefore undertaken collectively. This may be the case, for example, with waste disposal and recycling,
  - aid to repair past environmental damage which the firms are not under any legal obligation to remedy.

**15.2.2. *Aid for horizontal support measures***

- (1) Horizontal support measures are designed to help find solutions to environmental problems and to disseminate knowledge about such solutions so that they are applied more widely. The wide range of activities in this field includes:
- research and development of technologies that cause less pollution,
  - provisions of technical information, consultancy services and training about new environmental technologies and practices,
  - environmental audits in firms,
  - spreading information and increasing awareness of environmental problems among the general public, general promotion of ecological quality labels and of the advantages of environmentally friendly products, etc.

**15.2.3. Operating aid in the form of grants, relief from environmental taxes or charges and aid for the purchase of environmentally friendly products**

- (1) Despite the progress achieved in reducing pollution and in introducing cleaner technologies, there are many activities which damage the environment but whose environmental costs are not passed on in production costs and product prices. Conversely, the environmental benefits of products and equipment that cause less pollution are normally not fully reflected in lower prices to consumers. A clear trend is nevertheless apparent towards measures to internalize some of these external costs and benefits through taxes or through charges for environmental services, on the one hand, and through subsidies, on the other.
- (2) The introduction of environmental taxes and charges can involve State aid because some firms may not be able to stand the extra financial burden immediately and require temporary relief. Such relief is operating aid. It may take the form of:
  - relief from environmental taxes introduced in some countries, where it is necessary to prevent their firms being placed at a disadvantage compared with their competitors in countries that do not have such measures,
  - grants to cover all or part of the operating cost of waste disposal or recycling facilities, water treatment plant, or similar installations, which may be run by semi-public bodies with users being charged for the service. Cost-related charges for environmental services are in line with the 'polluter pays' principle. However, it may be necessary to delay the introduction of full charging or to cross-subsidize some users at the expense of others, especially during the transition from traditional waste disposal practices to new recycling of treatment techniques. The state may also cover part of the investment costs of such facilities.
- (3) Among the subsidies designed to reflect the positive environmental benefits of certain technologies are:
  - grants or cross-subsidies to cover the extra production costs of renewable energies, and
  - aid that encourages consumers and firms to purchase environmentally friendly products <sup>(1)</sup> rather than cheaper conventional ones.

**15.3. *The aim and scope of the rules to be applied with regard to aid for environmental protection***

- (1) The rules set out in this chapter aim to strike a balance between the requirements of competition and environment policy, given the widespread use of state aid in the latter policy. Such aid is normally only justified when adverse effects on competition are outweighed by the benefit for the environment. The rules are intended to ensure transparency and consistency in the manner in which the EEA provisions on state aid are applied by the EFTA Surveillance Authority to the wide range of instruments described above (regulation, taxes and subsidies, training and information measures) that may be used by EFTA States for environmental protection purposes. Therefore, the criteria the EFTA Surveillance Authority will apply in assessing whether state aid of various types for environmental protection purposes is compatible with Article 61 of the EEA Agreement are stated below. The intention is not to encourage EFTA States to grant aid, but when they wish to do so to guide them as to what types and levels of aid may be acceptable.
- (2) These rules apply to aid in all the sectors governed by the EEA Agreement, including those subject to specific sectoral rules which currently are synthetic fibres, motor vehicle, steel and transport, in so far as such rules do not provide otherwise.
- (3) This chapter sets out the approach followed by the EFTA Surveillance Authority in the assessment pursuant to Article 61 of State aid for the following purposes in the environmental field:
  - investment,

<sup>(1)</sup> General criteria for environmentally friendly products are listed in Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme, OJ No L 99, 11. 4. 1992, p. 1 (the act is foreseen to be adopted in the additional package to the EEA Agreement).

- information activities, training and advisory services,
- temporary subsidies towards operating costs in certain cases, and
- purchase or use of environmentally friendly products.

They apply to aid in all forms <sup>(1)</sup>.

- (4) Aid for energy conservation will be treated like aid for environmental purposes according to the rules in so far as it aims at and achieves significant benefits for the environment and the aid is necessary, having regard to the cost savings obtained by the investor. Aid for renewable energy is also subject to these rules, in so far as aid for investment is concerned. However, higher levels of aid than provided for in section 15.4.1 below may be authorized in appropriate cases. Operating aid for production of renewable energies will be judged on its merits.
- (5) State aid for research and development in the environmental field is subject to the rules set out in Chapter 14 of these guidelines.

#### 15.4. *Assessment of aid for environmental protection under Article 61 of the EEA Agreement*

- (1) State aid for environmental protection often fulfils the criteria laid down in Article 61 (1). It confers an advantage on particular enterprises, unlike general measures which benefit firms throughout the economy, and it can affect intra-EEA trade.
- (2) However, where aid meets the conditions set out below, the EFTA Surveillance Authority may consider that it is eligible for one of the exemptions provided for in Article 61 of the EEA Agreement. Exemption is conditional on compliance with other provisions of the EEA Agreement as well.

##### 15.4.1. *Aid for investment*

- (1) Aid for investment in land (when strictly necessary to meet environmental objectives), buildings, plant and equipment intended to reduce or eliminate pollution and nuisances or to adapt production methods in order to protect the environment may be authorized within the limits laid down in this chapter. The eligible costs must be strictly confined to the extra investment costs necessary to meet environmental objectives. General investment costs not attributable to environmental protection must be excluded. Thus, in the case of new or replacement plant, the cost of the basic investment involved merely to create or replace production capacity without improving environmental performance is not eligible. Similarly, when investment in existing plant increases its capacity as well as improving its environmental performance, the eligible costs must be proportionate to the plant's initial capacity. In any case aid ostensibly intended for environmental protection measures but which is in fact for general investment is not covered by rules on aid for environmental protection. This is true, for example, of aid for relocating plants to new sites in the same area. Such aid is not covered by these rules because recent cases within the EC have shown that it may conflict with competition and cohesion policy. It will therefore be considered on a case-by-case basis until sufficient experience has been built up for more general rules to be issued.
- (2) The rules for investment aid in general also apply to aid for investment to repair past damage to the environment, for example by making polluted industrial sites again fit for use. In cases where the person responsible for the pollution cannot be identified or called to account, aid for rehabilitating such areas may not fall pursuant to Article 61 (1) of the EEA Agreement in that it does not confer a gratuitous financial benefit on particular firms or industries. Such cases will be examined on their merits.
- (3) As a general rule, aid for environmental investment can be authorized up to the levels set out below <sup>(2)</sup>. These provisions apply both to investment by individual firms and investment in collective facilities.

<sup>(1)</sup> The principal forms are grants, subsidized loans, guarantees, tax concessions, reductions in charges and benefits in kind.

<sup>(2)</sup> The rules for investment aid laid down in this chapter are without prejudice to those provided by other EEA legislation existing or yet to be enacted, in particular in the environmental field.

*15.4.1.1. Aid to help firms adapt to new mandatory standards*

- (1) Aid for investment to comply with new mandatory standards or other new legal obligations and involving adaptation of plant and equipment to meet the new requirements can be authorized up to the level of 15 % gross <sup>(1)</sup> of the eligible costs. Aid may be granted only for a limited period and only in respect of plant which has been in operation for at least two years when the new standards or obligations enter into force.
- (2) For small and medium-sized enterprises, as defined for the purposes of State aid control in Chapter 10 of these guidelines, carrying out such investment an extra 10 percentage points gross of aid may be allowed. If the investment is carried out in assisted areas, aid can be granted up to the prevailing rate of regional aid authorized by the EFTA Surveillance Authority for the area, plus, for SMEs, 10 percentage points gross in Article 92 (3) (c) areas and 15 percentage points gross in Article 92 (3) (a) areas <sup>(2)</sup>.
- (3) In keeping with the 'polluter pays' principle, no aid should normally be given towards the cost of complying with mandatory standards in new plant. However, firms that instead of simply adapting existing plant more than two years old opt to replace it by new plant meeting the new standards may receive aid in respect of that part of the investment costs that does not exceed the cost of adapting the old plant.
- (4) If both EEA and national mandatory standards exist for one and the same type of nuisance or pollution, the relevant standard for the purposes of this provision shall be the stricter one.

*15.4.1.2. Aid to encourage firms to improve on mandatory environmental standards*

- (1) Aid for investment that allows significantly higher levels of environmental protection to be attained than those required by mandatory standards may be authorized up to a maximum of 30 % gross of the eligible costs. The level of aid actually granted for exceeding standards must be in proportion to the improvement of the environment that is achieved and to the investment necessary, for achieving the improvement.
- (2) If the investment is carried out by SMEs, an extra 10 percentage points gross of aid may be allowed. In assisted areas, aid can be granted up to the prevailing rate of regional aid authorized by the EFTA Surveillance Authority for the area, plus, where appropriate, the supplements for SMEs referred to above <sup>(3)</sup>.
- (3) If both EEA and national mandatory standards exist for one and the same type of nuisance or pollution, the relevant standard for the purposes of applying this provision shall be the stricter one.
- (4) Where a project partly involves adaptation to standards and partly improvement on standards, the eligible costs belonging to each category are to be separated and the relevant limit applied.

*15.4.1.3. Aid in the absence of mandatory standards*

- (1) In fields in which there are no mandatory standards or other legal obligations on firms to protect the environment, firms undertaking investment that will significantly improve on their environmental performance or match that of firms in other EEA States in which mandatory standards apply may be granted aid at the same levels and subject to the same condition of proportionality as for going beyond existing standards (see above).
- (2) Where a project partly involves adaptation to standards and partly measures for which there are no standards, the eligible costs belonging to each category are to be separated and the relevant limit applied.

<sup>(1)</sup> I.e. the nominal (before-tax) value of grants and the discounted before-tax value of interest subsidies as a proportion of the investment cost. Net figures are after tax.

<sup>(2)</sup> See chapter 10. If the aid available for environmental investment in a non-assisted area under these rules exceeds the prevailing rate of regional aid authorized for an Article 61 (3) (c) assisted area in the same country, then the rate of aid in the assisted area can be raised to that available in the non-assisted area.

<sup>(3)</sup> If the aid available for environmental investment in a non-assisted area exceeds the prevailing rate of regional aid authorized for an Article 61 (3) (c) assisted area in the same country, then the rate of aid in the assisted area can be raised to that available in the non-assisted area.

**15.4.2. Aid for information activities, training and advisory services**

- (1) Aid for publicity campaigns to increase general environmental awareness and provide specific information about, for example, selective waste collection, conservation of natural resources or environmentally friendly products may not fall within Article 61 (1) of the EEA Agreement at all where they are so general in scope and distant from the market-place as not to confer an identifiable financial benefit on specific firms. Even when aid for such activities does fall within Article 61 (1), it will normally be exemptible.
- (2) Aid may also be authorized for the provision of training and consultancy help to firms on environmental matters. For SMEs such aid may be granted at rates of up to 50 % of the eligible costs (see Chapter 10). In assisted areas aid of at least the authorized rate of investment aid may be authorized for training and consultancy services for both SMEs and larger firms.

**15.4.3. Operating aid**

- (1) The EFTA Surveillance Authority will not normally approve operating aid which relieves firms of costs resulting from the pollution or nuisance they cause. However, the EFTA Surveillance Authority may make an exception to this principle in certain well-defined circumstances. The EC Commission has done so so far in the fields of waste management and relief from environmental taxes. Such cases will be assessed on their merits and in the light of the strict criteria to be applied in the two fields just mentioned. These are that the aid must only compensate for extra production costs by comparison with traditional costs, and should be temporary and in principle degressive, so as to provide an incentive for reducing pollution or introducing more efficient uses of resources more quickly. Furthermore, the aid must not conflict with other provisions of the EEA Agreement and in particular those relating to the free movement of goods and services.
- (2) In the field of waste management, the public financing of the additional costs of selective collection, recovery and treatment of municipal waste for the benefit of businesses as well as consumers may involve State aid but can in that case be authorized provided that businesses are charged in proportion to their use of the system or to the amount of waste they produce in their enterprise. Aid for the collection, recovery and treatment of industrial and agricultural waste will be considered on a case-by-case basis.
- (3) Temporary relief from new environmental taxes may be authorized where it is necessary to offset losses in competitiveness, particularly at international level. A further factor to be taken into account is what the firms concerned have to do in return to reduce their pollution.

**15.4.4. Aid for the purchase of environmentally friendly products**

- (1) Measures to encourage final consumers (firms and individuals) to purchase environmentally friendly products may not fall within Article 61 (1) of the EEA Agreement because they do not confer a tangible financial benefit on particular firms. Where such measures do fall within Article 61 (1), they will be assessed on their merits and may be authorized provided that they are granted without discrimination as to the origin of the products, do not exceed 100 % of the extra environmental costs<sup>(1)</sup>, and do not conflict with other provisions of the EEA Agreement or legislation made under it<sup>(2)</sup> with particular reference to the free movement of goods.

<sup>(1)</sup> Unless EEA legislation does not allow as much as 100 %; see e.g., act referred to in point 3 of Chapter I of Annex II to the EEA Agreement on the approximation of the laws of the Member States relating to measures to be taken against air pollution by emissions from motor vehicles (Council Directive 91/441/EEC amending Directive 70/220/EEC). NB. Sectoral adaptations for the EFTA States concerning motor vehicles are laid down in Chapter I of Annex II to the EEA Agreement.

<sup>(2)</sup> E.g., act referred to in point 3 of Chapter I of Annex II to the EEA Agreement on the approximation of the laws of the Member States relating to measures to be taken against air pollution by emissions from motor vehicles (Council Directive 91/441/EEC amending Directive 70/220/EEC) (which also contains notification requirements) and act referred to in point 1 of Chapter XIX of Annex II to the EEA Agreement concerning the procedure for the provision of information in the field of technical standards and regulations (Council Directive 83/189/EEC).

**15.5. Basis of the exemption**

- (1) Within the limits and on the conditions set out in sections 15.4.1 to 15.4.4 aid for the above purposes will be authorized by the EFTA Surveillance Authority under the exemption provided for in Article 61 (3) (c) of the EEA Agreement for 'aid to facilitate the development of certain activities . . . , where such aid does not adversely affect trading conditions to an extent contrary to the common interest.' However, aid for environmental purposes in assisted areas pursuant to Article 61 (3) (a) of the EEA Agreement may be authorized under that provision.
- (2) Aid to promote the execution of important projects of common European interest which are an environmental priority and will have beneficial effects beyond the frontiers of the EEA State or States concerned can be authorized under the exemption provided for in Article 61 (3) (b) of the EEA Agreement. However, the aid must be necessary for the project to proceed and the project must be specific and well-defined, qualitatively important, and must make an exemplary and clearly identifiable contribution to the common European interest. When this exemption is applied, the EFTA Surveillance Authority may authorize aid at higher rates than the limits laid down for aid authorized pursuant to Article 61 (3) (c).

**15.6. Cumulation of aid from different sources**

- (1) The limits set above on the level of aid that may be granted for various environmental purposes apply to aid from all sources.

**15.7. Notification and review of the rules on aid for environmental protection**

- (1) Except in so far as aid classed as *de minimis* is concerned (see Chapter 12), the rules on aid for environmental protection do not affect the obligation of EFTA States pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement to notify all aid schemes, all alterations of such schemes and all individual awards of aid made to firms outside of authorized schemes. In the notification, EFTA States must supply the EFTA Surveillance Authority with all relevant informations showing, *inter alia*, the environmental purpose of the aid and the calculation of eligible costs. The rules for the accelerated clearance procedure for SME aid schemes and amendments of existing schemes (see Chapter 11) and on the notification of cumulations of aid (see Chapter 13) remain applicable. When it authorizes aid schemes, the EFTA Surveillance Authority may require individual notification of aid awards above a certain threshold or in certain sectors, apart from those referred to in paragraph 2 of section 15.3 or in other appropriate cases.
- (2) The EFTA Surveillance Authority will monitor the effects of existing aid schemes and will propose appropriate measures pursuant to Article 1 (1) of Protocol 3 if it finds the aid in question to be creating distortions of competition contrary to the functioning of the EEA Agreement.
- (3) The EFTA Surveillance Authority will follow these rules in its assessment of aid for environmental purposes until the end of 1999. Before the end of 1996 it will review the operation of the rules. The EFTA Surveillance Authority may amend them at any time should it prove appropriate to make changes in order to take account of other policies of the Contracting Parties such as competition, environmental and regional policies and of international commitments.

**16. AID FOR RESCUE AND RESTRUCTURING**

- (1) The EFTA Surveillance Authority's approach to rescue aid (aid granted for a limited period to provide for a study of restructuring and/or conversion opportunities) and restructuring aid (aid to keep enterprises in business until the restructuring and/or conversion can take effect) is outlined below.
- (2) Rescue aid merely granted to keep a firm in business while the causes of its difficulties are discovered and a remedy worked out, must observe the following conditions:

(<sup>1</sup>) This chapter corresponds to the Eighth Report on Competition Policy, point 228 on control of aid for rescue and restructuring (point 33 of Annex XV to the EEA Agreement).

- it must consist of cash aid in the form of loan guarantees or of loans bearing normal commercial interest rates,
  - it must be restricted to the amount needed to keep the firm in business (for example, covering wage and salary costs, routine supplies),
  - it must be paid only for the time needed (generally six months) to draw up the necessary and feasible recovery measures,
  - it must be warranted on the grounds of serious social difficulties; keeping the firm in operation must not have any adverse effects on the industrial situation in other EFTA States or EC Member States.
- (3) Restructuring aid must also be strictly conditional on the implementation of a sound restructuring and/or conversion programme and duly and effectively to restore the viability of the production concerned. Its intensity and amount must be restricted to the strict minimum for supporting the firm during the inevitable transitional period before such a programme takes effect. The period involved must therefore be limited and the assistance gradually reduced.
- (4) In the case of both rescue aid and restructuring aid, the EFTA Surveillance Authority requires that the industrial programmes drawn up for their application or individual significant cases of application as defined in chapter 29 be notified in advance.

#### 17. STATE GUARANTEES <sup>(1)</sup>

- (1) Guarantees given by the State directly or given by State's delegation through financial institutions are considered as falling within the scope of Article 61 (1) of the EEA Agreement.
- (2) Schemes establishing guarantees and guarantees granted outside a scheme have therefore to be notified to the EFTA Surveillance Authority pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.
- (3) The EFTA Surveillance Authority accepts the guarantees only if their mobilization is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the benefiting enterprise or any similar procedure. These conditions will have to be agreed at the initial, and only, examination by the EFTA Surveillance Authority of the proposed guarantee/State aid within the normal procedures pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.
- (4) Should the occasion arise that an EFTA State wants to mobilize the guarantee under different conditions than initially agreed at the granting stage, the EFTA Surveillance Authority will then consider the mobilization of the aid, as for other forms of aid, as creating a new aid, which has to be notified according to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.

#### 18. AID TO EMPLOYMENT <sup>(2)</sup>

- (1) Aid which simply has the effect of reducing labour costs without meeting special needs is to be regarded as operating aid and is in principle incompatible with the functioning of the EEA Agreement. On the other hand, the EFTA Surveillance Authority takes a generally favourable attitude to aid schemes for promoting employment where they are designed not just to keep workers in employment but to encourage firms to take on new workers, and especially to create additional jobs for particular categories of workers who have special difficulty in finding employment, for example the young or long-term unemployed, and where the aid is not confined to particular industries or firms.
- (2) In this context the EFTA Surveillance Authority takes into consideration the need to encourage the special effort made by firms recruiting such workers. In most cases such aid is not likely to alter trade to an extent contrary to the functioning of the EEA Agreement.

<sup>(1)</sup> This chapter corresponds to the following Commission letters to Member States: SG(89) D/4328 of 5 April 1989 and SG(89) D/12772 of 12 October 1989 (points 11—12 of Annex XV of the EEA Agreement).

<sup>(2)</sup> This chapter corresponds to the 16th Report on Competition Policy, point 253 and the 20th Report on Competition Policy, point 280 on aid to employment (points 35 and 36 of Annex XV to the EEA Agreement).

## PART IV:

## RULES ON STATE OWNERSHIP OF ENTERPRISES AND ON AID TO PUBLIC ENTERPRISES

19. PUBLIC AUTHORITIES' HOLDINGS <sup>(1)</sup>

- (1) The EFTA Surveillance Authority's general approach with regard to the acquisition of share holdings by the public authorities and the obligations of EFTA States in this field is the following:
- (2) 'Public holding' means a direct holding of central, regional or local government, or a direct holding of financial institutions or other national, regional or industrial agencies <sup>(2)</sup> which are funded from State resources within the meaning of Article 61 (1) of the EEA Agreement, or over which central, regional or local government exercises a dominant influence.
- (3) The EEA Agreement establishes both the principle of impartiality with regard to the system of property ownership (Article 125) and the principle of equality between public and private enterprises. This means that the EFTA Surveillance Authority action may neither penalize nor favour public authorities which provide companies with equity capital. Nor is it for the EFTA Surveillance Authority to express any opinion as to the choice companies make between methods of financing — loan or equity — whether the funds are of private or public origin.
- (4) Where, applying the principles laid down in this chapter, it is apparent that a public authority which injects capital by acquiring a holding in a company in contradiction to what hereinafter shall be referred to as the 'Market economy investor principle', by not merely providing equity capital under normal market economy conditions, the case has to be assessed in the light of Article 61 of the EEA Agreement. The Market economy investor principle is further developed in Chapter 20 to these guidelines.
- (5) Four types of situations can be distinguished in which public authorities may have occasion to acquire a holding in the capital of companies:
  - the setting up of a company,
  - partial or total transfer of ownership from the private to the public sector,
  - in an existing public enterprise, injection of fresh capital or conversion of endowment funds into capital,
  - in an existing private sector company, participation in an increase in share capital.
- (6) On this basis four cases can be distinguished:
  - (a) Straightforward partial or total acquisition of a holding in the capital of an existing company, without any injection of fresh capital, does not constitute aid to the company.
  - (b) Nor is State aid involved where fresh capital is contributed in circumstances that would be acceptable to a private investor operating under normal market economy conditions. This can be taken to apply:
    - where a new company is set up with the public authorities holding the entire capital or a majority or minority interest, provided the authorities apply the same criteria as a provider of capital under normal market economy conditions,
    - where fresh capital is injected into a public enterprise, provided this fresh capital corresponds to new investment needs and to costs directly linked to them, that the industry in which the enterprise operates does not suffer from structural overcapacity in the EEA and that the enterprise's financial position is sound,
    - where the public holding in a company is to be increased, provided the capital injected is proportionate to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance,

<sup>(1)</sup> This chapter corresponds to the Bulletin of the EC 9-1984 on the application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings (point 9 of Annex XV to the EEA Agreement).

<sup>(2)</sup> This includes public undertakings as defined in Article 2 of the act referred to in point 1 of Annex XV to the EEA Agreement (Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ No L 195, 29. 7. 1980, p. 35)).

- where, even though the holding is acquired in the manner referred to in either of the last two indents of subparagraph (c), it is in a small or medium-sized enterprise which because of its size is unable to provide adequate security on the private financial market, but whose prospects are such as to warrant a public holding exceeding its net assets or private investment,
  - where the strategic nature of the investment in terms of markets or supplies is such that acquisition of a shareholding could be regarded as the normal behaviour of a provider of capital, although profitability is delayed,
  - where the recipient company's development potential, reflected in innovative capacity from investment of all kinds, is such that the operation may be regarded as an investment involving a special risk but likely to pay off ultimately.
- (c) On the other hand, there is State aid where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions.

This is the case:

- where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested,
  - where, because of its inadequate cash flow if for no other reason, the company would be unable to raise the funds needed for an investment programme on the capital market,
  - where the holding is a short-term one, with duration and selling price fixed in advance, so that the return to the provider of capital is considerably less than he could have expected from a capital market investment for a similar period,
  - where the public authorities' holding involves the taking over or the continuation of all or part of the non-viable operations <sup>(1)</sup> of an ailing company through the formation of a new legal entity,
  - where the injection of capital into companies whose capital is divided between private and public shareholders makes the public holding reach a significantly higher level than originally and the relative disengagement of private shareholders is largely due to the companies' poor profit outlook,
  - where the amount of the holding exceeds the real value (net assets plus value of any goodwill or know-how) of the company, except in the case of companies of the kind referred to in the fourth indent of subparagraph (b) above.
- (d) Some acquisitions may not fall within the categories indicated in subparagraphs (b) and (c) so that it cannot be decided from the outset whether they do or do not constitute State aid.

In certain circumstances, however, there is a presumption that there is indeed State aid.

This is the case where:

- the authorities' intervention takes the form of acquisition of a holding combined with other types of intervention which need to be notified pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement,
- the holding is taken in an industry experiencing particular difficulties, without the circumstances being covered by subparagraph (c); accordingly, where the EFTA Surveillance Authority finds that an industry is suffering from structural overcapacity and even though most such cases are within the scope of subparagraph (c), it may consider it necessary to monitor all holdings in that industry, including those coming under subparagraph (b).

- (7) Leaving aside the fact that the EFTA Surveillance Authority has at all times the right to request information from the EFTA States case by case, the obligations devolving on EFTA States are specified in detail below.

<sup>(1)</sup> Excluding the straightforward takeover of the assets of a company which has become insolvent or gone into liquidation.

- (8) In the case referred to in 6 (a), there is no need to place any particular obligation on EFTA States.
- (9) In the cases referred to in 6 (b), the EFTA Surveillance Authority asks the EFTA States to inform it retrospectively by means of regular, and normally annual, reports on holdings acquired by financial institutions and directly by public authorities. The information given should include the following at least, possible as part of the financial institutions' reports:
- name of the institution or authority which acquired the holding,
  - name of the company involved,
  - amount of the holding,
  - capital of the company before the holding was acquired,
  - industry in which the company operates,
  - number of employees.
- (10) As regards the cases referred to in 6 (c), since these do constitute State aid, EFTA States are required to notify the EFTA Surveillance Authority pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement before they are put into effect.
- (11) With regard to the cases referred to in 6 (d) in which it is not clear from the outset whether or not they involve State aid, EFTA States should inform the EFTA Surveillance Authority retrospectively by means of regular and normally annual reports in the manner described in paragraph 9 above.
- (12) In cases of the kind described in 6 (d) where there is a presumption of State aid, the EFTA Surveillance Authority should be informed in advance. On the basis of an examination of the information received, it decides within 15 working days whether the information should be regarded as a notification for the purposes of Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.
- (13) Without prejudice to the EFTA Surveillance Authority's right to ask for information on specific cases, the obligation to supply regular retrospective information only applies to shareholdings in companies where one of the following thresholds is exceeded:
- balance-sheet total: ECU 4 million,
  - net turnover: ECU 8 million,
  - number of employees: 250.
- (14) The EFTA Surveillance Authority may review these thresholds in the light of future experience.
- (15) EFTA States also use certain forms of intervention which, while not having all the features of a capital contribution in the form of acquisition of a public holding, resemble this sufficiently to be treated in the same way. This is the case notably with capital contributions taking the form of convertible debenture loans or of loans where the financial yield is at least in part dependent on the company's financial performance. The criteria in paragraph 6 also apply in respect of these forms of intervention, and EFTA States are under the obligation set out in paragraphs 7 to 14.

## 20. APPLICATION OF STATE AID PROVISIONS TO PUBLIC ENTERPRISES IN THE MANUFACTURING SECTOR <sup>(1)</sup>

### 20.1. *Introduction*

- (1) A firm application of policy towards State aid is necessary for the successful functioning of the EEA Agreement. One of the areas identified as worthy of attention in this respect is public enterprises,

<sup>(1)</sup> This chapter corresponds to the Commission communication to the Member States on 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.

where there is need for both increased transparency and development of policy. The past experience of the EC Commission has shown that:

- in many cases only capital injections and not other forms of public funds have been fully included in aid disciplines for public enterprises,
- in addition, these disciplines in general only cover loss-making public enterprises,
- there has been a considerable volume of aid to public enterprises given other than through approved aid schemes (which are also available to private enterprises) which have not been notified under the existing rules.

- (2) This chapter firstly focuses, on the one hand, on the act referred to in point 1 of Annex XV to the EEA Agreement <sup>(1)</sup>, hereinafter referred to as the Transparency Directive and, on the other hand, it develops the 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, it does this in contradiction to the Market economy investor principle, and State aid is involved. It is then explained how the EFTA Surveillance Authority intends to increase transparency by applying this principle to all forms of public funds and to companies in all situations.
- (3) This chapter does not deal with the question of the compatibility under one of the derogations provided for in the EEA Agreement and it is limited to the manufacturing sector. This does not, however, preclude the EFTA Surveillance Authority from using the approach described in these rules in individual cases or sectors outside manufacturing to the extent that these principles apply in these excluded sectors and where it feels that it is essential to determine if State aid is involved.

#### 20.2. *Public enterprises and the rules of competition*

- (1) The EEA Agreement is neutral in the choice an EC Member State or an EFTA State may make between public and private ownership and does not prejudice a State's right to run a mixed economy (Article 125). However, the EEA Agreement lays down that the general rules of competition shall apply to public enterprises (Article 59 (1)). There is a specific derogation in Article 59 (2) from the general rule of Article 59 (1) in that the rules of competition apply to all public enterprises 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 to be contrary to the interests of the Contracting Parties. In the context of the State aid rules, this means that aid granted to public enterprises must, like any other State aid to private enterprises, be notified in advance to the EFTA Surveillance Authority to ascertain whether or not it falls within the scope of Article 61 (1). If it falls within Article 61 (1), it is for the EFTA Surveillance Authority to determine whether one of the general derogations provided for in the EEA Agreement is applicable in the sense that the aid becomes compatible with the functioning of the EEA Agreement. It is the EFTA Surveillance Authority's role to ensure that there is no discrimination against either public or private enterprises when it applies the rules of competition.
- (2) The Transparency Directive obliges EFTA States to ensure that the flow of all public funds to public enterprises and the uses to which these funds are put are made transparent (Article 1). When the EFTA Surveillance Authority considers it necessary so to request, EFTA States supply to it the information referred to in Article 1, together with any necessary background information, notably the objectives pursued (Article 5). Although the transparency in question applies to all public funds, the following are 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.

<sup>(1)</sup> Act referred to in point 1 of Annex XV to the EEA Agreement on the transparency of the financial relations between Member States and public undertakings.

- (3) Transparency of public funds must be achieved irrespective of the manner in which such provision of public funds is made. Thus, not only are 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 enterprises over which the public authority holds a dominant influence (Article 2).
- (4) The legality of Transparency Directive was upheld by the Court of Justice of the European Communities in its judgment of 6 July 1982 <sup>(1)</sup>.
- (5) The principles developed by the Court of Justice in this judgment with respect to the Transparency Directive are now part of the established case-law. These principles, as seen in the EEA context, may be summarized to the following:
  - making financial relations transparent and the provision, on request, of information under the Transparency Directive is necessary and respects the principle of proportionality,
  - the Transparency Directive respects the principle of neutrality of treatment of public and private enterprises,
  - for the purposes of monitoring compliance with Article 61 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement the EFTA Surveillance Authority has a legitimate interest:
    - to be informed of all the types of flows of public funds to public enterprises,
    - and
    - in the flows of public funds to public enterprises that come either directly from the public authorities or indirectly from other public enterprises.

20.3. *Principles to be used in determining whether aid is involved*

- (1) When public enterprises, just like private ones, benefit from moneys granted under transparent aid schemes approved by the EFTA Surveillance Authority, then it is clear that aid is involved and under what conditions the EFTA Surveillance Authority has authorized the aid in question. 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 enterprise when the private investor is operating under normal market economy conditions. The fact that competition is becoming ever more global and more intense both on the world and on European markets has many implications for European companies, for example with regard 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 such 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 than to a private enterprises in a comparable financial and competitive position, then the public enterprise is receiving an advantage not available to private enterprise 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 Agreement, then the principle of neutrality of treatment between public and private enterprises is infringed.
- (2) 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 and applied by the EC Commission in numerous individual cases <sup>(2)</sup>. There have also been a number of cases

<sup>(1)</sup> Joined Cases 188 to 190/80, France, Italy and the United Kingdom v. Commission [1982] ECR, p. 2545.

<sup>(2)</sup> Reference can be made to decisions Meura (OJ No L 276, 19. 10. 1984, p. 34), Leeuwarden (OJ No L 277, 29. 9. 1992, 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), ENI-Lanerosi (OJ No L 16, 20. 1. 1989, p. 52), Veneziana Vetro (OJ No L 166, 16. 6. 1989, p. 60), Quimigal (OJ No C 188, 28. 7. 1990, p. 3), CDF/Orkan (OJ No C 198, 7. 8. 1990, p. 2).

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 <sup>(1)</sup>.

- (3) It has to be noted that it is not important whether the capital injected into the public enterprise comes directly from the State or indirectly from State holding companies or other public enterprises.
- (4) The Court of Justice of the European Communities has also accepted the market economy investor principle as an appropriate one to be used to determine whether or not aid is involved. The Court has stated that in the case of an enterprise 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 foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have subscribed the capital in question <sup>(2)</sup>. The Court has 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. 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. 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 have no possibility of profitability, even in the long term, these injections must be considered as aid <sup>(3)</sup>.

#### 20.4. *Increased transparency of policy*

- (1) One of the aims of this chapter is to increase transparency by more systematically applying aid disciplines:
  - to public enterprises in all situations, not just those making losses,
  - to all the forms of public funds mentioned in the Transparency Directive (Article 3), in particular, for loans, guarantees and the rate of return, not just for capital injections.
- (2) This increased transparency of policy is to be brought about by clearly applying the market economy investor principle to public enterprises in all situations and all public funds covered by the Transparency Directive. The market economy investor principle is used because it is an appropriate and practical yardstick both for measuring any financial advantage a public enterprise may enjoy over a similar private one and for ensuring neutrality of treatment between public and private enterprises.

#### 20.5. *Practicality of the market economy investor principle*

- (1) It has to be noted that the application of the market economy investor principle may appear to cause certain difficulties. Some further explanations are therefore warranted. It is not the aim of the EFTA Surveillance Authority to replace the investor's judgement. Any requests for extra finance naturally calls for public enterprises and public authorities, just as it does for private enterprises

<sup>(1)</sup> Reference can be made to 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).

<sup>(2)</sup> Case 40/85 Belgium v. Commission [1986] ECR, p. 2321.

<sup>(3)</sup> Cases C 305/89, Italy v. Commission (Alfa) [1991] ECR, p. I-1603 and C 303/88 Lanerossi and [1991] ECR, p. 1433 respectively.

and the private providers of finance, to analyse the risk and the likely outcome of the project. In turn, the EFTA Surveillance Authority realises that this analysis of risk requires public enterprises, like private enterprises, to exercise entrepreneurial skills, which by the very nature of the problem implies a wide margin of judgement on the part of the investor. Within that wide margin the exercise of judgement by the investor cannot be regarded as involving State aid. It is in evaluation of the justification for the provision of funds that the EFTA State has to decide if a notification is necessary in conformity with its obligation pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement. In this context, it is useful to refer to paragraph 6 (d) and 12 of Chapter 19 of these guidelines. Only where there are no objective grounds to reasonably expect that an investment gives an adequate rate of return that would be acceptable to a private investor in a comparable private enterprise operating under normal market conditions, is State aid involved even when this is financed wholly or partially by public funds. It is not the EFTA Surveillance Authority's intention to analyse investment projects on an ex-ante basis, unless notification is received in advance in conformity with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.

- (2) There is no question of the EFTA Surveillance Authority 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 EFTA Surveillance Authority considers that there were no objective of *bona fide* grounds to reasonably expect an adequate rate of return in a comparable private enterprise 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 enterprise, 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 of 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.
- (3) The EFTA Surveillance Authority understands that a wide margin of judgement must come into entrepreneurial investment decisions. The market economy investor principle has, however, to be applied by the EFTA Surveillance Authority 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 must also be applied to any cross-subsidization by a profitable part of a public group of enterprises of an unprofitable part. This happens in private enterprises when either the enterprise 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 EFTA Surveillance Authority takes account of similar strategic goals. Such cross-subsidization is considered as aid only where the EFTA Surveillance Authority 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 EFTA Surveillance Authority does not normally ask for information of the flow of funds between such legally distinct subsidiaries of companies.
- (4) The EFTA Surveillance Authority 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 enterprise or group of enterprises 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 EFTA Surveillance Authority takes 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 restructure a company financially as opposed to calls for funds required to finance specific projects<sup>(1)</sup>. In addition the EFTA Surveillance Authority is also aware that a market economy investor's attitude is generally more favourably disposed towards calls for extra finance when the enterprise or group requiring the extra finance has a good record of providing adequate returns by way of dividends or capital accumulation on past investments. Where a company has under-performed in this respect in comparison with similar 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

<sup>(1)</sup> This may be particularly important for public enterprises that have been deliberately under-capitalized by the public authority owner for reasons extraneous to commercial justifications (e.g. public expenditure restrictions).

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.

- (5) 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 enterprise requiring finance may vary according to the nature and volume of the funding required, to the relationship between the enterprise and the shareholder and even to the past performance of the enterprise in providing an adequate return <sup>(1)</sup>. A market economy investor would not usually provide any additional finance without the appropriate level of information. Similar considerations would normally apply to public enterprises seeking finance. This financial information in the form of the relevant documentation should be made available at the specific request of the EFTA Surveillance Authority when it considers it necessary in evaluating the investment proposals from the point of view of deciding whether or not their financing constitutes aid <sup>(2)</sup>.
- (6) The EFTA Surveillance Authority does not disclose information supplied to it as it is covered by the obligations of professional secrecy. Therefore, investment projects are not scrutinized by the EFTA Surveillance Authority in advance except where aid is involved and prior notification in conformity with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement is required. However, where it has reasonable grounds to consider that aid may be granted in the provision of finance to public enterprises, the EFTA Surveillance Authority, pursuant to its responsibilities pursuant to Article 61 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, may ask for the information from EFTA States necessary to determine whether aid is involved in the specific case in question.

#### 20.6. *Compatibility of aid*

- (1) The EFTA Surveillance Authority 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 EFTA 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. 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 EEA Agreement is applicable, public enterprises are not exempted from the rules of competition by the imposition of these non-commercial objectives.
- (2) If the EFTA Surveillance Authority is to carry out its duties under the EEA Agreement, it must have the information available to determine whether the financial flows to public enterprises constitute aid, to quantify such aid and then to determine if one of the derogations provided for in the EEA Agreement is applicable. This chapter 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

<sup>(1)</sup> 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 the board level in formulating strategies and is already party to detailed information on the enterprise's financial situation.

<sup>(2)</sup> The provision of this information on request falls within the scope of the EFTA Surveillance Authority's powers of investigation of aid pursuant to Articles 3 and 61 of the EEA Agreement, Article 1 of Protocol 3 and Article 3 of the Surveillance Authority/Court Agreement and pursuant to Article 1 (c) of the Transparency Directive which states that the use to which public funds are put should be made transparent.

aid that is identified is compatible, is a question which is not dealt with because such a decision is in accordance with the principles used by the EFTA Surveillance Authority in the area.

#### 20.7. *Different forms of state intervention*

- (1) In deciding whether any public funds to public enterprises constitute aid, the EFTA Surveillance Authority must take into account the factors discussed below for each type of intervention covered by this chapter — capital injections, guarantees, loans, return on investment <sup>(1)</sup>. These factors are given as a guide to EFTA States of the likely attitude of the EFTA Surveillance Authority in individual cases. In applying this policy the EFTA Surveillance Authority bears in mind the practicability of the market economy investor principle described above.

##### 20.7.1. *Capital injections*

- (1) 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 is 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. A market economy investor would normally provide equity finance if the present value <sup>(2)</sup> 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.
- (2) In certain States investors may be obliged by law to contribute additional equity to firms whose capital basis has been eroded by continuous losses to below a predetermined level. A State might claim 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.
- (3) 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 EFTA Surveillance Authority evaluates 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 EFTA Surveillance Authority examines 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 is stressed that the items listed are indispensable to any analysis but not necessarily sufficient since account must also be taken of the principles set out above and of the question whether the funds required are for investment projects or a financial restructuring.

*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.

*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 EFTA Surveillance Authority is aware of the difficulties involved in making such comparisons between EFTA States due in particular to different accounting practices or standards. It bears this in mind when choosing

<sup>(1)</sup> This list is not exhaustive.

<sup>(2)</sup> Future cash flows discounted at the company's cost of capital (in-house discount rate).

the appropriate reference points to be used as a comparison with the public enterprises receiving funds.

*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.

*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.

#### 20.7.2. Guarantees

- (1) The position adopted by the EFTA Surveillance Authority in relation to State guarantees is contained in Chapter 17 of these guidelines. It regards all guarantees given by the State directly or by way of delegation through financial institutions as falling within the scope of Article 61 (1) of the EEA Agreement. 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 involves an analysis of the borrower's financial situation. 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 enterprise. If this guarantee is deemed incompatible with the functioning of the EEA Agreement following evaluation with respect to the derogations under the EEA Agreement, reimbursement of the value of any aid will be made by the enterprise 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 enterprises and no additional special arrangements are necessary for public enterprises other than the remarks made below.
- (2) 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 a status allows the enterprises in question to obtain credit on terms more favourable than would otherwise be available.
- (3) Where a public authority takes a holding in a public enterprise of a nature such that it is exposed to unlimited liability instead of the normal limited liability, the EFTA Surveillance Authority treats this as a guarantee on all the funds which are subject to unlimited liability. It then applies the abovementioned principles to this guarantee.

#### 20.7.3. Loans

- (1) 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;
  - and
  - (b) the security sought to cover the loan.
- (2) Where the perceived risk attached to the loan is high then *ceteris paribus* both (a) and (b) can be expected to reflect this fact. It is when this does not take place in practice that the EFTA Surveillance Authority considers 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 EFTA Surveillance Authority examines carefully the security used to cover loan finance. This evaluation process is similar to that proposed for capital injections.

- (3) 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 moneys 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 EFTA Surveillance Authority would evaluate it as such.
- (4) 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 enterprises obtaining loans from public financial institutions.

#### 20.7.4. Return on investments

- (1) The State, in common with any other market economy investor, should expect a normal return obtained by comparable private enterprises on its capital investments by way of dividends or capital appreciation<sup>(1)</sup>. The rate of return is 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 enterprise (i.e. debt or equity) which for public enterprises 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 enterprise to rectify the situation, then it can be assumed that the entity is being indirectly aided as the State is forgoing the benefit which a market economy investor would expect from a similar investment. A normal rate of return is defined with reference where possible being made to comparable private companies. The EFTA Surveillance Authority is aware of the difficulties involved in making such comparisons between EFTA States. In addition the difference in capital markets, currency fluctuations and interest rates between EFTA States further complicate international comparisons of such ratios. Where accounting practices even within a single EFTA State make accurate asset valuation hazardous, thereby undermining rate of return calculations, the EFTA Surveillance Authority examines 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.
- (2) When faced with an inadequate rate of return a private enterprise 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 enterprise has an inadequate rate of return, the EFTA Surveillance Authority could consider that this situation contains elements of aid, which should be analysed with respect to Article 61. In these circumstances, the public enterprise is effectively getting its capital cheaper than the market rate, i.e. equivalent to a subsidy.
- (3) Similarly, if the State forgoes dividend income from a public enterprise 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.

<sup>(1)</sup> The forgoing of a normal return on public funds falls within the scope of the Transparency Directive.

## PART V

## RULES ON SECTORAL AID

21. AID TO THE TEXTILE AND CLOTHING INDUSTRY <sup>(1)</sup>

- (1) In order to prevent State aid, granted to the textile and clothing industries, from distorting competition to a degree harmful to the functioning of the EEA Agreement, the following rules are set out:

21.1. *Special features of the textile/clothing industry*

- (1) The textile and clothing industry has been experiencing difficulties of adjustment. There are two reasons for the structural difficulties facing the industry; the growth of certain categories of production in developing countries, linked with an underlying trend towards the gradual opening-up of textile markets on a world-wide scale, and technological developments which could in the future transform the textile/clothing industry's production and marketing conditions.
- (2) Aid to the textile and clothing industries often has very marked repercussions on competition and trade within the territory covered by the EEA Agreement as intra-EEA trade in these products is at a high level. Although the problems of adjustment are basically the same throughout the territory covered by the EEA Agreement, the situation may differ appreciably from one country to another according to the degree of adjustment already achieved in each. In spite of the close interdependence of the various branches of the textile/clothing industry, these problems do not have the same urgency everywhere.
- (3) The EFTA Surveillance Authority considers it highly desirable that, where an EFTA State believes it necessary to give more or less specific aid to the textile/clothing sector, it should do so by means of special arrangements for this sector.
- (4) However, if the EFTA State also considers it necessary, in fixing such aid, to take into consideration extra-sectoral problems, in particular regional problems, the conditions it lays down for granting the aid must make it possible both to guide each decision to grant aid to the textile/clothing industry or to one of the enterprises therein (sectoral and extra-sectoral reasons) and to make possible an assessment of the impact of each of such aids on the situation of the industry throughout the territory covered by the EEA Agreement.
- (5) These guidelines concern only the sectoral aspect of the aid referred to above, but it is obvious that to the extent that the aid also meets extra-sectoral requirements, in particular those of regional origin, an assessment is needed from a regional standpoint. The regional aspect must be visualized and assessed simultaneously in the light of the problems of regional development and of their effects on the sector from the viewpoint of competition and trade between the Contracting Parties.

21.2. *Sectoral conditions for aid to the textile/clothing industry*

- (1) Aid granted by EFTA States to the textile/clothing industry may be justified in certain cases, in particular to solve pressing social problems. However, the EFTA Surveillance Authority recalls that aid in this sector of industry involves a risk of causing distortion of competition which is unacceptable to competitors who do not benefit from such measures. This applies in particular to aid for modernization and rationalization. Such aid cannot therefore be authorized unless it meets certain conditions, in particular:

— it must not lead to increases in capacity,

<sup>(1)</sup> This chapter corresponds to the Commission communication to the Member States on the Community framework for aids to the textile industry (SEC (71) 363 final-July 1971) and to the letter from the Commission to the Member States SG (77) D/1190 of 4 February 1977 and Annex (Doc. SEC (77) 317, 25. 1. 1977): Examination of the present situation with regard to aids to the textile and clothing industries (point 13—14 of Annex XV of the EEA Agreement).

- it must take account not only of the national state of the industry, but also of the situation within the territory covered by the EEA Agreement. In the EFTA Surveillance Authority's opinion, aid which may be granted to the textile/clothing industry should be planned and implemented in accordance with the following categories and conditions. At all events, such aid is assessed by the EFTA Surveillance Authority at the proper time by reference to these categories and conditions.

#### 21.2.1. Aid to joint measures in the textile/clothing field

- (1) This first category covers aid to joint measures taken by public, scientific or trade organizations and intended either:
  - to develop research, both basic and applied, into new fibres, into the improvement of the treatment of existing fibres and into processing methods,
  - to improve the short-term forecasts aimed at moderating the cyclical variations in activity which are particularly pronounced on the textile/clothing market.
- (2) The industrial sector benefiting from the grant of such aid should make a substantial contribution to the cost of the subsidized operation. Such aid may not affect competition and trade more than is absolutely unavoidable.

#### 21.2.2. Aid for improving the structure of the textile/clothing industry

- (1) This term must be understood to refer to aid to textile/clothing enterprises, intended:
  - to facilitate the elimination of surplus capacity in the branches or sub-branches where it exists,
  - to encourage the conversion of marginal activities to activities other than those of the textile/clothing sector,
  - to improve the industrial and commercial structure of the textile/clothing industry by encouraging horizontal concentration or vertical integration, in so far as such aid does not lead to increases in production capacity.
- (2) The application of the aid should meet the following conditions:
  - it must apply for a short period only,
  - it must be associated with a substantial contribution from the beneficiaries towards the cost and risks of the subsidized operations,
  - there must be a direct connection between the grant of the aid and the operations benefiting from the aid,
  - it must be possible to make an easy appraisal of the impact of the aid on the benefiting operations and to compare this impact throughout the territory covered by the EEA Agreement,
  - and, in any case, it must not affect competition and trade more than is absolutely unavoidable.

#### 21.2.3. Aid to investment in the textile/clothing industry

- (1) This category includes aid for the modernization of the textile/clothing industry and for conversion within this sector.
- (2) Since such aid has particularly marked repercussions on competitiveness it must be granted very sparingly.
- (3) In addition to the obligation not to increase production capacity and to take into consideration the situation throughout the territory covered by the EEA Agreement in the branch of industry which receives the benefit, such aid should find its justification in particularly pressing social problems.
- (4) Such aid should moreover meet the general conditions already set out above in respect of the improvement of the structure of the textile/clothing industry (section 21.2.2), and also the following requirements:
  - it must be strictly limited to those textile/clothing activities faced both with particularly pressing social problems and serious problems of adjustment,

- the aim of the aid must be to provide the beneficiaries in the short term with a level of competitiveness sufficient to ensure success on the international textile/clothing market, taking into account the basic trend towards a progressive opening-up of the markets on a world-wide scale,
- it must go beyond the limited criteria of appraisal on a sectoral basis, in that it also takes into consideration the conditions imposed by a dynamic development of the market structure within the territory covered by the EEA Agreement.

#### 21.3. *General principles to be applied*

- (1) Furthermore, the following should be taken into account when granting aid to the textile/clothing sector:
  - the need to prevent the creation of further excess production capacity in the industry, which already has persistent structural surplus capacity,
  - the importance of encouraging the conversion of branches or industries with excess capacity, and of promoting the development of production technology by means of research,
  - the need for continuous coordination of the decisions taken by the EFTA Surveillance Authority, after examining the aid to any one firm or branch of activity in the textile/clothing industry.
- (2) The EFTA Surveillance Authority considers that it is in the interest of the industry itself that the risk of competitive increase in aid be avoided.
- (3) A proliferation of uncoordinated national schemes of differing intensities cannot bring about lasting improvement in the industry either at national or at the EEA level, but instead affects conditions of competition without facilitating an improvement in the industry's position or the introduction of new technology. Aid measures of this kind would have a deleterious effect on trade and would cancel one another out by counteracting the efforts made by the authorities and reducing the expected results.
- (4) The rules for aid to the textile/clothing industry must take account of the special characteristics of this industry, notably the range and development of its products, of its technologies as of its markets and the fact that its structure is liable to undergo rapid change.
- (5) The term 'excess capacity' implies that account is taken of a sufficiently varied range of sectors. It must also be considered in relation to the expected development of competitive conditions.
- (6) Specific national aid to create additional capacity in those sectors of the textile and clothing industry where there is structural excess capacity or persistent stagnation of the market must be avoided.
- (7) In sectors of the textile and clothing industry where excess capacity and a shrinking market have caused prices to collapse throughout the territory covered by the EEA Agreement, assistance granted to firms converting to activities outside the industry or sector may a priori be given favourable consideration.
- (8) At a time when the industry is seeking new technologies as a means of improving its productivity and differentiating its products from those of non-EEA countries, aid to improve production processes and techniques may be given favourable consideration as may aid for applied research, undertaken by specialist organizations, provided the results are made available to the sector throughout the territory covered by the EEA Agreement on commercial terms and without discrimination.

#### 22. AID TO THE SYNTHETIC FIBRES INDUSTRY <sup>(1)</sup>

##### 22.1. *General principles*

- (1) Overcapacity has in general been so persistent in the synthetic fibres industry that, in this industry especially, the EFTA Surveillance Authority must ensure that the conditions of competition are

<sup>(1)</sup> This chapter corresponds to the code on aid to the synthetic fibres industry (OJ No C 346, 30. 12. 1992, p. 2).

determined by market forces. The EFTA Surveillance Authority considers that a high rate of capacity utilization by synthetic fibres producers is an effective means of enhancing their international competitiveness.

- (2) The EFTA Surveillance Authority informs the EFTA States and interested parties of its resolve to oppose any public financial support which would result in the installation of new capacity or even in the maintenance of existing capacity in the synthetic fibres industry. It intends to do this by making its authorization of aid conditional on a significant reduction in the production capacity of the assisted company. It is up to companies, if they so wish, to finance from internal resources any investment in expanding or maintaining capacity which they consider necessary to adapt their production to market trends and technological development. As a logical consequence, the EFTA Surveillance Authority will require notification of any plan to award aid, in whatever form, to synthetic fibres producers by way of support for such activities.
- (3) The EFTA Surveillance Authority would ask the EFTA States to transmit to it the information it needs to assess the sectoral consequences of any aid to a synthetic fibres producer. This is a general obligation which must be met even where the aid in question is granted under a scheme previously approved by the EFTA Surveillance Authority. In the case of aid coming under the rules on State aid for research and development and on environmental aid, the substantive examination of the aid schemes notified is carried out applying the provisions of those rules.
- (4) The EFTA Surveillance Authority informs the EFTA States and interested parties that the substantive field in which it exercises its specific monitoring powers in accordance with Article 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement comprises four fibres (i.e. polyester, polyamide, acrylic and polypropylene), irrespective of the end-use, whether textile or industrial, of the fibre concerned. Taking the industrial process, the principles set out in this chapter relate to the production and texturization of such fibres, and to their polymerization in so far as this operation is integrated into fibre production in terms of the machinery used.

#### 22.2. *Special notification requirements*

- (1) All aid to be granted by public authorities within the scope of an existing aid scheme to enterprises operating in the synthetic fibres industry as defined above, is subject to prior notification on the basis of Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.

#### 22.3. *Criteria for assessment*

- (1) The EFTA Surveillance Authority applies the following criteria when it scrutinizes proposals to grant aid for investments made by enterprises in the synthetic fibres industry.
- (2) Each proposal is assessed in the light of the functioning of the EEA Agreement, which in the case of the synthetic fibres industry is largely determined by the need for restructuring. The EFTA Surveillance Authority is generally sympathetic to investment aid granted to overcome the structural handicaps of the EFTA States' less-favoured regions.
- (3) When it assesses whether a significant reduction is made in the production capacity of a prospective recipient of investment aid (bearing in mind that, should a company increase or maintain its capacity, the EFTA Surveillance Authority will take an unfavourable view of the proposed aid), the EFTA Surveillance Authority considers the specifics of each proposal, including:
  - the intensity of the planned aid,
  - the volume and location of the aided investments (for example, if a project is eligible for regional aid pursuant to Article 61 (3) (a) or (c) of the EEA Agreement, the reduction in capacity might be assessed in the light of the severity of the region's structural handicap),
  - the trend of the average rate of capacity utilization both of the industry <sup>(1)</sup> and of the aid recipient and any industry group to which it belongs.

<sup>(1)</sup> By industry, the EFTA Surveillance Authority means the four fibres taken as a whole and the fibre concerned by the investment in question.

- (4) By applying the latter criterion relating to the average rate of utilization of the production capacity, the EFTA Surveillance Authority wishes to ensure that the restructuring of the company receiving the aid has not been necessitated by the recent acquisition of unused capacity which has rapidly become obsolete. On a more general level, this facilitates checks on the recipient company's viability.
- (5) When it comes to quantifying capacity, the EFTA States are asked to express it in tonnes and, in the case of yarn, also in decitex. The EFTA Surveillance Authority is introducing the latter variable in order that it might take into account in its assessment the average decitex in existence when the aid is granted and the decitex which will be produced once the aided investments have been carried out.

#### 22.4. *Time limit*

- (1) The above rules will apply until 31 December 1994, unless otherwise decided by the EFTA Surveillance Authority.

### 23. AID TO THE MOTOR VEHICLE INDUSTRY <sup>(1)</sup>

#### 23.1. *Introduction*

- (1) In view of the sensitivity of competition in the motor vehicle sector, the EFTA Surveillance Authority has decided to introduce the following rules for State aid in the motor vehicle industry. The objective of the rules is to establish full transparency of aid flows to the industry and impose at the same time a strict discipline to the granting of aid in order to assure that the competitiveness of the industry is not distorted by unfair competition. The EFTA Surveillance Authority can operate an effective policy only if it is able to take a position on individual cases before the aid is paid. Therefore, the rules foresee the prior notification of all significant aid cases irrespective of their objective as well as an annual report of all aid payments.

#### 23.2. *Definition of sector*

- (1) Under 'motor vehicle sector' is understood the manufacturing and assembly of motor vehicles and manufacture of motor vehicle engines.
- (2) Under 'motor vehicles' is understood passenger cars (volume, specialist and sports cars), vans, trucks, road tractors, buses, coaches and other commercial vehicles.
- (3) Excluded are racing cars, non-traffic cars (e.g. snow and golf cars), motorcycles, trailers, agricultural and forestry tractors, caravans, special purpose lorries and vans (e.g. fire engines, mobile work-shops), dumpers, work trucks (e.g. fork lifts, travel carriers, platform trucks) and military vehicles.
- (4) Under 'motor vehicle engines' is understood compression and spark engines for the above defined 'motor vehicles'.
- (5) Excluded are all parts and accessories for both motor vehicles and motor vehicle engines.
- (6) However, if a motor vehicle manufacturer or its subsidiary obtains aid for the manufacture of parts or accessories, or if any aid is granted for the manufacture of parts or accessories under licence or patents of a vehicle manufacturer, or of its subsidiary, such aid should be notified a priori.

#### 23.3. *Special notification requirements*

- (1) All aid to be granted by public authorities within the scope of an existing aid scheme to enterprises operating in the motor vehicle sector as defined above, where the cost of the project to be aided exceeds ECU 12 million is subject to prior notification on the basis of Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement. As regards aid to be granted outside the scope of an

<sup>(1)</sup> This chapter corresponds to the Community framework on State aid to the motor vehicle industry (OJ No C 123, 18. 5. 1989, p. 3 and OJ No C 81, 26. 3. 1991, p. 4) (points 16 and 17 of Annex XV to the EEA Agreement), as amended by Commission notice, OJ No C 36, 10. 2. 1993, p. 4.

approved aid scheme, any such project, whatever its cost and aid intensity, is of course subject without exception to the obligation of notification pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement. Where aid is not directly linked to a particular project, all proposed aid must be notified, even if paid under schemes already approved by the EFTA Surveillance Authority. The standard format for notification of aid projects in the motor vehicle industry is presented in Annex VI to these guidelines.

#### 23.4. *Criteria for assessment of aid cases*

- (1) The purpose of having prior notification of all aid to the motor vehicle sector is to allow the EFTA Surveillance Authority to verify more directly the compatibility of the aid in this sector with the competition rules of the EEA Agreement.
- (2) Evaluation of aid has to take account of general economic and industrial factors as well as sector and company-specific considerations together with regional and social factors. However, the EFTA Surveillance Authority is not seeking to impose an industrial policy strategy on the sector; such decisions are best left to the industry and the market itself. The aim of the EFTA Surveillance Authority in the sector is to ensure that motor vehicle manufacturers operate in the future in a climate of fair competition, thus preventing trade distortions resulting from aid and creating a generally competitive environment which will promote the industry's productivity and competitiveness.
- (3) The criteria which guides the EFTA Surveillance Authority in its assessment of aid cases varies according to the objectives pursued by the aid in question. However, in all cases, it is necessary to ensure that aid granted is in proportion to the problems it seeks to solve. For the various aid objectives the main assessment criteria of the EFTA Surveillance Authority shall be as follows:

##### 23.4.1. *Rescue and restructuring aid*

- (1) In principle, rescue and restructuring aid should only be approved in exceptional circumstances. The aid must be linked to a satisfactory restructuring plan. It is necessary to ensure that the aid does not allow a beneficiary to increase its market share at the expense of its unaided competitors. In cases where certain companies still have excess capacity the EFTA Surveillance Authority may require reductions in capacity in order to contribute to the overall recovery of the sector.

##### 23.4.2. *Regional aid*

- (1) The EFTA Surveillance Authority has a generally positive attitude towards investment aid for new plant and capacity extensions in motor vehicle activities which is granted in order to help overcome structural handicaps in disadvantaged regions of the EFTA States. The regional development benefits (e.g. the promotion of a lasting development of the region by creating viable jobs), should be assessed against possible adverse effects on the sector as a whole (such as the creation of important overcapacity).

##### 23.4.3. *Investment aid for innovation, modernization or rationalization*

- (1) In the context of the EEA market for motor vehicles, competition between producers will become even more intense and the distortive impact of aid will be greater. Therefore, the EFTA Surveillance Authority takes a strict attitude towards aid for modernization and innovation. These are activities to be undertaken by the companies themselves and normally financed from their own resources or by commercial loans as part of their normal company operation in a competitive market environment. Aid for fundamental rationalization must be carefully examined in order to verify that it brings about a necessary, radical change in the structure and organization of the company's activities and that the financing required goes beyond that which companies should normally be expected to finance from own resources. Similarly, proposed aid for innovation is examined in order to determine whether it really relates to the introduction of genuinely innovative products or processes.

**23.4.4. Aid for research and development**

- (1) The EFTA Surveillance Authority has a positive attitude towards aid for pre-competitive R&D. Nevertheless, the EFTA Surveillance Authority endeavours to ensure, in keeping with the rules on State aid for R&D (see Chapter 14), that a clear distinction is established between genuine research and development and the introduction of new technologies inherent to production investment (modernization).

**23.4.5. Aid for environmental and energy saving**

- (1) The development of less polluting and energy-saving vehicles is a standard requirement for the industry, and should thus be financed from the company's own resources. Aid for general pollution control, e.g. granted under the terms of the environmental aid rules (see Chapter 15) may still be acceptable under existing aid schemes. Such cases must be examined individually.

**23.4.6. Aid for vocational training linked to investments**

- (1) The EFTA Surveillance Authority has a generally positive attitude towards training, retraining and reconversion programmes. Aid proposed for such purposes must be examined in order to ensure that it does not simply alleviate the cost burden which companies would normally have to bear, in particular that they do not undermine the present rules.
- (2) Therefore, within the scope of these rules, the EFTA Surveillance Authority intends to carefully examine aid for company-specific vocational training measures which are prompted by, and thus directly linked to, investments. The EFTA Surveillance Authority ensures that:
  - such aid does not exceed a reasonable intensity, whenever linked with production investment,
  - the vocational training measures involved in the project correspond to genuinely qualitative changes in the required qualifications of the labour force and relate to a significant proportion of the workers, so that it can be assumed that these measures are intended to safeguard employment and develop new employment possibilities for persons at risk of unemployment.
- (3) Vocational training measures specific to one or all companies prompted by investments which do not fulfil these abovementioned criteria are to be considered as part of the investment, and submitted to the criteria regarding the different forms of investment aid as set out above.
- (4) Vocational training measures which are related to workers being retrained for continued employment in the company which are not linked to investment and which are intended to safeguard employment and develop new employment possibilities for persons at risk of unemployment in the framework of restructuring can be considered compatible.

**23.4.7. Operating aid**

- (1) As operating aid has a direct and ongoing distortive effect in a sensitive sector such as motor vehicles, it should not be authorized, even in disadvantaged regions. No new operating aid will be authorized in this sector and the EFTA Surveillance Authority will propose, on the basis of Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement, the progressive disappearance of existing operating aid to those EFTA States which may currently be granting such aid.

**23.5. Reporting**

- (1) The EFTA States are requested to provide the EFTA Surveillance Authority with an annual report which shall contain all aid payments under whatever form granted to all motor vehicle and motor vehicle engine producers during the year of reference. Aid payments which do not fulfil the threshold of prior notification should also be included in the annual report. The report should reach the EFTA Surveillance Authority at the end of the first quarter which follows the year of reference. Details of the information which should be included in the annual report are laid down in Annex VII to these guidelines.

## 24. AID TO NON-ECSC STEEL INDUSTRIES <sup>(1)</sup>

### 24.1. *Introduction*

- (1) The principles outlined in this chapter apply to steel activities not covered by Protocol 14 to the EEA Agreement. These activities are made up of a number of sectors and subsectors with the following chief characteristics:
  - the sectors are not covered by the ECSC Treaty,
  - in these sectors, steel undergoes preliminary or first-stage processing before subsequent processing into the end-product.
- (2) The following are the main subsectors involved in first-stage processing of steel:
  - pipes and tubes (seamless, large welded, small and medium welded),
  - wire drawing and rod-drawing,
  - cold-rolling and cold-forming,
  - forging (open-die forging, stamping),
  - steel foundries,
  - deep drawing and cutting.
- (3) Recognizing the sensitive nature of competition in the non-ECSC steel sectors, the aim of the following principles is to preserve even conditions of competition and trade and also to prevent that aid awarded to subsidiaries of steel groups for non-ECSC activities would ultimately benefit ECSC activities and thus undermine the necessary strict State aid discipline in that area.

### 24.2. *Special notification requirements*

- (1) Regardless of the general notification rules, EFTA States shall notify to the EFTA Surveillance Authority in advance all individual aid cases concerning the subsectors of seamless tubes and large welded tubes ( $\varnothing > 406,4$  mm), irrespective of the amount of the aid or the location of the regions or firms receiving the aid.
- (2) Aid granted under existing schemes to the non-ECSC steel sector is subject to prior notification of individual cases of aid exceeding the thresholds as laid down in Chapter 29.

### 24.3. *Criteria for assessment of aid cases*

- (1) The examination of aid cases is based on the following main parameters:
  - Degree of integration of each sector with activities covered by Protocol 14 to the EEA Agreement: only where there is a significant degree of integration is there a risk that aid transferred from one sector to another.
  - Only seamless tubes, large welded pipes ( $\varnothing > 406,4$  mm) and heavy open-die forging, followed by wire-drawing, are extensively technically integrated with steel activities covered by Protocol 14 to the EEA Agreement.
  - Financial and economic position of the sector: in theory, the ailing sectors are more likely to benefit from substantial aid. Tubes, heavy open-die forging, mild steel drawing and foundries are experiencing problems of overcapacity and are therefore in serious economic and financial difficulties.
  - Structure of the sector: sectors where there is a strong concentration of activities in a few major groups merit closer attention than those with a more fragmented structure where firms respond more flexibly to situations of surplus capacity. Only pipes and tubes, heavy open-die forging and mild steel wire-drawing are in the first category, whilst the dominant feature of the others is their fragmentation.

<sup>(1)</sup> This chapter corresponds to the framework for certain steel sectors not covered by the ECSC Treaty (OJ No C 320, 13. 12. 1988, p. 3) (point 37 of Annex XV to the EEA Agreement).

- Degree of economic activity in relation to steel covered by Protocol 14 to the EEA Agreement: the volume of steel consumption is one of the parameters used to assess the economic size of a sector in relation to the steel industry not covered by Protocol 14 to the EEA Agreement as a whole. Accordingly to that parameter, only tube firms and wire and rod drawing are of any significance.

#### 24.4. *Reporting*

- (1) EFTA States should supply the EFTA Surveillance Authority twice a year with reports on the aid disbursed over the previous six months to the subsector, referred to in paragraph 24.2 (1) and the small and medium-sized welded tubes, heavy open-die forging, foundries and mild steel wire-drawing subsectors.
- (2) The reports must be supplied within the two months following the end of each six-month period.
- (3) The EFTA Surveillance Authority reserves the right to change the lists of the subsectors referred to in paragraphs 24.2 (1) and 24.4 (1), if necessary by adding new subsectors if it finds that aid granted to those subsectors adversely affects trading conditions between the Contracting Parties.

## PART VI

RULES ON REGIONAL AID <sup>(1)</sup>

## 25. INTRODUCTION

- (1) Regional aid, when it is adequate and judiciously applied, forms one of the essential instruments of regional development and enables the individual countries to follow regional policies aimed at a more balanced growth between various regions.
- (2) However, aid granted in order to promote regional development, may constitute a risk of distorting competition and trade between countries to an extent incompatible with the functioning of the EEA Agreement.
- (3) Uncoordinated application of regional aid can, particularly in different social and economic circumstances, have negative effects on the functioning of the EEA Agreement. Therefore, the observance of a discipline prohibiting regional aid in the most developed regions and permitting aid in less developed regions according to the gravity of the problems will certainly have favourable effects on the latter. It is to be recognized as an objective of these guidelines to prevent the risks of outbidding of aid levels.
- (4) In introducing these guidelines, the EFTA Surveillance Authority is well aware of the fact that State aid is not the invariable and principal determinant of enterprises' decisions concerning location and extent of production activities. A complex set of factors, particularly socio-economic factors, is involved, which may explain why even a high level of aid intensity may in certain regions be insufficient to ensure further production or to attract new investments. Regarding the latter, experience shows that firms which actually have a choice of location, base their decision on a broad variety of variables, namely on the location of their suppliers and customers, the availability and quality of manpower, social legislation, company law, the level of labour costs and taxation, etc., of the different States, all of which influence the operation of establishments.
- (5) The risks of distorting competition and trade must therefore be appraised in a manner which varies in accordance with the various factors which favour or impede the development of the different regions of the territory covered by the EEA Agreement. This is, moreover, why the EFTA Surveillance Authority, in exercising its powers pursuant to Article 61 of the EEA Agreement, takes account of the fact that the EFTA States have the best knowledge at the national level of all the significant facts required to assess the needs of their regions.
- (6) Article 61 (3) of the EEA Agreement provides two distinct possibilities where the EFTA Surveillance Authority may consider regional aid compatible with the functioning of the Agreement. These are Articles 61 (3) (a) and (c) which apply to different degrees of regional disadvantage. The methods for application of Article 61 (3) (a) and (c) are presented in Chapter 28 of these guidelines.
- (7) Based on the considerations presented above, these guidelines define the principles to be observed for the coordination of regional policy valid for all regions of the territory covered by the EEA Agreement, while taking account of the specific problems of each of the regions.
- (8) The coordination principles for regional aid are established on the basis of five principal aspects forming a whole:

<sup>(1)</sup> Chapters 25 to 27 correspond to Council resolution of 20 October 1971 on general systems of regional aid (OJ No C 111, 4. 11. 1971, p. 1), Commission communication on Council resolution of 20 October 1971 on general systems of regional aid (OJ No C 111, 4. 11. 1971, p. 7), Commission communication to the Council on general regional aid systems (COM(75) 77 final), Commission communication of 21 December 1978 on regional aid systems (OJ No C 31, 3. 2. 1979, p. 9) as amended by Commission communication on the revision of the communication of 21 December 1978 (OJ No C 10, 16. 1. 1990, p. 8) (points 18 to 21 and point 23 of Annex XV to the EEA Agreement); Chapter 28 corresponds to Commission communication on the method for the application of Article 92 (3) (a) and (c) to regional aid (OJ No C 212, 12. 8. 1988, p. 2), as amended by Commission communication on the method of application of Article 92 (3) (c) to regional aid (OJ No C 114, 5. 5. 1992, p. 4) and Commission communication on the method of application of Article 92 (3) (a), to regional aid (OJ No C 163, 4. 7. 1990, p. 6) (point 22 and points 24 to 25 of Annex XV to the EEA Agreement).

- ceilings for aid intensity, differentiated according to the gravity of the regional problems,
- transparency,
- regional specificity,
- sectoral repercussions,
- a system of supervision.

The principal aspects of coordination are further developed in Chapters 26 to 28 of these guidelines.

- (9) A common method is established for assessing different aid schemes and individual cases. The common method, presented in Chapter 27 of these guidelines, is equally valid to aids other than aids classified as regional aids. However, the specific methods presented in Chapter 12 of these guidelines to be applied when aids are to be classified as *de minimis*, should be noted.
- (10) The common method referred to in Chapter 27 is based on the intensity of the aid either expressed as:
  - a percentage of the initial investment, or
  - in an amount expressed in European currency units (ecus) per job created by the initial investment.
- (11) Initial investment is defined as investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalization, restructuring or modernization). Investment in fixed assets by way of take-over of an establishment which has closed or would have closed had such take-over not taken place, may also be deemed to be initial investment. The manner in which initial investment so defined is identified in the regional aid schemes of the EFTA States is examined by the EFTA Surveillance Authority in the course of its review of existing aid schemes pursuant to Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement and its assessment of new aid pursuant to Article 1 (3) and 1 (2) of Protocol 3 to the Surveillance and Court Agreement.

## 26. PRINCIPLES FOR ASSESSMENT OF REGIONAL AID

### 26.1. *Differentiated ceilings of aid intensity*

- (1) The ceilings of aid intensity are fixed in net grant equivalents (NGE) expressed alternatively as a percentage of initial investment or in European currency units (ecus) per job created by the initial investment. The ceiling shall apply to all regional aid granted to a single investment. The ceilings are differentiated according to the gravity of problems in the regions in question.
- (2) One of the appropriate alternative ceilings must be respected by the total regional aid accorded to a given initial investment or on the creation of jobs.
- (3) If an EFTA State chooses to express the aid intensity in ecus per job created, also an additional ceiling expressed as a percentage of initial investment has to be observed (see 28.2.4). This addition ceiling does not apply for the tertiary sector and the transfer of an establishment.
- (4) For the purposes of paragraph (3), the tertiary sector is interpreted as being made up of the activities listed in sections G, H, I, J, K, L, M, N and O of the General Industrial Classification of Economic Activities within the European Communities (NACE-Rev. 1) <sup>(1)</sup>, with the exception of the following activities listed in Section I (Transport, storage and communication); division 60 (Land transport), division 61 (Water transport), division 62 (Air transport), group 63.1 (Cargohandling and storage) and group 63.2 (Other supporting transport activities).

<sup>(1)</sup> See Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Communities (OJ No L 293, 24. 10. 1990, p. 1), as amended by Commission Regulation (EEC) No 761/93 of 24 March 1993 (OJ No L 83, 3. 4. 1993, p. 1).

- (5) In the case of transfer of an establishment to an aided region, the ceilings are:
- 100 % of the cost of the transfer of capital equipment, or
  - the appropriate ceiling fixed in accordance with the differentiated ceilings of aid intensity applied to the value of the capital equipment or to the number of workers transferred.
- (6) The aid ceiling cannot be fixed once and for all. Thus, care must be taken to ensure that the ceiling chosen effectively corresponds to the needs and problems of the areas receiving aid.
- (7) The level of all regional aid ceilings will be revised, as a rule at the end of a three-year period having regard in particular to the experience gained, the evolution of the regional situation throughout the territory covered by the EEA Agreement (especially with regard to the development of unemployment), the number of jobs created or maintained and changes in aid schemes.

#### **Aid not conditional on initial investment or job creation**

- (8) Regional aid which is not conditional on initial investment or job creation may have the character of operating aid. The EFTA Surveillance Authority has reservations in principle as to the compatibility of operating aid with regard to the functioning of the EEA Agreement.
- (9) The circumstances in which the EFTA Surveillance Authority, notwithstanding its reservations in principle, might consider operating aid to be compatible with the functioning of the EEA Agreement, are specified in 28.1.5.

#### **Derogations**

- (10) Derogations from the intensity ceilings or from the guidelines concerning aid not conditional on initial investment or job creation regarding increases in, or the introduction of certain aid may be granted by the EFTA Surveillance Authority provided that the necessary justification is communicated in advance in accordance with the procedure provided for in Article 1 of Protocol 3 to the Surveillance and Court Agreement. The EFTA Surveillance Authority will periodically supply the EFTA States with a list of any such derogations.

#### **26.2. Transparency**

- (1) Transparency constitutes an essential condition for the coordination and assessment of general schemes of regional aid.
- (2) Aid is transparent when it is measurable using the common method. The common method is based on the relative size of the aid in relation to the amount of the initial investment expressed as a percentage or alternatively as the amount of aid expressed in ecus per job created by the initial investment. However, aid may still be assessable when the assessment involves assumptions which sometimes involve very wide margins of uncertainty. Aid which is not measurable to some extent is to be considered as non-transparent.
- (3) The EFTA States are obliged to ensure transparency of regional aid by eliminating non-transparent aid and by adapting existing and new schemes of aid towards real transparency.

#### **Ex-post system of measurement**

- (4) In order to ensure transparency, the EFTA Surveillance Authority will, in its decisions to authorize regional aid schemes which include both aid which can and which cannot be measured in advance, require the introduction of an *ex-post* system of measurement. To that effect, the EFTA State concerned shall incorporate in the aid scheme in question, a rule to the effect that in individual cases the net grant equivalent of aid which can be calculated in advance is subtracted from the appropriate ceiling to establish the amount of aid which could still be paid. The aid which cannot be measured in advance is then paid to the extent of this balance expressed as a net grant equivalent. If the aid is to be paid over a period of more than one year any balance remaining at

the end of a particular year may be carried forward to the next year and increased by the discount/reference year. This process continues until the aid terminates in accordance with its own particular rules of payment or until the balance to the ceiling is exhausted.

- (5) It should be remembered here that the ceilings are not necessarily those fixed under 28.1.4 and 28.2.4 but rather the maxima fixed by the EFTA State and accepted by the EFTA Surveillance Authority pursuant to Article 1 of Protocol 3 to the Surveillance and Court Agreement.

#### Measurability of aid conditional on initial investment or job creation

- (6) Labour aid is considered measurable when the aid awarded for each job created can be expressed as a net grant equivalent in ecus. Labour aid which cannot be so expressed can, however, always be measured by the *ex-post* system described in paragraph (4).
- (7) Aid for the rental of buildings is considered measurable when it is limited in time and the percentage of the rent given by way of aid in each year is fixed. The rent on the actual building, excluding the land, is assumed to be equivalent to a rate of return on the value of the building when the rate of return is deemed to be equal to the reference rate. The rent on the land element is assumed to be equal to a real rate of return, i.e. The difference between the reference rate and the rate of inflation. The capital value of the building and land shall be included in the standard basis for the purposes of defining the investment against which aid is to be measured.
- (8) Aid in the form of loan guarantees is measured by equating the guarantee to an interest subsidy on a loan equivalent to the value of the amount guaranteed. The value of the equivalent interest subsidy is taken as the difference between the reference rate applicable in a particular EFTA State and the rate at which the EFTA State's government can borrow, taken over the same period as that to which the reference rate relates. Any charge made by an EFTA State for granting a guarantee will be deducted from the value of the guarantee thus calculated. The ratio of the total amount paid out on behalf of defaulters each year to the total amount of guarantees still outstanding will be communicated annually by the EFTA State to the EFTA Surveillance Authority. This information on the default ratio may be used to adjust the value of a guarantee. Should an EFTA State prefer not to use this method for evaluating guarantees, it will notify to the EFTA Surveillance Authority all individual cases involving investment of over ECU 1,5 million in which guarantees are given.
- (9) Tax concessions are measured by the *ex-post* system outlined in paragraph (4).

#### Measurability of aid not conditional on initial investment or job creation

- (10) Aid related to replacement investment is measured by means of a method which is introduced with considerable reservations as it involves a wide degree of approximation. It is however considered necessary to place all EFTA States in the same position with regard to ceilings. The method described will therefore be used to ensure observance of the ceilings at least until the EFTA Surveillance Authority specifies the circumstances, if any, in which it might consider aid of this type to be compatible.
- (11) Aid to replacement investment is measured by first expressing the aid awarded as a net grant equivalent of replacement investment using the common method of evaluation. This net grant equivalent will then be related to the initial investment by using an appropriate discount rate. The timing of replacement investment will be based on the average life of capital equipment.
- (12) Tax aid which has the character of operating aid is measured by the *ex-post* system outlined in paragraph (4).
- (13) Labour aid which has the character of operating aid and which is expressed as a fixed amount per specified period for each person employed is measured by means of the reference rate, as the net grant equivalent of the sum necessary to generate the cash flow of the aid. The use of this method is based on the understanding that the amount paid for each person employed cannot be increased. Where the amount paid is not fixed, the *ex-post* system outlined in paragraph (4) is applied.

**Measurability of aid given on the transfer of an establishment**

- (14) Aid given on the transfer of capital equipment is considered measurable when it is either expressed as a percentage of the costs of moving capital equipment (including costs of dismantling and remounting) or expressed as a percentage of the value of the capital equipment moved. The value of the capital equipment moved and receiving aid in either of the two ways above shall not be included as capital expenditure eligible for further aid, and shall therefore be excluded from the standard basis.
- (15) Aid awarded on the basis of the number of workers transferred is coordinated against the appropriate ceilings in ecus per job created.

**26.3. Regional specificity**

- (1) Regional specificity is implemented in the light of the following principles:
- that regional aid does not cover the whole national territory, i.e. general aid may not be granted under the heading of regional aid,
  - that aid regimes clearly specify, either in geographical terms or by quantitative criteria, the limits of aided regions or, within these, the limits of aided areas,
  - that, except in the case of growth points, regional aid is not granted in a pin-point manner, i.e. to isolated geographical points having virtually no influence on the development of a region,
  - that, where problems which are different in kind, intensity or urgency occur, the aid intensity must be adapted accordingly,
  - that the graduation and variation of rates of aid across different areas and regions are clearly indicated.

**26.4. Sectoral repercussions**

- (1) The lack of sectoral specificity is a basic feature of most of the general schemes of regional aid, due to the fact that regional aid is often granted to all industrial sectors without distinction. Nevertheless, it is in the goods and services sectors that the effects of aid on competition and trade are felt. It is, however, difficult to assess these effects in the absence of any sectoral specificity in regional aid.
- (2) Consequently, maximum attention should be devoted to the sectoral aspects of the information on aid to be supplied to the EFTA Surveillance Authority by the EFTA States. In this respect, it is recalled that where a scheme of regional aid has mixed objectives, both regional and sectoral, it is essential that the scheme is notified as such to the EFTA Surveillance Authority, pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, so that it may be assessed from both the regional and the sectoral angles.
- (3) In the absence of a general solution for dealing with sectoral repercussions, the EFTA Surveillance Authority, following consultation with the EFTA States, will examine to what extent appropriate restrictions should be applied when awarding regional aid where such restrictions are justified by the situation in a sector.
- (4) When an investment benefits both from regional aid and from other types of aid on a regionally differentiated basis, the regional aid may be given only in so far as when the regional aid and the regional component of the other types of aid are cumulated, the ceilings approved by the EFTA Surveillance Authority are not exceeded.

**26.5. System of supervision**

- (1) The EFTA Surveillance Authority supervises the application of the principles of coordination by means of the *post facto* notification of significant cases of application of regional aid schemes, according to a procedure ensuring business secrecy. Adequate reporting requirements will be laid down in decisions on regional aid schemes according to Article 1 of Protocol 3 of the Surveillance and Court Agreement. The results of the application of the principles of coordination will be examined periodically with national officials responsible for aid. The EFTA Surveillance Authority will include the main results of this examination in the periodical survey on State aid which it has to prepare according to Protocol 27 (b) of the EEA Agreement.

## 27. THE COMMON METHOD OF ASSESSING AID

- (1) The common method of assessing aid facilitates the comparison of aid granted within the same scheme and the comparison between different aid schemes of the EFTA States, taking into consideration the theoretical maximum which may be granted. The theoretical maximum may be very different from the actual amount of aid granted in a given case.
- (2) The calculations are based on aid after tax, that is to say, the beneficiary's net subsidy-equivalent after payment of taxes on profits, assuming that in its first year of operation the enterprise makes such profits that the maximum tax is chargeable.
- (3) The basic definitions and the conventions are as follows:
  - (a) *The standard basis* for granting aid involves three categories of capital expenditure: land, buildings and plant. This convention involves a greater or lesser margin of approximation according to which items are included on the three categories of expenditure. The application of this method thus involves adjustments of the standard basis depending on whether aid is granted only for a part of these categories or for additional expenditure. In the latter case, the transparency of the aid depends on knowing its size in relation to the standard basis.
  - (b) *The breakdown of the standard basis for aid* is fixed by EFTA States and communicated to the EFTA Surveillance Authority. These breakdowns cannot be more than very rough averages. On this point therefore the method departs from the principle of considering only the theoretical maximum of aids.
  - (c) *The date of payment* is the same for all kinds of aid. This simplification also introduces a margin of approximation, but with a tendency to increase the intensity. No account is taken of the difference between the date or dates of payment and the date when the decision to grant it was taken. Loans at reduced rates or with rebates of interest are aligned on the date of subsidies by means of a calculation adjusting them to current values.
  - (d) The problem of different tax arrangements applied to aid within the same general scheme according to the different forms of aid, and between different general schemes of regional aid of the EFTA States, for the same form of aid, shall be solved by adopting the formula of the net result after tax, expressed as subsidy-equivalent, of aid actually remaining to the beneficiary. This assumes that the enterprise makes a profit from the outset and that at the end of the first financial year the profits are sufficient to pay the maximum taxes levied on the aid.
  - (e) Factors in the calculation as applied to loans at reduced rates or with rebates of interest are as follows:
    - the proportion: percentage of the capital expenditure, taking account of the standard basis, covered by the loan,
    - the term of the loan,
    - the term of the repayment-free period,
    - the extent of the interest rate debate.
- (f) A reference rate of interest is used to adjust aid to current values and to calculate aid element of loans. The reference rate shall reflect the average rate of interest on the market concerned. The reference rate is fixed by the EFTA Surveillance Authority on proposal from the EFTA State at the beginning of each year on the basis of the average annual rate for the preceding year. However, should there be a significant change in the relevant rate, it will be adjusted by agreement between the EFTA Surveillance Authority and the EFTA State concerned. Such an adjustment will only be made if there is an appreciable discrepancy between the current reference rate and the average of the rates recorded over a three-month period.
- (g) Transparent fiscal aid is that which fulfils the following conditions:

- the tax levied according to a standard or a maximum rate must be based on an amount invested in the region,
- in addition, the aid must be determinable by a proportion of the rate of tax and be granted for a specified term.

However, all fiscal aid may be made transparent by fixing a ceiling expressed as a percentage of the investment.

- (4) The common method of evaluation applies to the examination and calculation of aid intensities for regional aid schemes. Many of the assumptions and conventions used at the level of schemes are not necessary for the assessment of individual cases. With regard to them, the method is therefore adjusted according to the following refinements:
- the actual costs of land, buildings and plant will be used rather than the hypothetical standard basis,
  - the reference/discount rate will be the rate ruling at the beginning of the project,
  - where the aid and/or the investment is not given or undertaken all in one year, the actual timing of aid and investment will be taken into account. This is done by discounting both the investment and the aid, on the basis of calendar years, back to the year the investment was initially undertaken,
  - in the calculation of aid towards the rental of buildings or periods of reduced rents in State-owned buildings, the actual rent grant or reduction and the actual capital value of the buildings will be used.
- (5) The common method of evaluation describes a method of evaluation to be used for each type or category of aid. However, where for administrative or other reasons the EFTA Surveillance Authority considers that the method that would normally be used would be difficult or inappropriate to use for a particular aid, it will devise an alternative, equivalent method to overcome these difficulties. The EFTA Surveillance Authority will supply the EFTA States with details of such alternative methods.

## 28. METHODS FOR THE APPLICATION OF ARTICLE 61 (3) (a) AND (c) OF THE EEA AGREEMENT TO REGIONAL AID

- (1) In accordance with the basic principles on regional aid, as set out above, the EFTA Surveillance Authority has adopted methods for the application of Article 61 (3) (a) and (c) of the EEA Agreement. These methods for assessment are described below.
- (2) It should be observed that according to the Joint Declaration on Article 61 (3) (c) of the EEA Agreement, even if eligibility of the regions has to be denied in the context of Article 61 (3) (a) and according to the criteria of the first stage of analysis under subparagraph (c) by way of applying the methods outlined below, examination according to other criteria, e.g. very low population density, is possible.

### 28.1. *Method for the application of Article 61 (3) (a) to national regional aid*

- (1) Article 61 (3) (a) provides that aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the functioning of the EEA Agreement.

#### 28.1.1. Principles of method

- (1) In applying Article 61 (3) (a) the EFTA Surveillance Authority bases its decisions on a method of assessing the relative level of development of different regions compared to the EEA average. The method is based on the following principles:
- the socio-economic situation of Article 61 (3) (a) regions is assessed primarily by reference to per capita GDP/PPS (Gross domestic product in purchasing power standards) using the EEA index for the region averaged over a minimum period of three years based on the last three years, where possible,

- the relative level of regional development is compared to the EEA average,
- to determine eligibility pursuant to Article 61 (3) (a), reference is made to the situation of regions corresponding to NUTS <sup>(1)</sup> level II regions in the European Union requiring that the level II region concerned has a GDP/PPS index of 75 or lower, thus indicating an abnormally low standard of living and serious underemployment. This means that if a relatively favourable region is located in an otherwise backward area, it can be included pursuant to Article 61 (3) (a) provided the level II region to which it belongs satisfies the GDP/PPS threshold requirement. On the other hand, however, a more disadvantaged region will be excluded if this requirement is not satisfied,
- on this basis, level III regions are geographical units comparable to NUTS level III regions in the European Union used for differentiation of the maximum aid ceilings within the level II region.

#### 28.1.2. Choice of indicators

- (1) The method uses GDP per capita measured in purchasing power standards (PPS), a measure based on a comparison of the prices in the EEA States for the sample of products and services. This provides a method of measuring living standards which allows for differences in the cost of living between the regions of different EEA States.
- (2) Underemployment concerns all those who are not fully employed in some way. In general, where underemployment is great, productive output will tend to be low and as such will also be reflected in GDP data. For the areas concerned — predominantly rural areas with an underdeveloped industrial basis or a limited level of service activities — unemployment statistics are not a satisfactory measure of underemployment. The general low level of technology in the industrial infrastructure and the unsophisticated range of service activities lead to a relative emphasis on labour in the productive process. This can mask a significant level of underemployment which remains unrevealed by unemployment data.

#### 28.1.3. Exceptional regions

- (1) In addition to the regions selected by the above method, other regions may be eligible for exemption pursuant to Article 61 (3) (a), also with regard to the Joint Declaration on Article 61 (3) (c) of the EEA Agreement in order to take account of their exceptional situations, e.g. a very low population density.

#### 28.1.4. Aid ceilings

- (1) The highest permissible aid intensity which will apply in Article 61 (3) (a) regions is fixed to 75 % net grant equivalent (NGE) of initial investment, the alternative ceiling being a net grant equivalent of ECU 13 000 per job created by the investment <sup>(2)</sup>.
- (2) The principles of coordination provide that ceilings of aid intensity must be adapted according to the kind, intensity or urgency of the regional problems. Whilst all regions fulfilling the criteria for an Article 61 (3) (a) region have severe regional problems relative to an EEA standard, significant disparities in living standards and underemployment may exist between regions inside the same country.
- (3) Consequently, the EFTA Surveillance Authority will use its discretionary power to require a regional differentiation in aid intensity below 75 % NGE. As such the relevant ceiling of aid intensity for a regional aid scheme will be the maximum notified by the EFTA State to the EFTA Surveillance Authority in accordance with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement and approved by the EFTA Surveillance Authority when making its subsequent decision.

<sup>(1)</sup> Nomenclature of Statistical Territorial Units in the European Communities.

<sup>(2)</sup> Commission communication of 21 December 1978 on regional aid systems 2 (i) (OJ No C 31, 3. 2. 1979, p. 9), (point 21 of Annex XV of the EEA Agreement).

28.1.5. The range of aid instruments required to promote regional development in Article 61 (3) (a) regions

- (1) Regional aid can be broadly divided into two categories: aid linked to initial investment or job creation and that of a continuing character, designed to overcome particular or permanent disadvantages (operating aid).
- (2) Given the severe disadvantages of Article 61 (3) (a) regions, aid linked to initial investment may not always be suitable or sufficient to attract investment into the region or to allow indigenous economic activity to develop. Companies located in these regions typically face additional cost burdens because of location and infrastructure deficiencies which can permanently hamper their competitiveness.
- (3) Under certain conditions, some operating aid can bring a positive benefit to the least developed parts of the territory covered by the EEA Agreement.
  - Firstly, some regions may experience such serious cost and infrastructural disadvantages that even the maintenance of existing investment is extremely difficult. In the early stages of development, maintenance of existing investment, perhaps on a short to medium-term basis, can form a condition *sine qua non* for the attraction of new investment which will help in turn to develop the region. In many Article 61 (3) (a) regions, a broadly-based industrial structure does not yet exist. Most of the companies are very small, they operate in traditional sectors and will not expand without an outside stimulus. In such difficult environments, it may be justified to permit certain types of assistance such as marketing aid in order to enable companies in these regions to participate effectively in the EEA market, both as producers and consumers. Without them, the opportunities offered by the EEA may remain out of reach.
  - Secondly, some regions may suffer from such severe structural disadvantages, for example, those caused by remote location, that they are almost insuperable. As a practical example, island regions in peripheral locations can suffer a permanent cost disadvantage with respect to trade because of the burden of additional transportation expenses. The same holds true for communication costs. Operating aid of this type can foster closer links between the least-developed regions and the central regions, thereby promoting overall economic integration in the territory covered by the EEA Agreement.
- (4) In recognition of the special difficulties of these regions, the EFTA Surveillance Authority may, by way of derogation, authorize certain operating aid in Article 61 (3) (a) regions under the following conditions:
  - that the aid is limited in time and designed to overcome the structural handicaps of enterprises located in Article 61 (3) (a) regions,
  - that aid be designed to promote a durable and balanced development of economic activity and not give rise to a sectoral overcapacity at the EEA level such that the resulting EEA sectoral problem produced is more serious than the original regional problem; in this context a sectoral approach is required and in particular the EEA rules applicable to certain industrial sectors which currently are synthetic fibres, textiles and clothing, motor vehicle, steel and transport,
  - that such aid is not granted in violation of the specific rules on aid granted to companies in difficulty,
  - that aid designed to promote exports to other EEA States is excluded,
  - that an annual report on their application is sent to the EFTA Surveillance Authority, indicating total expenditure (or loss in the case of tax concessions and social security reductions) by type of aid and indication of sectors concerned.

28.2. Method for the application of Article 61 (3) (c) to national regional aid

- (1) Article 61 (3) (c) provides that aid to facilitate the development of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered compatible with the functioning of the EEA Agreement.

**28.2.1. Principles of method**

- (1) In applying Article 61 (3) (c), the EFTA Surveillance Authority bases its decisions on a method which allows the socio-economic situation of a region to be examined, both in its national context and in the context of obligations under the EEA Agreement. This enables the EFTA Surveillance Authority, having regard to the functioning of the EEA Agreement, to verify that a significant regional disparity exists and, if so, to authorize the EFTA State concerned, irrespective of its level of economic development, to pursue a national regional policy.
- (2) The decisions of the EFTA Surveillance Authority are based on the following principles:
  - regions are, as a rule, assessed on the basis of geographical units corresponding to the NUTS level III in the European Community (in justified exceptional circumstances a smaller or bigger unit may be used),
  - in the first stage of the analysis, the socio-economic situation of a region is assessed on the basis of two alternative criteria: per capita gross domestic product (GDP) or gross value added at factor cost (GVA) and structural unemployment,
  - in the second stage of analysis other relevant indicators are considered.

**28.2.2. First stage of analysis**

- (1) The socio-economic situation of a region is considered in relation to certain thresholds which are calculated in two steps. The first step relates to a minimum regional disparity in a national context whilst in the second step this minimum required disparity is adjusted to take account of the situation of those countries which have a more favourable level of development in an EEA context.
- (2) Since aid can only be accepted when it facilitates the development of certain economic areas, this requires a certain backwardness of the region within the EFTA State, that is to say a minimum negative regional disparity in the national context notwithstanding the relative situation of the EFTA State within the EEA. This minimum regional disparity in the national context is considered to be satisfied for the region, if:
  - income as measured by per capita GDP/GVA is at least 15 % below the average of the EFTA State concerned,
  - or
  - structural unemployment is at least 10 % above the average of the EFTA State concerned.
- (3) This is achieved if the GDP/GVA index for the region is not above a basic threshold of 85 or if the structural unemployment index is not below a basic threshold of 110. In each case the index for the EFTA State concerned equals 100.
- (4) A relatively more flexible threshold for structural unemployment has been fixed to take into account the important need to reduce unemployment.
- (5) At the same time aid can only be accepted when it does not adversely affect trading conditions to an extent contrary to the functioning of the EEA Agreement. Since it is against the functioning of the EEA Agreement to increase the existing differences between regions and the backwardness of less-favoured areas, the EFTA Surveillance Authority has determined that for aid to be granted to regions in EFTA States for which the indicator shows a more favourable situation than the EEA average, the national regional disparities of such regions must be correspondingly greater.
- (6) It is therefore necessary to establish the relative position of the EFTA State within the territory covered by the EEA Agreement. In measuring this position, two European indices are calculated for each EFTA State. They express the EFTA State's position with respect to income and to structural unemployment as a percentage of the corresponding EEA average. These indices are calculated as average values over a five-year period and are updated and published annually. In the second step the European index is used to adjust the respective basic threshold for each EFTA State which is better off than the EEA average, according to its relative position within the territory covered by the EEA Agreement, by applying the following formula:

$$\left( \text{basic threshold} + \frac{\text{basic threshold} \times 100}{\text{EEA index}} \right) : 2 = \text{modified threshold}$$

- (7) Since the situation of each region is examined in the first place in the national context, the formula attenuates the impact of the EEA index. The better the situation of an EFTA State compared with the EEA average, the more important must be the disparity of a region within the national context in order to justify the amount of aid.
- (8) In order to avoid the situation where the structural unemployment threshold becomes too rigorous, a maximum required disparity corresponding to an index of 145 is fixed. This facilitates the award of aid in regions with a very difficult unemployment situation in a national context even though the same situation may not be so unfavourable in an EEA context. Given the smaller variation in the threshold for GDP/GVA it has not been necessary to establish a maximum required disparity.

#### 28.2.3. Second stage of analysis

- (1) The first stage of analysis outlined above permits a basic examination of the socio-economic situation of a region in its national and EEA context in terms of unemployment and income levels. However, many other economic indicators can also be used to bring into more precise focus the socio-economic situation of a particular region. Therefore, meeting the relevant threshold in the first stage does not automatically qualify a region to receive State aid.
- (2) The first basic stage of analysis must be complemented by this second state which allows other relevant indicators based on available EEA and national statistical data to be taken into account. These other relevant indicators may include the trend and structure of unemployment, the development of employment, net migration, demographic pressure, population density, activity rates, productivity, the structure of economic activity (in particular the importance of declining sectors), investment, geographic situation and topography and infrastructure.
- (3) It is possible that these other relevant indicators may, especially with regard to the Joint Declaration on Article 61 (3) (c) of the EEA Agreement, reveal an adequate justification for regional aid even in regions which do not satisfy totally the thresholds established in the course of the first stage.

#### 28.2.4. Ceilings of aid intensity

- (1) Differentiated ceilings of aid intensity are established in accordance with the principles of coordination, providing that aid intensity must be adapted according to the kind, intensity or urgency of regional problems.
- (2) According to this, the EFTA Surveillance Authority will apply a maximum aid ceiling of 30 % net grant equivalent of initial investment or a net grant equivalent of ECU 5 500 per job created by the initial investment, but the latter may not exceed 40 % net grant equivalent of initial investment <sup>(1)</sup>.
- (3) In practice the ceilings approved by the EFTA Surveillance Authority may be lower, and frequently significantly lower, than the above maximum. If, for example, the approved ceiling expressed in net grant equivalent of initial investment is 20 %, the alternative ceiling would be ECU 3 500 per job created, but may not exceed 25 % net grant equivalent of initial investment <sup>(2)</sup>.

<sup>(1)</sup> Commission communication 1979 on regional aid systems (OJ No C 31, 3. 2. 1979, p. 9) (point 21 of Annex XV of the EEA Agreement), 2 (ii).

<sup>(2)</sup> Commission communication 1979, (point 21 of Annex XV of the EEA Agreement), 2 (iv).

## PART VII

## SPECIFIC RULES

## 29. GENERAL INVESTMENT AID SCHEMES

- (1) General investment aid schemes, i.e. schemes which are not directed at a specific sector (sectoral aid) or region (regional aid) and do not pursue a specific objective (horizontal aid), do not qualify for any of the exemption clauses provided for pursuant to Article 61 (2) or (3) of the EEA Agreement <sup>(1)</sup>. They are, therefore, incompatible with the functioning of the EEA Agreement and cannot be authorized by the EFTA Surveillance Authority.
- (2) The reasons for this are twofold. First, investment is a normal business expense that is in a firm's own interest and, therefore, in normal circumstances should not require government assistance. If incentives are given for such a near-market activity in an increasingly integrated market, this aid will tend to distort competition and trade and lead to misallocations of resources. Secondly, generally available investment aid operates against the objective to overcome structural handicaps of the EFTA States' less-favoured regions. When investment aid is available in non-assisted areas in the more prosperous parts of the territory covered by the EEA Agreement, it reduces the attractiveness of the incentives offered in assisted areas, especially in the less developed regions.
- (3) Although general investment aid schemes are incompatible with the EEA Agreement and the EFTA States should have brought them into line with the EEA Agreement under their general obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement (Article 3 of the EEA Agreement), some EFTA States might still apply such schemes. Until these are abolished or adjusted, the EFTA Surveillance Authority is obliged to monitor their application. Therefore, individual cases of application of such schemes have to be notified in advance pursuant to Article 1 (1) of Protocol 3 of the EEA Agreement, if they exceed the following thresholds <sup>(2)</sup>:
  - for aid having an intensity in net grant equivalent of over 15 % of investments: all cases of application,
  - for aid having an intensity over 10 % but not more than 15 %: cases where investment exceeds ECU 3 million,
  - for aid having an intensity over 5 % but not more than 10 %: cases where investment exceeds ECU 6 million,
  - for aids having an intensity of 5 % or less: cases where investment exceeds ECU 9 million.

## 30. STANDARDIZED ANNUAL REPORTING

- (1) For each authorized aid scheme, the EFTA Surveillance Authority will, as a general rule, request the EFTA States to furnish certain basic data in the form of annual reports on all current aid schemes in order to keep them under constant review. The data will enable the EFTA Surveillance Authority to monitor more effectively whether the implementation of all aid schemes fulfil or continue to fulfil the conditions necessary for the application of one of the exemption clauses contained in Article 61 (2) and (3) of the EEA Agreement.
- (2) To avoid placing an undue administrative burden on the EFTA States, detailed reports will be required only for a very limited number of aid schemes, whereas the simplified reports which will be generally asked for in decisions authorizing a scheme need contain only a limited number of data.
- (3) Annex III to these guidelines reproduces the structure required for a detailed report, and Annex IV provides an outline of the simplified reports to be submitted for all aid schemes for which a detailed report is not required. For aid notified under the accelerated clearance procedure and schemes with an annual budget of not more than ECU 5 million, only a very simplified report is required.

<sup>(1)</sup> See first, second and 20<sup>th</sup> Report on Competition Policy, points 164, 116—117 and 171.

<sup>(2)</sup> Paragraph (3) corresponds to letter from the Commission to the Member States SG(79) D/10478 of 14 September 1979 (point 32 of Annex XV to the EEA Agreement).

- (4) The annual reports should cover two financial years:
  - The year in which the report is received (year n) and for which estimated expenditure, or revenue losses due to tax expenditure, should be indicated.
  - the preceding year (year n-1), for which commitments had been made, expenditure actually had incurred and exact figures for revenue losses should be shown.
- (5) For each scheme, the first report should be sent to the EFTA Surveillance Authority not later than six months after the end of the financial year in which the scheme was approved by the EFTA Surveillance Authority. Subsequent annual reports should be sent to the EFTA Surveillance Authority not later than six months after the end of year n-1.
- (6) Failure to comply with the obligation to provide the reports within the deadline may oblige the EFTA Surveillance Authority to initiate proceedings pursuant to Article 1 (2) of Protocol 3 to the Surveillance and Court Agreement in respect of the aid scheme in question.
- (7) In addition to the information to be supplied in the standardized reports, EFTA States should provide any specific information requested by the EFTA Surveillance Authority as a condition of its approval of the aid.
- (8) The procedures for annual reports apply in general to State aid measures. They do not, however, apply to aid for transport where notifications and annual reports are governed by other rules, or to aid covered by the rules for steel (ECSC) and motor vehicles. Nor do they apply to *de minimis* aid. However, the arrangements for annual reports apply in general to the non-ECSC steel industry, in so far as the EFTA Surveillance Authority considers it necessary, and on a case-by-case basis.

### 31. OTHER SPECIFIC PROVISIONS

#### 31.1. *Conversions between national currencies and the ecu*

Any amounts expressed in these guidelines in ecus will be converted into the currencies of EFTA States throughout any calendar year at the exchange rates prevailing on the first day of the year on which exchange values for ecus into all currencies of the EEA are available. The exchange rates may be revised during the year by agreement between the EFTA Surveillance Authority and an EFTA State if necessitated by a significant change.

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## ANNEX I

CHECKLIST FOR INFORMATION TO BE SUPPLIED IN STATE AID NOTIFICATIONS TO THE  
EFTA SURVEILLANCE AUTHORITY

## SECTION I

1. EFTA State: .....
2. Title of aid scheme/aid measure (give title in original language and/or English): .....  
.....
3. Level of government responsible for scheme/aid measure:
  - central government,
  - regional authority,
  - local authority or
  - other.
4. Ministry or other administrative body with statutory responsibility for the scheme/aid measure and its implementation: .....  
.....  
Person(s) to contact: .....  
.....  
.....
5. Legal basis: .....  
(e.g. law, ministerial decree etc. (attach a copy of the draft legal basis if available at the time of notification)) .....  
Title: (give title in original language and/or English) .....  
References: .....  
.....  
.....
6. State whether a new scheme or an alteration to an existing one: ... — if a new scheme replaces an existing one, state which scheme: .....  
.....
7. If an alteration to an existing scheme give:
  - title of scheme: .....
  - date of notification and date of authorization by the EFTA Surveillance Authority and: .....  
.....
  - specify which rules and conditions are being changed and why: .....  
.....  
.....  
.....  
.....
8. Objective(s) of scheme/aid measure: (Indicate only one category; state secondary objectives, if any) .....  
.....

## Horizontal:

- SMEs,
- R&D <sup>(1)</sup>,
- environment,
- energy-saving,
- rescue and restructuring,
- employment etc..

## Regional:

- which regions, areas are eligible? .....

## Sectoral:

- which sectors (NACE three digit or equivalent national nomenclature (specify)) <sup>(2)</sup> are eligible? .....

.....

.....

.....

## 9. Form(s) of aid:

- grant,
- soft loan (including details of the preferential interest rate and how the loan is secured),
- interest subsidy,
- tax concession (e.g. deferred tax payments, lowered tax rates, exemptions of income from tax, reduced social security contributions etc.),
- equity participation,
- guarantee (including details of how the guarantee is secured and any charges made for the guarantee),
- aid tied to an R&D contract concluded with industrial firms (specify),
- other (specify).

Please state the following for each form of aid:

- a precise description of its rules and conditions of application (in particular its intensity) and
- its tax treatment.

## 10. State the eligible costs on which the aid is calculated for each form of aid (e.g. land, buildings, equipment, personnel, training, consultants' fees, etc.): .....

.....

.....

.....

## 11. State other aid limitations or criteria for each form of aid: .....

- specify any limits (number of employees, turnover, balance sheet totals, share of capital held by larger enterprises than SMEs <sup>(3)</sup> other) on recipients of aid or any other positive conditions used to determine recipients,

<sup>(1)</sup> If it is an R&D scheme, provide also additional information listed in section II of this Annex.

<sup>(2)</sup> NACE is the Central Industrial Classification of Economic Activities within the European Communities; see Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ No L 293, 24. 10. 1990, p. 1), as amended by Commission Regulation (EEC) No 761/93 of 24 March 1993 (OJ No L 83, 3. 4. 1993, p. 1).

<sup>(3)</sup> Small and medium-sized enterprises as defined under the rules on aid to SMEs.

- state whether the aid is accorded automatically once certain objective criteria are fulfilled or whether there is an element of discretion by the awarding authorities.

12. Repayment and penalty arrangements:

- repayment arrangements, if any, where projects are successful,
- penalty arrangements, if any, where projects fail to comply with the conditions on which aid was granted: .....
- .....
- .....

13. Cumulation of aid:

- where there is more than one form of aid, state to what extent a recipient may combine several forms of aid,
- state to what extent the aid in question may be combined with other aid schemes in operation: .....
- .....

14. Duration of aid scheme/aid measure:

- date of aid measure/scheme coming into force and date until which it will remain in force: .....
- if an existing scheme for what period of time being extended: .....

15. Budget/expenditure:

- give budget/expenditure figures in national currency,
- total budget for the duration of the scheme/aid measure,
- if an existing aid scheme is to be altered, give, for the last three years, expenditure in the form of commitments made (including estimated revenue losses in the case of tax expenditure),
- annual breakdown of the budget: .....
- .....
- .....
- .....

16. For schemes which do not have a specific sectoral or regional aim, specify any resulting sectoral or regional concentration of aid: .....

17. Estimated number of recipients: .....

18. Information/control measures envisaged to ensure that assisted projects comply with statutory objectives: .....

19. Fully reasoned justification of the compatibility of the aid scheme/aid measure backed by necessary statistical information: .....

20. Other relevant data (e.g. estimated number of jobs created or maintained): .....

## SECTION II

## ADDITIONAL INFORMATION TO BE PROVIDED IN A NOTIFICATION OF STATE AID FOR R&amp;D

## 1. Objectives:

Give a detailed description of the objectives of the measure and the type or nature of the R&D to be assisted:

.....

.....

## 2. Description of the stages of R&amp;D benefiting from aid:

- definition phase or feasibility studies,
- fundamental research,
- basic industrial research,
- applied research,
- development,
- pilot or demonstration projects.

## 3. Details of cost elements eligible for aid:

- personnel costs,
- supplies, materials (current costs), etc.,
- instrument and equipment,
- land and buildings,
- consultancy and equivalent services, including acquisition of research results, patent and know-how, licensing rights, etc.,
- first filing and maintenance costs for patents and/or copyright,
- overheads directly attributable to R&D,
- in the event of research contracts with industrial firms, admissible nominal profit margin.

Please specify the intensity levels where they vary according to cost elements:

.....

.....

## 4. Cooperative research:

- are projects carried out in cooperation with several firms eligible for aid? on special terms?  
.....
- if so, what are the terms?  
.....
- does the scheme provide for cooperation between enterprises and other bodies such as research institutions or universities? on special terms?  
.....
- if so, describe the terms and conditions:  
.....

**5. Multinational aspects:**

- does the scheme/project have multinational aspects (e. g. Esprit, Eureka projects)?

.....

if so:

- does the scheme envisage cooperation with partners in other countries?

.....

if so, please state which:

(a) other EFTA States: .....

(b) EC States: .....

(c) non-EEA States: .....

(d) undertakings in other countries: .....

- total costs of scheme/project: .....

- breakdown of total cost by partner:

.....

**6. Application of results:**

- who will own the R&D results in question?

.....

- are there any conditions attached to licensing of the results in question?

.....

- are there any provisions for general publication/dissemination of the results of the R&D?

.....

- what steps are envisaged to ensure that the results will be used/further developed?

.....

—

## ANNEX II

## NOTIFICATION FORM FOR THE USE OF THE ACCELERATED CLEARANCE PROCEDURE

1. EFTA State: .....
2. Title of scheme: .....
3. Is it a new scheme? .....
- 3.1. Level of government responsible for scheme: .....
  - central government: .....
  - regional authority: .....
  - local authority: .....
  - other: .....
- 3.2. Is it:
  - a horizontal scheme?  
for what purpose(s)? (e. g. SMEs, R&D, environment, energy-saving, rescue and restructuring, employment etc.): .....  
.....
  - a regional scheme?  
for which area(s)?: .....  
.....
  - a sectoral scheme?  
for which sector(s)?: .....  
.....
- 3.3. Form(s) of aid (specify conditions):
  - grant: .....
  - soft loan: .....
  - interest subsidy: .....
  - tax concession: .....
  - equity participation: .....
  - guarantee: .....
  - other: .....
- 3.4. Budget: .....  
.....
- 3.5. Duration: .....
- 3.6. Beneficiaries of aid:
  - firms employing up to ... persons (maximum 250) and having an annual turnover of up to ... (maximum ECU 20 million) or a balance sheet total of up to ... (maximum ECU 10 million) and not more than ... (maximum 25 %) owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.

## 3.7. Scale of aid:

3.7.1. if the scheme is for investment, what is the intensity of the aid? ... (maximum 7,5 % of the investment cost):

.....

3.7.2. if the scheme is to stimulate employment, what is the maximum amount of aid per job created? (maximum ECU 3 000):

.....

3.7.3. in other cases what is the maximum aid per firm? ... (maximum ECU 200 000):

.....

## 4. In the case of alteration to an existing scheme:

— when was the scheme notified to the EFTA Surveillance Authority?:

.....

— when was it approved by the EFTA Surveillance Authority? (date and reference of letter, aid case number),

.....

— how is the scheme to be amended? (duration, budget, conditions, etc.):

.....

.....

## 5. Remarks: .....

.....

## 6. Action proposed by the State Aid and Monopolies Directorate of the EFTA Surveillance Authority (to be left blank):

.....

—

## ANNEX III

## FORMAT OF DETAILED ANNUAL REPORT

1. Name of scheme: .....

2. Date of most recent approval by the EFTA Surveillance Authority: .../.../...

3. Expenditure under the scheme:

Separate figures should be provided for each form of aid in the scheme (e. g. grant, low-interest loans, guarantees). Provide figures on expenditure or commitments, revenue losses and other financial factors relevant to the granting of aid (e. g. period of loan, interest subsidies, default rates on loans net of sums recovered, default payments on guarantees net of premium income and sums recovered).

These expenditure figures should be provided on the following basis:

3.1. For year n, provide expenditure forecasts or estimated revenue losses due to tax expenditure.

3.2. For year n-1, indicate:

3.2.1. Expenditure committed, or estimated revenue losses due to tax expenditure, for new assisted projects and actual payments for new and current projects <sup>(1)</sup>.

3.2.2. Number of new recipients and number of new projects assisted, together with total amount of eligible investments and estimated number of jobs created or maintained.

3.2.3. Regional breakdown of amounts at 3.2.1 (NUTS level 2 or below) <sup>(2)</sup>.

3.2.4. For each major project (estimated investment in excess of ECU 3 million) for which a commitment was made but which was subsequently shelved: amount of investment and aid proposed, and number of jobs concerned.

3.2.5.1. Sectoral breakdown of total expenditure by recipients' sectors of activity (according to NACE two-digit classification or equivalent national nomenclature, to be specified).

3.2.5.2. Complete only if schemes are covered by the rules for State aids for R&D:

- breakdown of total expenditure by R&D stage (fundamental, basic industrial, applied, etc.),
- specify the number of projects involving EEA or international cooperation,
- give breakdown of expenditure by enterprise, research centre and university.

3.2.6. To be completed only for schemes:

- not reserved exclusively for SMEs,
- not involving the automatic granting of aid. Aid is granted automatically where it is necessary only to satisfy all the eligibility conditions in order to qualify for aid or where it is shown that a public authority is not exercising its statutory discretionary right to select recipients.

<sup>(1)</sup> If the figures for actual tax expenditure are not yet available, estimates should be provided and the final figures sent with the next report.

<sup>(2)</sup> The EFTA Surveillance Authority reserves the right to ask for more information at a higher level of disaggregation.

Provide the following information for each of those recipients, starting with the one receiving the most aid, which account for 30 % of total commitments in year n-1 (with the exception of budget appropriations earmarked for fundamental research by universities and other scientific institutions not covered by Article 61 of the EEA Agreement provided such research is not carried out under contract or in cooperation with the private sector):

- name,
- address,
- recipient's sector of activity (following classification referred to in question 3.2.5.1),
- amount of aid committed (or authorized where tax is involved),
- eligible cost of project,
- total cost of project.

The list must contain at least 10, but not more than 50 recipients. This rule takes precedence over the 30 % rule. If there are fewer than 10 recipients in the report year, they must all be listed. If there are several assisted projects per recipient, the information requested should be broken down by project. The information is not required in the case of aid subject to a ceiling and the number of recipients reaching it need be given.

3.2.7. Changes (administrative or other) introduced during the year.

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## ANNEX IV

## FORMAT OF SIMPLIFIED ANNUAL REPORT

For new aid schemes covered by the arrangement for aids covered by the accelerated clearance procedure or schemes with an annual budget of not more than ECU 5 million, give only the information requested in points 1, 2.1, 2.2.1 and 2.2.2 (very simplified report).

1. Name of scheme: .....
2. Expenditure under scheme:

Separate figures should be provided for each form of aid in the scheme (e.g. grant, low-interest loans, guarantees). Provide figures on expenditure or commitments, revenue losses and other financial factors relevant to the granting of aid (e.g. period of loan, interest subsidies, default rates on loans net of sums recovered, default payments on guarantees net of premium income and sums recovered).

These expenditure figures should be provided on the following basis:

- 2.1. For year n, provide expenditure forecasts or estimated revenue losses due to tax expenditure.
- 2.2. For year n-1, indicate:
  - 2.2.1. Expenditure committed, or estimated revenue losses due to tax expenditure, for new assisted projects and actual payments for new and current projects <sup>(1)</sup>.
  - 2.2.2. Number of new recipients and number of new projects assisted, together with estimated number of jobs created or maintained.
  - 2.2.3. Complete only if schemes are covered by the rules for State aids for R&D:
    - breakdown of total expenditure by R&D stage (fundamental, basic industrial, applied, etc.),
    - specify the number of projects involving EEA or international cooperation,
    - give breakdown of expenditure by enterprise, research centre and university.
  - 2.2.4. To be completed only for schemes:
    - not reserved exclusively for SMEs,
    - not involving the automatic granting of aid. Aid is granted automatically where it is necessary only to satisfy all the eligibility conditions in order to qualify for aid or where it is shown that a public authority is not exercising its statutory discretionary right to select recipients.

Provide the following information for each of the five recipients to which the largest amounts of aid were committed:

- name,
- address,
- recipient's sector of activity (following classification referred to in question 3.2.5.1),
- amount of aid committed (or authorized where tax is involved),
- eligible cost of project,
- total cost of project.

If there are fewer than five recipients in the report year, they must all be listed. If there are several assisted projects per recipient, the information requested should be broken down by project. The information is not required in the case of aid, subject to a ceiling where more than five recipients reach the ceiling. Only the level of the ceiling and the number of recipients reaching it need be given.

- 2.2.5. Changes (administrative or other) introduced during the year.

---

<sup>(1)</sup> If the figures for actual tax expenditure are not yet available, estimates should be provided and the final figures sent with the next report.

## ANNEX V

**AUTHORIZABLE RANGE OF AID FOR SMEs, BY SIZE OF COMPANY AND LOCATION**  
(not applicable to sectors subject to special rules on State aid)

| Category/purpose of aid                                                                      | Company size |                        |                                   | Aid allowed                                                                                                                                                   | Notification requirement           |
|----------------------------------------------------------------------------------------------|--------------|------------------------|-----------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|
|                                                                                              | Employees    | Turnover (ECU million) | Balance sheet total (ECU million) |                                                                                                                                                               |                                    |
| 'De minimis' (see Chapter 12)                                                                | No limit     | No limit               | No limit                          | ECU 50 000 in total per type of expenditure over three-year period                                                                                            | No notification required           |
| Accelerated procedure (see Chapter 11)                                                       | ≤ 250        | ≤ 20                   | ≤ 10                              | 7,5 % gross investment aid or ECU 3 000 per job or ECU 200 000 in total                                                                                       | Notification according to Annex II |
|                                                                                              | ≤ 50         | ≤ 5                    | ≤ 2                               | 15 % gross                                                                                                                                                    |                                    |
| Normal procedure:<br>Investment aid to assisted areas and environmental aid (see Chapter 10) | ≤ 250        | ≤ 20                   | ≤ 10                              | Authorized regional aid ceiling + 10 % gross (Article 61 (3) (c)) (absolute ceiling: 30 % net) + 15 % gross (Article 61 (3) (a)) (absolute ceiling: 75 % net) | Notification according to Annex I  |
| Aid to research and development (see Chapter 14)                                             | ≤ 250        | ≤ 20                   | ≤ 10                              | + 10 % gross above the normally authorizable ceiling                                                                                                          |                                    |
| Aid for consultancy help, training, etc. ('soft' aids) (see Chapter 10)                      | ≤ 250        | ≤ 20                   | ≤ 10                              | 50 % of cost of consultancy, etc.                                                                                                                             |                                    |

## ANNEX VI

NOTIFICATION FORM TO BE SUPPLIED TO THE EFTA SURVEILLANCE AUTHORITY ON  
STATE AID TO THE MOTOR VEHICLE SECTOR

1. EFTA State: .....

## 2. Recipient

company name: .....

location: .....

structure of ownership <sup>(1)</sup>: .....main fields of activities <sup>(2)</sup>: .....manpower <sup>(3)</sup>: .....

financial results:

|             | turnover | net result | cash flow |
|-------------|----------|------------|-----------|
| last year   | .....    | .....      | .....     |
| year before | .....    | .....      | .....     |

Market breakdown of sales: national ...%

other EEA ...%

non-EEA ...%

## 3. State aid

Title of scheme: .....

Legal basis: .....

Level of government:

— central government

— regional government

— local government

— other: .....

(a) *Form and amount of proposed aid measures(s) <sup>(1)</sup>:*

amount

grant .....

interest subsidy .....

tax credits, allowances of rate .....

reliefs .....

reduction in social security .....

contributions .....

equity participation .....

debt conversion or write-off .....

soft loan .....

<sup>(1)</sup> Identity and participation of major shareholders.<sup>(2)</sup> Indicate main products and the number of units produced last year.<sup>(3)</sup> If operating in different EEA States, indicate number of employees in each country.<sup>(4)</sup> The 13 categories are identical as in the annual report.

participatory loan .....  
 repayable advances .....  
 deferred tax provisions .....  
 amounts covered under guarantee scheme .....  
 losses arising from guarantee schemes .....  
 other: .....  
 conditions of aid measure(s): .....  
 estimated grant equivalent <sup>(2)</sup>:  
 — before taxation: .....  
 — after taxation: .....

(b) *Objective of aid measure(s):*

restructuring or rescue  
 general investments  
 regional development  
 innovation  
 research and development  
 trade/export  
 environmental protection  
 energy saving  
 company-specific training aid

other: .....

(c) *Justification of aid measure(s):* .....

(d) *Cumulation with other aid measure(s) <sup>(3)</sup>:* .....

4. **Assisted project**

Location: .....

Duration of project: .....

Cost of project: .....

Other companies involved <sup>(1)</sup>: .....

(a) *Type of project:*

new implantation  
 extension capacities  
 basic rationalization  
 introduction of innovations  
 restructuring of activities  
 transfer of activity  
 research and development  
 environmental protection  
 energy saving  
 training of personnel (company-specific)  
 plant closure  
 rescue operation  
 other: .....

<sup>(1)</sup> Indicate whether gross or net grant equivalent and eventually the reason for absence of an estimate.

<sup>(2)</sup> Eventually indicate date and numbers of other notifications.

<sup>(3)</sup> If the project is connected with other companies within the framework of joint venture, mergers, takeovers, acquisitions of shares or assets, indicate other companies concerned.

(b) *Description of project:*

(c) *Breakdown of project cost <sup>(2)</sup>:*

| item  | amount |
|-------|--------|
| ..... | .....  |
| ..... | .....  |
| ..... | .....  |
| ..... | .....  |
| ..... | .....  |
| ..... | .....  |
| ..... | .....  |

(d) *Financing of project cost:*

own resources

capital contributions

external borrowing

public assistance

(e) *Effect of project:*

on capacities <sup>(3)</sup>: .....

on production <sup>(3)</sup>: .....

on employment: .....

on distribution of sales: .....

— domestic in %: ...

— other EEA in %: ...

— non-EEA in %: ...

on level of qualifications:

on outsourcing: .....

on cost structure (cost per unit): .....

##### 5. other observations

##### 6. Project identification

Date of notification: . / . / ...

Number of notification <sup>(4)</sup>: ... / 19 ..

##### 7. Coordination of the aid project

Authority in charge of the file: .....

Person to contact for further inquiries: .....

<sup>(2)</sup> If investment project, detailed breakdown specifying all asset items. If restructuring project, detailed expenditures of the company as provided in the annual report (sources and applications), however with specification of social costs and other extraordinary restructuring costs.

If R & D project, detailed breakdown according to the rules on aid to R & D (see Chapter 14 of these guidelines).

<sup>(3)</sup> Indicate capacity and production in units for every main product which is affected by the project.

<sup>(4)</sup> Chronological order.

## ANNEX VII

## ANNUAL REPORT IN THE MOTOR VEHICLE SECTOR

The annual report should contain all aid flows to the undertakings operating in the sector awarded by public authorities (national, regional and local authorities) during the year of observation.

**1. Recipient**

Name of company receiving the aid. If the company is a subsidiary indicate the ultimate parent company.

**2. Categories of aid**

All public assistance measures provided for each recipient during the year should be classified according to the following categories:

- (1) grants;
- (2) interest subsidies;
- (3) tax credits, allowances, exemptions and rate reliefs;
- (4) reduction in social security contributions;
- (5) equity participation;
- (6) debt conversion or write-offs;
- (7) soft loans;
- (8) participatory loans;
- (9) repayable advances linked to performance;
- (10) deferred tax provisions (reserves, free or accelerated depreciation);
- (11) amounts covered under guarantee schemes;
- (12) losses arising from guarantee schemes;
- (13) others.

**3. Explanation on aid terms**

For assistance measures Nos 7 to 11 and 13 an additional explanation is requested on the terms of each measure in order to permit the calculation of the aid element in the form of grant equivalent (e.g. duration, interest bonification, impact of taxation on the grant equivalent, etc.).

