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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 July 1999

on aid granted by Italy to Sangalli Manfredonia Vetro

(notified under document number C (1999) 2895)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2000/369/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having in accordance with the abovementioned Articles given interested parties notice to submit their comments⁽¹⁾, and having regard to those comments,

Whereas:

concessions and reductions in social security contributions. A further complaint about the same aid measures was received by letter of 25 September 1998 from another flat-glass producer.

- (2) By letters of 18 February, 27 April, 17 July and 27 October 1998 the Commission asked the Italian authorities for detailed information on the measures in question. The Italian authorities replied by letter of 6 May 1998.

I. PROCEDURE

- (1) By letter of 10 February 1998, registered as incoming mail on 11 February 1998 under A/31060, the Commission received a complaint from a competitor concerning aid which the Italian authorities allegedly intended to grant to Sangalli Vetro SpA to build a flat-glass factory in Manfredonia in southern Italy. According to the complainant, the aid was in the form of a land sale at below the market price, provision of infrastructure free of charge, the grant of investment aid at an intensity higher than that allowed under the regional aid scheme applicable, the grant of employment subsidies, and tax

- (3) In view of the lack of sufficiently detailed information from the Italian authorities, and its doubts about the compatibility of the aid measures with the common market, the Commission decided on 22 December 1998 to initiate the procedure laid down in Article 88(2) of the Treaty and to require the Italian Government to answer its questions. The Italian Government was informed of this by letter of 27 January 1999 (SG(99) D/686), which was published in the *Official Journal of the European Communities* with an invitation to interested third parties to submit their comments on the aid in question⁽²⁾.

⁽¹⁾ OJ C 92, 1.4.1999, p. 5.

⁽²⁾ See footnote 1.

- (4) The Commission received comments from Sangalli Vetro SpA, from the recipient Sangalli Manfredonia Vetro Srl, from Enisud, and from a company intending to move to the same industrial site as Sangalli Vetro in Manfredonia; it forwarded them to the Italian Government for its observations, and the Italian Government replied by letter of 4 June 1999.

II. DESCRIPTION OF THE AID

II.1. The recipient

- (5) Sangalli Manfredonia Vetro Srl (Sangalli) was set up on 30 January 1998 and has its registered office in Foggia, Apulia, Italy. It is controlled by Sangalli Vetro SpA (Sangalli SpA). The Sangalli group operates in the flat-glass processing industry, obtaining its raw materials from major flat-glass producers established in various countries of the European Economic Area.
- (6) Sangalli is a medium-sized firm according to the criteria set out in the Commission recommendation concerning the definition of small and medium-sized enterprises⁽³⁾. When it starts operating in 2001, it will have 197 employees and assets of ITL 217 million.
- (7) The Sangalli Vetro group is also a medium-sized firm according to the criteria referred to in recital 6. It employs 213 persons and had a consolidated turnover of ITL 65,460 billion at 31 December 1997.

II.2. The measures at issue

- (8) The Article 88(2) procedure was initiated in respect of the following measures:
- the sale of land by Agricoltura SpA to Sangalli at a price which is apparently not consistent with the market price; the Commission did not have specific detailed information concerning the identity of the selling company, the prices charged and current market prices,
 - the subsidies which the regional and/or national authorities may have granted to Sangalli and other companies for the construction of infrastructure in the investment area; the

Commission did not have sufficient data to identify the nature of the infrastructure and to check that it was not built solely for the Sangalli project,

- investment aid for the building of a new flat-glass factory allegedly granted by the Italian Government to Sangalli; as the area concerned is an assisted region, the Commission noted that the Italian authorities had failed to state the exact legal basis for the measures in question and that the forecast market growth, as indicated by the complainants, would not be enough to absorb a capacity increase,
- a grant of ITL 50 million for employees which Enisud may have granted to Sangalli, as the Commission was unable to satisfy itself that it was not State aid,
- aid in the form of tax concessions and reductions in social security contributions, as the Commission was unable to establish whether they were covered by an approved scheme.

III.1. Reply of the Italian authorities to the initiation of the Article 88(2) procedure

- (9) On 18 December 1998, Agricoltura SpA, a company under private law (Agricoltura) sold a total of 206 563 m² of land at the industrial site of Mattinata e Mote Sant'Angelo (hereinafter Manfredonia). The Italian authorities state that the price paid by Sangalli was higher than the price determined in an expert report carried out by an independent company on 31 May 1996 for plots adjacent to the plots in question. In accordance with point II.3 of the Commission communication on State aid elements in sales of land and buildings by public authorities⁽⁴⁾, therefore, it was not necessary to notify the sale, as it did not comprise any State aid within the meaning of the Treaty. Furthermore, the price paid was also higher than that paid at the same time by other investors for adjacent plots.
- (10) The infrastructure that will be provided at the place of the investment will be used by all the firms located at the Manfredonia industrial site. It will consist in the supply of drinking water and the installation of a centralised water purifying and treatment plant, and a network of roads and shared parking areas. The cost of the infrastructure for the exclusive use of Sangalli, for example site development and connection to the electricity

⁽³⁾ OJ C 107, 30.4.1996, p. 4.

⁽⁴⁾ OJ C 209, 10.7.1997, p. 3.

grid, would be borne solely by Sangalli. The Italian authorities also state that Consorzio per lo Sviluppo Industriale ASI (Consorzio), which manages the industrial plots and the infrastructure work, has not, as yet, determined the charges which firms on the site will have to pay the use of the common infrastructure. The Italian authorities state, however, that, as a public business enterprise, Consorzio is obliged to apply tariffs which at least cover costs. The tariffs will be set out in a list of prices adopted by internal procedures which will apply to all the firms in Manfredonia.

(11) With regard to the situation in the flat-glass market, the Italian authorities have provided data indicating that the Italian and Community markets for flat glass are not suffering from excess capacity. On the contrary, they are growing by some 2 % a year owing to more varied uses for flat and other types of glass. This is demonstrated by the fact that other producers of flat glass are setting up joint subsidiaries in other European countries. According to the Italian authorities, the main reason why the complainants applied to the Commission is that, once the new factory at Manfredonia has been built, the Sangalli group will no longer have to acquire raw materials from the complainants. The Italian authorities have forwarded a list with the terms and conditions applied by the competitors of the Sangalli group.

(12) The investment aid granted totals ITL 135,6 billion, in respect of eligible, non-discounted costs of ITL 191 billion. The Italian authorities argue that this corresponds to an intensity of 40 % net grant equivalent, plus 15 % gross grant equivalent, which is permitted in an Objective 1b investment region and is calculated in accordance with the relevant Ministerial order⁽⁵⁾.

(13) The Italian authorities state that on 2 May 1998 Manfredonia Sviluppo, an incorporated partnership established in Foggia, Apulia, submitted to the responsible Ministry an application from Sangalli for admission to the 'Manfredonia Area Contract'

'⁽⁶⁾, an instrument used within the framework of the regional scheme provided for in Law No 488 of 19 December 1992⁽⁷⁾. The Sangalli project was approved on 15 July 1998. The scheme in Law No 488 of 1992 and the 'area contract' system were approved by the Commission in decisions of 30 June 1997 (letter SG(97)D/4949) and 22 December 1998 (letter SG(99)D/1119).

(14) On 7 May 1998 Enisud SpA (Enisud) and Sangalli signed an agreement which provided for the recruitment of a maximum of 45 workers formerly employed by ENI companies that had been hived off. For each ENI worker actually taken on, Enisud undertook to pay ITL 50 million (EUR 25 826). The agreement was not notified to the Commission in the annual report on Enisud's activities, as Sangalli had not yet employed any former ENI workers and would be taking on only those who satisfied the job requirements. Furthermore, the Italian authorities pointed out that the Commission had acknowledged in a letter of 10 May 1994 that Enisud's activities were similar to those forming the subject of its Decision 92/266/EEC⁽⁸⁾ on French public industrial groups, and that they were not caught by Article 87(1).

(15) The Italian authorities state that the general reductions in social security contributions have not yet been granted to Sangalli and that, when they are, the authorities will comply with the Pagliarini-Van Miert Agreement of 1 March 1995, extended by decision of 31 March 1998 (letter SG(98)D/2708 of 1 April 1998).

III.2. Comments by interested parties and comments by Italy

(16) The Commission has comments from Associazione degli Industriali di Capitanata (the Association) Foggia, Apulia; from Sangalli SpA; from Sangalli; and from Enisud.

⁽⁵⁾ *Circolare Ministero dell'Industria* No 234363 of 20 November 1997, as amended by *Circolare* No 9000043 of 5 February 1998.

⁽⁶⁾ The Manfredonia contract was signed on 4 March 1998. The examination of the various projects for admissibility was completed on 15 July 1998. The projects accepted included Sangalli Vetro.

⁽⁷⁾ On the basis of its decision of 21 May 1997 on State aid 27A/97, notified to Italy by letter No SG (97)D/4949 of 30 June 1997, the Commission authorised the scheme provided for in Law No 488 of 1992. By decision of 21 December 1998 concerning State aid 810/97, notified to Italy by letter of 9 February 1999, the Commission also approved the instruments implementing the Law, including the area contract instrument.

⁽⁸⁾ OJ L 138, 21.5.1992, p. 24.

(17) The Association emphasises that the Sangalli project, as part of the Manfredonia area contract, is of considerable importance to Apulia. With the opening of the new plant, there will be 500 new jobs, both direct and indirect, and other small and medium-sized firms will be encouraged to move to the region. Furthermore, the fact that Sangalli will be producing glass, the raw material which until now it has only processed, will strengthen competition in the common market in an oligopolistic sector.

(18) Sangalli itself also describes the situation in the flat-glass market in Europe and in Italy. According to its estimates, production in 2001 (excluding its own output) will be 950 000 tonnes, against demand of 1 058 000 tonnes. Sangalli justifies its investment by the need to produce its own flat glass, for which it has until now been dependent on the major European producers, and provides details concerning its future sales strategies. It also provides the same responses to the various points raised in the procedure as the Italian authorities.

(19) Enisud confirms the statement by the Italian authorities concerning the non-mandatory nature of the agreement between Sangalli and Enisud and the fact that the former has not as yet taken on any former ENI workers. Enisud also points out that, according to the abovementioned letter of 10 May 1994 from DG IV, the industrial restructuring of the ENI group does not contain any State aid. Enisud argues that this has been confirmed in the assessments of Enisud's annual reports carried out by the Commission; Enisud also specifies that, despite its efforts to promote the Manfredonia area contract (assistance for 80 firms totalling ITL 1 400 billion and 4 000 new jobs planned), no former ENI workers have been employed by any of the companies in Manfredonia.

(20) In its reply to the comments by third parties, as part of the procedure Italy states that it agrees with the observations submitted.

IV. ASSESSMENT OF THE AID

(21) Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement provide that any aid which distorts or threatens to distort competition by favouring certain

undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

(22) The procedure under Article 88(2) of the Treaty has enabled the Commission to determine that some of the measures in question do not comprise any State aid within the meaning of Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement, and that the initial investment aid complies with an approved scheme. On the other hand, tax concessions and reductions in social security contributions granted to the recipient are not compatible with the common market, as they are not covered by an approved scheme.

IV.1. The sale of land

(23) Agricoltura is a public enterprise governed by private law. On 18 December 1998 it sold Sangalli 206 563 m² of land located within its own operating area at a price of ITL 15 000 per m². Agricoltura will bear the costs of clearing the site and making good the damage caused by its polluting activities. Its responsibility for such work will be limited in time (12 months after the sale) and to a specific proportion of the costs.

(24) The Commission takes the view that the price paid by Sangalli corresponds to the market price. The Italian authorities have provided a report, dated 31 May 1996, carried out by an independent consultancy firm. According to that report, the price per square metre at the time was ITL 12 000. The Italian authorities have also submitted other contracts for the sale of parcels of land in the same area but smaller than that acquired by Sangalli. The contracts had recently been concluded by Agricoltura with other firms at ITL 12 000 per square metre and on the same conditions as those given to Sangalli: Agricoltura is to bear the costs of clearance and clean-up within the same time limits. The selling price is therefore higher in Sangalli's case than in that of the firms purchasing adjacent parcels, as its plot is larger, and the cost of clearing it is in turn higher.

- (25) The Commission therefore concludes that, in accordance with point II.3(b) of the Commission communication on State aid elements in sales of land and buildings by public authorities⁽⁹⁾, the sale does not comprise any State aid, because it took place at a price corresponding to that established by an independent valuer and to the market value at the time of the sale.

IV.2. Development of the infrastructure in the investment area

- (26) The infrastructure provided by Consorzio is for the benefit of all the firms located in the area. According to the information provided by the Italian authorities it comprises the supply, purification and treatment of water and the construction of road links and common parking areas within the industrial site.
- (27) As regards the utilisation of the infrastructure, the Italian authorities stated in a letter of 6 June 1999 that the charges cover the costs of the infrastructure provided. Furthermore, as stipulated in the agreement between Consorzio and Sangalli, the charges for the use of the infrastructure will be fixed by internal Consorzio rules, which will apply equally to all the firms concerned.
- (28) The cost of infrastructure specifically benefiting Sangalli, such as the electricity supply connection and the development of the site, is to be borne solely by the firm itself.
- (29) The Commission concludes from the foregoing that the infrastructure is shared by all the firms located within the Manfredonia industrial area, that it will not be made available free of charge, and that the charges will be calculated so as to cover all the costs incurred. Furthermore, the charges will be applied objectively to all the firms concerned. As the cost of infrastructure for the exclusive use of each firm, including Sangalli, will be borne solely by each firm, the Commission concludes that there is no selective assistance for the recipient company. The construction of the infrastructure in question is not, therefore, caught by Article 87(1) of the Treaty.

IV.3. The flat-glass industry and the Sangalli feasibility study

- (30) In connection with the initial investment aid, the Italian authorities have forwarded a feasibility study concerning the Sangalli project. In 2002, Sangalli will be producing 185 000 gross tonnes, or 160 000 tonnes net, of flat glass⁽¹⁰⁾ varying in thickness from 2 mm to 20 mm and of various sizes. Most of its output (approximately 100 000 tonnes) will be used by the Sangalli group itself, and 60 000 tonnes will be used by industry, of which 60 % on the domestic market and 40 % exported to Greece and eastern Europe.
- (31) As already stated in the notice initiating the procedure, the relevant market is the market for flat glass produced using the float process developed in the 1960s. The process makes it possible to produce glass which requires no further polishing or smoothing and may therefore be cut and sold directly. This is the process most often used by the industry's major producers. Flat glass produced in this way is then used in the manufacture of panes for construction, insulation and reinforcement.
- (32) The Community flat-glass market is shared by a small number of large manufactures⁽¹¹⁾ for whom, despite their strong expansion into eastern Europe, the Community market remains the largest outlet⁽¹²⁾. According to the major Community flat-glass manufacturers, after two years of crisis, 1997 saw an upturn in demand. The new investment took place mainly in eastern Europe and in South America. In addition, according to the same sources, 1997 witnessed one of the most extensive internal restructuring exercises in the industry, involving losses in jobs and in orders; the prospects for recovery, they say, are very poor, in a market still suffering from excess capacity⁽¹³⁾.

⁽¹⁰⁾ Flat glass produced by the float process.

⁽¹¹⁾ According to the magazine *Industrial minerals*, December 1997, the flat-glass market in Europe is shared by the following firms: Pilkington 25 %, Glaverbel 18 %, Saint-Gobain 29 %, Guardian 12 %, PPG 8 %, Sisecam 6 % and Euroglas 2 %.

⁽¹²⁾ This is the case for Pilkington plc, Saint-Gobain and Glaverbel. Websites (28.11.1998): <http://www.pilkington.com>, www.saint-gobain.com and www.glaverbel.com.

⁽¹³⁾ Pilkington annual report 1996/97 and 1998, websites (28.11.1998): <http://www.pilkington.com/finance>; 1997 annual report, group performance www.glaverbel.com.

⁽⁹⁾ OJ C 209, 10.7.1997, p. 3.

- (33) The Commission notes that the trend towards internal restructuring and relocation in the countries of eastern Europe is due, according to the *Panorama of EU industry*, to the fact that, 'The glass industry is going through a period of reorganisation... . Firms are also responding to the huge variations in the worldwide labour market, and are making investments in lower-cost countries to benefit from cheaper factors of production' ⁽¹⁴⁾. But this does not prove that capacity in the Community flat-glass market is greater than requirements.
- (34) According to a study carried out by an independent organisation, the historical trend in the glass market has in fact been one of worldwide growth in demand of some 2 to 3 % a year. Over the last 20 years, the figure for Europe has been 4,4 %. In the European Union, and specifically in the flat-glass sector, the demand forecasts are: + 3,2 % in 1998, + 4,6 % in 1999, + 2,9 % in 2000, + 4,3 % in 2001, + 2,7 % in 2002, and + 4,0 % in 2003, representing an average growth in demand of + 3,6 % over the whole period ⁽¹⁵⁾.
- (35) The firms themselves predict a growth in demand in the period 1998 to 2000 of some 2 to 3 % a year. In their annual reports all the large companies refer to 'current insufficient capacity' (Glaverbel 1998) ⁽¹⁶⁾ or state that, against the corresponding period in 1998, '1999 showed a change based on actual structure of + 4,3 %' (Saint-Gobain 1999) ⁽¹⁷⁾ or again that 'total consumption of flat glass in the 15 EU countries is growing at a rate of 4 %, higher than their average GDP' and that 'glass consumption in 1999 should experience similar growth' ⁽¹⁸⁾. This optimistic view of market trends is also confirmed by the fact that, as stated in the Commission decision of 7 August 1998 on the acquisition of PPT Industries Inc. by Glaverbel, 'In the last five years Guardian has built a new float-glass plant in Germany. There exist announced projects for new float-glass plants in Italy, Spain, Greece and the United Kingdom (mainly by the existing float-glass producers, but also by the potential new entrant Sangalli)' ⁽¹⁹⁾. This was recently confirmed in a report forwarded to the Commission by the European flat-glass producers group, which stated that Saint-Gobain would be opening a new factory at the end of 1999 in the United Kingdom, that Glaverbel and Pilkington would be opening another in Spain in mid-2000 and Interpane in France and Sangalli in Italy would also be doing the same at the end of 2000, all having the same production capacity of 500 tonnes a day (185 000 gross tonnes a year).
- (36) In conclusion, the European flat-glass industry is not in crisis, which explains the investments planned by the major companies in the sector. Furthermore, as regards the Italian flat-glass market, it is likely that there will be a strong increase in demand owing to the opening of a new Fiat plant at Melfi, Apulia, and the centralisation of Alfa Romeo production in Naples.
- (37) As regards the processed glass sector in which Sangalli SpA operates, the Commission concludes that in view of the market share held by Sangalli, a medium-sized firm, the aid could not seriously distort competition in that market.
- (38) On the basis of the foregoing, the Commission concludes that the Sangalli project is viable. First, over 60 % of the Manfredonia plant output is for the Sangalli group's own consumption. The flat-glass supply contracts concluded by the Sangalli group which the Italian authorities forwarded to the Commission show that the conditions and prices applied by the group's suppliers (Saint-Gobain, Pilkington and Glaverbel) are not competitive, and that Sangalli is unable to renegotiate them. With the new factory at Manfredonia, the group should no longer have to depend on its suppliers and should achieve higher profits in the future. Second, the output intended for the market is equal to only 1 % of demand at European level ⁽²⁰⁾. Not only is the market in southern Italy experiencing strong growth, but Manfredonia is close to Greece and the Balkans, regions where demand is expected to surge, so that it can be assumed that production for the domestic and European markets effectively corresponds to a real demand.
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- ⁽¹⁴⁾ DG III, *Panorama of EU industry* 97, Vol. I, pp. 9-8 to 9-14.
- ⁽¹⁵⁾ Study published by Frost & Sullivan Market Research in 1997.
- ⁽¹⁶⁾ Statement by Luc Willame, CEO of Glaverbel, to the General Shareholders' Meeting on 27 May 1998. Source: <http://www.glaverbel.com> (28.11.1998).
- ⁽¹⁷⁾ <http://www.saint-gobain.com> (15.6.1999).
- ⁽¹⁸⁾ Glaverbel 1998 annual report, 'Management report', section headed 'European glass consumption up'. Source: <http://www.glaverbel.com> (14.6.1999).
- ⁽¹⁹⁾ Point 22 of the decision of 7 August 1998 declaring a concentration to be compatible with the common market (Case IV/M.1230 — Glaverbel/PPG), OJ C 282, 11.9.1998, p. 2.
- ⁽²⁰⁾ According to estimates by the Association of flat-glass producers, forecast demand in the EU will be 6 390 million tonnes in 1999, 6 737 million tonnes in 2000 and 7 180 million tonnes in 2001.

IV.4. Regional aid

(39) On the basis of the information supplied by the Italian authorities in the course of this procedure, the Commission concludes that Italy, in granting non-repayable aid amounting to 70 % gross of the initial investment costs to Sangalli in Manfredonia, complied with Law No 488/92. The grand of ITL 135,630 billion, to be paid in three equal annual instalments in respect of eligible costs of ITL 191 billion⁽²¹⁾, corresponds to the maximum intensity allowed by Law No 488/92 (40 % nge + 15 % gge) for a medium-sized firm such as the recipient (see section II.1) in the investment area, which is in a region qualifying for aid under Article 87(3)(a)⁽²²⁾.

(40) The aid also complies with the instrument implementing Law No 488/92, the area contract⁽²³⁾. The area contract is intended to stimulate new employment initiatives and create jobs in industry, agriculture, the services sector and tourism. In accordance with the regional aid schemes the public authorities grant aid for investments that are viable from a technical, economic and financial standpoint and which benefit on their own account from favourable terms from credit institutions⁽²⁴⁾.

(41) Although the regional aid in question reaches the threshold provided for in the multisectoral framework on regional aid for large investment projects⁽²⁵⁾, it is not subject to the obligation to notify the Commission provided for in the framework. Italy formally granted Sangalli the aid in question on 15 July 1998, i.e. prior to the entry into force of the framework.

(42) On the basis of the information in recitals 30 to 38 and the abovementioned feasibility study presented by Sangalli to the Italian authorities, the Commission concludes that the Sangalli project is viable. Furthermore, the financing prospects and conditions applicable to Sangalli for its contribution to the project, amounting to 25 % of

the investment, appear to be adequate. Lastly, as regards job creation, the Commission notes that the project creates 197 direct jobs (management and workers) and 306 indirect jobs. Sangalli will obtain its supplies of raw materials (chiefly the glass-making sands) and its service requirements (land and sea transport) *in situ*.

(43) Accordingly, the Commission concludes that, in the present case, the regional aid granted by the Italian authorities to Sangalli complies with the terms and intensities of the scheme in Law No 488/92, which has already been approved by the Commission.

IV.5. Employment subsidy granted by Enisud

(44) By letter of 10 May 1994 the Commission stated that, applying by analogy Decision 92/266/EEC⁽²⁶⁾, the conversion activities of Enisud did not constitute State aid within the meaning of Article 87(1) of the Treaty. As requested in the letter, the Italian authorities had undertaken to send a report on the conversion activities of Enisud every year in order to verify that State aid was not being used⁽²⁷⁾. The Italian authorities have, to date, regularly presented such a report, and the Commission has not expressed any concern that the conversion measures taken by Enisud might contain State aid after all.

(45) Enisud belongs to the ENI group, which has been in the process of privatisation since December 1995⁽²⁸⁾. The Treasury currently holds only a minority shareholding (36,3 %) ⁽²⁹⁾. None of ENI's Board members are appointed by the State nor, as regards the conversion activities, are the supervisory bodies linked to the public authorities.

(46) The conversion activities essentially consist in finding employment for group employees currently without a job (covered by wage guarantee fund and mobility schemes) and in promoting industrial initiatives in areas where ENI has closed plants. The cost of such measures has been borne by the group⁽³⁰⁾ and has accounted for 0,28 % of its own funds (in-house financing).

⁽²¹⁾ The eligible costs break down as follows: 5 % for studies (ITL 9,5 billion); 3 % for land (ITL 5,5 billion); 20 % for plant (ITL 43,3 billion); and 72 % for equipment (ITL 132,6 billion).

⁽²²⁾ See decision of 21 May 1997 on State aid 27A/97 which lists the intensities allowable in Article 88(3)(a) regions, (OJ C 242, 8.8.1997).

⁽²³⁾ See footnote 7.

⁽²⁴⁾ See footnote 6.

⁽²⁵⁾ OJ C 107, 7.4.1998, p. 7.

⁽²⁶⁾ See footnote 8.

⁽²⁷⁾ See, *inter alia*, the 1997/98 annual report sent to the Commission in connection with the supervision of the conversion activities (document registered as incoming mail on 18 November 1998 under A/38296).

⁽²⁸⁾ ENI shares have also been quoted on the stock exchange since 1995.

⁽²⁹⁾ See <http://www.eni.it> (28.6.1999).

⁽³⁰⁾ According to ENI estimates contained in the report, the total conversion costs will be ITL 100 billion, and the activity is to continue until the end of 2000.

(47) The Commission therefore concludes that the grant of ITL 50 million per worker to firms which employ former ENI workers is not caught by Article 87(1) of the Treaty. As the resources used are not State resources, and the ENI group conducts its worker re-employment policy independently, the measure in question cannot be regarded as State aid.

(48) When it initiated the procedure, the Commission expressed doubts about the fact that the abovementioned annual report for the period from 1997 to October 1998 did not refer to the grant to Sangalli. The Italian authorities, like ENI and the recipient, have confirmed that the measure was not included in the annual report because the recruitment by Sangalli had not taken place; accordingly, the doubts expressed by the Commission have been resolved.

IV.6. General reductions in statutory contributions

(49) In their reply to the initiation of proceedings, the Italian authorities stated that any general reductions in statutory contributions (*sgravi contributivi di tipo generale*) granted to Sangalli, will comply with the Pagliarini-Van Miert. Agreement of 1 March 1995, extended by letter of 1 April 1998 (SG(98)D/2708).

(50) The Commission notes that the decision of 31 March 1998⁽³¹⁾, communicated to Italy by the letter of 1 April 1998 referred to in recital 15, renews only some of the measures contained in Decision 95/455/EC of 1 March 1995 on the arrangements for reducing the social security contributions paid by firms in the Mezzogiorno and for assigning to the State some of those contributions⁽³²⁾.

(51) The earlier decision provided for the dismantling of the system of reductions in social security contributions in the Mezzogiorno (0 % by 1 December 1997)⁽³³⁾. In addition, the differential in relation to centre-north regions in the proportion of contributions taken over by the State under the *fiscalizzazione* measures was to be phased out as follows: 2 % at 1 January 1998, 1 % at 1 January 1999 and 0 % at 1 January 2000.

(52) The most recent decision of 31 March 1998, however, relates only to the part concerning the reductions in social security contributions. The Commission there decides that aid to employment, which is aid not connected with investment and exempting for one year from social security contributions firms that create new jobs in specific regions of Italy, is compatible with the common market on the basis of the guidelines on aid to employment⁽³⁴⁾.

(53) Sangalli is a new company that is due to start operating in 2001, when the abovementioned decision will no longer be applicable. Furthermore, the jobs created are linked to investment. Accordingly, in this instance, reductions in tax and social security contributions are not covered by a scheme approved by the Commission.

(54) As they are not provided for in a scheme approved by the Commission, the reductions constitute new individual aid measures, the compatibility of which with the common market must be specifically assessed in the light of their characteristics.

(55) The aid in question is not compatible with the common market and does not qualify for exemption under Article 87(2), as it is not aid of a social character granted to individual consumers and is not intended to make good the damage caused by natural disasters or other exceptional occurrences. Neither does it qualify for exemption under Article 87(2)(c). Nor is exemption under Article 87(3)(b), (c) and (d) possible, as the aid is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, or to facilitate the development of certain economic activities or to promote culture and heritage conservation. However, the recipient is located in a region qualifying for assistance under Article 87(3)(a), and the Commission must determine the compatibility of the aid under that exemption.

⁽³⁴⁾ OJ C 334, 12.12.1995, p. 4. The granting of such aid is subject to the following conditions:

- the workers recruited must be unemployed,
- the recruiting firms must not have dismissed staff in the last 12 months,
- recruitment must involve the creation of new jobs, measured against the number of staff employed by the firm in the 12 months preceding the recruitment,
- contracts must be open-ended or of sufficient length to guarantee some job stability (employment must be guaranteed for at least 12 months following payment of the aid). In the event of combination with other aid, the total amount of the aid may not exceed the higher ceiling in the schemes concerned.

⁽³¹⁾ OJ C 188, 17.6.1998, p. 8.

⁽³²⁾ OJ L 265, 8.11.1995, p. 23.

⁽³³⁾ The decision provides for a different system for Abruzzi.

- (56) Point 10 of the guidelines on aid to employment referred to in recital 52 specifies that the guidelines cover only aid that is not linked to investment: 'Even where investment aid is calculated per job created or includes premiums for job creation, it does not constitute employment aid as such since it is not directly intended to create or maintain jobs. In view of its purpose and its permanent effects on the industrial structure, such aid should be treated just like any other investment aid and should be subject to the normal assessment criteria'.
- (57) The Commission concludes that the jobs created in connection with the investment have already been taken into account under the regional aid scheme (Law No 488/92). As a result, if Sangalli were to receive additional aid for the new jobs created, that aid would come on top of the investment aid forming the subject of this procedure: the total would exceed the maximum levels for the assisted region in question. The intensity of the investment aid provided for in Law No 488/92 already corresponds to the maximum intensity for the assisted region in question, so that combination with aid in the form of reductions in tax and social security contributions would result in the maximum levels being exceeded, which would be incompatible with the common market.
- (58) For those reasons, the Commission concludes that aid in the form of reductions in tax and social security contributions granted to Sangalli constitutes incompatible aid since it does not qualify for any of the relevant exemptions.
- (60) The investment aid of ITL 135,630 billion complies with the conditions and intensities provided for in Law No 488/92, already approved by the Commission. That aid is therefore compatible with the common market.
- (61) The contribution of ITL 50 million per worker which Enisud may grant to Sangalli does not comprise State aid within the meaning of Article 87(1) of the Treaty, as it does not involve the use of public resources and the public authorities are not involved in the choice of recipient.
- (62) On the other hand, tax relief and the social security reductions to which the Italian authorities refer in their letter of 6 May 1999 constitute aid which is not covered by Decision 95/455/EC. The benefit of that aid combines with the aid under Law No 488/92, as it is aid linked to initial investment benefiting firms in the regions provided for in Article 87(3)(a). As the intensity of the aid corresponds to the maximum for the assisted region in question, combination with aid in the form of tax concessions and social security reductions would result in the regional ceilings approved by the Commission being exceeded and thus render the aid in question incompatible. The Italian authorities are therefore not authorised to grant such aid to Sangalli.
- (63) On the basis of the information supplied by the Italian authorities, the Commission concludes that no State aid has been granted to the firm in question in advance of the Commission's final decision,

V. CONCLUSIONS

HAS ADOPTED THIS DECISION:

Article 1

- (59) On the basis of the foregoing, the Commission considers that the sale of land by Agricoltura to Sangalli does not comprise State aid as the sales price is consistent with the value calculated by an independent expert and with the price recently paid by other firms in similar transactions. Furthermore, the construction of infrastructure in the investment area cannot be regarded as State aid, as the infrastructure is used by all the firms located in the same industrial site and the charges, based on costs incurred, are applied objectively to all the firms. The costs of any infrastructure for the sole use of any one firm will be borne solely by that firm.

The sale of land by Agricoltura SpA to Sangalli Manfredonia Vetro Srl, the construction of common infrastructures in the investment area and the contribution that will be granted by Enisud SpA to Sangalli Manfredonia Vetro Srl for each employee of the ENI group who is recruited by Sangalli Manfredonia Vetro fall outside the scope of Article 87(1) of the Treaty.

Article 2

The aid granted by Italy to Sangalli Manfredonia Vetro Srl totalling ITL 135,630 billion complies with Law No 488 of 19 December 1992 establishing a regional aid scheme approved by the Commission.

Article 3

Italy shall not grant tax concessions or reductions in social security contributions to Sangalli Manfredonia Vetro Srl inasmuch as such measures are not part of a scheme approved by the Commission and constitute aid that is incompatible with the common market.

Article 4

Italy shall inform the Commission within two months of the date of notification of this Decision of the steps it has taken to comply herewith.

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 20 July 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

No 113/99/COL

of 4 June 1999

introducing guidelines on State aid for training and amending for the 18th time the Procedural and Substantive Rules in the field of State aid

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area⁽¹⁾, in particular to Articles 61 to 63,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice⁽²⁾, in particular Article 1 of Protocol 3 thereof,

Whereas under Article 24 of the Surveillance and Court Agreement the EFTA Surveillance Authority shall give effect to the provisions concerning State aid;

Whereas under 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 Procedural and Substantive Rules in the field of State aid⁽³⁾ adopted on 19 January 1994 by the EFTA Surveillance Authority⁽⁴⁾;

Whereas on 22 July 1998, the European Commission adopted a framework on training aid (OJ C 343, 11.11.1998), including at point 36 of that document a proposal for appropriate measures under Article 93(1) of the EC Treaty;

Whereas according to point II under the heading 'GENERAL' at the end of Annex XV to the EEA Agreement, the EFTA Surveillance Authority is to adopt, after consultation with the European Commission, acts corresponding to those adopted by the Commission, in order to maintain equal conditions of competition;

Having consulted the European Commission;

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

⁽²⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽³⁾ Also referred to as the State Aid Guidelines.

⁽⁴⁾ Initially published in OJ L 240, 15.9.1994 and the EEA supplement No 34 of the same date, last amendment (17th) adopted by Decision No 112/99/COL of 4 June 1999 (OJ L 112, 11.5.2000, p. 75).

Whereas the EFTA Surveillance Authority has, in a multicultural meeting on State aid held on 19 November 1997, consulted the EFTA States on the introduction of the new guidelines;

Whereas paragraph 18A.5(2) of the new guidelines includes a proposal for appropriate measures under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement and requires the agreement of the EFTA States concerned,

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines are amended by introducing as a new Chapter 18A, the guidelines on training aid set out in Annex I to this Decision.
2. The EFTA States shall be informed of this Decision by means of a letter, together with a copy of the Decision, including Annex I, requesting them to signify their agreement within two months to the proposed appropriate measures set out in paragraph 18A.5(2) of the guidelines.
3. The Decision, including Annex I, shall be published in the EEA Section of and the EEA Supplement to the *Official Journal of the European Communities*.
4. The Decision shall be authentic in the English language.

Done at Brussels, 4 June 1999.

For the EFTA Surveillance Authority

Knut ALMESTAD

President

ANNEX I

18A. TRAINING AID⁽¹⁾18A.1. **Introduction**

- (1) Although at present unemployment rates in the EFTA States are relatively moderate, finding ways of improving the employment situation is a major challenge continually facing all Contracting Parties to the EEA Agreement. It is clear from the preamble of the EEA Agreement and subsequent political declarations⁽²⁾ that the Contracting Parties regard it as being among their most important common objectives to foster harmonious economic development, promote conditions of high employment and avoid economic and social disparities.
- (2) The important part played by training, both in enhancing the competitiveness of EEA industry and in creating and maintaining jobs, has been stressed on many occasions. The Contracting Parties to the EEA Agreement have been in agreement on the importance of promoting investment in training as a significant competitiveness factor and as a catalyst of renewed growth and the re-establishment of a socially acceptable level of employment⁽³⁾. Within the framework of cooperation under the EEA Agreement, albeit a framework somewhat less comprehensive in scope than is currently the case within the European Union, the EFTA States have associated themselves with similar common objectives as pursued within the European Union concerning promotion of a skilled, trained and adaptable workforce and labour markets responsive to economic change. These common objectives, with the ultimate goal of a high level of employment, must also be taken into account in the application of competition rules in the context of the EEA Agreement.
- (3) Numerous studies have shown that the existence of a skilled workforce is a major factor in firms' location decisions. Training is therefore important, not only to the worker, who becomes more employable and less likely to be made redundant, and to the firm, for which it is a performance-enhancing factor, but also to the economy of the region, a highly skilled workforce being an undeniable asset when it comes to attracting new investment.
- (4) The work to be done to improve the functioning of the labour market and to reduce the skills gap would appear to call for a proactive approach by all concerned: the States concerned, firms, individuals and the two sides of industry. A number of initiatives are currently in action in the training field, both at national level and at the level of the European Union, in many instances with active participation from EFTA States on the basis of the modalities established in Part VI of the EEA Agreement. The Authority will endeavour to ensure that the control of State aid does not become an unjustified obstacle to EFTA States' labour market policy measures compatible with the EEA Agreement.
- (5) There appears to be a general agreement that the measures taken by EEA States cannot be confined to improving initial training, vocational training and the training of the unemployed. Businesses cannot adapt to structural and technological change simply by making people redundant and recruiting more skilled labour from elsewhere. Preventive policies are also needed to encourage workers to improve their skills and adaptability and induce firms to invest in training their workforce. Such policies seek to prevent the least skilled from sliding into unemployment by ensuring, on the contrary, that they are retrained and acquire transferable skills. The financial resources needed are considerable and government support may constitute a necessary incentive in the common interest of the Contracting Parties.

⁽¹⁾ This chapter corresponds to the framework on training aid (OJ C 343, 11.11.1998).

⁽²⁾ Reference can be made here in particular to joint meetings of EU and EFTA Ministers of Finance and Economy, which have been held annually since 1993, and the joint statements from those meetings. In these meetings, broad issues of economic policy have been addressed, including growth, competitiveness, employment, training and labour market flexibility. See e.g. the joint communiqué and the joint EU/EFTA Paper from the meeting of the Ministers on 12 October 1998.

⁽³⁾ See the guidelines and recommendations relating to the White Paper on growth, competitiveness and employment adopted at the European Council meeting in Essen in 1994 as well as the joint communiqué of the meeting of EU and EFTA Ministers of Finance and Economy on 18 September 1995 and statements from subsequent meetings of the same kind.

- (6) Most public financing in the training sphere does not fall within the scope of the competition rules. However, where EFTA States introduce financial and tax incentives to encourage firms to invest in training their workforce, steps must be taken to make sure that those incentives do not run counter to the objectives of competition policy, seeking as it does to ensure the competitiveness of businesses. It is for the Authority, in pursuance of the State aid rules in Articles 61 and 62 of the Agreement, to examine training measures which are liable to constitute aid within the meaning of Article 61(1) of the Agreement and to ensure that they are compatible with the functioning of the Agreement.
- (7) Training costs are increasingly forming part of the costs that have to be borne by firms if they are to remain competitive. Technical progress, the introduction of new technologies and the pace of change in the research and technological development field mean that firms have to train their staff continuously. A training aid measure which is intended to reduce, for certain firms, the costs they normally have to bear, in their own interest, in order to improve their employees' skills, confers on them an advantage over their competitors and is therefore liable to distort competition.
- (8) Where a measure constitutes State aid within the meaning of Article 61(1), it must be notified in good time to, and be approved by, the Authority before being implemented. The sole purpose of this system is to ensure that aid is vetted by the Authority so that measures which cause distortions of competition contrary to the common interest are not implemented. When assessing a measure's compatibility with the functioning of the Agreement, the Authority will take account of any beneficial effects of the aid which may justify a distortion of competition.
- (9) Training usually has positive external effects for society as a whole. One firm's expenditure on training is not only of benefit to the workers who are trained but increases the pool of skilled workers from which other firms may draw. Overall, investment in training increases the competitiveness of EEA industry and the attractiveness of the EEA as a place in which to set up in business. A firm will not take these secondary effects into account when deciding whether to invest in training, and it is possible that the local outlay of firms on training is lower than the socially optimum level, especially since, from the firm's point of view, investment in training involves the risk that, once trained, its workers might leave for another firm. The smaller the firm, the greater this risk tends to be, and this is one of the reasons why such firms are unwilling to invest in training. The risk is also proportionate to the transferability of the skills acquired. It may be concluded from this that most training aid measures are not simply operating aid, and the Authority is favourably disposed towards them to the extent that the distortions of competition to which they may give rise are justified or counterbalanced by their contribution to common objectives which market forces alone would not make it possible to attain. Thus, in its State aid policy, the Authority generally gives sympathetic consideration to training aid.
- (10) In order to render the control of training aid more transparent and ensure equality of treatment, these guidelines have been drawn up indicating how the Authority will assess the compatibility of such aid with the functioning of the EEA Agreement. The criteria set out herein seek to ensure that only training aid which contributes to the achievement of common objectives is approved, that such aid does not exceed the necessary incentive level, and that it does not amount to disguised operating aid.
- (11) These guidelines therefore pursue a number of objectives:
- to clarify the interpretation of Article 61 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement with regard to the notion of training aid in order to ensure greater legal certainty and transparency in the light of the prior notification requirement in Article 1(3) of Protocol 3 to the Surveillance and Court Agreement,
 - to ensure consistency between the rules on training aid and those laid down for other types of aid (notably in other guidelines or frameworks),
 - to increase the transparency of the approach which the Authority will follow in assessing the compatibility of training aid.

- (12) Section 18A(2) describes the types of measures which may constitute aid as covered by the competition rules of the EEA Agreement. Section 18A(3) defines the scope of the guidelines. Section 18A(4) sets out the principles on which the Authority will base its assessment of the compatibility of measures constituting aid. In the light of these principles, which make it possible to reconcile the objectives of an active employment policy with a level playing field for all businesses, the Authority lays down a series of thresholds of intensity below which aid may be considered to be compatible with the functioning of the Agreement. The differences between the thresholds proposed reflect the different degrees of externality and necessity of the aid according to the transferability of the training, the size of the firm and the area in which it is situated.

18A.2. *Scope of Article 61(1) of the EEA Agreement*

- (1) These guidelines concern only measures falling within the scope of Article 61(1) of the EEA Agreement, which provides that 'any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement'. The aid covered by these guidelines is that which favours one or more firms or sectors of industry by reducing the costs they would normally have to bear when they want their employees to acquire new skills or when they afford their employees the opportunity to acquire such skills.
- (2) Being general measures, many training measures are not caught by Article 61(1) of the EEA Agreement. Most training forms part of the tasks traditionally carried out by the State and by and large benefits people and workers everywhere. The financing by the State of this sort of training does not favour certain undertakings or the production of certain goods within the meaning of Article 61(1). The decision-making practice of the competent surveillance authorities and the case-law of the competent courts of justice illustrate in what circumstances a measure is in the nature of a 'general measure' and is accordingly excluded from the scope of Article 61(1) of the EEA Agreement. Examples are:
- schooling and initial training (such as apprenticeships and day release schemes),
 - the training or retraining of unemployed people, including traineeships in enterprises,
 - measures directly targeted at workers or even at certain categories of workers, affording them the opportunity of receiving training unconnected with the firm or industry in which they work (e.g. the 'learning account' system),
 - general tax incentive schemes (e.g. tax credits) which are open to all firms investing in employee training and apply automatically.
- (3) In this connection it must be pointed out, however, that a measure which, while being theoretically general in scope, in practice favours one or more firms or sectors, is in fact specific. This is the case, for example, where the authorities enjoy, when applying a general measure, a discretionary power which allows them to vary the amount of financial assistance according to the circumstances⁽⁴⁾. Such measures are liable to constitute aid within the meaning of Article 61(1) and must be notified pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.
- (4) Aid falls within the scope of Article 61(1) only in so far as it affects trade between Contracting Parties. Training aid granted to firms or sectors whose activities do not or are not likely to form the subject matter of trade between Contracting Parties (for example, certain local services) thus does not come under Article 61(1). Aid which satisfies the requirements of the *de minimis* rule as laid down in Chapter 12 of the present State aid guidelines is also deemed not to affect intra-EEA trade. Consequently, it does not come under Article 61(1) and does not need to be notified pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.

⁽⁴⁾ See the judgment of the Court of Justice of the European Communities in Case C-241/94 *France v Commission* ('Kimberly Clark') [1996] ECR I-4551.

18A.3. *Scope of these guidelines*

A. **Principles**

- (1) These guidelines apply to all training aid measures, notified or put into effect during its period of application, with the exception of those taken, for example to reskill workers, as part of the rescuing and restructuring of firms in difficulty, which will be assessed in accordance with the relevant guidelines in Chapter 16. As regards small and medium-sized enterprises, these guidelines shall accordingly prevail over the provisions on training aid contained in the guidelines in Chapter 10 on State aid for small and medium-sized enterprises.
- (2) In principle, these guidelines cover all sectors of industry. However, for sectors considered sensitive for which there are special rules on aid⁽⁵⁾, these guidelines apply only in so far as there is no conflict between the two. They nonetheless apply fully to the air transport sector.
- (3) These guidelines apply to training aid whether the training be provided by firms themselves or by public or private training centres.

B. **Connection with employment aid**

- (4) Training aid as referred to in these guidelines must be distinguished from employment aid, the compatibility of which with the functioning of the Agreement must be assessed in the light of the pertinent guidelines⁽⁶⁾. Some employment aid measures may be justified to some extent by the fact that, when it takes on certain workers, the assisted firm has to bear additional training costs. This is the case, for example, with aid designed to encourage the hiring of certain categories of unemployed people who experience particular difficulty in entering the labour market. Where the purpose and direct effect of such aid is to stimulate employment by giving the employer a financial incentive to recruit people he would not otherwise have recruited, the aid is to be considered purely as employment aid. Training is a secondary consideration here, just one aspect of the recruitment process that is being assisted. In such a case, moreover, it is often impossible to say which part of the total aid package has been earmarked for training and separate it from the rest. Even if it includes a training component, employment aid will therefore be examined as such.
- (5) Only aid which is not linked to investment falls within the scope of the employment aid guidelines. Consequently, where investment-linked employment aid contains a training component, that component will be examined separately on the basis of the present guidelines.

18A.4. *Assessment criteria for training aid*

A. **General principles**

- (1) In certain circumstances, training aid prohibited under Article 61(1) may qualify for one of the exemptions provided for in Article 61(3).
- (2) The main ground for exemption is that provided for in Article 61(3)(c), by virtue of which the Authority may authorise aid to facilitate the development of certain activities where it does not adversely affect trading conditions to an extent contrary to the common interest. Measures to improve the skills of a firm's workforce help to increase that firm's competitiveness and in so doing facilitate the development of certain activities. Training plays an essential part in introducing new technologies and stimulating innovation and investment. It may also help to create and maintain jobs. Training aid may thus fall within the exemption provided for in Article 61(3)(c).

⁽⁵⁾ This is currently the case with shipbuilding, synthetic fibres, the motor industry, the steel industry and transport.

⁽⁶⁾ See Chapter 18 'Aid to employment'.

- (3) The main argument in favour of training aid is that it helps to correct certain imperfections in the market. This is particularly the case with vocational training as it has numerous external effects. The importance of the externalities of training is linked primarily to the transferability of the skills and qualifications training imparts. The Authority accordingly considers that a more favourable attitude is justified vis-à-vis continuing vocational training schemes which to a substantial extent actually benefit workers more than is strictly necessary for the purpose of their jobs and do not simply meet the specific needs of the firm.
- (4) In this connection, the Authority will draw a distinction between specific training and general training actions:
- specific training involves theoretical and practical tuition directly and principally applicable to the employee's present or future position in the assisted firm. It is linked to a specific activity of the firm. Part of the training is normally given at the employee's work place. Its transferability to other firms or other fields of work is very limited,
 - general training includes tuition which is not applicable only or principally to the employee's present or future position in the assisted firm. It is linked to the overall activities of the firm and provides qualifications which are largely transferable to other firms or other fields of work.

The latter equips the workers concerned with additional skills directly transferable to other firms. It therefore effectively improves such workers' skills level, employability and adaptability and thus makes a bigger contribution to promoting employment and human resource development.

- (5) Among the criteria to determine the transferability of the skills acquired through the training, the following can be mentioned as examples:
- recognition, certification or validation of qualifications and skills by public authorities or bodies or by other bodies or institutions on which an EFTA State has conferred the necessary powers. Training leading to a diploma, certificate, etc., recognised by an EFTA State or within the framework of systems for the certification and validation of work experience is presumed to be of a general nature,
 - the fact that employees of different firms may avail themselves of the training or that it is organised jointly by a number of independent firms.

In this regard, it should be noted that in-company training, even if it directly responds to the contemporary needs of the company, can have a transferable character, if the skills it provides are largely transferable.

- (6) To approve an aid under Article 61(3)(c) of the Agreement, the Authority must ensure that the aid does not adversely affect trading conditions to an extent contrary to the common interest. To qualify for exemption under this provision, a State aid must therefore have an incentive character and be proportionate to the objectives of common interest it aims to achieve. The latter condition is considered to be fulfilled if the intensity of the aid does not exceed the thresholds defined in paragraph 18A(4)(11).
- (7) To determine the incentive effect, the Authority will consider whether training aid has the effect of encouraging firms to do more in the way of training than they would normally do or to spend more than they would normally spend on training. An aid measure which relates to a firm's normal operating costs (standard induction courses for new recruits and so forth), being intended solely to reduce either continuously or periodically the costs which the firm normally has to bear, is not an incentive and cannot as a rule be approved. The incentive effect will have to be demonstrated if aid for specific training is awarded to big enterprises outside areas assisted under Article 61(3)(a) or (c). In all other cases, the incentive effect will be presumed for the reasons set out in the following paragraph.

- (8) Statistics show that there is a direct link between a firm's size and the probability that its employees receive training⁽⁷⁾. In general, the percentage of workers attending a training course increases with the size of the firm. In view of the substantial underinvestment in training in small and medium-sized enterprises⁽⁸⁾, the Authority considers that in this case training aid always has an incentive effect and that higher intensities are authorisable. In those areas where the standard of living is abnormally low or where there is serious underemployment (Article 61(3)(a)), the incentive effect will also be presumed, even for large enterprises, owing to the relatively greater external impact training may have there. It is in such areas that expenditure on training and the level of skills are the lowest⁽⁹⁾ and that the common interest in raising that level with a view to improving the employment situation and attracting new investment is the strongest. An increase in allowable intensities is therefore also justified. Inasmuch as the training and retraining of workers also plays an important part in industrial adjustment, the same approach is justified for the areas falling within Article 61(3)(c). Finally, as far as general training is concerned, the incentive effect can always be presumed, given the important externalities of this type of training. On the other hand, where the worker being trained is required by contract to compensate his employer if he leaves the firm before a certain period has elapsed, the positive externalities will be reduced and the Authority will consider that a training aid measure is in principle unjustified.

B. Eligible costs

- (9) Eligible costs in the context of a training aid project are:
1. trainers' personnel costs;
 2. trainers' and trainees' travel expenses;
 3. other current expenses (materials, supplies, etc.);
 4. depreciation of tools and equipment, to the extent that they are used exclusively for the training scheme in question;
 5. cost of guidance and counselling services with regard to the training project;
 6. trainees' personnel costs up to the amount of the total of the other eligible costs referred to in points 1 to 5.

The eligible costs must be supported by documentary evidence, transparent and itemised. Under trainees' personnel costs referred to in point 6 only the hours during which the trainees effectively participated in the training, after deduction of any productive hours or of their equivalent, may be taken into account.

C. Authorised intensities

- (10) Training aid is authorisable under Article 61(3) of the Agreement if it complies with the following permissible intensities in relation to eligible costs as defined in the preceding paragraph.
- (11) The admissible intensity is 50 % for general training projects and 25 % for specific training projects. It is increased by 10 points (specific training) or 20 points (general training) for SMEs and by five points for assisted areas under Article 61(3)(c) and 10 points for assisted areas under Article 61(3)(a). This gives the following result:

⁽⁷⁾ Eurostat, Statistics in focus, population and social conditions, 1996, No 7, Table 2.

⁽⁸⁾ See Chapter 10.2 of the present State aid guidelines, concerning the definition of SMEs.

⁽⁹⁾ Eurostat, Statistics in focus, population and social conditions, 1996, No 7, Table 1.

Large firms	Specific training	General training
outside an assisted area	25	50
in an Article 61(3)(c) area	30	55
in an Article 61(3)(a) area	35	60
SMEs	Specific training	General training
outside an assisted area	35	70
in an Article 61(3)(c) area	40	75
in an Article 61(3)(a) area	45	80

- (12) The intensities mentioned above can be increased by 10 points when the beneficiaries of the training are categories of disadvantaged workers (low skilled workers, handicapped persons, older workers, women returning to the labour market and so forth).
- (13) Training aid measures may be cumulated only within the limits of the intensities indicated in paragraphs 18A.4.(11) to (12).

18A.5. *Notification and existing schemes*

- (1) Measures identified in this document as not constituting State aid caught by Article 61(1) of the Agreement do not need to be notified to the Authority. However, all training aid schemes and all ad hoc training aid cases which fall outside authorised schemes and do not fulfil the conditions of the *de minimis* rule must be notified to the Authority, pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, in sufficient time to enable it to submit its comments on their compatibility with the functioning of the Agreement.
- (2) These guidelines are without prejudice to schemes already authorised by the Authority when the guidelines are published. The Authority will, however, review such schemes pursuant to Article 1(1) of Protocol 3 to the Surveillance and Court Agreement. In this connection the Authority proposes to the EFTA States as an appropriate measure within the meaning of Article 1(1) of Protocol 3 to the Surveillance and Court Agreement:
- that they should notify to it as from 1 July 1999 any plan to grant aid under an approved scheme where the amount of aid to any one firm exceeds EUR 2,5 millions gross grant equivalent over a period of three years, and
 - that they should notify to it all existing schemes on aid for training which do not expire before 31 December 1999.
- (3) If an EFTA State does not accept the appropriate measures proposed, the Authority will be obliged to initiate proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.

18A.6. *Duration and review*

- (1) The Authority will use these guidelines as a basis for assessing training aid for a period of up to five years from the date of their publication. Before that period expires, the provisions of these guidelines will be evaluated and, if necessary, revised.

EFTA SURVEILLANCE AUTHORITY DECISION**No 149/99/COL****of 30 June 1999****introducing guidelines on the application of State aid rules to measures relating to direct business taxation and amending for the 19th time the Procedural and Substantive Rules in the field of State aid**

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area⁽¹⁾, and in particular to Articles 61 to 63,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice⁽²⁾, in particular Article 1 of Protocol 3 thereof,

Whereas under Article 24 of the Surveillance and Court Agreement the EFTA Surveillance Authority shall give effect to the provisions concerning State aid;

Whereas under 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 Procedural and Substantive Rules in the field of State aid⁽³⁾ adopted on 19 January 1994 by the EFTA Surveillance Authority⁽⁴⁾;

Whereas the European Commission on 11 November 1998 adopted, a notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998);

Whereas a uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area;

Whereas according to point II under the heading 'General' at the end of Annex XV to the EEA Agreement, the EFTA Surveillance Authority is to adopt, after consultation with the European Commission, acts corresponding to those adopted by the Commission, in order to maintain equal conditions of competition;

Having consulted the European Commission;

Whereas it is necessary to provide guidance to national authorities by indicating the principles and rules which will guide the EFTA Surveillance Authority when applying the EEA State aid rules to measures relating to direct business taxation;

Whereas the EFTA Surveillance Authority has consulted the EFTA States on the introduction of the new guidelines in multilateral meetings on State aid held on 26 October 1998 and 23 February 1999, as well as in writing,

(1) 'The EEA Agreement'.

(2) 'The Surveillance and Court Agreement'.

(3) 'The State Aid Guidelines'.

(4) OJ L 240, 15.9.1994 and in EEA Supplement No 34 of the same date, last amendment (18th) adopted by Decision No 113/99/COL of 4 June 1999 (See page 11 of this Official Journal).

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines shall be amended by introducing a new chapter, Chapter 17B, on the application of State aid rules to measures relating to direct business taxation as contained in Annex I to this Decision.
2. The Decision, including Annex I, shall be published in the EEA Section of and the EEA Supplement to the *Official Journal of the European Communities*.
3. The EFTA States shall be informed by means of a copy of the Decision, including Annex I.
4. The European Commission shall be informed, in accordance with point (d) of Protocol 27 to the EEA Agreement, by means of a copy of the Decision, including Annex I.
5. The Decision shall be authentic in the English language.

Done at Brussels, 30 June 1999.

For the EFTA Surveillance Authority

Knut ALMESTAD

The President

ANNEX I

17B. APPLICATION OF STATE AID RULES TO MEASURES RELATING TO DIRECT BUSINESS TAXATION⁽¹⁾17B.1. *Introduction*

- (1) The guidelines of this chapter form part of the general objective of clarifying and reinforcing the application of the State aid rules in order to reduce distortions of competition within the European Economic Area. The principle of incompatibility with the functioning of the EEA Agreement and the derogations from that principle apply to aid 'in any form whatsoever', which may include certain tax measures. However, the question whether or not a tax measure is to be qualified as aid under Article 61(1) of the EEA Agreement calls for clarification which these guidelines propose to provide. Such clarification is particularly important in view of the procedural requirements that stem from designation as aid and of the consequences where EFTA States fail to comply with such requirements.
- (2) Following the completion of the single market and its extension to the EEA, including the liberalisation of capital movements, it has also become apparent that there is a need to examine the particular effects of aid granted in the form of tax measures and to spell out the consequences as regards assessment of the compatibility of such aid with the functioning of the EEA Agreement.
- (3) The EFTA Court has noted⁽²⁾, that, as a general rule, a tax system of an EFTA/EEA State is not covered by the EEA Agreement. This must be understood to mean that it is for each such State to design and apply a tax system according to its own choices of policy. The EFTA Court has further noted that in certain cases, however, such a tax system may have consequences that would bring it within the scope of application of Article 61(1) EEA. These guidelines are aimed at clarifying in which instances such consequences will arise.
- (4) In addition to the objective of ensuring that decisions by the EFTA Surveillance Authority are transparent and predictable, these guidelines also aim to ensure consistency and equality of treatment between EEA States. With reference to the procedural rules for new and existing aid, the Authority intends to apply these new guidelines on a case-by-case basis to examine the compatibility of new tax arrangements in the EFTA States with the State aid rules of the EEA Agreement as well as relying on them for the review of existing State aid.

17B.2. *Competences under the EEA Agreement*

- (1) It is the competence of the EFTA Surveillance Authority to review aid granted by the EFTA/EEA States for compatibility of the State aid rules of that Agreement. The primary EEA State aid provisions are identical in substance to those of the EC Treaty⁽³⁾. It is established case-law of the European Court of Justice that the fiscal nature of a measure does not shield it from the application of Article 87 EC (ex Article 92). The notion of State aid deriving from the EEA Agreement must be interpreted in the same way throughout the EEA; also when the aid takes the form of tax measures.
- (2) Moreover, distortions of competition deriving from new State aid of this kind fall under a system of prior authorisation by the competent surveillance authority as defined in Article 62 of the EEA Agreement, subject to review by the competent judicature. Pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, the EFTA States must notify new State aid measures to the EFTA Surveillance Authority. The EFTA States may not put their proposed aid measures into effect until the Authority has approved them. The Authority examines the compatibility of aid not in terms of the form, which it may take, but in terms of its effect. It may decide that the EFTA State concerned must amend or abolish aid, which the Authority finds to be incompatible with the functioning of the EEA Agreement. Where aid has already been implemented in breach of the procedural rules, and where the Authority finds such aid not to be compatible with the EEA Agreement, the EFTA State must in principle recover it from the recipient(s).

⁽¹⁾ This chapter is based on the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3) taking into account the particular scope and objectives of the EEA Agreement.

⁽²⁾ EFTA Court, Case E-6/98, Judgment of 20 May 1999 (not yet published).

⁽³⁾ Thus, Article 61 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement are identical in substance to Articles 87 and 88 (ex Articles 92 and 93), respectively, of the EC Treaty. The only exception to this is that the exemption in Article 87(3)(d) (ex Article 92(3)(d)) of the EC Treaty, concerning aid to promote culture and heritage conservation, which was introduced by the Treaty on European Union (Maastricht Treaty), is not included in the EEA Agreement. However, this is of no relevance in the present context.

17B.3. *Application of Article 61(1) of the EEA Agreement to tax measures*

- (1) Article 61(1) of the EEA Agreement states that, 'any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of the Agreement'. In applying the EEA rules on State aid, it is irrelevant whether the measure is a tax measure, since Article 61 applies to aid measures 'in any form whatsoever'. To be termed aid, within the meaning of Article 61, a measure must meet the cumulative criteria described below.
- (2) Firstly, the measure must confer on recipients an advantage, which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including:
 - a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet),
 - a total or partial reduction in the amount of tax (such as exemption or a tax credit),
 - deferment, cancellation or even special rescheduling of tax debt.
- (3) Secondly, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. This criterion also applies to aid granted by regional or local bodies in the EFTA States⁽⁴⁾. Furthermore, State support may be provided just as much through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities.
- (4) Thirdly, the measure must affect competition and trade between Contracting Parties. This criterion presupposes that the beneficiary of the measure exercises an economic activity, regardless of the beneficiary's legal status or means of financing. Under settled case-law, for the purposes of this provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Contracting Parties. The mere fact that the aid strengthens the firm's position compared with that of other firms, which are competitors in intra-EEA trade, is enough to allow the conclusion to be drawn that intra-EEA trade is affected. Neither the fact that aid is relatively small in amount⁽⁵⁾, nor the fact that the recipient is moderate in size or its share of the EEA market very small⁽⁶⁾, nor indeed the fact that the recipient does not carry out exports⁽⁷⁾ or exports virtually all its production outside the EEA⁽⁸⁾ does anything to alter this conclusion.
- (5) Lastly, the measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. The selective advantage involved here may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system'⁽⁹⁾. If so, the measure is not considered to be aid within the meaning of Article 61(1) of the Agreement. These various aspects are looked at below.

17B.3.1. *Distinction between State aid and general measures*

- (1) Tax measures, which are open to all economic agents operating within an EFTA State, are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not, *de facto*, be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. However, this condition does not restrict the power of EFTA States to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production. Provided that they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid:
 - tax measures of a purely technical nature (for example, setting the rate of taxation, depreciation rules and rules on loss carry-overs; provisions to prevent double taxation or tax avoidance),

⁽⁴⁾ Judgment of the Court of Justice of the European Communities in Case 248/84 *Germany v Commission* [1987] ECR 4013.

⁽⁵⁾ With the exception, however, of aid meeting the tests of the *de minimis* rule. See Chapter 12 of the present State Aid Guidelines.

⁽⁶⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.

⁽⁷⁾ Case 102/87 *France v Commission* [1998] ECR 4067.

⁽⁸⁾ Case C-142/87 *Belgium v Commission* [1990] ECR I-959.

⁽⁹⁾ Case 173/73 *Italy v Commission* [1974] ECR 709.

- measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R & D), the environment, training, employment).

- (2) The fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid. Thus, measures designed to reduce the taxation of labour for all firms have a relatively greater effect on labour-intensive industries than on capital-intensive industries, without necessarily constituting State aid. Similarly, tax incentives for environmental, R & D or training investment favour only the firms which undertake such investment, but again do not necessarily constitute State aid.
- (3) In a judgment delivered in 1974⁽¹⁰⁾, the Court of Justice of the European Communities held that any measure intended partially or wholly to exempt firms in a particular sector from the charges arising from the normal application of the general system 'without there being any justification for this exemption on the basis of the nature or general scheme of this system' constituted State aid. The judgment also states that 'Article 92 (now, after amendment, Article 87; text added) does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects'. The judgment also points out that the fact that the measure brings charges in the relevant sector more into line with those of its competitors in other Member States does not alter the fact that it is aid. Such divergences between tax systems cannot be corrected by unilateral measures that target the firms which are most affected by the disparities between tax systems⁽¹¹⁾.
- (4) The main criterion in applying Article 61(1) EEA to a tax measure is therefore that the measure provides in favour of certain undertakings in the EFTA State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified 'by the nature or general scheme' of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the State concerned. If this is not the case, then State aid is involved.

17B.3.2. The selectivity or specificity criterion

- (1) The decision-making practice of the EC Commission and the EFTA Surveillance Authority so far shows that only measures whose scope extends to the entire territory of the State escape the specificity criterion laid down in Article 61(1) EEA. Measures, which are regional or local in scope, may favour certain undertakings, subject to the principles outlined in paragraph 17b(3)(1)(4)⁽¹²⁾. The EEA Agreement itself qualifies as aid measures which are intended to promote the economic development of a region. Article 61(3)(a) and (c) explicitly provides, in the case of this type of aid, for possible derogations from the general principle of incompatibility laid down in Article 61(1).
- (2) The EEA Agreement clearly provides that a measure, which is sectorally specific, is caught by Article 61(1). Article 61(1) expressly includes the phrase 'the production of certain goods' among the criteria determining whether there is aid that is subject to the Authority's monitoring. According to well-established practice and case-law, a tax measure whose main effect is to promote one or more sectors of activity constitutes aid. The same applies to a measure that favours only national products, which are exported⁽¹³⁾. Furthermore, the EC Commission and the EFTA Surveillance Authority have taken the view that a measure, which targets all of the sectors that are subject to international competition, constitutes aid⁽¹⁴⁾. A derogation from the

⁽¹⁰⁾ Case 173/73 *Italy v Commission* [1974] ECR 709.

⁽¹¹⁾ While Articles 94, 96 and 97 (ex Articles 100 to 102) of the EC Treaty empower the Community institutions to take certain action with respect to divergences between Member States' tax systems, the EEA Agreement does not have any corresponding provisions.

⁽¹²⁾ In the case of employers' social security contributions in Norway, the Authority concluded that regional differentiation of the rates of such contributions constituted State aid, as it favoured enterprises located in certain regions (Decision No 165/98/COL of 2 July 1998 (OJ L 32, 3.12.1998)). Norway contested this view and appealed the decision to the EFTA Court (Case E-6/98). By Judgment of 20 May 1999, the EFTA Court ruled in the Authority's favour.

⁽¹³⁾ Joined Cases 6 and 11/69 *Commission v France* [1969] ECR 561.

⁽¹⁴⁾ Commission Decision 97/239/EC of 4 December 1996 in the 'Maribel bis/ter' case (OJ L 95, 10.4.1997, p. 25) (currently *sub judice*, Case C-75/97). EFTA Surveillance Authority Decision No 16/96/COL of 7 February 1996 proposing appropriate measures to Iceland with regard to State aid in the form of sectorally differentiated social security tax.

base rate of corporation tax for an entire section of the economy therefore constitutes, except for certain cases⁽¹⁵⁾, State aid, as the Commission⁽¹⁶⁾ decided for a measure concerning the whole of the manufacturing sector⁽¹⁷⁾.

- (3) In several EEA States, different tax rules apply depending on the status of the undertakings. Some public undertakings, for example, are exempt from local taxes or from company taxes. Such rules, which accord preferential treatment to undertakings having the legal status of public undertaking and carrying out an economic activity, may constitute State aid within the meaning of Article 61 of the EEA Agreement.
- (4) Some tax benefits are on occasion restricted to certain types of undertaking, to some of their functions (intra-group services, intermediation or coordination) or to the production of certain goods. In so far as they favour certain undertakings or the production of certain goods, they may constitute State aid as referred to in Article 61(1).

17B.3.3. Discretionary administrative practices

- (1) The discretionary practices of some tax authorities may also give rise to measures that are caught by Article 61. The Court of Justice of the European Communities acknowledges that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria⁽¹⁸⁾.
- (2) If in daily practice tax rules need to be interpreted, they cannot leave room for a discretionary treatment of undertakings. Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail. As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre, which they sometimes enjoy, support the presumption that such is at any rate their effect in some instances. This does not make EFTA States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules.

17B.3.4. Justification of a derogation by 'the nature or general scheme of the system'

- (1) The differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is the case with measures whose economic rationale makes them necessary to the smooth functioning and effectiveness of the tax system⁽¹⁹⁾. However, it is up to the EFTA State to provide such justification.
- (2) The progressive nature of an income-tax scale or profit-tax scale is justified by the redistributive purpose of the tax. Differentiation of calculation of asset-depreciation and stock-valuation methods may be inherent in the tax systems to which they belong. Lastly, some conditions may be justified by objective differences between taxpayers. However, if the tax authority has discretionary freedom to set different depreciation periods or different valuation methods, firm by firm, sector by sector, there is a presumption of aid. Such a presumption also exists when the fiscal administration handles fiscal debts on a case-by-case basis with an objective different from the objective of optimising the recovery of tax debts from the enterprise concerned.

⁽¹⁵⁾ See paragraph 17B.3.4.(5).

⁽¹⁶⁾ Commission decision of 22 July 1998 in the 'Irish corporation tax' case (SG(98) D/7209) not yet published.

⁽¹⁷⁾ Other cases where the EFTA Surveillance Authority has so far applied State aid rules with respect to tax treatment include: tax exemption for glass packaging from a basic tax on non-reusable beverage packaging (Aid 95-002 (OJ C 212, 17.8.1995 and OJ L 124, 23.5.1996)) tax-related measures in favour of the maritime transport sector. Norway (Aid 97-001 (OJ C 337, 5.11.1998)) and public involvement in agreements concerning the construction and operation of an aluminium smelter at Grundartangi, Iceland (Aid 97-008 (OJ C 337, 5.11.1998)).

⁽¹⁸⁾ Case C-241/94 *France v Commission* (Kimberly Clark Sopalin) [1996] ECR I-4551.

⁽¹⁹⁾ This is usually reflected in the fact that such measures are not applied solely to specific sectors, are based on objective and horizontal criteria or conditions, and are not limited in time, see Commission Decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ L 146, 20.6.1996, p. 42).

- (3) Obviously, profit tax cannot be levied if no profit is earned. It may thus be justified by the nature of the tax system that non-profit-making undertakings, for example foundations or associations, are specifically exempt from the taxes on profits if they cannot actually earn any profits. Furthermore, it may also be justified by the nature of the tax system that legal entities such as cooperatives, which distribute all their profits to their members, are not taxed at the level of the cooperative when tax is levied at the level of their members.
- (4) A distinction must be made between, on the one hand, the external objectives assigned to a particular tax scheme (in particular, social or regional objectives) and, on the other, the objectives, which are inherent in the tax system itself. In general, the whole purpose of the tax system is to collect revenue to finance State expenditure. Each firm is supposed to pay tax once only. It is therefore inherent in the logic of the tax system that taxes paid in the State in which the firm is resident for tax purposes should be taken into account. Certain exceptions to the tax rules are, however, difficult to justify by the logic of a tax system. This is, for example, normally the case if companies with registered offices abroad are treated more favourably than the ones with registered offices in the State concerned, or if tax benefits are granted to head offices or to firms providing certain services (for example, financial services) within a group⁽²⁰⁾.
- (5) Specific provisions that do not contain discretionary elements, allowing for example tax to be determined on a fixed basis, may be justified by the nature and general scheme of the system where, for example, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors; such provisions do not therefore constitute State aid. Lastly, the logic underlying certain specific provisions on the taxation of small and medium-sized enterprises is comparable to that underlying the progressiveness of a tax scale.

17B.4. *Compatibility with the functioning of the EEA Agreement of State aid in the form of tax measures*

- (1) If a tax measure constitutes aid that is caught by Article 61(1), it can nevertheless, like aid granted in other forms, qualify for one of the derogations from the principle of incompatibility with the functioning of the Agreement provided for in Article 61(2) and (3). Furthermore, where the recipient, whether a private or public undertaking, has been entrusted by the State with the operation of services of general economic interest, the aid may also qualify for application of the provisions of Article 59 of the Agreement⁽²¹⁾.
- (2) The Authority could not, however, authorise aid, which proved to be in breach of the rules laid down in the Agreement, particularly those relating to the ban on discrimination and discriminatory taxation as well as to the right of establishment⁽²²⁾. Such aspects may, in parallel, be the object of a separate procedure on the basis of Article 31 of the Surveillance and Court Agreement. As is clear from case-law, those aspects of aid which are indissolubly linked to the object of the aid and which contravene specific provisions of the Agreement other than the State aid provisions must however be examined in the light of the procedure under Article 1 of Protocol 3 to the Surveillance and Court Agreement, as part of an overall examination of the compatibility or the incompatibility of the aid.
- (3) Where a fiscal aid is granted in order to provide an incentive for firms to embark on certain specific projects (investment in particular) and where its intensity is limited with respect to the costs of carrying out the project, it is no different from a subsidy and may be accorded the same treatment. Nevertheless, such arrangements must lay down sufficiently transparent rules to enable the benefit conferred to be quantified.
- (4) In most cases, however, tax relief provisions are general in nature: they are not linked to the carrying-out of specific projects and reduce a firm's current expenditure without it being possible to assess the precise volume involved when the Authority carries out its *ex ante* examination. Such measures constitute 'operating aid'. Operating aid is in principle prohibited. The Authority authorises it at present only in exceptional cases and subject to certain conditions, for example in shipbuilding, certain types of environmental protection aid⁽²³⁾ and in regions covered by the Article 61(3)(a) aid derogation provided that they are duly

⁽²⁰⁾ On the other hand, service charges or duties levied by public authorities on companies at different rates corresponding to the service or other benefits they receive do not involve State aid.

⁽²¹⁾ Judgment of the Court of First Instance in Case T-106/95 *FFSA and others v Commission* [1997] ECR II-229. Order of the Court of Justice in Case C-174/97 P [1998] I-1303.

⁽²²⁾ Case 74/76 *Iannelli v Meroni* [1977] ECR 557. See also Cases 73/79 'Sovraprezzo' [1980] ECRS. 1533, T-4993 'SIDE' [1995] ECR II-2501 and Joined Cases C 142 and 143/80 'Salengo' [1981] ECR 1413. See also EFTA Surveillance Authority Decisions No 40/95/COL (OJ C 212 and EEA Supplement to OJ 30, 17.8.1995) and 106/95/COL (OJ L 124 and EEA Supplement No 23, 23.5.1996). Tax exemption for glass packaging from a basic tax on non-reusable beverage packaging, Norway.

⁽²³⁾ See Chapter 15 of the present Guidelines.

justified and their level is proportional to the handicaps they are intended to offset⁽²⁴⁾. It must in principle (with the exception of the two categories of aid mentioned below) be degressive and limited in time. At present, operating aid can also be authorised in the form of transport aid in certain Nordic regions that are sparsely populated and are seriously handicapped in terms of accessibility. Operating aid may not be authorised where it represents aid for exports between Contracting Parties. As for State aid in favour of the maritime transport sector the specific rules for that sector apply⁽²⁵⁾.

- (5) If it is to be considered by the Authority to be compatible with the functioning of the EEA Agreement, State aid intended to promote the economic development of particular areas must be in proportion to, and targeted at, the aims sought. Where a derogation is granted on the basis of regional criteria, the Authority must ensure in particular that the relevant measures:
- contribute to regional development and relate to activities having a local impact. The establishment of offshore activities does not, to the extent that their externalities on the local economy are low, normally provide satisfactory support for the local economy,
 - relate to real regional handicaps. It is open to question whether there are any real regional handicaps for activities for which the additional costs have little incidence, such as for example the transport costs for financing activities, which lend themselves to tax avoidance,
 - are examined in an EEA context⁽²⁶⁾. The Authority must in this respect take account of any negative effects, which such measures may have on trade between Contracting Parties.

17B.5. **Procedures**

- (1) Article 1(3) of Protocol 3 to the Surveillance and Court Agreement requires EFTA States to notify the Authority of all their 'plans to grant or alter aid' and provides that any proposed measures may not be put into effect without the Authority's prior approval. This procedure applies to all aid, including tax aid.
- (2) If the Authority finds that State aid, which has been put into effect in breach of this rule, does not qualify for any of the exemptions provided for in the Agreement and is therefore incompatible with the functioning of the Agreement, it requires the EFTA State to recover it, except where that would be contrary to a general principle of EEA law, in particular legitimate expectations to which the Authority's behaviour can give rise. In the case of State aid in the form of tax measures, the amount to be recovered is calculated on the basis of a comparison between the tax actually paid and the amount, which should have been paid if the generally applicable rule had been applied. Interest is added to this basic amount. The interest rate to be applied is equivalent to the reference rate of interest determined on the basis of the provisions in Section 33.2 of the present Guidelines.
- (3) Article 1(1) of Protocol 3 to the Surveillance and Court Agreement states that the Authority 'shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States'. Such review extends to State aid in the form of tax measures. So as to allow such review to be carried out, the EFTA States are required to submit to the Authority every year reports on their existing State aid systems. In the case of tax relief or full or partial tax exemption, the reports must provide an estimate of budgetary revenue lost. Following its review, the Authority may, if it considers that the scheme is not or is no longer compatible with the functioning of the Agreement, propose that the EFTA State concerned amend or abolish it.

17B.6. **Implementation**

- (1) The Authority will, on the basis of the guidelines in this chapter and as from the time of their publication, examine the plans for tax aid notified to it and tax aid illegally implemented in the EFTA States. It will also keep existing systems under review. These guidelines are published for guidance purposes and are not exhaustive. The Authority will take account of all the specific circumstances in each individual case.
- (2) The Authority will review the application of the guidelines in this chapter two years after their publication.

⁽²⁴⁾ See Chapter 25 of the present Guidelines.

⁽²⁵⁾ See Chapter 24A. of the present Guidelines.

⁽²⁶⁾ See Case 730/79, *Philip Morris V Commission* [1980] ECR 2671.

EFTA SURVEILLANCE AUTHORITY DECISION**No 275/99/COL****of 17 November 1999****introducing guidelines on State aid elements in sales of land and buildings by public authorities and amending for the 20th time the Procedural and Substantive Rules in the field of State aid**

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area⁽¹⁾, in particular to Articles 61 to 63,

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

Whereas under Article 24 of the Surveillance and Court Agreement the EFTA Surveillance Authority shall give effect to the provisions concerning State aid;

Whereas under Article 5(2)(b) of the Surveillance and Court Agreement the EFTA Surveillance Authority shall issue notices or 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 Procedural and Substantive Rules in the field of State aid⁽³⁾ adopted on 19 January 1994 by the EFTA Surveillance Authority⁽⁴⁾;

Whereas the European Commission has adopted a communication on State aid elements in sales of land and buildings by public authorities⁽⁵⁾;

Whereas a uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area;

Whereas according to point II under the heading 'GENERAL' at the end of Annex XV to the EEA Agreement, the EFTA Surveillance Authority is to adopt, after consultation with the European Commission, acts corresponding to those adopted by the Commission, in order to maintain equal conditions of competition;

Having consulted the European Commission;

Whereas the EFTA Surveillance Authority has, in a multilateral meeting on State aid, consulted the EFTA States on the introduction of the new guidelines,

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines shall be amended by introducing a new chapter, Chapter 18B, on State aid elements in sales of land and buildings by public Authorities, as contained in Annex I to this Decision.
2. The EFTA States shall be informed by means of a letter, together with a copy of the Decision, including Annex I.

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

⁽²⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽³⁾ Hereinafter referred to as the State Aid Guidelines.

⁽⁴⁾ Initially published in OJ L 231, 3.9.1994, and in the EEA Supplement thereto No 32 on 3.9.1994, last amendment (19th) adopted by Decision No 149/99/COL of 30.6.1999 (not yet published).

⁽⁵⁾ OJ C 209, 10.7.1997, p. 3.

3. The European Commission shall be informed, in accordance with point (d) of Protocol 27 to the EEA Agreement, by means of a copy of the Decision, including Annex I.
4. The Decision, including Annex I, shall be published in the EEA Section of and the EEA Supplement to the *Official Journal of the European Communities*.
5. The Decision shall be authentic in the English language.

Done at Brussels, 17 November 1999.

For the EFTA Surveillance Authority

Knut ALMESTAD

The President

ANNEX I

18B. STATE AID ELEMENTS IN SALES OF LAND AND BUILDINGS BY PUBLIC AUTHORITIES⁽¹⁾18B.1. **Introduction**

1. On several occasions the EFTA Surveillance Authority has been involved in investigations concerning sales of publicly owned land and buildings in order to establish whether there was an element of State aid in favour of the buyers. Like the European Commission has done already towards the EC Member States, the EFTA Surveillance Authority has now drawn up general guidance to the EFTA States in order to make its general approach with regard to the problem of State aid through sales of land and buildings by public authorities transparent.
2. The following guidance to EFTA States:
 - describes a simple procedure that allows EFTA States to handle sales of land and buildings in a way that automatically precludes the existence of State aid,
 - specifies clearly cases of sales of land buildings that should be notified to the EFTA Surveillance Authority to allow for assessment of whether or not a certain transaction contains aid and, if so, whether or not the aid is compatible with the functioning of the EEA Agreement,
 - enables the EFTA Surveillance Authority to deal expeditiously with any complaints or submissions from third parties drawing its attention to cases of alleged aid connected to sales of land and buildings.
3. The procedural precautions recommended to avoid State aid rules coming into play are formulated in a way that should normally allow EFTA States to comply with the guidance without changing their domestic procedures.
4. The guidance concerns only sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.
5. The guidance does not affect specific provisions or practices of EFTA States intended to promote the quality of and access to private housing.

18B.2. **Principles**18B.2.1. **Sale through an unconditional bidding procedure**

1. A sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid, is by definition at market value and consequently does not contain State aid. The fact that a different valuation of the land and buildings existed prior to the bidding procedure, e.g. for accounting purposes or to provide a proposed initial minimum bid, is irrelevant.
 - (a) An offer is 'sufficiently well-publicised' when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

The intended sale of land and buildings, which in view of their high value or other features may attract investors operating on a Europe-wide or international scale, should be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.

⁽¹⁾ This Chapter corresponds to Community guidance (OJ C 209, 10.7.1997, p. 3).

- (b) An offer is 'unconditional' when any buyer, irrespective of whether or not he runs a business or of the nature of his business, is generally free to acquire the land and buildings and to use it for his own purposes. Restrictions may be imposed for the prevention of public nuisance, for reasons of environmental protection or to avoid purely speculative bids. Urban and regional planning restrictions imposed on the owner pursuant to domestic law on the use of the land and buildings do not affect the unconditional nature of an offer.
- (c) If it is a condition of the sale that the future owner is to assume special obligations — other than those arising from general domestic law or decision of the planning authorities or those relating to the general protection and conservation of the environment and to public health — for the benefit to the public authorities or in the general public interest, the offer is to be regarded as 'unconditional' within the meaning of the above definition only if all potential buyers would have to, and be able to, meet that obligation, irrespective of whether or not they run a business or of the nature of their business.

18B.2.2. Sale without an unconditional bidding procedure

(a) *Independent expert evaluation*

If public authorities intend not to use the procedure described under 18B.2.1., an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established, is the minimum purchase price that can be agreed without granting State aid.

An 'asset valuer' is a person of good repute who:

- has obtained an appropriate degree at a recognised centre of learning or an equivalent academic qualification,
- has suitable experience and is competent in valuing land and buildings in the location and of the category of the asset.

If in any EFTA State there are not appropriate established academic qualifications, the asset valuer should be a member of a recognised professional body concerned with the valuation of land and buildings and either:

- be appointed by the courts or an authority of equivalent status,
- have as a minimum a recognised certificate of secondary education and sufficient level of training with at least three years post-qualification practical experience in, and with knowledge of, valuing land and buildings in that particular locality.

The valuer should be independent in the carrying out of this tasks, i.e. public authorities should not be entitled to issue orders as regard the result of the valuation. State valuation offices and public officers or employees are to be regarded as independent provided that undue influence on their findings is effectively excluded.

'Market value' means the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale⁽¹⁾.

(b) *Margin*

If, after a reasonable effort to sell the land and buildings at the market value, it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5 % from that value can be deemed to be in line with market conditions. If, after a further reasonable time, it is clear that the land and buildings cannot be sold at the value set by the valuer less this 5 % margin, a new valuation may be carried out, which is to take account of the experience gained and of the offers received.

⁽¹⁾ Article 49(2) of Council Directive 91/674/EEC (OJ L 374, 31.12.1991, p. 7), cf. point 12(b) of Annex IX to the EEA Agreement.

(c) *Special obligations*

Special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them, irrespective of whether or not he runs a business or of the nature of his business. The economic disadvantage of such obligations should be evaluated separately by independent valuers and may be set off against the purchase price. Obligations whose fulfilment would at least partly be in the buyer's own interest should be evaluated with that fact in mind: there may, for example, be an advantage in terms of advertising, sport or arts sponsorship, image, improvement of the buyer's own environment, or recreational facilities for the buyer's own staff.

The economic burden related to obligations incumbent on all landowners under the ordinary law are not to be discounted from the purchase price (these would include, for example, care and maintenance of the land and buildings as part of the ordinary social obligations of property ownership or the payment of taxes and similar charges).

(d) *Cost to the authorities*

The primary cost to the public authorities of acquiring land and buildings is an indicator for the market value unless a significant period of time elapsed between the purchase and the sale of the land and buildings. In principle, therefore, the market value should not be set below primary costs during a period of at least three years after acquisition unless the independent valuer specifically identifies a general decline in market prices for land and buildings in the relevant market.

18B.2.3. Notification

EFTA States should consequently notify to the EFTA Surveillance Authority, without prejudice to the *de minimis* rule⁽¹⁾, the following transactions to allow it to establish whether State aid exists and, if so, to assess its compatibility with the functioning of the EEA Agreement:

- (a) any sale that was not concluded on the basis of an open and unconditional bidding procedure, accepting the best or only bid; and
- (b) any sale that was, in the absence of such procedure, conducted at less than market value as established by independent valuers.

18B.2.4. Complaints

When the EFTA Surveillance Authority receives a complaint or other submissions from third parties alleging that there was a State aid element in an agreement for the sale of land and buildings by public authorities, it will assume that no State aid is involved if the information supplied by the EFTA State concerned shows that the above principles were observed.

⁽¹⁾ See EFTA Surveillance Authority's Procedural and Substantive Rules in the field of State aid, Chapter 12 corresponding to the Commission notice on the *de minimis* rules published in OJ C 68, 6.3.1996, p. 9.