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II

(Acts whose publication is not obligatory)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

DECISION OF THE EFTA SURVEILLANCE AUTHORITY

No 329/99/COL

of 16 December 1999

Extending the Period of validity of present rules and introducing new guidelines on State aid for rescuing and restructuring firms in difficulty and amending for the twenty-second 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 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⁾, and in particular Article 24 and Article 1 of Protocol 3 there to,

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⁾, in particular the provisions contained in Chapter 16 (Aid for rescuing and restructuring firms in difficulty) thereof;

⁽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 of 3.9.1994 and in EEA Supplement No 32 thereto of the same date, last amendment (21st) adopted by Decision No 276/99/COL of 17.11.1999 (not yet published).

Recalling that the current rules on aid for rescuing and restructuring firms in difficulty, initially adopted on 19 October 1994⁽⁵⁾ and extended by the Authority's Decisions No 298/97 of 17 December 1997 and No 372/98 of 16 December 1998, will continue to apply until 31 December 1999;

Whereas the European Commission has adopted new Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁶⁾;

Whereas a strict discipline shall be maintained on aid for rescuing and restructuring firms in difficulty, and 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;

Whereas the new guidelines introduce specific notification obligations that constitute appropriate measures under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement which require the agreement of the EFTA States concerned,

HAS DECIDED AS FOLLOWS:

1. The State Aid Guidelines shall be amended by replacing Chapter 16 by new guidelines, 'Aid for rescuing and restructuring firms in difficulty', and two new annexes (Annex XIV, Notification form for individual grants of restructuring aid and Annex XV, Notification form for rescue aid), all contained in Annex I to this Decision.
2. Point 25.4(7) of Chapter 25 of the State Aid Guidelines as amended for the 14th time on 4 November 1998 shall read as follows:

 'An investment in fixed capital undertaken in the form of the purchase of an establishment which has closed or which would have closed had it not been purchased may also be regarded as initial investment.'
3. 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 to the new guidelines within six weeks of the date of this Decision, in so far as they involve appropriate measures according to Article 1(1) of Protocol 3 to the Surveillance and Court Agreement.
4. The European Commission shall be informed, in accordance with point (d) of Protocol 27 the EEA Agreement, by means of a copy of the Decision, including Annex I.
5. 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⁾ Published in OJ L 383, 31.12.1994 and in EEA Supplement No 59 thereto on the same date.

⁽⁶⁾ Published in OJ C 288, 9.10.1999, p. 2.

6. The amended guidelines, as referred to in paragraphs 1 and 2 above shall enter into force on their date of publication in the *Official Journal of the European Communities* and in the EEA Supplement thereto. Until that date the present guidelines will continue to apply.
7. The Decision shall be authentic in the English language.

Done at Brussels, 16 December 1999.

For the EFTA Surveillance Authority
The President
Knut ALMESTAD

ANNEX I

‘16. AID FOR RESCUING AND RESTRUCTURING FIRMS IN DIFFICULTY⁽¹⁾16.1. **Introduction**

1. The EFTA Surveillance Authority adopted its original Guidelines on State aid for rescuing and restructuring firms in difficulty⁽²⁾ in 1994. By decision of 16 December 1998 their validity was extended until 31 December 1999⁽³⁾.
2. The EFTA Surveillance Authority wishes through this version of the Guidelines, the text of which builds on previous versions, to make certain changes and clarifications prompted by a number of factors. First, completion of the single market and its impact on the European Economic Area calls for a closer watch to be kept on State aid. Secondly, the European Commission's sixth and seventh surveys on State aid in the EU in the manufacturing and certain other sectors⁽⁴⁾ reveal an increase in the volume of ad hoc aid, chiefly for rescuing and restructuring firms in difficulty. Finally, it is also desirable to further tighten the rules on rescue and restructuring aid, while taking account of the role of appropriate levels of aid in cushioning the social effects of restructuring. The EFTA Surveillance Authority therefore, like the European Commission has done already towards the EC Member States, sets about clarifying the rules applicable to rescue and restructuring aid and framing more strictly the guidelines according to which it will examine such aid.
3. State aid for rescuing firms in difficulty from bankruptcy and helping them to restructure may be regarded as legitimate only under certain conditions. It may be justified, for instance, by social or regional policy considerations, by the need to take into account the beneficial role played by small and medium-sized enterprises (SMEs) in the economy or, exceptionally, by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation.

16.2. **Definitions and scope of the present Guidelines and links with other texts on State aid**16.2.1. **Concept of a “a firm in difficulty”**

1. There is no EEA definition of what constitutes “a firm in difficulty”. However, for the purposes of these Guidelines, the EFTA Surveillance Authority regards a firm as being in difficulty where it is unable, either through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term.
2. In particular, a firm is, in any event and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines:
 - (a) in the case of a limited company⁽⁵⁾, where more than half of its registered capital has disappeared⁽⁶⁾ and more than one quarter of that capital has been lost over the preceding 12 months; or
 - (b) in the case of an unlimited company⁽⁷⁾, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or

⁽¹⁾ This Chapter corresponds to the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

⁽²⁾ First adopted 19.1.1994, published in OJ L 231 on 3.9.1994 and in EEA Supplement No 32 thereto on the same date, amended guidelines adopted 19.10.1994, published in OJ L 383 on 31.12.1994 and in EEA Supplement No 59 thereto on the same date.

⁽³⁾ Published in OJ C 111 on 22.4.1999 and in EEA Supplement No 17 thereto on the same date.

⁽⁴⁾ COM(1998) 417 final; COM(1999) 148 final.

⁽⁵⁾ This refers in particular to the types of company mentioned in the first subparagraph of Article 1(1) of Directive 78/660/EEC of 25 July 1978 (OJ L 222, 14.8.1978, p. 11) as amended in particular by Directive 90/605/EEC of 8 November 1990 (OJ L 317, 16.11.1990, p. 60), see point 4 of Annex XXII to the EEA Agreement.

⁽⁶⁾ By analogy with the provisions of Council Directive 77/91/EEC of 13 December 1976 (OJ L 26, 31.1.1977, p. 1), see point 2 of Annex XXII to the EEA Agreement.

⁽⁷⁾ This refers in particular to the types of company mentioned in Article 1 of Directive 90/605/EEC of 8 November 1990 (OJ L 317, 16.11.1990, p. 60), see point 4 of Annex XXII to the EEA Agreement.

- (c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.
3. The usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the company may already have become insolvent or may be the subject of collective insolvency proceedings brought under its domestic law. In the latter case, these Guidelines apply to any aid granted in the context of such proceedings which leads to the firm continuing in business. In any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or creditors.
 4. For the purposes of these Guidelines, a newly created firm⁽⁸⁾ is not eligible for rescue or restructuring aid, even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets.
 5. A company belonging to a larger business group is not normally eligible for rescue or restructuring aid, except where it can be demonstrated that the company's difficulties are its own and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself.

16.2.2. Definition of rescue and restructuring aid

1. Rescue aid and restructuring aid are covered by the same set of guidelines, because in both cases the public authorities are faced with a firm in difficulties and the rescue and the restructuring are often two parts of a single operation, even if they involve different processes.
2. Rescue aid is by nature temporary assistance. It should make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan and/or for the length of time the EFTA Surveillance Authority needs to be able to reach a decision on that plan.
3. Restructuring, on the other hand, should be based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability. Restructuring usually involves one or more of the following elements: the reorganisation and rationalisation of the firm's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, the restructuring of those existing activities that can be made competitive again and, possibly, diversification in the direction of new and viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. Restructuring operations within the scope of these Guidelines cannot, however, be limited to financial aid designed to make good past losses without tackling the reasons for those losses.

16.2.3. Scope

1. These Guidelines apply to firms in all sectors (except those covered by Article 27 and Protocol 14 to the EEA Agreement concerning coal and steel products), without prejudice to any specific rules relating to firms in difficulty in the sector concerned⁽⁹⁾.

16.2.4. Applicability of Article 61(1) of the EEA Agreement

1. State aid for rescuing or restructuring firms in difficulty will, by its very nature, tend to distort competition. In so far as it affects trade between the Contracting Parties, it falls within the scope of Article 61(1) of the EEA Agreement.
2. Aid for restructuring can take different forms, such as capital injections, debt write-offs, loans, relief from taxes or social security contributions, or loan guarantees. For rescues, however, and unless expressly stipulated otherwise in some other EEA text on State aid, assistance should be limited to loans or loan guarantees (see point 16.3.1).

⁽⁸⁾ The creation by a company of a subsidiary merely as a vehicle for receiving its assets and possibly its liabilities is not regarded as the creation of a new firm.

⁽⁹⁾ Specific rules of this nature exist for shipbuilding (Regulation (EC) No 1540/98 of 29 June 1998 (OJ L 202, 18.7.1998, p. 1) see point 1(b) of Annex XV to the EEA Agreement, the motor vehicle industry (Chapter 23 of these Guidelines) and the aviation sector (Chapter 30 of these Guidelines).

3. The source of the aid can be at any level of government⁽¹⁰⁾ central, regional or local, and any “public undertaking”, as defined in Article 2 of the act referred to in point 1 of Annex XV to the EEA Agreement⁽¹¹⁾. Thus, for example, rescue or restructuring aid may come from State holding companies or public investment companies⁽¹²⁾.
4. To determine when injections of new capital by public authorities into companies they own involve aid, the criterion applied is the “market-economy private investor” principle⁽¹³⁾. This provides that in circumstances where a rational private investor operating in a market economy would have made the finance available the provision or guarantee of funding to a company is not regarded as involving aid.
5. Where funding is provided or guaranteed by the State to an enterprise that is in financial difficulties, however, it must be deemed likely that the financial transfers involve State aid. Therefore, such financial transactions must be communicated to the EFTA Surveillance Authority in advance, where appropriate through the notification of a general scheme, in accordance with Article 1(3) of Protocol 3 to the Surveillance and Court Agreement⁽¹⁴⁾. The presumption of aid is stronger in cases where there is a EEA-wide structural excess of production capacity on a market in which the recipient firm is active or where the industry as a whole is in difficulties.
6. The assessment of rescue or structuring aid should not be affected by changes in the ownership of the business aided.

16.2.5. **Compatibility with the functioning of the EEA Agreement**

1. Article 61(2) and (3) of the EEA Agreement provides for the possibility of aid falling within the scope of Article 61(1) being regarded as compatible with the functioning of the EEA Agreement. Apart from cases of aid to make good the damage caused by national disasters or exceptional occurrences (Article 61(2)(b)), which are not covered here, the only basis whereby aid for rescuing or restructuring firms in difficulty can be deemed compatible is Article 61(3)(c). Under this provision the EFTA Surveillance Authority has the power to authorise “aid to facilitate the development of certain economic activities (...) where such aid does not adversely affect trading conditions to an extent contrary to the common interest.”
2. The EFTA Surveillance Authority considers that aid for rescue and restructuring may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the interest of the Contracting Parties if the conditions set out in these Guidelines are met. Where the firms to be rescued or restructured are located in assisted areas, the EFTA Surveillance Authority will take the regional considerations referred to in Article 61(3)(a) and (c) into account as described in point 16.3.2.5.

16.2.6. **Other EEA rules**

1. It should be stressed that the EFTA Surveillance Authority cannot authorise aid for rescuing or restructuring firms in difficulty where the terms and conditions of the aid infringe rules in the EEA Agreement and/or Surveillance and Court Agreement other than Article 61 of the EEA Agreement or Article 1 of Protocol 3 to the Surveillance and Court Agreement.

16.3. ***General conditions for the authorisation of rescue and/or restructuring aid notified individually to the EFTA Surveillance Authority***

1. This Section deals exclusively with aid measures that are notified individually to the EFTA Surveillance Authority. Under certain conditions, the EFTA Surveillance Authority may authorise rescue or restructuring aid schemes: those conditions are set out in point 16.4.

⁽¹⁰⁾ Including in the case of aid co-financed from joint activities established by the Contracting Parties.

⁽¹¹⁾ Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980, p. 35), as amended (OJ L 254, 12.10.1993, p. 16), see point 1 of Annex XV to the EEA Agreement.

⁽¹²⁾ See judgment of the European Court of Justice of 22 March 1977 in Case 78/76 *Steinike and Weinlig v Germany*, [1977] ECR 595: *Crédit Lyonnais/Usinor-Sacilor*, European Commission press release IP(91) 1045.

⁽¹³⁾ See Chapter 20 of these Guidelines on application of State aid provisions to public enterprise in the manufacturing sector.

⁽¹⁴⁾ See in particular point 20.5 of Chapter 20 of these Guidelines on application of State aid provisions to public enterprise in the manufacturing sector.

16.3.1. Rescue aid

1. In order to be approved by the EFTA Surveillance Authority, rescue aid as defined in point 16.2.2(2) must ⁽¹⁵⁾:
 - (a) consist of liquidity support in the form of loan guarantees or loans ⁽¹⁶⁾. In both cases, the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rates adopted by the EFTA Surveillance Authority;
 - (b) be linked to loans that are to be reimbursed over a period of not more than 12 months after disbursement of the last instalment to the firm ⁽¹⁷⁾;
 - (c) be warranted on the grounds of serious social difficulties and have no unduly adverse spillover effects on other EFTA States or EC Member States;
 - (d) be accompanied on notification by an undertaking on the part of the EFTA State concerned to communicate to the EFTA Surveillance Authority, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated;
 - (e) be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised (for example, covering wage and salary costs or routine supplies).
2. The rescue aid will initially be authorised for not more than six months or, where the EFTA State concerned has submitted a restructuring plan within that period, until the EFTA Surveillance Authority reaches its decision on the plan. In duly substantiated exceptional circumstances and at the request of the EFTA State concerned, the EFTA Surveillance Authority may extend the initial six-month period.
3. Rescue aid is a one-off operation designed to keep a company in business for a limited period, during which its future can be assessed. On the other hand, repeated rescues that would merely maintain the status quo, postpone the inevitable and in the mean time shift the attendant economic and social problems on to other, more efficient producers or other EFTA States or EC Member States cannot be allowed.
4. If the EFTA State fails to communicate the information stipulated in (d) of point 16.3.1(1) above before the six-month deadline expires and does not make a duly substantiated request for the deadline to be extended, the EFTA Surveillance Authority will initiate proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.
5. The approval of rescue aid does not necessarily mean that aid under a restructuring plan will subsequently be approved; such aid will have to be assessed on its own merits.

16.3.2. Restructuring aid**16.3.2.1. Basic principle**

1. Aid for restructuring raises particular competition concerns as it can shift an unfair share of the burden of structural adjustment and the attendant social and economic problems on to other producers who are

⁽¹⁵⁾ The items of information which the EFTA Surveillance Authority needs in order to examine the aid satisfactorily are listed in Annex XV to these Guidelines.

⁽¹⁶⁾ An exception may be made in the case of rescue aid in the banking sector, in order to enable the credit institution in question to continue temporarily carrying on its banking business in accordance with the prudential legislation in force (currently Council Directive 89/647/EEC of 17 December 1989 on a solvency ratio for credit institutions (OJ L 386, 30.12.1989, p. 14) see Chapter II point 18 of Annex IX to the EEA Agreement). Any aid granted in a form other than that described in subparagraph (b), for example a capital injection or a subordinated loan, will be taken into account when any compensatory measures under a restructuring plan are examined in accordance with point 16.3.2.2(1)(c) of these Guidelines.

⁽¹⁷⁾ Reimbursement of the loan linked to the rescue aid may possibly be covered by the restructuring aid subsequently approved by the EFTA Surveillance Authority.

managing without aid and to other EFTA States and/or EC Member States. The general principle should therefore be to allow the grant of restructuring aid only in circumstances in which it can be demonstrated that it does not run counter to the functioning of the EEA Agreement. This will only be possible if strict criteria are met, and if it is certain that any distortions of competition will be offset by the benefits flowing from the firm's survival (in particular, where it is clear that the net effect of redundancies resulting from the firm going out of business, combined with the effects on its suppliers, would exacerbate local, regional or national employment problems or, exceptionally, where the firm's disappearance would result in a monopoly or tight oligopolistic situation) and, where appropriate, there are adequate compensatory measures in favour of competitors.

16.3.2.2. *Conditions for the authorisation of aid*

1. Subject to the special provisions for assisted areas and SMEs (see points 16.3.2.5 and 16.3.2.6), the EFTA Surveillance Authority will approve aid only under the following conditions:

(a) Eligibility of the firm

The firm must qualify as a firm in difficulty within the meaning of these Guidelines (see point 16.2.1).

(b) Restoration of viability

The grant of the aid is conditional on implementation of the restructuring plan which must be endorsed by the EFTA Surveillance Authority in the case of all individual aid measures.

The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the EFTA State concerned commits itself. The plan must be submitted in all relevant detail to the EFTA Surveillance Authority and include, in particular, a market survey⁽¹⁸⁾. The improvement in viability must derive mainly from internal measures contained in the restructuring plan and may be based on external factors such as variations in prices and demand over which the company has no great influence only if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss-making even after restructuring.

The restructuring plan should describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It should take account, *inter alia*, of the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. It should enable the firm to progress towards a new structure that offers its prospects for long-term viability and enables it to stand on its own feet.

The plan should provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital should be enough to enable the restructured firm to compete in the marketplace on its own merits.

(c) Avoidance of undue distortions of competition

Measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. Otherwise, the aid should be regarded as "contrary to the common interest" and therefore incompatible with the functioning of the EEA Agreement.

⁽¹⁸⁾ The items of information which the EFTA Surveillance Authority needs in order to examine the aid satisfactorily are listed in Annex XIV to these Guidelines.

This condition usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period. Where the size of the relevant market(s)⁽¹⁹⁾ is negligible at EEA level, or the firm's share of the relevant market(s) is negligible, it should be considered that there is no undue distortion of competition. This condition should accordingly be regarded as not normally applying to small or medium-sized enterprises, except where otherwise provided by rules on State aid in a particular sector.

The compulsory limitation on or reduction in the company's presence on the relevant market(s) represents a compensatory factor in favour of its competitors. It should be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets. The EFTA Surveillance Authority will determine the extent of the limitation or reduction on the basis of the market survey attached to the restructuring plan and, where the procedure has been initiated, on the basis of information supplied by interested parties. The reduction in the firm's presence is to be put into effect through the restructuring plan and any conditions attached thereto.

A relaxation of the need for compensatory measures may be contemplated if such a reduction or limitation is likely to cause a manifest deterioration in the structure of the market, for example by having the indirect effect of creating a monopoly or a tight oligopolistic situation.

Compensatory measures can take different forms according to whether or not the firm is operating in a market where there is excess capacity. In assessing whether or not there is excess capacity on a given market, the EFTA Surveillance Authority can take into account all the relevant data in its possession:

- (i) where there is a Community-wide or EEA-wide structural excess of production capacity in a market served by the recipient, the restructuring plan must make a contribution, in proportion to the amount of aid received and its impact on that market, to the improvement of market conditions by irreversibly reducing production capacity. A capacity reduction is irreversible when the relevant assets are rendered permanently incapable of achieving the previous rate of output, or are permanently converted to another use. The sale of capacity to competitors is not sufficient in this case, except if the plant is sold for use in a geographic market in which its continued operation is unlikely to have significant effects on the competitive situation in the EEA. The capacity reduction requirements must contribute to a reduction in the recipient firm's presence on its market or markets;
- (ii) where, on the other hand, there is no Community-wide or EEA-wide structural excess of production capacity in a market served by the recipient, the EFTA Surveillance Authority will nevertheless examine whether compensatory measures should be required. Where any such compensatory measures involve a reduction in the capacity of the firm concerned, the necessary reduction could be achieved through the hiving-off of assets of subsidiaries. The EFTA Surveillance Authority will have to examine the compensatory measures proposed by the EFTA State concerned, whatever form they take, and determine whether they are sufficient in scope to mitigate the potentially distortive effects of the aid on competition. In examining the necessary compensatory measures, the EFTA Surveillance Authority will take account of the state of the market, and in particular its level of growth and the extent to which demand is met.

(d) Aid limited to the minimum

The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. To limit the distortive effect, the amount of the aid or the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. The EFTA Surveillance Authority will accordingly examine the level of the firm's liabilities after restructuring, including after any postponement or reduction of its debts, particularly in the context of its

⁽¹⁹⁾ As defined in point 26.7(6) of Chapter 26 of these Guidelines on multisectoral framework on regional aid for large investment projects: "The relevant product market(s) for determining market share comprises the products envisaged by the investment project and, where appropriate, its substitutes considered by the consumer (by reason of the products' characteristics, their prices and their intended use) or by the producer (through flexibility of the production installations). The relevant geographic market comprises usually the EEA or, alternatively, any significant part of it if the conditions of competition in that area can be sufficiently distinguished from other areas of the EEA. Where appropriate the relevant market(s) may be considered to be global". A footnote states that, where the investment concerns the production of intermediate goods, the relevant market may be the market for the final product if most of the production is not sold on the open market.

continuation in business following collective insolvency proceedings brought against it under national law⁽²⁰⁾. Neither should any of the aid go to finance new investment that is not essential for restoring the firm's viability.

In any event, it must be demonstrated to the EFTA Surveillance Authority that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as this is essential for restoring viability without thereby unduly distorting competition.

(e) Specific conditions attached to the authorisation of aid

In addition to the compensatory measures described in (c) above, and in the event that such provisions have not been adopted by the EFTA State concerned, the EFTA Surveillance Authority may impose any conditions and obligations it considers necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest. For example, it may require the EFTA State:

- (i) to take certain measures itself (e.g. to open up certain markets to other EEA operators);
- (ii) to impose certain obligations on the recipient firm (e.g. to refrain from acting as price leader on certain markets);
- (iii) to refrain from granting other types of aid to the recipient firm during the restructuring period.

(f) Full implementation of restructuring plan and observance of conditions

The company must fully implement the restructuring plan that has been accepted by the EFTA Surveillance Authority and must discharge any other obligations laid down in the EFTA Surveillance Authority decision. The EFTA Surveillance Authority will regard any failure to implement the plan or to fulfil the other obligations as misuse of the aid.

Where restructuring operations cover several years and involve substantial amounts of aid, the EFTA Surveillance Authority may require payment of the restructuring aid to be split into instalments and may make payment of each instalment subject to:

- (i) confirmation, prior to each payment, of the satisfactory implementation of each stage in the restructuring plan, in accordance with the planned timetable, or
- (ii) its approval, prior to each payment, after verification that the plan is being satisfactorily implemented.

(g) Monitoring and annual report

The EFTA Surveillance Authority must be put in a position to make certain that the restructuring plan is being implemented properly, through detailed regular reports communicated by the EFTA State concerned.

In the case of aid to large firms, the first of these reports will normally have to be submitted to the EFTA Surveillance Authority not later than six months after approval of the aid. Reports will subsequently have to be sent to the EFTA Surveillance Authority at least once a year, at a fixed date, until the objectives of the restructuring plan can be deemed to have been achieved. They must contain all the information the EFTA Surveillance Authority needs in order to be able to monitor the implementation of the restructuring programme, the timetable for payments to the company and its financial position and the observance of any conditions or obligations laid down in the decision approving the aid. They must in particular include all relevant information on any aid for any purpose which the company has received, either on an individual basis or under a general scheme, during the restructuring period (see point 16.5.2). Where the EFTA Surveillance Authority needs timely confirmation of certain key items of information, e.g. on closures or capacity reductions, it may require more frequent reports.

In the case of aid to small or medium-sized enterprises, transmission each year of a copy of the recipient firm's balance sheet and profit and loss account will normally be sufficient, except where stricter conditions have been laid down in the decision approving the aid.

⁽²⁰⁾ See the third sentence of point 16.2.1(3).

16.3.2.3. "One time, last time" condition

1. In order to prevent firms being unfairly assisted, restructuring aid should be granted once only. When planned restructuring aid is notified to the EFTA Surveillance Authority, the EFTA State must specify whether the firm concerned has in the past already received restructuring aid, including aid granted before entry into force of the present Guidelines and any unnotified aid⁽²¹⁾. If so, and where less than 10 years have elapsed since the restructuring period came to an end⁽²²⁾ or implementation of the plan has been halted, the EFTA Surveillance Authority will normally⁽²³⁾ allow further restructuring aid only in exceptional and unforeseeable circumstances for which the company is not responsible. An unforeseeable circumstance is one which could in no way be anticipated when the restructuring plan was drawn up.
2. The application of this rule will in no way be affected by any changes in ownership of the recipient firm following the grant of aid or by any judicial or administrative procedure which has the effect of putting its balance sheet on a sounder footing, reducing its liabilities or wiping out its previous debts where it is the same firm that is continuing in business.
3. Where a firm takes over assets of another firm, and in particular one that has been the subject of one of the procedures listed in point 16.3.2.3(2) or of collective insolvency proceedings brought under national law, and has itself already received rescue or restructuring aid, the purchaser is not subject to the "one time, last time" requirement, provided that the following three conditions are met:
 - (a) the purchaser is clearly separate from the old firm;
 - (b) the purchaser has acquired the old firm's assets at market price (thereby avoiding any shifting to the new company of aid paid to the old one);
 - (c) the winding-up or court-supervised administration and purchase of the old company are not merely devices aimed at evading application of the "one time, last time" principle (the EFTA Surveillance Authority could determine that this is the case if, for example, the difficulties encountered by the purchaser were clearly foreseeable when it took over the assets of the old company).
4. It should, however, be stressed here that, since it constitutes aid for initial investment, aid for the purchase of the assets cannot be authorised under these Guidelines (see also point 16.2.1(4)).

16.3.2.4. Amendment of the restructuring plan

1. Where restructuring aid has been approved, the EFTA State concerned may, during the restructuring period, ask the EFTA Surveillance Authority to agree to changes being made to the restructuring plan and the amount of the aid. The EFTA Surveillance Authority may allow such changes where they meet the following conditions:
 - (a) the revised plan must still show a return to viability within a reasonable timescale;
 - (b) if the amount of the aid is increased, any requisite compensatory measures must be more extensive than those initially imposed;
 - (c) if the proposed compensatory measures are smaller than those initially planned, the amount of the aid must be correspondingly reduced;
 - (d) the new timetable for implementation of the compensatory measures may be delayed with respect to the timetable initially adopted only for reasons outside the company's or the EFTA State's control. If that is not the case, the amount of the aid must be correspondingly reduced.

⁽²¹⁾ With regard to unnotified aid, the EFTA Surveillance Authority will take account in its analysis of the possibility that the aid could have been declared compatible with the functioning of the EEA Agreement.

⁽²²⁾ Unless otherwise specified, the restructuring period will normally come to an end when the deadline for implementation of the various measures provided for in the restructuring plan expires (see the sixth indent in point IV of Annex XIV to these Guidelines).

⁽²³⁾ Given the degree of liberalisation and specific features of each sector, two situations should be noted:

— in the air transport sector, entirely liberalised since 1997, the EFTA Surveillance Authority will apply the "one time, last time" principle within the limits and conditions of the guidelines on State aid in the aviation sector, see Chapter 30 of these Guidelines,

— in other sectors, if the effects of the liberalisation of EEA markets that were previously closed to competition have created new economic conditions, derogations may be considered.

16.3.2.5. *Restructuring aid in assisted areas*

1. The EFTA Surveillance Authority will take the needs of regional development into account when assessing restructuring aid in assisted areas. The fact that an ailing firm is located in an assisted area does not, however, justify a permissive approach to aid for restructuring: in the medium to long term it does not help a region to prop up companies artificially. Furthermore, given the limited resources available to promote regional development it is in the regions' own best interest to apply these scarce resources to develop as soon as possible alternative activities that are viable and sustainable. Finally, distortions of competition must be minimised even in the case of aid to firms in assisted areas.
2. Thus, the criteria listed in points 16.3.2.2, 16.3.2.3 and 16.3.2.4 are equally applicable to assisted areas, even when the needs of regional development are considered. In assisted areas, however, and unless otherwise stipulated in rules on State aid in a particular sector, the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures. If regional development needs justify it, the required capacity reduction will be smaller in assisted areas than in non-assisted areas and a distinction will be drawn between areas eligible for regional aid under Article 61(3)(a) of the EEA Agreement and those eligible under Article 61(3)(c) so as to take account of the greater severity of the regional problems in the former areas.

16.3.2.6. *Aid for restructuring small and medium-sized enterprises*

1. Aid to firms in the small to medium-sized category⁽²⁴⁾ tends to affect trading conditions less than that granted to large firms. This also applies to aid to help restructuring, so that the conditions laid down in point 16.3.2.2 are applied less strictly: the grant of restructuring aid to SMEs will not usually be linked to compensatory measures (see point 16.3.2.2(1)(c)), unless otherwise stipulated in rules on State aid in a particular sector; and the requirements regarding the content of reports will be less stringent (see point 16.3.2.2(1)(g)). On the other hand, the "one time, last time" principle (point 16.3.2.3) applies in full to SMEs.

16.3.2.7. *Aid to cover the social costs of restructuring*

1. Restructuring plans normally entail reductions in or abandonment of the affected activities. Such retrenchments are often necessary in the interests of rationalisation and efficiency, quite apart from any capacity reductions that may be required as a condition for granting aid (particularly in cases where there is a EEA-wide structural excess of production capacity — see point 16.3.2.2(1)(c)). Whatever the reason for them, such measures will generally lead to reductions in the company's workforce.
2. EFTA States' labour legislation may comprise general social security schemes under which redundancy benefits and early retirement pensions are paid direct to redundant employees. Such schemes are not to be regarded as State aid falling within the scope of Article 61(1) in so far as the State deals direct with employees and the company is not involved.
3. Besides direct redundancy benefit and early retirement provision for employees, general social support schemes frequently provide for the government to cover the cost of benefits which the company grants to redundant workers and which go beyond its statutory or contractual obligations. Where such schemes are available generally without sectoral limitations to any worker meeting predefined and automatic eligibility conditions, they are not deemed to involve aid under Article 61(1) for firms undertaking restructuring. On the other hand, if the schemes are used to support restructuring in particular industries, they may well involve aid because of the selective way in which they are used⁽²⁵⁾.
4. The obligations a company itself has under employment legislation or collective agreements with trade unions to provide redundancy benefits and/or early retirement pensions are part of the normal costs of a business which a firm has to meet from its own resources. This being so, any contribution by the State to these costs must be counted as aid. This is true regardless of whether the payments are made direct to the firm or are administered through a government agency to the employees.

⁽²⁴⁾ As defined in Section 10.2 of Chapter 10 of these Guidelines on aid to small and medium-sized enterprises (SMEs).

⁽²⁵⁾ In its judgment of 26 September 1996 in Case C-241/94 (*France v Commission, re: Kimberly Clark Sopalin*, [1996] ECR I-4551), the European Court of Justice confirmed that the system of financing on a discretionary basis by the French authorities, through the National Employment Fund, was liable to place certain undertakings in a more favourable situation than others and thus to qualify as aid within the meaning of Article 87(1) of the Treaty. (The Court's judgment did not call into question the Commission's conclusion that the aid was compatible with the common market).

5. The EFTA Surveillance Authority has a positive approach to such aid, for it brings economic benefits above and beyond the interests of the firm concerned, facilitating structural change and reducing hardship, and often only serves to even out differences in the obligations placed on companies by national legislation.
6. Besides meeting the cost of redundancy payments and early retirement, aid is commonly provided in connection with a particular restructuring case for training, counselling and practical help with finding alternative employment, assistance with relocation, and professional training and assistance for employees wishing to start new businesses. The EFTA Surveillance Authority consistently takes a favourable view of such aid.
7. The type of aid described in points 16.3.2.7(1) to (6) should be clearly identified in the restructuring plan, since aid for social measures exclusively for the benefit of redundant employees is disregarded for the purposes of determining the extent of the compensatory measures referred to in point 16.3.2.2(1)(c).
8. In the common interest, the EFTA Surveillance Authority will ensure in the context of the restructuring plan that social effects of the restructuring in EFTA States other than the one granting aid are kept to the minimum.

16.4. *Aid schemes for SMEs*

16.4.1. **General principles**

1. The EFTA Surveillance Authority will authorise aid schemes for rescuing and/or restructuring small or medium-sized enterprises in difficulty only where the firms concerned correspond to the definition of SMEs in Chapter 10 of these Guidelines. Subject to the following specific provisions, the compatibility of such schemes will be assessed in the light of the conditions set out in points 16.2 and 16.3. Any aid which is granted under a scheme and does not meet one of those conditions must be notified individually and approved in advance by the EFTA Surveillance Authority.

16.4.2. **Eligibility**

1. Unless otherwise stipulated in rules on State aid in a particular sector, awards of aid, under schemes authorised from now on, to small or medium-sized enterprises will be exempted from individual notification only where the enterprise concerned meets at least one of the three criteria set out in point 16.2.1(2). Aid to enterprises that do not meet any of those three criteria must be notified individually to the EFTA Surveillance Authority so that it can assess whether they qualify as firms in difficulty.

16.4.3. **Conditions for the authorisation of rescue aid schemes**

1. In order to be approved by the EFTA Surveillance Authority, rescue aid schemes must satisfy the conditions set out in (a), (b), (c) and (e) of point 16.3.1(1). Condition (d) set out in point 16.3.1(1) is replaced by the following, for the purposes of this point:

“(d) Rescue aid may be granted for not more than six months, during which time an analysis must be made of the firm's position. Before the end of that period the EFTA State should either approve a restructuring plan or a liquidation plan, or demand reimbursement of the loan and the aid corresponding to the risk premium from the beneficiary.”

Any rescue aid granted for longer than six months must be individually notified to the EFTA Surveillance Authority.

16.4.4. **Conditions for the authorisation of restructuring aid schemes**

1. The EFTA Surveillance Authority will authorise restructuring aid schemes only if the grant of aid is conditional on full implementation by the recipient of a restructuring plan that has been approved by the EFTA State concerned and meets the following conditions:

(a) “Restoration of viability”: the criteria set out in point 16.3.2.2(1)(b) apply;

- (b) "Avoidance of undue distortions of competition": since aid to SMEs tends to distort competition less, the principle set out in point 16.3.2.2(1)(c), namely that the recipient firm's presence on the relevant market(s) should be reduced, does not apply unless otherwise stipulated in rules on State aid in a particular sector. Schemes should nevertheless provide that recipient firms must not increase their capacity during the restructuring plan;
- (c) "Aid limited to the minimum necessary": the principles set out in point 16.3.2.2(1)(d) apply;
- (d) "One time, last time principle": the rule laid down in point 16.3.2.3. applies. However, EFTA States must notify measures individually to the EFTA Surveillance Authority where an exception is made to this principle:
 - (i) in exceptional and unforeseeable circumstances for which the company is not responsible;
 - (ii) where a firm takes over some or all of the assets of another firm which has itself already received rescue or restructuring aid;
- (e) "Amendment of the restructuring plan": any changes to the plan must comply with the rules set out in point 16.3.2.4.

16.4.5. **Common conditions for the authorisation of rescue and/or restructuring aid schemes**

1. Schemes must specify the maximum amount of aid that can be awarded to any one firm as part of a rescue and/or restructuring operation, including where the plan is modified. Any aid exceeding that amount must be notified individually to the EFTA Surveillance Authority. The maximum amount of aid may not be more than EUR 10 million, including any aid from other sources or under other schemes.

16.4.6. **Monitoring and annual reports**

1. Point 16.3.2.2(1)(g) does not apply to aid schemes. However, a condition of approval will be that reports are presented on the scheme's operation, normally on an annual basis, containing the information specified in Chapter 32 and in Annexes III and IV to these Guidelines. The reports must also include a list of all beneficiary firms indicating, for each of them:
 - (a) the company name;
 - (b) its sectoral code, using the NACE ⁽²⁶⁾ two-digit sectoral classification codes;
 - (c) the number of employees;
 - (d) annual turnover and balance sheet value;
 - (e) the amount of aid granted;
 - (f) where appropriate, any restructuring aid, or other support treated as such, which it has received in the past;
 - (g) whether or not the beneficiary company has been wound up or subject to collective insolvency proceedings before the end of the restructuring period.

16.5. ***Appropriate measures under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement***

1. The EFTA Surveillance Authority is proposing, under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, that the EFTA States adopt the following appropriate measures as set out below, with regard to their existing aid schemes. The EFTA Surveillance Authority will make authorisation of any future scheme conditional on compliance with the provisions below.

⁽²⁶⁾ Statistical classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

16.5.1. Individual notification of any aid for tangible investment during the restructuring period

1. Where a large enterprise receives restructuring aid examined under these Guidelines, the grant of any other investment aid during the restructuring period, even in accordance with a scheme that has already been authorised, is liable to influence the EFTA Surveillance Authority's assessment of the extent of the compensatory measures required.
2. During the period for restructuring such an enterprise, any aid intended to encourage tangible investment (whether it be to promote regional development, environmental protection or any other objective) awarded after 30 June 2000 must be notified individually, unless it is covered by the *de minimis* rule⁽²⁷⁾.

16.5.2. Need to inform the EFTA Surveillance Authority of any aid granted to the recipient firm

1. Where a large enterprise receives restructuring aid examined under these Guidelines, monitoring of the satisfactory implementation of the EFTA Surveillance Authority's decisions on such aid requires a large measure of transparency with regard to any further aid which the firm might receive, even in accordance with a scheme that has already been authorised and even where such aid is not subject to individual notification under point 16.5.1.
2. With effect from 30 June 2000, notifications of aid for restructuring a large enterprise must indicate, for information, all other aid of any kind which is planned to be granted to the recipient firm during the restructuring period, unless it is covered by the *de minimis* rule.
3. Likewise, the reports to be submitted in accordance with point 16.3.2.2(1)(g) of these Guidelines must indicate any other aid granted to the recipient firm during the period covered, and any other aid which is planned to be granted to the recipient firm during the restructuring period, unless it is covered by the *de minimis* rule.
4. The EFTA Surveillance Authority reserves the right to initiate proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement against all aid to a particular firm if the grant of aid under approved schemes is liable to circumvent the requirements of the present Guidelines.

16.5.3. Adaptation of existing rescue or restructuring aid schemes in the light of the present Guidelines

1. EFTA States must adapt their existing rescue and restructuring aid schemes which are to remain in operation after 30 June 2000 in order to bring them into line with the present Guidelines, and in particular with the requirements of point 16.4, after that date.
2. To enable the EFTA Surveillance Authority to monitor the adaptation process, EFTA States must let it have a list of all such schemes before 28 February 2000. They must subsequently, and in any event before 30 June 2000, provide it with sufficient information to enable it to check that the schemes have indeed been modified in accordance with these Guidelines.

16.6. Entry into force, duration and review of the Guidelines**16.6.1. Amendment of the regional aid Guidelines**

1. Point 25.4(7) of Chapter 25 of these Guidelines on national regional aid is hereby amended by deleting the text from the word "unless" up to the end of that point. That text excluded from the scope of "initial investment" the purchase of an establishment from a firm in difficulty, and thus disqualified it for regional aid. That exclusion therefore no longer operates. However, where an establishment is purchased from a firm in difficulty, it must be demonstrated in particular that the condition laid down in point 25.4(9) of Chapter 25 of these Guidelines, namely that the transaction takes place at market conditions, has been fulfilled.

⁽²⁷⁾ See Chapter 12 of these Guidelines.

16.6.2. Entry into force and duration

1. Subject to the following provisions, the present Guidelines shall enter into force on the date of their publication in the *Official Journal of the European Communities* and in the EEA Supplement thereto. They shall remain in force, unless otherwise stipulated in any new decision, for five years.

16.6.3. Aid to SMEs

1. Aid for rescuing and restructuring SMEs individually notified before 30 April 2000 will be assessed in the light of the Guidelines in force before adoption of the present text. The extension of those Guidelines, which was notified to EFTA States and published in the EEA Section of and the EEA Supplement to the *Official Journal of the European Communities* on 22 April 1999 is therefore renewed for such aid.
2. Any scheme is nevertheless subject to the appropriate measure referred to in point 16.5.3 where the scheme is intended to remain in operation after 30 June 2000.

16.6.4. Aid to large enterprises

1. Subject to the provisions set out below, the EFTA Surveillance Authority will assess the compatibility with the functioning of the EEA Agreement of any aid for rescuing or restructuring large enterprises, on the basis of the present Guidelines once they are published in the *Official Journal of the European Communities* and in the EEA Supplement thereto. However, notifications registered by the EFTA Surveillance Authority before that date will be examined in the light of the criteria in force at the time of notification.

16.6.5. Non-notified aid

1. The EFTA Surveillance Authority will examine the compatibility with the functioning of the EEA Agreement of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement:
 - (a) on the basis of the present Guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Communities* and in the EEA Supplement thereto;
 - (b) on the basis of the Guidelines in force at the time the aid is granted in all other cases.'

'ANNEX XIV**NOTIFICATION FORM FOR INDIVIDUAL GRANTS OF RESTRUCTURING AID****I. Information on the company**

- Company name.
- Legal status.
- Sector in which it operates, with corresponding NACE code.
- Names of the main shareholders and extent of their holdings.
- List of all shareholders' agreements (creation of a hard core, purchase option, etc.).
- If the company belongs to a group, copy of the full, up-to-date organisation chart of the whole of the group, showing the links between its members (capital and voting rights).
- If the company originates from a purchase of assets following liquidation or court-supervised administration proceedings, also give the above details for the firm(s) concerned.
- Location of all main production sites throughout the world, with workforce.
- If the company is treated as an SME, the EFTA State must supply evidence that it fulfils all the criteria of the EEA definition. If that is the case, it must explain why the company does not qualify for a restructuring aid scheme for SMEs (either there is no such scheme or the company does not meet the eligibility criteria).

- A copy of the last three profit and loss accounts (if possible) or at least of the most recent one.
- A copy of any court decision appointing an administrator or opening an investigation into the company.

II. Market surveys

The EFTA State must supply a copy of the survey of the market(s) served by the firm in difficulty, with the name of the organisation which carried it out. The market survey must give in particular:

- a precise definition of the market covered by the survey,
- the names of the company's main competitors with their shares of the world, EEA or domestic market, as appropriate,
- the evolution of the company's market shares in recent years,
- an assessment of total production capacity and demand at EEA level, concluding whether or not there is excess capacity on the market,
- EEA-wide forecasts for trends in demand, aggregate capacity and prices on the market over the five years ahead.

III. Description of the aid

- Demonstrate that the company's difficulties are its own and are not the result of an arbitrary allocation of costs within a group.
- State whether the company has already received rescue aid and, if so, give the approval date and attach the EFTA State's commitment to submit a restructuring or liquidation plan.
- State whether the company or any of its subsidiaries in which it holds not less than 25% of the capital or the voting rights have in the past already received restructuring aid or aid regarded as such. If so, give the references of the previous EFTA Surveillance Authority decisions.
- Indicate the form to be taken by the aid and the total amount of the financial benefit involved.
- Describe the compensatory measures proposed with a view to mitigating the distortive effects on competition at EEA level.
- Specify all the aid of any kind which the firm is likely to receive before the end of its restructuring period, unless it is covered by the *de minimis* rule.

IV. Restructuring plan

The EFTA State must supply a restructuring plan drawn up in accordance with point 16.3.2.2 of Chapter 16 of the Guidelines and containing at least the following information:

- presentation of the different market assumptions arising from the market survey,
- analysis of the reasons why the firm has run into difficulty,
- presentation of the proposed future strategy for the firm,
- description of the different restructuring measures planned and their cost,
- comparative assessment of the economic and social consequences, at regional and/or national level, of disappearance of the firm in difficulty and of implementation of the restructuring plan,
- timetable for implementing the different measures and final deadline for implementing the restructuring plan in its entirety,
- very precise description of the financial arrangements for the restructuring:
 - use of capital still available,
 - sale of assets or subsidiaries to help finance the restructuring,

- financial commitment by the different private shareholders and the main lending banks,
- amount of public assistance and demonstration of the need for that amount,
- where appropriate, grant of repayable loans or insertion of a “better fortunes” clause to secure reimbursement of the aid,
- projected profit and loss accounts for the next five years with estimated return on capital and sensitivity study based on several scenarios,
- record of the discussions on the planned restructuring held with the trade unions representing the firm's employees,
- name(s) of the author(s) of the restructuring plan and date on which it was drawn up.

V. Undertaking by the EFTA State

The EFTA State must undertake to give, in the reports on restructuring aid that has been allowed, all relevant information on aid of any kind granted to the firm receiving restructuring aid, whether under a scheme or not, until the restructuring period comes to an end.

ANNEX XV

NOTIFICATION FORM FOR RESCUE AID

Essential information on the company

Company name:

.....

Legal status:

Sector in which it operates:

Workforce (consolidated where appropriate):

Operating costs and financial charges over the last 12 months:

Maximum amount to be loaned:

Name of lender:

.....

Essential supporting documents to be supplied

- Latest profit and loss account with balance sheet, or court decision opening an investigation into the company under national company law.
- An undertaking by the EFTA State to submit to the EFTA Surveillance Authority, within not more than six months of the date of approval of the rescue aid, either a restructuring plan, or a liquidation plan, or proof that both the loan and the aid have been reimbursed in full.
- A liquidity plan for the six months ahead, indicating the amounts to be borrowed in the short term.
- A copy of the offer of a loan (linked to the rescue aid) to the firm in difficulty, specifying the conditions for the payment of the amounts loaned and the terms of reimbursement.
- A copy of the draft guarantee covering the loan in question where it is to be guaranteed.

DECISION OF THE EFTA SURVEILLANCE AUTHORITY**No 32/00/COL****of 16 February 2000**

introducing guidelines on cooperation between national courts and the EFTA Surveillance Authority in the State aid field and amending for the twenty-third 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 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⁾, and in particular Article 24 and Article 1 of Protocol 3 thereto,

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 notice on cooperation between national courts and the Commission in the State aid field ⁽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 consulted the EFTA States on the introduction of these new guidelines,

⁽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 on 3.9.1994 and in EEA Supplement No 32 thereto on 3.9.1994, last amendment (22nd) adopted by Decision No 329/99/COL of 16.12.1999 (see page 1 of this Official Journal).

⁽⁵⁾ Published in OJ C 312, 23.11.1995, p. 8.

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines shall be amended by introducing a new chapter, Chapter 9A, on cooperation between national courts and the EFTA Surveillance Authority in the State aid field, 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.
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, 16 February 2000.

For the EFTA Surveillance Authority

The President

Knut ALMESTAD

ANNEX I

9A. COOPERATION BETWEEN NATIONAL COURTS AND THE EFTA SURVEILLANCE AUTHORITY IN THE STATE AID FIELD

1. The purpose of this chapter is to offer guidance on cooperation between national courts and the EFTA Surveillance Authority in the State aid field. This chapter does not in any way limit the rights conferred on EFTA States, individuals or undertakings by EEA law. It is without prejudice to any interpretation of EEA/EC law, which may be given by the EFTA Court, the European Court of Justice and the Court of First Instance. Finally, it does not seek to interfere in any way with the fulfilment by national courts of their duties.
2. The European Commission (the Commission) issued on 23 November 1995 a notice on cooperation between national courts and the Commission in the State aid field⁽¹⁾. This non-binding act contains principles and rules which the Commission follows in the field of State aid. It also explains the ways in which the Commission envisages cooperation with national courts. The EFTA Surveillance Authority considers the subject of this Commission notice to be of EEA relevance. In order to maintain equal conditions in the State aid field and to ensure an homogeneous application of the EEA State aid rules throughout the European Economic Area, the EFTA Surveillance Authority amends its current Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement by the present chapter⁽²⁾. In the light of the codification developments of State aid rules in the Community and their consequent impact on the laws of the EFTA States, there will be an increasing need for cooperation between the EFTA Surveillance Authority and national courts in this field.

9A.1. *Introduction*

1. According to the case-law of the European Court of Justice, the last sentence of Article 88(3) of the EC Treaty, which is mirrored by the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, has direct effect in the legal order of the EC Member States⁽³⁾. This sentence contains the "standstill provision". It reads: "[t]he Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision". The proper enforcement of this provision is crucial for the effective control of State aids. This provision, like Community Regulations (which are by nature and function in the system of Community sources of law directly applicable) must be applied by national courts without the intervention of a legal measure designed to transpose Community law into national law. National courts in the Community have the power to enforce the direct effect of the last sentence of Article 88(3) of the EC Treaty.
2. The EFTA Surveillance Authority considers that the situation is different as regards EEA law, in so far as the EFTA States are concerned. In those States, the internal effect of EEA law is governed by the respective constitutional law, subject to Protocol 35 to the EEA Agreement. According to this Protocol, the EFTA States are under an obligation to ensure, if necessary by a separate statutory provision, that in cases of conflict between implemented EEA rules and other statutory provisions, the implemented EEA rules prevail. According to the EFTA Court, it is inherent in the nature of such a provision that individuals and economic operators in cases of conflict between implemented EEA rules and national statutory provisions must be entitled to invoke and to claim at national level any rights that could be derived from provisions of the EEA law⁽⁴⁾, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise⁽⁵⁾.
3. The proper application of the "standstill provision" in the EEA may require effective cooperation between the EFTA Surveillance Authority and national courts. This chapter explains how the EFTA Surveillance Authority intends to assist national courts by instituting closer cooperation in the application and interpretation of

⁽¹⁾ OJ C 312, 23.11.1995, p. 8.

⁽²⁾ The Guidelines and this new chapter are available from the EFTA Surveillance Authority's homepage (www.efta.int).

⁽³⁾ Court of Justice of the European Communities, Case 120/70, *Lorenz v Germany* [1973] ECR 1471, paragraph 8.

⁽⁴⁾ See in this context also the preamble of the Surveillance and Court Agreement, which clarifies that "the objective of the Contracting Parties to the EEA Agreement, in full deference to the independence of the courts, to arrive at and maintain a uniform interpretation and application of the EEA Agreement and those provisions of the Community legislation which are substantially reproduced in that Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition". The preamble furthermore states that "in the applications of Protocols 1 to 4 to this Agreement due account shall be paid to the legal and administrative practices of the Commission of the European Communities prior to the entry into force of this Agreement".

⁽⁵⁾ EFTA Court, Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark* (1 January 1994 to 30 June 1995) EFTA Court Report, paragraph 77.

Articles 61 and 62 of the EEA Agreement in individual cases. While the EFTA Surveillance Authority may not always be in a position to act promptly to safeguard the interests of third parties in State aid matters, national courts may be better placed to ensure that breaches of the "standstill provision" are dealt with and remedied.

9A.2. Powers

1. The EFTA Surveillance Authority is responsible for giving effect to the provisions of the EEA Agreement concerning State aid as well as for ensuring that those provisions are applied by the EFTA States. National courts, on the other hand, are responsible for the protection of rights and the enforcement of duties, usually at the behest of private parties. The EFTA Surveillance Authority must examine all aid measures, which fall under Article 61(1) of the EEA Agreement, in order to assess their compatibility with the functioning of the EEA Agreement. National courts are able to ensure, in accordance with the applicable national procedural law that EFTA States comply with their procedural obligations.
2. The "standstill provision" provides that the EFTA States shall not put its proposed measures into effect until the procedure in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement has resulted in a final decision. This provision implies a general prohibition to implement the aid before the EFTA Surveillance Authority has taken a decision, also in cases where formal proceedings are not opened.
3. The prohibition on implementation referred to in this provision extends to all aid which has been implemented without being notified⁽⁶⁾ and, in the event of notification, operates during the preliminary period and, if the EFTA Surveillance Authority sets in motion the formal investigation procedure, until the final decision.
4. Of course a court would have to consider whether the "proposed measures" constitute State aid within the meaning of Article 61(1) of the EEA Agreement before reaching a decision under the "standstill provision". The notion of State aid must be interpreted widely to encompass not only subsidies, but also tax concessions and investments from public funds made in circumstances in which a private investor would have withheld support. The aid must come from the "State", which includes all levels, manifestations and emanations of public authority. The aid must favour certain undertakings or the production of certain goods: this serves to distinguish State aid, to which Article 61(1) of the EEA Agreement applies, from general measures to which it does not. For example, measures which have neither as their object nor as their effect the favouring of certain undertakings or the production of certain goods, or which apply to persons in accordance with objective criteria without regard to the location, sector or undertaking in which the beneficiary may be employed, are not considered to be State aid.
5. Only the EFTA Surveillance Authority can decide that State aid is "compatible with the functioning of the EEA Agreement", i.e. authorise that aid.
6. In applying the "standstill provision", national courts may of course refer advisory opinions on the interpretation of Article 61 of the EEA Agreement to the EFTA Court pursuant to Article 34 of the Surveillance and Court Agreement. They could also request assistance from the EFTA Surveillance Authority by asking it for "legal or economic information"⁽⁷⁾.
7. The national court's role is to safeguard rights which individuals enjoy as a result of the prohibition laid down in the "standstill provision", which has been accordingly implemented into the national legal order of the EFTA States⁽⁸⁾. The fact that the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, which in the opinion of the EFTA Surveillance Authority fulfils the implicit criteria in Protocol 35 to the EEA Agreement of being unconditional and sufficiently precise, has been incorporated in the national legal order of the EFTA States, gives national courts sufficient powers to ensure that the "standstill provision" will be complied with. A court should use all appropriate devices and remedies and apply all relevant provisions of national law to give effect to the national law implementing the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement. A national court must, within its jurisdiction, protect rights which that law confers on individuals. A judge may, as appropriate and in accordance with applicable rules of national law and the

⁽⁶⁾ With the exception of "existing" aid. Such aid may be implemented until the EFTA Surveillance Authority has decided that it is incompatible with the functioning of the EEA Agreement.

⁽⁷⁾ In analogy with the Court of Justice of the European Communities, *Delimitis* judgment (ECJ), Case C-234/89, *Delimitis v Henninger Bräu* [1991] ECR I-935).

⁽⁸⁾ The "standstill provision" has been implemented in Iceland by Chapter XI, Article 46 of the Competition Law (The Law Gazette A, No 8/1993, as amended by Law No 24/1994, 83/1997 and 82/1998). In Norway it has been implemented by No 2 of the Regulations relating to the implementation of the provisions on State aid of the EEA Agreement (laid down by Royal Decree of 4 December 1992 pursuant to Act No 117 of 27 November 1992 relating to State aid, of EEA Agreement, Article 61 and following. Submitted by the Ministry of Industry and Energy, amended by Royal Decree of 31 March 1995, amended by Royal Decree of 13 September 1996). Since Liechtenstein has a monistic system, the "standstill provision" has been directly incorporated into the Liechtenstein legal order (*Liechtensteinisches Landesgesetzblatt*, Jahrgang 1995, No 72, 28 April 1995).

developing case-law of the EFTA Court, the Court of Justice and Court of First Instance of the European Communities grant interim relief, for example by ordering the freezing or return of monies illegally paid, and award compensation for the damage suffered, where such remedies are available under national law.

8. The EFTA Surveillance Authority considers that the simultaneous application of national State aid law is compatible with the application of EEA State aid law, provided that it does not impair the effectiveness and uniformity of EEA State aid rules and the measures to enforce them. Any conflicts that may arise when national and implemented EEA State aid law are applied simultaneously are foreseen in the EEA Agreement to be resolved so that implemented EEA law takes precedence. The purpose of this principle is to rule out any national measure which could jeopardise the full effectiveness of the provisions of EEA law.

9A.3. *The EFTA Surveillance Authority's limited powers*

1. The application of implemented EEA State aid law by the national courts has considerable advantages for individuals and undertakings. The EFTA Surveillance Authority cannot award damages for loss suffered as a result of an infringement of national law, which implemented the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement. Such claims may be brought only before the national courts. National courts can usually adopt interim measures and order the termination of infringements quickly. In addition, courts may award costs to the successful applicant. This is never possible in the administrative procedure before the EFTA Surveillance Authority.

9A.4. *Application of Article 1 of Protocol 3 to the Surveillance and Court Agreement*

1. EFTA States are required to notify to the EFTA Surveillance Authority all plans to grant aid or to alter aid plans already approved. This also applies to aid that may qualify for approval under Article 61(2) of the EEA Agreement, because the EFTA Surveillance Authority has to check that the requisite conditions are met. The only exception to the notification obligation is for aid that qualifies as *de minimis* because it does not significantly affect trade between the Contracting Parties to the EEA Agreement and thus does not fall within the scope of Article 61(1)⁽⁹⁾.
2. The EFTA Surveillance Authority receives notification of general schemes or programmes of aid, as well as of plans to grant aid to individual firms. Once a scheme has been authorised by the EFTA Surveillance Authority, individual awards of aid under the scheme do not normally have to be notified. However, under some of the aid codes or frameworks for particular industries or particular types of aid, individual notification is required of all awards of aid or of awards exceeding a certain amount. Individual notification may also be required in some cases by the terms of the EFTA Surveillance Authority's authorisation of a given scheme. EFTA States must notify aid, which they wish to grant outside the framework of an authorised scheme. Notification is required in respect of planned measures, including plans to make financial transfers from public funds to public or private sector undertakings, which may involve aid within the meaning of Article 61(1).
3. The first question which national courts have to consider in an action under national law, implementing the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, is whether the measure constitutes new or existing State aid within the meaning aid of Article 61(1). The second question to be answered is whether the measure has been notified either individually or under a scheme and if so, whether the EFTA Surveillance Authority has had sufficient time to come to a decision.
4. With respect to aid schemes, a period of two months is considered to be "sufficient time", after which the EFTA State concerned may, after giving the EFTA Surveillance Authority prior notice, implement the notified measure. The EFTA Surveillance Authority reduces this period voluntarily to 30 working days for individual cases and 20 working days under the "accelerated" procedure and for new aid schemes for small and medium-sized undertakings. The periods run from the time the EFTA Surveillance Authority is satisfied that the information provided by the EFTA State is sufficient to enable it to reach a decision.
5. If the EFTA Surveillance Authority has decided to initiate the procedure provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, the period during which the implementation of an aid measure is prohibited runs until the EFTA Surveillance Authority has reached a positive decision. For non-notified aid measures, no deadline exists for the EFTA Surveillance Authority's decision-making process, although the EFTA Surveillance Authority will act as speedily as possible. Aid may not be awarded before the EFTA Surveillance Authority's final decision.

⁽⁹⁾ See in this context Chapter 12 of the State Aid Guidelines concerning the *de minimis* rule.

6. If the EFTA Surveillance Authority has not ruled on an aid measure, national courts can always be guided, in interpreting national law which implemented EEA law, by the case-law of the EFTA Court, the Court of Justice and the Court of First Instance of the European Communities, as well as by decisions issued by the EFTA Surveillance Authority and the Commission. The EFTA Surveillance Authority has published guidelines⁽¹⁰⁾, which may be of assistance in this respect.
7. National courts should thus be able to decide whether or not the measure at issue is illegal, because the EFTA State did not comply with the notification requirements. Where national courts have doubts, they may request an advisory opinion from the EFTA Court in accordance with Article 34 of the Surveillance and Court Agreement⁽¹¹⁾.
8. Where national courts render judgments, finding that the "standstill provision" has not been complied with, they must rule that the measure at issue infringes the national law, which implemented the EEA law, and take the appropriate measures to safeguard the rights enjoyed by individuals and undertakings.

9A.5. *Effects of EFTA Surveillance Authority decisions*

1. A national court is bound by an EFTA Surveillance Authority decision addressed to an EFTA State under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement where the beneficiary of the aid in question seeks to question the validity of the decision of which it had been informed in writing by the EFTA State concerned and where it had failed to bring an action for annulment of the decision within the time limits prescribed by Article 36 of the Surveillance and Court Agreement.

9A.6. *Cooperation between national courts and the EFTA Surveillance Authority*

1. The EFTA Surveillance Authority realises that the principles set out above for the application and interpretation of State aid rules by national courts are complex and may sometimes be insufficiently developed to enable them to carry out their judicial duties properly. National courts may therefore ask the EFTA Surveillance Authority for assistance.
2. Article 3 of the EEA Agreement, which is modelled on Article 10 (former Article 5) of the EC Treaty, puts on the Contracting Parties the obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement and to facilitate cooperation within its framework⁽¹²⁾.
3. The Court of Justice of the European Communities has held that, pursuant to Article 10 of the EC Treaty, the Commission has a duty of sincere cooperation *vis-à-vis* judicial authorities of the Community Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system⁽¹³⁾. The EFTA Surveillance Authority considers that it is under similar obligations of sincere cooperation *vis-à-vis* national courts of the EFTA States, by virtue of the corresponding Article 3 of the EEA Agreement and Article 2 of the Surveillance and Court Agreement. It further considers that such cooperation can be an important factor in ensuring an effective and consistent application of the EEA State aid rules. In addition, participation by the national courts in the application of competition law in the field of State aid is necessary to give effect to the "standstill provision". The Surveillance and Court Agreement obliges the EFTA Surveillance Authority to follow the procedure laid down in Article 1(2) of Protocol 3 before it can order reimbursement of aid which is incompatible with the functioning of the EEA Agreement. The application of the rules on notification in the field of State aid constitutes an essential link in the chain of possible legal action by individuals and undertakings.
4. In the light of these considerations, the EFTA Surveillance Authority intends to work towards closer cooperation with national courts in the following manner.
5. The EFTA Surveillance Authority is committed to a policy of openness and transparency. The EFTA Surveillance Authority conducts its policy so as to give the parties concerned useful information on the application of State

⁽¹⁰⁾ Procedural and Substantive Rules in the field of State aid (State Aid Guidelines), initially adopted and issued on 19 January 1994. Published in OJ L 231 on 3.9.1994 and in the EEA Supplement No 32 thereto on the same date, last amendment (22nd) adopted by Decision No 329/99/COL of 16 December 1999 (see page 1 of this Official Journal).

⁽¹¹⁾ The EFTA Court normally renders advisory opinions within eight months.

⁽¹²⁾ See in this context also Article 2 of the Surveillance and Court Agreement, which states that "[t]he EFTA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Agreement".

⁽¹³⁾ Court of Justice of the European Communities, Case C-2/88, *Imm. Zwartveld* [1990] ECR at paragraph 18; Case C-234/89, *Delimitis v Henninger Bräu* [1991] ECR at paragraph 53.

aid rules. To this end, it will continue to publish as much information as possible on State aid cases and policy. The case-law of the EFTA Court, the Court of Justice and Court of First Instance of the European Communities, general texts on State aid published by the EFTA Surveillance Authority, decisions taken by the EFTA Surveillance Authority or the Commission, the Commission's annual reports on competition policy and the monthly *Bulletin of the European Union* may assist national courts in examining individual cases.

6. If these general pointers are insufficient, national courts may, within the limits of their national procedural law, ask the EFTA Surveillance Authority for information of a procedural nature to enable them to discover whether a certain case is pending before the EFTA Surveillance Authority, whether a case has been the subject of a notification or whether the EFTA Surveillance Authority has officially initiated a procedure or taken any other decision.
7. National courts may also consult the EFTA Surveillance Authority where the interpretation of Article 61(1) of the EEA Agreement or Article 1(3) of Protocol 3 to the Surveillance and Court Agreement causes particular difficulties. As far as Article 61(1) is concerned, these difficulties may relate in particular to the characterisation of the measure as State aid, the possible distortion of competition to which it may give rise and the effect on trade between the Contracting Parties. Courts may therefore consult the EFTA Surveillance Authority on its customary practice in relation to these issues. They may obtain information from the EFTA Surveillance Authority regarding factual data, statistics, market studies and economic analyses. Where possible, the EFTA Surveillance Authority will communicate these data or will indicate the source from which they can be obtained.
8. In its answer, the EFTA Surveillance Authority will not go into the substance of the individual case or the compatibility of the measure with the functioning of the EEA Agreement. The answer given by the EFTA Surveillance Authority will not be binding on the requesting court. The EFTA Surveillance Authority will make it clear that its view is not definitive and that the court's right to request an advisory opinion from the EFTA Court is unaffected.
9. It is in the interests of the proper administration of justice that the EFTA Surveillance Authority should answer requests for legal and factual information in the shortest possible time. Nevertheless, the EFTA Surveillance Authority cannot accede to such requests unless several conditions are met. The requisite data must actually be at its disposal and the EFTA Surveillance Authority may communicate only non-confidential information.
10. Article 14 of the Surveillance and Court Agreement requires the EFTA Surveillance Authority not to disclose information of a confidential nature. In addition, the duty of sincere cooperation applies to the relationship between courts and the EFTA Surveillance Authority, and does not concern the position of the parties to a dispute pending before those courts. The EFTA Surveillance Authority is obliged to respect legal neutrality and objectivity. Consequently, it will not accede to requests for information unless they come from a national court, either directly, or indirectly through parties which have been ordered by the court concerned to request certain information.

9A.7. **Final remarks**

1. This chapter is issued for guidance and does not in any way limit the rights conferred on EFTA States by EEA law or on individuals and undertakings by implemented EEA law.
 2. This chapter is without prejudice to any interpretation of EEA law, which may be given by the EFTA Court, the Court of Justice and Court of First Instance of the European Communities.'
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DECISION OF THE EFTA SURVEILLANCE AUTHORITY**No 72/00/COL****of 5 April 2000****amending for the twenty-sixth time the Procedural and Substantive Rules in the field of State aid,
introducing new guidelines for the reference rate of interest**

THE EFTA SURVEILLANCE AUTHORITY,

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

Having consulted the European Commission,

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

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;

Whereas the European Commission has adopted a notice on the method for setting the reference and discount rates ⁽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 Commission, acts corresponding to those adopted by the European Commission in order to maintain equal conditions of competition;

Recalling that the EFTA Surveillance Authority has consulted the EFTA States in writing on the subject of introducing new guidelines on the method for setting the reference and discount rates,

⁽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 EEA Supplement No 32 thereto on the same date, as last amended by Decision No 52/00/COL of 1 March 2000 (not yet published in the Official Journal).

⁽⁵⁾ OJ C 273, 9.9.1997, p. 3.

HAS DECIDED AS FOLLOWS:

1. The procedural and substantive rules in the field of State aid shall be amended by introducing a new Chapter 33.2 (Reference rate of interest) 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 this Decision, including Annex I.
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 this Decision, including Annex I.
4. This Decision, including the Annex I, shall be published in the EEA section of, and the EEA Supplement to, the *Official Journal of the European Communities*.
5. This Decision shall be authentic in the English language.

Done at Brussels, 5 April 2000.

For the EFTA Surveillance Authority

The President

Knut ALMESTAD



ANNEX I

‘33.2. Reference rate of interest ⁽¹⁾

For the purposes of EEA monitoring of State aid as required by the EEA Agreement, the EFTA Surveillance Authority uses various parameters, including the reference and discount rates.

Those rates are used to measure the grant equivalent of aid that is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes for loans. They are also used in implementing the *de minimis* rule and for the repayment of illegal aid.

The reference rates are supposed to reflect the average level of interest rates charged, in the various EFTA States parties to the EEA Agreement, on medium and long-term loans (five to 10 years) backed by normal security.

As from 1 April 2000 the reference rates are fixed as follows:

- the indicative rate is defined as the level of the rate of yield on five-year State bonds, in the relevant currency, plus a premium of 25 basis points,
- the reference rate is deemed to be equal to the average of the indicative rates recorded in the preceding months of September, October and November,
- the reference rate will be fixed (from 2001 onwards) with effect from 1 January,
- the reference rate is adjusted again in the course of the year if it differs by more than 15% from the average of the indicative rates recorded over the last known three months.

It should also be noted that:

- the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan,
- the EFTA Surveillance Authority reserves the right, if necessary for examining certain cases, to use a shorter base rate (for example, LIBOR one-year rate) or a longer base rate (for example, the rate on 10-year bonds) than the rate of yield on five-year State bonds.

Reference rates will be made known by the EFTA Surveillance Authority on the Internet at the following address: <http://www.efta.int/>.

⁽¹⁾ This chapter partly corresponds to the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

DECISION OF THE EFTA SURVEILLANCE AUTHORITY**No 78/00/COL****of 12 April 2000**

revising the guidelines on the application of the EEA State aid provisions to State guarantees and to guarantees given to public enterprises in the manufacturing sector, and amending for the twenty-seventh 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 Articles 61 to 63 thereof,

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

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⁾, in particular the provisions contained in Chapter 17 (aid in the form of State guarantees) and paragraph 7(2) of Chapter 20 (guarantees to public enterprises in the manufacturing sector) thereof;

Whereas the European Commission issued on 24 November 1999 a notice to the Member States on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14);

Whereas this notice is of relevance also for the European Economic Area;

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 Commission, acts corresponding to those adopted by the Commission, in order to maintain equal conditions of competition;

Having consulted the European Commission;

Recalling that the EFTA Surveillance Authority has consulted the EFTA States in a multilateral meeting on the subject,

⁽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 of 3.9.1994 and in the EEA Supplement No 32 of the same date, last amendment (26th) adopted by Decision No 72/00/COL of 5.4.2000 (see page 26 of this Official Journal).

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines shall be amended by replacing the existing Chapter 17 and paragraph 7(2)(1) of Chapter 20 with a new Chapter 17 'State guarantees', 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 this Decision, including Annex I.
5. The Decision shall be authentic in the English language.

Done at Brussels, 12 April 2000.

For the EFTA Surveillance Authority
The President
Knut ALMESTAD

ANNEX I

17. STATE GUARANTEES⁽¹⁾17.1. **Introduction**

1. This chapter outlines the EFTA Surveillance authority's approach to State aid granted in the form of guarantees. Guarantees are usually associated with a loan or other financial obligation to be contracted by a borrower with a lender. However, this chapter covers all forms of guarantees, irrespective of their legal basis and the transaction covered. Guarantees may be granted as individual guarantees or within guarantee schemes. If aid is involved, this aid in most cases benefits the borrower. However, in certain circumstances, there may also be an aid to the lender.
2. This chapter applies without prejudice to Article 125 of the EEA Agreement and thus does not prejudice the rules in the EFTA States governing the system of property ownership. The EFTA Surveillance Authority is neutral as regards public or private ownership. This notice does not apply to export credit guarantees.
3. The EFTA Surveillance Authority adopted in 1994 guidelines concerning State guarantees⁽²⁾, which stipulated that the EFTA Surveillance Authority would regard all guarantees given by the State, either directly or by delegation through financial institutions, as falling within the scope of Article 61(1) of the EEA Agreement. According to these guidelines, the EFTA Surveillance Authority should be notified of any plans to establish guarantee schemes or grant guarantees outside a scheme. The guidelines adopted by the EFTA Surveillance Authority in 1994 on the application of State aid provisions to public enterprises in the manufacturing sector⁽³⁾ also addressed the subject of guarantees.
4. Experience gained in the mean time suggests that the policy pursued by the EFTA Surveillance Authority in this area should be reviewed. This chapter replaces the existing Chapter 17 on State guarantees and Chapter 20, point 20.7.2(1). Its purpose is to give the EFTA States more detailed explanations about the principles on which the EFTA Surveillance Authority intends to base its interpretation of Articles 61 and 62 of the EEA Agreement, as well as Protocol 3 to the Surveillance and Court Agreement, and their application to State guarantees. The EFTA Surveillance Authority intends in this way to make its policy in this area as transparent as possible, thereby ensuring that its decisions are predictable and that equal treatment is guaranteed.

17.2. **Applicability of Article 61(1) of the EEA Agreement**17.2.1. **Aid to the borrower**

1. Usually, the aid beneficiary is the borrower. The State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms. State guarantees may thus facilitate the creation of new businesses and enable certain undertakings to raise money in order to pursue new activities or simply remain active instead of being eliminated or restructured, thereby creating distortions of competition. State guarantees thus generally fall within the scope of Article 61(1) of the EEA Agreement, if trade between the Contracting Parties is affected and no market premium is paid.
2. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. This carrying of a risk by the State should normally be remunerated by an appropriate premium. Where the State forgoes such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if no payments are ever made by the State under a guarantee, there may nevertheless be a State aid under Article 61(1) of the EEA Agreement. The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the

⁽¹⁾ This chapter corresponds to the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

⁽²⁾ Chapter 17 of the guidelines. Chapter 17 corresponded to the following Commission letters to the EC Member States: SG(89) D/4328 of 5 April 1989 and SG(89) D/12772 of 12 October 1989 (points 11 and 12 of Annex XV to the EEA Agreement).

⁽³⁾ Chapter 20 of these guidelines. Guarantees are addressed in section 20.7.2 thereof.

terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment the guarantee is given.

3. The EFTA Surveillance Authority also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability⁽⁴⁾.
4. Article 61(1) of the EEA Agreement covers aid granted by EFTA States or through State resources. Therefore, in the same way as other forms of potential aid, guarantees given by the State directly, namely by central, regional or local authorities, as well as guarantees given by undertakings under the dominant influence of public authorities, may constitute State aid.

17.2.2. Aid to the lender

1. Even if usually the aid beneficiary is the borrower it cannot be ruled out that under certain circumstances the lender, too, will benefit from the aid. In such a case the EFTA Surveillance Authority will certainly pursue the matter accordingly.
2. In particular, for example, if a State guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be an aid to the lender, in so far as the security of the loans is increased. Such aid is capable of favouring the lender and distorting competition, and generally falls within the scope of Article 61(1) of the EEA Agreement, if trade between contracting parties is affected.

17.3. Amount of the aid

1. In the case of an individual State guarantee, the aid element must be assessed by reference to the details of the guarantee and loan (or other financial obligation). The relevant factors include in particular the duration and amount of the guarantee and loan, the risk of default by the borrower, the price paid by the borrower for the guarantee, the nature of any security given, how and when the State could be called upon to pay a debt and the means (e.g. declaration of bankruptcy) to be used by the State to recover amounts owed by the borrower once the guarantee has been invoked.
2. The cash grant equivalent of a loan guarantee in a given year can be:
 - calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums paid have been deducted, or
 - taken to be the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor (the probability of default) and (b) any premium paid, i.e. (guaranteed sum × risk) – premium, or
 - calculated by any other objectively justifiable and generally accepted method.

For individual guarantees, the first method should in principle be the standard form of calculation, for guarantee schemes the second one.

The risk factor should be based on the past experience of defaults on loans given in similar circumstances (sector, size of firm, level of general economic activity). The yearly grant equivalents should be discounted to their present value using the reference rate, then added up to obtain the total grant equivalent.

3. Where, at the time the loan is granted, there is a strong probability that the borrower will default, e.g. because he is in financial difficulty, the value of the guarantee may be as high as the amount effectively covered by that guarantee.

⁽⁴⁾ See Chapter 20 of these guidelines, points 20.7.2(2) and 20.7.2(3).

4. If a financial obligation is wholly covered by a State guarantee, the lender has less incentive to assess properly, secure and minimise the risk arising from the lending operation, and in particular to assess properly the borrower's creditworthiness. Such risk assessment might also not always be taken over by the guarantor, for lack of means. This lack of incentive to minimise the risk of non-repayment of the loan might encourage lenders to contract loans with a greater than normal commercial risk and could thus increase the amount of higher-risk guarantees in the State's portfolio.
5. The EFTA Surveillance Authority considers that a percentage of at least 20 % not covered by a State guarantee will serve as an appropriate limit for inducing the lender to properly assess the creditworthiness of the borrower⁽⁵⁾, to properly secure its loans and to minimise the risk associated with the transaction⁽⁶⁾. The EFTA Surveillance Authority will therefore, in general, examine critically any guarantees covering the entirety (or nearly the entirety) of a financial transaction.
6. In the case of State guarantee schemes, the specific features of the individual cases may not be known at the time when the scheme is to be assessed. In these circumstances, the aid element must be assessed by reference to the provisions of the scheme concerning amongst others the maximum amount and duration of loans, the category of enterprise and type of project eligible, the security required from the borrowers, the premium to be paid and the interest rates obtained by them.

17.4. ***Conditions excluding the existence of aid***

1. An individual guarantee or a guarantee scheme entered into by the State will be outside the scope of Article 61(1) of the EEA Agreement when there is no aid which favours certain undertakings or the production of certain goods. In such cases, notification by the EFTA State is not necessary. Also, a guarantee does not constitute State aid under Article 61(1) of the EEA Agreement when the measure does not affect trade between contracting parties.
2. The EFTA Surveillance Authority considers that the fulfilment of all the following conditions ensures that an individual State guarantee does not constitute State aid under Article 61(1) of the EEA Agreement:
 - (a) the borrower is not in financial difficulty;
 - (b) the borrower would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
 - (c) the guarantee is linked to a specific financial transaction, is for a fixed maximum amount, does not cover more than 80 % of the outstanding loan or other financial obligation (except for bonds and similar instruments) and is not open-ended;
 - (d) the market price for the guarantee is paid (which reflects, amongst others, the amount and duration of the guarantee, the security given by the borrower, the borrower's financial position, the sector of activity and the prospects, the rates of default, and other economic conditions).
3. The EFTA Surveillance Authority considers that the fulfilment of all the following conditions ensures that a State guarantee scheme does not constitute State aid under Article 61(1) of the EEA Agreement:
 - (a) the scheme does not allow guarantees to be granted to borrowers who are in financial difficulty;
 - (b) the borrowers would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
 - (c) the guarantees are linked to a specific financial transaction, are for a fixed maximum amount, do not cover more than 80 % of each outstanding loan or other financial obligation (except for bonds and similar instruments) and are not open-ended;

⁽⁵⁾ This is under the assumption that the same level of security is provided by the company to the State and the credit institution.

⁽⁶⁾ The answers to a questionnaire on State guarantees in the EFTA States show that this principle is being applied only to a certain extent. Most of the guarantees cover the full amount of the underlying financial operation, thereby exempting the lending institution from the necessity to access properly the creditworthiness of the beneficiary in its own interest.

- (d) the terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the beneficiary enterprises make it, in all probability, self-financing;
 - (e) the scheme provides for the terms on which future guarantees are granted and the overall financing of the scheme to be reviewed at least once a year;
 - (f) the premiums cover both the normal risks associated with granting the guarantee and the administrative costs of the scheme, including, where the State provides the initial capital for the start-up of the scheme, a normal return on that capital.
4. Failure to comply with any one of the above conditions set out in point 17.4(2) and (3) does not mean that such guarantee or guarantee scheme is automatically regarded as State aid. If there is any doubt as to whether a planned guarantee or scheme does constitute State aid, it should be notified.
 5. There may be circumstances in which it is planned to use State guarantees to enable enterprises, and in particular small and medium-sized enterprises, to obtain loans that the market would not supply. The enterprises may be starting up, expanding fast or be small and hence unable to furnish the necessary security to secure a loan or obtain a guarantee. They may fall into the category of high-risk enterprises (expected to move into profitability only in the long term and/or having a particularly high failure rate). This may be the case, for example, with projects concerning new, innovative products or processes. The EFTA Surveillance Authority considers that such circumstances will generally not take State guarantees outside the scope of Article 61(1) of the EEA Agreement. State guarantees given in such circumstances should therefore be notified to the EFTA Surveillance Authority in sufficient time, in the same way as State guarantees given in other circumstances.

17.5. *Compatibility of State aid in the form of guarantees with the functioning of the EEA Agreement*

1. State guarantees within the scope of Article 61(1) of the EEA Agreement must be examined by the EFTA Surveillance Authority with a view to determining whether or not they are compatible with the functioning of the Agreement. Before such assessment of compatibility can be made, the beneficiary of the aid must be identified. As has been explained in point 17.2, this can be either the borrower, or the lender, or both.
2. In most cases the guarantee contains aid to the borrower (point 17.2.1). Whether or not this aid is compatible with the functioning of the EEA Agreement will be examined by the EFTA Surveillance Authority according to the same rules as are applied to aid measures taking other forms. The concrete criteria for the compatibility assessment can be seen from the chapters of these guidelines covering horizontal, regional and sectoral aid. The examination will take into account, in particular, the aid intensity, the characteristics of the beneficiaries and the objectives pursued.
3. The EFTA Surveillance Authority will accept guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed at the initial examination by the EFTA Surveillance Authority of the proposed guarantee within the normal procedures of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, at the stage when it is granted. In the event that an EFTA State wants to mobilise the guarantee under conditions other than those initially agreed at the granting stage, then the EFTA Surveillance Authority will regard the mobilisation of the guarantee as creating a new aid which has to be notified under Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.
4. Where the guarantee contains aid to the lender (point 17.2.2), attention should be drawn to the fact that such aid might, in principle, constitute operating aid.

17.6. *Consequences of infringement of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement*

1. Where an EFTA State does not observe the obligations of prior notification and suspension laid down in Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, the aid element of the guarantee is to be qualified as unlawful in accordance with Chapter 6 of these guidelines. As to the consequences of infringement of the third sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, various distinctions should be drawn. In the following the position of the aid beneficiary and that of lenders not being a beneficiary will be examined in turn.

2. First, where aid has been illegally granted, the beneficiaries of the aid contained in the guarantee will run a risk. The EFTA Surveillance Authority may take interim measures in accordance with Chapter 6, point 6.2.1, of these guidelines, pending the outcome of the examination as to the compatibility of the aid. If, after this examination, the EFTA Surveillance Authority finds that the State aid is incompatible with the functioning of the EEA Agreement, it will as a rule order the State to recover the aid from the beneficiary in accordance with Chapter 6, point 6.2.3, of these guidelines, even if this means the declaration of bankruptcy of the enterprise.
3. Moreover, aid beneficiaries also run a risk at national level, inasmuch as the national courts' role is to safeguard rights which individuals enjoy as a result of the prohibition laid down in the "standstill provision" of the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, which has been accordingly implemented into the national legal order of the EFTA States. The fact that the last sentence of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement has been incorporated in the national legal order of the EFTA States, gives national courts sufficient powers to ensure that the "standstill provision" will be complied with⁽⁷⁾. National courts in the EFTA States have to draw all the appropriate conclusions from the illegality of State aid granted in breach of the procedural rules of the Surveillance and Court Agreement. If a national court is requested to order recovery of the unlawful aid, it must normally grant that application⁽⁸⁾.
4. Secondly, guarantees differ from other State aid measures, such as grants or tax exemptions, in the sense that in the case of a guarantee the State also enters into a legal relation with the lender. Therefore, consideration has to be given to whether the fact that a State aid has been illegally granted also has consequences for third parties. In the case of State guarantees for loans, this concerns mainly the financial lending institutions. In the case of guarantees for bonds issued to obtain financing for undertakings, this concerns the financial institutions involved in the issuance of the bonds.
5. The question whether the illegality of the aid affects the legal relations between the State and third parties is a matter which has to be examined under national law. National courts may have to examine whether national law prevents the guarantee contracts from being honoured, and in that assessment the EFTA Surveillance Authority considers that they should take account of the breach of EEA law. Accordingly, lenders may have an interest in verifying, as a standard precaution, that the EEA rules on State aid have been observed, whenever guarantees are granted. The EFTA State should be able to provide a case number issued by the EFTA Surveillance Authority for an individual case or a scheme and eventually a non-confidential copy of the EFTA Surveillance Authority's decision together with the relevant reference to the EEA section of the *Official Journal of the European Communities* and the EEA Supplement thereto. The EFTA Surveillance Authority for its part will do its utmost to make available in a transparent manner information on cases and schemes approved by it.

17.7. ***Reports to be submitted to the EFTA Surveillance Authority by the EFTA States***

1. As there may be new developments on the financial markets and as the value of State guarantees is difficult to assess, the constant review pursuant to Article 62(1) of the EEA Agreement of State guarantee schemes approved by the EFTA Surveillance Authority is of particular importance. In addition to the usual data on expenditure, the reports to be presented annually to the EFTA Surveillance Authority should give (for schemes and individual guarantees as well) data on the total amount of State guarantees outstanding, the total amount paid in the preceding year by the State to defaulting debtors (net of any funds recovered), and the premiums paid for State guarantees in the same year. This information will help in calculating the rate of default and will be used to reassess the value of future guarantees and, if necessary, the premium to be paid in the future.
2. The EFTA Surveillance Authority does not intend to use information supplied in the abovementioned reports and not known or foreseeable when it took an earlier decision, in order to revise its initial conclusions concerning the existence or scale of aid contained in State guarantee schemes. The EFTA Surveillance Authority may, however, use such information to propose appropriate measures to an EFTA State under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, in order to alter an existing State guarantee scheme.'

⁽⁷⁾ See in this context also Chapter 9A of these guidelines (On cooperation between national courts and the EFTA Surveillance Authority in the State aid field).

⁽⁸⁾ See Case C-39/94 *Syndicat Français de l'Express International (SFEI) and others v La Poste and others* [1996] ECR I-3547.

RECOMMENDATION OF THE EFTA SURVEILLANCE AUTHORITY**No 67/00/COL****of 24 March 2000**

concerning a coordinated monitoring programme for 2000 to ensure compliance with maximum levels of pesticide residues in and on cereals and certain products of plant origin, including fruit and vegetables

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the EEA Agreement, and in particular Article 109 and Protocol 1 thereto,

Having regard to the Surveillance and Court Agreement, and in particular Article 5(2)(b) and Protocol 1 thereto,

Having regard to the Act referred to in point 38 of Chapter XII of Annex II to the EEA Agreement on the fixing of maximum levels for pesticide residues in and on cereals (Council Directive 86/362/EEC)⁽¹⁾ and in particular Article 7(2)(b) thereof,

Having regard to the Act referred to in point 54 of Chapter XII of Annex II to the EEA Agreement on the fixing of maximum levels for pesticide residues in and on certain products of plant origin, including fruit and vegetables (Council Directive 90/642/EEC)⁽²⁾, and in particular Article 4(2)(b) thereof,

After consulting the EFTA Foodstuffs Committee assisting the EFTA Surveillance Authority,

Whereas Article 7(2)(b) of Directive 86/362 and Article 4(2)(b) of Directive 90/642 require the EFTA Surveillance Authority to submit to the EFTA Foodstuffs Committee assisting the EFTA Surveillance Authority by 31 December each year a recommendation to the EFTA States setting out a coordinated monitoring programme to ensure compliance with maximum levels of pesticide residues set out in the Annexes II to the said Directive;

Whereas the EFTA Surveillance Authority should recommend a monitoring programme each year; whereas experience, gained by the European Commission and its Member States in establishing, carrying out and reporting on the previous annual coordinated monitoring programmes, indicates that multiannual programmes appear to be most effective and practical; whereas it appears appropriate to indicate in this recommendation the framework of future programmes;

Whereas the EFTA Surveillance Authority should progressively work towards a system which would permit the estimation of actual pesticide dietary exposure, as provided for in the second paragraph of Article 7(3) of Directive 86/362 and the second paragraph of Article 4(3) of Directive 90/642; whereas to facilitate examination of the feasibility of such estimations, data concerning the monitoring of residues of pesticides in a number of food products which constitute major components of European diets should be available; whereas in view of the resources available at national level for pesticide residue monitoring, the EFTA States are only able to analyse samples of four to five products each year within a coordinated monitoring programme; whereas each pesticide should generally be monitored in 20 food products over a series of five-year cycles;

Whereas the residues recommended to be monitored in 2000 will allow examination of the feasibility of using the data concerning the pesticides acephate, the benomyl group, chlorpyrifos, iprodione and methamidophos as these compounds (identified as Group A in Annex I) have already been monitored between 1996 and 1999 for estimation of actual dietary exposure;

⁽¹⁾ Hereinafter referred to as Directive 86/362.

⁽²⁾ Hereinafter referred to as Directive 90/642.

Whereas the residues recommended to be monitored in 2000 and 2001 will allow examination of the feasibility of using the data concerning the pesticides diazinon, metalaxyl, methidathion, thiabendazole and triazophos as these compounds (identified as Group B in Annex I) have already been monitored between 1997 and 1999 for estimation of actual dietary exposure;

Whereas the residues recommended to be monitored in 2000, 2001 and 2002 will allow examination of the feasibility of using the data concerning the pesticides chlorpyrifos-methyl, deltamethrin, endosulfan, imazilil, lambda-cyhalothrin, the maneb group, mecarbam, permethrin, pirimiphos-methyl and vicolozolin as these compounds (identified as Group C in Annex I) have already been monitored in 1998 and 1999 for estimation of actual dietary exposure;

Whereas a systematic statistical approach to numbers of samples to be taken in the specific coordinated exercise is necessary; whereas such an approach has been set out by the Commission of the Codex Alimentarius⁽³⁾. Based on a binomial probability distribution it can be calculated that examination of a total sample number of 459 gives a 99% confidence of detecting one sample containing pesticide residues above the limit of determination (LOD) if it is anticipated that 1% of products of plant origin will contain residues above the LOD; whereas the total number of samples to be taken by each EFTA State should be apportioned on the basis of population and consumer numbers, with a minimum of 12 samples per product and per year;

Whereas draft guidelines concerning quality control procedures for pesticide residue analysis, published in Annex II⁽⁴⁾ to the monitoring recommendation for 1999 have been discussed by the experts of the EU Member States at Oeiras, Portugal on 15 and 16 September 1997 and discussed and taken note of in the subgroup 'Pesticide residues' of the Working Group on Plant Health on 20 and 21 November 1997; whereas it is agreed by the EU Member States that these draft guidelines should be implemented as far as possible by the analytical laboratories of the EU Member States and should be reviewed in the light of this experience;

Whereas Article 4(2)(a) of Directive 90/642 requires the EFTA States to specify the criteria applied in drawing up their national inspection programmes when sending to the EFTA Surveillance Authority information on their implementation during the previous year; whereas such information should include the criteria applied in determining the numbers of samples to be taken and analyses to be carried out and the reporting levels applied and the criteria by which the reporting levels have been fixed; whereas details of accreditation under the Act referred to in point 54n of Chapter XII of Annex II to the EEA Agreement on the subject of additional measures concerning the official control of foodstuffs (Council Directive 93/99/EEC)⁽⁵⁾ of the laboratories carrying out analyses should be indicated;

Whereas information on the results of monitoring programmes is particularly appropriate for treatment, storage and transmission by electronic/informatic methods; whereas formats have been developed for supply in diskette form to the EU Member States by the Commission; whereas the same format could be used by the EFTA States; whereas the EFTA States should therefore be able to send their reports to the EFTA Surveillance Authority in the standard format; whereas the further development of such a standard format is most effectively undertaken by the development of guidelines;

Whereas Liechtenstein shall comply with the provisions of the acts referred to in Chapter XII of Annex II to the EEA Agreement by 1 January 2000; whereas therefore Liechtenstein is included in this recommendation for 2000,

HAS ADOPTED THIS RECOMMENDATION:

It is recommended that Iceland, Liechtenstein and Norway:

1. sample and analyse for the product/pesticide residue combinations set out in Annex I, on the basis of a target number of 12 samples of each product, reflecting as appropriate, national, EEA and third

⁽³⁾ Codex Alimentarius, Pesticide Residues in Foodstuffs, Rome 1994, ISBN 92-5-203271-1; Vol. 2, p. 372.

⁽⁴⁾ EFTA Surveillance Authority, Doc. No 99-899-D.

⁽⁵⁾ Hereinafter referred to as Directive 93/99.

country share of the EFTA State's market; for at least one pesticide possibly posing an acute risk, one of the products will be subjected to individual analysis of the items in the composite sample: two samples of an appropriate number of items will be taken, where possible the produce of a single producer; if in the first composite sample a detectable level of the pesticide is found, the items of the second sample will be analysed individually; in 2000 this will include the combination cucumbers/methamidophos and/or pears/chlormequat;

2. by 31 August 2001 report the results for the part of the specific exercise allocated for 2000 in Annex I, together with the analytical methods used and reporting levels achieved, in accordance with the quality control procedures set out in Annex II to the recommendation of the EFTA Surveillance Authority for the year 1999, in a format as set out in Annex III to that recommendation;
3. by 31 August 2000, send to the EFTA Surveillance Authority and to EEA/EFTA States all the information as required by Article 7(3) of Directive 86/362 and Article 4(3) of Directive 90/642 concerning the 1999 monitoring exercise, to ensure, at least by check sampling, compliance with maximum pesticide residue levels including:
 - 3.1. — the results of their national programmes concerning pesticides listed in Annexes II to Directives 86/362 and 90/642, in relation to harmonised levels and, where these have not yet been fixed at Community level, in relation to the national levels in force,
 - 3.2. — information on their laboratories' quality control procedures and, in particular, information concerning aspects of the guidelines concerning quality control procedures for pesticide residue analysis, which they have not been able to apply or have had difficulty in applying,
 - 3.3. — information on accreditation in accordance with the provisions of Article 3 of Directive 93/99 (including type of accreditation, accreditation body and copy of accreditation certificate) of the laboratories carrying out the analyses.
4. This recommendation is addressed to Iceland, Liechtenstein and Norway.

Done at Brussels, 24 March 2000.

For the EFTA Surveillance Authority
Hannes HAFSTEIN
College Member

ANNEX I

Pesticide/product combinations to be monitored in the specific exercise set out in point 1 of the recommendation

Pesticide residue to be analysed for	Years ⁽¹⁾			
	2000	2001	2002	2003
Group A				
Acephate	(a)			
Benomyl group	(a)			
Chlorpyrifos	(a)			
Iprodione	(a)			
Methamidophos	(a)			
Group B				
Diazinon	(a)	(b)		
Metalaxyl	(a)	(b)		
Methidathion	(a)	(b)		
Thiabendazol	(a)	(b)		
Triazophos	(a)	(b)		
Group C				
Chlorpyrifos-methyl	(a)	(b)	(c)	
Deltamethrin	(a)	(b)	(c)	
Endosulfan	(a)	(b)	(c)	
Imazalil	(a)	(b)	(c)	
Lambda-cyhalothrin	(a)	(b)	(c)	
Maneb group	(a)	(b)	(c)	
Mecarbam	(a)	(b)	(c)	
Permethrin	(a)	(b)	(c)	
Pirimiphos-methyl	(a)	(b)	(c)	
Vinclozolin	(a)	(b)	(c)	

Pesticide residue to be analysed for	Years ⁽¹⁾			
	2000	2001	2002	2003
Group D				
Azinphos-methyl		(b)	(c)	(d)
Captan		(b)	(c)	(d)
Chlorothalonil		(b)	(c)	(d)
Dichlofluanid		(b)	(c)	(d)
Dicofol		(b)	(c)	(d)
Dimethoate		(b)	(c)	(d)
Disulfoton		(b)	(c)	(d)
Folpet		(b)	(c)	(d)
Malathion		(b)	(c)	(d)
Omethoate		(b)	(c)	(d)
Oxydemeton-methyl		(b)	(c)	(d)
Phorate		(b)	(c)	(d)
Procymidone		(b)	(c)	(d)
Propyzamide		(b)	(c)	(d)
Thiometon		(b)	(c)	(d)
Group E				
Aldicarb			(c)	(d)
Bromopropylate			(c)	(d)
Cypermethrin			(c)	(d)
Deltamethrin			(c)	(d)
Imazalil			(c)	(d)
Lambda-cyhalothrin			(c)	(d)
Methamidophos			(c)	(d)
Methiocarb			(c)	(d)

Pesticide residue to be analysed for	Years ⁽¹⁾			
	2000	2001	2002	2003
Methomyl			(c)	(d)
Monocrotophos			(c)	(d)
Parathion			(c)	(d)
Permethrin			(c)	(d)
Pirimiphos-methyl			(c)	(d)
Tolylfluanid			(c)	(d)
Vinclozolin			(c)	(d)

⁽¹⁾ Indicative for 2001, 2002 and 2003, subject to programmes which will be recommended for these years.

(a) Rice (husked or polished), cucumber, head cabbage, peas (frozen or fresh, analysed without pods).

(b) Apples, barley, tomatoes, lettuce.

(c) Pears, bananas, beans (fresh or frozen), potatoes.

(d) Carrots, oranges, peaches, spinach.

RECOMMENDATION OF THE EFTA SURVEILLANCE AUTHORITY**No 68/00/COL****of 24 March 2000****on a coordinated programme for the official control of foodstuffs for 2000**

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the EEA Agreement, and in particular Article 109 and Protocol 1 thereto,

Having regard to the Surveillance and Court Agreement, and in particular Article 5(2)(b) and Protocol 1 thereto,

Having regard to the Act referred to in point 50 of Chapter XII of Annex II to the EEA Agreement on the official control of foodstuffs (Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs)⁽¹⁾, and in particular Article 14(3) thereof,

After consulting the EFTA Foodstuffs Committee assisting the EFTA Surveillance Authority,

Whereas it is necessary with a view to the sound operation of the European Economic Area, to arrange for coordinated food inspection programmes within the EEA;

Whereas such programmes emphasise compliance with the foodstuffs legislation in force under the EEA Agreement, the protection of public health, consumer interests and fair trade practices;

Whereas Article 3 of the Act referred to in point 54n of Chapter XII of Annex II to the EEA Agreement (Council Directive 93/99/EC of 29 October 1993 on the subject of additional measures concerning the official control of foodstuffs)⁽²⁾ requires the laboratories referred to in Article 7 of Directive 89/397 to comply with the criteria in the European standard EN45000 series; whereas only such laboratories may be considered suitable to carry out analyses within the coordinated programme of official controls;

Whereas the results from simultaneous implementation of national programmes and coordinated programmes can provide information and experience on which to base future control activities;

Whereas Liechtenstein shall comply with the provisions of the acts referred to in Chapter XII of Annex II to the EEA Agreement by 1 January 2000, whereas therefore Liechtenstein is included in this recommendation for 2000;

Whereas the European Commission, in its recommendation of 22 February 2000 concerning a coordinated programme for the official control of foodstuffs for 2000, has recommended the Member States of the European Union to apply a corresponding programme,

HAS ADOPTED THIS RECOMMENDATION:

1. It is recommended that during 2000 Iceland, Liechtenstein and Norway should carry out controls and, where indicated, take samples and analyse such samples in laboratories, carry out audits and/or inspections, to monitor compliance with the following EEA Acts and measures:

⁽¹⁾ Hereinafter referred to as 'Directive 89/397'.

⁽²⁾ Hereinafter referred to as 'Directive 93/99'.

- (a) Article 3(2) of the Act referred to in point 54j Chapter XII of Annex II to the EEA Agreement (Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs) ⁽³⁾ concerning the application of the principles of HACCP in certain types of food businesses,
 - (b) paragraph 2 of Chapter IV of the Annex to Directive 93/43 concerning bulk transport of foodstuffs,
 - (c) the Act referred to in point 53 in Chapter XII of Annex II to the EEA Agreement (Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs) ⁽⁴⁾ concerning nutritional claims on fruit-flavoured milk drinks, yoghurts and soft drinks.
2. Although sampling and/or inspection rates have not been set, Iceland, Liechtenstein and Norway should ensure that these are sufficient to provide an overview of the subject under consideration in each State. Suggestions will be made for methods of analysis.
 3. Iceland, Liechtenstein and Norway should provide information as requested, following the format of the record sheets provided in the Annex, to help enhance the comparability of results.
 4. Foodstuffs submitted for analysis under this programme should be submitted to laboratories complying with the provisions of Article 3 of Directive 93/99.
 5. **HACCP in certain food businesses**

5.1. *Scope of the programme*

Article 3(2) of Directive 93/43 requires food business operators covered by the Directive to apply certain principles of the hazard analysis and critical control point (HACCP) system to their businesses in addition to the general hygiene requirements contained in the Annex to the Directive. Since the coming into force of the Directive in December 1995 food business operators have been required to have in place systems for analysis and control of food safety hazards, which may be based, where they exist, on voluntary industry guides to good hygiene practice. Article 5 of Directive 93/43 requires Iceland, Liechtenstein and Norway to encourage the development of sectoral voluntary guides to good hygiene practice which elaborate, for the sector concerned, the general hygiene principles of the Annex to the Directive and the requirements relating to the application of the principles of HACCP in Article 3(2).

Article 3(2) of Directive 93/43 applies to all food businesses covered by the Directive regardless of size or type of business. As the range of businesses which must comply with this provision is broad, for the sake of comparability of results only, certain types and sizes of food businesses have been selected. This selection does not in any way indicate that other businesses have more or less responsibility under this provision.

5.2. *Method*

The competent authorities of Iceland, Liechtenstein and Norway, in the normal course of their duties, shall visit the food business operations covered by Directive 93/43 in the following categories:

- (a) mass/industrial catering establishments,
- (b) retail butchers selling directly to consumers.

The results of the control shall be recorded on the report forms in the Annex.

⁽³⁾ Hereinafter referred to as 'Directive 93/43'.

⁽⁴⁾ Hereinafter referred to as 'Directive 90/496'.

6. **Transport of bulk foodstuffs**

6.1. *Scope of the programme*

Chapter IV of the Annex to Directive 93/43 specifically requires bulk foodstuffs in liquid, granulate or powdered form to be transported in receptacles and/or containers/tankers reserved for the transport of foodstuffs. For two classes of foodstuffs derogations to this provision have been adopted by the Commission and become a part of the EEA Agreement, namely in relation to the transport by sea of edible oils and fats, and raw sugar. This element of the coordinated programme is designed to check whether foodstuffs which are not covered by the derogations made under Article 4 of Directive 93/43 comply with the requirements relating to transport.

6.2. *Method*

The results of the following controls should be recorded on the report forms in the Annex:

- on the premises of manufacturers of bulk foodstuffs of non-animal origin (oil, flour, starch, etc.), controls should be carried out to check the condition, repair and cleanliness of the receptacles, in line with the general provisions of Chapter IV of the Annex to Directive 93/43 and a record kept. Controls should be carried out to establish whether the manufacturer has satisfactory procedures in place to ensure that the receptacles or vessels used for the transport of the foodstuffs are reserved for foodstuffs only,
- controls should be undertaken on the premises of carriers, in order to check the types of goods carried, by examining transport documents and by direct observation.

7. **Nutrition labelling**

7.1. *Scope of the programme*

Directive 90/496 lays down specific labelling requirements for nutrients present in a food when labelling or presentation of the food comprises a nutritional claim. Foodstuffs for special nutritional uses within the scope of the Act referred to in point 51 in Chapter XII of Annex II to the EEA Agreement (Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses)⁽⁵⁾ are excluded.

7.2. *Method*

Foods in two categories, fruit and vegetable juices, and fruit-flavoured milk drinks and yoghurts, which claim certain nutritional qualities on their labels, should be sampled to examine whether the nutritional claim is authorised and whether the wording conforms with the provisions of Directive 90/496. Furthermore, the sample should be analysed in order to establish whether the values in the nutritional claim are accurate or within accepted tolerances. The results should be recorded on the report forms in the Annex.

Done at Brussels, 24 March 2000.

For the EFTA Surveillance Authority

Hannes HAFSTEIN

College Member

⁽⁵⁾ Hereinafter referred to as 'Directive 89/398'.

ANNEX

EFTA State:

1. HACCP in certain food businesses

1(a) Business sector: Mass catering establishments, including industrial caterers

Only record one visit to a premise, not a repeat or a follow-up visit.

What was the total number of mass catering/ industrial catering businesses visited during the operation of this programme?	
How many of those visited complied with Article 3(2) of Directive 93/43, on the application of the principles of HACCP?	
Does an approved voluntary guide to good hygiene practice exist for mass caterers/ industrial caterers?	
How many of the food businesses in this sector, which were visited, had an approved voluntary guide to good hygiene practice?	
Were documents, relating to the hazard analysis or the monitoring of CCPs, present in those businesses complying with Article 3(2)?	

What follow-up action was taken by the competent authorities in the premises which did not comply with Article 3(2)? Please record in the table below.

None	Verbal warning	Written warning	Written instructions	Sales prohibition	Administrative penalties	Court action	Other

EFTA State:

1. HACCP in certain food businesses

1(b) Business sector: Retail butchers selling directly to consumers

Only record one visit to a food business, not a repeat or a follow-up visit.

What was the total number of retail butchers visited during the operation of this programme?	
How many of those visited complied with Article 3(2) of Directive 93/43, on the application of the principles of HACCP?	
Does an approved voluntary guide to good hygiene practice exist for retail butchers?	
How many of the food businesses in this sector, which were visited, had an approved voluntary guide to good hygiene practice?	
Were documents, relating to the hazard analysis or the monitoring of CCPs, present in those businesses complying with Article 3(2)?	

What follow-up action was taken by the competent authorities in the premises which did not comply with Article 3(2)? Please record in the table below.

None	Verbal warning	Written warning	Written instructions	Sales prohibition	Administrative penalties	Court action	Other

EFTA State:

2.2(a) Controls performed at the premises of manufacturers of foodstuffs

[illegible]

2. Transport of bulk foodstuffs

22(b) Controls performed at the premises of the carriers of bulk foodstuffs

EFTA State:

[illegible]

3. Nutritional labelling claims

3(a) *Fruit and vegetable juices*

EFTA State:

Claims on the label in relation to:	Number of products sampled and analysed	Number of non-conforming products		
		Unauthorised claims	Wording on the nutritional label not in conformity	Non-correlation between the values as declared and as analysed outside the tolerance
Energy value				
Proteins and their components				
Carbohydrates and their components				
Fats and their components				
Vitamins and minerals				

Action taken in the case of non-conformity

None	Verbal warning	Written warning	Written instructions	Sale prohibited	Administrative penalties	Court action	Other

EFTA State:

3. Nutritional labelling claims

3(b) Fruit-flavoured milk drinks and yoghurts

Claims on the label in relation to:	Number of products sampled and analysed	Number of non-conforming products		
		Unauthorised claims	Wording on the nutritional label not in conformity	Non-correlation between the values as declared and as analysed outside the tolerance
Energy value				
Proteins and their components				
Carbohydrates and their components				
Fats and their components				
Vitamins and minerals				

Action taken in the case of non-conformity

None	Verbal warning	Written warning	Written instructions	Sale prohibited	Administrative penalties	Court action	Other