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I

(Legislative acts)

DECISIONS

DECISION No 466/2014/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 16 April 2014****granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 209 and 212 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure ⁽¹⁾,

Whereas

- (1) In addition to its core mission of financing investment in the European Union, which remains its main task and objective, the European Investment Bank (EIB) undertakes financing operations outside the Union in support of the Union's external policies. This allows the budget funds of the Union available to the external regions to be complemented by the financial strength of the EIB for the benefit of the targeted third countries. In undertaking such financing operations, the EIB indirectly contributes to the general principles and policy objectives of the Union, which include reducing poverty through inclusive growth and sustainable economy, environmental and social development and the prosperity of the Union in changing global economic circumstances.
- (2) Article 209(3) of the Treaty on the Functioning of the European Union (TFEU), in conjunction with Article 208 thereof, provides that the EIB is to contribute, under the terms laid down in its Statute, to the implementation of the measures necessary to further the objectives of Union development cooperation policy.
- (3) With a view to supporting Union external action, and in order to enable the EIB to finance investments outside the Union without affecting the credit standing of the EIB, the majority of its operations outside the Union have benefited from an EU budgetary guarantee ('EU guarantee') administered by the Commission. This further supports EIB's creditworthiness towards the financial markets, which is of primary importance.
- (4) The latest EU guarantee for EIB financing operations signed during the period from 1 February 2007 to 31 December 2013 was established by Decision No 1080/2011/EU of the European Parliament and of the Council ⁽²⁾. An EU guarantee for EIB financing operations outside the Union in support of Union policies should be established for the 2014-20 multiannual financial framework.

⁽¹⁾ Position of the European Parliament of 11 March 2014 (not yet published in the Official Journal) and decision of the Council of 14 April 2014.

⁽²⁾ Decision No 1080/2011/EU of the European Parliament and of the Council of 25 October 2011 granting an EU guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Union and repealing Decision No 633/2009/EC (OJ L 280, 27.10.2011, p. 1).

- (5) The Guarantee Fund for external actions ('Guarantee Fund'), established by Council Regulation (EC, Euratom) No 480/2009 ⁽¹⁾, provides a liquidity cushion for the Union budget against losses incurred on EIB financing operations and on macro-financial assistance and Euratom loans outside the Union.
- (6) A list of countries potentially eligible for EIB financing under the EU guarantee should be established. It is also appropriate to establish a list of countries actually eligible for EIB financing under the EU guarantee.
- (7) Bhutan should be added to the list of countries actually eligible for EIB financing and Myanmar/Burma should be added to both lists following the recent developments which allowed the Union to open a new chapter in its relations with Bhutan and Myanmar/Burma in order to support the ongoing political and economic reforms in both countries.
- (8) In order to reflect significant policy developments, the list of countries actually eligible for EIB financing operations under the EU guarantee should be reviewed as appropriate and the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of amendments to Annex III to this Decision. The Commission's amendments to Annex III should be based on an overall assessment including economic, social, environmental and political aspects, in particular those related to the democracy, human rights and fundamental freedoms. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of all relevant documents to the European Parliament and to the Council.
- (9) In order to cater for the potential evolution of the actual provisioning needs of the Guarantee Fund in accordance with Regulation (EC, Euratom) No 480/2009, the maximum ceiling of the EU guarantee should be broken down into a fixed ceiling of a maximum amount of EUR 27 000 000 000 and an optional additional amount of EUR 3 000 000 000. The provisioning of the Guarantee Fund in the general budget of the Union (budget line 01 03 06) is made *ex-post* on the basis of the outturn figures for outstanding guaranteed external lending at the end of year *n*-2. In view of the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, 'reflows' deriving from Mediterranean risk capital and loan investments under operations concluded before 2007 using Union budget funds have been accumulated in a fiduciary account established for the Facility for Euro-Mediterranean Investment and Partnership (FEMIP). Part of these reflows should be used for the Guarantee Fund as an exceptional measure to ensure that the ceilings of EIB financing operations under this Decision are sustained at an appropriate level for the 2014-20 period. The remaining funds should be returned to the general budget of the Union.
- (10) Issues to be considered for the activation, in whole or in part, of the optional additional amount should include: progress in the implementation of this Decision by the EIB, in particular the results of EIB operations based on information from, amongst others, the Results Measurement framework (REM), including the development impact; the provisioning needs of the Guarantee Fund taking into account past and future outstanding amounts on all activities covered by the Guarantee Fund; the macroeconomic, financial and political situation of the eligible regions and countries at the time of the mid-term review.
- (11) The amounts covered by the EU guarantee in each region should continue to represent ceilings for the EIB financing under the EU guarantee and not targets that the EIB is required to meet. The ceilings should be evaluated as part of the mid-term review of this Decision, in particular in light of possible changes to the list of regions and countries actually eligible for EIB financing.
- (12) EIB financing operations should be consistent with the beneficiary country's own strategies. Against this background, in order to enhance the coherence and the focus of the EIB external financing activity on supporting Union policies, and for the maximum benefit of beneficiaries, Decision No 1080/2011/EU sets out general objectives for EIB financing operations across all eligible regions and countries, i.e. local private sector development, in particular in support of small and medium-sized enterprises (SMEs), social and economic infrastructure and climate change mitigation and adaptation, building on the comparative strengths of the EIB in areas where it has a well-proven track record. These objectives should be maintained in this Decision to further promote sustainable growth and job creation.

⁽¹⁾ Council Regulation (EC, Euratom) No 480/2009 of 25 May 2009 establishing a Guarantee Fund for external actions (OJ L 145, 10.6.2009, p. 10).

- (13) Improving access to financing for SMEs, including SMEs from the Union investing in the regions covered by this Decision, can play an essential role in stimulating economic development and in combating unemployment. In order to effectively reach out to SMEs, the EIB financing operations should be result-oriented. The EIB should, where possible, invest in research and innovation by SMEs as a means of supporting local development. The EIB should cooperate with local financial intermediary institutions in the eligible countries, which should be integrated into the local economy, in particular to ensure that part of the financial benefits is passed on to their clients and that added value is provided compared to other sources of finance. The EIB should also, as far as possible, increase the diversification of its financial partners in the countries in which it operates. During its due diligence, the EIB should assess if financing operations supporting SMEs via a financial intermediary are in line with the regional technical operational guidelines, the REM and the EIB standards. The EIB should establish a reporting mechanism to make sure that the funds dedicated to SMEs are used for their benefit. A consolidated report on SMEs financing under this Decision should be provided by the EIB as part of its contribution to the mid-term review.
- (14) The coverage of the EU guarantee, which is limited to risks of a sovereign and political nature, is not sufficient in itself to ensure a meaningful EIB activity in support of micro-finance. Therefore such activity, where appropriate, should be carried out in connection with budgetary resources available under other instruments and via intermediary institutions including at local level as a means to promote growth and contribute indirectly to reducing poverty in poorer countries.
- (15) The EIB should continue to finance investment projects in the areas of social, environmental, and economic infrastructure, including transport and energy, and should consider increasing its activity in support of health and education infrastructure when there is clear added value in doing so.
- (16) To reinforce the climate change dimension of the EU guarantee, an overall volume of operations target and a system allowing to *ex-ante* assess greenhouse gas emissions of projects supported under the EU guarantee should be introduced. EIB financing operations in support of climate change mitigation and adaptation should represent at least 25 % of total EIB financing operations in order to further the promotion of the Union's climate goals on a global scale. The EIB should provide its technical expertise in cooperation with the Commission to support public and private counterparties benefitting from EIB financing operations in order to address the challenge of climate change and to make the best possible use of available financing. Concessional funding should be available for mitigation and adaptation projects. EIB financing operations should, where possible and appropriate, be complemented by funds from the general budget of the Union through the efficient and appropriate blending of grants and loans for climate change financing in the context of Union external assistance. In this regard, the Commission's annual report to the European Parliament and the Council should contain a detailed report on the financial instruments used for financing these projects, identifying the amounts of EIB financing operations and the corresponding amounts of grants.
- (17) Within the areas covered by the general objectives, regional integration among countries, in particular economic integration between Pre-accession countries, Neighbourhood countries and the Union, should be an underlying objective for EIB financing operations. In that context, the EIB should be able to support partner countries within areas covered by the general objectives through foreign direct investments by companies from the Union that promote economic integration with the Union and that contribute to promoting technology and knowledge transfer, provided that appropriate consideration has been given during the investment projects' due diligence to minimise the risks that EIB financing operations lead to negative repercussions on employment in the Union. The EIB should also be encouraged to support foreign direct investment in partner countries by companies from the Union at its own risk, taking into account the EIB's risk-bearing capacity.
- (18) The EIB should regularly conduct *ex post* or mid-term evaluations of supported activities under this Decision with a view to assessing their relevance, performance and development effects and to identify aspects that could improve future activities. Such evaluations should contribute to accountability and analysis of sustainability.
- (19) The practical measures for linking the general objectives of the EU guarantee and their implementation are to be set out in regional technical operational guidelines. Such guidelines should be consistent with the wider Union regional policy framework, including the differentiation principle in the European Neighbourhood Policy. The regional technical operational guidelines should be reviewed following the adoption of this Decision and further updated following the mid-term review in order to adapt to the developments in the Union external policies and priorities. The update of the regional operational technical guidelines should, among other considerations, take into account relevant developments in the eligible countries.

- (20) In accordance with Protocol No 5 on the Statute of the European Investment Bank annexed to the Treaty on European Union (TEU) and the TFEU, applications made directly to the EIB for EIB financing operations to be carried out under this Decision are to be submitted to the Commission for an opinion on the conformity with relevant Union legislation and policies. In the case of EIB financing operations falling under this Decision, where the Commission delivers a negative opinion on any such operation, that operation should not be covered by the EU guarantee.
- (21) While the EIB's strength remains its distinctive model as a publicly owned investment bank whose remit is that of providing long-term lending so as to meet the policy goals set by its shareholders, EIB financing operations should contribute to the general principles guiding Union external action, as referred to in Article 21 TEU, of consolidating and supporting democracy and the rule of law, human rights and fundamental freedoms, and to the implementation of international commitments and agreements, including environmental agreements to which the Union is a party. In particular, the EIB should contribute to economic, financial and technical cooperation with third countries in accordance with Article 212 TFEU. Furthermore, EIB actions should be in line with international law, including respect for the principles of the Charter of the United Nations. EIB actions should also be in line with the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) at relevant stages of the project cycle. In relation to developing countries, EIB financing operations should foster their sustainable economic, social and environmental development, particularly in the most disadvantaged amongst them, their smooth and gradual integration into the world economy, as well as compliance with objectives approved by the Union in the context of the United Nations and other relevant international organisations. While contributing to the implementation of the measures necessary to further the objectives of Union development cooperation policy in accordance with Article 209(3) TFEU, the EIB should strive to support indirectly the achievement of the United Nations' 2015 Millennium Development Goals, and after 2015 the achievement of any new development targets which might modify or replace the Millennium Development Goals, in all regions where it is active.
- (22) The EIB activity under this Decision should support the implementation of the European Consensus on Development, of the Agenda for Change and of the principles of aid effectiveness outlined in the Paris Declaration of 2005, the Accra Agenda for Action of 2008 and the Busan Partnership Agreement of 2011. Furthermore, it should be coherent with the EU Strategic Framework and Action Plan on Human Rights and Democracy adopted by the Council on 25 June 2012 and international environmental agreements including biodiversity commitments. It should be implemented through a number of concrete measures, in particular by reinforcing the EIB's capacity to appraise environmental, social, development aspects of investment projects, including human rights, fundamental freedoms and conflict-related risks, and by promoting local consultation with public authorities and civil society. In this context, the EIB should implement and further develop its REM which provides a detailed set of performance indicators measuring the economic, environmental, social, and development impact of its financing operations throughout the EIB project cycle. The implementation of the REM should be evaluated as part of the mid-term review of this Decision. When carrying out due diligence in respect of an investment project, the EIB should, where appropriate and in line with the Union's social and environmental principles and international best practices, as well as Union law and the national law of the beneficiary country, require the investment project promoter to carry out local consultations and disclose their results to the public in order to take account of the impact of projects on the relevant stakeholders. The EIB should remain in communication with the project promoters and beneficiaries of the projects throughout the project programming process. Finance contracts signed during the period covered by this Decision for EIB financing operations involving public counterparties should explicitly include the possibility to suspend disbursements in case of revocation of eligibility under this Decision of the country in which the investment project takes place.
- (23) At all levels, from upstream strategic planning to downstream investment project development, it should be ensured that EIB financing operations comply with and support Union external policies and the general objectives set out in this Decision. With a view to increasing the coherence of Union external action, dialogue on policy and strategy should be further strengthened between the Commission and the EIB, including the European External Action Service (EEAS), while keeping the European Parliament and the Council duly informed. EIB offices outside the Union should whenever possible be located within Union delegations in order to foster such cooperation while sharing operating costs. The Memorandum of Understanding between the European Commission and the European Investment Bank in respect of cooperation and coordination in the regions covered by the External Mandate, which was revised in 2013 enhancing cooperation and early mutual exchange of information between

the Commission, the EEAS and the EIB at operational level, should continue to be applied. Cooperation in the framework of the Memorandum of Understanding should in particular include a regular review of the application of the differentiation principle in Neighbourhood countries. It is of particular importance to have an early and systematic exchange of views between the Commission and the EIB, including the EEAS, as appropriate, in the process of preparing relevant programming documents in order to maximise synergies between their activities. The cooperation in relation to the respect of human rights, fundamental freedoms and conflict prevention issues should also be reinforced. The EIB should be encouraged to cooperate with Union delegations during the EIB project cycle.

- (24) Union external relations should be supported by several instruments in particular by Regulation (EU) No 236/2014 of the European Parliament and of the Council ⁽¹⁾. With a view to enhancing the coherence of overall Union support in the regions concerned, opportunities should be seized to combine EIB financing with Union budgetary resources when and as appropriate, in the form of financial instruments provided for in Title VIII of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council ⁽²⁾ and technical assistance for project preparation and implementation, through the Instrument for Pre-Accession Assistance II established by Regulation (EU) No 231/2014 of the European Parliament and of the Council ⁽³⁾, the European Neighbourhood Instrument established by Regulation (EU) No 232/2014 of the European Parliament and of the Council ⁽⁴⁾, the Development Cooperation Instrument established by Regulation (EU) No 233/2014 of the European Parliament and of the Council ⁽⁵⁾, the Partnership Instrument for cooperation with third countries established by Regulation (EU) No 234/2014 of the European Parliament and of the Council ⁽⁶⁾, the Instrument for the promotion of Democracy and Human Rights worldwide established by Regulation (EU) No 235/2014 of the European Parliament and of the Council ⁽⁷⁾, the Instrument contributing to stability and peace established by Regulation (EU) No 230/2014 of the European Parliament and of the Council ⁽⁸⁾, and the Instrument for Nuclear Safety Cooperation established by Council Regulation (EU) No 237/2014 ⁽⁹⁾. Following Decision No 1080/2011/EU, the Commission established an EU Platform for Blending in External Cooperation with a view to optimising the functioning of mechanisms for the blending of grants and loans outside the Union in particular in implementing the general budget of the Union and EIB loans respectively, and exchanging best practices on governance and on evaluation criteria at project level. The participation of the EIB and other financial institutions in blending mechanisms should be fully in line with the Union's external objectives, aid effectiveness and transparency.
- (25) In its financing operations outside the Union that fall within the scope of this Decision, the EIB should endeavour further to enhance coordination and cooperation with European and international financial institutions, in particular those participating in the EU Platform for Blending in External Cooperation. This cooperation includes, where appropriate, cooperation on sector conditionality and mutual reliance on procedures, use of co-financing and participation in global initiatives, such as those promoting aid coordination and effectiveness. Such coordination and cooperation should strive to minimise possible duplication of costs and unnecessary overlap. Cooperation should be based on the principle of reciprocity. Reciprocal access by the EIB to financial instruments set up by other European and international financial institutions should be promoted, as appropriate. The tripartite memorandum of understanding between the Commission, the EIB Group and the European Bank for Reconstruction and Development (EBRD) in respect of cooperation outside the Union, which allows the EIB Group and the EBRD to act in a complementary way by relying on their respective comparative advantages, was updated in 2012 to cover the extension of EBRD's geographical scope to the Mediterranean region and should continue to be applied. The principles set out in this Decision should also be applied when EIB financing is implemented through cooperation agreements with other European and international financial institutions.

⁽¹⁾ Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action (OJ L 77, 15.3.2014, p. 95).

⁽²⁾ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

⁽³⁾ Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II) (OJ L 77, 15.3.2014, p. 11).

⁽⁴⁾ Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (OJ L 77, 15.3.2014, p. 27).

⁽⁵⁾ Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 (OJ L 77, 15.3.2014, p. 44).

⁽⁶⁾ Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries (OJ L 77, 15.3.2014, p. 77).

⁽⁷⁾ Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide (OJ L 77, 15.3.2014, p. 85).

⁽⁸⁾ Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace (OJ L 77, 15.3.2014, p. 1).

⁽⁹⁾ Council Regulation (Euratom) No 237/2014 of 13 December 2013 establishing an Instrument for Nuclear Safety Cooperation (OJ L 77, 15.3.2014, p. 109).

- (26) The EIB should be encouraged to continue to finance operations outside the Union also at its own risk, including in support of Union economic interests, in countries and in favour of investment projects having a sufficient creditworthiness according to the assessment of the EIB and taking into account its own risk absorption capacity, so that the use of the EU guarantee can be focused on countries and investment projects where the EU guarantee provides added value on the basis of EIB own assessment, including in terms of sustainable economic, social and environmental development.
- (27) The EIB should expand the range of innovative financial instruments it offers, including by focusing more on developing guarantee instruments. Moreover, the EIB should actively seek to participate in risk sharing instruments and debt capital market financing of projects with stable and predictable cash flow generation. In particular, it should consider supporting debt capital market instruments issued or granted for the benefit of an investment project carried out in the eligible countries. In addition, the EIB should increase its provision of loans in local currencies and issue bonds in local markets, provided that beneficiary countries put in place the necessary structural reforms, in particular in the financial sector, as well as other measures to facilitate EIB activities. In the diversification and expansion of capital market instruments, special care should be taken to ensure that such instruments do not lead to risky financial practices and indebtedness and therefore could threaten financial stability.
- (28) The Commission should report annually to the European Parliament and the Council. The report should assess EIB financing operations and their compliance with this Decision, their added value and contribution to the Union external policies, their quality, their development impact drawing on the EIB's REM and the financial benefits transferred to beneficiaries. The report should also include information on calls on the EU guarantee, on climate change and biodiversity financing under this Decision, on the follow-up of the functioning of the Memorandum of Understanding between the EIB and the European Ombudsman, and a description of the cooperation with the Commission and other European and international financial institutions, including co-financing. The report should be made public in order to allow relevant stakeholders, including civil society, to express their views.
- (29) The EIB financing operations in support of Union external policies should continue to be conducted in accordance with the principles of sound banking practice. They should continue to be managed in accordance with the EIB's own rules and procedures, which should reflect those principles, including appropriate control measures and compliance with the EIB's statement on social and environmental standards, as well as with the relevant rules and procedures concerning the Court of Auditors and the European Anti-Fraud Office (OLAF). In its financing operations the EIB should adequately implement its policies towards weakly regulated or non-cooperative jurisdictions identified as such by the Union, the United Nations, the Organisation for Economic Cooperation and Development or the Financial Action Task Force in order to contribute to the international fight against tax fraud, tax evasion and money-laundering. In the interests of transparency, the EIB should draw up, to the extent possible, in cooperation with the local financial intermediaries, a list of the final borrowers.
- (30) The EIB should take appropriate measures ensuring that, when financing operations subject to the EU guarantee, the financial interests of the Union are protected by the application of preventive measures against fraud, corruption, money laundering and any other illegal activities and that OLAF is entitled to conduct on-the-spot checks and inspections in the premises of the beneficiaries. The EIB should, in line with its Policy on preventing and deterring prohibited conduct in European Investment Bank activities (the 'EIB anti-fraud policy'), which was adopted in 2008 and revised in 2013, cooperate closely with the competent Union and Member States' authorities in order to strengthen the anti-money laundering and anti-terrorist financing measures in force and help improve their enforcement. In line with its Whistleblowing Policy, the EIB should also pay particular attention to information by whistleblowers regarding potential cases of fraud, corruption or other illegal activity, allowing for a proper follow-up, feedback and protection against retaliation.
- (31) The EIB governing bodies should be encouraged to take the necessary measures to adapt the EIB activity to contribute to the Union's external policies in an effective manner, and to adequately meet the requirements set out in this Decision,

HAVE ADOPTED THIS DECISION:

Article 1

EU guarantee

1. The Union shall grant the European Investment Bank (EIB) a budgetary guarantee for financing operations carried out outside the Union ('EU guarantee'). The EU guarantee shall be granted as a global guarantee in respect of payments due to the EIB, but not received by it, in connection with loans, loan guarantees, and debt capital market instruments granted for or issued for the benefit of EIB investment projects that are eligible in accordance with paragraph 2.
2. Eligible for the EU guarantee shall be the EIB loans, loan guarantees, and debt capital market instruments that are granted for or issued for the benefit of investment projects carried out in eligible countries in accordance with the EIB's own rules and procedures, including the EIB's statement on environmental and social principles and standards, and in support of the relevant Union external policy objectives, where EIB financing has been granted in accordance with a signed agreement which has neither expired nor been cancelled ('EIB financing operations').
3. The EIB financing operations in support of Union external policies shall continue to be managed in accordance with the principles of sound banking practices.
4. The EU guarantee shall be restricted to 65 % of the aggregate amount disbursed and guaranteed under EIB financing operations, less amounts reimbursed, plus all related amounts.
5. The EU guarantee shall cover EIB financing operations signed during the period from 1 January 2014 to 31 December 2020.
6. If, on expiry of the period referred to in paragraph 5, the European Parliament and the Council have not adopted a decision granting a new EU guarantee to the EIB against losses under its financing operations outside the Union, that period shall be automatically extended once by six months.

Article 2

Ceilings for EIB financing operations under EU guarantee

1. The maximum ceiling of the EIB financing operations under EU guarantee throughout the period 2014-20 shall not exceed EUR 30 000 000 000. Amounts initially earmarked for financing operations but subsequently cancelled shall not count against the ceiling.

This maximum ceiling shall be broken down into:

- (a) a fixed ceiling of a maximum amount of EUR 27 000 000 000;
- (b) an optional additional amount of EUR 3 000 000 000.

The European Parliament and the Council shall decide in accordance with the ordinary legislative procedure on the activation in whole or in part of the amount referred to in point (b) and its regional distribution following the mid-term review as set out in Article 19.

2. The fixed ceiling referred to in point (a) of paragraph 1 shall be broken down into regional ceilings and sub-ceilings as laid down in Annex I. Within the regional ceilings, the EIB shall progressively ensure a balanced country distribution within the regions covered by the EU guarantee.

Article 3

General objectives and principles

1. The EU guarantee shall be granted only for EIB financing operations which have added value on the basis of the EIB's own assessment, and support any of the following general objectives:
 - (a) local private sector development, in particular support to SMEs;
 - (b) development of social and economic infrastructure, including transport, energy, environmental infrastructure, and information and communication technology;
 - (c) climate change mitigation and adaptation.

2. Whilst preserving the EIB's distinct character as an investment bank, EIB financing operations carried out under this Decision shall contribute to the general EU interest, in particular the principles guiding Union external action, as referred to in Article 21 TEU and shall contribute to the implementation of international environmental agreements to which the Union is a party. The EIB governing bodies are encouraged to take the necessary measures to adapt the EIB activity to contribute to the Union external policies in an effective manner, and to adequately meet the requirements set out in this Decision.

3. Regional integration among countries, including in particular economic integration between Pre-accession countries, Neighbourhood countries and the Union, shall be an underlying objective for EIB financing operations within areas covered by the general objectives set out in paragraph 1. The EIB shall undertake financing operations in beneficiary countries within areas covered by the general objectives by supporting foreign direct investments that promote economic integration with the Union.

4. In developing countries, as defined in the Organisation for Economic Cooperation and Development list of official development assistance recipients, the EIB financing operations shall contribute, in accordance with Articles 208 and 209 TFEU, indirectly to the objectives of the Union development cooperation policy, such as reducing poverty through inclusive growth and sustainable economy, environmental and social development.

5. To ensure that private sector investments have the greatest development impact, the EIB shall endeavour to strengthen the local private sector in beneficiary countries through support to local investment as provided for in point (a) of paragraph 1. EIB financing operations supporting the general objectives set out in paragraph 1 shall endeavour to also include support to investment projects by SMEs from the Union. In order to effectively monitor the use of funds for the benefit of the SMEs concerned, the EIB shall establish adequate contractual requirements with financial intermediaries, including standards for reporting to be provided by the beneficiaries.

The EIB shall cooperate with financial intermediaries that can support the specific needs of SMEs in the countries of operation and that do not participate in EIB financing operations implemented in an eligible country through vehicles located in a foreign non-cooperative jurisdiction referred to in Article 13.

6. EIB financing operations supporting the general objective set out in point (b) of paragraph 1 shall support investment projects predominantly in the areas of transport, energy, environmental infrastructure, information and communication technology, health and education. This includes production and integration of energy from renewable sources, energy systems transformation enabling a switch to lower carbon intensive technologies and fuels, sustainable energy security and energy infrastructure, including for gas production and transportation to Union energy market, as well as electrification of rural areas, environmental infrastructure such as water and sanitation and green infrastructure, telecommunications and broadband network infrastructure.

7. EIB financing operations supporting the general objectives set out in point (c) of paragraph 1 shall support investment projects in climate change mitigation and adaptation which contribute to the overall objective of the United Nations Framework Convention on Climate Change, in particular by avoiding or reducing greenhouse gas emissions in the areas of renewable energy, energy efficiency and sustainable transport, or by increasing resilience to the adverse impacts of climate change on vulnerable countries, sectors and communities. The eligibility criteria for climate action projects are defined in the EIB climate change strategy which shall be updated before the end of 2015. To this end, an analysis of the carbon footprint ought to be included in the environmental assessment procedure to determine whether project proposals optimise energy-efficiency improvements. Over the period covered by this Decision, the volume of those operations shall represent at least 25 % of total EIB financing operations.

8. In line with Union and international climate change objectives, before the end of 2015 the EIB, in cooperation with the Commission, shall update its climate change strategy as regards EIB financing operations. This update shall, inter alia, integrate concrete actions to ensure that investment projects under this Decision are in line with Union's climate change objectives and to step up efforts to support renewable energy sources and energy efficiency.

9. The EU guarantee shall cover only EIB financing operations carried out in eligible countries that have concluded a framework agreement with the EIB establishing the legal conditions under which such operations are to be carried out.

*Article 4***Countries covered**

1. The list of countries potentially eligible for EIB financing under EU guarantee is set out in Annex II. The list of countries eligible for EIB financing under EU guarantee is set out in Annex III and shall include no countries other than those listed in Annex II. For countries not listed in Annex II, eligibility for EIB financing under the EU guarantee shall be decided on a case-by-case basis in accordance with the ordinary legislative procedure.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 18 concerning amendments to Annex III. The Commission's decisions shall be based on an overall assessment, including economic, social, environmental and political aspects, in particular those related to the democracy, human rights and fundamental freedoms as well as the relevant European Parliament resolutions and Council decisions and conclusions.
3. Delegated acts amending Annex III shall not affect the EU guarantee coverage of EIB financing operations signed before the entry into force of those delegated acts, subject to paragraph 4.
4. Disbursements on EIB financing operations benefiting from a Comprehensive Guarantee as referred to in Article 8(1) shall not be made in countries not listed in Annex III.
5. The EU guarantee shall not cover EIB financing operations in a specific country with which the agreement concerning such operations has been signed after that country's accession to the Union.

*Article 5***Contribution of EIB financing operations to Union policies**

1. The Commission shall update, together with the EIB, the existing regional technical operational guidelines for EIB financing operations within one year following the entry into force of this Decision.

The regional technical operational guidelines shall be consistent with the wider Union regional policy framework set out in Annex IV. In particular, the regional technical operational guidelines shall ensure that EIB financing under this Decision is complementary to corresponding Union assistance policies, programmes and instruments in the different regions.

In updating the regional technical operational guidelines, the Commission and the EIB shall take into account relevant European Parliament resolutions and Council decisions and conclusions. The regional technical operational guidelines shall be consistent with the priorities contained in the national or regional programmes, where available, drawn up by the beneficiary countries, taking due account of any consultation with local civil society in the process of drawing up those programmes.

The Commission shall transmit to the European Parliament and to the Council the updated regional technical operational guidelines, as soon as they are established.

Within the framework set out by the regional technical operational guidelines, the EIB shall define corresponding financing strategies and ensure their implementation.

EIB financing operations shall be consistent with the regional technical operational guidelines and the strategies of the beneficiary country.

The regional technical operational guidelines shall be reviewed following the mid-term review referred to in Article 19.

2. Within the framework of the procedure provided for in Article 19 of Protocol No 5, the Commission delivers an opinion on EIB financing operations. In the case of EIB financing operations falling under this Decision, where the Commission delivers an unfavourable opinion, that operation shall not be covered by the EU guarantee.

*Article 6***Cooperation with the Commission and the EEAS**

1. The consistency of EIB external actions with Union external policy objectives shall be further strengthened, with a view to maximising synergies between EIB financing operations and Union budgetary resources, in particular through the updating of the regional technical operational guidelines referred to in Article 5, for which the EEAS shall be consulted on policy issues, as appropriate, as well as through regular and systematic dialogue and early exchange of information on:
 - (a) strategic documents prepared by the Commission or the EEAS as appropriate, such as country and regional strategy papers, indicative programmes, action plans and pre-accession documents;
 - (b) the EIB's strategic planning documents, investment project pipelines and EIB annual reporting to the Commission;
 - (c) other policy and operational aspects.
2. The cooperation shall be carried out on a region-by-region basis, including at Union delegation level, taking into consideration the EIB's role as well as the policies of the Union in each region.

*Article 7***Cooperation with other European and international financial institutions**

1. EIB financing operations shall be carried out, where appropriate, in cooperation with other European multilateral and Member States' financial institutions ('European financial institutions') and international financial institutions, including regional development banks ('international financial institutions') in order to maximise synergies, cooperation and efficiency, to develop jointly innovative financial instruments, to ensure prudent and reasonable sharing of risks and coherent investment project and sector conditionality, and in order to minimise possible duplication of costs and unnecessary overlap.
2. The cooperation referred to in paragraph 1 shall be facilitated by coordination between the Commission, the EIB and the relevant European and international financial institutions operating in the different regions, carried out where appropriate in the context of memoranda of understanding or other Union regional cooperation frameworks.

*Article 8***Coverage and terms of the EU guarantee**

1. For EIB financing operations, except those consisting of debt capital market instruments, entered into with a State, or guaranteed by a State, and for other EIB financing operations entered into with regional or local authorities, or public enterprises or institutions owned or controlled by a State, where such other EIB financing operations have an appropriate EIB credit risk assessment taking into account the credit risk situation of the country concerned, the EU guarantee shall cover all payments due to the EIB, but not received by it ('Comprehensive Guarantee').
2. For the purposes of paragraph 1, Palestine is represented by the Palestinian Authority and Kosovo ⁽¹⁾ is represented by the Authorities of Kosovo.
3. For EIB financing operations other than those referred to in paragraph 1, the EU guarantee shall cover all payments due to the EIB but not received by it, where the non-receipt has been caused by the realisation of one of the following political risks ('Political Risk Guarantee'):
 - (a) non-transfer of currency;
 - (b) expropriation;

⁽¹⁾ This designation is without prejudice to positions on status, and is in line with the United Nations Security Council Resolution 1244(1999) and the International Court of Justice opinion on Kosovo's declaration of independence.

(c) war or civil disturbance;

(d) denial of justice upon breach of contract.

4. For EIB financing operations consisting of debt capital market instruments, only the Political Risk Guarantee shall apply.

5. Financing agreements with individual promoters relating to EIB financing operations shall also include appropriate environmental and social provisions in accordance with the EIB's own rules and procedures.

6. The Commission and the EIB shall set out in the guarantee agreement referred to in Article 14 a clear and transparent allocation policy allowing the EIB to identify, within its external activity, the operations to be financed under this Decision in order to ensure the most effective use of the EU guarantee. The allocation policy shall be based on the credit-worthiness of EIB financing operations as assessed by the EIB, the ceilings as defined in Annex I, the nature of the counterparty, whether a sovereign State or a sub-sovereign entity falling under paragraph 1 of this Article or a private entity, EIB risk absorption capacity and other relevant criteria, including added value of the EU guarantee. The European Parliament and the Council shall be informed on the allocation policy in accordance with Article 14.

7. When the EU guarantee is called, the Union shall be subrogated to any relevant rights of the EIB in respect of any obligation in connection to its financing operations, in accordance with the guarantee agreement referred to in Article 14.

Article 9

EIB assessment and monitoring of investment projects

1. The EIB shall carry out thorough due diligence and, where appropriate, shall require project promoters to carry out local public consultation, in line with Union social and environmental principles, with the relevant national and local stakeholders, as well as with civil society, at project planning stage and implementation stage on social, human rights, environmental, economic and development-related aspects of investment projects covered by the EU guarantee, and to provide information relevant for the assessment of the contribution to the fulfilment of Union external policy and strategic objectives.

Where appropriate, this appraisal shall include an assessment of how the capacities of the beneficiaries of EIB financing can be reinforced throughout the project cycle with technical assistance. The EIB's own rules and procedures shall include the necessary provisions on assessment of environmental and social impact of investment projects and of aspects related to human rights and conflict prevention, to ensure that investment projects supported under this Decision are environmentally and socially sustainable.

2. In addition to the *ex-ante* assessment of development-related aspects, the EIB shall monitor the implementation of financing operations. In particular, it shall require the project promoters to carry out thorough monitoring during project implementation until completion, inter alia, on the economic, development, social, environmental and human rights impact of the investment project. The EIB shall verify on a regular basis the information provided by the project promoters and make it publicly available if the project promoter agrees. Where possible, project completion reports related to EIB financing operations shall be published excluding confidential information.

3. The EIB monitoring shall also endeavour to cover the implementation of intermediated operations and the performance of financial intermediaries in support of SMEs.

4. The EIB shall establish a comprehensive system to *ex-ante* assess relative and absolute greenhouse gas emissions related to EIB financing operations where those emissions meet significant thresholds, as defined in a relevant methodology included in the EIB climate change strategy, and where data is available.

5. The results of monitoring shall, where possible, be disclosed, subject to confidentiality requirements and the agreement of relevant parties.

*Article 10***External assigned revenue for the Guarantee Fund**

Repayments and revenues for an amount of EUR 110 000 000, originating from operations concluded before 2007, including capital repayments, guarantees released, and repayments of the principal of loans, dividends, capital gains, guarantee fees and interest on loans and on amounts on fiduciary accounts, paid back to the fiduciary account established for the Facility for Euro-Mediterranean Investment and Partnership and attributable to the support from the general budget of the Union, shall constitute external assigned revenue in accordance with Article 21(4) of Regulation (EU, Euratom) No 966/2012 and shall be used for the Guarantee Fund.

Amounts exceeding EUR 110 000 000 which have been paid back to the fiduciary account established for the Facility for Euro-Mediterranean Investment and Partnership shall be entered in the general budget of the Union after deduction of management costs and fees.

*Article 11***Annual reporting and accounting**

1. The Commission shall report annually to the European Parliament and to the Council on EIB financing operations carried out under this Decision. The report shall be made public and include:

- (a) an assessment of EIB financing operations at project, sector, country and regional levels and their compliance with this Decision;
- (b) an assessment of the added value, the estimated outputs, outcomes and development impact of EIB financing operations at an aggregated basis, drawing on the EIB's Results Measurement framework annual report. To that effect, the EIB shall use performance indicators in relation to development, environmental and social aspects, including human right aspects, of projects funded, taking into account the relevant indicators under the Paris Declaration of 2005 for Aid Effectiveness. Indicators for environmental aspects of projects shall include criteria for clean technology which are oriented in principle at energy efficiency and technologies for reducing emissions;
- (c) an assessment of the contribution of EIB financing operations to the fulfilment of Union external policy and strategic objectives, taking into account the regional technical operational guidelines referred to in Article 5;
- (d) an assessment of the financial benefit transferred to beneficiaries of EIB financing operations on an aggregated basis;
- (e) an assessment of the quality of EIB financing operations, in particular, the extent to which the EIB has taken into account environmental and social sustainability in the due diligence and monitoring of the investment projects financed;
- (f) detailed information on calls on the EU guarantee;
- (g) information on the climate change and biodiversity financing volumes under this Decision, the impact on absolute and relative greenhouse gas emissions referred to in Article 9(4) on an aggregated basis as well as the number of projects assessed against the climate risk;
- (h) a description of the cooperation with the Commission and other European and international financial institutions, including co-financing. The report shall in particular include a breakdown of Union financial resources and resources of other European and international financial institutions used in combination with EIB financing, thus giving an overview of the overall investment supported by EIB financing operations carried out under this Decision. The report shall also mention the conclusion of new memoranda of understanding between the EIB and other European or international financial institutions having a bearing on EIB financing operations under this Decision;
- (i) information on the follow up of the functioning of the Memorandum of Understanding between the EIB and the European Ombudsman in so far as that Memorandum concerns EIB financing operations covered by this Decision.

2. For the purposes of the Commission's reporting referred to in paragraph 1, the EIB shall provide the Commission with yearly reports on EIB financing operations carried out under this Decision including all necessary elements allowing the Commission to report in accordance with paragraph 1. The EIB may also provide to the Commission additional information relevant for the European Parliament and the Council to have a comprehensive overview of EIB external activity.

3. The EIB shall provide the Commission with statistical, financial and accounting data on each EIB financing operation, as well as any additional information necessary to fulfil the Commission's reporting duties or requests by the Court of Auditors and an auditor's certificate on the outstanding amounts of the EIB financing operations. EIB shall also provide the Commission any other necessary documents in line with Regulation (EU, Euratom) No 966/2012.
4. For the purposes of the Commission's accounting and reporting of the risks covered by the EU guarantee, the EIB shall provide the Commission with the EIB's risk assessment and grading information concerning EIB financing operations.
5. The EIB shall provide the Commission, at least on a yearly basis, an indicative multiannual programme of the planned volume of signatures of EIB financing operations, so as to ensure compatibility of the EIB's forecast financing with the ceilings established in this Decision and for the Commission to ensure appropriate budgetary planning for provisioning the Guarantee Fund. The Commission shall take account of this forecast when preparing the draft general budget of the Union.
6. The EIB shall on a regular basis provide the European Parliament, the Council and the Commission with all its independent evaluation reports which assess the practical results achieved by the specific activities of the EIB under this Decision and other external mandates.
7. The EIB shall provide the information referred to in paragraphs 2 to 6 at its own expense. The EIB shall also make publicly available the information referred to in paragraphs 2, 3 and 6, in general terms and excluding any confidential information.

Article 12

Transparency and public disclosure of information

1. In accordance with its own transparency policy and Union principles on access to documents and information, and progressively with International Aid Transparency Initiative standards, the EIB shall make publicly available on its website information relating to:
 - (a) all EIB financing operations carried out under this Decision, after the project approval stage, in particular indicating whether an investment project is covered by the EU guarantee and how it contributes to the goals of the Union external action, noting in particular its economic, social and environmental impact;
 - (b) unless confidentiality requirements apply, any memoranda of understanding between the EIB and other European or international financial institutions having a bearing on EIB financing operations under this Decision;
 - (c) where possible and appropriate, existing framework agreements between the EIB and a recipient country. When signing new agreements or amending existing ones, the EIB shall endeavour to make possible their disclosure;
 - (d) the EIB's allocation policy.
2. The Commission shall make publicly available on its website specific information relating to all cases of recoveries under the guarantee agreement referred to in Article 14, and the agreement laying down the detailed provisions and procedures relating to recovery of claims referred to in Article 15(2), unless confidentiality requirements apply.

Article 13

Non-cooperative jurisdictions

In its financing operations, the EIB shall not tolerate any activities carried out for illegal purposes, including money laundering, financing of terrorism, tax fraud and tax evasion, corruption, and fraud affecting the financial interests of the Union. In particular the EIB shall not participate in any financing operation implemented in an eligible country through a foreign vehicle located in a non-cooperative jurisdiction identified as such by the Union, the United Nations, the Organisation for Economic Cooperation and Development or the Financial Action Task Force.

In its financing operations, the EIB shall apply the principles and standards set out in Union law on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, including a requirement to take reasonable measures to identify the beneficial owners where applicable.

Article 14

Guarantee agreement

The Commission and the EIB shall sign a guarantee agreement laying down the detailed provisions and procedures relating to the EU guarantee as set out in Article 8, and shall inform the European Parliament and the Council accordingly.

Article 15

Recovery of payments made by the Commission

1. Where the Commission makes any payment under the EU guarantee, the EIB shall, in the name and on behalf of the Commission, pursue the recovery of claims for the amounts paid.
2. No later than the date of signature of the guarantee agreement referred to in Article 14, the Commission and the EIB shall sign a separate agreement laying down the detailed provisions and procedures relating to recovery of claims.

Article 16

Auditing by the Court of Auditors

The EU guarantee and the payments and recoveries under it attributable to the general budget of the Union shall be audited by the Court of Auditors.

Article 17

Anti-fraud measures

1. The EIB shall notify OLAF promptly and provide it with the necessary information when, at any stage of the preparation, implementation or closure of projects subject to the EU guarantee, it has grounds to suspect that there is a potential case of fraud, corruption, money laundering or other illegal activity that may affect the financial interests of the Union.
2. OLAF may carry out investigations, including on-the-spot checks and inspections, in accordance with the provisions and procedures laid down in Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council ⁽¹⁾, Council Regulation (Euratom, EC) No 2185/96 ⁽²⁾ and Council Regulation (EC, Euratom) No 2988/95 ⁽³⁾ in order to protect the financial interests of the Union, with a view to establishing whether there has been fraud, corruption, money laundering or any other illegal activity affecting the financial interests of the Union in connection with any financing operations. OLAF may transmit to the competent authorities of the Member States concerned information obtained in the course of investigations.

Where such illegal activities are proven, the EIB shall assist recovery efforts with respect to its financing operations and within its scope of responsibilities.

⁽¹⁾ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom, EC) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

⁽²⁾ Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

⁽³⁾ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1).

3. Financing agreements signed in relation to projects supported under this Decision shall include clauses allowing suspension of EIB financing operations and, if necessary, appropriate recovery measures in cases of fraud, corruption or other illegal activity. The decision whether to suspend or cancel the EIB financing shall be taken by the EIB after due consideration of all circumstances and risks.
4. The EIB shall continue to rely on its single point of contact for anti-corruption and anti-fraud for EIB staff and all stakeholders.
5. In its financing operations, the EIB shall implement its exclusion mechanism for debarment of counterparties involved in fraud and corruption which includes the exclusion criteria of the Union's Central Exclusion Database ensuring that rights of all parties are respected.

Article 18

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Article 4 shall be conferred on the Commission for an indeterminate period of time from 11 May 2014.
3. The delegation of power referred to in Article 4 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 4 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 19

Mid-term review

By 31 December 2016, the Commission, in cooperation with the EIB, shall submit to the European Parliament and the Council a mid-term report evaluating the application of this Decision in the first years accompanied, where appropriate, by a proposal for its amendment. The mid-term report shall draw upon an independent external evaluation and contribution from the EIB.

The report shall include in particular:

- (a) an assessment of the application of the allocation policy;
- (b) an assessment of EIB reporting and where appropriate recommendations on how to improve it;
- (c) an assessment of the REM, including performance indicators and criteria, and their contribution to the achievement of the objectives of this Decision;
- (d) a detailed account of the criteria considered for the recommendation concerning the potential activation in whole or in part of the optional additional amount.

*Article 20***Final reporting**

By 31 December 2021, the Commission shall present to the European Parliament and to the Council a final report on the application of this Decision.

*Article 21***Entry into force**

This Decision shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

Done at Strasbourg, 16 April 2014.

For the European Parliament
The President
M. SCHULZ

For the Council
The President
D. KOURKOULAS

*ANNEX I***REGIONAL CEILINGS**

- A. Pre-accession countries: EUR 8 739 322 000;
- B. Neighbourhood and Partnership countries: EUR 14 437 225 000, broken down into the following indicative sub-ceilings:
 - (i) Mediterranean countries: EUR 9 606 200 000;
 - (ii) Eastern Europe, Southern Caucasus and Russia: EUR 4 831 025 000;
- C. Asia and Latin America: EUR 3 407 295 000, broken down into the following indicative sub-ceilings:
 - (i) Latin America: EUR 2 288 870 000;
 - (ii) Asia: EUR 936 356 000;
 - (iii) Central Asia: EUR 182 069 000;
- D. South Africa: EUR 416 158 000.

Within the overall fixed ceiling, the EIB governing bodies may decide, after consulting the Commission, to reallocate an amount of up to 20 % of the sub-regional ceilings within regions and up to 10 % of the regional ceilings between regions.

ANNEX II

POTENTIALLY ELIGIBLE REGIONS AND COUNTRIES

A. Pre-accession countries

1. Candidates

Iceland, former Yugoslav Republic of Macedonia, Montenegro, Serbia, Turkey

2. Potential candidates

Albania, Bosnia and Herzegovina, Kosovo

B. Neighbourhood and Partnership countries

1. Mediterranean countries

Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, Tunisia

2. Eastern Europe, Southern Caucasus and Russia

Eastern Europe: Belarus, Republic of Moldova, Ukraine

Southern Caucasus: Armenia, Azerbaijan, Georgia

Russia

C. Asia and Latin America

1. Latin America

Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela

2. Asia

Afghanistan, Bangladesh, Bhutan, Brunei, Cambodia, China (including Hong Kong and Macao Special Administrative Regions), India, Indonesia, Iraq, Laos, Malaysia, Maldives, Mongolia, Myanmar/Burma, Nepal, Pakistan, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand, Vietnam, Yemen

3. Central Asia

Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan

D. South Africa

South Africa

ANNEX III

ELIGIBLE REGIONS AND COUNTRIES

A. Pre-accession countries

1. Candidates

Iceland, former Yugoslav Republic of Macedonia, Montenegro, Serbia, Turkey

2. Potential candidates

Albania, Bosnia and Herzegovina, Kosovo

B. Neighbourhood and Partnership countries

1. Mediterranean countries

Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia

2. Eastern Europe, Southern Caucasus and Russia

Eastern Europe: Republic of Moldova, Ukraine

Southern Caucasus: Armenia, Azerbaijan, Georgia

Russia

C. Asia and Latin America

1. Latin America

Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela

2. Asia

Bangladesh, Brunei, Bhutan, Cambodia, China (including Hong Kong and Macao Special Administrative Regions), India, Indonesia, Iraq, Laos, Malaysia, Maldives, Mongolia, Myanmar/Burma, Nepal, Pakistan, Philippines, Singapore, South Korea, Sri Lanka, Thailand, Vietnam, Yemen

3. Central Asia

Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan

D. South Africa

South Africa

ANNEX IV

REGIONAL POLICY FRAMEWORK

EIB activity in partners participating in the pre-accession process takes place in the framework established in the Accession and European Partnerships which set out the priorities for candidates and potential candidates with a view to making progress in moving closer to the Union, and which provide a framework for Union assistance. The Stabilisation and Association Process is the Union policy framework for the Western Balkans. It is based on progressive partnership, in which the Union offers trade concessions, economic and financial assistance and contractual relationships through Stabilisation and Association Agreements. Pre-accession financial assistance helps the candidates and potential candidates prepare for the obligations and challenges of membership of the Union. This assistance supports the reform process, including preparations for eventual membership. It focuses on institution-building, alignment with the *acquis* of the Union, preparation for Union policies and instruments and promotion of measures to achieve economic convergence.

EIB activity in Neighbourhood countries takes place in the framework of the new European Neighbourhood Policy set out in the Joint Communication entitled 'A new response to a changing Neighbourhood', adopted by the High Representative of the Union for Foreign Affairs and Security Policy and the Commission on 25 May 2011, and the Council conclusions adopted on 20 June 2011, which calls notably for greater support to partners committed to building democratic societies and undertaking reforms, in line with the 'more for more' and 'mutual accountability' principles, and provides the strategic policy framework for the Union relations with the neighbours. In the framework of this co-operation, EIB financing under this Decision will also be targeted at policies promoting inclusive growth and job creation contributing to social stability in line with an incentive-based approach supporting Union external policy objectives, including in relation to migration issues.

In order to achieve these objectives the Union and its partners implement jointly agreed bilateral action plans defining a set of priorities including on political and security issues, trade and economic matters, environmental and social concerns and integration of transport and energy networks.

The Union for the Mediterranean, the Eastern Partnership, the Black Sea Synergy, the Union Strategy for the Danube Region and the Union Strategy for the Baltic Sea Region are multilateral and regional initiatives aimed at fostering co-operation between the Union and the respective group of Neighbourhood partner countries facing common challenges and/or sharing a common geographical environment. The Union for the Mediterranean aims to relaunch the Euro-Mediterranean integration process by supporting mutual economic, social and environmental development on both sides of the Mediterranean and supports improved socioeconomic development, solidarity, regional integration, sustainable development and knowledge building, underlining the need to increase financial cooperation to support regional and transnational projects. The Union for the Mediterranean supports, in particular, the creation of maritime and land highways, the de-pollution of the Mediterranean, the Mediterranean solar energy plan, the Mediterranean Business Development Initiative, civil protection initiatives and the Euro-Mediterranean university.

The Eastern Partnership aims to create the necessary conditions to accelerate political association and further economic integration between the Union and Eastern partner countries. The Eastern Partnership will provide additional impetus to the economic and social and regional development of the partner countries. It will facilitate good governance, including in the financial sector, promote regional development and social cohesion and help to reduce partner countries' socioeconomic disparities.

The Union Strategy for the Baltic Sea Region supports a sustainable environment and optimal economic and social development in the Baltic Sea region. The Union Strategy for the Danube Region supports, in particular, the development of transport, energy connections and security, sustainable environment and socioeconomic development in the Danube region. The Eastern Partnership aims to create the necessary conditions to accelerate political association and further economic integration between the Union and Eastern partner countries. Russia and the Union have a wide-ranging strategic partnership, distinct from the European Neighbourhood Policy and expressed through the Common Spaces and Roadmaps. These are complemented at multilateral level by the Northern Dimension which provides a framework for cooperation between the Union, Russia, Norway and Iceland (Belarus, Canada and the United States are observers to the Northern Dimension).

EIB activity in Latin America takes place in the framework of the Union, Latin America and the Caribbean Strategic Partnership. As highlighted in the 30 September 2009 Commission Communication from the Commission to the European Parliament and the Council entitled 'The European Union and Latin America: Global Players in Partnership', the Union's priorities in the field of cooperation towards Latin America are the promotion of regional integration and the eradication of poverty and social inequality in order to promote sustainable economic and social development. These policy objectives will be fostered taking into account the different level of development of Latin American countries. Bilateral dialogue and cooperation will be pursued in areas of common interest for both regions, including environment, climate change, disaster risk reduction and energy, science, research, higher education, technology and innovation.

In Asia, the Union is deepening its strategic partnerships with China and India and negotiations are progressing on new partnership and free trade agreements with South-East Asian countries. At the same time, development cooperation remains high on the Union's agenda with Asia; the Union development strategy for the Asian region aims at eradicating poverty by supporting broad-based sustainable economic growth, promoting a conducive environment and conditions for trade and integration within the region, enhancing governance, increasing political and social stability, and supporting the achievement of the 2015 Millennium Development Goals. Policies are being put in place jointly to address common challenges, such as climate change, sustainable development, security and stability, governance and human rights, as well as the prevention of, and response to, natural and humanitarian disasters.

The Union Strategy for a new partnership with Central Asia adopted by the European Council of 21-22 June 2007 has strengthened regional and bilateral dialogue and Union cooperation with Central Asian countries on major issues facing the region, such as poverty reduction, sustainable development and stability. The implementation of the strategy has brought about important advances in the fields of human rights, the rule of law, good governance and democracy, education, economic development, trade and investment, energy and transport and environmental policies.

EIB activity in South Africa takes place in the framework of the Joint EU Country Strategy Paper for South Africa. The main focal areas identified in that Strategy Paper are employment creation and capacity development for service delivery and social cohesion. EIB activities in South Africa have taken place in high complementarity with the Union development cooperation programme, namely through the EIB focus on private sector support and investments in expansion of infrastructure and social services (housing, electric power, drinking water purification and municipal infrastructure). The mid-term review of the EU Country Strategy Paper for South Africa conducted in 2009-10 has proposed the strengthening of actions in the area of climate-change through activities supporting the creation of green jobs. For the period 2014-20, EIB activity is expected to support in a complementary fashion Union external cooperation policies, programmes and instruments by continuing to focus on key EU-South Africa priorities in order to promote equitable and sustainable economic growth, contribute to employment creation and capacity development, and support the sustainable provision and equitable access to basic infrastructure and services.

II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) No 467/2014**of 7 May 2014****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾,Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ⁽²⁾, and in particular Article 136(1) thereof,

Whereas:

- (1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto.
- (2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.⁽²⁾ OJ L 157, 15.6.2011, p. 1.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7 May 2014.

For the Commission,

On behalf of the President,

Jerzy PLEWA

Director-General for Agriculture and Rural Development

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)		
CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MA	41,8
	MK	101,4
	TN	43,5
	TR	74,0
	ZZ	65,2
0707 00 05	MK	51,1
	TR	124,7
	ZZ	87,9
0709 93 10	TR	106,4
	ZZ	106,4
0805 10 20	EG	49,6
	IL	58,8
	MA	47,3
	TN	68,6
	TR	54,5
	ZZ	55,8
	TR	87,3
	ZZ	87,3
0808 10 80	AR	95,8
	BR	84,2
	CL	101,2
	CN	126,1
	MK	26,2
	NZ	159,4
	US	160,8
	ZA	99,3
	ZZ	106,6

⁽¹⁾ Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

DECISIONS

COMMISSION DECISION

of 2 May 2014

establishing the ecological criteria for the award of the EU Ecolabel for converted paper products

(notified under document C(2014) 2774)

(Text with EEA relevance)

(2014/256/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel ⁽¹⁾, and in particular Article 8(2) thereof,

After consulting the European Union Eco-labelling Board,

Whereas:

- (1) Under Regulation (EC) No 66/2010, the EU Ecolabel may be awarded to those products with a reduced environmental impact during their entire life cycle.
- (2) Regulation (EC) No 66/2010 provides that specific EU Ecolabel criteria are to be established according to product groups.
- (3) Since products having the best environmental performance should be produced with reduced discharges of toxic or eutrophic substances into waters, reduced environmental damage or risks related to the use of energy (global warming, acidification, ozone depletion, depletion of non-renewable resources), reduced environmental damage or risks related to the use of hazardous chemicals, it is appropriate to establish EU Ecolabel criteria for the product group 'converted paper'.
- (4) The revised criteria, as well as the related assessment and verification requirements should be valid for three years from the date of adoption of this Decision, taking into account the innovation cycle for this product group.
- (5) The measures provided for in this Decision are in accordance with the opinion of the Committee established by Article 16 of Regulation (EC) No 66/2010,

HAS ADOPTED THIS DECISION:

Article 1

1. The product group 'converted paper products' shall comprise the following products:
 - (a) envelopes and paper carrier bags that consist of at least 90 % by weight of paper, paperboard or paper-based substrates;
 - (b) stationery paper products that consist of at least 70 % by weight of paper, paperboard or paper based substrates, except for suspension files and folders with metal fastener subcategories.

⁽¹⁾ OJ L 27, 30.1.2010, p. 1.

In the case referred to in point (b), the plastic component cannot exceed 10 % except for ring binders, exercise books, notebooks, diaries, and lever arch files where the plastic weight cannot exceed 13 %. Furthermore, the metal weight cannot exceed 30 g per product except for suspension files, folders with metal fasteners and ring binders where it can be up to 50 g and except for lever arch files, where it can up to 120 g.

2. The product group 'converted paper product' shall not include the following products:
 - (a) printed paper products included in the EU Ecolabel as established in Commission Decision 2012/481/EU ⁽¹⁾;
 - (b) packaging products (with the exception of paper carrier bags).

Article 2

For the purpose of this Decision, the following definitions shall apply:

- (1) 'Board substrate' means paperboard, cardboard or board, unprinted and not converted, with a basis weight higher than 400 g/m²;
- (2) 'Consumables' means chemical products used during the printing, coating and finishing processes and capable of being consumed, destroyed, dissipated, wasted or spent;
- (3) 'Converted paper product' is a paper, paperboard or paper based substrates, either printed or unprinted, generally used to protect, handle or store items and/or notes, for which the converting process is an essential part of the production process, comprising three main categories of products: envelopes, paper carrier bags and stationery paper products;
- (4) 'Stationery paper products' include folders, binders, notebooks, pads, notepads, exercise books, spiral-bound notebook, calendars with covers, diaries and loose-leafs;
- (5) 'Converting process' means a process whereby a material is processed into a converted paper product. This process can include a printing process (pre-press, press, and post-press operations);
- (6) 'Halogenated organic solvent' means an organic solvent which contains at least one atom of bromine, chlorine, fluorine or iodine per molecule;
- (7) 'Non-paper components' means all the parts of a converted paper product that do not consist of paper, paperboard or paper based substrates;
- (8) 'Packaging' means all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer;
- (9) 'Paper carrier bags' are paper-based products used for the handling/transportation of goods;
- (10) 'Recycling' means any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original purpose or other purposes, except for energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations;
- (11) 'Recycled fibres' means fibres diverted from the waste stream during a manufacturing process or generated by end-users of the product, which can no longer be used for their intended purpose. Excluded is reutilisation of materials generated in a process and capable of being reclaimed within the same process that generated it (mill broke — own produced or purchased);
- (12) 'Folders' mean folding cases or covers for loose papers, such as suspension files, indices and dividers, document wallet, 3-flap folders, and square cut folders;
- (13) 'Binders' are paper-based products consisting of a cover, usually made of board, with rings for holding loose papers together, such as ring binders and lever arch files;

⁽¹⁾ Commission Decision 2012/481/EU of 16 August 2012 establishing the ecological criteria for the award of the EU Ecolabel for printed paper (OJ L 223, 21.8.2012, p. 55).

- (14) 'Volatile Organic Compounds' (VOC) means any organic compound as well as the fraction of creosote, having at 293,15 K a vapour pressure of 0,01 kPa or more, or having a corresponding volatility under the particular conditions of use;
- (15) 'Washing agents' means: chemicals used to wash printing forms and printing presses to remove printing inks, paper dust and similar products; cleaners for finishing machines and printing machines; printing inks removers used in washing off dried printing inks;
- (16) 'Waste paper' means paper generated during the production of finished converted paper product and which does not form part thereof.

Article 3

In order to be awarded the EU Ecolabel under Regulation (EC) No 66/2010, an item of converted paper product shall fall within the product group 'Converted paper product' as defined in Article 1 of this Decision and shall comply with the criteria as well as the related assessment and verification requirements set out in the Annex.

Article 4

The criteria for the product group 'Converted paper product', as well as the related assessment and verification requirements, shall be valid for three years from the date of adoption of this Decision.

Article 5

For administrative purposes the code number assigned to 'Converted paper product' shall be '046'.

Article 6

This Decision is addressed to the Member States.

Done at Brussels, 2 May 2014.

For the Commission
Janez POTOČNIK
Member of the Commission

ANNEX

FRAMEWORK

The aims of the criteria

The Ecolabel criteria reflect the best environmental performing products on the market of converted paper products. Whilst the use of chemical products and release of pollutants is part of the production process, a product that bears the EU Ecolabel guarantees the consumer that the use of such substances has been limited to the extent technically possible without prejudice to the fitness for use of the final product. The use of hazardous substances is excluded whenever possible. Derogations are granted only when there are no viable alternatives existing on the market and, such hazardous substances are only allowed at minimal concentrations.

CRITERIA

Criteria for awarding the EU Ecolabel to converted paper products:

1. Substrate
2. Fibres: sustainable forest management
3. Excluded or limited substances and mixtures
4. Recyclability
5. Emissions
6. Waste
7. Energy
8. Training
9. Fitness for use
10. Information on the product
11. Information appearing on the EU Ecolabel

These criteria apply to all such processes undertaken at the site or sites or dedicated lines where the converting paper product is converted. If there are converting, printing, coatings and finishing processes exclusively used for ecolabelled products, criteria 2, 4, 5, 6 and 7 shall apply to those processes only.

The ecological criteria do not cover the transport of raw materials, consumables and final products.

Criterion 1 applies only to substrates used in the final converted paper product.

Criteria 4, 9, 10 and 11 apply to the final converted paper product.

Criterion 3 applies both to the non-paper components of the converted paper product and to the converting, printing, coating and finishing processes of the paper components.

Criteria 5, 6, 7 and 8 apply to the converting, printing, laminating and finishing processes of the paper components only.

The specific assessment and verification requirements are indicated within each criterion.

All printing or converting on the converted paper product shall fulfil the criteria. Parts of the product that are printed or converted by a sub-contractor shall therefore also fulfil the related requirements. The application shall include a list of all the printing houses and subcontractors involved in the production of the converted paper, and their geographic locations.

The applicant shall provide a list of chemical products used in the printing house for the production of the converted paper products. This requirement applies to all consumables used during the converting, printing, coating and finishing processes. The list provided by the applicant shall include the amount, function and supplier of any chemical product used, together with the Safety Data Sheet, designed in accordance with the guidance in sections 10, 11 and 12 of Annex II to Regulation (EC) No 1907/2006 of the European Parliament and of the Council ⁽¹⁾.

Where the applicant is required to provide declarations, documentation, analyses, test reports, or other evidence to show compliance with the criteria, it is understood that those may originate from the applicant and/or his supplier(s) and/or their supplier(s), as appropriate.

Where appropriate, test methods other than those indicated for each criterion may be used if their equivalence is accepted by the competent body assessing the application.

Competent Bodies shall preferentially recognise tests which are accredited according to ISO 17025 and verifications performed by bodies which are accredited under the EN 45011 standard or an equivalent international standard.

Where appropriate, competent bodies may require supporting documentation and may carry out independent verifications.

Criterion 1 — Substrate

Part A — Paper Substrate

The substrate used shall be in conformity with the criteria 1, 2, 4 and 5 of the EU Ecolabel as established in Commission Decision 2011/333/EU ⁽²⁾ for Copying and graphic paper or in Commission Decision 2012/448/EU ⁽³⁾ for Newsprint paper and shall demonstrate the conformity to the criterion 2 — Fibres: sustainable forest management of the EU Ecolabel as established in this Commission Decision for converted paper products.

Assessment and verification: the applicant shall provide the specifications of the converted paper products concerned, including the trade names, amounts and weight/m² of the paper used. The list shall also include the names of the suppliers of the papers used. Conformity with the criteria 1, 2, 4 and 5 of the EU Ecolabel as established in Decision 2011/333/EU or Decision 2012/448/EU shall be proven for each substrate by providing a copy of a valid EU Ecolabel certificate for the paper used. Conformity with criterion 2 on fibres sustainable forest management shall be proven for each substrate by providing a PEFC, FSC or equivalent certificate valid for the substrate used, or through a self-declaration in case the applicant already has a valid EU Ecolabel certificate for the substrate used.

Part B — Board Substrate

Criterion B1 — Emissions to water and to air

(a) COD, Sulphur, NO_x, Phosphorous

For each of these parameters, the emissions to air and/or water from the pulp, the laminating papers and the board production shall be expressed in terms of points (P_{COD} , P_{S} , P_{NO_x} , P_{P}) as detailed below.

None of the individual points P_{COD} , P_{S} , P_{NO_x} , P_{P} shall exceed 1,5.

The total number of points ($P_{\text{total}} = P_{\text{COD}} + P_{\text{S}} + P_{\text{NO}_x} + P_{\text{P}}$) shall not exceed 4,0.

The calculation of P COD shall be made as follows (the calculations of P_{S} , P_{NO_x} , P_{P} shall be made in exactly the same manner).

⁽¹⁾ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (OJ L 396, 30.12.2006, p. 1).

⁽²⁾ Commission Decision 2011/333/EU of 7 June 2011 on establishing the ecological criteria for the award of the EU Ecolabel for copying and graphic paper (OJ L 149, 8.6.2011, p. 12).

⁽³⁾ Commission Decision 2012/448/EU of 12 July 2012 on establishing the ecological criteria for the award of the EU Ecolabel for newsprint paper (OJ L 202, 28.7.2012, p. 26).

For each pulp 'i', or each laminating paper, 'i' used, the related measured COD emissions ($COD_{pulp, i}$ or $COD_{paper, i}$ expressed in kg/air dried tonne — ADT), shall be weighted according to the proportion of each pulp or laminating paper used (pulp 'i', or paper 'i', with respect to air dried tonne of pulp, or paper), and summed together. The weighted COD emission for the pulps, or laminating papers, is then added to the measured COD emission from the board production to give a total COD emission, COD_{total} .

The weighted COD reference value for the pulp production or laminating paper production shall be calculated in the same manner, as the sum of the weighted reference values for each pulp or laminating paper used and added to the reference value for the board production to give a total COD reference value $COD_{ref, total}$. The reference values for each pulp or laminating paper type used and for the board production are given in the Table 1.

Finally, the total COD emission shall be divided by the total COD reference value as follows:

$$P_{COD} = \frac{COD_{total}}{COD_{ref, total}} = \frac{\sum_{i=1}^n [pulp \text{ or } laminating \text{ paper}, i \times COD_{pulp \text{ or } laminating \text{ paper}, i}] + COD_{board \text{ machine}}}{\sum_{i=1}^n [pulp \text{ or } laminating \text{ paper}, i \times COD_{ref, pulp \text{ or } laminating \text{ paper}, i}] + COD_{ref \text{ board machine}}}$$

Table 1

Reference values for emissions from different pulp types and from board production

Pulp grade/Board	Emissions (kg/ADT) (*)			
	COD _{reference}	S _{reference}	NOx _{reference}	P _{reference}
Bleached chemical pulp (other than sulphite)	18	0,6	1,6	0,045 (*)
Bleached chemical pulp (sulphite)	25,0	0,6	1,6	0,045
Unbleached chemical pulp	10,0	0,6	1,6	0,04
CTMP	15,0	0,2	0,3	0,01
TMP/groundwood pulp	3,0	0,2	0,3	0,01
Recycled fibres pulp	2,0	0,2	0,3	0,01
Laminating bleached kraft paper	19	0,9	2,4	0,055
Laminating unbleached kraft paper	11	0,9	2,4	0,055
Laminating recycled paper	3	0,5	1,1	0,02
Board production (non-integrated mills where all pulps used are purchased market pulps)	1	0,3	0,8	0,01
Board production (integrated mills)	1	0,3	0,7	0,01

(*) Exemption from this level, up to a level of 0,1 shall be given where it can be demonstrated that the higher level of P is due to P naturally occurring in the wood pulp.

In case of a co-generation of heat and electricity at the same plant the emissions of S and NO_x resulting from electricity generation can be subtracted from the total amount. The following equation can be used to calculate the proportion of the emissions resulting from electricity generation:

$$2 \times (\text{MWh}(\text{electricity})) / [2 \times \text{MWh}(\text{electricity}) + \text{MWh}(\text{heat})]$$

The electricity in this calculation is the electricity produced at the co-generation plant.

The heat in this calculation is the net heat delivered from the power plant to the pulp/laminating paper/board production.

Assessment and verification: the applicant shall provide detailed calculations showing compliance with this criterion, together with related supporting documentation which shall include test reports using the following test methods: COD: ISO 6060; NO_x: ISO 11564; S(oxid.): EPA No 8; S(red.): EPA No 16A; S content in oil: ISO 8754; S content in coal: ISO 351; P: EN ISO 6878, APAT IRSA CNR 4110 or Dr Lange LCK 349.

The supporting documentation shall include an indication of the measurement frequency and the calculation of the points for COD, S and NO_x. It shall include all emissions of S and NO_x which occur during the production of pulp, laminating paper and board, including steam generated outside the production site, except those emissions related to the production of electricity. Measurements shall include recovery boilers, lime kilns, steam boilers and destructor furnaces for strong smelling gases. Diffuse emissions shall be taken into account. Reported emission values for S to air shall include both oxidised and reduced S emissions (dimethyl sulphide, methyl mercaptan, hydrogen sulphide and the like). The S emissions related to the heat energy generation from oil, coal and other external fuels with known S content may be calculated instead of measured, and shall be taken into account.

Measurements of emissions to water shall be taken on unfiltered and unsettled samples either after treatment at the plant or after treatment by a public treatment plant. The period for the measurements shall be based on the production during 12 months. In case of a new or a rebuilt production plant, the measurements shall be based on at least 45 subsequent days of stable running of the plant. The measurement shall be representative of the respective campaign.

In case of integrated mills, due to the difficulties in getting separate emission figures for pulp, laminating paper and board, if only a combined figure for pulp, laminating paper and board production is available, the emission values for pulp(s) shall be set to zero and the figure for the board mill shall include pulp, laminating paper and board production.

(b) AOX

The weighted average value of AOX released from the productions of the pulps used in the substrate shall not exceed 0,170 kg/ADT board.

AOX emissions from each individual pulp used in the board shall not exceed 0,250 kg/ADT pulp.

Assessment and verification: the applicant shall provide test reports using the following test method: AOX ISO 9562 accompanied by detailed calculations showing compliance with this criterion, together with related supporting documentation.

The supporting documentation shall include an indication of the measurement frequency. AOX shall only be measured in processes where chlorine compounds are used for the bleaching of the pulp. AOX need not be measured in the effluent from non-integrated board production or in the effluents from pulp production without bleaching or where the bleaching is performed with chlorine-free substances.

Measurements shall be taken on unfiltered and unsettled samples either after treatment at the plant or after treatment by a public treatment plant. The period for the measurements shall be based on the production during 12 months. In case of a new or a re-built production plant, the measurements shall be based on at least 45 subsequent days of stable running of the plant. The measurement shall be representative of the respective campaign.

(c) CO₂

The emissions of carbon dioxide from non-renewable sources shall not exceed 1 000 kg per tonne of board produced, including emissions from the production of electricity (whether on-site or off-site). For non-integrated mills (where all pulps used are purchased market pulps) the emissions shall not exceed 1 100 kg per tonne. The emissions shall be calculated as the sum of the emissions from the pulp and board production.

Assessment and verification: the applicant shall provide detailed calculations showing compliance with this criterion, together with related supporting documentation.

The applicant shall provide data on the air emissions of carbon dioxide. This shall include all sources of non-renewable fuels during the production of pulp and board, including the emissions from the production of electricity (whether on-site or off-site).

The following emission factors shall be used in the calculation of the CO₂ emissions from fuels:

Table 2

Fuel	CO ₂ fossil emission	Unit
Coal	95	g CO ₂ fossil/MJ
Crude oil	73	g CO ₂ fossil/MJ
Fuel oil 1	74	g CO ₂ fossil/MJ
Fuel oil 2-5	77	g CO ₂ fossil/MJ
LPG	69	g CO ₂ fossil/MJ
Natural gas	56	g CO ₂ fossil/MJ
Grid electricity	400	g CO ₂ fossil/kWh

The period for the calculations or mass balances shall be based on the production during 12 months. In case of a new or a rebuilt production plant, the calculations shall be based on at least 45 subsequent days of stable running of the plant. The calculations shall be representative of the respective campaign.

For grid electricity, the value quoted in the table above (the European average) shall be used unless the applicant presents documentation establishing the average value for their suppliers of electricity (contracting supplier or national average), in which case the applicant may use this value instead of the value quoted in the table.

The amount of energy from renewable sources ⁽¹⁾ purchased and used for the production processes shall not be considered in the calculation of the CO₂ emissions: appropriate documentation that this kind of energy are actually used at the mill or are externally purchased shall be provided by the applicant.

Criterion B2 — Energy use

(a) Electricity

The electricity consumption related to the pulp, laminating paper and the board production shall be expressed in terms of points (P_E) as detailed below.

The number of points, P_E, shall be less than or equal to 1,5.

⁽¹⁾ As defined in Directive 2009/28/EC of the European Parliament and of the Council (OJ L 140, 5.6.2009, p. 16).

The calculation of P_E shall be made as follows.

Calculation for pulp or laminating paper production: For each pulp, laminating paper i used, the related electricity consumption ($E_{\text{pulp or laminated paper, } i}$ expressed in kWh/ADT) shall be calculated as follows:

$$E_{\text{pulp or laminating paper, } i} = \text{Internally produced electricity} + \text{purchased electricity} - \text{sold electricity}$$

Calculation for board production: Similarly, the electricity consumption related to the board production (E_{board}) shall be calculated as follows:

$$E_{\text{board}} = \text{Internally produced electricity} + \text{purchased electricity} - \text{sold electricity}$$

Finally, the points for pulp, laminating paper and board production shall be combined to give the overall number of points (P_E) as follows:

$$P_E = \frac{\sum_{i=1}^n [\text{pulp or laminated paper, } i \times E_{\text{pulp or laminated, } i}] + E_{\text{board}}}{\sum_{i=1}^n [\text{pulp or laminated paper, } i \times E_{\text{refpulp or laminated, } i}] + E_{\text{refboard}}}$$

In case of integrated mills, due to the difficulties in getting separate electricity figures for pulp, laminating paper and board, where only a combined figure for pulp, laminating paper and board production is available, the electricity values for pulp(s) shall be set to zero and the figure for the board mill shall include pulp, laminating paper and board production.

(b) Fuel (heat)

The fuel consumption related to the pulp, laminating paper and the board production shall be expressed in terms of points (P_F) as detailed below.

The number of points, P_F , shall be less than or equal to 1,5.

The calculation of P_F shall be made as follows.

Calculation for pulp or laminating paper production: For each pulp, laminating paper i used, the related fuel consumption ($F_{\text{pulp or laminated paper, } i}$ expressed in kWh/ADT) shall be calculated as follows:

$$F_{\text{pulp or laminating paper, } i} = \text{Internally produced fuel} + \text{purchased fuel} - \text{sold fuel} - 1,25 \times \text{internally produced electricity}$$

Note:

$F_{\text{pulp or laminating paper, } i}$ (and its contribution to P_F , pulp or laminating paper) need not be calculated for mechanical pulp unless it is market air dried mechanical pulp containing at least 90 % dry matter.

The amount of fuel used to produce the sold heat shall be added to the term 'sold fuel' in the equation above.

Calculation for board production: Similarly the fuel consumption related to the board production (F_{board} , expressed in kWh/ADT), shall be calculated as follows:

$$F_{\text{board}} = \text{Internally produced fuel} + \text{purchased fuel} - \text{sold fuel} - 1,25 \times \text{internally produced electricity}$$

Finally, the points for pulp and board production shall be combined to give the overall number of points (P_F) as follows:

$$P_F = \frac{\sum_{i=1}^n [\text{pulp or laminating paper}, i \times F_{\text{pulp or laminating paper}, i}] + F_{\text{board}}}{\sum_{i=1}^n [\text{pulp or laminating paper}, i \times F_{\text{refpulp or laminating paper}, i}] + F_{\text{refboard}}}$$

Table 3

Reference values for electricity and fuel

Pulp grade	Fuel kWh/ADT $F_{\text{reference}}$	Electricity kWh/ADT $E_{\text{reference}}$
Chemical pulp	4 000 (Note: for air dry market pulp containing at least 90 % dry mater (admp), this value may be upgraded by 25 % for the drying energy)	800
Mechanical pulp	900 (Note: this value is only applicable for admp)	1 900
CTMP	1 000	2 000
Recycled fibre pulp	1 800 (Note: for admp, this value may be upgraded by 25 % for the drying energy)	800
Laminating kraft paper (bleached or unbleached)	6 100	1 600
Laminating recycled paper	3 900	1 600
Board production	2 100	800

Assessment and verification (for both (a) and (b)): the applicant shall provide detailed calculations showing compliance with this criterion, together with all related supporting documentation. Reported details shall therefore include the total electricity and fuel consumption.

The applicant shall calculate all energy inputs, divided into heat/fuels and electricity used during the production of pulp and board, including the energy used in the de-inking of waste papers for the production of recycled board. Energy used in the transport of raw materials, as well as conversion and packaging, is not included in the energy consumption calculations.

Total heat energy includes all purchased fuels. It also includes heat energy recovered by incinerating liquors and wastes from on-site processes (e.g. wood waste, sawdust, liquors, waste paper, paper broke), as well as heat recovered from the internal generation of electricity — however, the applicant need only count 80 % of the heat energy from such sources when calculating the total heat energy.

Electric energy means net imported electricity coming from the grid and internal generation of electricity measured as electric power. Electricity used for wastewater treatment need not be included.

Where steam is generated using electricity as the heat source, the heat value of the steam shall be calculated, then divided by 0,8 and added to the total fuel consumption.

In case of integrated mills, due to the difficulties in getting separate fuel (heat) figures for pulp, laminating paper and board, if only a combined figure for pulp, laminating paper and board production is available, the fuel (heat) values for pulp(s) shall be set to zero and the figure for the board mill shall include pulp, laminating paper and board production.

Criterion B3 — Excluded or limited substances and mixtures

Assessment and verification: the applicant shall supply a list of the chemical products used in the pulp and board production, together with appropriate documentation (such as SDSs). This list shall include the quantity, function and suppliers of all the substances used in the production process.

(a) Hazardous substances and mixtures

In accordance with Article 6(6) of Regulation (EC) No 66/2010 of the European Parliament and of the Council ⁽¹⁾ the board shall not contain substances referred to in Article 57 of Regulation (EC) No 1907/2006 nor substances or mixtures meeting the criteria for classification with the hazard classes or categories specified below.

List of hazard statements and risk phrases:

Hazard Statement ⁽¹⁾	Risk Phrase ⁽²⁾
H300 Fatal if swallowed	R28
H301 Toxic if swallowed	R25
H304 May be fatal if swallowed and enters airways	R65
H310 Fatal in contact with skin	R27
H311 Toxic in contact with skin	R24
H330 Fatal if inhaled	R26
H331 Toxic if inhaled	R23
H340 May cause genetic defects	R46
H341 Suspected of causing genetic defects	R68
H350 May cause cancer	R45
H350i May cause cancer by inhalation	R49
H351 Suspected of causing cancer	R40
H360F May damage fertility	R60

⁽¹⁾ Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ L 27, 30.1.2010, p. 1).

Hazard Statement ⁽¹⁾	Risk Phrase ⁽²⁾
H360D May damage the unborn child	R61
H360FD May damage fertility. May damage the unborn child	R60; R61; R60-61
H360Fd May damage fertility. Suspected of damaging the unborn child	R60-R63
H360Df May damage the unborn child. Suspected of damaging fertility	R61-R62
H361f Suspected of damaging fertility	R62
H361d Suspected of damaging the unborn child	R63
H361fd Suspected of damaging fertility. Suspected of damaging the unborn child	R62-63
H362 May cause harm to breast fed children	R64
H370 Causes damage to organs	R39/23; R39/24; R39/25; R39/26; R39/27; R39/28
H371 May cause damage to organs	R68/20; R68/21; R68/22
H372 Causes damage to organs through prolonged or repeated exposure	R48/25; R48/24; R48/23
H373 May cause damage to organs through prolonged or repeated exposure	R48/20; R48/21; R48/22
H400 Very toxic to aquatic life	R50
H410 Very toxic to aquatic life with long-lasting effects	R50-53
H411 Toxic to aquatic life with long-lasting effects	R51-53
H412 Harmful to aquatic life with long-lasting effects	R52-53
H413 May cause long-lasting harmful effects to aquatic life	R53
EUH059 Hazardous to the ozone layer	R59
EUH029 Contact with water liberates toxic gas	R29
EUH031 Contact with acids liberates toxic gas	R31
EUH032 Contact with acids liberates very toxic gas	R32

Hazard Statement ⁽¹⁾	Risk Phrase ⁽²⁾
EUH070 Toxic by eye contact	R39-41
No commercial dye formulation, colorants, surface-finishing agents, auxiliaries and coating materials shall be used on either pulp or board that has been assigned or may be assigned at the time of application the hazard statement H317: May cause allergic skin reaction.	R43

⁽¹⁾ As provided for in Regulation (EC) No 1272/2008 of the European Parliament and of the Council.

⁽²⁾ As provided for in Council Directive 67/548/EEC.

The use of substances or mixtures which change their properties upon processing (e.g. become no longer bioavailable, undergo chemical modification) so that the identified hazard no longer applies are exempted from the above requirement.

Concentration limits for substances or mixtures which may be or have been assigned the hazard statements or risk phrase listed above, meeting the criteria for classification in the hazard classes or categories, and for substances meeting the criteria of Article 57(a), (b) or (c) of Regulation (EC) No 1907/2006, shall not exceed the generic or specific concentration limits determined in accordance with the Article 10 of Regulation (EC) No 1272/2008 of the European Parliament and of the Council ⁽¹⁾. Where specific concentration limits are determined they shall prevail over the generic ones.

Concentration limits for substances meeting criteria of Article 57(d), (e) or (f) of Regulation (EC) No 1907/2006 shall not exceed 0,10 % weight by weight.

Assessment and verification: the applicant shall prove compliance with the criterion providing data on the amount (kg/ADT board produced) of substances used in the process and that the substances referred to in this criterion are not retained in the final product above concentration limits specified. The concentration for substances and mixtures shall be specified in the Safety Data Sheets in accordance with Article 31 of Regulation (EC) No 1907/2006.

(b) Substances listed in accordance with Article 59(1) of Regulation (EC) No 1907/2006

No derogation from the prohibition set out in Article 6(6) of Regulation (EC) No 66/2010 shall be granted concerning substances identified as substances of very high concern and included in the list provided for Article 59 of Regulation (EC) No 1907/2006, present in mixtures, in an article or in any homogenous part of a complex article in concentrations higher than 0,10 %. Specific concentration limits determined in accordance with Article 10 of Regulation (EC) No 1272/2008 shall apply in case it is lower than 0,10 %.

Assessment and verification: the list of substances identified as substances of very high concern and included in the candidate list in accordance with Article 59 of Regulation (EC) No 1907/2006 can be found here:

http://echa.europa.eu/chem_data/authorisation_process/candidate_list_table_en.asp

Reference to the list shall be made on the date of application.

The applicant shall prove compliance with the criterion providing data on the amount (kg/ADT board produced) of substances used in the process and that the substances referred to in this criterion are not retained in the final product above concentration limits specified. The concentration shall be specified in the safety data sheets in accordance with Article 31 of Regulation (EC) No 1907/2006.

(c) Chlorine

Chlorine gas shall not be used as a bleaching agent. This requirement does not apply to chlorine gas related to the production and use of chlorine dioxide.

⁽¹⁾ Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures (OJ L 353, 31.12.2008, p. 1).

Assessment and verification: the applicant shall provide a declaration from the pulp producer(s) that chlorine gas has not been used as a bleaching agent. Note: while this requirement also applies to the bleaching of recycled fibres, it is accepted that the fibres in their previous life-cycle may have been bleached with chlorine gas.

(d) APEOs

Alkylphenol ethoxylates or other alkylphenol derivatives shall not be added to cleaning chemicals, de-inking chemicals, foam inhibitors, dispersants or coatings. Alkylphenol derivatives are defined as substances that upon degradation produce alkyl phenols.

Assessment and verification: the applicant shall provide a declaration(s) from their chemical supplier(s) that alkylphenol ethoxylates or other alkylphenol derivatives have not been added to these products.

(e) Residual monomers

The total quantity of residual monomers (excluding acrylamide) that may be or have been assigned any of the following risk phrases (or combinations thereof) and are present in coatings, retention aids, strengtheners, water repellents or chemicals used in internal and external water treatment shall not exceed 100 ppm (calculated on the basis of their solid content):

Hazard Statement ⁽¹⁾	Risk Phrase ⁽²⁾
H340 May cause genetic defects	R46
H350 May cause cancer	R45
H350i May cause cancer by inhalation	R49
H351 Suspected of causing cancer	R40
H360F May damage fertility	R60
H360D May damage the unborn child	R61
H360FD May damage fertility. May damage the unborn child	R60; R61; R60-61
H360Fd May damage fertility. Suspected of damaging the unborn child	R60-R63
H360Df May damage the unborn child. Suspected of damaging fertility	R61-R62
H400 Very toxic to aquatic life	R50
H410 Very toxic to aquatic life with long-lasting effects	R50-53
H411 Toxic to aquatic life with long-lasting effects	R51-53
H412 Harmful to aquatic life with long-lasting effects	R52-53
H413 May cause long-lasting harmful effects to aquatic life	R53

⁽¹⁾ As provided for in Regulation (EC) No 1272/2008.

⁽²⁾ As provided for in Directive 67/548/EEC.

Acrylamide shall not be present in coatings, retention aids, strengtheners, water repellents or chemicals used in internal and external water treatment in concentrations higher than 700 ppm (calculated on the basis of their solid content).

The competent body may exempt the applicant from these requirements in relation to chemicals used in external water treatment.

Assessment and verification: the applicant shall provide from their chemical supplier(s) a declaration of compliance with this criterion, together with appropriate documentation (such as Safety Data Sheets).

(f) Surfactants in de-inking

All surfactants used in de-inking shall be ultimately biodegradable.

Assessment and verification: the applicant shall provide from their chemical supplier(s) a declaration of compliance with this criterion together with the relevant safety data sheets or test reports for each surfactant which shall indicate the test method, threshold and conclusion stated, using one of the following test method and pass levels: OECD 302 A-C (or equivalent ISO standards), with a percentage degradation (including adsorption) within 28 days of at least 70 % for 302 A and B, and of at least 60 % for 302 C.

(g) Biocides

The active components in biocides or biostatic agents used to counter slime-forming organisms in circulation water systems containing fibres shall not be potentially bio-accumulative. Biocides' bioaccumulation potentials are characterised by log Pow (log octanol/water partition coefficient) < 3,0 or an experimentally determined bioconcentration factor (BCF) ≤ 100.

Assessment and verification: the applicant shall provide from their chemical supplier(s) a declaration of compliance with this criterion together with the relevant material safety data sheet or test report which shall indicate the test method, threshold and conclusion stated, using the following test methods: OECD 107, 117 or 305 A-E.

(h) Azo dyes

Azo dyes that may cleave to any of the following aromatic amines shall not be used, in accordance with Annex XVII to Regulation (EC) No 1907/2006:

1. 4-aminobiphenyl	(92-67-1)
2. benzidine	(92-87-5)
3. 4-chloro-o-toluidine	(95-69-2)
4. 2-naphthylamine	(91-59-8)
5. o-aminoazotoluene	(97-56-3)
6. 2-amino-4-nitrotoluene	(99-55-8)
7. p-chloroaniline	(106-47-8)
8. 2,4-diaminoanisole	(615-05-4)
9. 4,4'-diaminodiphenylmethane	(101-77-9)
10. 3,3'-dichlorobenzidine	(91-94-1)
11. 3,3'-dimethoxybenzidine	(119-90-4)

12. 3,3'-dimethylbenzidine	(119-93-7)
13. 3,3'-dimethyl-4,4'-diaminodiphenylmethane	(838-88-0)
14. p-cresidine	(120-71-8)
15. 4,4'-methylene-bis-(2-chloroaniline)	(101-14-4)
16. 4,4'-oxydianiline	(101-80-4)
17. 4,4'-thiodianiline	(139-65-1)
18. o-toluidine	(95-53-4)
19. 2,4-diaminotoluene	(95-80-7)
20. 2,4,5-trimethylaniline	(137-17-7)
21. 4-aminoazobenzene	(60-09-3)
22. o-anisidine	(90-04-0)

Assessment and verification: the applicant shall provide from their chemical supplier(s) a declaration of compliance with this criterion.

(i) Metal complex dye stuffs or pigments

Dyes or pigments based on lead, copper, chromium, nickel or aluminium shall not be used. Copper phthalocyanine dyes or pigments may, however, be used.

Assessment and verification: the applicant shall provide from their chemical supplier(s) a declaration of compliance.

(j) Ionic impurities in dye stuffs

The levels of ionic impurities in the dye stuffs used shall not exceed the following: Ag 100 ppm; As 50 ppm; Ba 100 ppm; Cd 20 ppm; Co 500 ppm; Cr 100 ppm; Cu 250 ppm; Fe 2 500 ppm; Hg 4 ppm; Mn 1 000 ppm; Ni 200 ppm; Pb 100 ppm; Se 20 ppm; Sb 50 ppm; Sn 250 ppm; Zn 1 500 ppm.

Assessment and verification: the applicant shall provide a declaration of compliance.

Criterion B4 — Waste management

All pulp and board production sites shall have a system for handling waste (as defined by the relevant regulatory authorities of the pulp and board production sites in question) and residual products arising from the production of the eco-labelled product. The system shall be documented or explained in the application and include information on at least the following points:

- procedures for separating and using recyclable materials from the waste stream,
- procedures for recovering materials for other uses, such as incineration for raising process steam or heating, or agricultural use,
- procedures for handling hazardous waste (as defined by the relevant regulatory authorities of the pulp and board production sites in question).

Assessment and verification: the applicant shall provide a detailed description of the procedures adopted for the waste management of each of the sites concerned and a declaration of compliance with the criterion.

Criterion 2 — Fibres: sustainable forest management

The fibre raw material may be recycled or virgin fibre.

Virgin fibres shall be covered by valid sustainable forest management and chain of custody certificates issued by an independent third party certification scheme such as FSC, PEFC or equivalent.

However, where certification schemes allow mixing of certified material, recycled materials and uncertified material in a product or product line, the proportion of uncertified virgin material shall not exceed 30 % of the total fibre raw material. Such uncertified material shall be covered by a verification system which ensures that it is legally sourced and meets any other requirement of the certification scheme with respect to uncertified material.

The certification bodies issuing forest and/or chain of custody certificates shall be accredited/recognised by that certification scheme.

Assessment and verification: the applicant shall provide appropriate documentation indicating the types, quantities and origins of fibres used in the pulp and the board production.

Where virgin fibres are used, the product shall be covered by valid forest management and chain of custody certificates issued by an independent third party certification scheme, such as PEFC, FSC or equivalent. If the product or product line includes uncertified material, proof should be provided that the uncertified material is less than 30 % and is covered by a verification system which ensures that it is legally sourced and meets any other requirement of the certification scheme with respect to uncertified material.

Where recycled fibres are used, the applicant shall provide a declaration stating the average amount of grades of recovered paper used for the product in accordance with the standard EN 643 or an equivalent standard. The applicant shall provide a declaration that no mill broke (own or purchased) was used for the percentage calculation.

Criteria applicable to converting processes

Criterion 3 — Excluded or limited substances and mixtures**(a) Hazardous substances and mixtures**

Consumables that could end up in the final converted paper product, and that contain substances and/or mixtures meeting the criteria for classification with the hazard statements or risk phrases specified below in accordance with Regulation (EC) No 1272/2008 or Council Directive 67/548/EEC ⁽¹⁾ or substances referred to in Article 57 of Regulation (EC) No 1907/2006 shall not be used for printing, coating, and finishing operations of the final converted paper product.

This requirement shall not apply to toluene for use in rotogravure printing processes where a closed or encapsulated installation or recovery system, or any equivalent system, is in place to control and monitor fugitive emissions and where the recovery efficiency is at least 92 %. UV varnishes and UV inks classified H412/R52-53 are also exempted from this requirement.

The non-paper components that are part of the final converted paper product shall not contain the substances referred to above.

List of hazard statements and risk phrases

Hazard Statement ⁽¹⁾	Risk Phrase ⁽²⁾
H300 Fatal if swallowed	R28
H301 Toxic if swallowed	R25

⁽¹⁾ Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 196, 16.8.1967, p. 1).

Hazard Statement ⁽¹⁾	Risk Phrase ⁽²⁾
H304 May be fatal if swallowed and enters airways	R65
H310 Fatal in contact with skin	R27
H311 Toxic in contact with skin	R24
H330 Fatal if inhaled	R23 or R26
H331 Toxic if inhaled	R23
H340 May cause genetic defects	R46
H341 Suspected of causing genetic defects	R68
H350 May cause cancer	R45
H350i May cause cancer by inhalation	R49
H351 Suspected of causing cancer	R40
H360F May damage fertility	R60
H360D May damage the unborn child	R61
H360FD May damage fertility. May damage the unborn child	R60; R61; R60/61
H360Fd May damage fertility. Suspected of damaging the unborn child	R60; R63
H360Df May damage the unborn child. Suspected of damaging fertility	R61; R62
H361f Suspected of damaging fertility	R62
H361d Suspected of damaging the unborn child	R63
H361fd Suspected of damaging fertility. Suspected of damaging the unborn child	R62-63
H362 May cause harm to breast fed children	R64
H370 Causes damage to organs	R39/23; R39/24; R39/25; R39/26; R39/27; R39/28
H371 May cause damage to organs	R68/20; R68/21; R68/22
H372 Causes damage to organs through prolonged or repeated exposure	R48/25; R48/24; R48/23
H373 May cause damage to organs through prolonged or repeated exposure	R48/20; R48/21; R48/22
H400 Very toxic to aquatic life	R50
H410 Very toxic to aquatic life with long-lasting effects	R50/53

Hazard Statement ⁽¹⁾	Risk Phrase ⁽²⁾
H411 Toxic to aquatic life with long-lasting effects	R51/53
H412 Harmful to aquatic life with long-lasting effects	R52/53
H413 May cause long-lasting harmful effects to aquatic life	R53
EUH059 Hazardous to the ozone layer	R59
EUH029 Contact with water liberates toxic gas	R29
EUH031 Contact with acids liberates toxic gas	R31
EUH032 Contact with acids liberates very toxic gas	R32
EUH070 Toxic by eye contact	R39/41

⁽¹⁾ As provided for in Regulation (EC) No 1272/2008.

⁽²⁾ As provided for in Directive 67/548/EEC.

Substances or mixtures which change their properties upon processing (e.g. become no longer bioavailable, undergo chemical modification) so that the identified hazard no longer applies are exempted from the above requirement.

Concentration limits for substances which may be, or have been, assigned the hazard statements or risk phrase listed above or which meet the criteria for classification in the hazard classes or categories, and concentration limits for substances meeting the criteria of Article 57 (a), (b) or (c) of Regulation (EC) No 1907/2006, shall not exceed the generic or specific concentration limits determined in accordance with the Article 10 of Regulation (EC) No 1272/2008. Where specific concentration limits are determined they shall prevail over the generic ones.

Concentration limits for substances meeting criteria set out in Article 57(d), (e) or (f) of Regulation (EC) No 1907/2006 shall not exceed 0,10 % weight by weight.

Assessment and verification: for substances not already classified in accordance with Regulation (EC) No 1272/2008, the applicant shall prove compliance with these criteria by providing: (i) a declaration that the non-paper components that are part of the final product do not contain the substances referred to in these criteria in concentration above the authorised limits; (ii) a declaration that none of the consumables used for printing, coating and finishing operations of the final converted paper product contain the substances referred to in these criteria in concentration above the authorised limits; (iii) a list of all consumables used for the printing, finishing and coating of the converted paper products. This list shall include the quantity, function and suppliers of all the consumables used in the production process.

The applicant shall demonstrate compliance with this criterion by providing a declaration from their chemical supplier(s) on the non-classification of each substance into any of the hazard classes associated to the hazard statements referred to in the above list in accordance with Regulation (EC) No 1272/2008, as far as this can be determined, as a minimum, from the information meeting the requirements listed in Annex VII to Regulation (EC) No 1907/2006. This declaration shall be supported by summarised information on the relevant characteristics associated to the hazard statements referred to in the above list, to the level of detail specified in section 10, 11 and 12 of Annex II to Regulation (EC) No 1907/2006 (Requirements for the Compilation of Safety Data Sheets).

Information on intrinsic properties of substances may be generated by means other than tests, for instance through the use of alternative methods such as in vitro methods, by quantitative structure activity models or by the use of grouping or read-across in accordance with Annex XI to Regulation (EC) No 1907/2006. The sharing of relevant data is strongly encouraged.

The information provided shall relate to the forms or physical states of the substance or mixtures as used in the final product.

For substances listed in Annexes IV and V to REACH, exempted from registration obligations under Article 2(7)(a) and (b) of REACH Regulation (EC) No 1907/2006, a declaration to this effect will suffice to comply with the requirements set out above.

The applicant shall provide appropriate documentation on the recovery efficiency of the closed/encapsulated installation/recovery system, or any equivalent system, that has been put in place to deal with the use of toluene in rotogravure printing processes.

(b) Substances listed in accordance with Article 59(1) of Regulation (EC) No 1907/2006

No derogation from the prohibition set out in Article 6(6) of Regulation (EC) No 66/2010 shall be granted concerning substances identified as substances of very high concern and included in the list provided for in Article 59 of Regulation (EC) No 1907/2006, present in mixtures in concentrations higher than 0,1 %. Specific concentration limits determined in accordance with Article 10 of Regulation (EC) No 1272/2008 shall apply where the concentration is lower than 0,10 %.

Assessment and verification: the list of substances identified as substances of very high concern and included in the candidate list in accordance with Article 59 of Regulation (EC) No 1907/2006 can be found here:

http://echa.europa.eu/chem_data/authorisation_process/candidate_list_table_en.asp

Reference to the list shall be made on the date of application.

The applicant shall prove compliance with the criterion providing data on the amount of substances used for the printing of the converted paper products and a declaration stating that the substances referred to in this criterion are not retained in the final product above the concentration limits specified. The concentration shall be specified in the safety data sheets in accordance with Article 31 of Regulation (EC) No 1907/2006.

(c) Biocides

Biocides, either as part of the formulation or as part of any mixture included in the formulation, that are used to preserve the product and that are classified H410/R50-53 or H411/R51-53 in accordance with Directive 67/548/EEC, Directive 1999/45/EC of the European Parliament and of the Council ⁽¹⁾ or Regulation (EC) No 1272/2008, are permitted only if their bioaccumulation potentials are characterised by log Pow (log octanol/water partition coefficient) < 3,0 or an experimentally determined bioconcentration factor (BCF) ≤ 100.

Assessment and verification: the applicant shall provide copies of the material safety data sheets for all biocides used during the different production stages, together with a documentation of the concentrations of the biocides in the final product.

(d) Washing agents

Washing agents used for cleaning in printing processes and/or sub-processes that contain aromatic hydrocarbon shall only be allowed if they are in compliance with point 3(b) and if one of the following conditions is fulfilled:

- (i) the amount of aromatic hydrocarbons in the washing agent products used does not exceed 0,10 % (w/w);
- (ii) the amount of aromatic hydrocarbon-based washing agent used annually does not exceed 5 % of the total amount of washing agent used in one calendar year.

This criterion shall not apply to toluene used as washing agent in rotogravure printing.

Assessment and verification: the applicant shall provide the Safety Data Sheet for each washing agent used in a printing house during the year to which the annual consumption refers. The washing agent suppliers shall provide declarations of the aromatic hydrocarbon contents in the washing agents.

⁽¹⁾ Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ L 200, 30.7.1999, p. 1).

(e) Alkyl phenol ethoxylates — Halogenated solvents — Phthalates

The following substances or preparations shall not be added to inks, dyes, toners, adhesives, or washing agents or other cleaning chemicals used for the printing of the converted paper product:

- Alkyl phenol ethoxylates and their derivatives that may produce alkyl phenols by degradation.
- Halogenated solvents that at the time of application are classified in the hazard or risk categories listed in point 3(a).
- Phthalates that at the time of application are classified with risk phrases H360F, H360D, H361f in accordance with Regulation (EC) No 1272/2008.

Assessment and verification: the applicant shall provide a declaration of compliance with this criterion.

(f) Printing inks, toners, inks, varnishes, foils and laminates

The following heavy metals or their compounds shall not be used as printing inks, toners, inks, varnishes, foils and laminates (whether as a substance or as part of any preparation used): cadmium, copper (excluding copper-phthalocyanine), lead, nickel, chromium VI, mercury, arsenic, soluble barium, selenium, antimony. Cobalt can only be used up to 0,10 % (w/w)

Ingredients may contain traces of those metals up to 0,010 % (w/w) deriving from impurities in the raw materials.

Assessment and verification: the applicant shall provide a declaration of compliance with this criterion as well as declarations from ingredient suppliers.

(g) Metal components

Metals shall not be coated with cadmium, chromium, nickel, zinc, mercury, lead, tin and their compounds.

The surface treatment of metal surfaces with nickel or zinc can be accepted for small parts (such as rivet, eyelet, and flat bar mechanisms) where this is necessary due to heavy physical wear.

Both nickel plating and zinc galvanisation shall make use of wastewater treatment, ion exchange technology, membrane technology or equal technology in order to recycle the chemical products as much as possible.

Emissions from surface treatment shall be recycled and destroyed. The system shall be closed without drainage, with an exception for zinc where the emission can be a maximum of 0,50 mg/l.

The chemical products used in the surface treatment must be in compliance with the criteria 3 (c) Biocides and 3 (e) Alkyl phenol ethoxylates — Halogenated solvents — Phthalates.

This requirement applies to each separate metal-type component exceeding 10 % by weight of the final products in the subcategory of suspension file, folders with metal fastener, ring binder and lever arch file.

Assessment and verification: the applicant shall provide a declaration of compliance with this criterion.

Criterion 4 — Recyclability

The converted paper product shall be recyclable. The non-paper components of the converted paper product shall be easily removable to ensure that those components will not hinder the recycling process.

- (a) Wet strength agents may be used only if the recyclability of the finished product can be proved.
- (b) Non-soluble adhesives may be used only if their removability can be proved.
- (c) Coating varnishes and lamination, including polyethene and/or polyethene/polypropylene, may be used only for binders, folders, exercise books, notebooks and diaries.

Assessment and verification: the applicant shall provide the test result of the recyclability for wet strength agents and removability for adhesives. The reference test methods are PTS method PTS-RH 021/97 (for wet strength agents), INGEDE Method 12 (for non-soluble adhesive removability), or equivalent test methods. The applicant shall provide a declaration that coated and laminated converted paper products are in compliance with point 3(c). Where a part of a converted paper product is easily removable (for instance a metal bar in a suspension file or a plastic cover or reusable exercise book cover), the recyclability test may be made without this component. The easiness of removal of the non-paper components shall be proven via a declaration of the paper collecting company, the recycling company or an equivalent organisation. Test methods shown by a competent and independent third party as giving equivalent results may also be used.

Criterion 5 — Emissions

(a) Emissions to water

Rinsing water containing silver from film processing, as well as from plate production, and photo-chemicals shall not be discharged to a sewage treatment plant.

Assessment and verification: the applicant shall provide a declaration of compliance with this criterion, together with a description of the management of photo-chemicals and silver containing rinsing water on site. Where the film processing and/or the plate production are outsourced, the sub-contractor shall provide a declaration of compliance with this criterion, together with a description of the management of photo-chemicals and silver containing rinsing water at the subcontractors.

In **Rotogravure printing**, the amount of Cr and Cu discharged into a sewage treatment plant must not exceed, respectively, **45 mg per m²** and **400 mg per m²** of printing cylinder surface area used in the press.

Assessment and verification: discharges of Cr and Cu into the sewage shall be checked at rotogravure printing plants after treatment and before their release. A representative sample of Cr and Cu discharges shall be collected each month. At least one annual analytical test shall be carried out by an accredited laboratory to determine the content of Cr and Cu in a representative sub-sample of these samples. Compliance with this criterion shall be assessed by dividing the content of Cr and Cu, as determined by the annual analytical test, by the cylinder surface used in the press during the printing. The cylinder surface used in the press during printing is calculated by multiplying the cylinder surface ($= 2\pi rL$, where r is the radius and L the length of the cylinder) by the number of printing productions during a year ($=$ number of different printing jobs). The reference test methods are for Cr: EN ISO 11885 (Water quality. Determination of selected elements by inductively coupled plasma optical emission spectrometry (ICP-OES)), and EN 1233 (Water quality. Determination of chromium. Atomic absorption spectrometric methods), and for Cu: EN ISO 11885 (Water quality. Determination of selected elements by inductively coupled plasma optical emission spectrometry (ICP-OES)).

(b) Emissions to air

Volatile Organic Compounds (VOC)

The following criterion must be met:

$$(P_{\text{VOC}} - R_{\text{VOC}})/P_{\text{paper}} < 5 \text{ [kg/tonnes]}$$

Where:

P_{VOC} = the annual total kilograms of VOC contained in the purchased chemical products used for the annual total production of converted products

R_{VOC} = the annual total kilograms of VOC destroyed by abatement, recovered from printing processes and sold, or reused

P_{paper} = the annual total tonnes of paper purchased and used for the production of converted products.

Where a printing/converting house uses different printing technologies, this criterion shall be fulfilled for each one separately.

The P_{VOC} term shall be calculated from SDS information related to VOC content or from an equivalent declaration provided by the supplier of chemical products.

The R_{VOC} term shall be calculated from the declaration on the content of VOC contained in the chemical products sold or from the internal counting register (or any other equivalent document) reporting the annual amount of VOC recovered and reused on site.

Specific conditions for heat-set printing:

- (i) For heat-set offset printing with an integrated after-burner unit in place for the drying unit, the following calculation method shall apply:

$P_{\text{VOC}} = 90 \%$ of the annual total kilograms of VOC contained in damping solutions used for the annual production of converted products + 85 % of the annual total kilograms of VOC contained in washing agents used for the annual production of converted products.

- (ii) For heat-set offset printing, without an integrated after-burner unit in place for the drying unit, the following calculation method shall apply:

$P_{\text{VOC}} = 90 \%$ of the annual total kilograms of VOC contained in damping solutions used for the annual production of converted products + 85 % of the annual total kilograms of VOC contained in washing agents used for the annual production of converted products + 10 % of annual total kilograms of VOC contained in the printing inks used for the annual production of converted products.

For (i) and (ii), proportionately lower percentages than 90 % and 85 % may be used in this calculation if more than 10 % or 15 % respectively of annual total kilograms of VOC contained in the damping solutions or washing agents used for the annual production of converted products are shown to be abated in the treatment system for combusting gases from the drying process.

Assessment and verification: a declaration of the VOC content in alcohols, washing agents, inks, damping solutions or other corresponding chemical products shall be provided by the chemical supplier. The applicant shall provide evidence of the calculation according to the criteria laid down above. The period for the calculations shall be based on the production during 12 months. In case of a new or a rebuilt production plant, the calculations shall be based on at least 3 months of representative running of the plant.

Criterion 6 — Waste

- (a) Waste management

The facility where the converted paper products are produced shall have in place a system for handling waste, including residual products derived from the production of the converted paper products, as defined by local and national relevant regulatory authorities.

The system shall be documented or explained and shall include information on at least the following procedures:

- (i) handling, collection, separation and use of recyclable materials from the waste stream;
- (ii) recovery of materials for other uses, such as incineration for raising process steam or heating, or agricultural use;
- (iii) handling, collection, separation and disposal of hazardous waste, as defined by the relevant local and national regulatory authorities.

Assessment and verification: the applicant shall provide a declaration of compliance with this criterion, together with a description of the procedures adopted for waste management. Where appropriate, the applicant shall provide the corresponding declaration to the local authority every year. Where the waste management is outsourced, the sub-contractor shall provide a declaration of compliance with this criterion as well.

(b) Waste paper

The amount of waste paper 'X' shall not exceed:

- 20 % for envelopes
- 20 % for stationery products
- 10 % for paper bags

where, X = annual kilos of waste paper produced during the converting (including finishing processes) of the ecolabelled converted paper product, divided by annual tonnes of paper purchased and used for the production of ecolabelled converted paper product.

Where the printing house carries out finishing processes on behalf of another printing house, the amount of waste paper produced in those processes shall not be included in the calculation of 'X'.

Where the finishing processes are outsourced to another company, the amount of waste paper resulting from the outsourced work shall be calculated and declared in the calculation of 'X'.

Assessment and verification: the applicant shall provide a description of the calculation of the amount of waste paper, together with a declaration from the contractor collecting the waste paper from the printing house. The outsourcing terms and calculations on the amount of paper waste involved in the finishing processes shall be provided. The period for the calculations shall be based on the production during 12 months. In case of a new or a rebuilt production plant, the calculations shall be based on at least 3 months of representative running of the plant.

Criterion 7 — Energy use

The printing/converting house shall establish a register of all energy consuming devices (including machinery, lighting, air conditioning, cooling) and a programme consisting of measures for improvement of energy efficiency.

Assessment and verification: the applicant shall provide the register of energy consuming devices together with the improvement programme.

Criterion 8 — Training

All members of staff participating in day to day operation shall be given the knowledge necessary to ensure that the EU Ecolabel requirements are fulfilled and continuously improved.

Assessment and verification: the applicant shall provide a declaration of compliance with this criterion, together with details of the training programme, its content, and an indication of which staff have received what training and when. The applicant shall provide to the Competent Body also a sample of training material.

Criterion 9 — Fitness for use

The product shall be suitable for its purpose.

Assessment and verification: the applicant shall provide appropriate documentation in compliance with this criterion. National or commercial standards, where relevant, may be used by the applicant to prove the fitness for use of the converted paper products. For paper carrier bags, the reference test method is EN 13590:2003.

Criterion 10 — Information on the paper carrier bags

The following information shall appear on the paper carrier bags:

'Please reuse this bag'

Assessment and verification: the applicant shall provide a sample layout of the paper carrier bag bearing the information required.

Criterion 11 — Information appearing on the EU Ecolabel

The optional label with text box shall contain the following text:

- This product is recyclable
- Emissions of chemicals to air and water of paper production, printing and converting processes have been limited

In order to avoid the risk of providing confusing messages to consumers between an EU ecolabelled bag and its non EU ecolabelled contents, paper carrier bags shall be designed to be open and to be filled either at the point of purchase or afterwards so that consumers understand that the EU Ecolabel is only valid for the paper carrier bag, and not for the goods added. The EU Ecolabel logo displayed on the bag shall bear the following text 'EU Ecolabelled paper carrier bag'.

The guidelines for the use of the optional label with the text box can be found in the 'Guidelines for the use of the EU Ecolabel logo' on the website:

<http://ec.europa.eu/environment/ecolabel/promo/pdf/logo%20guidelines.pdf>

Assessment and verification: the applicant shall provide a sample of the converted paper product showing the label, together with a declaration of compliance with this criterion.

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 73/13/COL

of 20 February 2013

amending for the eighty-ninth time the procedural and substantive rules in the field of state aid by introducing a new chapter on the application of state aid rules in relation to the rapid deployment of broadband networks

THE EFTA SURVEILLANCE AUTHORITY,

HAVING regard to the Agreement on the European Economic Area ⁽¹⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ⁽²⁾, in particular its Articles 5(2)(b) and 24,

RECALLING the Procedural and Substantive Rules in the Field of State Aid adopted on 19 January 1994 by the Authority ⁽³⁾,

WHEREAS:

Under Article 24 of the Surveillance and Court Agreement, the Authority shall give effect to the provisions of the EEA Agreement concerning state aid,

Under Article 5(2)(b) of the Surveillance and Court Agreement, the 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 Authority considers it necessary,

On 19 December 2012, the European Commission adopted a new Communication on the application of state aid rules in relation to the *rapid deployment of broadband networks* ⁽⁴⁾.

That Communication is also of relevance for the European Economic Area,

Uniform application of the EEA state aid rules is to be ensured throughout the European Economic Area,

⁽¹⁾ The 'EEA Agreement'.

⁽²⁾ The 'Surveillance and Court Agreement'.

⁽³⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ) L 231, 3.9.1994, p. 1, and EEA Supplement No 32, 3.9.1994, p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/> NB: Updated hyperlink.

⁽⁴⁾ Communication from the Commission; EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks (OJ C 25, 26.1.2013, p. 1).

According to point II under the heading 'GENERAL' at the end of Annex XV to the EEA Agreement, the Authority, after consultation with the Commission, is to adopt acts corresponding to those adopted by the European Commission,

The European Commission and the EFTA States have been consulted,

HAS ADOPTED THIS DECISION:

Article 1

The State Aid Guidelines shall be amended by introducing a new chapter on the application of state aid rules in relation to the rapid deployment of broadband networks. The new chapter is contained in the Annex to this Decision.

Article 2

Only the English version is authentic.

Done at Brussels, 20 February 2013.

For the EFTA Surveillance Authority

Oda Helen SLETNES

President

Sabine MONAUNI-TÖMÖRDY

College Member

ANNEX

APPLICATION OF STATE AID RULES IN RELATION TO RAPID DEPLOYMENT OF BROADBAND NETWORKS ⁽¹⁾**1. INTRODUCTION**

- (1) Broadband connectivity is of strategic importance for European growth and innovation in all sectors of the economy and for social and for territorial cohesion. The European Union's Europe 2020 Strategy ('EU2020') underlines the importance of broadband deployment. One of its flagship initiatives, the Digital Agenda for Europe (hereinafter referred to as 'the DAE') ⁽²⁾ restates the objective of the EU2020 to bring basic broadband to all Europeans by 2013 and seeks to ensure that, by 2020, (i) all Europeans have access to much higher internet speeds of above 30 Mbps and (ii) 50 % or more of European households subscribe to internet connections above 100 Mbps. In line with the EU2020 and the DAE, the EFTA Surveillance Authority (hereinafter referred to as 'the Authority') also supports the widespread availability of broadband services for all European citizens, and access to higher internet speeds.
- (2) The electronic communication sector has undergone a thorough liberalisation process and is now subject to sectoral regulation. The EEA regulatory framework for electronic communications also provides harmonisation rules concerning broadband access ⁽³⁾. With regard to legacy broadband networks, wholesale markets are to date subject to *ex ante* regulation in the majority of the EEA States. Further deployment of broadband networks and in particular of Next Generation Access (hereinafter referred to as NGA) ⁽⁴⁾ networks continues to require the intervention of the national regulatory authorities (hereinafter referred to as NRAs) due to their role in the electronic communications sector.
- (3) It is all the more important that public funds are carefully used in this sector and that the Authority ensures that state aid is complementary and does not substitute investments of market players. Any State intervention should limit as much as possible the risk of crowding out private investments, of altering commercial investment incentives and ultimately of distorting competition contrary to the common interest of the EEA.
- (4) These guidelines summarise the principles of the Authority's policy in applying the state aid rules of the EEA Agreement to measures that support the deployment of broadband networks in general (Section 2). They explain the application of these principles in the assessment of aid measures for the rapid roll-out of basic broadband and very high speed, next generation access (NGA) networks (in Section 3). The Authority will apply the guidelines in the assessment of state aid for broadband. This will increase the legal certainty and transparency of its decision-making.

2. THE MAIN PRINCIPLES OF THE AUTHORITY'S POLICY ON STATE AID FOR BROADBAND

- (5) According to Article 61(1) of the EEA Agreement, '*any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement*'. It follows that in order for a measure to qualify as state aid, the following cumulative conditions have to be met:
 - (a) the measure has to be granted out of State resources,
 - (b) it has to confer an economic advantage to undertakings,

⁽¹⁾ This Chapter corresponds to the *Communication from the European Commission — EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks* (OJ C 25, 26.1.2013, p. 1).

⁽²⁾ Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 245 final, *A Digital Agenda for Europe*, as recognised in the resolution from the 37th Meeting of the EEA Joint Parliamentary Committee on 26 October 2011.

⁽³⁾ See Article 12(4) of Act referred to at point 5cl of Annex XI to the EEA Agreement (*Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)* (OJ L 108, 24.4.2002, p. 33) (OJ L 116, 22.4.2004, p. 60 and EEA Supplement No 20, 22.4.2004, p. 14), as amended by Directive 2009/140/EC (Better Regulations Directive) (OJ L 337, 18.12.2009, p. 37) (not yet incorporated into the EEA Agreement) and by Act referred to at point 5cl of Annex XI to the EEA Agreement (*Regulation (EC) No 544/2009*, (OJ L 167, 29.6.2009, p. 12); OJ L 334, 17.12.2009, p. 4 and EEA Supplement No 68, 17.12.2009, p. 4).

⁽⁴⁾ See Act referred to at point 26l of Annex XI of the EEA Agreement (*Commission Recommendation of 20.9.2010 on regulated access to Next Generation Access Networks (NGA)* (OJ L 251, 25.9.2010, p. 35) OJ L 341, 13.12.2012, p. 28 and EEA Supplement No 70, 13.12.2012, p. 32.

- (c) the advantage has to be selective and
- (d) distort or threaten to distort competition;
- (e) the measure has to affect intra-EEA trade.

2.1. Article 61(1) of the EEA Agreement: Presence of aid

- (6) **The use of State resources:** The transfer of State resources may take many forms such as direct grants, tax rebates ⁽⁵⁾, soft loans or other types of preferential financing conditions. State resources will also be involved if the State provides a benefit in kind, for instance investing in the construction of (part) of the broadband infrastructure. State resources can be used ⁽⁶⁾ at the national, regional or local level.
- (7) **Undertaking:** State measures supporting broadband investments usually address the exercise of an economic activity, such as the construction, operation and granting of access to broadband infrastructure or enabling the provision of connectivity to end users. Also the State itself can carry out an economic activity when it operates and exploits (parts of) a broadband infrastructure, for instance via an in-house company or as part of the State administration. The construction of a broadband network infrastructure with a view of its future commercial exploitation by the State or third party operators, will also constitute an economic activity ⁽⁷⁾. The roll-out of a broadband network for non-commercial purposes might not constitute state aid ⁽⁸⁾, because the network construction does not favour any undertaking ⁽⁹⁾. However, if such a network is subsequently opened for the use of broadband investors or operators, state aid is likely to be involved ⁽¹⁰⁾.
- (8) **Advantage:** The aid is usually granted directly to investors of the network, which in most cases are chosen by means of a competitive tender process. When the State's contribution is not provided on normal market terms and consequently qualifies as state aid under the market economy investor principle (see paragraph (11) below), the use of a competitive selection process ensures that any aid is limited to the minimum amount necessary for the particular project. However, it does not eliminate the aid, as the public authority will still provide a subsidy to the winning bidder (for instance in terms of 'gap funding' or in-kind contribution) and the purpose of such procedure is precisely the selection of the aid beneficiary. The financial support received will enable the successful bidder to conduct this commercial activity on conditions which would not otherwise be available on the market. Besides the direct beneficiary of the aid, third party operators receiving wholesale access to the subsidised infrastructure may be indirect beneficiaries ⁽¹¹⁾.
- (9) **Selectivity:** State measures supporting the deployment of broadband networks are selective in nature in that they target broadband investors and third party operators which are active only in certain segments of the overall electronic communications services market. As regards the business-end users of the subsidised network ⁽¹²⁾, by contrast, the measure might not be selective as long as the access to the subsidised infrastructure is open to all sectors of the economy. Selectivity will exist if broadband deployment is specifically addressed to dedicated business users, for instance if the State support is geared toward the deployment of a broadband network in favour of pre-determined companies which are not chosen according to general criteria applicable in the entire area for which the granting authority is responsible ⁽¹³⁾.

⁽⁵⁾ See for instance, Commission Decision No 398/05 — Hungary, *Development Tax Benefit for Broadband*.

⁽⁶⁾ Resources of a public undertaking constitute State resources within the meaning of Article 61(1) of the EEA Agreement because the public authorities control these resources. Case C-482/99 *France v Commission*, [2002] ECR I-4397. In line with this judgment, it will further have to be assessed whether financing via a public undertaking is imputable to the State.

⁽⁷⁾ Case T-443/08 and T-455/08 *Freistaat Sachsen and Others v Commission* [2011] ECR II-1311, paragraphs (93) to (95).

⁽⁸⁾ See, for instance, Commission Decision in Case NN 24/07 — Czech Republic, *Prague Municipal Wireless Network*.

⁽⁹⁾ Similarly, if a network is constructed or broadband services are procured to satisfy the own needs of the public administration, under certain circumstances, such intervention might not confer advantage to economic undertakings. See Commission Decision in Case N 46/07 — United Kingdom, *Welsh Public Sector Network Scheme*.

⁽¹⁰⁾ Commission Decision in Case SA.31687(N 436/10) — Italy, *Broadband in Friuli Venezia Giulia (Project Hermes)* and in Case N 407/09 — Spain, *Xarxa Oberta*.

⁽¹¹⁾ It is likely that the benefit of the subsidy is at least partially passed on to third party operators even if they pay a remuneration for the wholesale access. Indeed wholesale prices are often regulated. Price regulation leads to a lower price than the one which the wholesaler could otherwise achieve on the market (which could be a monopoly price if there is no competition with other networks). Where prices are not regulated, the wholesaler will in any case be required to benchmark his prices on the average prices applied in other, more competitive areas (see paragraph (74) h) below) which is also likely to lead to a price lower than the one which the wholesaler could otherwise have achieved on the market.

⁽¹²⁾ Subsidies to residential users fall outside the scope of Article 61(1) of the EEA Agreement.

⁽¹³⁾ An example would be aid to a business districts, see for instance, Commission Decision in Case N 626/09 — Italy, *NGA for industrial districts of Lucca*.

- (10) **Distortion of competition:** According to the case-law of the Court of Justice of the European Union (hereinafter referred to as the 'CJEU'), financial support or support in kind distorts competition insofar as it strengthens the position of an undertaking compared with other undertakings ⁽¹⁴⁾. Due to the state aid granted to a competitor, existing operators might reduce capacity or potential operators might decide not to enter into a new market or a geographic area. Distortions of competition are likely to be enhanced if the beneficiary of the aid has market power. Where the aid beneficiary is already dominant on a market, the aid measure may reinforce this dominance by further weakening the competitive constraint that competitors can exert.
- (11) **Effect on trade:** Finally, insofar as the State intervention is liable to affect service providers from other EEA States, (also by discouraging their establishment in the EEA State in question) it also has an effect on trade since the markets for electronic communications services (wholesale and retail broadband markets) are open to competition between operators and service providers ⁽¹⁵⁾.

2.2. Absence of aid: the application of the market economy investor principle

- (12) Article 125 of the EEA Agreement provides that '[t]his Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership'. According to the case-law of the CJEU, relating to the corresponding Article 345 of the Treaty on the Functioning of the European Union (hereinafter referred to as the 'TFEU') it follows from the principle of equal treatment that capital placed by the State, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as state aid. When equity participation or capital injections by a public investor do not present sufficient prospects of profitability, even in the long term, such intervention must be regarded as aid within the meaning of Article 61(1) of the EEA Agreement, and its compatibility with the functioning of the EEA Agreement must be assessed on the basis solely of the criteria laid down in that provision ⁽¹⁶⁾.
- (13) In its Amsterdam decision, the European Commission (hereinafter referred to as 'the Commission') has examined the application of the principle of the market economy private investor in the broadband field ⁽¹⁷⁾. As underlined in this decision, the conformity of a public investment with market terms has to be demonstrated thoroughly and comprehensively, either by means of a significant participation of private investors or the existence of a sound business plan showing an adequate return on investment. Where private investors take part in the project, it is a *sine qua non* condition that they would have to assume the commercial risk linked to the investment under the same terms and conditions as the public investor. This also applies to other forms of state supports such as soft loans or guarantees ⁽¹⁸⁾.

2.3. State aid for broadband deployment as a service of general economic interest — Altmark and compatibility under Article 59(2) of the EEA Agreement.

- (14) In some cases, EFTA States may consider that the provision of a broadband network should be regarded as a service of a general economic interest (hereinafter referred to as 'SGEI') within the meaning of Article 59(2) of the EEA Agreement ⁽¹⁹⁾ and the *Altmark* jurisprudence ⁽²⁰⁾ and provide public funding on this basis. In such cases, EFTA States measures have to be assessed in line with the Authority's Guidelines on compensation granted for the provision of services of general economic interest ⁽²¹⁾, and the Authority's Framework for state aid in the form of public service compensation ⁽²²⁾, as well as the Commission Decision of 20 December 2011 on the application of

⁽¹⁴⁾ Case C-310/99 *Italian Republic v Commission* [2002] ECR I-02289, paragraph 65.

⁽¹⁵⁾ See Commission Decision in Case N 237/08 — Germany, *Broadband support in Niedersachsen*.

⁽¹⁶⁾ Case C-303/88, *Italian Republic v Commission* [1991] ECR I-1433, at paragraphs 20-22.

⁽¹⁷⁾ Commission Decision of 11 December 2007 in Case C 53/06 — The Netherlands, *Citynet Amsterdam — Investment by the city of Amsterdam in a fibre-to-the home (FtTH) network* (OJ L 247, 16.9.2008, p. 27).

⁽¹⁸⁾ The Authority's Guidelines on State Guarantees (OJ L 274, 26.10.2000, EEA Supplement No 48, 26.10.2000, p. 45), amended by OJ L 105, 21.4.2011, p. 32, EEA Supplement No 23, 21.4.2011, p. 1.

⁽¹⁹⁾ According to the case-law, undertakings entrusted with the operation of services of general economic interest must have been assigned that task by an act of a public authority. In this respect, a service of general economic interest may be entrusted to an operator through the grant of a public service concession; see Joined Cases T-204/97 and T-270/97 *EPAC — Empresa para a Agroalimentação e Cereais, SA v Commission* [2000] ECR II-2267, paragraph 126 and Case T-17/02 *Fred Olsen, SA v Commission* [2005] ECR II-2031, paragraphs 186, 188-189.

⁽²⁰⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747. Hereinafter referred to as 'the *Altmark* Judgment'.

⁽²¹⁾ See <http://www.eftasurv.int/media/state-aid-guidelines/Part-VI—Compensation-granted-for-the-provision-of-services-of-general-economic-interest.pdf> (not yet published).

⁽²²⁾ See <http://www.eftasurv.int/media/state-aid-guidelines/Part-VI—Framework-for-state-aid-in-the-form-of-public-service-compensation.pdf> (not yet published).

Article 106(2) of the Treaty on the Functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ⁽²³⁾, and Commission Regulation (EC) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest ⁽²⁴⁾. These documents (referred to all together as the 'SGEI package'), indeed, also apply to state aid for broadband deployment. What follows will only illustrate the application of some of the principles clarified in these documents to broadband financing, in the light of certain sectoral specificities.

The SGEI definition

- (15) Concerning the SGEI definition, the Authority has already clarified, in general terms, that EFTA States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions ⁽²⁵⁾.
- (16) Applying this principle to the broadband sector, the Authority considers that in areas where private investors have already invested in a broadband network infrastructure (or are further expanding the network) and are already providing competitive broadband services with an adequate broadband coverage, setting up a parallel competitive and publicly-funded broadband infrastructure cannot be considered as an SGEI within the meaning of Article 59(2) of the EEA Agreement ⁽²⁶⁾. However, where it can be demonstrated that private investors are not in a position to provide in the near future ⁽²⁷⁾ adequate broadband coverage to all citizens or users, thus leaving a significant part of the population unconnected, a public service compensation may be granted to an undertaking entrusted with the operation of an SGEI provided the conditions of the SGEI communication cited above are fulfilled. In this respect, the networks to be taken into consideration for assessing the need for an SGEI should always be of comparable type, namely either basic broadband or NGA networks.
- (17) Moreover, the deployment and the operation of a broadband infrastructure can qualify as an SGEI only if such infrastructure provides all users in a given area with universal connectivity, residential and business users alike. Support for connecting businesses only would not be sufficient ⁽²⁸⁾.
- (18) The compulsory nature of the SGEI mission also implies that the provider of the network to be deployed will not be able to refuse wholesale access to the infrastructure on a discretionary and/or discriminatory basis (because for instance, it may not be commercially profitable to provide access services to a given area).
- (19) Given the degree of competition that has been achieved since the liberalisation of the electronic communications sector in the EEA, and in particular the competition that exists today on the retail broadband market, a publicly-funded network set up within the context of an SGEI should be available to all interested operators. Accordingly, the recognition of an SGEI mission for broadband deployment should be based on the provision of a passive ⁽²⁹⁾, neutral ⁽³⁰⁾ and open infrastructure. Such a network should provide access seekers with all possible forms of network access and allow effective competition at the retail level, ensuring the provision of competitive and affordable services to end-users ⁽³¹⁾.

⁽²³⁾ Act referred to at point 1h of Annex XV to the EEA Agreement, Decision No 66/2012 (OJ L 207, 2.8.2012, p. 46 and EEA Supplement No 43, 2.8.2012, p. 56), (OJ L 7, 11.1.2012, p. 3-10).

⁽²⁴⁾ Act referred to at point 1ha of Annex XV to the EEA Agreement, see Joint Committee Decision No 225/2012 of 7 December 2012, not yet published.

⁽²⁵⁾ See point 48 of the Authority's Guidelines on compensation granted for the provision of services of general economic interest, and point 13 of the Framework for state aid in the form of public service compensation).

⁽²⁶⁾ See point 49 of the Authority's Guidelines on compensation granted for the provision of services of general economic interest.

⁽²⁷⁾ The term in the 'near future' should be understood as referring to a period of three years in line with paragraph (59) of these Guidelines.

⁽²⁸⁾ In line with the principle expressed in point 50 of the Authority's Guidelines on compensation granted for the provision of services of general economic interest. See also Commission Decision N 284/05 — Ireland, Regional broadband Programme: Metropolitan Area Networks ('MANs'), phases II and III and N 890/06 — France, Aide du Sicoval pour un réseau de très haut débit.

⁽²⁹⁾ The passive network infrastructure is basically the physical infrastructure of the networks. For a definition, see the glossary.

⁽³⁰⁾ A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end-users.

⁽³¹⁾ In line with paragraph (74)(g) of these Guidelines.

- (20) Therefore, the SGEI mission should only cover the deployment of a broadband network providing universal connectivity and the provision of the related wholesale access services, without including retail communication services ⁽³²⁾. Where the provider of the SGEI mission is also a vertically integrated broadband operator, adequate safeguards should be put in place to avoid any conflict of interest, undue discrimination and any other hidden indirect advantages ⁽³³⁾.
- (21) Given that the market for electronic communications is fully liberalised, it follows that an SGEI mission for broadband deployment cannot be based on the award of an exclusive or special right to the provider of the SGEI within the meaning of Article 59(2) of the EEA Agreement.

Calculation of the compensation and claw-back

- (22) For the calculation of the SGEI compensation the principles of the SGEI package fully apply. However, in the light of the specificities of the broadband sector, it is useful to add a clarification for SGEI intended to cover unconnected neighbourhoods or districts (so called 'white spots') within a broader area in which some operators have already deployed their own network infrastructure or may plan to do so in the near future. In cases in which the area for which the SGEI is entrusted is not limited just to the 'white spots', because of their size or location, the SGEI provider may need to deploy a network infrastructure also in the profitable areas already covered by commercial operators. In such situation, any compensation granted should only cover the costs of rolling out an infrastructure in the non-profitable white spots, taking into account relevant revenue and a reasonable profit ⁽³⁴⁾.
- (23) In many circumstances, it may be appropriate to fix the compensation amount on an *ex ante* basis, so as to cover the expected funding gap over a given period, rather than to establish the compensation merely on the basis of costs and revenues as they occur. In the former model, there are typically more incentives for the company to contain costs and to develop the business over time ⁽³⁵⁾. Where an SGEI mission for the deployment of a broadband network is not based on the deployment of a publicly-owned infrastructure adequate review and claw-back mechanisms should be put in place to prevent the SGEI provider from obtaining an undue advantage by retaining ownership of the network that was financed with public funds when the SGEI concession expires.

2.4. Administrative and regulatory measures supporting broadband roll-out falling outside the scope of EEA state aid rules

- (24) EFTA States may choose several types of measures in order to accelerate the deployment of broadband and in particular NGA networks besides providing direct funding to companies. These measures do not necessarily need to involve state aid within the meaning of Article 61(1) of the EEA Agreement.

⁽³²⁾ This limitation is justified by the fact that, once a broadband network providing universal connectivity has been deployed, the market forces are normally sufficient to provide communication services to all users at a competitive price.

⁽³³⁾ Such safeguards should include, in particular, an obligation of accounting separation, and may also include the setting up of a structurally and legally separate entity from the vertically integrated operator. Such entity should have sole responsibility for complying with and delivering the SGEI mission assigned to it.

⁽³⁴⁾ It is for the EFTA States to devise, given the particularities of each case, the most appropriate methodology to ensure that the compensation granted will only cover the costs of discharging the SGEI mission in the white spots in line with the principles of the SGEI package, taking into account the relevant revenue and a reasonable profit. For instance, the compensation granted could be based on a comparison between revenues accruing from the commercial exploitation of the infrastructure in the profitable areas already covered by commercial operators and the revenues accruing from the commercial exploitation in the white spots. Any profit in excess of a reasonable profit, i.e. profits beyond the average industry return on capital for deploying a given broadband infrastructure, could be assigned to the financing of the SGEI in the non-profitable areas while the remaining profits could be part of the financial compensation granted. See Commission Decision in Case N 331/08, France — THD Hauts de Seine.

⁽³⁵⁾ However, where future costs and revenue developments are surrounded by a high degree of uncertainty and there is a strong asymmetry of information, the public authority may also wish to adopt compensation models that are not entirely *ex ante*, but rather a mix of *ex ante* and *ex post* (e.g. using claw-backs such as to allow a balanced sharing of unanticipated gains).

- (25) Given that generally a large part of the cost of deploying NGA networks is in the civil engineering work ⁽³⁶⁾, EFTA States may decide in accordance with the regulatory framework for electronic communications ⁽³⁷⁾, for instance, to facilitate the acquisition process of rights of ways, to require that network operators coordinate their civil engineering works and/or that they share part of their infrastructure. In the same vein, EFTA States may also require that for any new constructions (including new water, energy, transport or sewage networks) and/or buildings a connection suitable for NGA should be in place. Third parties may also place at their own cost their passive network infrastructure when general civil engineering works are carried out in any event. This opportunity should be offered in a transparent and non-discriminatory way to all interested operators and should in principle be open to all potential users and not just electronic communications operators (*i.e.* electricity gas, water utilities etc.) ⁽³⁸⁾. A centralised inventory of the existing infrastructure (subsidised or otherwise), possibly also including planned works, could help the roll-out of commercial broadband ⁽³⁹⁾. Existing infrastructure does not only concern telecommunication infrastructure, such as wired, wireless or satellite infrastructure, but also alternative infrastructures (sewers, manholes, etc.) of other industries (such as utilities) ⁽⁴⁰⁾.

2.5. The compatibility assessment under Article 61(3)(c) of the EEA Agreement

- (26) Where State intervention to support broadband deployment fulfils the conditions defined in Section 2.1, its compatibility will generally be assessed by the Authority under Article 61(3)(c) of the EEA Agreement ⁽⁴¹⁾. To date, regional and local authorities have adopted different models of intervention. A non-exhaustive list of these models is provided in the Appendix. Apart from those described in the appendix, public authorities may also develop other models of supporting broadband deployment ⁽⁴²⁾. For all types of intervention forms all the compatibility criteria set out these Guidelines must be applied ⁽⁴³⁾.
- (27) Broadband state aid projects may be implemented in assisted areas within the meaning of Article 61(3)(a) and (c) of the EEA Agreement, and the Regional Aid specific rules ⁽⁴⁴⁾. In this case, aid for broadband may qualify as aid for an initial investment within the meaning of the regional aid rules. Where a measure falls within the scope of such rules, and where it is envisaged to grant individual ad hoc aid to a single firm, or aid confined to one area of activity, the EFTA State is responsible for demonstrating that the conditions of the regional aid rules have been fulfilled. This includes in particular that the project in question contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition.

2.5.1. Overview of the common principles of compatibility

- (28) In the assessment under Article 61(3)(c) of the EEA Agreement the Authority ensures that the positive impact of the aid measure in reaching an objective of common interest outweighs its potential negative side effects, such as distortions of trade and competition. This exercise is conducted in two steps.

⁽³⁶⁾ For instance digging, laying down cables, in-house wirings. In case of deploying fibre to the home networks, such costs could entail up to 70 %-80 % of the total investment costs.

⁽³⁷⁾ For reference, see above, footnote 3.

⁽³⁸⁾ See also Commission Decision in Case N 383/09 — Germany — *Amendment of N 150/23008 Broadband in the rural areas of Saxony*. This case concerned a situation where general civil engineering works, like road maintenances, did not constitute state aid. The measures taken by the German authorities constituted 'general civil engineering works' which would have been carried out by the State for maintenance purposes in any event. The possibility of placing ducts and broadband infrastructure at the occasion of the road maintenance — and at the costs of the operators — was announced publicly and not limited to or geared towards the broadband sector. However, it cannot be excluded that public funding of such works falls within the notion of aid of Article 61(1) of the EEA Agreement if they are limited to or clearly geared towards the broadband sector.

⁽³⁹⁾ See, for instance, the German NRA's 'Infrastrukturatlas', where operators voluntarily share information on the available and potential reusable infrastructures.

⁽⁴⁰⁾ It should be recalled that the Regulatory framework for e-communications gives the competent national authorities the possibility to require undertakings to provide the necessary information in order for these authorities to be able to establish, in conjunction with NRAs, a detailed inventory of the nature, availability and geographical location of network elements and facilities, and make it available to interested parties. See Article 12(4) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory Framework for Electronic Communications Networks and services (Framework Directive) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

⁽⁴¹⁾ See, for instance, the Authority's Decision No 231/11/COL on the rapid deployment of a Next Generation Access network in rural areas of the municipality of Tromsø (OJ C 10, 2.1.2012, p. 5 and EEA Supplement No 2, 12.1.2012, p. 3). A list of all Commission decisions taken under the state aid rules concerning broadband is available at http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

⁽⁴²⁾ For instance, loans (as opposed to grants) may be a useful tool to counteract the lack of credit for long term infrastructure investments.

⁽⁴³⁾ This is without prejudice to the possible application of the Authority's Regional Aid Guidelines as referred to in paragraph (27).

⁽⁴⁴⁾ See the Authority's Guidelines on national regional aid applicable *ratione temporis* (e.g. Guidelines on national regional aid for 2007-2013 (OJ L 54, 28.2.2008, p. 1 EEA Supplement No 11, 28.2.2008, p. 1.).

(29) First, every aid measure has to comply with the below necessary conditions. Failure to comply with one of the following conditions will result in declaring the aid incompatible with the functioning of the EEA Agreement.

- (1) Contribution to the achievement of objectives of common interest
- (2) Absence of market delivery due to market failures or important inequalities
- (3) Appropriateness of state aid as a policy instrument
- (4) Existence of incentive effect
- (5) Aid limited to the minimum necessary
- (6) Limited negative effects
- (7) Transparency

(30) Second, if all necessary conditions are met, the Authority balances the positive effects of the aid measure in reaching an objective of common interest against the potential negative effects.

(31) The individual steps of the Authority's assessment in the field of broadband are set out in further detail in what follows.

(1) Contribution to the achievement of objectives of common interest

(32) As regards the common interest objective, the Authority will assess to what extent the planned intervention will contribute to the achievement of the objectives of common interest explained above.

(2) Absence of market delivery due to market failures or important inequalities

(33) A 'market failure' exists if markets, left to their own devices, without intervention fail to deliver an efficient outcome for society. This may arise, for instance, when certain investments are not being undertaken even though the economic benefit for society exceeds the cost ⁽⁴⁵⁾. In such cases, the granting of state aid may produce positive effects and overall efficiency can be improved by adjusting the economic incentives for firms. In the broadband sector, one form of market failure is related to positive externalities. Such externalities arise where market players do not internalise the whole benefit of their actions. For example, the availability of broadband networks paves the way for the provision of more services and for innovation, both of these are likely to benefit more people than the immediate investors and subscribers to the network. The market outcome would therefore generate insufficient private investment in broadband networks.

(34) Due to economics of density, the deployment of broadband networks is generally more profitable where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs of investment, unit costs increase significantly as population densities drop ⁽⁴⁶⁾. Therefore, when deployed on commercial terms, broadband networks tend to profitably cover only part of the population. However, widespread and affordable access to broadband generates positive externalities because of its ability to accelerate growth and innovation in all sectors of the economy. Where the market does not provide sufficient broadband coverage or the access conditions are not adequate, state aid may therefore help to remedy such market failure.

⁽⁴⁵⁾ However, the fact that a specific company may not be capable of undertaking a project without aid does not mean that there is a market failure. For instance, the decision of a company not to invest in a project with low profitability or in a region with limited market demand and/or poor cost competitiveness may not be an indication of a market failure, but rather of a market that functions well.

⁽⁴⁶⁾ Satellite systems also have unit costs, but in larger steps and therefore tend to be more independent of population density.

- (35) A second possible objective of common interest is related to equity. Governments may choose to intervene to correct social or regional inequalities generated by a market outcome. In certain cases, state aid for broadband may also be used to achieve equity objectives, i.e. as a way of improving access to an essential means of communication and participation in society as well as freedom of expression for all members of society, thereby improving social and territorial cohesion.

(3) Appropriateness of state aid as a policy instrument and the design of the measure

- (36) Public intervention in support of broadband networks may take place at State, regional or municipal level. ⁽⁴⁷⁾ Therefore, coordination of the various interventions is essential to avoid duplications and incoherence. To ensure consistency and coordination of the local interventions, it is necessary to ensure a high level of transparency of local initiatives.
- (37) Wherever possible and respecting competences and specificities, EFTA States are encouraged to design nationwide schemes containing the main principles underlying the public initiatives and to indicate the most relevant features of the planned networks ⁽⁴⁸⁾. National framework schemes for broadband development ensure coherency in the use of public funds, reduce administrative burden on smaller granting authorities and accelerate the implementation of the individual aid measures. Further, EFTA States are encouraged to give clear guidance at central level for the implementation of state aid-financed broadband projects.
- (38) The role of NRAs in designing a pro-competitive state aid measure in support of broadband is particularly important. The NRAs have gained technical knowledge and expertise due to the crucial role assigned to them by sectoral regulation ⁽⁴⁹⁾. They are best placed to support public authorities with regard to the state aid schemes and should be consulted when target areas are being identified. NRAs should also be consulted with regard to determining the wholesale access prices and conditions and solving disputes between access seekers and the subsidised infrastructure operator. EFTA States are encouraged to provide NRAs with the resources they need to give such support. Where necessary, EFTA States should provide an appropriate legal basis for such involvement of NRAs in state aid broadband projects. In keeping with best practice, NRAs should issue guidelines for local authorities which include recommendations on market analysis, wholesale access products and pricing principles taking into account the Electronic Communications Regulatory Framework and relative Recommendations issued by the Authority ⁽⁵⁰⁾.
- (39) In addition to the involvement of NRAs, National Competition Authorities may also provide useful advice in particular in relation to large framework schemes to help establishing a level playing field for the bidding operators and to avoid that a disproportionately high share of State funds is earmarked to one operator, thereby strengthening its (possibly already dominant) market position ⁽⁵¹⁾. In addition to the role of NRAs, some EEA States set up

⁽⁴⁷⁾ For municipal and regional funding see Commission Decisions in Cases SA 33420 (2011/N) — Germany, *Breitband Lohr am Main*, N 699/09 — Spain, *Desarrollo del programa de infraestructuras de telecomunicaciones en la Región de Murcia*.

⁽⁴⁸⁾ EU Member States have often notified framework programmes which describe under which conditions municipal or regional funding can be granted to broadband deployment. See, for instance, N 62/10 — Finland, *High speed broadband construction aid in sparsely populated areas of Finland*, N 53/10 — Germany, *Federal framework programme on duct support*, or N 30/10 — Sweden, *State aid to Broadband within the framework of the rural development program*.

⁽⁴⁹⁾ For reference, see above footnote 3.

⁽⁵⁰⁾ See for example the Authority's Recommendation of 5 November 2008 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Act referred to at point 5cl of Annex XI to the EEA Agreement (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services) (OJ C 156, 9.7.2009, p. 18 and EEA Supplement No 36, 9.7.2009, p. 1). This would increase transparency, ease the administrative burden on local authorities and could mean that NRAs would not have to analyse each state aid case individually.

⁽⁵¹⁾ See, for instance, *Avis n° 12-A-02 du 17.1.2012 relatif à une demande d'avis de la commission de l'économie, du développement durable et de l'aménagement du territoire du Sénat concernant le cadre d'intervention des collectivités territoriales en matière de déploiement des réseaux à très haut débit* (French Competition Authority's opinion in relation to the deployment of very high speed broadband networks).

national competence centres to help small, local authorities to design adequate state aid measures and ensure consistency in the application of the state aid rules as specified in these Guidelines ⁽⁵²⁾.

- (40) So that the measure is properly designed, the balancing test further requires that state aid is an *appropriate* policy instrument to address the problem. In this respect, whilst *ex ante* regulation has in many cases facilitated broadband deployment in urban and more densely populated areas, it may not be a sufficient instrument to enable the supply of broadband service, especially in underserved areas where the inherent profitability of investment is low ⁽⁵³⁾. Likewise, although they can contribute positively to broadband penetration ⁽⁵⁴⁾, demand-side measures in favour of broadband (such as vouchers for end users) cannot always solve the lack of broadband provision ⁽⁵⁵⁾. Hence, in some situations there may be no alternative to granting public funding to overcome the lack of broadband connectivity. Granting authorities shall also take into account spectrum (re-)allocations leading to possible network roll-out in the target areas that could achieve the objectives of the granting authorities without the provision of direct grants.

(4) Existence of incentive effect

- (41) Regarding the *incentive effect* of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any state aid. Where an operator is subject to certain obligations to cover the target area ⁽⁵⁶⁾, it may not be eligible for state aid, as the latter is unlikely to have an incentive effect.

(5) Aid limited to the minimum necessary

- (42) In assessing the *proportional* character of the notified measures, the Authority will highlight a number of necessary conditions to minimise the state aid involved and the potential distortions of competition as explained more in detail in the following Sections.

(6) Limited negative effects

- (43) The change in the beneficiary's behaviour because of the aid may also have negative effects on competition and trade, however. The significance of the distortion of competition can be assessed in terms of effects on competitors. If competitors see the profitability of their prior investment decreasing because of the aid, they may decide to reduce their own future investment or even withdraw from the market altogether ⁽⁵⁷⁾. Additionally, where the aid beneficiary to be chosen following the competitive selection process is likely to be an undertaking already dominant on a market or may become dominant due to the State funded investment, the aid measure could weaken the competitive constraint that competitors can exert. Moreover, if a state aid measure or the conditions attached to it (including its financing method when it forms an integral part of it) entail a non-severable violation of EEA law, the aid cannot be declared compatible with the functioning of the EEA Agreement ⁽⁵⁸⁾.

(7) Transparency

- (44) Aid shall be awarded in a transparent manner; in particular, it must be ensured that the EFTA States, economic operators, the interested public and the Authority have easy access to all relevant acts and pertinent information about the aid awarded thereunder. The details of the transparency requirements are specified in paragraph (74).

⁽⁵²⁾ See, for instance, Commission Decisions in Cases N 237/08 *Broadband support in Niedersachsen, Germany* or SA.33671 *Broadband Delivery UK, United Kingdom*.

⁽⁵³⁾ See for instance, Commission Decision N 473/07 — Italy, *Broadband connection for Alto Adige*, Decision N 570/07 — Germany, *Broadband in rural areas of Baden-Württemberg*.

⁽⁵⁴⁾ In particular to promote take-up of already available broadband solutions, be they locally available terrestrial fixed or wireless networks or generally available satellite solutions.

⁽⁵⁵⁾ See, for instance, Commission Decision N 222/06 — Italy, *Aid to bridge the digital divide in Sardinia*.

⁽⁵⁶⁾ This may, for instance, apply to mobile LTE (long-term evolution) or LTE advanced operators with coverage targets under their licence conditions, in the target area. Similarly, if an operator designated with an universal service obligation (USO) receives public service compensation, no additional State aid can be granted to finance the same network.

⁽⁵⁷⁾ This type of effect can be referred to as 'crowding out'.

⁽⁵⁸⁾ See, for instance, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraphs 94-116.

(8) The overall balancing exercise and the compatibility conditions to limit the distortion of competition

- (45) A carefully designed state aid scheme for broadband should ensure that the overall balance of the effects of the measure is positive.
- (46) In this regard, the effect of the state aid measure can be described as a change of activity compared with what would have happened without the aid. The positive effects of the aid are directly linked to the change in the aid beneficiary's behaviour. This change should enable the achievement of the desired common interest goal. In the broadband sector, the aid leads to the rollout of a new infrastructure which would not have been there otherwise, thus delivering additional capacity and speed on the market as well as lower prices and better choice for consumers, higher quality and innovation. This would also result in more access for consumers to online resources and, together with increased consumer protection in this area, it is likely to stimulate an increase in demand.
- (47) A subsidised network should be able to ensure a 'step change' in terms of broadband availability. A 'step change' can be demonstrated if as the result of the public intervention (i) the selected bidder makes significant new investments in the broadband network ⁽⁵⁹⁾ and (ii) the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity ⁽⁶⁰⁾, speeds and competition ⁽⁶¹⁾. The step change shall be compared to that of existing as well as concretely planned network roll-outs.
- (48) Moreover, to ensure that the negative effects on competition are minimised, a number of conditions have to be fulfilled in the design of the aid measure, as specified below in Section 3.4.
- (49) To further ensure that distortions of competition are limited, the Authority may require that certain schemes are subject to a time limitation (of normally four years or less) and to an evaluation in order to verify (i) whether the assumptions and conditions which led to the compatibility decision have been realised; (ii) the effectiveness of the aid measure in light of its pre-defined objectives; (iii) its impact on markets and competition and that no undue distortive effects arise under the duration of the aid scheme that is contrary to the interests of the EEA ⁽⁶²⁾. Given its objectives and in order not to put disproportionate burden on EFTA States and on smaller aid projects, this only applies for national aid schemes and aid schemes with large aid budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen. The evaluation shall be carried out by an expert independent from the state aid granting authority on the basis of a common methodology ⁽⁶³⁾ and shall be made public. The evaluation shall be submitted to the Authority in due time to allow for the assessment of the possible prolongation of the aid measure and in any case upon expiry of the scheme. The precise scope and modalities of the evaluation shall be defined in the approval decision of the aid measure. Any subsequent aid measure with a similar objective shall take into account the results of that evaluation.
- (50) If the balancing test shows that the negative effects outweigh the benefits, the Authority may prohibit the aid, or ask for remedial action, either in the design of the aid, or in the harm it does to competition.

⁽⁵⁹⁾ For instance, marginal investments related merely to the upgrade of the active components of the network should not be considered eligible for state aid. Similarly, although certain copper enhancing technologies (such as vectoring) could increase the capabilities of the existing networks, they may not require significant investments in new infrastructure hence should not be eligible for state aid.

⁽⁶⁰⁾ For instance, an upgrade from a basic to an NGA broadband network. Also certain upgrades of an NGA network (such as extension of fibre connectivity nearer to the end user) could constitute a step change. In areas where broadband networks are already present, the application of the step change should ensure that the use of state aid does not lead to a duplication of existing infrastructure. Similarly, a small, gradual upgrade of existing infrastructures for instance from 12 Mbps to 24 Mbps is unlikely to bring additional service capabilities (and would likely disproportionately favour the existing operator).

⁽⁶¹⁾ The subsidised network should be pro-competitive, i.e. allow for effective access at different levels of the infrastructure in the way indicated in paragraph (74) and, in the case of support to NGA deployment, also in paragraph (76).

⁽⁶²⁾ See, for instance, Commission Decision in Case SA.33671 *Broadband Delivery UK, United Kingdom*.

⁽⁶³⁾ Such a common methodology may be provided by the Authority.

3. THE ASSESSMENT OF STATE AID FOR BROADBAND

3.1. Types of broadband networks

- (51) For the purposes of state aid assessment, the present Guidelines distinguish between basic and NGA networks.
- (52) Several different technology platforms can be considered as basic broadband networks including asymmetric digital subscriber lines (up to ADSL2+ networks), non-enhanced cable (e.g. DOCSIS 2.0), mobile networks of third generation (UMTS) and satellite systems.
- (53) At the current stage of market and technological development ⁽⁶⁴⁾, NGA networks are access networks which rely wholly or partly on optical elements ⁽⁶⁵⁾ and which are capable of delivering broadband access services with enhanced characteristics as compared to existing basic broadband networks ⁽⁶⁶⁾.
- (54) NGA networks are understood to have at least the following characteristics: (i) deliver services reliably at a very high speed per subscriber through optical (or equivalent technology) backhaul sufficiently close to user premises to guarantee the actual delivery of the very high speed; (ii) support a variety of advanced digital services including converged all-IP services, and (iii) have substantially higher upload speeds (compared to basic broadband networks). At the current stage of market and technological development, NGA networks are: (i) fibre-based access networks (FTTx) ⁽⁶⁷⁾; (ii) advanced upgraded cable networks ⁽⁶⁸⁾ and (iii) certain advanced wireless access networks capable of delivering reliable high-speeds per subscriber ⁽⁶⁹⁾.
- (55) It is important to bear in mind that in the longer term NGA networks are expected to supersede existing basic broadband networks and not just to upgrade them. To the extent that NGA networks require a different network architecture, offering significantly better quality broadband services than today as well as the provision of multiple services that could not be supported by today's broadband networks, it is likely that in the future there will be marked differences emerging between areas that will be covered and areas that will not be covered by NGA networks ⁽⁷⁰⁾.
- (56) EFTA States can freely decide what form their intervention will take, provided it complies with state aid rules. In some cases, EFTA States might decide to finance so-called next generation networks (NGN), i.e. backhaul networks which do not reach the end-user. Backhaul networks are a necessary input for retail telecommunication operators to provide access services to the end-users. These types of networks are able to sustain both basic and NGA types of networks ⁽⁷¹⁾ it is the (investment) choice of the telecommunication operators what type of 'last mile' infrastructure they wish to connect to the backhaul network ⁽⁷²⁾. Public authorities may also decide to undertake just civil

⁽⁶⁴⁾ Due to rapid technological development, in the future other technologies may also be able to deliver NGA services.

⁽⁶⁵⁾ Coaxial, wireless and mobile technologies make use, to a certain extent, of a fibre support infrastructure, thereby making them conceptually similar to a wired network using copper to deliver the service for the part of the last mile not covered by fibre.

⁽⁶⁶⁾ The final connection to the end-user may be ensured both by wired and wireless technologies. Given the rapid evolution of advanced wireless technologies such as LTE-Advanced and the intensifying market deployment of LTE or Wi-Fi, next generation fixed wireless access (e.g. based on possibly tailored mobile broadband technology) could be a viable alternative to certain wired NGA (FTTCab, for example) if certain conditions are met. Since the wireless medium is 'shared' (the speed per user depends on the number of connected users in the area covered) and is inherently subject to fluctuating environmental conditions, in order to provide reliably the minimum download speeds per subscriber that can be expected of an NGA, next generation fixed wireless networks may need to be deployed at a certain degree of density and/or with advanced configurations (such as directed and/or multiple antennas). Next generation wireless access based on tailored mobile broadband technology must also ensure the required quality of service level to users at a fixed location while serving any other nomadic subscribers in the area of interest.

⁽⁶⁷⁾ The term FTTx refers to FTTC, FTTN, FTTP, FTTB and FTTH.

⁽⁶⁸⁾ Using at least the 'DOCSIS 3.0' cable modem standard.

⁽⁶⁹⁾ See, for instance, Commission Decision in Case SA.33671 *Broadband Delivery UK, United Kingdom*.

⁽⁷⁰⁾ If today the differences between an area where only narrowband internet is available (dial-up) and an area where broadband exists means that the former is a 'white' area, likewise an area that lacks a next generation broadband infrastructure, but may still have one basic broadband infrastructure in place should also be considered a 'white' NGA area.

⁽⁷¹⁾ In comparison to other networks which do not reach the end consumer (like FTTC), an important characteristic of NGN backhaul infrastructure is that it is open for interconnection with other networks.

⁽⁷²⁾ Commission Decision in Case N 407/09 — Spain — *Optical fibre Catalonia (Xarxa Oberta)*.

engineering works (such as digging on public land, construction of ducts) in order to enable and accelerate the deployment by the operators concerned of their own network elements. Furthermore, when suitable, public authorities might also wish to take satellite solutions into account.

3.2. The distinction between white, grey and black areas for basic broadband networks

- (57) In order to assess market failure and equity objectives, a distinction can be made between the types of areas that may be targeted. This distinction is explained in the following sections. In the identification of the targeted areas, whenever the public intervention is limited to the backhaul part of the network, the state aid assessment will take into account the situation on both the backhaul markets and the access markets ⁽⁷³⁾.
- (58) The different standards to justify public interventions in these geographical areas will be described below.
- (59) For the purpose of identifying the geographical areas as white, grey or black as described below, the aid granting authority needs to determine whether broadband infrastructures exist in the targeted area. In order to further ensure that the public intervention does not disrupt private investments, the aid granting authorities should also verify whether private investors have concrete plans to roll out their own infrastructure in the near future. The term 'near future' should be understood as referring to a period of three years ⁽⁷⁴⁾. If the granting authority takes a longer time horizon for the deployment of the subsidised infrastructure, the same time horizon should also be used to assess the existence of commercial investment plans.
- (60) To verify that there are no private investors planning to roll out their own infrastructure in the near future, the aid granting authority should publish a summary of the planned aid measure and invite interested parties to comment.
- (61) There exists the risk that a mere 'expression of interest' by a private investor could delay delivery of broadband services in the target area if subsequently such investment does not take place while at the same time public intervention has been stalled. The aid granting authority could therefore require certain commitments from the private investor before deferring the public intervention. These commitments should ensure that significant progress in terms of coverage will be made within the three-year period or for the longer period foreseen for the supported investment. It may further request the respective operator to enter into a corresponding contract which outlines the deployment commitments. This contract could foresee a number of 'milestones' which would have to be achieved during the three-year period ⁽⁷⁵⁾ and reporting on the progress made. If a milestone is not achieved, the granting authority may then go ahead with its public intervention plans. This rule applies both for basic and for NGA networks.

3.2.1. 'White areas': promoting territorial cohesion and the economic development objective

- (62) 'White areas' are those in which there is no broadband infrastructure and it is unlikely to be developed in the near future. The Authority acknowledges that by providing financial support for the provision of broadband services in areas where broadband is currently not available, EFTA States pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest, provided the conditions set out in Section 3.4 below are fulfilled ⁽⁷⁶⁾.

⁽⁷³⁾ Commission Decisions in Cases N 407/09 — Spain — *Optical fibre Catalonia (Xarxa Oberta)* and SA. 33438 — Poland, *Broadband network for Eastern Poland*.

⁽⁷⁴⁾ The three-year period would start from the moment of publication of the planned aid measure.

⁽⁷⁵⁾ In this regard, an operator should be able to demonstrate that within the three-year period it will cover a substantial part of the territory and of the population concerned thereby. For instance, the aid granting authority may request any operator who declares an interest in building its own infrastructure in the target area to deliver a credible business plan, supporting documents like bank loan agreements and a detailed calendar deployment plan within two months. In addition, within 12 months the investment should be started and permission should be obtained for most of the rights of ways necessary for the project. Additional milestones on the progress of the measure can be agreed for every 6 month period.

⁽⁷⁶⁾ See, for instance, Commission Decisions in Cases N 607/09 — Ireland, *Rural Broadband Reach*, or N 172/09 — Slovenia, *Broadband development in Slovenia*.

3.2.2. 'Grey areas': need for a more detailed assessment

- (63) 'Grey areas' are those in which one network operator is present and another network ⁽⁷⁷⁾ is unlikely to be developed in the near future. The mere existence of one network operator ⁽⁷⁸⁾ does not necessarily imply that no market failure or cohesion problem exists. If that operator has market power (monopoly) it may provide citizens with a suboptimal combination of service quality and prices. Certain categories of users may not be adequately served or, in the absence of regulated wholesale access tariffs, retail prices may be higher than those charged for the same services offered in more competitive but otherwise comparable areas or regions of the country. If, in addition, there are only limited prospects that alternative operators enter the market, the funding of an alternative infrastructure could be an appropriate measure ⁽⁷⁹⁾.
- (64) On the other hand, in areas where there is already one broadband network operator, subsidies for the construction of an alternative network could distort market dynamics. Therefore State support for the deployment of broadband networks in 'grey' areas is only justified when it can be clearly demonstrated that a market failure persists. A more detailed analysis and a thorough compatibility assessment will be necessary.
- (65) Grey areas could be eligible for State support, provided the compatibility conditions in Section 3.4 are met, if it is proved that (i) no affordable or adequate services are offered to satisfy the needs of citizens or business users ⁽⁸⁰⁾ and that (ii) there are no less distortive measures available (including *ex ante* regulation) to reach the same goals.
- (66) To establish (i) and (ii), the Authority will assess in particular whether:
- (a) the overall market conditions are not adequate, by looking, *inter alia*, into the level of current broadband prices, the type of services offered to end-users (residential and business users) and the conditions attached thereto;
 - (b) in the absence of *ex ante* regulation imposed by an NRA, effective network access is not offered to third parties or access conditions are not conducive to effective competition;
 - (c) overall entry barriers preclude the potential entry of other electronic communication operators ⁽⁸¹⁾, and
 - (d) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network provider have not been able to overcome such problems.

⁽⁷⁷⁾ The same company may operate separate fixed and mobile networks in the same area but this will not change the 'colour' of such area.

⁽⁷⁸⁾ The competitive situation is assessed according to the number of existing infrastructure operators. In Commission Decision N 330/2010 — France, *Programme national Très Haut Débit*, it was clarified that the existence of several retail providers on one network (including Local Loop Unbundling (LLU)) does not turn the area into a black area, but that the territory remains a grey area as only one infrastructure is present. At the same time, the existence of competing operators (at the retail level) will be considered an indication that, albeit grey, the area in question may not be problematic in terms of presence of a market failure. Convincing proof of access problems or quality of service will have to be supplied.

⁽⁷⁹⁾ In its Decision N 131/05 — United Kingdom, *FibreSpeed Broadband Project Wales*, the Commission had to assess whether the financial support given by the Welsh authorities for the construction of an open, carrier-neutral, fibre-optic network linking 14 business parks could still be declared compatible even if the target locations were already served by the incumbent network operator, who provided price regulated leased lines. The Commission found that the leased lines offered by the incumbent operator was very expensive, almost unaffordable for SMEs. See also Commission Decision N 890/06 — France, *Aide du Sicoval pour un réseau de très haut débit* and Commission Decision N 284/05 — Ireland, *Regional Broadband Programme: Metropolitan Area Networks ('MANs'), phases II and III*.

⁽⁸⁰⁾ In addition to the specifications of paragraph (66), the granting authorities could take into consideration indicators such as: the penetration rate for services with the highest performance levels, excessively high prices for high-performance services (including leased lines for end-users as explained in the previous footnote) having the effect of discouraging take up and innovation, e-government services in the process of being developed which require performances beyond the ones offered on the existing network. Where in the target area a significant proportion of citizens and business users are already adequately served, it has to be ensured that the public intervention does not lead to an undue overbuild of the existing infrastructure. In that case, the public intervention may be limited to 'gap-filling' measures only.

⁽⁸¹⁾ For instance, whether the broadband network already in place was built on the basis of a privileged use/access to ducts not accessible by or not shared with other network operators.

- (67) Only grey areas that meet the eligibility criteria listed above will undergo the compatibility test described in section 3.4.

3.2.3. 'Black areas': no need for State intervention

- (68) When in a given geographical zone there are or there will be in the near future at least two basic broadband networks of different operators and broadband services are provided under competitive conditions (infrastructure-based competition⁽⁸²⁾), it can be assumed that there is no market failure. Accordingly, there is very little scope for State intervention to bring further benefits. On the contrary, State support for the funding of the construction of an additional broadband network with comparable capabilities will, in principle, lead to an unacceptable distortion of competition, and the crowding out of private investors. Accordingly, in the absence of a clearly demonstrated market failure, the Authority will take a negative view of measures to fund the roll-out of an additional broadband infrastructure in a 'black area'⁽⁸³⁾.

3.3. The distinction between white, grey and black areas for NGA networks

- (69) The distinction made above in Section 3.2 between 'white', 'grey' and 'black' areas is relevant also for assessing whether state aid for NGA networks is compatible with the functioning of the EEA Agreement under Article 61(3)(c).
- (70) At present, by upgrading active equipment, certain advanced basic broadband networks can also support some broadband services which in the future are likely to be offered over NGA networks (such as triple play services). However, novel products or services which are not substitutable from the perspective of either demand or supply may emerge and will require capacity, reliability and substantially higher upload and download speeds beyond the upper physical limits of basic broadband infrastructure.

3.3.1. 'White NGA areas'

- (71) Accordingly, for the purposes of assessing state aid for NGA networks, an area where NGA networks do not at present exist and where they are not likely to be built within three years in line with paragraphs (59) to (61) by private investors, should be considered to be a 'white NGA' area. Such an area is eligible for state aid to NGA provided the compatibility conditions indicated in Sections 3.4 and 3.5 are fulfilled.

3.3.2. 'Grey NGA areas'

- (72) An area should be considered a 'grey NGA' area where only one NGA network⁽⁸⁴⁾ is in place or is being deployed in the coming three years and there are no plans by any operator to deploy a NGA network in the coming three years. In assessing whether other network investors could deploy additional NGA networks in a given area, account should be taken of any existing regulatory or legislative measures that may have lowered barriers for such network deployments (access to ducts, sharing of infrastructure, etc.). The Authority will need to carry out a more detailed analysis in order to verify whether State intervention is needed since State intervention in such areas carries a high risk of crowding out existing investors and distorting competition. In this respect, the Authority will carry out its assessment on the basis of the compatibility conditions established in these Guidelines.

3.3.3. 'Black NGA areas'

- (73) If at least two NGA networks of different operators exist in a given area or will be deployed in the coming three years, such an area should be considered a 'black NGA' area. The Authority will consider that State support for an additional publicly-funded, equivalent NGA network in such areas is likely to seriously distort competition and is incompatible with the functioning of the EEA Agreement under Article 61(3)(c).

⁽⁸²⁾ If only one infrastructure is present, even if this infrastructure is used — via unbundling (LLU) — by several electronic communication operators, such situation shall be considered to be a competitive grey area. It is not considered as a 'black area' within the meaning of these Guidelines. See also Commission Decision in Case SA. 31316 *Programme national 'Très haut débit'*, France.

⁽⁸³⁾ See Commission Decision of 19.7.2006 on the measure No C 35/05 (ex N 59/05) — *The Netherlands Broadband infrastructure in Appingedam* (OJ L 86, 27.3.2007, p. 1). In this decision, the Commission noted that the competitive forces of the specific market were not duly taken into account. In particular, that the Dutch broadband market was a fast-moving market in which providers of electronic communications services, including cable operators and internet Service Providers, were in the process of introducing very high capacity broadband services without any State support.

⁽⁸⁴⁾ The same company may operate separate fixed and wireless NGA networks in the same area but this will not change the 'colour' of such area.

3.4. Design of the measure and the need to limit distortions of competition

(74) Every State measure in support of broadband deployment should fulfil all compatibility principles described above in Section 2.5, including the common interest objective, the existence of market failure, the appropriateness and the incentive effect of the measure. As regards limiting the distortions of competition, besides the demonstration of how a 'step change' is achieved in all cases (in white, grey and black areas) ⁽⁸⁵⁾, the following necessary conditions must be fulfilled to demonstrate the proportionality of the measure. Failure to meet any of these conditions would most likely require an in-depth assessment ⁽⁸⁶⁾ which could result in a conclusion that the aid is incompatible with the functioning of the EEA Agreement.

(a) *Detailed mapping and analysis of coverage*: EFTA States should clearly identify which geographic areas will be covered by the support measure in question ⁽⁸⁷⁾, whenever possible in cooperation with the competent national bodies. The consultation of the NRA is encouraged but optional. Best practice examples suggest creation of a central database of the available infrastructure at a national level thereby increasing transparency and reducing the costs for the implementation of smaller, local projects. EFTA States have the freedom to define the target areas, however, they are encouraged to take into account economic conditions in the definition of relevant regions before launching the tender ⁽⁸⁸⁾.

(b) *Public consultation*: EFTA States should give adequate publicity to the main characteristics of the measure and to the list of target areas by publishing the relevant information of the project and inviting to comment. A publication on a central webpage at national level would in principle ensure that such information is made available to all interested stakeholders. By also verifying the results of the mapping in a public consultation EFTA States minimise distortions of competition with existing providers and with those who already have investment plans for the near future and enable these investors to plan their activities' ⁽⁸⁹⁾. A detailed mapping exercise and a thorough consultation ensure not only a high degree of transparency but serve also as an essential tool for defining the existence of 'white', 'grey' and 'black' areas ⁽⁹⁰⁾.

(c) *Competitive selection process*: Whenever the granting authorities select a third-party operator to deploy and operate the subsidised infrastructure ⁽⁹¹⁾, the selection process shall be conducted in line with the spirit and the principles of the Public Procurement Directives ⁽⁹²⁾. It ensures that there is transparency for all investors wishing to bid for the implementation and/or management of the subsidised project. Equal and non-discriminatory treatment of all bidders and objective evaluation criteria are indispensable conditions. The competitive tender is a method to reduce budgetary costs, to minimise the potential state aid involved and at the same time reduces the selective nature of the measure in so far as the choice of the beneficiary is not known in

⁽⁸⁵⁾ See paragraph (47) above.

⁽⁸⁶⁾ The detailed assessment could necessitate the opening of a procedure according to Article 1(2) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

⁽⁸⁷⁾ This mapping should be done on the basis of homes passed by a particular network infrastructure and not on the basis of the actual number of homes or customers connected as subscribers.

⁽⁸⁸⁾ For instance, target areas that are too small might not provide sufficient economic incentives for market players to bid for the aid, while areas that are too big might reduce the competitive outcome of the selection process. Several selection procedures also allow different potential undertakings to benefit from state aid thereby avoiding that one (already dominant) operators market share is further strengthened by state aid measures by favouring large market players or discouraging technologies which would mainly be competitive in smaller target areas.

⁽⁸⁹⁾ In case where it can be demonstrated that existing operators did not provide any meaningful information to a public authority for the purposes of the required mapping exercise, such authorities would have to rely only on whatever information has been made available to them.

⁽⁹⁰⁾ See, for instance, Commission Decision in Case N 266/08 — Germany, *Broadband in rural areas of Bayern*.

⁽⁹¹⁾ The situation is different when the public authority decides to deploy and manage the network directly (or through a fully owned entity) such as in Commission Decision in Case N 330/2010 — France *Programme national Très Haut Débit* and SA.33807 (2011/N) —Italy, *National Broadband Plan*. In such cases, to safeguard the results of competition that have been achieved since the liberalisation of the electronic communications sector in the Union, and in particular the competition that exists today on the retail broadband market, in case of a publicly managed subsidised networks (i) the publicly owned network operators shall limit their activity on the pre-defined target areas and shall not expand to other commercially attractive regions; (ii) the public authority shall limit its activity to maintain the passive infrastructure and to grant access to it, but shall not engage in competition on the retail levels with commercial operators and (iii) to have an accounting separation between the funds used for the operation of the networks and the other funds at the disposal of the public authority.

⁽⁹²⁾ Act referred to at point 2 of Annex XVI to the EEA Agreement, (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114), OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18.

advance ⁽⁹³⁾. EFTA States shall ensure a transparent process ⁽⁹⁴⁾ and a competitive outcome ⁽⁹⁵⁾ and shall use a dedicated central website at the national level to publish all ongoing tender procedures on broadband state aid measures ⁽⁹⁶⁾.

- (d) *Most economically advantageous offer*: Within the context of a competitive tender procedure, the aid granting authority shall establish qualitative award criteria on which the submitted bids are assessed. Relevant award criteria may include, for instance, the achieved geographical coverage ⁽⁹⁷⁾, sustainability of the technological approach or the impact of the proposed solution on competition ⁽⁹⁸⁾. Such qualitative criteria have to be weighed against the requested aid amount. In order to reduce the amount of aid to be granted, at similar if not identical quality conditions, the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid. The awarding authority shall always specify in advance the relative weighting which it will give to each of the (qualitative) criteria chosen.
- (e) *Technological neutrality*: As different technological solutions exist to provide broadband services, the tender should not favour or exclude any particular technology or network platform. Bidders should be entitled to propose the provision of the required broadband services using or combining whatever technology they deem most suitable. On the basis of the objective tender criteria, the granting authority is then entitled to select the most suitable technological solution or mix of technology solutions. In principle, universal coverage of larger target areas can be reached with a mix of technologies
- (f) *Use of existing infrastructure*: Since the re-usability of existing infrastructure is one of the main determinants for the cost of broadband roll-out, EFTA States should encourage bidders to have recourse to any available existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funding. Any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the tender, should fulfil the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. EFTA States should setup a national database on the availability of existing infrastructures that could be re-used for broadband roll-out.
- (g) *Wholesale access*: Third parties' effective wholesale access to a subsidised broadband infrastructure is an indispensable component of any State measure supporting broadband. In particular, wholesale access enables third party operators to compete with the selected bidder (when the latter is also present at the retail level), thereby strengthening choice and competition in the areas concerned by the measure while at the same time avoiding the creation of regional service monopolies. Applying only to state aid beneficiaries, this condition is not

⁽⁹³⁾ See for instance, Commission Decision N 475/07- Ireland, *National Broadband Scheme (NBS)*, Commission Decision N157/06 — United Kingdom, *South Yorkshire Digital region Broadband Project*.

⁽⁹⁴⁾ When the object of such a competitive selection process is a public contract covered by the EU public procurement directives 2004/17/EC (Act referred to at point 4 of Annex XVI to the EEA Agreement, OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18) or 2004/18/EC (Act referred to at point 2 of Annex XVI to the EEA Agreement (OJ L 245, 7.9.2006, p. 22) and EEA Supplement No 44, 7.9.2006, p. 18), the tender notice shall be published in EU Official Journal in order to ensure EEA wide competition, in accordance with the requirements of these directives. In all other cases, tender information should be publicised at least nationwide.

⁽⁹⁵⁾ In the case that a competitive selection process does not generate a sufficient number of bidders, the cost calculation proposed by the winning bidder may be put to examination by an external auditor.

⁽⁹⁶⁾ If for technical reasons it is not feasible to set up a national website, regional websites should be put in place. Such regional websites should be interconnected.

⁽⁹⁷⁾ In terms of the geographic area as defined in the call for the competitive selection process.

⁽⁹⁸⁾ For instance, network topologies allowing full and effective unbundling could receive more points. It should be noted that at this stage of market development, a point-to-point topology is more conducive for long term competition in comparison with point-to-multipoint topology, while the deployment costs are comparable especially in urban areas. Point-to-multipoint networks will be able to provide full and effective unbundling only once wavelength-division-multiplexed passive optical network (WDM-PON) access is standardised and requested under the applicable regulatory frameworks.

contingent on any prior market analysis within the meaning of Article 7 of the Framework Directive ⁽⁹⁹⁾. The type of wholesale access obligations imposed on a subsidised network should be aligned with the portfolio of access obligations laid down under the sectoral regulation ⁽¹⁰⁰⁾. In principle, subsidised companies should provide a wider range of wholesale access products than those mandated by NRAs under sectoral regulation to the operators who have significant market power ⁽¹⁰¹⁾ since the aid beneficiary is using not just its own resources but taxpayers' money to deploy its own infrastructure ⁽¹⁰²⁾. Such wholesale access should be granted as early as possible before starting the network operation ⁽¹⁰³⁾.

Effective wholesale access to the subsidised infrastructure ⁽¹⁰⁴⁾ should be offered for at least a period of seven years. If at the end of the seven-year period the operator of the infrastructure in question is designated by the NRA under the applicable regulatory framework as having significant market power (SMP) in the specific market concerned, access obligations would need to be imposed in accordance with the Electronic Communications Regulatory Framework ⁽¹⁰⁵⁾. NRAs or other competent national bodies are encouraged to publish guidance for granting authorities on the principles to set wholesale access conditions and tariffs. In order to allow effective access, the same access conditions shall apply on the entirety of the subsidised network, including on the parts of such network where existing infrastructures have been used ⁽¹⁰⁶⁾. The access obligations shall be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure.

- (h) *Wholesale access pricing:* Benchmarking is an important tool for ensuring that the aid granted will serve to replicate market conditions like those prevailing in other competitive broadband markets. Wholesale access price, should be based on the pricing principles set by the NRA and on benchmarks and should take into account the aid received by the network operator ⁽¹⁰⁷⁾. For the benchmark, the average published wholesale prices that prevail in other comparable, more competitive areas of the country or the EEA shall be taken or, in the absence of such published prices, prices already set or approved by the NRA for the markets and services concerned. If there are no published or regulated prices available for certain wholesale access products to benchmark against, the pricing should follow the principles of cost orientation pursuant to the methodology established in accordance with the sectorial regulatory framework ⁽¹⁰⁸⁾. Given the complexity of benchmarking wholesale access prices, EFTA States are encouraged to provide a mandate and the necessary staffing to the NRA to advise aid granting authorities on such matters. A detailed description of the aid project should be sent to the NRA at least two months prior to the notification to allow the NRA to have a reasonable period of time to provide its opinion. Where the NRA has obtained such competence, the aid granting authority should seek advice from the NRA in setting the wholesale access prices and conditions. The benchmarking criteria should be clearly indicated in the tender documents.
- (i) *Monitoring and claw-back mechanism:* The granting authorities shall closely monitor the implementation of the broadband project during the entire duration of the project. Where the operator is selected on the basis of a competitive procurement procedure, there is typically less need to monitor the subsequent development of the profitability of the project. In many circumstances, it may be appropriate to fix the aid amount on an *ex ante* basis, so as to cover the expected funding gap over a given period, rather than to establish the aid amount on the basis of costs and revenues as they are incurred. In the former model, there are typically more incentives for the company to contain costs and to become more efficient over time. However, where future costs and revenue developments are surrounded by a high degree of uncertainty and there is a strong asymmetry of

⁽⁹⁹⁾ For reference, see above footnote 3. Moreover, whenever EFTA States opt for a management model whereby the subsidised broadband infrastructure offers only wholesale access services to third parties, not retail services, the likely distortions of competition are further reduced as such a network management model helps to avoid potentially complex issues of margin squeeze and hidden forms of access discrimination. See, for instance, SA.30317 High-speed broadband in Portugal.

⁽¹⁰⁰⁾ Whenever the state aid measure covers the funding of new passive infrastructure elements such as ducts or poles, access to those should also be granted and be unlimited in time. See, for instance, Commission Decisions in Cases N 53/2010 — Germany, *Federal framework programme on ducts support*, N 596/09 — Italy — *Bridging the digital divide in Lombardia*, N 383/09 — Germany — *Amendment of N 150/08 Broadband in the rural areas of Saxony*, N 330/2010 — France, *Programme national Très Haut Débit*.

⁽¹⁰¹⁾ For example, for NGA networks, the point of reference should be the list of access products included in the NGA recommendation.

⁽¹⁰²⁾ If state aid is provided to fund the construction of ducts, the latter should be large enough to cater for several cable networks and to host point-to-multipoint as well as point-to-point solutions.

⁽¹⁰³⁾ Where the network operator also provides retail services, in line with the NGA recommendation, this would normally imply granting access at least six months before the launch of such retail services.

⁽¹⁰⁴⁾ Effective wholesale access to the subsidised infrastructure can be provided by means of the wholesale access products detailed in Appendix II.

⁽¹⁰⁵⁾ For reference, see above footnote 3.

⁽¹⁰⁶⁾ For instance, the usage of wholesale access by third parties cannot be limited only to retail broadband services.

⁽¹⁰⁷⁾ To what extent the aid amount is taken into account may vary depending on the competitive situation in the competitive selection process and in the target area. The benchmark would therefore be the upper limit of the wholesale price.

⁽¹⁰⁸⁾ So that operators do not artificially inflate their costs, EFTA States are encouraged to use contracts which incentivise firms to reduce their costs with time. For instance, in contrast to cost-plus contracts, a fixed-price contract would give the company the incentive to reduce costs over time.

information, the public authority may also wish to adopt financing models that are not entirely *ex ante*, but rather a mix of *ex ante* and *ex post* (e.g. using claw-backs such as to allow a balanced sharing of unanticipated gains). In order not to put a disproportionately high burden on small, local projects, a minimum threshold may be justified for the claw-back mechanism. Therefore EFTA States should implement the claw-back mechanism if the aid amount of the project is above EUR 10 million ⁽¹⁰⁹⁾. Granting authorities can foresee that any extra profit reclaimed from the selected bidder could be spent for further broadband network expansion within the framework scheme and at the same conditions of the original aid measure. An accounting separation obligation for the winning bidder as regards the subsidy received will make it easier for the granting authorities to monitor the implementation of the scheme as well as any extra profit generated ⁽¹¹⁰⁾.

- (j) *Transparency*: EFTA States shall publish on a central website at least the following information on the state aid measures: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology. Such information shall be published after the granting decision has been taken and shall be kept for at least 10 years and shall be available for the general public without restrictions. The aid beneficiary is obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including, inter alia, ducts, street cabinets and fibre) deployed under a state aid measure ⁽¹¹¹⁾. This will enable other operators to easily ascertain the possibility to access such infrastructure and should provide all relevant information about the broadband network to a central register of broadband infrastructures, if such database exists within the EFTA State, and/or to the NRA.
- (k) *Reporting*: starting from the date when the network is put into use, for the duration of the aid measure, the state aid granting authority should report every two years key information on the aid projects to the EFTA Surveillance Authority ⁽¹¹²⁾. In the case of national or regional framework schemes, the national or regional authorities should consolidate the information of the individual measures and report to the Authority. When adopting a decision under these Guidelines the Authority may require additional reporting regarding the aid granted.

3.5. Supporting the rapid deployment of NGA networks

- (75) As with the policy followed with respect to basic broadband deployment, state aid in favour of NGA network deployment may constitute an appropriate and justified instrument, provided that a number of fundamental conditions are fulfilled. While commercial operators take their investment decisions in NGA networks on the basis of the expected profitability, the choice of the public authority has to take into account also the public interest in funding an open and neutral platform on which multiple operators will be able to compete for the provision of services to the end users.
- (76) Any measure to support NGA deployment must fulfil the compatibility conditions indicated in Section 2.5 and 3.4. In addition, the following conditions must be met, taking into account the specific situations in which the public investment in NGA networks will occur.
 - (a) *Wholesale access*: Due to the economics of NGAs, it is of utmost importance to ensure effective wholesale access for third party operators. Especially in areas in which there are already competing basic broadband operators ⁽¹¹³⁾, in which it has to be ensured that the competitive market situation which existed before the intervention is preserved. The access conditions described above in Section 3.4 are specified as follows. The subsidised network must therefore offer access under fair and non-discriminatory conditions to all operators who request

⁽¹⁰⁹⁾ The claw-back is not necessary in case of publicly owned, wholesale only infrastructures, managed by the public authority with the sole purpose to grant fair and non-discriminatory access to all operators if the conditions specified in footnote 93 are met.

⁽¹¹⁰⁾ Best practice examples suggest monitoring and claw-back for a minimum of seven years, and any extra profit (i.e. profit higher than in the original business plan or the industry average) to be shared between the beneficiary and the public authorities according to the aid intensity of the measure.

⁽¹¹¹⁾ This information should be regularly updated (for example every six months) and shall be available in non-proprietary formats.

⁽¹¹²⁾ Such information should at least include: besides the information already made public following paragraph (74) j), the date when the network is put into use, the wholesale access products, the number of access seekers and service providers on the network, the number of houses passed, take-up rates.

⁽¹¹³⁾ Including LLU operators.

it and will provide them with the possibility of effective and full unbundling ⁽¹¹⁴⁾. Moreover, third party operators must have access to passive and not only active ⁽¹¹⁵⁾ network infrastructure ⁽¹¹⁶⁾. Apart from bitstream access and unbundled access to the local loop and sub-loop, the access obligation should therefore also include the right to use ducts and poles, dark fibre or street cabinets ⁽¹¹⁷⁾. Effective wholesale access should be granted for at least seven years and the right of access to ducts or poles should not be limited in time. This is without prejudice to any similar regulatory obligations that may be imposed by the NRA in the specific market concerned in order to foster effective competition or measures adopted during or after the expiry of that period ⁽¹¹⁸⁾.

It may be the case that in areas with low population density, where there are limited broadband services, or for small local companies, the imposition of all types of access products might disproportionately increase investment costs ⁽¹¹⁹⁾ without delivering significant benefits in terms of increased competition ⁽¹²⁰⁾. In such a situation, one may envisage that access products requiring costly interventions on the subsidised infrastructure not otherwise foreseen (e.g. co-location in intermediary distribution points) be offered only in case of a reasonable demand from a third-party operator. The demand is considered reasonable if (i) the access seeker provides a coherent business plan which justifies the development of the product on the subsidised network and (ii) no comparable access product is already offered in the same geographic area by another operator at equivalent prices to those of more densely populated areas ⁽¹²¹⁾.

By contrast, the preceding paragraph cannot be invoked in more densely populated areas where one may expect infrastructure competition to develop. Therefore, in such areas, the subsidised network should satisfy all types of network access products that operators may seek ⁽¹²²⁾.

- (b) *Fair and non-discriminatory treatment*: The subsidised infrastructure must enable the provision of competitive and affordable services to end-users by competing operators. Where the network operator is vertically integrated, adequate safeguards must be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages. In the same vein, the award criteria should contain the provision that bidders proposing a wholesale-only model, a passive-only model or both shall receive additional points.

⁽¹¹⁴⁾ At this stage of market development, a point-to-point topology can be effectively unbundled. If the selected bidder rolls out a point-to-multipoint topology network, it shall have a clear obligation to provide effective unbundling via wavelength division multiplexing (WDM) as soon as the access is standardized and commercially available. Until WDM unbundling becomes effective, the selected bidder shall be required to provide access seekers with a virtual unbundling product, as close as possible to physical unbundling.

⁽¹¹⁵⁾ If they are indirect beneficiaries, when they obtain access at the wholesale level, third-party operators may have to give bit-stream access themselves. In spite of the fact that aid was only granted for passive infrastructure, also active access was requested for instance in Commission Decision in Case N 330/2010 — France, *Programme national Très Haut Débit*.

⁽¹¹⁶⁾ Such as Customer premise equipment (CPEs) or other equipment needed to operate the network. If it proves necessary to upgrade certain parts of the network in order to provide effective access, this shall be foreseen in the granting authorities' plans, for example: foreseeing adequately sized ducts, increasing the size of street cabinets to provide effective unbundling etc.

⁽¹¹⁷⁾ A strong access obligation is all the more crucial in order to deal with the temporary substitution between the services offered by existing ADSL operators and those offered by future NGA network operators. The access obligation will ensure that competing ADSL operators can migrate their customers to a NGA network as soon as a subsidised network is in place and thus start planning their own future investments without suffering a competitive handicap. See, for instance, N 461/09 — United Kingdom, *Cornwall & Isles of Scilly Next Generation Broadband*.

⁽¹¹⁸⁾ In this regard, the possible persistence of the specific market conditions that justified the granting of an aid for the infrastructure in question should be taken into consideration.

⁽¹¹⁹⁾ The disproportionate increase in costs must be proved with detailed and objective cost calculations by the granting authority.

⁽¹²⁰⁾ For instance, see Commission Decision in Case N 330/2010 — France, *Programme national Très Haut Débit* and in Case SA.33671 — *Broadband Delivery UK, United Kingdom*.

⁽¹²¹⁾ Other conditions may be accepted by the Authority as part of the proportionality analysis in light of the specificities of the case and the overall balancing exercise. See for example, Commission Decision in Case N 330/2010 — France, *Programme national Très Haut Débit* and in Case SA.33671 — United Kingdom, *Broadband Delivery UK*. If the conditions are fulfilled, access should be granted within a period which is customary for the particular market. In the case of conflict, the aid granting authority should ask the NRA or another competent national body for an advice.

⁽¹²²⁾ For instance, in case of passive fixed networks it shall be able to support both point-to-point as well as point-to-multipoint topologies depending on the choice of the operators. In particular in the more densely populated areas, should they be eligible for state aid, it would not be considered in the public interest to grant aid for investments in simple upgrades of existing networks not bringing a step change also in terms of competition.

- (77) State aid projects aiming at the funding of backhaul networks ⁽¹²³⁾ or limited to civil works open for access to all operators and technologies exhibit especially pro-competitive features. This feature will be taken into account in the assessment of such projects.

3.6. Aid to ultra-fast broadband networks

- (78) In light of the objectives referred to in the Introduction, in particular achieving 50 % penetration to internet connections above 100 Mbps, and taking into account that especially in urban areas there may be higher performance needs compared to what commercial investors are willing to offer in the near future, by way of derogation to paragraph (73), public intervention could exceptionally be allowed for NGA networks able to provide ultra-fast speeds well above 100 Mbps.
- (79) In 'black NGA' areas, such intervention could only be allowed if the 'step change' required by paragraph (47) is proved on the basis of the following cumulative criteria:
- (a) the existing or planned ⁽¹²⁴⁾ NGA networks do not reach the end user premises with fibre networks ⁽¹²⁵⁾;
 - (b) the market situation is not evolving towards the achievement of a competitive provision of ultra-fast services ⁽¹²⁶⁾ above 100 Mbps in the near future by the investment plans of commercial operators in accordance with (59) to (61);
 - (c) there is expected demand for such qualitative improvements ⁽¹²⁷⁾.
- (80) In the situation described in the previous paragraph, any new subsidised network must respect the compatibility conditions of paragraphs (74) and (76). In addition, the aid granting authority must also demonstrate that:
- (a) the subsidised network exhibits significant enhanced technological characteristics and performance compared to the verifiable characteristics and performance of existing or planned networks ⁽¹²⁸⁾; and
 - (b) the subsidized network will be based on an open architecture operated as a wholesale only network; and
 - (c) the aid does not lead to an excessive distortion of competition with other NGA technologies that have recently been the subject of significant new infrastructure investments by market operators in the same target areas ⁽¹²⁹⁾.
- (81) Only if these additional conditions are fulfilled, public funding of such networks might be considered compatible under the balancing test. In other words, such funding would have to lead to a significant, sustainable, pro-competitive and non-temporary technological advancement without creating disproportionate disincentives to private investments.

Final Provisions

- (82) These Guidelines will be applied from the first day following their adoption. The Authority will apply these Guidelines to all notified aid measures in respect of which it is called upon to take a decision after the adoption of the Guidelines, even where the projects were notified prior to that date.

⁽¹²³⁾ See above paragraph (56). Interventions going beyond the central office level will be considered already NGA and not NGN. See Commission Decision in Case SA.34031 — *Next generation broadband in Valle d'Aosta*.

⁽¹²⁴⁾ Based on credible investment plans for the near future of three years in accordance with paragraphs (59) to (61).

⁽¹²⁵⁾ For instance, NGA networks do not reach end user premises with fibre in case of FTTN networks, where fibre is installed only until the nodes (cabinets). Similarly, some cable networks are also using fibre until the cabinets and connect end-users with coaxial cables.

⁽¹²⁶⁾ For example, in an area where there is an FTTC or equivalent network and an upgraded cable network (at least DOCSIS 3.0) the market conditions are generally considered competitive enough to be able to evolve towards the provision of ultra-fast services without the need of public intervention.

⁽¹²⁷⁾ See for example the indicators in footnote 81 and 82.

⁽¹²⁸⁾ See paragraph (59) to (61) above.

⁽¹²⁹⁾ This would normally be the case when, due to the aid, market operators cannot recoup the infrastructure investments undertaken in an appropriate period taking into account normal amortisation time. The following (interconnected) factors will in particular be taken into account: the size of the investment, how recent it is, the minimum period required in order to get an adequate return on the investment and the likely effect of the roll-out of the new subsidised ultra-fast network on the number of subscribers to the existing NGA networks and the relative subscription prices.

- (83) In accordance with the Authority's Applicable Rules For The Assessment Of Unlawful state Aid ⁽¹³⁰⁾, the Authority will apply to unlawful aid the rules in force at the time when the aid was granted. Accordingly, it will apply these Guidelines in the case of unlawful aid granted after its publication.
- (84) The Authority herewith proposes to EFTA States, on the basis of Article 61(1) of the EEA Agreement, to take appropriate measures and amend, where necessary, their existing aid schemes in order to bring them into line with the provisions of these Guidelines within 12 months after their adoption.
- (85) The EFTA States are invited to give their explicit unconditional agreement to these proposed appropriate measures within two months from the date of receipt of the measures. In the absence of any reply, the Authority will assume that the EFTA State in question does not agree with the proposed measures.
- (86) The Authority will review the present Guidelines in line with future revisions of the corresponding Communication from the Commission — *Community Guidelines for the application of state aid rules in relation to rapid deployment of broadband networks by the Commission*.
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⁽¹³⁰⁾ OJ L 73, 19.3.2009, p. 23, EEA Supplement No 15, 19.3.2009, p. 1. See <http://www.eftasurv.int/?1=1&showLinkID=15119&1=1>

Appendix I

Typical interventions for broadband support

In its case practice, the Commission has observed certain most recurrent funding mechanisms used by EU States to foster broadband deployment, assessed under Article 107(1) TFEU, corresponding to Article 61(1) of the EEA Agreement. The following list is illustrative and not exhaustive, as public authorities might develop different ways of supporting broadband deployment or deviate from the models described. The constellations typically involve state aid, unless the investment is carried out in line with the market economy investor principle (see Section 2.2).

1. **Monetary allocation** ('gap funding' ⁽¹⁾): In the majority of cases examined by the Commission, the EEA State ⁽²⁾ awards direct monetary grants to broadband investors ⁽³⁾ to build, manage and commercially exploit a broadband network ⁽⁴⁾. Such grants normally involves state aid within the meaning of Article 61(1) of the EEA Agreement, as the grant is financed by State resources and gives an advantage to the investor to conduct a commercial activity under conditions which would not have been available on the market. In such case, both the network operators receiving the grant and the electronic communication providers seeking wholesale access to the subsidised network are beneficiaries of the aid.
2. **Support in kind**: In other cases, EEA States support broadband deployment by financing the rollout of a full broadband network (or parts thereof) which is subsequently put at the disposal of electronic communication investors which will use these network elements for their own broadband deployment project. This support can take many forms, with the most recurring being EEA States providing broadband passive infrastructure by carrying out civil engineering work (for instance by digging up a road) or by placing ducts or dark fibre ⁽⁵⁾. Such form of support creates an advantage for the broadband investors who save the respective investment costs ⁽⁶⁾ as well as for electronic communication providers which seek wholesale access to the subsidised network.
3. **State operated broadband network or parts thereof**: State aid can also be involved if the State, instead of providing support to a broadband investor, constructs (parts of) a broadband network and operates it directly through a branch of the public administration or via an in-house company ⁽⁷⁾. This model of intervention typically consists of the construction of a publicly owned passive network infrastructure, with a view of making it available to broadband operators by granting wholesale access to the network on non-discriminatory terms. Operating the network and granting of wholesale access to it against remuneration is an economic activity within the meaning of Article 61(1) of the EEA Agreement. The construction of a broadband network with a view to its commercial exploitation constitutes an economic activity according to case-law (i.e. state aid within the meaning of Article 61(1) of the EEA Agreement can already be present at the moment of the construction of the broadband network) ⁽⁸⁾. Electronic communication providers seeking wholesale access to the publicly operated network will also be considered aid beneficiaries.
4. **Broadband network, managed by a concessionary**: EEA States may also fund the roll-out of a broadband network, that remains in public ownership, but whose operation will be offered through a competitive tender procedure to a commercial operator to manage and exploit it at the wholesale level ⁽⁹⁾. Also in this case, as the network is

⁽¹⁾ 'Gap funding' refers to the difference between investment costs and expected profits for private investors.

⁽²⁾ Or any other public authority granting the aid.

⁽³⁾ The term 'investors' denotes undertakings or electronic communications network operators that invest in the construction and deployment of broadband infrastructures.

⁽⁴⁾ Examples for gap funding are Commission Decisions in Cases SA.33438 a.o — Poland — *Broadband network project in Eastern Poland*, SA.32866 — Greece — *Broadband development in Greek rural areas*, SA.31851 — Italy — *Broadband Marche*, N 368/09 — Germany — *Amendment of state aid broadband scheme N 115/08- Broadband in the rural areas of Germany*.

⁽⁵⁾ Commission Decisions in Cases N 53/2010 — Germany, *Federal framework programme on ducts support*, N 596/09 — Italy — *Bridging the digital divide in Lombardia*, See also N 383/09 — Germany — *Amendment of N 150/08 Broadband in the rural areas of Saxony*.

⁽⁶⁾ Civil engineering costs and other investment in passive infrastructure can constitute up to 70 % of the total cost of a broadband project.

⁽⁷⁾ Commission Decision in Case N 330/2010 — France — *Programme national Très Haut Débit*, which covered various intervention modalities, inter alia, one in which the *collectivités territoriales* can operate their own broadband networks as a 'regie' operation.

⁽⁸⁾ Case T-443/08 and T-455/08 *Freistaat Sachsen v Commission* [2011] ECR II-1311.

⁽⁹⁾ Commission Decisions in Cases N 497/2010 — United Kingdom, *SHEFA — 2 Interconnect* N 330/2010 — France — *Programme national Très Haut Débit*, N 183/09 — Lithuania, *RAIN project*.

constructed with a view to its exploitation, the measure may constitute state aid. The operator managing and exploiting the network as well as third-party electronic communication providers seeking wholesale access to the network will also be considered aid beneficiaries.

*Appendix II***Glossary of technical terms**

For the purpose of these Guidelines, the following definitions should apply. The definitions are without prejudice to further market, technological and regulatory changes.

Access segment: 'last mile' segment connection the backhaul network with the end user premises.

Backhaul network: The part of the broadband network, which constitutes the intermediate link between the backbone network and the access network and carries data to and from the global network.

Bit-stream access: Wholesale access provider installs a high speed access link to the customer premises and makes this access link available to third parties.

Dark fibre: Unlit fibre without transmission systems connected.

Duct: Underground pipe or conduit used to house (fibre, copper or coax) cables of a broadband network.

Full unbundling: Physical unbundling grants access to the end-consumer access line and allows the competitor's own transmission systems to directly transmit over it. In certain circumstances, virtual unbundling may be considered equivalent to physical unbundling.

FTTH: Fibre to the home network, which reaches the end user premises with fibre, *i.e.* an access network consisting of optical fibres lines in both the feeder and the drop segments of the access network (including in-house wiring).

FTTB: Fibre to the building, which reaches the end user premises with fibre, *i.e.* fibre is rolled out to the building, but copper, coax or LAN is used within the building.

FTTN: Fibre to the Nodes. The fibre is terminated in a street cabinet up to several kilometres away from the customer premises, with the final connection being copper (in fibre to the cabinet/VDSL networks) or coax (in the cable/DOCSIS 3 network). Fibre-to-the-node is often seen as a temporary, interim step towards full FTTH.

Neutral networks: networks which can sustain any type of network topologies. In case of FTTH networks, the infrastructure shall be able to support both point to point and point to multipoint topologies.

Next Generation Access Network: Access networks which rely wholly or partly on optical elements and which are capable of delivering broadband access services with enhanced characteristics as compared to existing basic broadband networks.

Passive network: Broadband network without any active component. Typically comprises civil engineering infrastructure, ducts and dark fibre and street cabinets.

Passive wholesale access: Access to a transmission medium without any electronic component.

Point-to-multipoint: A network topology that has dedicated individual customer lines to an intermediate passive node (e.g. street cabinet) where these lines are aggregated onto a shared line. Aggregation could be either passive (with splitters such as in a PON architecture) or active (such as FTTC).

Point-to-Point: Network topology whereby the customer lines remain dedicated all the way from the customer to the Metropolitan Point of Presence.

Wholesale access products: Access enables an operator to utilise the facilities of another operator. The wholesale access products that can be provided over the subsidised network are the following:

- **FTTH/FTTB network:** ducts access, access to dark fibre, unbundled access to the local loop (WDM-PON or optical distribution frame (ODF) unbundling), and bit-stream access.
 - **Cable networks:** duct access and bit-stream access.
 - **FTTC networks:** duct access, sub-loop unbundling and bit-stream access.
 - **Passive network infrastructure:** duct access, access to dark fibre and/or unbundled access to the local loop. In case of an integrated operator: the access obligations (differing from the passive infrastructure access) shall be imposed in accordance with the provisions of the NGA Recommendation.
 - **ADSL-based broadband networks:** unbundled access to the local loop, bit-stream access.
 - **Mobile or wireless networks:** bit-stream, sharing of physical masts and access to the backhaul networks.
 - **Satellite platform:** bit-stream access.
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