

EFTA SURVEILLANCE AUTHORITY DECISION

No 197/03/COL

of 5 November 2003

amending for the thirty-ninth time the Procedural and Substantive Rules in the Field of State Aid by introducing a new chapter 34: Reference rates and discount rates and interest rates to be applied for the recovery of unlawful state aid

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 to Article 24, Article 5 (2) (b) and Article 1 in Part I of Protocol 3 thereof ⁽³⁾,

WHEREAS under Article 24 of the Surveillance and Court Agreement, the EFTA Surveillance Authority shall give effect to the provisions of the EEA Agreement concerning State aid,

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

RECALLING the Procedural and Substantive Rules in the Field of State Aid ⁽⁴⁾ adopted on 19 January 1994 by the EFTA Surveillance Authority ⁽⁵⁾,

WHEREAS, on 8 May 2003, the European Commission published a new Communication on the interest rates to be applied when aid granted unlawfully is being recovered ⁽⁶⁾,

WHEREAS this Communication is also of relevance for the European Economic Area,

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

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

WHEREAS, the former Chapter 33.2 of the State Aid Guidelines on Reference Rates of Interest also deals with interest rates and should therefore become part of the same chapter as the provisions for the interest rates to be applied for the recovery of unlawful aid,

HAVING consulted the European Commission,

RECALLING that the EFTA Surveillance Authority has consulted the EFTA States in a multilateral meeting on 20 June 2003 on the subject,

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

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

⁽³⁾ Protocol 3 to the Surveillance and Court Agreement as amended by the EFTA States on 10 December 2001. The amendments entered into force on 28 August 2003.

⁽⁴⁾ Hereinafter referred to as the State Aid Guidelines.

⁽⁵⁾ Initially published in OJ L 231, 3.9.1994, and in the EEA Supplement thereto No 32 on the same date, last amended by College Decision No 196/03/COL of 5 November 2003, not yet published.

⁽⁶⁾ Commission Communication on the interest rates to be applied when aid granted unlawfully is being recovered (OJ C 110, 8.5.2003, p. 21, corrigendum OJ C 150, 27.6.2003, p. 3).

HAS DECIDED AS FOLLOWS:

1. The State Aid Guidelines shall be amended by adding a new Chapter 34 'Reference and discount rates and interest rates to be applied for the recovery of unlawful aid'.
2. Chapter 33.2 of the State Aid Guidelines will become Chapter 34.1. Chapter 33.2 will be deleted.
3. The title of Chapter 33 'Other provisions' will be replaced by the title of Chapter 33.1 and will now read 'Conversions between national currencies and the Euro'. Any reference in this chapter to ECUs should now read 'Euro'. The title of Chapter 33.1 will be deleted.
4. The new Chapter 34 can be found in Annex to this Decision.
5. The EFTA States shall be informed by means of a letter, including a copy of this Decision and including the Annex.
6. The European Commission shall be informed, in accordance with point (d) of Protocol 27 of the EEA Agreement, by means of a copy of this Decision, including the Annex.
7. The Decision, including the Annex, shall be published in the EEA Section of and in the EEA Supplement to the *Official Journal of the European Union*.
8. The Decision shall be authentic in the English language.

Done at Brussels, 5 November 2003.

For the EFTA Surveillance Authority

Einar M. BULL
President

Hannes HAFSTEIN
College Member

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ANNEX

34. REFERENCE AND DISCOUNT RATES AND INTEREST RATES TO BE APPLIED FOR THE RECOVERY OF UNLAWFUL AID**34.1. REFERENCE RATES OF INTEREST ⁽¹⁾**

- (1) For the purposes of monitoring State aid as required by the EEA Agreement, the EFTA Surveillance Authority uses various parameters, including the reference and discount rates.
- (2) Those rates are used to measure the grant equivalent of aid that is disbursed in several installments and to calculate the aid element resulting from interest subsidy schemes for loans. They are also used in implementing the de minimis rule and for the repayment of illegal aid.
- (3) The reference rates are supposed to reflect the average level of interest rates charged, in the various EFTA States parties to the EEA Agreement, on medium and long-term loans (five to ten years) backed by normal security.
- (4) As from 1 April 2000 the reference rates are fixed as follows:
 - the indicative rate is defined as the level of the rate of yield on five-year State bonds, in the relevant currency, plus a premium of 25 basis points,
 - the reference rate is deemed to be equal to the average of the indicative rates recorded in the preceding months of September, October and November,
 - the reference rate will be fixed (from 2001 onwards) with effect from 1 January,
 - the reference rate is adjusted again in the course of the year if it differs by more than 15 % from the average of the indicative rates recorded over the last known three months.

IT SHOULD ALSO BE NOTED THAT:

- the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided).
 - the EFTA Surveillance Authority reserves the right, if necessary for examining certain cases, to use a shorter base rate (for example, Libor one-year rate) or a longer base rate (for example, the rate on ten-year bonds) than the rate of yield on five-year State bonds.
- (5) Reference rates will be made known by the EFTA Surveillance Authority on Internet at the following address: www.eftasurv.int.

34.2. INTEREST RATES TO BE APPLIED WHEN AID GRANTED UNLAWFULLY IS BEING RECOVERED ⁽²⁾

- (1) Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement provides that when negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary. The aid to be recovered shall include interest at an appropriate rate fixed by the EFTA Surveillance Authority. Interest shall be payable from the date the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

⁽¹⁾ This sub-chapter partly corresponds to the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3), formerly chapter 33.2 of the State Aid Guidelines.

⁽²⁾ This chapter corresponds to Commission Communication on the interest rates to be applied when aid granted unlawfully is being recovered (OJ C 110, 8.5.2003, p. 21, corrigendum OJ C 150, 27.6.2003, p. 3).

- (2) In a letter to the EU Member States of 22 February 1995 the European Commission took the view that for the purpose of restoring the status quo, commercial rates provide a better measure of the advantage improperly conferred on the recipient of unlawful aid than legal rates. Accordingly, the European Commission informed the EU Member States that in any decisions it might adopt ordering the recovery of aid unlawfully granted, it would apply the reference rate used in the calculation of the net grant equivalent of regional aid measures as the basis for the commercial rate. Thus, for several years it has been the standard practice of the European Commission to include in its recovery decisions a clause requiring interest to be calculated on the basis of the reference rate used for calculating the net grant equivalent of regional aids. On 9 September 1997, the European Commission adopted a notice which set out further details on the reference rates used for the calculation of repayments of illegal aid and other purposes ⁽¹⁾, which the EFTA Surveillance Authority partially integrated into the State Aid Guidelines, see the present Chapter 34.1 ⁽²⁾. The question has arisen whether this interest rate should be applied on a simple basis or on a compound basis ⁽³⁾.
- (3) In accordance with a great number of decisions of the Community judiciary ⁽⁴⁾, recovery is the logical consequence of the illegality of aid. The objective of recovery is to re-establish the previously existing situation. By repaying the aid, the beneficiary forfeits the unfair advantage which it enjoyed over its competitors on the market and the conditions of competition which existed prior to the payment of the aid are restored. In market practice, simple interest would normally be calculated where the beneficiary of the funds does not have use of the interest amount before the end of the period, for example where interest is only paid at the end of the period. Compound interest would normally be calculated if each year (or period) the amount of interest can be considered as being paid to the beneficiary and so accruing to the initial capital amount. In this case, the beneficiary would earn interest on the interest paid for each period.
- (4) In practice, the type of aid which has been granted and the situation of the individual beneficiary may differ. If the aid consists in overcompensation, the benefit which the company took from it can be assimilated to a deposit which would normally attract compound interest. If the aid was an investment aid for a certain eligible cost, the aid may have replaced an alternative source of financing, which would also normally bear compound interest at commercial rates. If the aid was an operating aid, it would have direct effects on the profit and loss accounts, and hence the balance sheet, leading to the availability of funds for deposit. Thus, despite the variety of situations, it appears that the effects of an unlawful aid are to provide funding to the beneficiary on similar conditions to a medium term non-interest bearing loan. Accordingly, the use of compound interest appears necessary to ensure that the financial advantages resulting from this situation are fully neutralised.
- (5) Accordingly, the EFTA Surveillance Authority wishes to inform the EFTA States and interested parties that in any future decisions it may adopt ordering the recovery of aid unlawfully granted, it will apply the reference rate used for calculating the net grant equivalent of regional aids on a compound basis. In accordance with normal market practice, compounding should take place on an annual basis. Likewise, the EFTA Surveillance Authority will expect the EFTA States to apply compound interest in the execution of pending recovery decisions, unless this would be contrary to a general principle of EEA law.'

⁽¹⁾ Commission notice on the method for setting the reference and discount rates, see footnote 1.

⁽²⁾ The subsequent Commission notice on technical adaptations to the method for setting the reference and discount rates (OJ C 241, of 26.8.1999, p. 9), related to entry into the third stage of economic and monetary union on 1 January 1999 and was not relevant for the European Economic Area.

⁽³⁾ The calculation of simple interest uses the formula $\text{Interest} = (\text{Capital} \times \text{Interest rate} \times \text{Number of years})$.
The calculation of compound interest, compounding on a yearly basis uses the formula $\text{Interest} = (\text{Capital} (1 + \text{Interest rate})^{\text{Number of years}}) - \text{Capital}$.

⁽⁴⁾ See in particular Case C-24/95 Land Rheinland-Pfalz v. Alcan [1997] ECR I-1591 and Case T-459/93 Siemens v Commission [1995] ECR II-1675.