

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

introducing guidelines on cooperation between national courts and the EFTA Surveillance Authority in the State aid field and amending for the twenty-third time the Procedural and Substantive Rules in the field of State aid

THE EFTA SURVEILLANCE AUTHORITY,

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

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

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

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

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

Whereas the European Commission has adopted a notice on cooperation between national courts and the Commission in the State aid field ⁽⁵⁾;

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

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

Having consulted the European Commission;

Whereas the EFTA Surveillance Authority has consulted the EFTA States on the introduction of these new guidelines,

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

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

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

⁽⁴⁾ Initially published in OJ L 231 on 3.9.1994 and in EEA Supplement No 32 thereto on 3.9.1994, last amendment (22nd) adopted by Decision No 329/99/COL of 16.12.1999 (see page 1 of this Official Journal).

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

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines shall be amended by introducing a new chapter, Chapter 9A, on cooperation between national courts and the EFTA Surveillance Authority in the State aid field, as contained in Annex I to this Decision.
2. The EFTA States shall be informed by means of a letter, together with a copy of the Decision, including Annex I.
3. The European Commission shall be informed, in accordance with point (d) of Protocol 27 to the EEA Agreement, by means of a copy of the Decision, including Annex I.
4. The Decision, including Annex I, shall be published in the EEA section of and the EEA Supplement to the *Official Journal of the European Communities*.
5. The Decision shall be authentic in the English language.

Done at Brussels, 16 February 2000.

For the EFTA Surveillance Authority
The President
Knut ALMESTAD

ANNEX I

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

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

9A.1. **Introduction**

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

⁽¹⁾ OJ C 312, 23.11.1995, p. 8.

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

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

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

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

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

9A.2. Powers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9A.7. **Final remarks**

1. This chapter is issued for guidance and does not in any way limit the rights conferred on EFTA States by EEA law or on individuals and undertakings by implemented EEA law.
 2. This chapter is without prejudice to any interpretation of EEA law, which may be given by the EFTA Court, the Court of Justice and Court of First Instance of the European Communities.'
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