

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

No 53/96/COL

of 15 May 1996

on the eighth amendment of the Procedural and Substantive Rules in the Field of State Aid

THE EFTA SURVEILLANCE AUTHORITY

has amended the Procedural and Substantive Rules in the Field of State Aid ⁽¹⁾, adopted on 19 January 1994 ⁽²⁾, as last amended by Decision No 23/96/COL ⁽³⁾, as follows:

Chapter 14 of the State Aid Guidelines shall be replaced by the following:

'14. AID FOR RESEARCH AND DEVELOPMENT' ⁽¹⁾

14.1. *Introduction*

- (1) It is widely acknowledged that research and development can contribute to economic growth, improved competitiveness and better employment prospects. The Contracting Parties to the EEA Agreement have declared as one of their common objectives to strengthen the scientific and technological basis of European industry and to encourage it to become more competitive at the international level. To this end Part VI of the Agreement establishes detailed arrangements aimed at strengthening and broadening cooperation in the framework of the Community's activities *inter alia* in the field of research and technological development (R&TD).
- (2) EFTA States participate in the implementation of the fourth framework programme of Community activities in the field of research

and technological development (1994-98) through participation in its specific programmes. The EFTA States contribute financially to the programmes and in consequence thereof have access to all parts of these programmes and participate fully in the EC committees which assist the EC Commission in the management of the programmes. At the project level, institutions, undertakings, organizations and nationals of EFTA States shall have the same rights and obligations, including with regard to exploitation of results, as those applicable to their partners and counterparts in EC Member States.

- (3) Measures taken by the Contracting Parties to the EEA Agreement in support of research and development have to be compatible with the functioning of the Agreement. State aid rules in the EEA Agreement must be applied constructively to encourage cooperation which helps new technology to be developed and disseminated, while observing the rules on intellectual property rights. In the control of State aid, regard must be paid to the need for resources to be made available to those sectors which will contribute to improving the competitiveness of European industry.

- (4) The EFTA Surveillance Authority has taken a favourable view of State aid for R&D. This favourable attitude is justified on several counts: the aims of such aid, the often considerable financial requirements and risks of R&D operations and, given the distance from the market place of such projects, the reduced likelihood that such aid will distort competition and trade.

⁽¹⁾ Hereinafter referred to as the State Aid Guidelines.

⁽²⁾ OJ No L 231, 3. 9. 1994, p. 1.

⁽³⁾ OJ No L 140, 13. 6. 1996, p. 54.

14.2. *Applicability of Article 61 of the EEA Agreement to aid for R&D*

made to products, production lines, manufacturing processes, existing services and other operations in progress, even if such changes may represent improvements.

14.2.1. Definitions of the stages of R&D

- (1) The closer R&D is to the market, the more significant may be the distortive effect of the State aid. In order to determine the proximity to the market of the aided R&D, the EFTA Surveillance Authority makes a distinction between fundamental research, industrial research and precompetitive development activity.

- (2) The following definitions, which correspond to those laid down in the WTO Agreement on Subsidies and Countervailing Measures, are designed to help the EFTA States to formulate their notifications. They are intended to be indicative not normative.

— By *fundamental research* is meant an activity to broaden scientific and technical knowledge not linked to industrial or commercial objectives.

— By *industrial research* is meant planned research or critical investigation aimed at the acquisition of new knowledge, the objective being that such knowledge may be useful in developing new products, processes or services or in bringing about a significant improvement in existing products, processes or services.

— By *precompetitive development activity* is meant the shaping of the results of industrial research into a plan, arrangement or design for new, altered or improved products, processes or services, whether they are intended to be sold or used, including the creation of an initial prototype which could not be used commercially. This may also include the conceptual formulation and design of other products, processes or services and initial demonstration projects or pilot projects, provided that such projects cannot be converted or used for industrial applications or commercial exploitation. It does not include the routine or periodic changes

- (3) Innovation does not qualify as a separate category of R&D. Aid for activities that could be regarded as innovative but do not correspond to the categories mentioned in point 14.2 can benefit from State aid only if it conforms with the EFTA Surveillance Authority policy on investment aid.

14.2.2. R&D by public research establishments and R&D contracts

- (1) Public financing of R&D activities by public non-profit-making higher-education or research establishments is normally not covered by Article 61 (1) of the EEA Agreement.

- (2) Where the results of publicly financed R&D projects carried out by such establishments are made available to European industry on a non-discriminatory basis, the EFTA Surveillance Authority will assume that State aid within the meaning of Article 61 (1) of the EEA Agreement is not normally involved.

- (3) Where R&D is carried out by public non-profit-making, higher-education or research establishments on behalf of, or in collaboration with industry, the EFTA Surveillance Authority will assume that State aid within the meaning of Article 61 (1) of the EEA Agreement is not involved either:

(a) where the public non-profit-making higher-education or research establishments contribute to research projects as a commercial firm would, for example, in return for payment at the market rate for the services they provide;

(b) or

— where the industrial participants in the research bear the full cost of the project, or

- where the results which do not give rise to intellectual property rights may be widely disseminated and any intellectual property rights to the R&D results are fully allocated to the public non-profit-making establishments, or
 - where the public non-profit-making establishments receive from the industrial participants compensation equivalent to the market price for the intellectual property rights which result from the research project and which are held by those industrial participants, and where the results which do not give rise to intellectual property rights may be widely disseminated to interested third parties.
- (4) Public authorities may commission R&D from firms or buy the results of R&D directly from them. If there is no open tender procedure, the EFTA Surveillance Authority will assume that State aid within the meaning of Article 61 (1) of the EEA Agreement may be involved. If these contracts are awarded according to market conditions, in particular after an open tender procedure in accordance with the act referred to in point 5b of Annex XVI to the EEA Agreement⁽³⁾, it will normally be assumed that no State aid within the meaning of Article 61 (1) of the EEA Agreement is involved.
- (4) major advance over specific Community or European R&D programmes.
- (4) In the past, the European Commission has applied the derogation contained in Article 92 (3) (b) of the EC Treaty (which corresponds to Article 61 (3) (b) of the EEA Agreement) in a limited number of cases. It has transpired that, as regards R&D, this derogation may apply particularly to transnational projects of major qualitative and, in principle, quantitative significance (e.g. projects related to the formulation of industrial standards that could enable European industries to secure the full benefit of the single market and the EEA Agreement)⁽³⁾.
- (5) If State aid for R&D does not qualify for the derogation provided for in Article 61 (3) (b), it may nevertheless be compatible with the EEA Agreement by virtue of Article 61 (3) (c), which provides a derogation for aid that facilitates the development of certain economic activities as long as it does not adversely affect trading conditions to an extent contrary to the common interest.
- (6) When examining whether or not Article 61 (3) (c) of the EEA Agreement is applicable, the EFTA Surveillance Authority will pay special attention to the type of research carried out, the beneficiaries, the aid intensity, the accessibility to the results and other relevant factors as mentioned in Sections 14.5 to 14.7.

14.3. *Assessment of aid for R&D under Article 61 of the EEA Agreement*

- (1) Where it satisfies the tests of Article 61 (1) of the EEA Agreement and therefore has to be examined by the EFTA Surveillance Authority, aid granted to firms for R&D may be regarded as compatible with the functioning of the EEA Agreement by virtue of one of the derogations provided for in Article 61 (3).
- (2) In all cases where, after examination, the EFTA Surveillance Authority concludes that the purpose of the aid in question is to promote the execution of an important project of common European interest, that aid may qualify for the derogation contained in Article 61 (3) (b).
- (3) The common European interest must be demonstrated in practical terms: for example, it must be proved that the project represents a

14.4. *Specific notification requirements*

- (1) State aid for R&D has to be notified to the EFTA Surveillance Authority pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement. Annex I to these guidelines contains a checklist of the information to be supplied in State aid notifications. Section II of Annex I lists additional information to be provided concerning aid for R&D. Furthermore, paragraph 14.4 (8) contains additional requirements for major R&D projects and paragraphs 14.4 (6) and (7) provide derogation from the general rule concerning notification of budget increases and extension in time of existing aid schemes.
- (2) The EFTA Surveillance Authority aims to achieve the highest possible degree of transparency in the application of aid schemes. This means that there must be a clear statement of objectives to be achieved, the beneficiaries,

etc. The different categories of costs which the aid is designed to reduce must be specified and the aid must be granted in such a form that the intensity of the aid in relation to these costs, as listed in Section 14.6, can be calculated.

- (3) In the case of R&D projects, all types of aid may be authorized. The EFTA States must nevertheless make it possible for the EFTA Surveillance Authority to calculate the grant equivalent of the aid if the latter is not paid in the form of an outright grant and must consequently provide sufficient information to enable the Authority to do this.
- (4) Where an EFTA State is of the opinion that Article 61 (3) (b) of the EEA Agreement is applicable, it must examine whether the relevant conditions are met and demonstrate to the EFTA Surveillance Authority, in its notification, that they are met.
- (5) The provisions of Chapter 11 of these guidelines, on the accelerated clearance of new aid schemes for SMEs and of modifications of existing schemes, applies in full to State aid for R&D, as does the *de minimis* rule set out in Chapter 12 of these guidelines.
- (6) The EFTA Surveillance Authority also considers that a notification of the increase in the annual budget of an authorized R&D scheme is not necessary if, expressed in ecus, it is not more than 100 % (in nominal terms) of the initial annual amount, provided that the scheme is of unlimited duration or that the increase takes place within the period of validity of a scheme of limited duration.
- (7) Extensions with or without a budgetary increase (up to the abovementioned limit of 100 %), without changes in the conditions for implementing the previously approved aid schemes and consistent with the present rules need be renotified only from the fifth year following the expiry of the validity of the original scheme. The EFTA States, however, are obliged to inform the EFTA Surveillance Authority of such refinancings/extensions in advance and to continue to submit an annual report to it on the application of the schemes in question.
- (8) Individual grants of aid under an R&D scheme that has been authorized by the EFTA Surveillance Authority do not, in principle,

need to be notified. However, in order to allow the Authority to assess significant amounts of aid under approved schemes and the compatibility of such aid with the functioning of the EEA Agreement, the EFTA Surveillance Authority requires prior notification of any individual research project costing more than ECU 25 million (ECU 30 million for Eureka projects⁽⁴⁾) and for which it is proposed to provide aid with a gross grant equivalent of more than ECU 5 million.

- (9) Individual grants of aid outside the scope of authorized R&D schemes are to be notified in the normal manner pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement unless they constitute *de minimis* awards.

14.5. *Aid intensity*

14.5.1. *Basic rules*

- (1) The allowable intensity of aid will be determined by the EFTA Surveillance Authority on a case-by-case basis. The Authority's assessment in each case will take into consideration the nature of the project or programme, overall policy considerations relating to the competitiveness of European industry, the risk of distortion of competition and the effect on trade between the Contracting Parties. A general evaluation of such risks leads the Authority to consider that fundamental research and industrial research and industrial research may qualify for higher level of aid than precompetitive development activities, which are more closely related to the market introduction of R&D results and, if aided, could therefore more easily lead to distortions of competition and trade.
- (2) The public financing of fundamental research that is normally independently carried out by non-profit-making higher-education or research establishments does not constitute State aid within the meaning of Article 61 (1) of the EEA Agreement.
- (3) In exceptional cases where fundamental research is carried out by or for firms, the aid would fall within Article 61 (1) of the Agreement but, since this type of research is far from the market and its results are, in principle, widely available for exploitation on a non-discriminatory basis and at market rates, it may be awarded at a gross aid intensity of up to 100 %.

- (4) To qualify as fundamental research, the work should not be linked to any industrial or commercial objectives of a particular enterprise, and a wide dissemination of the results of the research must be guaranteed.
- (5) As a general rule, the gross aid intensity for industrial research must not exceed 50 % of the eligible costs of the project (as defined in Section 14.6).
- (6) Technical feasibility studies preparatory to industrial research activities may qualify for aid amounting to 75 % of study costs, while such studies preparatory to precompetitive development activities may qualify for support amounting to 50 % of study costs; these ceilings have been set in the light of the negligible impact of such aid on competition and trade conditions.
- (7) Precompetitive development activities are close to the market and there is a greater risk that any such aid will distort competition and intra-EEA trade. The permissible gross aid intensity for such activities is fixed at 25 % of the eligible costs (as defined in Section 14.6).

14.5.2. Intensities in certain specific circumstances

- (1) As stated in point 14.4 (3), the EFTA States are free to use all instruments of aid to support R&D. In the case of advances that are repayable only in the event of a successful outcome of research activities, the permissible aid intensity (in gross grant equivalent) is that stipulated by this framework for the various stages of research. In the event of failure of the research concerned, the EFTA Surveillance Authority may allow a higher level of aid intensity since the project's failure reduces the risk of competition and trade being distorted.
- (2) When notifying reimbursable aid, the EFTA States are required to inform the EFTA Surveillance Authority of the amounts and exact procedures for repayment, with the proposed conditions being assessed by the Authority on a case-by-case basis.
- (3) With a view to encouraging dissemination of research results, the EFTA Surveillance Authority considers that aid in support of patent applications and renewals by SMEs (as defined in Chapter 10 of these guidelines)

may be granted up to the same level as that for the research activities which first led to the patents concerned.

- (4) In the case of State aid for an R&D project being carried out in collaboration between public research establishments and enterprises, the combined aid deriving from direct government support for a specific research project and, where they constitute aid (see points 14.2.2 (1) to (3) above), contributions from public research establishments to that project may not exceed the abovementioned aid ceilings.
- (5) In cases of R&D activity spanning industrial research and precompetitive development activities, the permissible aid intensity will not normally exceed the weighted average of the permissible aid intensities applicable to the two types of research.

14.5.3. Additions to the basic intensities

- (1) Without prejudice to the case-by-case assessment, which, as indicated in point 14.5.1 (1), will normally be made, the aid intensities specified in points 14.5.1 (5) to 14.5.2 (4) may be exceeded in the following situations:
 - where the aid is to be given to SMEs⁽³⁾: an extra 10 percentage points,
 - where the research project is carried out in an Article 61 (3) (a) region: an extra 10 percentage points,
 - where the research project is carried out in an Article 61 (3) (c) region: an extra 5 percentage points.
- (2) The abovementioned regional bonuses may be exceeded, taking into account the ceilings applicable to regional investment aid and the need to stimulate intangible investment, without however exceeding the limits set out in point 14.5.3 (7) below.
- (3) Where the research project is in accordance with the objectives of a specific project or programme undertaken as part of the European Community's current framework programme for R&D, it will qualify for an extra 15 percentage points.
- (4) That figure will rise to 25 percentage points where the project also involves effective cross-border cooperation between firms and public research bodies or between at least two independent partners in two States parties to the

EEA Agreement and where its results are widely disseminated and published, while observing intellectual and industrial property rights.

(5) Where the research project is not in accordance with the objectives of a specific project or programme undertaken as part of the European Community's current framework programme for R&D, the EFTA Surveillance Authority will allow increases of up to 10 percentage points provided that at least one of the following conditions is satisfied:

(a) the project involves effective cross-border cooperation between at least two independent partners in two States parties to the EEA Agreement, particularly in the context of coordinating national R&TD policies;

(b) the project involves effective cooperation between firms and public research bodies, particularly in the context of coordination of national R&TD policies;

(c) the project's results are widely disseminated and published, patent licences are granted or other appropriate steps are taken under conditions similar to those for the dissemination of European Community R&TD results.

(6) The EFTA State concerned must provide the EFTA Surveillance Authority with sufficient information to enable it to assess whether these criteria are met.

(7) The combination of the increases described at points 14.5.3 (1) to (5) with the percentages specified at points 14.5.1 (5) and 14.5.2 (4) may not exceed a maximum gross intensity of 75 % for industrial research and 50 % for precompetitive development activities. These limits must be respected in all cases.

research, 50 % for precompetitive development activities).

(2) The ceilings laid down above in respect of R&D aid apply to State aid. However, when examining R&D aid, the EFTA Surveillance Authority must take into account the effect on competition and trade of a combination of State aid with financing obtained through participation of EFTA States in Community programmes, according to the arrangements in Part VI and Protocols 31 and 32 of the EEA Agreement. When new aid measures foresee the possibility of such co-financing, the EFTA States shall inform of this in their notifications to the EFTA Surveillance Authority as well as of the arrangement made to ensure that the overall aid ceilings are not exceeded.

(3) Where co-financing according to point 14.5.4 (2) and State aid are combined, total official support may not exceed 75 % in the case of industrial research and 50 % in the case of precompetitive development activities.

(4) Gross intensities of 75 % for industrial research and 50 % for precompetitive development activities (maximum intensities authorized by the WTO Agreement on Subsidies and Countervailing Measures for non-actionable subsidies) may be authorized if similar projects or programmes of competitors located outside the territory covered by the EEA Agreement have received (in the last three years), or are going to receive, aid of an equivalent intensity for the two types of research.

(5) The EFTA State concerned will provide the EFTA Surveillance Authority with sufficient information to enable it to assess the situation, in particular regarding the need to offset the competitive advantage enjoyed by a third-country competitor.

14.5.4. Application of aid ceilings of the WTO rules

(1) Where State aid for R&D qualifies for the derogation laid down in Article 61 (3) (b) of the EEA Agreement, the gross aid intensity must not exceed the limits authorized by the WTO Subsidies Code (75 % for industrial

14.6. *Eligible R&D costs for the purpose of calculating the aid intensity*

(1) The costs set out below will be regarded as eligible for the purposes of calculating the intensity of R&D aid (where generated by other activities as well in particular other R&D activities they must be broken down by type of activity):

- personnel costs (researchers, technicians and other supporting staff employed solely on the research activity),
- cost of instruments, equipment, and land and premises used solely and on a continual basis (except where transferred commercially) for the research activity,
- cost of consultancy and equivalent services used exclusively for the research activity, including the research, technical knowledge and patents, etc. bought from outside sources,
- additional overheads incurred directly as a result of the research activity,
- other operating expenses (e.g. costs of materials, supplies and similar products) incurred directly as a result of the research activity.

14.7. *Incentive effect of R&D aid*

- (1) State aid for R&D should serve as an incentive for firms to undertake R&D activities in addition to their normal day-to-day operations. It may also encourage firms not carrying out research and development to undertake such activities. Where this incentive effect is not evident, the EFTA Surveillance Authority may consider such aid less favourably than it usually does.
- (2) In order to verify that the planned aid will induce firms to pursue research which they would not otherwise have pursued, the EFTA Surveillance Authority must take particular account of quantifiable factors (such as changes in R&D spending, in the number of people assigned to R&D activities and in R&D spending as a proportion of total turnover), market failures, additional costs connected with cross-border cooperation and other relevant factors indicated by the EFTA State that made the notification. Proposed aid may also be permitted if it contributes towards expanding the scope of research or speeding it up.

- (3) Accordingly, the EFTA Surveillance Authority calls on the EFTA States, both when notifying R&D aid and when submitting annual reports on the implementation of approved aid schemes, to demonstrate that the aid is necessary as an incentive, and is on no account operating aid.
- (4) The EFTA Surveillance Authority may assume that the aid provides a necessary incentive if the recipient is an SME within the meaning of the definition laid down in Chapter 10 of these guidelines.
- (5) The EFTA Surveillance Authority will attribute particular importance to the conditions at points 14.7 (2) and (3):
 - in the case of individual, close-to-the-market research projects to be undertaken by large firms,
 - in all cases in which a significant proportion of the R&D expenditure has already been made prior to the aid application.

14.8. *Annual reports*

- (1) For each authorized aid scheme, the EFTA Surveillance Authority will generally request an annual report on implementation. On the basis of these reports, the Authority will be in a position to monitor the allocation of aid and, if necessary, propose appropriate measures if it considers that the scheme is distorting, or is likely to distort, competition contrary to the common interest, for example, by undue concentration on specific sectors or firms.
- (2) These reports have to be in accordance with the requirements set out in Annexes III and IV to these guidelines.

14.9. *Implementation and duration*

- (1) State aid for R&D activities in the shipbuilding and ship repair sector is governed by the rules stipulated in the relevant act on aid to shipbuilding referred to in Annex XV to the EEA Agreement.

- (2) The EFTA Surveillance Authority will review the present rules in five years' time. It may also decide to amend them at any time, in cooperation with the EFTA States, should it prove necessary for reasons connected with competition policy or to take into account developments in the European Union.

(¹) This chapter corresponds to the Community framework for State aid for research and development (OJ No C 45, 17. 2. 1996, p. 5).

(²) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ No L 209, 24. 7. 1992).

(³) Thus, the Commission has decided to regard a number of Eureka projects in the field of electro-

nics (EU 127 Jessi, EU 102 Eprom, EU 147 DAB, EU 43 ESF) or high-definition television (EU 95 HDTV) as being of common European interest.

(⁴) The Authority aims to amend the notification procedure for Eureka projects at a later stage and may propose appropriate measures to that effect.

(⁵) See definition in Section 10.2 of these guidelines.'

Done at Brussels, 15 May 1996.

For the EFTA Surveillance Authority

Knut ALMESTAD

The President