

## II

(Acts whose publication is not obligatory)

EUROPEAN ECONOMIC AREA  
EFTA SURVEILLANCE AUTHORITY

## EFTA SURVEILLANCE AUTHORITY DECISION

No 262/02/COL

of 18 December 2002

**amending for the thirty-fifth time the Procedural and Substantive Rules in the Field of State Aid by introducing new guidelines relating to the methodology for analysing state aid linked to stranded costs**

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area <sup>(1)</sup>, in particular to Articles 61 to 63 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice <sup>(2)</sup>, in particular to Article 24 and Article 1 of Protocol 3 thereof,

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 <sup>(3)</sup> adopted on 19 January 1994 by the EFTA Surveillance Authority <sup>(4)</sup>,

WHEREAS, on 26 July 2001, the European Commission adopted a Communication setting out the principles on which it will analyse State aid linked to stranded costs in the electricity sector <sup>(5)</sup>,

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 EC Commission, in order to maintain equal conditions of competition,

<sup>(1)</sup> Hereinafter referred to as the EEA Agreement.

<sup>(2)</sup> Hereinafter referred to as the Surveillance and Court Agreement.

<sup>(3)</sup> Hereinafter referred to as the State Aid Guidelines.

<sup>(4)</sup> Initially published in OJ L 231, 3.9.1994, EEA Supplement No 32.

<sup>(5)</sup> The Communication is available on the Commission's website:

[http://europa.eu.int/comm/competition/state\\_aid/legislation/stranded\\_costs/en.pdf](http://europa.eu.int/comm/competition/state_aid/legislation/stranded_costs/en.pdf)

HAVING consulted the European Commission,

RECALLING that the EFTA Surveillance Authority has consulted the EFTA States in a multilateral meeting on 19 October 2001 on the subject,

HAS DECIDED AS FOLLOWS:

1. The State Aid Guidelines shall be amended by adding a new Chapter 21; *Methodology for analysing State aid linked to stranded costs*. The new chapter is contained in Annex I to this Decision.
2. The EFTA States shall be informed by means of a letter, including a copy of the Decision and Annex I. The EFTA States shall be requested to signify their agreement to the proposed appropriate measure (reporting obligation in point 21.4.(5)(c)) as set out in Annex I within 20 working days from the date on which the letter is notified to them.
3. 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 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* after the EFTA States have signified their agreement to the appropriate measures.
5. The Decision shall be authentic in the English language.

Done at Brussels, 18 December 2002.

*For the EFTA Surveillance Authority*

Einar M. BULL  
*President*

Hannes HAFSTEIN  
*College Member*

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## ANNEX

## 21. METHODOLOGY FOR ANALYSING STATE AID LINKED TO STRANDED COSTS

## 21.1. INTRODUCTION

- (1) European Parliament and Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity <sup>(1)</sup> (hereinafter referred to as "the Directive" or "Directive 96/92/EC") laid down the principles for opening up the European electricity industry to competition.
- (2) The abovementioned Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 168/1999 <sup>(2)</sup>.
- (3) The gradual transition from a situation of largely restricted competition to one of genuine competition at EEA level must take place under acceptable economic conditions that take account of the specific characteristics of the electricity industry. This concern is already reflected to a very large extent in the text of the Directive itself.
- (4) In order to enable them to cope with a number of very specific situations, Article 24 of the Directive allows EFTA States to defer application of some of the provisions of the Directive for a transitional period. State aid mechanisms designed to allow electricity undertakings to adapt to the introduction of competition under favourable conditions do not fall within the scope of the derogations provided for in Article 24.
- (5) The purpose of these Guidelines is to clarify how the Authority intends, in the light of Directive 96/92/EC, to apply the rules of the EEA Agreement to State aid of this kind. These Guidelines does not prejudice the rules on State aid that result from other relevant frameworks, guidelines and notices. In particular, the Authority will continue to authorize regional aid and environmental aid in accordance with the respective guidelines. Similarly, aid that could not be authorized under Article 61 of the EEA Agreement will, where appropriate, be open to examination in the light of Article 59(2) of the EEA Agreement.

## 21.2. TRANSITIONAL MEASURES AND STATE AID

- (1) Article 24 of the Directive 96/92/EC, as adapted by Article 1(i) of Decision No 168/1999 of the EEA Joint Committee of 26 November 1999, stipulates that transitional measures derogating temporarily from the Directive may be authorized by the Authority <sup>(3)</sup>:

"Those EFTA States in which commitments or guarantees of operation given before the entry into force of Decision No 168/1999 of the EEA Joint Committee of 26 November 1999 may not be honoured on account of the provisions of that Decision, may apply for a transitional regime pursuant to Article 24(1) and (2). Applications for a transitional period must be notified to the EFTA Surveillance Authority no later than six months after the entry into force of Decision No 168/1999 of the EEA Joint Committee of 26 November 1999".

- (2) Given the present state of play, the Authority considers that decisions taken by it pursuant to Article 24 can create a transitional regime only where it has previously found that the measures notified by the EFTA Member States pursuant to that Article are incompatible with the Directive's provisions set out in Chapters IV, V, VI and VII. Under Article 24 of the Directive, the Authority alone may authorize derogations from those provisions.
- (3) Accordingly, a system of levies introduced by an EFTA State via a fund to offset the costs of commitments or guarantees that might not be honoured on account of the application of Decision No 168/1999 does not constitute a measure that could benefit from a Authority decision granting a transitional regime under Article 24 of Directive 96/92/EC; such a measure does not require a derogation from the relevant chapters of the Directive. It may, on the other hand, constitute State aid, which is covered by Article 61 of the EEA Agreement and Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

<sup>(1)</sup> OJ L 27, 30.1.1997, p. 20.

<sup>(2)</sup> OJ L 61, 1.3.2001, p. 23, and EEA Supplement No 11, 1.3.2001, p. 221.

<sup>(3)</sup> Article 3 of Decision No 168/1999 states: "This Decision shall enter into force on 27 November 1999, provided that all the notifications under Article 103(1) of the Agreement have been made to the EEA Joint Committee."

- (4) The purpose of these Guidelines is to show how the Authority intends to apply the EEA Agreement rules on State aid in the case of aid measures designed to compensate for the cost of commitments or guarantees that it might no longer be possible to honour on account of Decision 168/1999. In particular, the Guidelines do not apply to measures that could not be classified as State aid within the meaning of Article 61(1) of the EEA Agreement.

### 21.3. DEFINITION OF ELIGIBLE STRANDED COSTS

- (1) Such commitments or guarantees of operation are normally referred to as "stranded costs". They may, in practice, take a variety of forms: long-term purchase contracts, investments undertaken with an implicit or explicit guarantee of sale, investments undertaken outside the scope of normal activity, etc. In order to rank as eligible stranded costs that could be recognized by the Authority, such commitments or guarantees must satisfy the following criteria:
- (a) The "commitments or guarantees of operation" that could give rise to stranded costs must predate 27 November 1999, the date of entry into force of Decision No 168/1999.
  - (b) The existence and validity of such commitments or guarantees will be substantiated in the light of the underlying legal and contractual provisions and of the legislative context in which they were made.
  - (c) Such commitments or guarantees of operation must run the risk of not being honoured on account of the provisions of Directive 96/92/EC. In order to qualify as stranded costs, commitments or guarantees must consequently become non-economical on account of the effects of the Directive and must significantly affect the competitiveness of the undertaking concerned. Among other things, this must result in that undertaking's making accounting entries (e.g. provisions) designed to reflect the foreseeable impact of the commitment or guarantee.

Especially where, as a result of the commitments or guarantees in question, the viability of the undertakings might be jeopardised in the absence of aid or any transitional measures, the commitments or guarantees are deemed to meet the requirements laid down in the preceding paragraph.

The effect of such commitments or guarantees on the competitiveness or viability of the undertakings concerned will be assessed at the consolidated level. For commitments or guarantees to constitute stranded costs, it must be possible to establish a cause-and-effect relationship between the entry into force of Decision 168/1999 and the difficulty that the undertakings concerned have in honouring or securing compliance with such commitments or guarantees. In order to establish such cause-and-effect relationship, the Authority will take into account any fall in electricity prices or market share losses suffered by the undertakings concerned. Commitments or guarantees that could not have been honoured irrespective of the entry into force of Decision 168/1999 do not constitute stranded costs.

- (d) Such commitments or guarantees must be irrevocable. Should an undertaking have the possibility of revoking against payment, or modifying, such commitments or guarantees, account will have to be taken of this fact in calculating the eligible stranded costs.
- (e) Commitments or guarantees linking enterprises belonging to one and the same group cannot, as a rule, qualify as stranded costs.
- (f) Stranded costs are economic costs that must correspond to the actual sums invested, paid or payable by virtue of the commitments or guarantees from which they result: flat-rate calculations cannot, therefore, be accepted unless it can be shown that they reflect economic realities.
- (g) Stranded costs must be net of the income, profits or added value associated with the commitments or guarantees from which they arise.
- (h) Stranded costs must be valued net of any aid paid or payable in respect of the assets to which they relate. In particular, where a commitment or a guarantee of operation corresponds to an investment, which is the subject of State aid, the value of the aid must be deducted from any stranded costs resulting from the commitment or guarantee.

- (i) Wherever stranded costs arise from commitments or guarantees that are difficult to honour on account of Decision 168/1999, calculation of the eligible stranded costs will take account of the actual change over time in the economic and competitive conditions prevailing on the national and common electricity markets. In particular, where commitments or guarantees could constitute stranded costs because of the foreseeable fall in electricity prices, calculation of the stranded costs must take account of actual movements in electricity prices.
- (j) Costs depreciated before the transposition of Decision 168/1999 into national law cannot give rise to stranded costs. However, provisions or depreciation of assets entered in the balance sheet of the undertakings concerned with the explicit aim of taking account of the foreseeable effects of the Decision may correspond to stranded costs.
- (k) Eligible stranded costs may not exceed the minimum level necessary to allow the undertakings concerned to continue to honour or secure compliance with the commitments or guarantees called into question by Decision 168/1999 <sup>(1)</sup>. Consequently, they will have to be calculated by taking into account the most economic solution (in the absence of any aid) from the point of view of the undertakings concerned. This may involve, among other things, the termination of commitments or guarantees giving rise to stranded costs or the disposal of all or some of the assets giving rise to stranded costs (where this does not run counter to the very principles of the commitments or guarantees themselves).
- (l) Costs which some undertakings may have to bear after the time horizon indicated in Article 26 of the Directive (26 November 2006) cannot, as a rule, constitute eligible stranded costs within the meaning of this methodology <sup>(2)</sup>. However, if it appears necessary, the Authority may in due course take into account such commitments or guarantees and, if appropriate, consider them as eligible stranded costs during the next stage of opening up the common electricity market.
- (m) For EFTA States which open up their markets more quickly than is required by the EEA Joint Committee Decision No 168/1999, the Authority may agree to regard as eligible stranded costs under this methodology costs which some undertakings may have to bear after the time horizon indicated in Article 26 of the Directive if such costs result from commitments or guarantees which meet the criteria under points (a) to (l) in section 21.3 above and provided that they are limited to a period not extending beyond 31 December 2010.

#### 21.4. STRANDED COSTS AND STATE AID

- (1) The general principle laid down in Article 61(1) of the EEA Agreement is that State aid is prohibited. However, paragraphs 2 and 3 of that Article provide for a number of derogations from this general rule. Furthermore, in accordance with Article 59(2) of the EEA Agreement, "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-enhancing monopoly" are subject to the rules contained in the EEA Agreement, in particular the rules on competition, in so far as the application of those rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. In any event, trade must not be affected to an extent contrary to the interests of the Contracting Parties.
- (2) The State aid corresponding to the eligible stranded costs defined in these Guidelines is designed to facilitate the transition for electricity undertakings to a competitive electricity market. The Authority may take a favourable view of such aid to the extent that the distortion of competition is counterbalanced by the contribution made by the aid to the attainment of a common objective that market forces could not achieve. Indeed, the distortion of competition that results from aid paid to facilitate the transition for electricity undertakings from a largely closed market to one that has been partially liberalized cannot be contrary to the common interest where it is limited in time and in its effects, since liberalization of the electricity market is in the general interest of the EEA market and supplements moves to establish the internal market. The Authority also takes the view that aid granted for stranded costs enables electricity undertakings to reduce the risks relating to their historic commitments or investments and may thus encourage them to maintain their investments in the long term. Finally, if there were no compensation for stranded costs, there would be a greater risk that the undertakings concerned might pass on the entire cost of their non-economical commitments or guarantees to their captive customers.

<sup>(1)</sup> In the case of a long-term contract of sale or purchase, the stranded costs will, therefore, be calculated by comparison with the conditions on which, in a liberalised market, the undertaking would normally have been able to sell or purchase the product under consideration, all things being equal.

<sup>(2)</sup> It must be understood that investments which cannot be recouped or are not economically viable as a result of the liberalisation of the internal market in electricity may constitute stranded costs within the meaning of this methodology, including in cases where they are, in principle, to extend beyond 2006. Furthermore, commitments or guarantees which must absolutely continue to be honoured after 26 November 2006 because failure to do so might give rise to major risks concerning protection of the environment, public safety, social protection of workers or the security of the electricity network may, if duly justified, constitute eligible stranded costs according to this methodology.

- (3) Aid to compensate for stranded costs in the electricity industry can be further justified in relation to other liberalized sectors by the fact that liberalization of the electricity market has not been accompanied by either faster technological progress or increased demand and by the fact that it is hardly conceivable, in the interests of environmental protection, security of supply and the smooth operation of the EEA countries' economies, to wait until electricity undertakings encounter difficulties before considering whether to grant them state support.
- (4) In this context, the Authority takes the view that aid designed to offset stranded costs normally qualifies for the derogation under Article 61(3)(c) of the EEA Agreement if it facilitates the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.
- (5) Without prejudice to the specific provisions resulting from the Authority's guidelines on the application of the EEA State aid provisions, including the guidelines on State aid for environmental protection <sup>(1)</sup>, the Authority may, in principle, accept as being compatible with Article 61(3)(c) of the EEA Agreement aid designed to offset eligible stranded costs which satisfied the following criteria:
- (a) The aid must serve to offset eligible stranded costs that have been clearly determined and isolated. It may under no circumstances exceed the amount of the eligible stranded costs.
  - (b) The arrangements for paying the aid must allow account to be taken of future developments in competition. Such developments may be gauged in particular by way of quantifiable factors (prices, market shares, other relevant factors indicated by the EFTA State). Since changes in the conditions of competition have a direct effect on the amount of eligible stranded costs, the amount of the aid paid will necessarily be conditional on the development of genuine competition, and the calculation of aid paid over time will have to take account of changes in the relevant factors in order to gauge the degree of competition achieved.
  - (c) The EFTA State must undertake to send to the Authority an annual report that, in particular, describes developments in the competitive situation on its electricity market by indicating among other things the changes observed in the relevant quantifiable factors. The annual report will give details of how the stranded costs taken into account for the relevant year have been calculated and will specify the amounts of aid paid.
  - (d) The degressive nature of aid intended to offset stranded costs will be viewed favourably by the Authority when making its assessment; it will, in fact, help the undertaking concerned to speed up its preparations for a liberalized electricity market.
  - (e) The maximum amount of aid that can be paid to an undertaking to offset stranded costs must be specified in advance. It must take account of productivity gains that may be achieved by the undertaking.

Similarly, the detailed arrangements for calculating and financing aid designed to offset stranded costs and the maximum period for which such aid can be granted must be clearly spelt out in advance. Notification of the aid will specify in particular how calculation of the stranded costs will take account of changes in the various factors mentioned in point (b).

- (f) In order to avoid any cumulation of aid, the EFTA State will undertake in advance not to pay any rescue or restructuring aid to undertakings that are to benefit from aid in respect of stranded costs. The Authority takes the view that the payment of compensation for stranded costs linked to investments in assets that offer no prospects of long-term viability does not facilitate the transition of the electricity industry to a liberalized market and cannot therefore qualify for the derogation under Article 61(3)(c) of the EEA Agreement.
- (6) However, the Authority entertains the most serious misgivings regarding aid intended to offset stranded costs which do not satisfy the above criteria or which are likely to give rise to distortions of competition contrary to the common interest for the following reasons:
- (a) The aid is not linked to eligible stranded costs that meet the above definition or to clearly defined and individualized stranded costs or exceeds the amount of eligible stranded costs.

<sup>(1)</sup> OJ L 237, 6.9.2001, p. 16.

- (b) The aid is intended to safeguard all or some of the income pre-dating the entry into force of Decision 168/1999, without taking strictly into account the eligible stranded costs that might result from the introduction of competition.
- (c) The amount of aid is not likely to be adjusted to take due account of the differences between the economic and market assumptions initially made when estimating stranded costs and real changes in them over time.

#### 21.5. METHOD OF FINANCING AID INTENDED TO OFFSET STRANDED COSTS

- (1) EFTA States are free to choose the methods of financing aid intended to offset stranded costs which they consider to be the most appropriate. However, in order to authorize such aid, the Authority will make sure that the financing arrangements do not give rise to effects that conflict with the objectives of Directive 96/92/EC or with the interests of the Contracting Parties. The interests of the Contracting Parties take into account, among other things, consumer protection, free movement of goods and services, and competition.
- (2) The financing arrangements must not have the effect of deterring outside undertakings or new players from entering certain national or regional markets. In particular, aid intended to offset stranded costs cannot be financed out of levies on electricity in transit between EEA States or from levies linked to the distance between the producer and the consumer.
- (3) The Authority will also ensure that the arrangements for financing aid intended to offset stranded costs result in fair treatment for eligible and non-eligible consumers. To this end, the annual report referred to in point (c) in section 21.4. will give the breakdown by eligible and non-eligible consumers of the sources of finance intended to offset the stranded costs. Where non-eligible consumers participate in the financing of stranded costs directly through the tariff for the purchase of electricity, this must be clearly stated. The contribution imposed on either group (eligible or non-eligible) must not exceed the proportion of stranded costs to be offset that corresponds to the market share accounted for by those consumers.
- (4) Where funds are raised by private undertakings with a view to financing aid mechanisms designed to offset stranded costs, the management of those funds will have to be clearly separate from that of the normal resources of those undertakings. Such investments must not benefit the undertakings managing them.

#### 21.6. OTHER ASSESSMENT FACTORS

- (1) In examining State aid intended to offset stranded costs, the Authority takes particular account of the size and level of interconnection of the network concerned and of the structure of the electricity industry. Aid for a small network with a low degree of interconnection with the rest of the EEA will be less likely to give rise to substantial distortions of competition.
- (2) This methodology for stranded costs is without prejudice to the application, in the regions covered by Article 61(3)(a) of the EEA Agreement, of the guidelines on national regional aid <sup>(1)</sup>. Pursuant to Article 59(2) of the EEA Agreement, where application of the rules on State aid to stranded costs obstructs the performance, in law or in fact, of the particular tasks assigned to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, those rules may be derogated from provided that trade is not affected to an extent contrary to the interests of the Contracting Parties.
- (3) The rules laid down in this methodology for State aid intended to offset stranded costs arising from Decision 168/1999 apply independently of the public or private ownership of the undertakings concerned.

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<sup>(1)</sup> OJ L 111, 29.4.1999 and EEA Supplement No 18. See in this context chapter 25 of the State aid Guidelines.