

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

EFTA SURVEILLANCE AUTHORITY DECISION

No 788/08/COL

of 17 December 2008

amending, for the sixty-seventh time, the procedural and substantive rules in the field of State aid by amending the existing chapters on reference and discount rates and on State aid granted in the form of guarantees and by introducing a new chapter on recovery of unlawful and incompatible State aid, on State aid to cinematographic and other audiovisual works and State aid for railway undertakings

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, 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 ⁽³⁾, in particular to Article 24 and Article 5(2)(b) thereof,

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

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

WHEREAS under Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾, the Authority shall keep under constant review all systems of aid existing in the EFTA States and propose any appropriate measures required by the progressive development or by the functioning of the EEA Agreement,

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

WHEREAS, on 15 November 2007 the European Commission adopted a Notice under the heading Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid ⁽⁶⁾,

WHEREAS, on 19 January 2008, the European Commission issued a Communication concerning the revision of the method for setting the reference and discount rates ⁽⁷⁾,

WHEREAS, on 16 June 2008, the European Commission issued a Communication concerning the prolongation of the application of the Communication on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works of 2001 ⁽⁸⁾,

WHEREAS, on 20 June 2008, the European Commission adopted a Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽⁹⁾,

WHEREAS, on 22 July 2008, the European Commission issued a Communication concerning Community guidelines on State aid for railway undertakings ⁽¹⁰⁾,

WHEREAS these Communications and Notices are also of relevance for the European Economic Area,

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

⁽¹⁾ Hereinafter referred to as the Authority.

⁽²⁾ Hereinafter referred to as the EEA Agreement.

⁽³⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽⁴⁾ Hereinafter referred to as Protocol 3.

⁽⁵⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ) L 231, 3.9.1994 p. 1 and EEA Supplement No 32, 3.9.1994 p. 1. The Guidelines were last amended on 8.10.2008. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

⁽⁶⁾ OJ C 272, 15.11.2007, p. 4.

⁽⁷⁾ OJ C 14, 19.1.2008, p. 6.

⁽⁸⁾ OJ C 134, 16.6.2007, p. 5.

⁽⁹⁾ OJ C 155, 20.6.2008, p. 10.

⁽¹⁰⁾ OJ C 184, 22.7.2008, p. 13.

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

HAVING consulted the European Commission,

RECALLING that the Authority has consulted the EFTA States by letters to Iceland, Liechtenstein and Norway,

HAS ADOPTED THIS DECISION:

Article 1

The Chapter of the State Aid Guidelines on reference and discount rates shall be amended. The new chapter is contained in Annex I to this Decision.

Article 2

The Chapter of the State Aid Guidelines on state guarantees shall be amended. The new chapter is contained in Annex II to this Decision.

Article 3

The State Aid Guidelines shall be amended by introducing a new chapter on state aid for railway undertakings. This new chapter is contained in Annex III to this Decision.

Article 4

The State Aid Guidelines shall be amended by introducing a new chapter on recovery of unlawful and incompatible state aid. The new chapter is contained in Annex IV to this Decision.

Article 5

The State Aid Guidelines shall be amended by introducing a new chapter on support for cinema and other audiovisual works. This new chapter is contained in Annex V to this Decision.

Article 6

The existing chapter of the State Aid Guidelines on Complaints - Form For The Submission Of Complaints Concerning Alleged Unlawful State Aid shall be deleted.

Article 7

Only the English versions are authentic.

Done at Brussels, 17 December 2008.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kristján A. STEFÁNSSON
College Member

ANNEX I

REFERENCE AND DISCOUNT RATES ⁽¹⁾

Within the framework of State aid control, the Authority makes use of reference and discount rates. The reference and discount rates are applied as a proxy for the market rate and to measure the grant equivalent of aid, in particular when it is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes. They are also used to check compliance with the *de minimis* rule and block exemption regulations.

The Authority adopts the following methodology for setting the reference rates:

— Calculation basis: 1-year IBOR

The base rate is based on 1-year money market rates. The Authority is reserving the right to use shorter or longer maturities adapted to certain cases.

Where those rates are not available, the 3-month money market rate will be used.

In the absence of reliable or equivalent data or in exceptional circumstances the Authority may, in close cooperation with the EFTA State(s) concerned and in principle based on data from the relevant Central Bank, determine another calculation basis.

— Margins

The following margins are to be applied in principle depending on the rating of the undertaking concerned and the collateral ⁽²⁾ offered.

Loan margins in basis points			
Rating category	Collateralisation		
	High	Normal	Low
Strong (AAA-A)	60	75	100
Good (BBB)	75	100	220
Satisfactory (BB)	100	220	400
Weak (B)	220	400	650
Bad/Financial difficulties (CCC and below)	400	650	1 000 ⁽¹⁾

⁽¹⁾ Subject to the application of the specific provisions for rescue and restructuring aid, as currently laid down in the Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ L 97, 15.4.2005, p. 41) and in particular point 24(a), which refers to 'an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rates adopted by the Authority'. Hence, for rescue aid cases, the 1-year IBOR increased with at least 100 basis points shall be applied.

Normally, 100 basis points are added to the base rate. This assumes (i) loans to undertakings with satisfactory rating and high collateral; or (ii) loans to undertakings with good rating and normal collateral.

For borrowers that do not have a credit history or a rating based on a balance sheet approach, such as certain special-purpose companies or start-up companies, the base rate should be increased by at least 400 basis points (depending on the available collaterals) and the margin can never be lower than the one which would be applicable to the parent company.

⁽¹⁾ This chapter corresponds to the Commission's Communication on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:014:0006:0009:EN:PDF>

⁽²⁾ Normal collateral should be understood as the level of collateral normally required by financial institutions as a guarantee for their loan. The level of collaterals can be measured as the Loss Given Default (LGD), which is the expected loss in percentage of the debtor's exposure taking into account recoverable amounts from collateral and the bankruptcy assets; as a consequence the LGD is inversely proportional to the validity of collaterals. For the present chapter it is assumed that 'High' collateralisation implies an LGD below or equal to 30 %, 'Normal' collateralisation an LGD between 31 % and 59 %, and 'Low' collateralisation an LGD above or equal to 60 %. For more details, on the notion LGD, see Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework — Comprehensive Version, available on: <http://www.bis.org/publ/bcbs128.pdf>

Ratings do not need to be obtained from specific rating agencies — national rating systems or rating systems used by banks to reflect default rates are equally acceptable ⁽¹⁾.

The above margins may be revised from time to time to take account of the market situation.

— Update

An update of the reference rate will be carried out every year. The base rate will thus be calculated on the basis of the 1-year IBOR recorded in September, October and November of the previous year. The then fixed base rate will be in force as from the first of January. In addition, to take account of significant and sudden variations, an update will be made each time the average rate, calculated over the previous three months, deviates by more than 15 % from the rate in force. This new rate will enter into force on the first day of the second month following the months used for the calculation.

— Discount rate: Calculation of net present value

The reference rate is also to be used as a discount rate, for calculating present values. To that end, in principle, the base rate increased by a fixed margin of 100 basis points will be used.

— The present methodology will enter into force as of 1 January 2009.

—

⁽¹⁾ For a comparison between the most commonly used credit rating mechanisms, see e.g. Table 1 in Working Paper No 207 of the Bank for International Settlements: <http://www.bis.org/publ/work207.pdf>

ANNEX II

STATE GUARANTEES ⁽¹⁾

1. INTRODUCTION

1.1. Background

This Chapter updates the EFTA Surveillance Authority's approach to state aid granted in the form of guarantees and aims to give EFTA States more detailed guidance about the principles on which the EFTA Surveillance Authority intends to base its interpretation of Articles 61 and 62 of the EEA Agreement, as well as Protocol 3 of the Surveillance and Court Agreement, and their application to state guarantees. These principles are currently laid down in the existing Chapter of the EFTA Surveillance Authority's State Aid Guidelines on state guarantees ⁽²⁾. Experience gained in the application of the existing Chapter since 2000 suggests that the EFTA Surveillance Authority's policy in this area should be reviewed. In this connection, the EFTA Surveillance Authority wishes to recall for instance the recent practice of the European Commission in various specific decisions ⁽³⁾ with respect to the need to undertake an individual assessment of the risk of losses related to each guarantee in the case of schemes. The EFTA Surveillance Authority intends to further make its policy in this area as transparent as possible so that its decisions are predictable and that equal treatment is ensured. In particular, the EFTA Surveillance Authority wishes to provide small and medium-sized enterprises (hereafter 'SMEs') and EFTA States with safe harbours predetermining, for a given company and on the basis of its financial rating, the minimum margin that should be charged for a state guarantee in order to be deemed as not constituting aid within the scope of Article 61(1) of the EEA Agreement. Likewise, any shortfall in the premium charged in comparison with that level could be deemed as the aid element.

1.2. Types of guarantee

In their most common form, guarantees are associated with a loan or other financial obligation to be contracted by a borrower with a lender; they may be granted as individual guarantees or within guarantee schemes.

However, various forms of guarantee may exist, depending on their legal basis, the type of transaction covered, their duration, etc. Without the list being exhaustive, the following forms of guarantee can be identified:

- general guarantees, i.e. guarantees provided to undertakings as such as opposed to guarantees linked to a specific transaction, which may be a loan, an equity investment, etc;
- guarantees provided by a specific instrument as opposed to guarantees linked to the status of the undertaking itself;
- guarantees provided directly or counter guarantees provided to a first level guarantor;
- unlimited guarantees as opposed to guarantees limited in amount and/or time. The EFTA Surveillance Authority also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit state guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability;
- guarantees clearly originating from a contractual source (such as formal contracts, letters of comfort) or another legal source as opposed to guarantees whose form is less visible (such as side letters, oral commitments), possibly with various levels of comfort that can be provided by this guarantee.

Especially in the latter case, the lack of appropriate legal or accounting records often leads to very poor traceability. This is true both for the beneficiary and for the State or public body providing it and, as a result, for the information available to third parties.

⁽¹⁾ This Chapter corresponds to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10, and Corrigendum published in the OJ C 244, 25.9.2008, p. 32), and replaces the existing Chapter of the EFTA Surveillance Authority's State Aid Guidelines on state guarantees (OJ L 274, 26.10.2000, p. 29, EEA Supplement No 48, 26.10.2000, p. 45).

⁽²⁾ OJ L 274, 26.10.2000, p. 29, EEA Supplement No 48, 26.10.2000, p. 45. The Chapter corresponded to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

⁽³⁾ For example: Commission Decision 2003/706/EC of 23 April 2003 on the aid scheme implemented by Germany entitled 'Guarantee schemes of the Land of Brandenburg for 1991 and 1994' State aid C 45/98 (ex NN 45/97) (OJ L 263, 14.10.2003, p. 1); Commission Decision of 16 December 2003 on the guarantee schemes in ship financing — Germany (N 512/03) (OJ C 62, 11.3.2004, p. 3); Commission Decision 2006/599/EC of 6 April 2005 on the aid scheme which Italy is planning to implement for ship financing (OJ L 244, 7.9.2006, p. 17).

1.3. Structure and scope of the Chapter

For the purpose of this Chapter:

- (a) 'guarantee scheme' means any tool on the basis of which, without further implementing measures being required, guarantees can be provided to undertakings respecting certain conditions of duration, amount, underlying transaction, type or size of undertakings (such as SMEs);
- (b) 'individual guarantee' means any guarantee provided to an undertaking and not awarded on the basis of a guarantee scheme.

Sections 3 and 4 of this Chapter are designed to be directly applicable to guarantees linked to a specific financial transaction such as a loan. The EFTA Surveillance Authority considers that, owing to their frequency and the fact that they can usually be quantified, these are the cases where guarantees most need to be classed as constituting state aid or otherwise.

As in most cases the transaction covered by a guarantee would be a loan, the Chapter will further refer to the principal beneficiary of the guarantee as the 'borrower' and to the body whose risk is diminished by the state guarantee as the 'lender'. The use of these two specific terms also aims to facilitate understanding of the rationale underpinning the text, since the basic principle of a loan is broadly understood. However, it does not ensue that sections 3 and 4 are only applicable to a loan guarantee. They apply to all guarantees where a similar transfer of risk takes place such as an investment in the form of equity, provided the relevant risk profile (including the possible lack of collateralisation) is taken into account.

The Chapter applies to all economic sectors, including the transport sector, without prejudice to specific rules relating to guarantees in the sector concerned.

This Chapter does not apply to export credit guarantees.

1.4. Other types of guarantee

Where certain forms of guarantee (see point 1.2) involve a transfer of risk to the guarantor and where they do not display one or more of the specific features referred to in point 1.3, for instance insurance guarantees, a case-by-case analysis will have to be made for which, as far as is necessary, the applicable sections or methodologies described in this Chapter will be applied.

1.5. Neutrality

This Chapter applies without prejudice to Article 125 of the EEA Agreement and thus does not prejudice the rules in the EFTA States governing the system of property ownership. The EEA Agreement is neutral as regards public and private ownership.

In particular, the mere fact that the ownership of an undertaking is largely in public hands is not sufficient in itself to constitute a state guarantee provided there are no explicit or implicit guarantee elements.

2. APPLICABILITY OF ARTICLE 61(1)

2.1. General remarks

Article 61(1) of the EEA Agreement states that any aid granted by EC Member States, EFTA States or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of the EEA Agreement.

These general criteria equally apply to guarantees. As for other forms of potential aid, guarantees given directly by the State, namely by central, regional or local authorities, as well as guarantees given through state resources by other state-controlled bodies such as undertakings and imputable to public authorities ⁽⁴⁾, may constitute state aid.

In order to avoid any doubts, the notion of state resources should thus be clarified as regards state guarantees. The benefit of a state guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be state aid under Article 61(1) of the EEA Agreement. The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee. Whether or not a guarantee constitutes state aid, and, if so, what the amount of that state aid may be, must be assessed at the moment when the guarantee is given.

In this context the EFTA Surveillance Authority points out that the analysis under state aid rules does not prejudice the compatibility of a given measure with other provisions of the EEA Agreement.

⁽⁴⁾ See Case C-482/99 *France v Commission* (Stardust) [2002] ECR I-4397.

2.2. Aid to the borrower

Usually, the aid beneficiary is the borrower. As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the state guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the state guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a state guarantee, find a financial institution prepared to lend on any terms. State guarantees may thus facilitate the creation of new business and enable certain undertakings to raise money in order to pursue new activities. Likewise, a state guarantee may help a failing firm remain active instead of being eliminated or restructured, thereby possibly creating distortions of competition.

2.3. Aid to the lender

2.3.1. Even if usually the aid beneficiary is the borrower, it cannot be ruled out that under certain circumstances the lender, too, will directly benefit from the aid. In particular, for example, if a state guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased. Where the guarantee contains aid to the lender, attention should be drawn to the fact that such aid might, in principle, constitute operating aid.

2.3.2. Guarantees differ from other state aid measures, such as grants or tax exemptions, in that, in the case of a guarantee, the State also enters into a legal relationship with the lender. Therefore, consideration has to be given to the possible consequences for third parties of state aid that has been illegally granted. In the case of state guarantees for loans, this concerns mainly the lending financial institutions. In the case of guarantees for bonds issued to obtain financing for undertakings, this concerns the financial institutions involved in the issuance of the bonds. The question whether the illegality of the aid affects the legal relations between the State and third parties is a matter which has to be examined under national law. National courts may have to examine whether national law prevents the guarantee contracts from being honoured, and in that assessment the EFTA Surveillance Authority considers that they should take account of the breach of EEA law. Accordingly, lenders may have an interest in verifying, as a standard precaution, that the EEA rules on state aid have been observed whenever guarantees are granted. An EFTA State should be able to provide a case number issued by the EFTA Surveillance Authority for an individual case or a scheme and possibly a non-confidential copy of the EFTA Surveillance Authority's decision together with the relevant reference to the *Official Journal of the European Union*. The EFTA Surveillance Authority for its part will do its utmost to make available in a transparent manner information on cases and schemes approved by it.

3. CONDITIONS RULING OUT THE EXISTENCE OF AID

3.1. General considerations

If an individual guarantee or a guarantee scheme entered into by the State does not bring any advantage to an undertaking, it will not constitute state aid.

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed in its recent judgments ⁽⁵⁾ that the European Commission should base its assessment on the principle of an investor operating in a market economy (hereafter referred to as the 'market economy investor principle'). Account should therefore be taken of the effective possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the capital market. State aid is not involved where a new funding source is made available on conditions which would be acceptable for a private operator under the normal conditions of a market economy ⁽⁶⁾.

In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the EFTA Surveillance Authority sets out in this section a number of sufficient conditions for the absence of aid. Individual guarantees are covered in point 3.2 with a simpler option for SMEs in point 3.3. Guarantee schemes are covered in point 3.4 with a simpler option for SMEs in point 3.5.

⁽⁵⁾ See Case C-482/99 referred to in footnote 4.

⁽⁶⁾ See the EFTA Surveillance Authority's State Aid Guidelines on public authorities' holdings (OJ L 231, 3.9.1994, p.1, EEA Supplement No 32, 3.9.1994, p. 1). These Guidelines are based on Bulletin EC 9-1984 on the Application of [ex] Articles 92 and 93 of the EEC Treaty to public authorities' holdings (Bulletin of the European Communities No 9-1984), incorporated into point 9 of Annex XV to the EEA Agreement. See also Joined Cases 296 and 318/82 Netherlands and Leeuwarder Papierwarenfabriek Bv v Commission [1985] ECR 809, paragraph 17. See also the EFTA Surveillance Authority's State Aid Guidelines on aid to the aviation sector (OJ L 124, 23.5.1996, p. 41 (point 30), EEA Supplement No 23, 23.5.1996, p. 86 (point 30)). These Guidelines prescribe the application by the Authority of criteria corresponding to Commission Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector (OJ C 350, 10.12.1994, p. 5), points 25 and 26.

3.2. Individual guarantees

Regarding an individual state guarantee, the EFTA Surveillance Authority considers that the fulfilment of all the following conditions will be sufficient to rule out the presence of state aid.

- (a) The borrower is not in financial difficulty.

In order to decide whether the borrower is to be seen as being in financial difficulty, reference should be made to the definition set out in the Chapter of these Guidelines on aid for rescuing and restructuring firms in difficulty ⁽⁷⁾. SMEs which have been incorporated for less than three years shall not be considered as being in difficulty for that period for the purposes of this Chapter.

- (b) The extent of the guarantee can be properly measured when it is granted.

This means that the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time.

- (c) The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation; this limitation does not apply to guarantees covering debt securities ⁽⁸⁾.

The EFTA Surveillance Authority considers that if a financial obligation is wholly covered by a state guarantee, the lender has less incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to properly assess the borrower's creditworthiness. Such risk assessment might, due to lack of means, not always be taken over by the state guarantor. This lack of incentive to minimise the risk of non-repayment of the loan might encourage lenders to contract loans with a greater than normal commercial risk and could thus increase the amount of higher-risk guarantees in the State's portfolio.

This limitation of 80 % does not apply to a public guarantee granted to finance a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest (SGEI) ⁽⁹⁾ and when this guarantee has been provided by the public authority having put in place this entrustment. The limitation of 80 % applies if the company concerned provides other SGEIs or other economic activities.

In order to ensure that the lender effectively bears part of the risk, due attention must be given to the following two aspects:

- when the size of the loan or of the financial obligation decreases over time, for instance because the loan starts to be reimbursed, the guaranteed amount has to decrease proportionally, in such a way that at each moment in time the guarantee does not cover more than 80 % of the outstanding loan or financial obligation;
- losses have to be sustained proportionally and in the same way by the lender and the guarantor. In the same manner, net recoveries (i.e. revenues excluding costs for claim handling) generated from the recuperation of the debt from the securities given by the borrower have to reduce proportionally the losses borne by the lender and the guarantor. First-loss guarantees, where losses are first attributed to the guarantor and only then to the lender, will be regarded as possibly involving aid.

If an EFTA State wishes to provide a guarantee above the 80 % threshold and claims that it does not constitute aid, it should duly substantiate the claim, for instance on the basis of the arrangement of the whole transaction, and notify it to the EFTA Surveillance Authority so that the guarantee can be properly assessed with regards to its possible state aid character.

⁽⁷⁾ OJ L 97, 15.4.2005, p. 41, EEA Supplement No 18, 14.4.2005, p. 1. The Chapter corresponds to the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

⁽⁸⁾ For the definition of 'debt securities', see Article 2(1)(b) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38), which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 120/2005 of 30.9.2005, amending Annex IX to the EEA Agreement (OJ L 339, 22.12.2005, p. 26, EEA Supplement No 66, 22.12.2005, p. 15). The Directive was last amended by Directive 2008/22/EC (OJ L 76, 19.3.2008, p. 50) (not yet incorporated into the EEA Agreement).

⁽⁹⁾ Such an SGEI must comply with EEA rules such as Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67), which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 91/2006, amending Annex XV to the EEA Agreement (OJ L 289, 19.10.2006, p. 31, EEA Supplement No 52, 19.10.2006, p. 24) and the Chapter of these Guidelines on state aid in the form of public service compensation (OJ L 109, 26.4.2007, p. 44, EEA Supplement No 20, 26.4.2007, p. 1). The Chapter corresponds to Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

- (d) A market-oriented price is paid for the guarantee.

As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid.

If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan.

In both cases, in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration. This includes: the amount and duration of the transaction; the security given by the borrower and other experience affecting the recovery rate evaluation; the probability of default of the borrower due to its financial position, its sector of activity and prospects; as well as other economic conditions. This analysis should notably allow the borrower to be classified by means of a risk rating. This classification may be provided by an internationally recognised rating agency or, where available, by the internal rating used by the bank providing the underlying loan. The EFTA Surveillance Authority points to the link between rating and default rate made by international financial institutions, whose work is also publicly available⁽¹⁰⁾. To assess whether the premium is in line with the market prices an EFTA State can carry out a comparison of prices paid by similarly rated undertakings on the market.

The EFTA Surveillance Authority will therefore not accept that the guarantee premium is set at a single rate deemed to correspond to an overall industry standard.

3.3. Valuation of individual guarantees for SMEs

As an exception, if the borrower is an SME⁽¹¹⁾, the EFTA Surveillance Authority can by way of derogation from point 3.2(d) accept a simpler evaluation of whether or not a loan guarantee involves aid. In that case, and provided all the other conditions laid down in points 3.2(a), (b) and (c) are met, a state guarantee would be deemed as not constituting aid if the minimum annual premium ('safe harbour premium'⁽¹²⁾) set out in the following table is charged on the amount effectively guaranteed by the State, based on the rating of the borrower⁽¹³⁾:

Credit quality	Standard and Poor's	Fitch	Moody's	Annual safe-harbour premium
Highest quality	AAA	AAA	Aaa	0,4 %
Very strong payment capacity	AA +	AA +	Aa 1	0,4 %
	AA	AA	Aa 2	
	AA –	AA –	Aa 3	
Strong payment capacity	A +	A +	A 1	0,55 %
	A	A	A 2	
	A –	A –	A 3	

⁽¹⁰⁾ Such as Table 1 on agencies' credit ratings to be found in the Bank for International Settlements Working Paper No 207, available at: <http://www.bis.org/publ/work207.pdf>.

⁽¹¹⁾ 'SMEs' refer to small and medium-sized enterprises as defined in the Chapter of the EFTA Surveillance Authority State Aid Guidelines on aid to micro, small and medium-sized enterprises (SMEs). The definition corresponds to the one set forth in Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). See also Annex I to Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 88/2002 amending Annex XV to the EEA Agreement (OJ L 266, 3.10.2002, p. 56, EEA Supplement No 49, 3.10.2002, p. 42). This Regulation was last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 28/2007 (OJ L 209, 9.8.2007, p. 50, EEA Supplement No 38, 9.8.2007, p. 33).

⁽¹²⁾ These safe-harbour premiums are established in line with the margins determined for loans to similarly rated undertakings in the Chapter of the EFTA Surveillance Authority State Aid Guidelines on the method for setting the reference and discount rates. These Guidelines correspond to the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6). Following the study commissioned by the European Commission on that topic (http://ec.europa.eu/comm/competition/state_aid/studies_reports/full_report.pdf — see pages 23 and 156-159 of the study), a general reduction of 20 basis points has been taken into account. This reduction corresponds to the difference in margin for a similar risk between a loan and a guarantee in order to take into account the additional costs specifically linked to loans.

⁽¹³⁾ The table refers to the rating classes of Standard and Poor's, Fitch and Moody's, which are the rating agencies most frequently used by the banking sector in order to link their own rating system, as described in point 3.2(d). However, ratings do not need to be obtained from those specific rating agencies. National rating systems or rating systems used by banks to reflect default rates are equally acceptable provided they supply the one-year probability of default as this figure is used by rating agencies to rank companies. Other systems should allow for a similar classification through this ranking key.

Credit quality	Standard and Poor's	Fitch	Moody's	Annual safe-harbour premium
Adequate payment capacity	BBB +	BBB +	Baa 1	0,8 %
	BBB	BBB	Baa 2	
	BBB –	BBB –	Baa 3	
Payment capacity is vulnerable to adverse conditions	BB +	BB +	Ba 1	2,0 %
	BB	BB	Ba 2	
	BB –	BB –	Ba 3	
Payment capacity is likely to be impaired by adverse conditions	B +	B +	B 1	3,8 %
	B	B	B 2	
	B –	B –	B 3	6,3 %
Payment capacity is dependent upon sustained favourable conditions	CCC +	CCC +	Caa 1	No safe-harbour annual premium can be provided
	CCC	CCC	Caa 2	
	CCC –	CCC –	Caa 3	
	CC	CC		
		C		
In or near default	SD	DDD	Ca	No safe-harbour annual premium can be provided
	D	DD	C	
		D		

The safe-harbour premiums apply to the amount effectively guaranteed or counter-guaranteed by the State at the beginning of each year concerned. They must be considered as the minimum to be applied with respect to a company whose credit rating is at least equal to those given in the table ⁽¹⁴⁾.

In the case of a single upfront guarantee premium, the loan guarantee is deemed to be free of aid if it is at least equal to the present value of the future guarantee premiums as indicated above, the discount rate used being the corresponding reference rate ⁽¹⁵⁾.

As outlined in the table above, companies with a rating corresponding to CCC/Caa or worse cannot benefit from this simplified methodology.

For SMEs which do not have a credit history or a rating based on a balance sheet approach, such as certain special purpose companies or start-up companies, the safe-harbour premium is set at 3,8 % but this can never be lower than the premium which would be applicable to the parent company or companies.

These margins may be revised from time to time to take account of the market situation.

3.4. Guarantee schemes

For a state guarantee scheme, the EFTA Surveillance Authority considers that the fulfilment of all the following conditions will rule out the presence of state aid:

- (a) The scheme is closed to borrowers in financial difficulty (see details in point 3.2(a)).
- (b) The extent of the guarantees can be properly measured when they are granted. This means that the guarantees must be linked to specific financial transactions, for a fixed maximum amount and limited in time.

⁽¹⁴⁾ For example, a company to which a bank assigns a credit rating corresponding to BBB-/Baa 3 should be charged a yearly guarantee premium of at least 0,8 % on the amount effectively guaranteed by the State at the beginning of each year.

⁽¹⁵⁾ See the Guidelines referred to in footnote 12 providing that: 'The reference rate is also to be used as a discount rate, for calculating present values. To that end, in principle, the base rate increased by a fixed margin of 100 basis points will be used.' (p. 4).

- (c) The guarantees do not cover more than 80 % of each outstanding loan or other financial obligation (see details and exceptions in point 3.2(c)).
- (d) The terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the beneficiaries make it, in all probability, self-financing. The self-financing nature of the scheme and the proper risk orientation are viewed by the EFTA Surveillance Authority as indications that the guarantee premiums charged under the scheme are in line with market prices.

This entails that the risk of each new guarantee has to be assessed, on the basis of all the relevant factors (quality of the borrower, securities, duration of the guarantee, etc). On the basis of this risk analysis, risk classes ⁽¹⁶⁾ have to be defined, the guarantee has to be classified in one of these risk classes and the corresponding guarantee premium has to be charged on the guaranteed or counter-guaranteed amount.

- (e) In order to have a proper and progressive evaluation of the self-financing aspect of the scheme, the adequacy of the level of the premiums has to be reviewed at least once a year on the basis of the effective loss rate of the scheme over an economically reasonable time horizon, and premiums adjusted accordingly if there is a risk that the scheme may no longer be self-financing. This adjustment may concern all issued and future guarantees or only the latter.
- (f) In order to be viewed as being in line with market prices, the premiums charged have to cover the normal risks associated with granting the guarantee, the administrative costs of the scheme, and a yearly remuneration of an adequate capital, even if the latter is not at all or only partially constituted.

As regards administrative costs, these should include at least the specific initial risk assessment as well as the risk monitoring and risk management costs linked to the granting and administration of the guarantee.

As regards the remuneration of the capital, the EFTA Surveillance Authority observes that usual guarantors are subject to capital requirement rules and, in accordance with these rules, are forced to constitute equity in order not to go bankrupt when there are variations in the yearly losses related to the guarantees. State guarantee schemes are normally not subject to these rules and thus do not need to constitute such reserves. In other words, each time the losses stemming from the guarantees exceed the revenues from the guarantee premiums, the deficit is simply covered by the state budget. This state guarantee to the scheme puts the latter in a more favourable situation than a usual guarantor. In order to avoid this disparity and to remunerate the State for the risk it is taking, the EFTA Surveillance Authority considers that the guarantee premiums have to cover the remuneration of an adequate capital.

The EFTA Surveillance Authority considers that this capital has to correspond to 8 % ⁽¹⁷⁾ of the outstanding guarantees. For guarantees granted to undertakings whose rating is equivalent to AAA/AA- (Aaa/Aa3), the amount of capital to be remunerated can be reduced to 2 % of the outstanding guarantees. Meanwhile, with regard to guarantees granted to undertakings whose rating is equivalent to A+/A- (A1/A3), the amount of capital to be remunerated can be reduced to 4 % of the outstanding guarantees.

The normal remuneration of this capital is made up of a risk premium, possibly increased by the risk-free interest rate.

The risk premium must be paid to the State on the adequate amount of capital in all cases. Based on its practice and the practice of the European Commission, the EFTA Surveillance Authority considers that a normal risk premium for equity amounts to at least 400 basis points and that such risk premium should be included in the guarantee premium charged to the beneficiaries ⁽¹⁸⁾.

⁽¹⁶⁾ See further details in footnote 13.

⁽¹⁷⁾ Corresponding to the capital requirements laid down in Article 75 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1), which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 65/2008 amending Annex IX to the EEA Agreement (OJ L 257, 25.9.2008, p. 27, EEA Supplement No 58, 25.9.2008, p. 9), read in conjunction with Annex VI (paragraph 41 onwards) thereto.

⁽¹⁸⁾ For a guarantee to a BBB rated company amounting to 100, the reserves to be constituted thus amount to 8. Applying 400 basis points (or 4 %) to this amount results in annual capital costs of $8 \% \times 4 \% = 0,32 \%$ of the guaranteed amount, which will impact the price of the guarantee accordingly. If the one-year default rate anticipated by the scheme for this company is, for instance, 0,35 % and the yearly administrative costs are estimated at 0,1 %, the price of the guarantee deemed as non-aid will be 0,77 % per year.

If, as in most state guarantee schemes, the capital is not provided to the scheme and therefore there is no cash contribution by the State, the risk-free interest rate does not have to be taken into account. Alternatively, if the underlying capital is effectively provided by the State, the State has to incur borrowing costs and the scheme benefits from this cash by possibly investing it. Therefore the risk-free interest rate has to be paid to the State on the amount provided. Moreover, this charge should be taken from the financial income of the scheme and does not necessarily have to impact the guarantee premiums⁽¹⁹⁾. The EFTA Surveillance Authority considers that the yield of the 10-year government bond may be used as a suitable proxy for the risk-free rate taken as normal return on capital.

- (g) In order to ensure transparency, the scheme must provide for the terms on which future guarantees will be granted, such as eligible companies in terms of rating and, when applicable, sector and size, maximum amount and duration of the guarantees.

3.5. Valuation of guarantee schemes for SMEs

In view of the specific situation of SMEs and in order to facilitate their access to finance, especially through the use of guarantee schemes, two specific possibilities exist for such companies:

- the use of safe harbour premiums as defined for individual guarantees to SMEs;
- the valuation of guarantee schemes as such by allowing the application of a single premium and avoiding the need for individual ratings of beneficiary SMEs.

The conditions of use of both rules are defined as follows:

Use of safe-harbour premiums in guarantee schemes for SMEs

In line with what is proposed for simplification purposes in relation to individual guarantees, guarantee schemes in favour of SMEs can also, in principle, be deemed self-financing and not constitute state aid if the minimum safe-harbour premiums set out in point 3.3 and based on the ratings of undertakings are applied⁽²⁰⁾. The other conditions set out in points 3.4(a), (b) and (c) as well as in point 3.4(g) still have to be fulfilled, and the conditions set out in points 3.4(d), (e) and (f) are deemed to be fulfilled by the use of the minimum annual premiums set out in point 3.3.

Use of single premiums in guarantee schemes for SMEs

The EFTA Surveillance Authority is aware that carrying out an individual risk assessment of each borrower is a costly process, which may not be appropriate where a scheme covers a large number of small loans for which it represents a risk pooling tool.

Consequently, where a scheme only relates to guarantees for SMEs and the guaranteed amount does not exceed a threshold of EUR 2,5 million per company in that scheme, the EFTA Surveillance Authority may accept, by way of derogation from point 3.4(d), a single yearly guarantee premium for all borrowers. However, in order for the guarantees granted under such a scheme to be regarded as not constituting state aid, the scheme has to remain self-financing and all the other conditions set out in points 3.4(a), (b) and (c) as well as in points 3.4(e), (f) and (g) still have to be fulfilled.

3.6. No automatic classification as state aid

Failure to comply with any one of the conditions set out in points 3.2 to 3.5 does not mean that the guarantee or guarantee scheme is automatically regarded as state aid. If there is any doubt as to whether a planned guarantee or guarantee scheme constitutes state aid, it should be notified to the EFTA Surveillance Authority.

4. GUARANTEES WITH AN AID ELEMENT

4.1. General

Where an individual guarantee or a guarantee scheme does not comply with the market economy investor principle, it is deemed to entail state aid. The state aid element therefore needs to be quantified in order to check whether the aid may be found compatible under a specific state aid exemption. As a matter of principle, the state aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually or through a scheme and the actual price paid for that measure.

⁽¹⁹⁾ In that case, and provided the risk-free rate is deemed to be 5 %, the annual cost of the reserves to be constituted will be, for the same guarantee of 100 and reserves of 8 to be constituted, $8 \% \cdot (4 \% + 5 \%) = 0,72 \%$ of the guaranteed amount. Under the same assumptions (default rate of 0,35 % and administrative costs of 0,1 %), the price of the guarantee would be 0,77 % per year and an additional charge of 0,4 % should be paid by the scheme to the State.

⁽²⁰⁾ This includes the provision whereby for SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3,8 % but this can never be lower than the premium which would be applicable to the parent companies.

The resulting yearly cash grant equivalents should be discounted to their present value using the reference rate, then added up to obtain the total grant equivalent.

When calculating the aid element in a guarantee, the EFTA Surveillance Authority will devote special attention to the following elements:

- (a) Whether in the case of individual guarantees the borrower is in financial difficulty. Whether in the case of guarantee schemes, the eligibility criteria of the scheme provide for exclusion of such undertakings (see details in point 3.2(a)).

The EFTA Surveillance Authority notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee.

- (b) Whether the extent of each guarantee can be properly measured when it is granted.

This means that the guarantees must be linked to a specific financial transaction, for a fixed maximum amount and limited in time. In this connection the EFTA Surveillance Authority considers in principle that unlimited guarantees are incompatible with Article 61 of the EEA Agreement.

- (c) Whether the guarantee covers more than 80 % of each outstanding loan or other financial obligation (see details and exceptions in point 3.2(c)).

In order to ensure that the lender has a real incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to assess properly the borrower's creditworthiness, the EFTA Surveillance Authority considers that a percentage of at least 20 % not covered by a state guarantee should be carried by the lender ⁽²¹⁾ to properly secure its loans and to minimise the risk associated with the transaction. The EFTA Surveillance Authority will therefore, in general, examine more thoroughly any guarantee or guarantee scheme covering the entirety (or nearly the entirety) of a financial transaction except if an EFTA State duly justifies it, for instance, by the specific nature of the transaction.

- (d) Whether the specific characteristics of the guarantee and loan (or other financial obligation) have been taken into account when determining the market premium of the guarantee, from which the aid element is calculated by comparing it with the premium actually paid (see details in point 3.2(d)).

4.2. Aid element in individual guarantees

For an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price actually paid.

Where the market does not provide guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the state guarantee after any premiums paid have been taken into account. If there is no market interest rate and if the EFTA State wishes to use the reference rate as a proxy, the EFTA Surveillance Authority stresses that the conditions laid down in the Chapter of the Authority's State Aid Guidelines on reference rates ⁽²²⁾ are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the base rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.

4.3. Aid element in individual guarantees for SMEs

For SMEs, the simplified evaluation system outlined in point 3.3 can also be applied. In that case, if the premium for a given guarantee does not correspond to the value set as a minimum for its rating class, the difference between this minimum level and the premium charged will be regarded as aid. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the relevant reference rate ⁽²³⁾.

⁽²¹⁾ This is based on the assumption that the corresponding level of security is provided by the company to the State and the credit institution.

⁽²²⁾ See the Chapter referred to in footnote 12.

⁽²³⁾ See further details in footnote 15.

Only in cases clearly evidenced and duly justified by the EFTA State concerned may the EFTA Surveillance Authority accept a deviation from these rules. A risk-based approach still has to be respected in such cases.

4.4. Aid element in guarantee schemes

For guarantee schemes, the cash grant equivalent of each guarantee within the scheme is the difference between the premium effectively charged (if any) and the premium that should be charged in an equivalent non-aid scheme set up in accordance with the conditions laid down in point 3.4. The aforementioned theoretical premiums from which the aid element is calculated have therefore to cover the normal risks associated with the guarantee as well as the administrative and capital costs ⁽²⁴⁾. This way of calculating the grant equivalent is aimed at ensuring that, also over the medium and long term, the total aid granted under the scheme is equal to the money injected by the public authorities to cover the deficit of the scheme.

Since, in the case of state guarantee schemes, the specific features of the individual cases may not be known at the time when the scheme is to be assessed, the aid element must be assessed by reference to the provisions of the scheme.

Aid elements in guarantee schemes can also be calculated through methodologies already accepted by the EFTA Surveillance Authority following their notification under an Act incorporated into the EEA Agreement in the field of state aid, such as Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid ⁽²⁵⁾, provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

Only in cases clearly evidenced and duly justified by the EFTA State concerned may the EFTA Surveillance Authority accept a deviation from these rules. A risk-based approach still has to be respected in such cases.

4.5. Aid element in guarantee schemes for SMEs

The two simplification tools outlined in point 3.5 and relating to guarantee schemes for SMEs can also be used for aid calculation purposes. The conditions of use of both rules are defined as follows:

Use of safe-harbour premiums in guarantee schemes for SMEs

For SMEs, the simplified evaluation system outlined above in point 3.5 can also be applied. In that case, if the premium for a given category in a guarantee scheme does not correspond to the value set as a minimum for its rating class ⁽²⁶⁾, the difference between this minimum level and the premium charged will be regarded as aid ⁽²⁷⁾. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the reference rate ⁽²⁸⁾.

Use of single premiums in guarantee schemes for SMEs

In view of the more limited distortion of competition that may be caused by state aid provided in the framework of a guarantee scheme for SMEs, the EFTA Surveillance Authority considers that if an aid scheme only relates to guarantees for SMEs, where the guaranteed amount does not exceed a threshold of EUR 2,5 million per company in this given scheme, the EFTA Surveillance Authority may accept, by way of derogation from point 4.4, a valuation of the aid intensity of the scheme as such, without the need to carry out a valuation for each individual guarantee or risk class within the scheme ⁽²⁹⁾.

⁽²⁴⁾ This calculation can be summarised, for each risk class, as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor of the risk class ('risk' being the probability of default after inclusion of administrative and capital costs), which represents the market premium, and (b) any premium paid, i.e. (guaranteed sum × risk) – premium paid.

⁽²⁵⁾ OJ L 302, 1.11.2006, p. 29. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 157/2006 (OJ L 89, 29.3.2007, p. 33, EEA Supplement No 15, 29.3.2007, p. 26).

⁽²⁶⁾ This includes the possibility whereby SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3,8 % but this can never be lower than the premium which would be applicable to the parent company or companies.

⁽²⁷⁾ This calculation can be summarised, for each risk class, as the outstanding sum guaranteed multiplied by the difference between (a) the safe-harbour premium percentage of that risk class and (b) the premium percentage paid, i.e. guaranteed sum × (safe-harbour premium – premium paid).

⁽²⁸⁾ See further details in footnote 12.

⁽²⁹⁾ This calculation can be summarised, irrespective of the risk class, as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor of the scheme ('risk' being the probability of default after inclusion of administrative and capital costs), and (b) any premium paid, i.e. (guaranteed sum × risk) – premium paid.

5. COMPATIBILITY WITH THE FUNCTIONING OF THE EEA AGREEMENT OF STATE AID IN THE FORM OF GUARANTEES

5.1. **General**

State guarantees within the scope of Article 61(1) of the EEA Agreement must be examined by the EFTA Surveillance Authority with a view to determining whether or not they are compatible with the functioning of the EEA Agreement. Before such assessment of compatibility can be made, the beneficiary of the aid must be identified.

5.2. **Assessment**

Whether or not this aid is compatible with the functioning of the EEA Agreement will be examined by the EFTA Surveillance Authority according to the same rules as are applied to aid measures taking other forms. The concrete criteria for the compatibility assessment have been clarified and detailed by the EFTA Surveillance Authority in its State Aid Guidelines⁽³⁰⁾. The examination will take into account, in particular, the aid intensity, the characteristics of the beneficiaries and the objectives pursued.

5.3. **Conditions**

The EFTA Surveillance Authority will accept guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed between the parties when the guarantee is initially granted. In the event that an EFTA State wants to mobilise the guarantee under conditions other than those initially agreed to at the granting stage, then the EFTA Surveillance Authority will regard the mobilisation of the guarantee as creating new aid which has to be notified under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

6. REPORTS TO BE PRESENTED TO THE EFTA SURVEILLANCE AUTHORITY BY EFTA STATES

In accordance with general monitoring obligations⁽³¹⁾, in order to further monitor new developments on the financial markets and since the value of state guarantees is difficult to assess and changes over time, the constant review, pursuant to Article 62(1) of the EEA Agreement, of state guarantee schemes approved by the EFTA Surveillance Authority is of particular importance. EFTA States shall therefore submit reports to the EFTA Surveillance Authority.

For aid guarantee schemes, these reports will have to be presented at least at the end of the period of validity of the guarantee scheme and for the notification of an amended scheme. The EFTA Surveillance Authority may however consider it appropriate to request reports on a more frequent basis, depending on the case.

For guarantee schemes, for which the EFTA Surveillance Authority has taken a non-aid decision, and especially when no solid historic data exists for the scheme, the EFTA Surveillance Authority may request, when taking its non-aid decision for such reports to be presented, thereby clarifying on a case-by-case basis the frequency and the content of the reporting requirement.

Reports should include at least the following information:

- (a) the number and amount of guarantees issued;
- (b) the number and amount of guarantees outstanding at the end of the period;
- (c) the number and value of defaulted guarantees (displayed individually) on a yearly basis;
- (d) the yearly income:
 - (1) income from the premiums charged;
 - (2) income from recoveries;
 - (3) other revenues (e.g. interest received on deposits or investments);

⁽³⁰⁾ See the EFTA Surveillance Authority State Aid Guidelines, <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

⁽³¹⁾ Such as those laid down in particular by the EFTA Surveillance Authority's Decision No 195/04/COL of 14.7.2004 (OJ L 139, 25.5.2006, p. 37, EEA Supplement No 26, 25.5.2006, p. 1) as last amended by the Authority's Decision No 789/08/COL of 17.12.2008, OJ L 340, 22.12.2010, p. 1, EEA Supplement No. 72, 22.12.2010, p. 1. This Decision corresponds to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1) as last amended by Regulation (EC) No 271/2008 (OJ L 82, 25.3.2008, p. 1). Commission Regulation (EC) No 794/2004 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 123/2005, amending Annex XV and Protocol 26 to the EEA Agreement (OJ L 339, 22.12.2005, p. 32, EEA Supplement No 66, 22.12.2005, p. 18).

- (e) the yearly costs:
 - (1) administrative costs;
 - (2) indemnifications paid on mobilised guarantees;
- (f) the yearly surplus or shortfall (difference between income and costs); and
- (g) the accumulated surplus or shortfall since the beginning of the scheme ⁽³²⁾.

For individual guarantees, the relevant information, mainly that referred to in points (d) to (g), should be similarly reported.

In all cases, the EFTA Surveillance Authority draws the attention of EFTA States to the fact that correct reporting at a remote date presupposes correct collection of the necessary data from the beginning of the use of the scheme and their aggregation on a yearly basis.

The attention of EFTA States is also drawn to the fact that for non-aid guarantees provided individually or under a scheme, although no notification obligation exists, the EFTA Surveillance Authority may have to verify that the guarantee or scheme does not entail aid elements, for instance following a complaint. In that case, the EFTA Surveillance Authority will request information similar to that set out above for reports from the EFTA State concerned.

Where reports already have to be presented following specific reporting obligations established by block exemption regulations, guidelines or frameworks applicable in the state aid field, those specific reports will replace the reports to be presented under the present guarantee reporting obligation provided the information listed above is included.

7. IMPLEMENTING MEASURES

The EFTA Surveillance Authority invites EFTA States to adjust their existing guarantee measures to the stipulations of the present Chapter by 1 January 2010 as far as new guarantees are concerned.

⁽³²⁾ If the scheme has been active for more than 10 years, only the last 10 annual amounts of shortfall or surplus are to be provided.

ANNEX III

GUIDELINES ON STATE AID FOR RAILWAY UNDERTAKINGS ⁽¹⁾

1. INTRODUCTION

1.1. General context: the railway sector

- (1) The railways have unique advantages: they are a safe and clean mode of transport. Rail transport therefore has great potential for contributing to the development of sustainable transport in the European Economic Area.
- (2) The European Commission White Paper 'European transport policy for 2010: time to decide' ⁽²⁾ and its mid-term review ⁽³⁾ underline to what extent a dynamic railway industry is necessary for establishing an efficient, clean and safe goods and passenger transport system that will contribute to the creation of a single European market enjoying lasting prosperity. The EEA Consultative Committee resolution and report on 'An Ambitious Transport Policy' ⁽⁴⁾ further underline the importance of such a dynamic railway industry for the EEA. The road congestion plaguing the towns and certain areas of the EEA, the need to face up to the challenges of climate change, and the increase in fuel prices show how necessary it is to stimulate the development of rail transport. In this respect it should be pointed out that the common transport policy also has to pursue the environmental objectives set by the EEA Agreement ⁽⁵⁾ and the Treaty Establishing the European Community ⁽⁶⁾.
- (3) However, rail transport in Europe has an image problem, having declined steadily from the 1960s to the end of the 20th century. Both goods and passenger traffic volumes have fallen in relative terms compared with the other transport modes. Rail freight has even shown a decline in absolute terms: loads transported by rail were higher in 1970 than in 2000. The traditional railway undertakings were unable to offer the reliability and good timekeeping their customers expected of them, which led to a shift of traffic from rail to the other modes of transport, chiefly road ⁽⁷⁾. Although passenger transport by rail might have continued to grow in absolute terms, this increase seems very limited compared with that of road and air transport ⁽⁸⁾.
- (4) This trend seems to have reversed recently ⁽⁹⁾, but there is still a long way to go for rail transport to become sound and competitive. Particularly in the rail freight transport sector there continue to be major difficulties which call for public-sector action ⁽¹⁰⁾.
- (5) The relative decline in Europe's railway industry is largely due to the way transport supply has been organised historically, essentially on national and monopolistic lines.
- (6) First of all, in the absence of competition on the national networks, railway undertakings had no incentive to reduce their operating costs and develop new services. Their activities did not bring in sufficient revenue to cover all the costs and investments necessary. These essential investments were not always made and sometimes the EEA States forced the national railway undertakings into making them when they were not in a position to finance them adequately from their own resources. The result was heavy indebtedness for these undertakings, which itself had a negative impact on their development.

⁽¹⁾ This Chapter corresponds to the Community Guidelines on State aid for railway undertakings published in OJ C 184, 22.7.2008, p. 13.

⁽²⁾ COM(2001) 370 of 12.9.2001, p. 18.

⁽³⁾ Communication from the European Commission 'Keep Europe moving - Sustainable mobility for our continent - Mid-term review of the Transport White Paper', COM(2006) 314, 22.6.2006, p. 21.

⁽⁴⁾ Available at the EFTA webpage: <http://www.efta.int/advisory-bodies/consultative-committee.aspx>.

⁽⁵⁾ Paragraph 9 of the Preamble of the EEA Agreement acknowledges the determination of the Contracting Parties to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development, as well as the principle that precautionary and preventive action should be taken. In accordance with Article 1 of the EEA Agreement the parties should strive for closer cooperation on environmental issues. By virtue of Article 73 of the EEA Agreement, the Contracting Parties shall have, amongst others, the objective to 'preserve, protect and improve the quality of the environment' when taking action in the area of the four freedoms. Moreover, Article 78 of the EEA Agreement encourages the Contracting Parties to strengthen and broaden cooperation in the framework of the Community's activities amongst others in the field of environment.

⁽⁶⁾ Article 2 of the EC Treaty stipulates as one of the main objectives of the Community that of promoting 'sustainable and non-inflationary growth' respecting the environment. These provisions are supplemented by specific objectives set out in Article 174, which provides that Community environment policy shall contribute in particular to preserving, protecting and improving the quality of the environment. Article 6 of the Treaty provides that 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

⁽⁷⁾ In the EU, from 1995 to 2005 rail freight (expressed in tonne-km) increased by 0,9 % per year on average, as against 3,3 % average annual growth for road during the same period (source: Eurostat).

⁽⁸⁾ In the EU, from 1995 to 2004 passenger rail transport (expressed in passenger-km) increased by 0,9 % per year on average, as against 1,8 % average annual growth for private vehicles during the same period (source: Eurostat).

⁽⁹⁾ Since 2002, particularly in those countries which have opened up their markets to competition. In 2006 there was a 3,7 % growth on the year in rail freight performance and 3 % in the performance of passenger transport. This improvement is likely to continue in 2007.

⁽¹⁰⁾ Communication from the European Commission 'Towards a rail network giving priority to freight' (SEC(2007) 1322, SEC(2007) 1324 and SEC(2007) 1325, 18.10.2007).

- (7) Secondly, the development of rail transport in Europe was hamstrung by the lack of standardisation and interoperability on the networks, while road hauliers and air carriers had been able to develop a whole range of international services. The EEA has inherited a mosaic of national rail networks characterised by different track gauges and incompatible signalling and safety systems, which do not allow the railway undertakings to benefit from the economies of scale which would result from designing infrastructure and rolling stock for a large single market rather than for 27 ⁽¹¹⁾ national markets.
- (8) The EEA is conducting a three-pronged policy to revitalise the rail industry by:
- (a) gradually introducing conditions fostering competition on the rail transport services markets;
 - (b) encouraging standardisation and technical harmonisation on the European rail networks, aiming at full interoperability at the European level;
 - (c) granting financial support at the EEA level (in the TEN-T programme and the Structural Funds framework).
- (9) The EEA has thus gradually opened up the rail transport markets to competition. An initial liberalisation package was adopted in 2001 including Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways ⁽¹²⁾, Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings ⁽¹³⁾, Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification ⁽¹⁴⁾. That package was followed by a second package in 2004 the main instruments of which were Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency ⁽¹⁵⁾, Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification ⁽¹⁶⁾, Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system ⁽¹⁷⁾ and Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways ⁽¹⁸⁾. A third package was adopted in 2007 comprising Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 ⁽¹⁹⁾, Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations ⁽²⁰⁾, Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of

⁽¹¹⁾ Iceland, Malta and Cyprus do not have rail transport networks.

⁽¹²⁾ OJ L 75, 15.3.2001, p. 1.

⁽¹³⁾ OJ L 75, 15.3.2001, p. 26.

⁽¹⁴⁾ OJ L 75, 15.3.2001, p. 29. The Directive was last amended by Directive 2007/58/EC (OJ L 315, 3.12.2007, p. 44). Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 33/2009 of 17 March 2009 (OJ L 130, 28.5.2009, p. 27, and EEA Supplement No 28, 28.5.2009, p. 25). The Directives 2001/12/EC, 2001/13/EC and 2001/14/EC were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 118/2001 of 28 September 2001 (OJ L 322, 6.12.2001, p. 32, and EEA Supplement No 60, 6.12.2001, p. 29). This Decision amended the Decision of the EEA Joint Committee No 7/94 of 21 March 1994 on the incorporation of Council Directive 91/440/EEC (OJ L 160, 28.6.1994, p. 1, and EEA Supplement No 17, 28.6.1994, p. 1) and the Decision of the EEA Joint Committee No 71/95 of 15 December 1995 on the incorporation of Council Directive 95/18/EC (OJ L 57, 7.3.1996, p. 37, and EEA Supplement No 11, 7.3.1996, p. 14).

⁽¹⁵⁾ OJ L 164, 30.4.2004, p. 1. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 82/2005 of 10 June 2005 (OJ L 268, 13.10.2005, p. 13, and EEA Supplement No 52, 13.10.2005, p. 7).

⁽¹⁶⁾ OJ L 164, 30.4.2004, p. 44.

⁽¹⁷⁾ OJ L 164, 30.4.2004, p. 114.

⁽¹⁸⁾ OJ L 164, 30.4.2004, p. 164. The Directives 2004/49/EC, 2004/50/EC and 2004/51/EC were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 151/2004 of 29 October 2004 (OJ L 102, 21.4.2005, p. 27, and EEA Supplement No 20, 21.4.2005, p. 17). This Decision amended the Decision of the EEA Joint Committee No 71/95 of 15 December 1995 on the incorporation of Council Directive 95/18/EC (OJ L 57, 7.3.1996, p. 37, and EEA Supplement No 11, 7.3.1996, p. 14), the Decision of the EEA Joint Committee No 118/2001 of 28 September 2001 on the incorporation of Directives 2001/12/EC, 2001/13/EC and 2001/14/EC (OJ L 322, 6.12.2001, p. 32, and EEA Supplement No 60, 6.12.2001, p. 29), the Decision of the EEA Joint Committee No 25/97 of 30 April 1997 on the adoption of Directive 96/48/EC (OJ L 242, 4.9.1997, p. 74, and EEA Supplement No 37, 4.9.1997, p. 74), the Decision of the EEA Joint Committee No 16/2002 of 1 March 2002 on the adoption of Directive 2001/16/EC (OJ L 110, 25.4.2002, p. 11, and EEA Supplement No 21, 25.4.2002, p. 8) and the Decision of the EEA Joint Committee No 7/94 of 21 March 1994 on the incorporation of Council Directive 91/440/EEC (OJ L 160, 28.6.1994, p. 1, and EEA Supplement No 17, 28.6.1994, p. 1).

⁽¹⁹⁾ OJ L 315, 3.12.2007, p. 1. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 85/2008 of 2 July 2008 (OJ L 280, 23.10.2008, p. 20 and EEA Supplement No. 64, 23.10.2008, p. 13.).

⁽²⁰⁾ OJ L 315, 3.12.2007, p. 14. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 90/2010 of 2 July 2010 (OJ L 277, 21.10.2010, p. 43, and EEA Supplement No 59, 21.10.2010, p. 12).

railway infrastructure⁽²¹⁾ and Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community⁽²²⁾. The rail freight market was opened to competition on 15 March 2003 on the trans-European rail freight network, then on 1 January 2006 for international freight and finally from 1 January 2007 for rail cabotage. The third railway package sets 1 January 2010 as the date for opening up international passenger transport to competition. Some of the EEA States, such as the United Kingdom, Germany, the Netherlands and Italy, have already (partially) opened up their domestic passenger transport markets.

- (10) The relevant provisions of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁽²³⁾, put in place a new institutional and organisational framework for the players in the railway industry, involving:
 - (a) separating railway undertakings⁽²⁴⁾ from infrastructure managers⁽²⁵⁾ as regards accounts and organisation;
 - (b) management independence of railway undertakings;
 - (c) management of railway undertakings according to the principles which apply to commercial companies;
 - (d) financial equilibrium of railway undertakings according to a sound business plan;
 - (e) compatibility of EEA States' financial measures with the state aid rules⁽²⁶⁾.
- (11) Alongside this liberalisation process, the European Commission and the EEA Joint Committee have undertaken, on a second level, to promote the interoperability of European rail networks. This approach has been accompanied by EEA initiatives to improve the safety standard of rail transport⁽²⁷⁾.
- (12) The third level of public intervention in favour of the railway industry lies in the area of financial support. The European Commission considers this support to be justified in certain circumstances in view of the substantial adaptation costs necessary in that industry.
- (13) The European Commission notes, furthermore, that there has always been considerable injection of public funds in the rail transport sector.
- (14) The granting of state aid to the railway industry can be authorised only where it contributes to the completion of an integrated EEA market, open to competition and interoperable and to EEA objectives of sustainable mobility. The European Commission and the EFTA Surveillance Authority will accordingly make sure that public-sector financial support does not cause distortions of competition contrary to the common interest. Here the European Commission and the EFTA Surveillance Authority will in certain cases be able to ask EEA States for commitments on the EEA objectives in return for the granting of aid.

1.2. Objective and scope of these guidelines

- (15) The objective of these guidelines is to provide guidance on the compatibility with the EEA Agreement of state aid to railway undertakings as it is defined in Directive 91/440/EEC and in the context described above. In addition, chapter 3 also applies to urban, suburban and regional passenger transport undertakings. The guidelines are based in particular on the principles established by the Community legislator in the three successive railway packages. Their aim is to improve the transparency of public financing and legal certainty with regard to the state aid rules in the context of the opening-up of the EEA markets. These guidelines do not concern public financing intended for infrastructure managers.

⁽²¹⁾ OJ L 315, 3.12.2007, p. 44. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 33/2009 of 17 March 2009 (OJ L 130, 28.5.2009, p. 27, and EEA Supplement No 28, 28.5.2009, p. 25).

⁽²²⁾ OJ L 315, 3.12.2007, p. 51. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 12/2009 of 5 February 2009 (OJ L 73, 19.3.2009, p. 47, and EEA Supplement No 16, 19.3.2009, p. 18).

⁽²³⁾ OJ L 237, 24.8.1991, p. 25. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 7/94 of 21 March 1994. Directive as last amended by Directive 2007/58/EC.

⁽²⁴⁾ Article 3 of Directive 91/440/EEC defines a railway undertaking as 'any public or private undertaking licensed according to applicable Community legislation, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking must ensure traction; this also includes undertakings which provide traction only'.

⁽²⁵⁾ Article 3 of Directive 91/440/EEC defines an infrastructure manager as 'any body or undertaking responsible in particular for establishing and maintaining railway infrastructure. This may also include the management of infrastructure control and safety systems. The functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings'.

⁽²⁶⁾ Article 9(3) of Directive 91/440/EEC states: 'Aid accorded by Member States to cancel the debts referred to in this Article shall be granted in accordance with Articles 73, 87 and 88 of the Treaty'.

⁽²⁷⁾ In particular, Directive 2004/49/EC incorporated into the EEA Agreement by Decision of the EEA Joint Committee 151/2004 29 October 2004.

- (16) Article 61(1) of the EEA Agreement provides that in principle any aid granted by EC Member States or EFTA States which threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between EEA States, incompatible with the common market. Nevertheless, such state aid may in certain situations be justified in the light of the common interest of the EEA. Some of these situations are mentioned in Article 61(3) of the EEA Agreement, and apply to the transport sector as they do to other sectors of the economy.
- (17) Also, Article 49 of the EEA Agreement provides that aid is compatible with the EEA 'if it meets the needs of coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service'. This Article constitutes a *lex specialis* in the general scheme of the EEA Agreement. On the basis of the corresponding EC Treaty Article 73 the Community legislator has adopted two instruments specific to the transport sector: Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway⁽²⁸⁾ and Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway⁽²⁹⁾. Regulation (EEC) No 1192/69 of the Council of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings⁽³⁰⁾ likewise provides that certain compensation may be granted by Member States to railway undertakings⁽³¹⁾.
- (18) Article 3 of Regulation (EEC) No 1107/70 provides that EEA States are neither to take coordination measures nor to impose obligations inherent in the concept of a public service which involve the granting of aid pursuant to Article 49 of the EEA Agreement except in the cases or circumstances provided for by the Regulation in question, without prejudice, however, to Regulations (EEC) No 1191/69 and (EEC) No 1192/69. According to the judgment of the European Court of Justice in *Altmark*⁽³²⁾, it follows that state aid which cannot be authorised on the basis of Regulations (EEC) No 1107/70, (EEC) No 1191/69 or (EEC) No 1192/69 cannot be declared compatible on the basis of Article 73 of the EC Treaty⁽³³⁾. In addition, it should be recalled that public service compensation which does not respect provisions stemming from Article 49 of the EEA Agreement cannot be declared compatible with the common market on the basis of Article 59(2) or any other provision of the EEA Agreement⁽³⁴⁾.
- (19) Regulation (EC) No 1370/2007 ('the PSO Regulation')⁽³⁵⁾, which will enter into force on 3 December 2009 and which repeals Regulations (EEC) No 1191/69 and (EEC) No 1107/70, will put in place a new legal framework. The aspects relating to public service compensation are therefore not covered by these guidelines.
- (20) After the entry into force of Regulation (EC) No 1370/2007 Article 49 of the EEA Agreement will be directly applicable as a legal basis for establishing the compatibility of aid not covered by the PSO Regulation, and in particular aid for the coordination of freight transport. A general interpretation therefore needs to be developed for considering the compatibility of aid for coordination purposes with Article 49 of the EEA Agreement. The aim of these guidelines is in particular to establish criteria for this examination and intensity thresholds. In view of the wording of Article 49, the EFTA Surveillance Authority must nevertheless make it possible for the EFTA States to show, where appropriate, the need for and proportionality of any measures which exceed the thresholds established.
- (21) These guidelines concern the application of Articles 49 and 61 of the EEA Agreement and their implementation with regard to public funding for railway undertakings within the meaning of Directive 91/440/EEC. They deal with the following aspects: public financing of railway undertakings by means of infrastructure funding (Chapter 2), aid for the purchase and renewal of rolling stock (Chapter 3), debt cancellation by States with a view to the financial rejuvenation of railway undertakings (Chapter 4), aid for restructuring railway undertakings (Chapter 5), aid for the needs of transport coordination (Chapter 6), and State guarantees for railway undertakings (Chapter 7). However, these guidelines do not deal with the rules for the application of the PSO Regulation, for which neither the European Commission nor the EFTA Surveillance Authority have yet developed any decision-making practice⁽³⁶⁾.

⁽²⁸⁾ OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

⁽²⁹⁾ OJ L 130, 15.6.1970, p. 1.

⁽³⁰⁾ OJ L 156, 28.6.1969, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

⁽³¹⁾ These three sets of regulations were made part of the EEA Agreement from its conception.

⁽³²⁾ Judgment of the Court of Justice of 24 July 2003, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ('Altmark') [2003] ECR I-7747.

⁽³³⁾ Judgment in *Altmark*, paragraph 107.

⁽³⁴⁾ See, in that regard, recital 17 of European Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67). This Decision is incorporated to the EEA Agreement by the Decision of the EEA Joint Committee No 91/2006 of 7 July 2006 (OJ L 286, 19.10.2006, p. 31, and EEA Supplement No 52, 19.10.2006, p. 24). Article 86(2) EC corresponds to Article 59(2) of the EEA Agreement.

⁽³⁵⁾ Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 85/2008 of 4 July 2008 (OJ L 280, 23.10.2008, p. 20 and EEA Supplement No 64, 23.10.2008, p. 13).

⁽³⁶⁾ Nor do they concern the application of Regulation (EEC) No 1192/69. This regulation was made part of the EEA Agreement from its conception.

2. PUBLIC FINANCING OF RAILWAY UNDERTAKINGS BY MEANS OF RAILWAY INFRASTRUCTURE FUNDING

- (22) Railway infrastructure is of major importance for the development of the railway sector in Europe. Whether for interoperability, safety or the development of high-speed rail, considerable investments will have to be made in this infrastructure ⁽³⁷⁾.
- (23) These guidelines apply only to railway undertakings. Their aim is therefore not to define, in the light of state aid rules, the legal framework which applies to the public financing of infrastructure. This chapter only examines the effects of public financing of infrastructure on railway undertakings.
- (24) Moreover, public financing of infrastructure development can grant an advantage to railway undertakings indirectly and thereby constitute aid. According to the case-law of the European Court of Justice, it should be evaluated whether the infrastructure measure has the economic effect of lightening the burden of charges normally encumbering railway undertakings' budgets ⁽³⁸⁾. For that to be the case, a selective advantage would have to be granted to the undertakings concerned, that advantage originating in the financing of the infrastructure in question ⁽³⁹⁾.
- (25) Where infrastructure use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with EEA legislation (Directive 2001/14/EC), the European Commission and the EFTA Surveillance Authority normally consider that public financing of the infrastructure does not constitute state aid to railway undertakings ⁽⁴⁰⁾.
- (26) The EFTA Surveillance Authority points out that, where public financing of railway infrastructure constitutes aid to one or more railway undertakings, it may be authorised, for example on the basis of Article 49 of the EEA Agreement, if the infrastructure in question meets the needs of transport coordination. In this regard, Chapter 6 of these guidelines is a pertinent reference point for assessing compatibility.

3. AID FOR THE PURCHASE AND RENEWAL OF ROLLING STOCK

3.1. Objective

- (27) The fleet of locomotives and carriages used for passenger transport is ageing and in some cases worn out, especially in the new EU Member States. In 2005, 70 % of the locomotives (diesel and electric) and 65 % of the wagons of the EU-25 and Norway were more than 20 years old ⁽⁴¹⁾. Taking only the Member States which joined the European Union in 2004, 82 % of locomotives and 62 % of wagons were more than 20 years old in 2005 ⁽⁴²⁾. According to the information at its disposal, the European Commission estimates that the annual rate of renewal of the fleet is around 1 %.
- (28) This trend of course reflects the difficulties of the railway industry in general, which reduce the incentives for railway undertakings and their capacity to invest in an effort to modernise and/or renew their rolling stock. Such investment is indispensable to keeping rail transport competitive with other modes of transport which cause more pollution or entail higher external costs. It is also necessary to limit the impact of rail transport on the environment, particularly by reducing the noise pollution it causes, and to improve its safety. Finally, improving interoperability between the national networks means it is necessary to adapt the existing rolling stock in order to be able to maintain a coherent system.
- (29) In the light of the above it seems that under certain circumstances aid for the purchase and renewal of rolling stock can contribute to several types of objectives of common interest and therefore be considered compatible with the EEA Agreement.

⁽³⁷⁾ Communication from the European Commission 'Keep Europe moving - Sustainable mobility for our continent - Mid-term review of the Transport White Paper'. See also the EEA Consultative Committee resolution and report on 'An Ambitious Transport Policy'.

⁽³⁸⁾ Judgment of the European Court of Justice of 13 June 2002, Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163.

⁽³⁹⁾ Judgment of the European Court of Justice of 19 September 2000, Case C-156/98 *Germany v Commission* [2000] ECR I-6857.

⁽⁴⁰⁾ European Commission Decision of 7 June 2006, N 478/2004, State guarantee for capital borrowings by Córas Iompair Éireann (CIÉ) for infrastructure investment, OJ C 209, 31.8.2006, p. 8; Decision of 8 March 2006, N 284/2005, Ireland - Regional Broadband Programme (OJ C 207, 30.8.2006, p. 3), point 34; and the following Decisions: Decision 2003/227/EC of 2 August 2002 on various measures and the state aid invested by Spain in 'Terra Mítica SA', a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), point 64; Decision of 20 April 2005, N 355/2004 PPP, Belgium - Public-Private-Partnership for tunnelling the Krijgsbaan at Deurne; the development of industrial estates and the operation of Antwerp Airport (OJ C 176, 16.7.2005, p. 11), point 34; Decision of 11 December 2001, N 550/2001, Belgium - Public-private partnership for loading and unloading facilities (OJ C 24, 26.1.2002, p. 2), point 24; Decision of 20 December 2001, N 649/2001, United Kingdom - Freight Facilities Grant (OJ C 45, 19.2.2002, p. 2), point 45; Decision of 17 July 2002, N 356/2002, United Kingdom - Network Rail (OJ C 232, 28.9.2002, p. 2), point 70; N 511/1995 Jaguar Cars Ltd. See also, the European Commission Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector (OJ C 350, 10.12.1994, p. 5), point 12, The EFTA Surveillance Authority adopted corresponding Guidelines by Decision No 124/95/COL of 6 December 1995 (OJ L 124, 23.5.1996, p. 41 and EEA Supplement No 23, 23.5.1996, p. 104); White Paper: Fair Payment for Infrastructure use (COM(1998) 466 final, point 43; Communication from the European Commission to the European Parliament and the Council: 'Reinforcing Quality Service in Sea Ports: A Key for European Transport' (COM(2001) 35 final, p. 11).

⁽⁴¹⁾ Source: UIC Rolling stock fleet in EU-25 + Norway (2005).

⁽⁴²⁾ Source: CER (2005).

- (30) This chapter seeks to define the conditions in which the EFTA Surveillance Authority is to carry out such a compatibility assessment.

3.2. Compatibility

- (31) The compatibility assessment has to be made according to the common-interest objective to which the aid is contributing.
- (32) The EFTA Surveillance Authority considers that in principle the need to modernise rolling stock can be sufficiently taken into account either in implementing the general state aid rules or by applying Article 49 of the EEA Agreement where such aid is intended for transport coordination (see chapter 6).
- (33) In assessing the compatibility of aid for rolling stock the EFTA Surveillance Authority therefore generally applies the criteria defined for each of the following aid categories in these guidelines or in any other relevant document:
- (a) aid for coordination of transport ⁽⁴³⁾;
 - (b) aid for restructuring railway undertakings ⁽⁴⁴⁾;
 - (c) aid for small and medium-sized enterprises ⁽⁴⁵⁾;
 - (d) aid for environmental protection ⁽⁴⁶⁾;
 - (e) aid to offset costs relating to public service obligations and in the framework of public service contracts ⁽⁴⁷⁾;
 - (f) regional aid ⁽⁴⁸⁾.
- (34) In the case of regional aid for initial investment, the Guidelines on national regional aid, 'the regional aid guidelines', provide that 'in the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for aid for initial investment' (point 39, footnote 40). The EFTA Surveillance Authority considers that a derogation should be made from this rule with regard to rail passenger transport. This is due to the specific characteristics of this mode of transport, and in particular to the fact that it is possible that the rolling stock in this sector may be permanently assigned to specific lines or services. Subject to certain conditions, defined below, the costs of acquisition of rolling stock in the rail passenger transport sector (or for other modes such as light rail, underground or tram) are deemed to be admissible expenditure within the meaning of the guidelines in question ⁽⁴⁹⁾. However, the costs of acquisition of rolling stock for exclusive use in freight transport are not admissible.
- (35) In view of the situation described in points 28 and 29, this derogation applies to any kind of investment in rolling stock, whether initial or for replacement purposes, so long as it is assigned to lines regularly serving a region eligible for aid under Article 61(3)(a) of the EEA Agreement or a region of low population density within the meaning of points 69 and 70 of the regional aid guidelines ⁽⁵⁰⁾. In the other regions, the derogation applies only to aid for initial investment. For aid for investment for replacement purposes, the derogation applies only when all the rolling stock that the aid is used to modernise is more than 15 years old.

⁽⁴³⁾ See Chapter 6.

⁽⁴⁴⁾ See chapter 5, see also the EFTA Surveillance Authority Guidelines on state aid for rescuing and restructuring firms in difficulty adopted by Decision No 305/04/COL of 1 December 2004 (OJ L 97, 15.4.2005, p. 41 and EEA Supplement No 21, 28.4.2005, p. 1). See corresponding Community guidelines (OJ C 244, 1.10.2004, p. 2).

⁽⁴⁵⁾ European Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33). Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85). The Regulation was incorporated into the EEA Agreement Annex XV by Decision of the EEA Joint Committee No 88/2002 of 25 June 2002 (OJ L 266, 3.10.2002, p. 56 and EEA Supplement No 49, 3.10.2002, p. 42).

⁽⁴⁶⁾ The EFTA Surveillance Authority adopted Guidelines on state aid for environmental protection by Decision No 500/08/COL of 16 July 2008 (OJ L 144, 10.6.2010, p. 1 and EEA Supplement No. 29, 10.6.2010, p. 1). See corresponding Community guidelines (OJ C 82, 1.4.2008, p. 1).

⁽⁴⁷⁾ Regulation (EEC) No 1191/69 cited above, incorporated into the EEA Agreement at its conception; PSO Regulation of the European Parliament and of the Council, cited above and incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 85/2008, in which attention should be drawn in particular to Article 3(1) of the Regulation: 'Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract'.

⁽⁴⁸⁾ See point 8 of The EFTA Surveillance Authority Guidelines on national regional aid for 2007-2013 adopted by Decision 85/06/COL of 6 April 2006 (OJ L 54, 28.2.2008, p. 1 and EEA Supplement No 11, 28.2.2008, p. 1). See corresponding Community Guidelines (OJ C 54, 4.3.2006, p. 13, point 8).

⁽⁴⁹⁾ The EFTA Surveillance Authority notes that, depending on the specific circumstances of the case in point, this reasoning may be applied mutatis mutandis to vehicles used for the public transport of passengers by road, where such vehicles meet the latest Community standards applicable to new vehicles. Where that is the case, in the interests of equal treatment the EFTA Surveillance Authority will, in such situations, apply the approach described here for railway rolling stock. The EFTA Surveillance Authority encourages the EFTA State to support the least polluting technologies when awarding this type of aid and will study the extent to which specific financial aid leading to higher aid intensities for such technologies is appropriate.

⁽⁵⁰⁾ The least populated regions represent or belong to regions at NUTS-II level with a population density of no more than 8 inhabitants per km² and extend to adjacent and contiguous smaller areas meeting the same population density criterion.

- (36) In order to avoid distortions of competition which would be contrary to the common interest, the EFTA Surveillance Authority does, however, consider that such a derogation has to be made subject to four conditions, which have to be met cumulatively:
- (a) the rolling stock concerned must be exclusively assigned to urban, suburban or regional passenger transport services in a specific region or for a specific line serving several different regions; For the purposes of these guidelines 'urban and suburban transport services' is to be understood as transport services serving an urban centre or conurbation as well as those services between that centre or conurbation and its suburbs. 'Regional transport services' is to be understood as transport services intended to meet the transport needs of one or more regions. Transport services serving several different regions, in one or more EEA States, may therefore be covered by the scope of this point if it can be shown that there is an impact on the regional development of the regions served, in particular by the regular nature of the service. In this case, the EFTA Surveillance Authority verifies that the aid does not compromise the effective opening of the international passenger transport market and cabotage following the entry into force of the third railway package;
 - (b) the rolling stock must remain exclusively assigned to the specific region or the specific line passing through several different regions for which it has received aid for at least ten years;
 - (c) the replacement rolling stock must meet the latest interoperability, safety and environmental standards ⁽⁵¹⁾ applicable to the network concerned;
 - (d) the EFTA State must prove that the project contributes to a coherent regional development strategy.
- (37) The EFTA Surveillance Authority will take care to avoid undue distortions of competition, notably by taking account of the additional revenue that the replaced rolling stock on the line in question could procure for the enterprise aided, for example, through sales to a third party or use on other markets. To this end, the granting of the aid may be made subject to the obligation on the recipient undertaking to sell under normal market conditions all or part of the rolling stock it is no longer using, so as to allow its further use by other operators; in this case the proceeds from the sale of the old rolling stock will be deducted from the eligible costs.
- (38) More generally, the EFTA Surveillance Authority will ensure that no improper use is made of the aid. The other conditions provided for in the regional aid guidelines, notably as regards the intensity ceilings and the regional aid maps and the rules on the cumulation of aid, apply. The EFTA Surveillance Authority notes that the specific lines concerned may in certain cases pass through regions where there are different intensity ceilings in accordance with the regional aid maps. In this case the EFTA Surveillance Authority will apply the highest rate of intensity of the regions regularly served by the line concerned in proportion to the regularity of such service ⁽⁵²⁾.
- (39) With regard to investment projects with eligible expenditure in excess of EUR 50 million, the EFTA Surveillance Authority considers it appropriate, due to the specificities of the rail passenger transport sector, to derogate from points 49 to 59 of the regional aid guidelines. However, points 53 and 56 of those guidelines remain applicable when the investment project concerns rolling stock assigned to a specific line serving several regions.
- (40) If the recipient undertaking is entrusted with providing services of general economic interest that necessitate buying and/or renewing rolling stock and it already receives compensation for this, that compensation should be taken into account in the amount of regional aid that may be awarded to this undertaking, in order to avoid overcompensation.

4. DEBT CANCELLATION

4.1. Objective

- (41) As mentioned in section 1.1, railway undertakings have in the past experienced a state of imbalance between their revenues and their costs, especially their investment costs. This has led to major indebtedness, the financial servicing of which represents a very heavy burden on railway undertakings and limits their capacity to make the necessary investments in both infrastructure and renewal of rolling stock.

⁽⁵¹⁾ Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards is possible within the Guidelines on state aid for environmental protection.

⁽⁵²⁾ Where the line or specific service systematically (that is to say, on every journey) serves the region to which the highest rate applies, this rate is applied to all admissible expenditure. Where the region to which the highest rate applies is only occasionally served, this rate is applied only to the part of the admissible expenditure allocated to serving that region.

- (42) Directive 91/440/EEC explicitly took this situation into account. It follows from the seventh recital thereto that EEA States 'should ensure in particular that existing publicly owned or controlled railway transport undertakings are given a sound financial structure' and envisages that a 'financial rearrangement' might be necessary for this purpose. Article 9 of the Directive provides: 'In conjunction with the existing publicly owned or controlled railway undertakings, Member States shall set up appropriate mechanisms to help reduce the indebtedness of such undertakings to a level which does not impede sound financial management and to improve their financial situation'. Article 9(3) envisages the granting of state aid 'to cancel the debts referred to in this Article', and provides that such aid must be granted in accordance with Articles 49, 61 and 62 of the EEA Agreement ⁽⁵³⁾.
- (43) At the beginning of the 1990s, following the entry into force of Directive 91/440/EEC, the EEA States considerably reduced the debts of railway undertakings. The debt restructuring took different forms:
- (a) transfer of all or part of the debt to the body responsible for managing the infrastructure, thus enabling the railway undertaking to operate on a sounder financial footing. It was possible to make this transfer when transport service activities were separated from infrastructure management;
 - (b) the creation of separate entities for the financing of infrastructure projects (for example, high-speed lines), making it possible to relieve railway undertakings of the future financial burden which the financing of this new infrastructure would have meant;
 - (c) financial restructuring of railway undertakings, notably by the cancellation of all or part of their debts.
- (44) These three types of action have helped to improve the financial situation of railway undertakings in the short term. Their indebtedness has been reduced compared with total liabilities, as has the share of interest repayments in the operating costs. In general the debt reduction has allowed railway undertakings to improve their financial situation through a reduction in their capital and interest repayments. Such reductions have also helped to lower the rates of interest, which has a substantial impact on the financial servicing of the debt.
- (45) However, the EFTA Surveillance Authority notes that the level of indebtedness of many railway undertakings continues to give cause for concern. Several of these undertakings have a level of indebtedness higher than is acceptable for a commercial company, are still not capable of self-financing, and/or cannot finance their investment needs from the revenue from present and future transport operations. Also, in the Member States which joined the European Community after 1 May 2004 the level of indebtedness of the companies in the sector is considerably higher than in the rest of the EEA.
- (46) This fact is reflected in the Community legislator's choice not to amend the provisions of Directive 1991/440/EEC when Directives 2001/12/EC and 2004/51/EC were adopted. These provisions therefore fall within the general framework formed by the successive railway packages.
- (47) This chapter seeks to define how, in the light of this requirement of secondary legislation, the EFTA Surveillance Authority intends to apply the rules on state aid in the EEA Agreement to the mechanisms for reducing the indebtedness of railway undertakings.

4.2. Presence of state aid

- (48) The EFTA Surveillance Authority notes first of all that the principle of incompatibility laid down in Article 61(1) of the EEA Agreement applies only to aid 'which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only 'in so far as it affects trade between Contracting Parties'. Under established case-law of the European Court of Justice, when state aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, these undertakings must be regarded as affected by that aid ⁽⁵⁴⁾.
- (49) Any measure attributable to the State which leads to the complete or partial cancellation of debts specifically in favour of one or more railway undertakings and through State resources therefore falls within the scope of Article 61(1) of the EEA Agreement, if the railway undertaking in question is active in markets open to competition and if this debt cancellation strengthens its position in at least one of those markets.
- (50) The EFTA Surveillance Authority notes that Directive 2001/12/EC opened up the international rail freight services market to competition over the whole trans-European rail freight network from 15 March 2003. It therefore considers that, generally, the market was opened up to competition at the latest on 15 March 2003.

⁽⁵³⁾ See footnote 26.

⁽⁵⁴⁾ Judgment of the Court of Justice of 17 September 1980, Case 730/79 *Phillip Morris Holland v Commission* [1980] ECR 2671, paragraph 11.

4.3. **Compatibility**

- (51) When the cancellation of a railway undertaking's debt constitutes state aid covered by Article 61(1) of the EEA Agreement it must be notified to the EFTA Surveillance Authority in accordance with Article 62 of the EEA Agreement.
- (52) Aid of this kind must generally be examined on the basis of the EFTA Surveillance Authority guidelines on state aid for rescuing and restructuring firms in difficulty of 2004 ('the 2004 guidelines on state aid for restructuring'), subject to Chapter 5 of these Guidelines.
- (53) In specific cases where the debts cancelled exclusively concern transport coordination, compensation of public service obligations or the setting of accounting standards, the compatibility of this aid will be examined on the basis of Article 49 of the EEA Agreement, the regulations adopted for the implementation thereof and the rules for the normalisation of the accounts ⁽⁵⁵⁾.
- (54) In the light of Article 9 of Directive 91/440/EEC, the EFTA Surveillance Authority also considers that, under certain circumstances, it should be possible to authorise this aid without financial restructuring if the cancellation concerns old debts incurred prior to the entry into force of Directive 2001/12/EC, which lays down the conditions for opening up the sector to competition.
- (55) The EFTA Surveillance Authority takes the view that this type of aid may be compatible in so far as it seeks to ease the transition to an open rail market, as provided for by Article 9 of Directive 91/440/EEC ⁽⁵⁶⁾. Thus it considers that such aid may be regarded as compatible with Article 61(3)(c) of the Agreement ⁽⁵⁷⁾, provided that the following conditions are met.
- (56) Firstly, the aid must serve to offset clearly determined and individualised debts incurred prior to 15 March 2001, the date on which Directive 2001/12/EC entered into force. Under no circumstances may the aid exceed the amount of these debts. The logic of Article 9 of Directive 91/440/EEC, repeated in subsequent Directives, was to address a level of debt accumulated at a time when a decision to open the market at EEA level had yet to be taken.
- (57) Secondly, the debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure. Debts incurred for the purpose of investment not directly linked to transport and/or rail infrastructure are not eligible.
- (58) Thirdly, the cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial management. The aid must be necessary to remedy this situation, insofar as the likely development of competition in the EEA would not allow them to rectify their financial situation within a foreseeable future. Assessment of this criterion has to take into account any productivity improvements which the undertaking can reasonably be expected to achieve.
- (59) Fourthly, the aid must not go beyond what is necessary for the purpose. In this regard, account must also be taken of future developments in competition. It should not, at any rate, place the undertaking in a situation more favourable than that of an average well-managed undertaking with the same activity profile.
- (60) Fifthly, cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition in the EEA, for example by deterring outside undertakings or new players from entering certain national or regional markets. In particular, aid intended for cancelling debts cannot be financed from levies imposed on other rail operators ⁽⁵⁸⁾.
- (61) Where these conditions are met, the debt cancellation measures are contributing to the objective set in Article 9 of Directive 91/440/EEC, without unduly distorting competition and trade between EEA States. They can thus be considered compatible with the common market.

5. AID FOR RESTRUCTURING RAILWAY UNDERTAKINGS – RESTRUCTURING A 'FREIGHT' DIVISION

5.1. **Objective**

- (62) Save where specifically provided otherwise, the EFTA Surveillance Authority assesses the compatibility of state aid for restructuring firms in difficulty in the railway industry on the basis of the 2004 guidelines on state aid for restructuring. Those guidelines do not provide for any derogation for railway undertakings.

⁽⁵⁵⁾ Regulation (EEC) No 1192/69

⁽⁵⁶⁾ The EFTA Surveillance Authority applies, by analogy, certain conditions laid down by the European Commission communication relating to the methodology for analysing state aid linked to stranded costs of 26 July 2001, SEC(2001) 1238.

⁽⁵⁷⁾ Without prejudice to the application of Regulations (EEC) No 1191/69, (EEC) No 1192/69 and (EEC) No 1107/70.

⁽⁵⁸⁾ Without prejudice to the application of Directive 2001/14/EC.

- (63) Generally speaking, a division of an undertaking, namely an economic entity without legal personality, is not eligible for restructuring aid. The 2004 guidelines on state aid for restructuring apply only to 'firms in difficulty'. They also state, at point 12, that a firm 'belonging to or being taken over by a larger business group is not normally eligible for restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself'. It should be avoided, *a fortiori*, that artificial subdivision allows a loss-making activity within a given company to receive public funds.
- (64) However, the EFTA Surveillance Authority considers that the European rail freight sector currently finds itself in a very specific situation making it necessary, in the common interest, to envisage that aid granted to a railway undertaking allowing it to overcome difficulties in the freight operations of that undertaking might, under certain circumstances, be considered compatible with the common market.
- (65) In today's railway industry, the competitive situation of freight transport operations is quite different from that which applies to passenger transport. The national freight markets are open to competition whereas the rail passenger transport markets are not going to be opened up before 1 January 2010.
- (66) This situation has a financial impact in so far as freight is in principle governed solely by the business relations between shippers and carriers. The financial equilibrium of passenger transport, on the other hand, may also depend on the public authorities taking action by way of public service compensation.
- (67) However, several European railway undertakings have not legally separated their passenger and freight transport activities, or have only just done so. Moreover, current EEA legislation does not provide for the obligation to make this legal separation.
- (68) Furthermore, one of the central priorities of European transport policy has, for many years, been to breathe new life into the railway freight industry. The reasons for this are set out in chapter 1 of these guidelines.
- (69) This specific characteristic of rail freight activities necessitates an adapted approach, as has been recognised in the European Commission's decision-making practice⁽⁵⁹⁾ on the basis of the Community Guidelines on state aid for rescuing and restructuring firms in difficulty of 1999⁽⁶⁰⁾.
- (70) This chapter is intended to show, in the light of the EFTA Surveillance Authority's decision-making practice and taking account of the amendments made by the 2004 guidelines on state aid for restructuring to the corresponding 1999 guidelines, the way in which the EFTA Surveillance Authority intends to implement this approach in future.
- (71) In view of the risks highlighted above, this approach is justified and will be maintained only for the freight divisions of railway undertakings, and for a transitional period, namely for restructurings notified before 1 January 2010, the date on which the rail passenger transport market will be opened up to competition.
- (72) Furthermore, the EFTA Surveillance Authority wishes to take account of the fact that, in a growing number of EEA States, railway undertakings have adapted their organisation to specific developments in rail freight and passenger transport activities by taking steps to legally separate their freight transport activities. The EFTA Surveillance Authority will therefore require, as part of the restructuring efforts and before awarding any aid, the legal separation of the freight division in question by transforming it into a commercial company under common commercial law. The EFTA Surveillance Authority is of the view that this separation will, with other appropriate measures, help considerably to achieve two goals, namely to exclude all cross-subsidisation between the restructured division and the rest of the undertaking and to ensure that all financial relations between these two activities are carried out in a sustainable manner and on a commercial basis.
- (73) In order to avoid any doubt, the 2004 guidelines on state aid for restructuring will continue to apply in their entirety when examining the aid dealt with in this chapter, except with regard to the express derogations set out below.

5.2. Eligibility

- (74) The eligibility criteria must be adapted to include the situation in which a freight division of a railway undertaking constitutes a coherent and permanent economic unit, which will be legally separated from the rest of the undertaking through the restructuring process before aid is granted, and faces difficulties such that, if it had been separated from the railway undertaking, it would be a 'firm in difficulty' within the meaning of the 2004 guidelines on state aid for restructuring.

⁽⁵⁹⁾ See European Commission Decision of 2 March 2005, N 386/2004, Aid for restructuring SNCF Freight (OJ C 172, 12.7.2005, p. 3).

⁽⁶⁰⁾ OJ C 288, 9.10.1999, p. 2. The EFTA Surveillance Authority adopted corresponding Guidelines by Decision No 329/99/COL of 16 December 1999 (OJ L 241, 26.10.2000, p. 1).

- (75) This means, in particular, that that division of the undertaking would be facing serious difficulties of its own, which are not the result of an arbitrary allocation of costs within the railway undertaking.
- (76) In order for the division to be restructured to constitute a coherent and permanent economic unit it must comprise all the freight transport activities of the railway undertaking, whether industrial, commercial, accounting or financial. It must be possible to attribute to it a level of losses, as well as a level of own funds or capital, which sufficiently reflects the economic reality of the situation which the division faces in order to evaluate in a coherent manner the criteria fixed in point 9 of the 2004 guidelines on state aid for restructuring ⁽⁶¹⁾.
- (77) When assessing whether a division is in difficulty as described above, the EFTA Surveillance Authority will also take into account the ability of the rest of the railway undertaking to ensure the recovery of the division to be restructured.
- (78) The EFTA Surveillance Authority is of the view that, although the situation described is not directly covered by the 2004 guidelines on state aid for restructuring, point 11 of which excludes newly created firms from the scope of the guidelines, restructuring aid may be granted in this context to enable the firm created by this legal separation to operate in viable market conditions. This is intended to apply only in situations where the firm to be created as a result of legal separation includes the entire freight division, as described by the separate accounting established in accordance with Article 9 of Directive 91/440/EEC, and includes all the division's assets, liabilities, capital, off-balance sheet commitments and workforce.
- (79) The EFTA Surveillance Authority considers that, for the same reasons, when a railway undertaking has recently legally separated its freight division, where this division fulfilled the above criteria, the firm in question must not be considered a newly created firm within the meaning of point 11 of the 2004 guidelines on state aid for restructuring, and is therefore not excluded from the scope of these guidelines.

5.3. Return to long-term viability

- (80) The EFTA Surveillance Authority will make sure not only that the criteria for a return to long-term viability as set out in the 2004 guidelines on state aid for restructuring are fulfilled ⁽⁶²⁾, but also that restructuring will ensure the freight activity is transformed from a protected activity enjoying exclusive rights into one which is competitive on the open market. This restructuring should therefore concern all aspects of the freight activity, whether industrial, commercial, or financial. The restructuring plan required by the restructuring guidelines ⁽⁶³⁾ must make it possible to ensure a standard of quality, reliability and service which meets customers' requirements.

5.4. Prevention of any excessive distortion of competition

- (81) In analysing the prevention of any excessive distortion of competition, as provided for by the 2004 guidelines on state aid for restructuring, the EFTA Surveillance Authority will also base itself on:

- (a) the difference between the economic models for rail and the other modes of transport;
- (b) the EEA objective of shifting the balance between modes of transport;
- (c) the competitive situation on the market at the time of restructuring (degree of integration, growth potential, presence of competitors, likely trends).

5.5. Aid limited to a minimum

- (82) The provisions of the 2004 guidelines on state aid for restructuring apply when verifying this criterion. To this end the firm's own contribution will include that of the freight division which will be legally separated from the railway undertaking. However, in the EFTA Surveillance Authority's view, the very specific situation of the European rail freight industry, which is described above, may constitute an exceptional circumstance within the meaning of paragraph 43 of those guidelines. It may therefore accept lower own contributions than those provided for in the 2004 guidelines on state aid for restructuring provided that the freight division's own contribution is as high as possible without jeopardising the viability of the operation.

⁽⁶¹⁾ Point 9 of the guidelines on state aid for restructuring states: In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these guidelines in the following circumstances:

'a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;' or

'b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;' or

'c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings'.

⁽⁶²⁾ See in particular points 33 to 36 of the guidelines on state aid for restructuring.

⁽⁶³⁾ See in particular section 3.2 of the restructuring guidelines.

5.6. 'One time, last time' principle

- (83) The 'one time, last time' principle applies to the legally separated firm, by taking account of the restructuring aid notified as initial restructuring aid received by the undertaking. However, restructuring aid authorised under the conditions set out in this chapter does not affect application of the 'one time, last time' principle with regard to the rest of the railway undertaking.
- (84) To avoid any doubt, if the railway undertaking as a whole has already received restructuring aid, the 'one time, last time' principle means that aid as provided for in this chapter may not be granted to restructure the freight division of the undertaking.

6. AID FOR COORDINATION OF TRANSPORT

6.1. Objective

- (85) As already stated, Article 49 of the EEA Agreement was implemented by Regulations (EEC) No 1191/69 and (EEC) No 1107/70, which will be repealed by the PSO Regulation. The PSO Regulation will, however, apply only to land passenger transport. It will not cover rail freight transport, for which aid for coordination of transport will continue to be subject only to Article 49 of the EEA Agreement.
- (86) In addition to this, Article 9 of the PSO Regulation concerning aid for coordination of transport and aid for research and development applies explicitly without prejudice to Article 49 of the EEA Agreement, so it will be possible to use Article 49 directly for justifying the compatibility of aid for coordination of rail passenger transport.
- (87) The objective of this chapter is therefore to establish criteria which will allow the EFTA Surveillance Authority to assess the compatibility, on the basis of Article 49 of the EEA Agreement, of aid for the coordination of transport, both generally (section 6.2) and as regards certain specific forms of aid (section 6.3). The EFTA Surveillance Authority notes that, although the general implementing principles of Article 49 of the Agreement are relevant when assessing state aid under the PSO Regulation, these guidelines do not cover the detailed rules for the implementation of the adopted Regulation in question.

6.2. General considerations

- (88) Article 49 of the EEA Agreement provides for compatibility of aid which meets the needs of coordination of transport. The European Court of Justice has ruled that this Article 'acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardise the general interests of the Community' ⁽⁶⁴⁾.
- (89) The concept of 'coordination of transport' used in Article 49 of the EEA Agreement has a significance which goes beyond the simple fact of facilitating the development of an economic activity. It implies an intervention by public authorities which is aimed at guiding the development of the transport sector in the common interest.
- (90) The progress made with liberalising the land transport sector has in some respects considerably reduced the need for coordination. In an efficient liberalised sector, coordination can in principle result from the action of market forces. As indicated above, however, the fact remains that investment in infrastructure development continues to be carried out by the public authorities. Moreover, even after the liberalisation of the sector, there may still be various market failures. These in particular are the failures which justify the intervention of the public authorities in this field.
- (91) Firstly, the transport sector entails major negative externalities, for example between users (congestion), or in respect of society as a whole (pollution). These externalities are difficult to take into account, notably due to the inherent limits to the possibility of including external costs, or even simply direct usage costs, in the pricing systems for access to transport infrastructure. As a result there may be disparities between the different modes of transport, which ought to be corrected by public authority support for those modes of transport which give rise to the lowest external costs.
- (92) Secondly, the transport sector may experience 'coordination' difficulties in the economic sense of the term, for example in the adoption of a common interoperability standard for rail, or in the connections between different transport networks.
- (93) Thirdly, the railway undertakings may not be able to reap the full rewards of their research, development and innovation efforts (positive externalities), which also amounts to a failure of the market.

⁽⁶⁴⁾ Judgement of the Court of Justice of 12 October 1978, Case 156/77 *Commission v Belgium* [1978] ECR 1881, paragraph 10.

- (94) The presence of a specific provision in the EEA Agreement making it possible to authorise aid which meets the needs of transport coordination shows how important these risks of market failures are and the negative impact they have on the development of the EEA.
- (95) In principle, aid which meets the needs of transport coordination has to be considered compatible with the EEA Agreement.
- (96) Nevertheless, for a given aid measure to be considered to 'meet the needs' of transport coordination, it has to be necessary and proportionate to the intended objective. Furthermore, the distortion of competition which is inherent in aid must not jeopardise the general interests of the EEA. By way of illustration, aid likely to shift traffic flows from short sea shipping to rail would fail to meet these criteria.
- (97) Finally, in view of the rapid development of the transport sector, and hence the need for coordinating it, any aid notified to the EFTA Surveillance Authority for the purpose of obtaining a decision, on the basis of Article 49 of the EEA Agreement, that the aid is compatible with the Agreement has to be limited ⁽⁶⁵⁾ to a maximum of 5 years, in order to allow the EFTA Surveillance Authority to re-examine it in the light of the results obtained and, where necessary, to authorise its renewal ⁽⁶⁶⁾.
- (98) As regards the railway industry more specifically, aid for the needs of transport coordination can take several forms:
- (a) aid for infrastructure use, that is to say, aid granted to railway undertakings which have to pay charges for the infrastructure they use, while other undertakings providing transport services based on other modes of transport do not have to pay such charges;
 - (b) aid for reducing external costs, designed to encourage a modal shift to rail because it generates lower external costs than other modes such as road transport;
 - (c) aid for promoting interoperability, and, to the extent to which it meets the needs of transport coordination, aid for promoting greater safety, the removal of technical barriers and the reduction of noise pollution in the rail transport sector, hereinafter referred to as 'interoperability aid';
 - (d) aid for research and development in response to the needs of transport coordination.
- (99) In the following sections the EFTA Surveillance Authority will specify the conditions which, from the point of view of its decision-making practice, make it possible to ensure, for these different types of aid for coordination of transport, that the aid concerned meets the conditions of compatibility mentioned in Article 49 of the EEA Agreement. In view of the specific nature of research and development aid, the criteria applicable to this type of measure are dealt with separately.

6.3. Criteria for aid for rail infrastructure use, reducing external costs and interoperability

- (100) The assessment of the compatibility of aid for infrastructure use, reducing external costs and interoperability with respect to Article 49 of the EEA Agreement is in keeping with the European Commission's decision-making practice pursuant to Article 3(1)(b) of Regulation (EEC) No 1107/70. In the light of this practice the conditions which follow appear sufficient for determining whether the aid is compatible.

6.3.1. Eligible costs

- (101) The eligible costs are determined on the basis of the following.
- (102) As regards aid for rail infrastructure use, the eligible costs are the additional costs for infrastructure use paid by rail transport but not by a more polluting competing transport mode.
- (103) As regards aid for reducing external costs, the eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes.

⁽⁶⁵⁾ Ibidem.

⁽⁶⁶⁾ This period is increased to 10 years for measures which fall within the scope of Article 15(1)(e) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003, p. 51; Directive as last amended by Directive 2004/75/EC (OJ L 157, 30.4.2004, p. 100). See in particular European Commission Decision of 2 April 2008, NN 46/B/2006 - Slovakia - Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published. Council Directive 2003/96/EC is not incorporated into the EEA Agreement as it concerns tax harmonisation which is outside the scope of the EEA Agreement.

- (104) In that regard, it should be recalled that Article 10 of Directive 2001/14/EC explicitly allows EEA States to put in place a compensation scheme for the demonstrably unpaid environmental, accident-related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail. If there is not yet any EEA legislation which harmonises methods for calculating infrastructure access charges within or across land transport modes, the EFTA Surveillance Authority will take account of the development of the rules governing the allocation of infrastructure costs and external costs when applying these guidelines ⁽⁶⁷⁾.
- (105) Both for aid for rail infrastructure use and for aid for reducing external costs, the EFTA State has to provide a transparent, reasoned and quantified comparative cost analysis between rail transport and the alternative options based on other modes of transport ⁽⁶⁸⁾. The methodology used and calculations performed must be made publicly available ⁽⁶⁹⁾.
- (106) As regards interoperability aid, the eligible costs cover, to the extent to which they contribute to the objective of coordinating transport, all investments relating to the installation of safety systems and interoperability ⁽⁷⁰⁾, or noise reduction both in rail infrastructure and in rolling stock. In particular they cover investment associated with the deployment of ERTMS (European Rail Traffic Management System) and any like measure which can help to remove the technical barriers in the European rail services market ⁽⁷¹⁾.

6.3.2. Necessity and proportionality of the aid

- (107) The EFTA Surveillance Authority considers that there is a presumption of necessity and proportionality of the aid when the intensity of the aid stays below the following values:
- (a) for aid for rail infrastructure use, 30 % of the total cost of rail transport, up to 100 % of the eligible costs ⁽⁷²⁾;
 - (b) for aid for reducing external costs, 30 % ⁽⁷³⁾ of the total cost of rail transport, up to 50 % of the eligible costs ⁽⁷⁴⁾;
 - (c) for interoperability aid, 50 % of the eligible costs.

⁽⁶⁷⁾ In this connection the third paragraph of Article 11 of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, OJ L 187, 20.7.1999, p. 42, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 5/2002 of 1 February 2002, (OJ L 88, 4.4.2002, p. 9 and EEA Supplement No 18, 4.4.2002, p. 6), as amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 132/2007 of 26 October 2007 (OJ L 100, 10.4.2008, p. 1 and EEA Supplement No 19, 10.4.2008, p. 1), provides that 'No later than 10 June 2008, the European Commission shall present, after examining all options including environment, noise, congestion and health-related costs, a generally applicable, transparent and comprehensible model for the assessment of all external costs to serve as the basis for future calculations of infrastructure charges. This model shall be accompanied by an impact analysis of the internalisation of external costs for all modes of transport and a strategy for a stepwise implementation of the model for all modes of transport'. During the preparation of a communication on the internalisation of external costs to comply with this objective, on 16 January 2008 the European Commission published a handbook on the studies carried out so far on external costs in the transport sector (http://ec.europa.eu/transport/costs/handbook/index_en.htm). This handbook, which was compiled jointly by several transport research institutes, can be used, amongst other factors, to determine eligible costs. Furthermore, the European Commission has published a White Paper COM(1998) 466, Fair payment for infrastructure use - A phased approach to a common transport infrastructure charging framework in the European Union, (Bulletin of the EU - Supplement 3/98).

⁽⁶⁸⁾ EFTA States can find indications of the different methods for evaluating extra costs in Annex 2 to European Commission Green Paper Towards fair and efficient pricing in transport - Policy options for internalising the external costs of transport in the European Union (Bulletin of the EU - Supplement 2/96; COM(1995) 691 final) and in the study which the European Commission published on 16 January 2008 (See Article 11 of Directive 1999/62/EC).

⁽⁶⁹⁾ Article 10 of Directive 2001/14/EC.

⁽⁷⁰⁾ See, in particular, Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system (OJ L 235, 17.9.1996, p. 6) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 25/97 (OJ L 242, 4.9.1997, p. 74 and EEA Supplement No 37, 4.9.1997, p. 74) and Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system, (OJ L 110, 20.4.2001, p. 1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 16/2002 (OJ L 110, 25.4.2002, p. 11 and EEA Supplement No 21, 25.4.2002, p. 8). Both Directives as last amended by Directive 2007/32/EC (OJ L 141, 25.6.2007, p. 63) were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 163/07 (OJ L 124, 8.5.2008, p. 30 and EEA Supplement No 26, 8.5.2008, p. 24).

⁽⁷¹⁾ Calculation of the eligible costs will take account of any changes made to charges for infrastructure use based on rolling stock performance (especially sound performance).

⁽⁷²⁾ See, by way of illustration, European Commission Decision of 22 December 2006, N 574/05, prolongation of existing aid scheme N 335/03 - Italy (Friuli-Venezia Giulia) - Aid for the setting up of rolling-motorway services (OJ C 133, 15.6.2007, p. 6); European Commission Decision of 12 October 2006, N 427/2006 - United Kingdom - Rail Environmental Benefit Procurement Scheme (REPS) (OJ C 283, 21.11.2006, p. 10).

⁽⁷³⁾ Annex I to Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second Marco Polo programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003 (OJ L 328, 24.11.2006, p. 1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 70/07 of 29 June 2007 (OJ L 304, 22.11.2007, p. 54 and EEA Supplement No 56, 22.11.2007, p. 8) provides that EEA financial assistance for modal shift actions is limited to a maximum of 35 % of the total expenditure necessary to achieve the objectives of the action and incurred as a result of the action. In these guidelines, as regards state aid for transport coordination the criterion is 30 % of the total cost of rail transport.

⁽⁷⁴⁾ See, by way of illustration, European Commission Decision of 22 December 2006, N 552/06 - Denmark - Prolongation of environmental aid scheme for the transport of goods by rail (OJ C 133, 15.6.2007, p. 5) and European Commission Decision of 12 October 2006, N 427/2006 - United Kingdom - Rail Environmental Benefit Procurement Scheme (REPS), op. cit.

- (108) For aid above these thresholds, EFTA States must demonstrate the need and proportionality of the measures in question ⁽⁷⁵⁾.
- (109) For both aid for rail infrastructure use and aid for reducing external costs, the aid has to be strictly limited to compensation for opportunity costs connected with the use of rail transport rather than with the use of a more polluting mode of transport. Where there are several competing options which cause higher levels of pollution than rail transport, the limit chosen corresponds to the highest cost differential among the various options. Where the intensity thresholds referred to in point 107 are adhered to, it may be presumed that the 'no overcompensation' criterion is met.
- (110) At any rate, where the aid recipient is a railway undertaking it must be proved that the aid really does have the effect of encouraging the modal shift to rail. In principle this will mean that the aid has to be reflected in the price demanded from the passenger or from the shipper, since it is they who make the choice between rail and the more polluting transport modes such as road ⁽⁷⁶⁾.
- (111) Finally, specifically as regards aid for rail infrastructure use and aid for reducing external costs, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

6.3.3. Conclusion

- (112) Aid for rail infrastructure use, for reducing external costs or for interoperability that is necessary and proportionate and so does not distort competition contrary to the common interest must be considered compatible under Article 49 of the EEA Agreement.

6.4. Compatibility of aid for research and development

- (113) In the area of land transport, Article 3(1)(c) of Regulation (EEC) No 1107/70, adopted on the basis of Article 73 of the EC Treaty, provides for the possibility of granting aid to research and development. The European Commission has recently developed a body of practice in the application of this provision ⁽⁷⁷⁾.
- (114) Article 9(2)(b) of the PSO Regulation adopts the text of Article 3(1)(c) of Regulation (EEC) No 1107/70. Under that provision, aid which has the purpose of promoting research into or development of rail passenger transport systems and technologies which are more economic for the EEA in general, which is restricted to the research and development stage and which does not cover the commercial exploitation of such transport systems and technologies, has to be regarded as meeting the needs of transport coordination.
- (115) Article 9(2)(b) of the PSO Regulation applies without prejudice to Article 61 of the EEA Agreement. Thus, aid for research, development and innovation in the field of passenger transport, if not covered by Article 9 of the PSO Regulation, and aid which only concerns freight, may be considered compatible on the basis of Article 61(3)(c) of the EEA Agreement.
- (116) In this regard the EFTA Surveillance Authority has defined, in the Guidelines for state aid for research and development and innovation ⁽⁷⁸⁾ (hereinafter the 'R&D&I guidelines') the conditions under which it will declare aid of that type compatible with the EEA on the basis of Article 61(3)(c) of the EEA Agreement. The R&D&I guidelines apply 'to aid to support research and development and innovation in all sectors governed by the EEA Agreement. They also apply to those sectors which are subject to specific Community rules on state aid, unless such rules provide otherwise' ⁽⁷⁹⁾. The R&D&I guidelines therefore apply to aid for research, development and innovation in the railway transport sector which does not fall within the scope of Article 3(1)(c) of Regulation (EEC) No 1107/70 or Article 9 of the PSO Regulation (following the entry into force of that Regulation).

⁽⁷⁵⁾ This could be the case with interoperability measures on the trans-European transport network as last defined by Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network (OJ L 167, 30.4.2004, p. 1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 62/06 of 2 June 2006 (OJ L 245, 7.9.2006, p. 9 and EEA Supplement No 44, 7.9.2006, p. 8).

⁽⁷⁶⁾ With regard to measures falling under Article 15(1)(e) of Directive 2003/96/EC, an impact on the price of transport may be taken for granted, unless there is proof to the contrary. See in particular the European Commission decision of 2 April 2008, NN 46/B/2006 - Slovakia - Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published.

⁽⁷⁷⁾ European Commission Decision of 30 May 2007, N 780/06 - The Netherlands - Onderzoek en ontwikkeling composiet scheepsconstructie en multi-purpose laadruim; het 'CompoCaNord'-project (OJ C 227, 27.9.2007, p. 5); European Commission Decision of 19 July 2006, N 556/2005 - The Netherlands - Environmental protection and innovation in public transport in the province of Gelderland (OJ C 207, 30.8.2006); European Commission Decision of 20 July 2005, N 63/2005 - Czech Republic - Programme for energy economics and use of alternative fuels in the transport sector (OJ C 83, 6.4.2006).

⁽⁷⁸⁾ The EFTA Surveillance Authority adopted Guidelines for state aid for research and development and innovation by Decision 14/07/COL of 7 February 2007 (OJ L 305, 19.11.2009, p. 1 and EEA Supplement No. 60, 19.11.2009, p. 1. Updated Guidelines are available on the EFTA Surveillance Authority web page at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>). See corresponding Community guidelines (OJ C 323, 30.12.2006, p. 1).

⁽⁷⁹⁾ Ibidem, point 2.1.

- (117) It is not excluded that the compatibility of aid for research and development may be analysed directly on the basis of Article 49 of the EEA Agreement, if it is aimed at meeting the needs of transport coordination. In this case the abovementioned conditions should be checked, in particular the fact that the aid must be necessary and proportionate to the intended objective, and must not jeopardise the general interests of the EEA. The EFTA Surveillance Authority considers that the general principles set out in the R&D&I guidelines are relevant in analysing these various criteria.

7. STATE GUARANTEES FOR RAILWAY UNDERTAKINGS

- (118) The EFTA Surveillance Authority's Guidelines on state guarantees⁽⁸⁰⁾ sets out the legal requirements applicable to state guarantees, including in the rail transport field.
- (119) These guidelines state, in point 1.2, that the EFTA Surveillance Authority 'regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit state guarantee or coverage of losses by the State'.
- (120) The European Commission's and the EFTA Surveillance Authority's consistent practice has been to consider unlimited guarantees in a sector open to competition to be incompatible with the EC Treaty and the EEA Agreement respectively. In accordance with the proportionality principle they cannot in particular be justified by tasks of general interest. With an unlimited guarantee it is impossible to check whether the amount of aid exceeds the net costs of providing the public service⁽⁸¹⁾.
- (121) When the state guarantees are granted to undertakings with a presence on both competitive and non-competitive markets, the European Commission's and the EFTA Surveillance Authority's practice is to require the complete removal of the unlimited guarantee granted to the undertaking as a whole⁽⁸²⁾.
- (122) Several railway undertakings are enjoying unlimited guarantees. These guarantees are generally a legacy of special cases of historic monopolies set up for railway undertakings before the EEA Agreement entered into force or before the rail transport services market was opened up to competition.
- (123) According to the information available to the European Commission and the EFTA Surveillance Authority, these guarantees do, to a large extent, constitute existing aid. The EFTA States concerned are invited to inform the EFTA Surveillance Authority of the conditions for implementing the schemes for existing aid as well as of the measures envisaged for removing them, in accordance with the procedure defined in section 8.3.

8. FINAL PROVISIONS

8.1. Rules on the cumulation of aid

- (124) The aid ceilings stipulated in these guidelines are applicable irrespective of whether the aid in question is financed wholly or in part from state resources or from Community resources. Aid authorised under these guidelines may not be combined with other forms of state aid within the meaning of Article 61(1) of the EEA Agreement or with other forms of Community financing if such combination produces a level of aid higher than that laid down in these guidelines.
- (125) In the case of aid serving different purposes and involving the same eligible costs, the most favourable aid ceiling will apply.

8.2. Date of application

- (126) The EFTA Surveillance Authority will apply these guidelines from the date of their publication in the *Official Journal of the European Union* and the *EEA Supplement*.

The EFTA Surveillance Authority will apply these guidelines to all aid, whether or not notified, in respect of which it is called upon to take a decision after the date of their publication.

⁽⁸⁰⁾ The EFTA Surveillance Authority adopted Guidelines on state Guarantees by Decision 788/08/COL of 17 December 2008. See corresponding Community guidelines (OJ C 155, 20.6.2008, p. 10).

⁽⁸¹⁾ European Commission Decision 2005/145/EC of 16 December 2003 on the state aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9); European Commission Decision of 24 April 2007, E 12/2005 – Poland – Unlimited guarantee for the Polish post office (Poczta Polska) (OJ C 284, 27.11.2007, p. 2); European Commission Decision of 27 March 2002, E 10/2000 – Germany – State guarantees for public credit institutions in Germany (OJ C 150, 22.6.2002, p. 7); EFTA Surveillance Authority Decision of 15 July 2005, 177/05/COL State guarantee in favour of Liechtensteinische Landesbank (OJ C 310, 8.12.2005, p. 17 and EEA Supplement No 62, 8.12.2005, p. 1).

⁽⁸²⁾ Ibidem.

8.3. Appropriate measures

- (127) In accordance with Article 62(1) of the EEA Agreement, the EFTA Surveillance Authority proposes that the EFTA States amend their existing aid schemes relating to state aid covered by these guidelines so as to comply with them at the latest two years after their publication in the *Official Journal of the European Union* and the *EEA Supplement*, subject to the specific provisions in the chapter on state guarantees. The EFTA States are invited to confirm that they accept these proposals for appropriate measures in writing at the latest one year after the date of publication in the *Official Journal of the European Union* and the *EEA Supplement*.
- (128) Should an EFTA State fail to confirm its acceptance in writing by that date, the EFTA Surveillance Authority will apply Article 19(2) of Part II of Protocol 3 to the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and, if necessary, initiate the proceedings referred to in that provision.

8.4. Period of validity and reporting

- (129) The EFTA Surveillance Authority reserves the right to amend these guidelines. It will present a report on their application before any amendment and at the latest five years after the date of their publication.
-

ANNEX IV

RECOVERY OF UNLAWFUL AND INCOMPATIBLE STATE AID ⁽¹⁾

1. INTRODUCTION

1. The EFTA Surveillance Authority (hereinafter referred to as 'the Authority') is prepared to take a strong stance against unlawful aid. Under Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as 'Protocol 3') ⁽²⁾ the Authority has systematically ordered the EFTA States to recover any unlawful aid found to be incompatible with the functioning of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement'), unless it has considered that this would be contrary to a general principle of EEA law. The Authority has adopted 6 such recovery decisions.
2. It is essential for the integrity of the State aid regime that these decisions ordering EFTA States to recover unlawful state aid (hereinafter referred to as 'recovery decisions') are enforced in an effective and immediate manner. The experience of the Authority in recent years indicates that there is cause for real concern in this respect. The State Aid Scoreboard for the EFTA States presented in autumn 2008 ⁽³⁾ also shows that out of 6 recovery decisions adopted by the Authority, only one has been fully implemented by the EFTA State concerned ⁽⁴⁾.
3. In 2004, the European Commission (hereinafter referred to as 'the Commission') ordered a comparative study on the enforcement of EU State aid policy in different Member States (hereinafter referred to as the 'Enforcement Study') ⁽⁵⁾. One of the objectives of the study was to assess the effectiveness of recovery procedures and practices in a number of Member States. The authors of the Study found that the excessive length of recovery proceedings is a recurring theme in all country reports.
4. Based on its own experience, the Authority has noticed that the recovery of unlawful and incompatible aid also faces a number of obstacles in the EFTA States. Recovery proceedings, to which national law provisions are applicable, are particularly lengthy, and, in practice, recovery has not been completed within the deadline set out in any of the recovery decisions of the Authority. Therefore, the Authority wishes to stress the need for an effective enforcement of recovery decisions. It is clear that the implementation of such decisions is a shared responsibility between the Authority and the EFTA States, and will require considerable efforts by both in order to be successful.
5. The purpose of the present Chapter is to explain the Authority's policy towards the implementation of recovery decisions. It shall not examine the consequences that national courts may draw from the non respect of the notification and standstill obligation of Article 1(3) in Part I of Protocol 3. The Authority considers that there is a need to clarify the measures it intends to take to facilitate the execution of recovery decisions and to set out actions EFTA States could take to ensure that they reach full compliance with the rules and principles as established by the body of EEA law, and, in particular, the case law of the Courts of the European Communities and of the EFTA Court. To this end, the present Chapter will first recall the purpose of recovery and the basic principles underlying the implementation of recovery decisions. It will then present the practical implications of these basic principles for each of the actors involved in the recovery process.

2. THE PRINCIPLES OF RECOVERY POLICY

2.1. A short history of recovery policy

6. Article 1(3) in Part I of Protocol 3 states that '[t]he EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'
7. In cases where an EFTA State does not notify the Authority of its plans to grant or alter aid prior to such aid being put into effect, the aid is unlawful in relation to EEA law from the time that it is granted.

⁽¹⁾ This Chapter corresponds to the Commission's notice entitled *Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid*, OJ 2007 C 272, 15.11.2007, p. 4.

⁽²⁾ Protocol 3 of the Surveillance and Court Agreement was amended to reflect the provisions of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

⁽³⁾ http://www.eftasurv.int/media/scoreboard/stateaidscoreboardeea_eftastatesautumn2008.pdf

⁽⁴⁾ See the Authority's Annual Report 2006, p. 56.

⁽⁵⁾ Study on the enforcement of state aid law at national level, Competition studies 6, Luxembourg, Office for Official Publications of the European Communities - http://www.concurrences.com/IMG/pdf/Study_2006.pdf.

8. In its *Kohlegesetz* judgment ⁽⁶⁾ of 1973, the European Court of Justice (hereinafter referred to as the ECJ) confirmed for the first time that the Commission had the power to order the recovery of unlawful and incompatible State aid. The Court held that the Commission was competent to decide that a Member State must alter or abolish a state aid that was incompatible with the common market. It should therefore also be entitled to require repayment of this aid ⁽⁷⁾.
9. In 2001, Protocol 3 was amended by *inter alia* inserting Part II which amongst others included basic rules on recovery ⁽⁸⁾. Further implementing provisions on recovery were included in Decision No 195/04/COL of 14 July 2004, as amended ⁽⁹⁾.
10. Article 14(1) in Part II of Protocol 3 confirms the constant case law of the ECJ ⁽¹⁰⁾ and establishes an obligation on the Authority to order recovery of unlawful and incompatible aid unless this would be contrary to a general principle of law. This article also provides that the EFTA State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. Article 14(2) establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Decision No 195/04/COL elaborates on the methods to be used for the calculation of recovery interest. Finally, Article 14(3) states that '[...] recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the EFTA Surveillance Authority's decision. [...]'].
11. In a number of recent judgments, the ECJ further clarified the scope and interpretation of Article 14(3) of Council Regulation No 659/1999 (which corresponds to Article 14(3) in Part II of Protocol 3) thereby emphasising the need for an immediate and effective execution of recovery decisions ⁽¹¹⁾. In addition, the Authority has also started to apply the *Deggendorf* case law ⁽¹²⁾ in a systematic manner. This case law enables the Authority, if certain conditions have been satisfied, to order EFTA States to suspend the payment of a new compatible aid to a company until that company has reimbursed old unlawful and incompatible aid that is subject to a recovery decision.

2.2. Purpose and principles of recovery policy

2.2.1. Purpose of recovery

12. The ECJ has held on several occasions that the purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid. This is necessary to ensure that the level-playing field in the internal market is maintained. In this context, the ECJ underlined that the recovery of unlawful and incompatible aid is not a penalty ⁽¹³⁾, but the logical consequence of the finding that it is unlawful ⁽¹⁴⁾. It can therefore not be regarded as disproportionate to the objectives of the EC Treaty as regards state aid ⁽¹⁵⁾.
13. According to the ECJ, the 're-establishment of the previously existing situation is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored' ⁽¹⁶⁾. In order to eliminate any financial advantages incidental to unlawful aid, interest is to be recovered on the sums unlawfully granted. Such interest must be equivalent to the financial advantage arising from the availability of the funds in question, free of charge, over a given period ⁽¹⁷⁾.
14. Furthermore, the ECJ has insisted that in order for a recovery decision to be fully executed, the actions undertaken by a Member State must produce concrete effects as regards recovery ⁽¹⁸⁾ and that recovery must be immediate ⁽¹⁹⁾. For recovery to reach its objective, it is indeed essential that the repayment of the aid takes place without delay.

⁽⁶⁾ Case C-70/72, *Commission v Germany*, [1973] ECR 813, paragraph 13.

⁽⁷⁾ Article 6 of the EEA Agreement provides that, without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two treaties, shall in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement. As regards relevant rulings by the Court of Justice given after the date of signature of the EEA Agreement, it follows from Article 3(2) of the Surveillance and Court Agreement that the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by these rulings.

⁽⁸⁾ See footnote 2 above.

⁽⁹⁾ Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Agreement between the EFTA State on the Establishment of a Surveillance Authority and a Court of Justice, OJ L 139, 25.5.2006, p. 37, as amended. Decision No 195/04/COL corresponds to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, pp. 1-134), as amended.

⁽¹⁰⁾ Case C-301/87 *France v Commission* [1990] ECR I-307.

⁽¹¹⁾ Case C-415/03 *Commission v Greece* ('Olympic Airways') [2005] ECR I-3875 and Case C-232/05 *Commission v France* ('Scott') [2006] ECR I-10071.

⁽¹²⁾ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Germany* ('Deggendorf') ECR [1994] I-833.

⁽¹³⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 65.

⁽¹⁴⁾ Case C-183/91 *Commission v Greece* [1993] ECR I-3131, paragraph 16.

⁽¹⁵⁾ Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽¹⁶⁾ Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 27.

⁽¹⁷⁾ Case T-459/93, *Siemens v Commission* [1995] ECR II-1675, paragraphs 97 to 101.

⁽¹⁸⁾ Case C-415/03, *Commission v Greece*, cited above footnote 11.

⁽¹⁹⁾ Case C-232/05, *Commission v France*, cited above footnote 11.

2.2.2. *The obligation to recover unlawful and incompatible state aid and its exceptions*

15. Article 14(1) in Part II of Protocol 3 specifies that '[w]here 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'.
16. The provisions in Protocol 3 impose two limits on the Authority's power to order recovery of unlawful and incompatible aid. Article 14(1) in Part II of Protocol 3 provides that the Authority shall not require recovery of the aid if this would be contrary to a general principle of law. The general principles of law most often invoked in this context are the principles of the protection of legitimate expectation⁽²⁰⁾ and of legal certainty⁽²¹⁾. It is important to note that the ECJ has given a very restrictive interpretation to these principles in the context of recovery. Article 15 in Part II of Protocol 3 states that the powers of the Authority to recover aid shall be subject to a limitation period of 10 years (the so-called 'prescription period'). The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Authority or the Commission⁽²²⁾ or by an EFTA State, acting at the request of the Authority, with regard to the unlawful aid, shall interrupt the limitation period.
17. The EFTA State to which a recovery decision is addressed is obliged to execute this decision⁽²³⁾. The ECJ has recognised only one exception to the obligation for a Member State to implement a recovery decision addressed to it, namely the existence of exceptional circumstances that would make it absolutely impossible for the Member State to execute the decision properly⁽²⁴⁾.
18. According to the ECJ, absolute impossibility can however not be merely supposed. The Member State concerned must demonstrate that it attempted, in good faith, to recover unlawful aid and it must cooperate with the Commission in accordance with Article 10 of the EC Treaty, with a view to overcoming the difficulties encountered⁽²⁵⁾.
19. A review of the jurisprudence shows that the ECJ has interpreted the concept of 'absolute impossibility' in a very restrictive manner. The Court has confirmed on several occasions that a Member State may not plead requirements of its national law, such as national prescription rules⁽²⁶⁾ or the absence of a recovery title under national law⁽²⁷⁾, in order to justify its failure to comply with a recovery decision⁽²⁸⁾. In the same way, the ECJ held that the obligation to recover is not affected by circumstances linked to the economic situation of the beneficiary. It clarified that a company in financial difficulties does not constitute proof that recovery was impossible⁽²⁹⁾. In such circumstances, the Court pointed out that the absence of any recoverable assets is the only way for a Member State to show the absolute impossibility of recovering the aid⁽³⁰⁾. In a number of cases, the Member State argued that they had not been able to execute the recovery decision because of the administrative or technical difficulties involved (e.g. the very high number of beneficiaries involved). The Court consistently refused to accept that such difficulties constitute an absolute impossibility to recover⁽³¹⁾. Finally, the apprehension of even insurmountable internal difficulties cannot justify a failure by a Member State to fulfil its obligations under Community law⁽³²⁾.

2.2.3. *The use of national procedures and the necessity of an immediate and effective execution*

20. Article 14(3) in Part II of Protocol 3 specifies that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the EFTA Surveillance Authority's decision'.

⁽²⁰⁾ On the principle of the protection of the legitimate expectations, see Case C-24/95 *Alcan* [1997] ECR I-1591, paragraph 25, and Case C-5/89 *BUG-Alutechnik* [1990] ECR I-3437, paragraphs 13 and 14, and Joined cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnford a.o. v EFTA Surveillance Authority*, [2005] EFTA Court Report, p. 121, paragraph 171. For an example where the ECJ recognised the existence of legitimate expectations on the part of the beneficiary, see Case C-223/85 *RSV* [1987] ECR p. 4617.

⁽²¹⁾ On the principle of legal certainty, see T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39 and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraphs 116 to 118, and Joined cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 140, and Joined cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnford a.o. v EFTA Surveillance Authority*, cited above in footnote 20, paragraph 172. See also Case T-308/00 *Saltzgritter v Commission* [2004] ECR II-1933 paragraph 166.

⁽²²⁾ For an interpretation of 'any Commission action', see Case T-369/00 *Département du Loiret v Commission* [2003] ECR II-1789.

⁽²³⁾ Case 94/87 *Commission v Germany* [1989] ECR 175.

⁽²⁴⁾ Case C-404/00 *Commission v Spain* [2003] ECR I-6695.

⁽²⁵⁾ Case C-280/95 *Commission v Italy* [1998] ECR I-259.

⁽²⁶⁾ Case C-24/95 *Alcan*, cited above footnote 20, paragraphs 34 to 37.

⁽²⁷⁾ Case C-303/88 *Italy v Commission* [1991] ECR I-1433.

⁽²⁸⁾ Case C-52/84 *Commission v Belgium* [1986] ECR p. 89, paragraph 9.

⁽²⁹⁾ Case C-52/84 *Commission v Belgium* cited above footnote 28, paragraph 14.

⁽³⁰⁾ Case C-499/99 *Commission v Spain* [2002] ECR I-6031.

⁽³¹⁾ Case C-280/95 *Commission v Italy*, cited above footnote 25.

⁽³²⁾ Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 34.

21. If EFTA States are free to choose, according to their national law, the means by which they implement recovery decisions, the measures chosen should give full effect to the recovery decision. It is therefore necessary that the national measures taken by EFTA States lead to an effective and immediate execution of the Authority's decision.
22. In its *Olympic Airways* judgment ⁽³³⁾, the ECJ underlined that the implementation measures taken by the Member State must be effective and produce a concrete outcome in terms of recovery. The actions undertaken by the State must result in the actual recovery of the sums owed by the beneficiary. In its *Scott* judgment ⁽³⁴⁾, the ECJ confirmed that line and emphasised that national procedures which do not fulfil the conditions laid down in Article 14(3) of the Procedural Regulation (which corresponds to Article 14(3) in Part II of Protocol 3) should be left unapplied. It refuted, in particular, the Member State's argument that it had taken all steps available in its national system and insisted that these steps should also lead to a concrete outcome in terms of recovery, and this within the deadline set by the Commission.
23. Article 14(3) in Part II of Protocol 3 requires that recovery decisions are implemented in a way that is both effective and immediate. In the *Scott* case, the ECJ stressed the importance of the time-dimension in the recovery process. The Court specified that the application of national procedures should not impede the restoration of effective competition by preventing the immediate and effective execution of the Commission's decision. National procedures, which prevent the immediate restoration of the previously existing situation and prolong the unfair competitive advantage resulting from unlawful and incompatible aid, do not fulfil the conditions laid down in Article 14(3) in Part II of Protocol 3.
24. In this context it is important to recall that an action for annulment of a recovery decision brought under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the Surveillance and Court Agreement) does not have a suspensive effect. In the context of such an action, the beneficiary of the aid may however apply for the suspension of the execution of the recovery decision pursuant to Article 40 of the Surveillance and Court Agreement. Applications for suspension must state the circumstances giving rise to urgency and must contain the pleas of fact and law establishing a *prima facie* case for the interim measures being applied for ⁽³⁵⁾. The EFTA Court may then, if it considers that the circumstances so require, order that application of the contested decision be suspended.

2.2.4. *The principle of loyal cooperation*

25. Article 3 EEA obliges EFTA States to facilitate the achievement of the EEA tasks and imposes mutual duties of cooperation on the EEA institutions and the EFTA States, with a view to attaining the objectives of the EEA Agreement.
26. In the context of the implementation of recovery decisions, the Authority and the EFTA States' authorities must therefore cooperate to attain the objective of the restoration of competitive conditions in the internal market.
27. If an EFTA State encounters unforeseen or unforeseeable difficulties in executing the recovery decision within the required time-limit or perceives consequences overlooked by the Authority, it should submit those problems for consideration to the Authority, together with proposals for suitable amendments ⁽³⁶⁾. In such a case, the Authority and the EFTA State concerned must work together in good faith to overcome the difficulties, whilst fully observing the EEA Agreement ⁽³⁷⁾. Likewise the principle of loyal cooperation requires that the EFTA States provide the Authority with all the information enabling it to establish that the means chosen constitute an adapted implementation of the decision ⁽³⁸⁾.
28. Informing the Authority of the technical and legal difficulties involved in implementing a recovery decision does however not relieve EFTA States from the duty to take all necessary steps possible to recover the aid from the undertaking in question and to propose to the Authority any suitable arrangements for implementing the decision ⁽³⁹⁾.

3. IMPLEMENTING RECOVERY POLICY

29. Both the Authority and the EFTA States have an essential role to play in the implementation of recovery decisions and may contribute to an effective enforcement of recovery policy.

⁽³³⁾ Case C-415/03 *Commission v Greece* cited above footnote 11.

⁽³⁴⁾ Case C-232/05 *Commission v France* cited above footnote 11.

⁽³⁵⁾ Article 80(2) of the EFTA Court's Rules of Procedure.

⁽³⁶⁾ Case C-404/00 *Commission v Spain*, cited above footnote 24.

⁽³⁷⁾ Case C-94/87 *Commission v Germany*, cited above footnote 23, paragraph 9, and Case C-348/93 *Commission v Italy*, cited above footnote 16, paragraph 17.

⁽³⁸⁾ For an illustration of proposals for implementation see Case C-209/00 *Commission v Germany* [2002] ECR I-11695.

⁽³⁹⁾ Case 94/87 *Commission v Germany*, cited above footnote 23, paragraph 10.

3.1. The role of the Authority

30. The Authority's recovery decision imposes a recovery obligation upon the EFTA State concerned. It requires the EFTA State concerned to recover a certain amount of aid from a beneficiary or a number of beneficiaries within a given time frame. Experience shows that the speed with which a recovery decision is executed is affected by the degree of precision or the completeness of that decision. The Authority will therefore continue its efforts to ensure that recovery decisions provide a clear indication of the amount(s) of aid to be recovered, the undertaking(s) liable to recovery and the deadline within which the recovery should be completed.

Identification of the undertakings from whom the aid must be recovered

31. The unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it ⁽⁴⁰⁾. The Authority will continue its present practice of identifying in its recovery decisions, where possible, the identity of the undertaking(s) from whom the aid must be recovered. If, at the stage of the implementation, it appears that the aid was transferred to other entities, the EFTA State may have to extend recovery to encompass all effective beneficiaries to ensure that the recovery obligation is not circumvented.
32. The ECJ has given some guidance on the conditions under which the recovery obligation must be extended to companies other than the original beneficiary of the unlawful and incompatible aid. According to the ECJ, a transfer of the undue advantage may occur when the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value, sometimes to a successor company set up in order to circumvent the recovery order ⁽⁴¹⁾. In line with that case law, it will be for the Authority to prove that assets have been sold at a price that is lower than their market value, especially to a successor company set up to circumvent the recovery order, in which case the recovery order can be extended to that third party. Typical cases of circumvention are cases where the transfer does not reflect any economic logic other than the invalidation of the recovery order ⁽⁴²⁾.
33. As regards transfer of shares of a company that has to reimburse an illegal and incompatible aid (share deals), the ECJ held ⁽⁴³⁾ that the sale of shares in such a company to a third party does not affect the obligation of the beneficiary to reimburse such aid ⁽⁴⁴⁾. When it can be established that the buyer of the shares paid the prevailing market price for the shares of that company, it cannot be regarded as having benefited from an advantage that could constitute a state aid ⁽⁴⁵⁾.
34. When it adopts a recovery decision regarding aid schemes, the Authority is normally not in a position to identify, in the decision itself, all the undertakings that have received unlawful and incompatible aid. This will have to be done at the start of the implementation process by the EFTA State concerned, which will have to look at the individual situation of each undertaking concerned ⁽⁴⁶⁾.

Determination of the amount to be recovered

35. The purpose of recovery is achieved 'once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored' ⁽⁴⁷⁾.
36. As it has done in the past, the Authority will clearly identify the unlawful and incompatible aid measures that are subject to recovery in its recovery decisions. When it has the necessary data at its disposal, the Authority will also endeavour to quantify the precise amount of aid to be recovered. It is clear, though, that the Authority cannot and is legally not required to fix the exact amount to be recovered. It is sufficient for the Authority's decision to include information enabling the EFTA State to determine the amount, without too much difficulty ⁽⁴⁸⁾.

⁽⁴⁰⁾ Case C-303/88 *Italy v Commission*, cited above footnote 27, paragraph 57, and Case C-277/00 *Germany v Commission* ('SMI') [2004] ECR I-3925, paragraph 75.

⁽⁴¹⁾ Case C-277/00 *Germany v Commission*, cited above footnote 40.

⁽⁴²⁾ Case C-328/99 and C-399/00, *Italy and SIM 2 Multimedia Spa v Commission* [2003] ECR I-4035. For another example of circumvention, see case C-415/03, *Commission v Greece*, cited above footnote 11.

⁽⁴³⁾ Case C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission*, cited above footnote 42, paragraph 83.

⁽⁴⁴⁾ In the event of a privatisation of a company that received state aid declared compatible by the Authority, the EFTA State can introduce a liability clause in the privatisation agreement to protect the buyer of the company against the risk that the initial Authority's decision approving the aid would be overturned by the EFTA Court and replaced by an Authority's decision ordering the recovery of that aid from the beneficiary. Such a clause could provide for an adjustment of the price paid by the buyer for the privatised company to take due account of the new recovery liability.

⁽⁴⁵⁾ Case C-277/00 *Germany v Commission*, cited above footnote 40, paragraph 80.

⁽⁴⁶⁾ Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 91.

⁽⁴⁷⁾ Case C-277/00 *Germany v Commission*, cited above footnote 40, paragraphs 74-76.

⁽⁴⁸⁾ Case C-480/98 *Spain v Commission* [2000] ECR I-8717, paragraph 25, and Joined cases C-67/85, C-68/85, and C-70/85 *Kwekerij van der Kooy BV and others v Commission* [1988] ECR p. 219.

37. In the case of an unlawful and incompatible aid scheme, the Authority is not able to quantify the amount of incompatible aid to be recovered from each beneficiary. This would require a detailed analysis by the EFTA State of the aid granted in each individual case on the basis of the scheme in question. The Authority therefore indicates in its decision that EFTA States will have to recover all aid, unless it has been granted to a specific project, which, at the time of granting, fulfilled all conditions of the block exemption regulations or in an aid scheme approved by the Authority.
38. According to Article 14(2) in Part II of Protocol 3, the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate level to be fixed by the Authority. Interest shall be payable from the time the unlawful aid was at the disposal of the beneficiary until the date of its recovery⁽⁴⁹⁾. Decision No 195/04/COL establishes that the interest rate shall be applied on a compound basis until the date of the recovery of the aid⁽⁵⁰⁾.

Timetable for the implementation of the decision

39. In the past, the Commission's recovery decisions specified a single time-limit of two months, within which the Member State concerned was required to communicate to the Commission the measures it had taken to comply with a given decision. The ECJ acknowledged that this deadline is to be regarded as the deadline for the execution of the decision itself⁽⁵¹⁾.
40. The ECJ further concluded that contacts and negotiations between the Commission and the Member State, in the context of the execution of the Commission's decision, could not relieve the Member State from the duty to take all necessary measures to execute the decision within the prescribed time-limit⁽⁵²⁾.
41. The Authority recognises that the two month deadline for the execution of its decisions is too short in the majority of cases. Therefore, the deadline will be prolonged to four months for the execution of recovery decisions. From now on, the Authority will specify two time-limits in its decisions:
- a first time-limit of two months following the entry into force of the decision, within which the EFTA State must inform the Authority of the measures planned or taken;
 - a second time-limit of four months following the entry into force of the decision, within which the Authority's decision must have been executed.
42. If an EFTA State encounters serious difficulties preventing it from respecting either one of these deadlines, it must inform the Authority of these difficulties, providing an appropriate justification. The Authority may then prolong the deadline in accordance with the principle of loyal cooperation⁽⁵³⁾.

3.2. The role of the EFTA States: implementing the recovery decisions

3.2.1. Who is responsible for the implementation of the recovery decision?

43. The EFTA State is responsible for the implementation of the recovery decision. Article 14(1) in Part II of Protocol 3 provides that the EFTA State concerned is to take all necessary measures to recover the aid from the beneficiary.
44. In this context, it is important to keep in mind that the ECJ has recalled on several occasions that a Commission decision addressed to a Member State is binding on all the organs of that State, including the courts of that State⁽⁵⁴⁾. This implies that each organ of the EFTA State involved in the implementation of a recovery decision must take all necessary measures to secure the immediate and effective application of such a decision.
45. EEA law does not prescribe which organ of the EFTA State should be in charge of the practical implementation of a recovery decision. It is for the domestic legal system of each EFTA State to designate the bodies that will be responsible for the implementation of the recovery decision. In general, the choice in the EFTA States has been to appoint one central body (for instance a Ministry) which is in charge of monitoring the recovery process and that is in constant contact with the Authority⁽⁵⁵⁾.

⁽⁴⁹⁾ See, in that context, the exception of Case C-480/98 *Spain v Commission*, cited above footnote 48, paragraphs 36 and following.

⁽⁵⁰⁾ Further guidance as to calculation of interests is contained in Decision No 195/04/COL.

⁽⁵¹⁾ See Case C-207/05 *Commission v Italy* [2006] ECR I-70, paragraphs 31 to 36, Case C-378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 28, and Case C-232/05 *Commission v France*, cited above footnote 11.

⁽⁵²⁾ Case C-5/86 *Commission / Belgium* [1987] ECR p. 1773.

⁽⁵³⁾ Case C-207/05 *Commission v Italy*, cited above footnote 51.

⁽⁵⁴⁾ Case 249/85 *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR p. 2345.

⁽⁵⁵⁾ The authors of the Enforcement Study referred to above note that 'a principle common to all countries reviewed is that recovery must be effected by the authority that granted the aid'. They also point out that, in countries which charge one central body with the task of overseeing the recovery process, the existence of such a body appears to contribute to a more efficient implementation of recovery decisions (see page 521 of the Study).

3.2.2. Implementation of the recovery obligation

46. Article 14(3) of Protocol 3 obliges the EFTA States to initiate recovery proceedings without any delay. As mentioned in section 3.1 above, the recovery decision will specify a time-limit within which the EFTA State is to submit precise information on the measures it has taken and planned to execute the decision. In particular, the EFTA State will be required to provide complete information on the identity of the beneficiaries of the unlawful and incompatible aid, the amounts of aid involved and the national procedure applied to obtain recovery. In addition, the EFTA State will be required to provide documentation showing that it notified the beneficiary of its obligation to repay the aid.

Identification of the aid beneficiary and the amount to be recovered

47. The recovery decision will not always contain complete information on the identity of the beneficiaries, nor on the amounts of aid to be recovered. In such cases, the EFTA State must identify without any delay the undertakings concerned by the decision and quantify the precise amount of aid to be recovered from each of them.
48. In the case of an unlawful and incompatible aid scheme, the EFTA State will be required to carry out a detailed analysis of each individual aid granted on the basis of the scheme in question. To quantify the precise amount of aid to be recovered from each individual beneficiary under the scheme, it will need to determine the extent to which the aid has been granted to a specific project, which, at the time of granting, fulfilled all conditions of the block exemption regulations or in an aid scheme approved by the Authority. In such cases, the EFTA State may also apply the substantive *de minimis* criteria applicable at the time of the granting of the unlawful and incompatible aid that is subject to the recovery decision.
49. National authorities are allowed to take into account the incidence of the tax system in order to determine the amount to be reimbursed. Where a beneficiary of unlawful and incompatible aid has paid tax on the aid received, the national authorities may, in accordance with their national tax rules, take account of the earlier payment of tax by recovering only the net amount received by the beneficiary⁽⁵⁶⁾. The Authority considers that in such cases, the national authorities will need to ensure that the beneficiary will not be able to enjoy a further tax deduction by claiming that the reimbursement has reduced his taxable income, since this would mean that the net amount of the recovery was lower than the net amount initially received.

The applicable recovery procedure

50. EEA law does not prescribe which procedure the EFTA State should apply to execute a recovery decision. However, EFTA States should be aware that the choice and application of a national procedure is subject to the condition that such procedure allows for the immediate and effective execution of the Authority's decision. This implies that the authorities responsible should carefully consider the full range of recovery instruments available under national law and select the procedure most likely to secure the immediate execution of the decision. They should use fast-track procedures where possible under national law. According to the principle of equivalence and effectiveness, these procedures must not be less favourable than those governing similar domestic actions, and that they should not render practically impossible or excessively difficult the exercise of rights conferred by EEA law⁽⁵⁷⁾.
51. More generally, EFTA States should not be able to place any obstacles in the way of carrying out a recovery decision⁽⁵⁸⁾. Consequently, EFTA State authorities are under an obligation to set aside any provisions of national law, which might impede the immediate execution of the recovery decision⁽⁵⁹⁾.

The notification and enforcement of recovery orders

52. Once the beneficiary, the amount to be recovered and the applicable procedure have been determined, recovery orders should be sent to the beneficiaries of the unlawful and incompatible aid without delay and within the deadline prescribed by the Authority's decision. The authorities responsible for carrying out the recovery must ensure that these recovery orders are enforced and that recovery is completed within the time-limit specified in the decision. Where a beneficiary does not comply with the recovery order, EFTA States should seek the immediate enforcement of its recovery claims under national law.

3.2.3. Litigation before national courts

53. The implementation of recovery decisions can give rise to litigation in national courts. Two main categories of recovery-related litigation can be distinguished: actions brought by the recovering authority seeking a court order to force an unwilling recipient to refund the unlawful and incompatible aid and actions brought by beneficiaries contesting the recovery order.

⁽⁵⁶⁾ Case T-459/93 *Siemens v Commission*, cited above footnote 17, paragraph 83. See also Case C-148/04 *Unicredito Spa v Agenzia delle Entrate, Ufficio Genova I* [2005] ECR I-11137, paragraphs 117 to 120.

⁽⁵⁷⁾ Case C-13/01 *Safalero* [2003] ECR I-8679, paragraphs 49-50.

⁽⁵⁸⁾ Case C-48/71 *Commission v Italy* [1972] ECR p. 529.

⁽⁵⁹⁾ Case C-232/05 *Commission v France*, cited above footnote 11.

54. The execution of a recovery decision can be delayed for many years when the national measures taken for the implementation of a recovery decision are challenged in court. This is even more the case when the recovery decision is itself challenged before the EFTA Court, especially if national judges are asked to suspend the implementation of national measures until the EFTA Court has ruled on the validity of the recovery decision.
55. In line with the case law of the ECJ, the beneficiary of an aid who could without any doubt have challenged a recovery decision under Article 36 of the Surveillance and Court Agreement before the EFTA Court can no longer challenge the validity of the decision in proceedings before the national court on the ground that the decision was unlawful⁽⁶⁰⁾. It derives from this that the beneficiary of an aid who could have asked for interim relief before the EFTA Court in accordance with Articles 40 and 41 of the Surveillance and Court Agreement and has failed to do so, cannot ask for a suspension of the measures taken by the national authorities for implementing that decision on grounds linked to the validity of the decision.
56. On the other hand, in cases where it is not self-evident that an action for annulment brought against the contested decision by the beneficiary of the aid would have been admissible, an adequate legal protection must be offered to the aid beneficiary. In the event that the aid beneficiary challenges the implementation of the decision in proceedings before the national court on the ground that such recovery decision was unlawful, the national judge should rely on the procedure laid down in Article 34 of the Surveillance and Court Agreement⁽⁶¹⁾.
57. In case the beneficiary also asks for interim relief of the national measures adopted to implement the recovery decision because of an alleged illegality of the Authority's recovery decision, the national judge has to assess whether the case at hand fulfils the conditions established by the ECJ in the *Zuckerfabrik*⁽⁶²⁾ and *Atlanta*⁽⁶³⁾ cases. This means that a national court should only order interim relief if:
- (1) that court entertains serious doubts as to the validity of the act and, if the validity of the contested act is not already in issue before the EFTA Court, itself acts in accordance with the second sentence in paragraph 56 above;
 - (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
 - (3) the court takes due account of the EEA interest; and
 - (4) in its assessment of all those conditions, it respects any decisions of the EFTA Court ruling on the lawfulness of the act or on an application for interim measures seeking similar interim relief at EEA level⁽⁶⁴⁾.

3.2.4. *The specific case of insolvent beneficiaries*

58. As a preliminary observation, it is important to recall that the ECJ has consistently held that the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid⁽⁶⁵⁾.
59. In the majority of cases involving an insolvent aid beneficiary, it will not be possible to recover the full amount of unlawful and incompatible aid (including interest), as the beneficiary's assets will be insufficient to satisfy all creditors' claims. Consequently, it is not possible to fully re-establish the *ex ante* situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion of competition, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases⁽⁶⁶⁾. The Authority is therefore of the view that a decision ordering the EFTA State to recover unlawful and incompatible aid from an insolvent beneficiary may be considered to be properly executed either when full recovery is completed or, in case of partial recovery, when the company is liquidated and its assets are sold at market conditions.
60. When implementing recovery decisions concerning insolvent beneficiaries, EFTA State authorities should ensure that due account is taken, throughout the insolvency proceedings, of the EEA interest and more in particular of the need to end immediately the distortion of competition caused by the granting of unlawful and incompatible aid.

⁽⁶⁰⁾ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Germany*, cited above footnote 12.

⁽⁶¹⁾ Case C-346/03 *Atzeni a.o.* [2006] ECR I-1875, paragraph 30-34.

⁽⁶²⁾ Joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen A.G. a.o.* [1991] ECR I-415, paragraphs 23 and following.

⁽⁶³⁾ Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH a.o.* [1995] ECR I-3761, paragraph 51.

⁽⁶⁴⁾ Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH a.o.*, cited above footnote 63, paragraph 51.

⁽⁶⁵⁾ Case C-42/93 *Spain v Commission ('Merco')* [1994] ECR I-4175.

⁽⁶⁶⁾ Case C-52/84 *Commission v Belgium*, cited above footnote 28.

61. However, the sole registration of claims in bankruptcy proceedings may not always be sufficient to ensure the immediate and effective implementation of the Authority's recovery decisions. The application of certain provisions of national bankruptcy laws may frustrate the effect of recovery decisions by allowing the company to operate despite the absence of full recovery, thus allowing the distortion of competition to continue. The Authority therefore considers that there is a need to define the obligations of the EFTA States at the different steps of the bankruptcy proceedings.
62. The EFTA State should immediately register its claims in the bankruptcy proceedings ⁽⁶⁷⁾. According to the ECJ case law, recovery will be done according to national bankruptcy rules ⁽⁶⁸⁾. The recovery debt will thus be refunded by virtue of the status given to it by national law.
63. In the past, there have been cases, dealt with by the Commission, in which the insolvency administrator refused to register a recovery claim in the bankruptcy proceedings, and this because of the form of the illegal and incompatible aid granted (for example when the aid had been granted in the form of a capital injection). This situation is problematic, especially if such a refusal would deprive the authorities responsible for the execution of the recovery decision of any means to ensure that due account is taken of the Community and EEA interest in the course of the insolvency proceedings. Therefore the Authority considers that the EFTA State should dispute any refusal by the insolvency administrator to register its claims ⁽⁶⁹⁾.
64. To ensure the immediate and effective implementation of a recovery decision, the Authority is of the view that the authorities responsible for the execution of the recovery decision should also appeal any decision by the insolvency administrator or the insolvency court to allow a continuation of the insolvent beneficiary's activity beyond the time limits set in the recovery decision. Likewise, national courts, when faced with such a request, should take the EEA interest fully into account, and more in particular the need to ensure that the execution of the Authority's decision is immediate and that the distortion of competition caused by the unlawful and incompatible aid is ended as soon as possible. The Authority considers that they should therefore not allow for a continuation of an insolvent beneficiary's activity in the absence of full recovery.
65. In the case where a continuation plan is proposed to the creditors' committee implying a continuation of the activity of the beneficiary, the national authorities responsible for the execution of the recovery decision can only support this plan if it ensures that the aid is repaid in full within the time limits foreseen in the Authority's recovery decision. In particular, the EFTA State cannot waive part of its recovery claim, nor can it accept any other solution that would not result in the immediate ending of the activity of the beneficiary. In the absence of a full and immediate repayment of the unlawful and incompatible aid, the authorities responsible for the execution of the recovery decision should take all measures available to oppose the adoption of a continuation plan and should insist on the ending of the activity of the beneficiary within the time limit set in the recovery decision.
66. In the case of liquidation, and as long as the aid has not been fully recovered, the EFTA State should oppose any transfer of assets that is not carried out on market terms and/or that is organised so as to circumvent the recovery decision. To achieve a 'correct transfer of assets', the EFTA State has to ensure that the undue advantage created by the aid is not transferred to the acquirer of the assets. This may be the case if the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value or to a successor company set up in order to circumvent the recovery order. In such a case, the recovery order needs to be extended to that third party ⁽⁷⁰⁾.

4. CONSEQUENCES OF THE FAILURE TO IMPLEMENT THE AUTHORITY'S RECOVERY DECISIONS

67. An EFTA State is deemed to comply with the recovery decision when the aid has been fully reimbursed within the prescribed time limit or, in the case of an insolvent beneficiary, when the company is liquidated under market conditions.

⁽⁶⁷⁾ Case C-142/87 *Commission v Belgium* [1990] ECR I-959, paragraph 62.

⁽⁶⁸⁾ Case C-142/87 *Commission v Belgium*, cited above footnote 67, and Case C-499/99 *Commission v Spain*, cited above footnote 30, paragraphs 28-44.

⁽⁶⁹⁾ See, in that context, the judgment of the Commercial Chamber of the Amberg Court of 23 July 2001 in relation to the aid granted by Germany to 'Neue Maxhütte-Stahlwerke GmbH' (Commission Decision of 18 October 1995, OJ L 53, 2.3.1996, p. 41). In that case, the German court over-ruled the refusal of the insolvency administrator to register a recovery claim resulting from an illegal and incompatible aid granted in the form of a capital injection, as this would render the execution of the recovery decision impossible.

⁽⁷⁰⁾ Case C-277/00 *Germany v Commission*, cited above footnote 40.

68. The Authority may also accept, in duly justified cases, a provisional implementation of the decision when it is subject to litigation before a national court or the EFTA Court (e.g. the payment of the full amount of unlawful and incompatible aid into a blocked account ⁽⁷¹⁾). The EFTA State must ensure that the advantage linked to the unlawful and incompatible aid leaves the company ⁽⁷²⁾. The EFTA State should submit, for approval by the Authority, a justification for the adoption of such provisional measures and a full description of the provisional measure envisaged.

69. Where the EFTA State concerned has not complied with the recovery decision, and where it has not been able to demonstrate the existence of absolute impossibility, the Authority may initiate infringement proceedings. In addition, if certain conditions are satisfied, it may require the EFTA State concerned to suspend the payment of a new compatible aid to the beneficiary or beneficiaries concerned in application of the *Deggendorf* principle.

4.1. Infringement proceedings

— Actions on the basis of Article 1(2) in Part I in conjunction with Article 23(1) in Part II of Protocol 3

70. If the EFTA State concerned does not comply with the recovery decision within the prescribed time limit and if it has not been able to demonstrate absolute impossibility, the Authority, or any other interested EFTA State, may refer the matter directly to the EFTA Court pursuant to Article 1(2) in Part I read in conjunction with Article 23(1) in Part II of Protocol 3. The Authority may then invoke arguments concerning the behaviour of the executive, legislative or judicial organs of the EFTA State concerned, as the EFTA State should be considered in its entirety ⁽⁷³⁾.

71. In accordance with Article 33 of the Surveillance and Court Agreement, the EFTA States concerned should take the necessary measures to comply with the judgments of the EFTA Court.

— Actions on the basis of Article 23(2) in Part II of Protocol 3

72. If the Authority considers that the EFTA State concerned has not complied with the judgment of the EFTA Court, the Authority may refer the matter to the EFTA Court directly in accordance with Article 1(2) in Part II read in conjunction with Article 23(2) in Part II of Protocol 3.

4.2. Applying the *Deggendorf* case-law

73. In its judgment on the *Deggendorf* case, the Court of First Instance of the European Communities held that, 'when the Commission considers the compatibility of a State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that previous decision may have imposed on a Member State. It follows that the Commission has the power to take into consideration, first, any accumulated effect of the old [...] aid and the new [...] aid and, secondly, the fact that the [old] aid declared unlawful [...] had not been repaid' ⁽⁷⁴⁾. In application of this judgment, and to avoid a distortion of competition contrary to the common interest, the Authority may order an EFTA State to suspend the payment of a new compatible aid to an undertaking that has at its disposal an unlawful and incompatible aid subject to an earlier recovery decision, and this until the EFTA State has reassured itself that the undertaking concerned has reimbursed the old unlawful and incompatible aid.

74. In practice, in the course of the preliminary investigation of a new aid measure, the Authority will request a commitment from the EFTA State to suspend the payment of new aid to any beneficiary that still needs to reimburse an unlawful and incompatible aid subject to an earlier recovery decision. If the EFTA State does not give this commitment and/or in the absence of clear data on the aid measures involved ⁽⁷⁵⁾ preventing the Authority from assessing the global impact of the old and the new aid on competition, the Authority will take a final conditional decision on the basis of Article 7 (4) in Part II of Protocol 3, requiring the EFTA State concerned to suspend payment of the new aid until it is satisfied that the beneficiary concerned has reimbursed the old unlawful and incompatible aid, including any recovery interests due.

⁽⁷¹⁾ In practical terms, the payment of the total amount of aid and the interests on a blocked account may be ruled by a specific contract, signed by the bank and the beneficiary, and by which the parties agree that the sum will be released in favour of one or the other party once the litigation has come to an end.

⁽⁷²⁾ Contrary to the constitution of a blocked account, the use of bank guarantees may not be considered as an adequate provisional measure since the total amount of the aid is still at the recipient's disposal.

⁽⁷³⁾ Case C-224/01, *Köbler*, [2003], ECR I-10239, paragraphs 31-33; Case C-173/03, *Traghetti del Mediterraneo*, [2003], page I-05177, paragraphs 30-33.

⁽⁷⁴⁾ Case T-244/93 and T-486/93 *TWD Deggendorf v Commission* [1995] ECR II-2265, paragraph 56.

⁽⁷⁵⁾ For instance in the case of illegal and incompatible schemes where the amount and the beneficiaries are not known to the Authority.

75. The *Deggendorf* principle has been integrated into the Chapter on aid for rescuing and restructuring firms in difficulty of the Authority's State Aid Guidelines ⁽⁷⁶⁾ and into Decision No 195/04/COL as well as into Block Exemption Regulations which have been incorporated into the EEA Agreement ⁽⁷⁷⁾. The Authority intends to integrate this principle into all forthcoming state aid rules and decisions.
5. CONCLUSION
76. The maintenance of a system of free and undistorted competition is one of the cornerstones of the European Economic Area. As part of the EEA competition policy, state aid discipline is essential to ensure that the internal market remains a level playing field in all economic sectors in Europe. In this key task, the Authority and the EFTA States have the joint responsibility to ensure a proper enforcement of state aid discipline and in particular of recovery decisions.
77. By issuing this Chapter, the Authority is willing to increase the awareness of the principles of recovery policy as defined by the Courts of the European Communities and the EFTA Court and to clarify the Authority's practice as regards its recovery policy. The Authority commits itself to abide by these recalled principles and invites EFTA States to ask for advice when facing difficulties in implementing recovery decisions. The services of the Authority remain at the disposal of the EFTA States to provide further guidance and assistance if required.
78. In return, the Authority expects EFTA States to abide to the principles of recovery policy. It is only through a joint effort of both the Authority and the EFTA States that state aid discipline will be ensured and will produce its desired objective, i.e. the maintenance of undistorted competition within the internal market.
-

⁽⁷⁶⁾ Chapter on aid for rescuing and restructuring firms in difficulty was adopted on 1 December 2004.

⁽⁷⁷⁾ Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid, OJ L 302, of 1 November 2006, p. 29, as referred to at point 1i of Annex XV to the EEA Agreement, OJ L 89 of 29 March 2007, p. 33 and EEA Supplement No 15 of 29 March 2007, p. 26, entry into force on 9 December 2006 and Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3, as referred to at point 1j of Annex XV to the EEA Agreement, entry into force on 8 November 2008.

ANNEX V

STATE AID TO CINEMATOGRAPHIC AND OTHER AUDIOVISUAL WORKS

1. INTRODUCTION

1. Audiovisual works, and cinema in particular, play an important role in shaping European identities, both in common aspects shared across Europe and in the cultural diversity that characterises our different traditions and histories. They are an essential element for the good functioning of our democracies because of their widespread influence on society. They are also at the heart of the transformations resulting from the development of the information society: new technological developments offer new opportunities for promoting culture and heritage conservation, and to increase mutual understanding across Europe.
2. Audiovisual works have unique characteristics because of their double nature: they are economic goods, offering important opportunities for the creation of wealth and employment. They are also cultural goods which at the same time mirror and shape our societies. This is the reason why the development of this sector has never been left solely to market forces.
3. Amongst audiovisual works, cinematographic works have a particular prominence, because of their cost of production and cultural importance: budgets for the productions of cinema films are substantially higher than for other audiovisual content, they are more frequently the subject of international co-productions, and the duration of their exploitation life is longer, with the potential to use all distribution channels, cinemas, DVDs and videocassettes (both selling and rental), Internet downloading, and television (pay-per-view, pay-per-channel, free-to-air). Cinematographic works face strong competition from outside Europe ⁽¹⁾.
4. These Guidelines set out the principles to be applied for the application of State aid rules to the cinema sector and for TV production. They are based on Chapter 2 of the European Commission's Communication on certain legal aspects relating to cinematographic and other audiovisual works ⁽²⁾. Chapter 2 sets out the general orientation of the European Commission with regard to state aid in the cinema sector.

2. GENERAL ORIENTATION WITH REGARD TO STATE AID TO THE CINEMA SECTOR

5. Cinema and TV programmes are two of the most universal media of entertainment, with a powerful impact on a great number of people internationally. The current stage of development and the special characteristics of audiovisual production within the European Economic Area, mean that it is difficult for producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. In these circumstances, the fostering of audiovisual production by the EEA States plays a key role to ensure that their indigenous culture and creative capacity can be expressed, thereby reflecting the diversity and richness of European culture.
6. In the Community pillar, the Maastricht Treaty gave Community-level recognition to the utmost importance of promoting culture for the European Union and its Member States by incorporating culture amongst the Community's policies specifically referred to in the EC Treaty (see Article 151 EC). At the same time, it included in Article 87(3)(d) EC a new specific possibility of exception to the general incompatibility principle of Article 87(1) EC for aid granted by the Member States to promote culture.
7. The EEA Agreement also recognises the need for strengthening cultural cooperation in Article 13 of Protocol 31. The EEA Agreement does not contain a 'cultural exemption' similar to Article 87(3)(d) EC. Nevertheless, the Authority considers that, in line with its constant practice ⁽³⁾, film and TV production support measures may be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement. In its assessment, the Authority will apply the same criteria as those applied by the European Commission for the purposes of Article 87(3)(d) EC.
8. The EEA States implement a wide range of support measures for the audiovisual production of films and TV programmes. This support focuses on the creation and production phases of film-making and generally takes the form of subsidies or repayable advances. The rationale behind these measures is based on both cultural and industrial considerations. They have the primary cultural aim of ensuring that the national and regional cultures and creative potential are expressed in the audiovisual media of film and television. On the other hand, they aim to generate the critical mass of activity that is required to create the dynamic for the development and consolidation of the industry through the creation of soundly-based production undertakings and the development of a permanent pool of human skills and experience.

⁽¹⁾ European Audiovisual Observatory: the market shares of American cinema films in Europe in 2006 was 62,7 %.

⁽²⁾ Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, Com(2001) 534 final, OJ C 43, 16.2.2002, p. 6, hereafter 'the Communication'. The state aid part of the Communication was prolonged in 2004 (COM(2004) 171 final, OJ C 123, 30.4.2004, p. 1) and 2007, OJ C 134, 16.6.2007, p. 5. The European Commission has proposed to prolong the Communication further until other new guidelines will come into effect, or, at the latest, 31 December 2012.

⁽³⁾ Decision No 32/02/COL of 20 February 2002, No 169/02/COL of 18 September 2002, No 186/03 of 29 October 2003, No 179/05/COL of 15 July 2005 and Decision No 342/06/COL of 14 November 2006.

9. These Guidelines do not cover the application of Articles 53 and 54 of the EEA Agreement (anti-competitive practices by companies) to the audiovisual sector ⁽⁴⁾.

2.1. Compatibility with the EEA Agreement of schemes of aid to cinema and TV production

10. The basic rules on State aid under the EEA Agreement are as follows: Article 1(3) in Part I of Protocol 3, to the Surveillance and Court Agreement provides that the EFTA States ⁽⁵⁾ are obliged to inform the Authority of any plans to grant or alter aid before putting it into effect. Article 61(1) of the EEA Agreement prohibits aid granted by the State or through State resources, which distorts or threatens to distort competition and trade between the EEA States. However, the Authority may exempt certain State aid from this prohibition. In particular, Article 61(3) of the EEA Agreement lists certain aid types that, in view of their effects, the Authority may authorise. One of these exemptions is Article 61(3)(c) of the EEA Agreement for aid to facilitate the development of certain economic activities where such aid does not affect competition and trading conditions to an extent contrary to the common interest. In its case practice the Authority has, on the basis of that provision, authorised support to TV and cinema production for the purpose of promoting culture, taking into account the criteria developed by the European Commission.

2.2. Assessment of aid schemes to cinema and TV production

11. When it assesses aid schemes to cinema and TV production, the Authority must verify:

- first, whether the aid scheme respects the ‘general legality’ principle, i.e. the Authority must verify that the scheme does not contain clauses that would be contrary to provisions of the EEA Agreement in fields other than State aid;
- secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out by the European Commission in its Communication and explained below ⁽⁶⁾.

The second condition is specific to cinema and TV production aid schemes, whereas the other is a routine test applied to all aid schemes irrespective of the sector.

(a) Respect of the general legality criterion

12. The Authority must verify that the eligibility conditions of the State aid schemes do not contain clauses contrary to the EEA Agreement in fields other than State aid. The Authority must ensure, inter alia, that the principles prohibiting discrimination on the grounds of nationality, freedom of establishment, free movement of goods and freedom to provide services have been respected (Articles 4, 11, 13, 28, 31, 34 and 36 of the EEA Agreement). The Authority enforces these principles in conjunction with the application of competition rules when the provisions in breach of these principles are not detachable from the operation of the scheme.
13. In compliance with the above principles, aid schemes must not: e.g. reserve the aid for nationals exclusively; require beneficiaries to have the status of national undertaking established under national commercial law (undertakings established in one of the EEA States and operating in another by means of a permanent branch or agency must be eligible for aid; furthermore, the agency requirement should only be enforceable upon payment of the aid); require workers of foreign companies providing film-making services to comply with national labour standards.
14. Certain schemes of aid to cinema and TV production are financed by parafiscal charges. In line with the European Commission's decision practice and the European Court of Justice's case law, the Authority's practice is that when such schemes benefit solely national producers or do so to a higher extent than to competitors located in another EEA State, in order to be compatible with the EEA Agreement, imported products may not be levied and national production may not enjoy a lower rate of taxation when exported.

(b) The specific compatibility criteria for State aid to cinema and TV programme production

15. The specific criteria on which basis the European Commission currently assesses State aid to cinema and TV programme production under the culture derogation of Article 87(3)(d) EC were established in its decision of June 1998 on the French automatic aid scheme to film production. These specific criteria, which the Authority will apply in its analysis of similar cases under Article 61(3)(c) of the EEA Agreement, are:

- (1) The aid is directed to a cultural product. Each EFTA State must ensure that the content of the aided production is cultural according to verifiable national criteria.

⁽⁴⁾ For example, practices such as block bookings or the bundling of rights, which could be incompatible with the EEA Agreement.

⁽⁵⁾ Hereinafter, the term ‘EFTA States’ means the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.

⁽⁶⁾ The specific compatibility criteria have been first developed in a 1998 decision by the European Commission on the French automatic scheme, Commission decision N3/98.

- (2) The producer must be free to spend at least 20 % of the film budget in other EEA States without suffering any reduction in the aid provided for under the scheme. In other words, the Authority accepted as an eligibility criteria territorialisation in terms of expenditure of up to 80 % of the production budget of an aided film or TV work.
- (3) Aid intensity must in principle be limited to 50 % of the production budget with a view to stimulating normal commercial initiatives inherent in a market economy and avoiding a bidding contest between the EEA States. Difficult and low budget films are excluded from this limit. The Authority considers that it is up to each EFTA State to establish a definition of difficult and low budget film according to national parameters.
- (4) Aid supplements for specific film-making activities (e.g. post-production) are not allowed in order to ensure that the aid has a neutral incentive effect and consequently that the protection/attraction of those specific activities in/to the EFTA State granting the aid is avoided.

Several considerations arise in respect of the above-mentioned criteria:

16. The Authority considers that aid should be towards the overall budget of a specific film-making project and the producer should be free to choose the items of the budget that will be spent in other EEA States. Undertakings in the film and TV programme production sector may also benefit from other aid types granted under national horizontal aid schemes authorised by the Authority under the Article 61(3)(a) and (c) of the EEA Agreement exemptions (e.g. regional aid, aid for SMEs, research and development aid, training aid, employment aid).
 17. The Authority accepts that EFTA States may require a certain part of the film production budget to be spent on their territory as an eligibility criterion for aid. This is based on the reasoning that a certain degree of territorialisation of the expenditure may be necessary to ensure the continued presence of the human skills and technical expertise required for cultural creation. This should be limited to the minimum degree required to promote cultural objectives.
 18. Furthermore, given the particular characteristics of film production, the Authority considers that the overall budget of an audiovisual production is the disbursement at risk necessary for its creation and, consequently, admits that the reference for aid calculation is that overall budget, regardless of the nature of the individual expenditure items of which it is formed. The earmarking of aid to specific individual items of a film budget could turn such aid into a national preference to the sectors providing the specific aided items, which might be incompatible.
 19. Funds provided directly from EC programmes like MEDIA 2007 do not count for the purposes of respecting the 50 % aid ceiling. This assistance promotes the distribution of national films abroad and, consequently, its effects do not add up to those of national schemes focusing on national production and distribution.
 20. Legal obligations imposed by EFTA States upon TV broadcasters to invest in audiovisual production do not constitute State aid, where these investments provide a reasonable compensation to broadcasters. The extent to which these legal obligations may be considered State aid as such has to be considered in view of the development of the Court of Justice jurisprudence after its judgement of 13.3.2001 in Case C-379/98 (*PreussenElektra*).
 21. In the Authority's view, the above criteria strike a balance between the aims of cultural creation, the development of the EEA audiovisual production and the respect of the EEA rules on State aid.
-