

## III

(Other acts)

## EUROPEAN ECONOMIC AREA

## EFTA SURVEILLANCE AUTHORITY DECISION

No 271/14/COL

of 9 July 2014

**amending for the 97th time the procedural and substantive rules in the field of State aid by adopting new Guidelines for research and development and innovation [2015/1359]**

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

HAVING REGARD to the Agreement on the European Economic Area ('the EEA Agreement'), 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 ('Surveillance and Court Agreement'), in particular to Articles 5(2)(b) and 24 thereof and Article 1 in Part I of Protocol 3 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,

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,

On 21 May 2014, the European Commission published a 'Communication from the Commission, Framework for State aid for research and development and innovation' <sup>(1)</sup>. The Framework set out the conditions under which public financing for research and development and innovation may constitute State aid and, when it does constitute State aid, the conditions of compatibility. They apply from 1 July 2014.

This Framework is of relevance to the European Economic Area,

Uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area in line with the objective of homogeneity established in Article 1 of the EEA Agreement,

According to point II under the heading 'GENERAL' of Annex XV to the EEA Agreement, the Authority, after consultation with the European Commission, is to adopt new Guidelines, corresponding to those adopted by the European Commission,

HAVING consulted the European Commission,

HAVING consulted the EFTA States by a letter dated 26 June 2014 on the subject,

<sup>(1)</sup> OJ C 198, 27.6.2014, p. 1.

HAS ADOPTED THIS DECISION:

*Article 1*

The substantive rules in the field of State aid shall be amended by introducing new Guidelines for research and development and innovation. The new Guidelines are annexed to this Decision and form an integral part of it.

*Article 2*

Only the English version is authentic.

Done at Brussels, 9 July 2014.

*For the EFTA Surveillance Authority*

Oda Helen SLETNES

*President*

Helga JÓNSDÓTTIR

*College Member*

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STATE AID FOR RESEARCH AND DEVELOPMENT AND INNOVATION <sup>(1)</sup>

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<sup>(1)</sup> These Guidelines correspond to the Communication from the Commission. Framework for State aid for research and development and innovation (OJ C 198, 27.6.2014, p. 1)

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## INTRODUCTION

1. In order to prevent state subsidies from distorting competition within the European Economic Area ('EEA') and affecting trade between the contracting parties to the EEA Agreement ('Contracting Parties') in a manner contrary to the common interest, Article 61(1) of the EEA Agreement lays down the principle that State aid is prohibited. In certain cases, however, such aid may be compatible with the functioning of the EEA Agreement on the basis of Articles 61(2) and 61(3) thereof.
2. Promoting research and development and innovation ('R&D&I') is an important EEA objective laid down in Article 1.2(f) and 78 of the EEA Agreement, which call for cooperation between the Contracting Parties in this field <sup>(2)</sup>. The main objectives are to strengthen the scientific and technological base of European industry and to encourage its international competitiveness.
3. The European Commission ('the Commission') in its 'Europe 2020 strategy' <sup>(3)</sup> identifies research and development ('R & D') as a key driver for achieving the objectives of smart, sustainable and inclusive growth. To that effect, the Commission set out the headline target according to which 3 % of the European Union's gross domestic product ('GDP') should be invested in R & D by 2020. In order to foster progress in the field of R&D&I, the Europe 2020 strategy in particular puts forward the 'Innovation Union' flagship initiative <sup>(4)</sup> aiming at improving framework conditions and access to finance for research and innovation in order to ensure that innovative ideas can be turned into products and services that create growth and jobs <sup>(5)</sup>. The Commission's Europe 2020 communication noted that State aid policy can 'actively and positively contribute (...) by prompting and supporting initiatives for more innovative, efficient and greener technologies, while facilitating access to public support for investment, risk capital and funding for research and development'.

<sup>(2)</sup> Research and development is further covered by Protocol 31 to the EEA Agreement. Further information is available at: <http://www.efta.int/eea/policy-areas/flanking-horizontal-policies/research-innovation>

<sup>(3)</sup> Communication from the Commission, 'Europe 2020 — A strategy for smart, sustainable and inclusive growth', COM(2010) 2020 final, 3.3.2010.

<sup>(4)</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'European 2020 Flagship Initiative — Innovation Union', COM(2010) 546 final, 6.10.2010.

<sup>(5)</sup> Overall R & D expenditure within the European Union (of which roughly 1/3 is public and 2/3 private) stood at 2,06 % of GDP in 2012, and increased by 0,24 percentage points since 2005 (Eurostat statistics on headline indicators: [http://epp.eurostat.ec.europa.eu/portal/page/portal/europe\\_2020\\_indicators/headline\\_indicators](http://epp.eurostat.ec.europa.eu/portal/page/portal/europe_2020_indicators/headline_indicators)). Even though private expenditure in R & D as a share of GDP has slightly increased since 2008, there are however large differences among EU Member States, industrial sectors and individual actors (European Commission, 'Research and Innovation performance in EU Member States and Associated Countries 2013').

4. Whereas it is generally accepted that competitive markets tend to bring about efficient results in terms of prices, output and use of resources, in the presence of market failures <sup>(6)</sup> state intervention may improve the functioning of markets and, thereby, contribute to smart, sustainable and inclusive growth. In the context of R&D&I, market failures may arise for instance because market actors do not normally take into account the (positive) externalities that ensue on other actors in the economy, and therefore engage in a level of R&D&I activities which is too low from the point of view of society. Likewise, R&D&I projects might suffer from insufficient access to finance (due to asymmetric information) or from coordination problems among firms. Therefore, State aid for R&D&I can be compatible with the functioning of the EEA Agreement where it can be expected to alleviate a market failure in promoting the execution of an important project of common European interest or facilitating the development of certain economic activities, and where the ensuing distortion of competition and trade is not contrary to the common interest.
5. Aid for R&D&I will primarily be justified on the basis of Articles 61(3)(b) and 61(3)(c) of the EEA Agreement, according to which the EFTA Surveillance Authority ('the Authority') may consider compatible with the functioning of the EEA Agreement State aid to promote the execution of an important project of common European interest or to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent which goes contrary to the common interest.
6. In its communication on State aid modernisation <sup>(7)</sup>, the Commission announced three objectives to be pursued through the modernisation of State aid control:
  - (a) fostering sustainable, smart and inclusive growth in a competitive internal market;
  - (b) focusing *ex ante* scrutiny on cases with the biggest impact on the internal market while strengthening the cooperation with Member States in State aid enforcement;
  - (c) streamlining the rules and providing for faster decisions.
7. In particular, the Commission called for a common approach in the revision of the different guidelines and frameworks based on strengthening the internal market, promoting more effectiveness in public spending through a better contribution by State aid to objectives of common interest, and exercising greater scrutiny on the incentive effect, on limiting the aid to the minimum, and on the potential negative effects of the aid on competition and trade. The Authority supports the Commission's modernisation initiative. As a consequence, the compatibility conditions set out in these guidelines are based on that common approach.

## 1. SCOPE OF APPLICATION AND DEFINITIONS

### 1.1. Scope of application

8. The principles set out in these guidelines apply to State aid for R&D&I in all sectors governed by the EEA Agreement. They therefore apply to those sectors which are subject to specific EEA rules on State aid, unless such rules provide otherwise.
9. Funding centrally managed by the European Union institutions, agencies, joint undertakings or other international bodies that is not directly or indirectly under the control of the EFTA States <sup>(8)</sup> does not constitute State aid.

<sup>(6)</sup> The term 'market failure' refers to situations in which markets, where left to their own devices, are unlikely to produce efficient outcomes.

<sup>(7)</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, 'EU State Aid Modernisation (SAM)', COM(2012) 209 final, 8.5.2012.

<sup>(8)</sup> Such as funding provided under Horizon 2020 or the EU programme for the competitiveness of enterprises and small and medium-sized enterprises (COSME). Regulation (EU) No 1291/2013 of the European Parliament and the Council of 11 December 2013 establishing Horizon 2020 — the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJ L 347, 20.12.2013, p. 104), was incorporated as point 1 into Protocol 31 to the EEA Agreement by Decision No 109/2014 of 16.5.2014 (not yet published). COSME is one of the EU programmes under consideration or foreseen to be incorporated into the EEA Agreement. The complete list of programmes with potential interest for the EEA Agreement is available at: <http://www.efta.int/eea/eu-programmes>

Where such funding is combined with State aid, only the latter will be considered for determining whether notification thresholds and maximum aid intensities are respected or, in the context of these guidelines, subject to a compatibility assessment.

10. Aid for R&D&I for firms in difficulty, as defined for the purposes of these guidelines by the Authority guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(9)</sup>, as amended or replaced, is excluded from the scope of these guidelines.
11. When assessing R&D&I aid in favour of a beneficiary that is subject to an outstanding recovery order following a previous Authority decision declaring an aid illegal and incompatible with the functioning of the EEA Agreement, the Authority will take account of the amount of aid still to be recovered <sup>(10)</sup>.

### 1.2. Aid measures covered by these Guidelines

12. The Authority has identified a series of R&D&I measures for which State aid may, under specific conditions, be compatible with the functioning of the EEA Agreement:
  - (a) **aid for R & D projects** where the aided part of the research project falls within the categories of fundamental research and applied research, of which the latter can be divided into industrial research and experimental development <sup>(11)</sup>. Such aid is mainly targeted at the market failure related to positive externalities (knowledge spillovers), but may also address a market failure caused by imperfect and asymmetric information or (mainly in collaboration projects) a coordination failure;
  - (b) **aid for feasibility studies** related to R & D projects, which aims at overcoming a market failure primarily related to imperfect and asymmetric information;
  - (c) **aid for the construction and upgrade of research infrastructures**, which mainly addresses the market failure stemming from coordination difficulties. High-quality research infrastructures are increasingly necessary for ground-breaking research, as they attract global talent and are essential for example for information and communication technologies and key enabling technologies <sup>(12)</sup>;
  - (d) **aid for innovation activities**, which is mainly targeted at market failures related to positive externalities (knowledge spillovers), coordination difficulties and, to a lesser extent, asymmetric information. With respect to small and medium-sized enterprises ('SMEs') such innovation aid may be awarded for obtaining, validating and defending patents and other intangible assets, for the secondment of highly qualified personnel, and for acquiring innovation advisory and support services. Moreover, in order to encourage large enterprises to collaborate with SMEs in process and organisational innovation activities, the costs incurred by both SMEs and large enterprises for such activities may also be supported;
  - (e) **aid for innovation clusters**, which aims at tackling market failures linked with coordination problems hampering the development of clusters, or limiting the interactions and knowledge flows within and between clusters. State aid could contribute to resolving this problem, first by supporting the investment in open and shared infrastructures for innovation clusters, and second by supporting, for no longer than ten years, the operation of clusters for the enhancement of collaboration, networking and learning.

<sup>(9)</sup> Aid for rescuing and restructuring firms in difficulty (OJ L 97, 15.4.2005, p. 41 and EEA Supplement No 18, 14.4.2005, p. 1), as prolonged by the Authority Decision No 438/12/COL (OJ L 190, 11.7.2013, p. 91 and EEA Supplement No 40, 11.7.2013, p. 15).

<sup>(10)</sup> See Joined Cases T-244/93 and T-486/93 *TWD Textilwerke Deggendorf GmbH v Commission* [1995] ECR II-02265.

<sup>(11)</sup> The Authority considers that it is useful to maintain different categories of R & D activities regardless of the fact that those activities may follow an interactive model rather than a linear model.

<sup>(12)</sup> Key enabling technologies are defined and identified in the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, 'A European strategy for Key Enabling Technologies — A bridge to growth and jobs', COM(2012) 341 final, 26.6.2012.

13. EFTA States must notify R&D&I aid in accordance with Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, with the exception of measures that fulfil the conditions laid down in a block exemption Regulation incorporated into the EEA Agreement.
14. These guidelines set out the compatibility criteria for R&D&I aid schemes and individual aid which are subject to the notification requirement and must be assessed on the basis of Article 61(3)(c) of the EEA Agreement <sup>(13)</sup>.

### 1.3. Definitions

15. For the purposes of these guidelines, the following definitions apply:
  - (a) **'ad hoc aid'** means aid not awarded on the basis of an aid scheme;
  - (b) **'aid'** means any measure fulfilling the criteria laid down in Article 61(1) of the EEA Agreement;
  - (c) **'aid intensity'** means the gross aid amount expressed as a percentage of the eligible costs, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount is the grant equivalent of the aid. Aid payable in several instalments is discounted to its value at the date of award. The interest rate to be used for this purpose is the discount rate <sup>(14)</sup> applicable at the date of award. The aid intensity is calculated per beneficiary;
  - (d) **'aid scheme'** means any act on the basis of which, without further implementing measures being required, individual aid may be awarded to undertakings defined therein in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings;
  - (e) **'applied research'** means industrial research, experimental development, or any combination of both;
  - (f) **'arm's length'** means that the conditions of the transaction between the contracting parties do not differ from those which would be stipulated between independent enterprises and contain no element of collusion. Any transaction that results from an open, transparent and non-discriminatory procedure is considered as meeting the arm's length principle;
  - (g) **'date of award of the aid'** means the date on which the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime;
  - (h) **'effective collaboration'** means collaboration between at least two independent parties to exchange knowledge or technology, or to achieve a common objective based on the division of labour where the parties jointly define the scope of the collaborative project, contribute to its implementation and share its risks, as well as its results. One or several parties may bear the full costs of the project and thus relieve other parties of its financial risks. Contract research and provision of research services are not considered forms of collaboration.
  - (i) **'exclusive development'** means the public procurement of research and development services of which all benefits accrue exclusively to the contracting authority or contracting entity, and which it may use in the conduct of its own affairs on condition that it fully remunerates them;

<sup>(13)</sup> The criteria for the analysis of the compatibility with the functioning of the EEA Agreement of State aid to promote the execution of important projects of common European interest, including R&D&I aid, must be assessed on the basis of Article 61(3)(b) of the EEA Agreement. The Authority may provide guidelines to assess the State aid measures in favour of important projects of common European interest corresponding to the Commission communication 'Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' (OJ C 188, 20.6.2014, p. 4).

<sup>(14)</sup> See the Authority guidelines on reference and discount rates (OJ L 105, 21.4.2011, p. 32 and EEA Supplement No 23, 21.4.2011, p. 1).

- (j) **'experimental development'** means acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements;
- (k) **'feasibility study'** means the evaluation and analysis of the potential of a project, which aims at supporting the process of decision making by objectively and rationally uncovering its strengths and weaknesses, opportunities and threats, as well as identifying the resources required to carry it through and ultimately its prospects for success;
- (l) **'full allocation'** means that the research organisation, research infrastructure or public purchaser enjoys the full economic benefit of intellectual property rights by retaining the right to make unrestricted use of them, particularly the right of ownership and the right to license. This may also be the case where the research organisation or research infrastructure (respectively, public purchaser) decides to conclude further contracts concerning those rights, including licensing them to a collaboration partner (respectively, undertakings);
- (m) **'fundamental research'** means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view;
- (n) **'gross grant equivalent'** means the amount of the aid if it had been awarded in the form of a grant, before any deduction of tax or other charge;
- (o) **'highly qualified personnel'** means staff having a tertiary education degree and at least five years of relevant professional experience which may also include doctoral training;
- (p) **'individual aid'** means aid awarded to a specific undertaking and includes ad hoc aid and aid awarded on the basis of an aid scheme;
- (q) **'industrial research'** means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation;
- (r) **'innovation advisory services'** means consultancy, assistance and training in the fields of knowledge transfer, acquisition, protection and exploitation of intangible assets, use of standards and regulations embedding them;
- (s) **'innovation clusters'** means structures or organised groups of independent parties (such as innovative start-ups, small, medium and large enterprises, as well as research and knowledge dissemination organisations, non-for-profit organisations and other related economic actors) designed to stimulate innovative activity by promoting sharing of facilities and exchange of knowledge and expertise and by contributing effectively to knowledge transfer, networking, information dissemination and collaboration among the undertakings and other organisations in the cluster;
- (t) **'innovation support services'** means the provision of office space, data banks, libraries, market research, laboratories, quality labelling, testing and certification for the purpose of developing more effective products, processes or services;

- (u) **'intangible assets'** means assets that do not have a physical or financial embodiment such as patents, licences, know-how or other intellectual property;
- (v) **'knowledge transfer'** means any process which has the aim of acquiring, collecting and sharing explicit and tacit knowledge, including skills and competence in both economic and non-economic activities such as research collaborations, consultancy, licensing, spin-off creation, publication and mobility of researchers and other personnel involved in those activities. Besides scientific and technological knowledge, it includes other kinds of knowledge such as knowledge on the use of standards and regulations embedding them and on conditions of real life operating environments and methods for organisational innovation, as well as management of knowledge related to identifying, acquiring, protecting, defending and exploiting intangible assets;
- (w) **'large enterprises'** means undertakings which do not fall within the definition of small and medium-sized enterprises;
- (x) **'net extra costs'** means the difference between the expected net present values of the aided project or activity and a viable counterfactual investment that the beneficiary would have carried out in the absence of aid;
- (y) **'organisational innovation'** means the implementation of a new organisational method in an undertaking's business practices, workplace organisation or external relations, excluding changes that are based on organisational methods already in use in the undertaking, changes in management strategy, mergers and acquisitions, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products;
- (z) **'personnel costs'** means the cost of researchers, technicians and other supporting staff to the extent employed on the relevant project or activity;
- (aa) **'pre-commercial procurement'** means the public procurement of research and development services where the contracting authority or contracting entity does not reserve all the results and benefits of the contract exclusively for itself for use in the conduct of its own affairs, but shares them with the providers under market conditions. The contract, the object of which falls within one or several categories of research and development defined in these guidelines, must be of limited duration and may include the development of prototypes or limited volumes of first products or services in the form of a test series. The purchase of commercial volumes of products or services must not be an object of the same contract;
- (bb) **'process innovation'** means the implementation of a new or significantly improved production or delivery method (including significant changes in techniques, equipment or software), excluding minor changes or improvements, increases in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products;
- (cc) **'R & D project'** means an operation that includes activities spanning over one or several categories of research and development defined in these guidelines, and that is intended to accomplish an indivisible task of a precise economic, scientific or technical nature with clearly pre-defined goals. An R & D project may consist of several work packages, activities or services, and includes clear objectives, activities to be carried out to achieve those objectives (including their expected costs), and concrete deliverables to identify the outcomes of those activities and compare them with the relevant objectives. When two or more R & D projects are not clearly separable from each other and in particular when they do not have independent probabilities of technological success, they are considered as a single project;
- (dd) **'repayable advance'** means a loan for a project which is paid in one or more instalments and the conditions for the reimbursement of which depend on the outcome of the project;

- (ee) **‘research and knowledge dissemination organisation’** or ‘research organisation’ means an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Where such entity also pursues economic activities, the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, for example in the quality of shareholders or members, may not enjoy a preferential access to the results generated by it;
- (ff) **‘research infrastructure’** means facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or set of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research. Such infrastructures may be ‘single-sited’ or ‘distributed’ (an organised network of resources) <sup>(15)</sup>;
- (gg) **‘secondment’** means temporary employment of staff by a beneficiary with the right for the staff to return to the previous employer;
- (hh) **‘small and medium-sized enterprises’** or ‘SMEs’, ‘small enterprises’ and ‘medium-sized enterprises’ means undertakings fulfilling the criteria laid down in the Authority’s definition of micro, small and medium-sized enterprises <sup>(16)</sup>;
- (ii) **‘start of works’** or ‘start of the project’ means either the start of R&D&I activities, or the first agreement between the beneficiary and the contractors to conduct the project, whichever comes first. Preparatory works such as obtaining permits and conducting feasibility studies are not considered as start of works;
- (jj) **‘tangible assets’** means assets consisting of land, buildings and plants, machinery and equipment.

## 2. STATE AID WITHIN THE MEANING OF ARTICLE 61(1) OF THE EEA AGREEMENT

16. Generally, any measure meeting the criteria of Article 61(1) of the EEA Agreement constitutes State aid. The Authority clarifies in this Section how it understands the notion of aid in situations typically arising in the field of R&D&I activities, without prejudice to the interpretation of the Court of Justice of the European Union and the EFTA Court.

### 2.1. Research and knowledge dissemination organisations and research infrastructures as recipients of State aid

17. Research and knowledge dissemination organisations (‘research organisations’) and research infrastructures are recipients of State aid if their public funding fulfils all conditions of Article 61(1) of the EEA Agreement. In accordance with the case-law of the EFTA Court and Court of Justice of the European Union, the beneficiary must qualify as an undertaking, but that qualification does not depend upon its legal status, that is to say whether it is organised under public or private law, or its economic nature, that is to say whether it seeks to make profits or not. Rather, what is decisive for that qualification as an undertaking is whether it carries out an economic activity consisting of offering products or services on a given market <sup>(17)</sup>.

#### 2.1.1. Public funding of non-economic activities

18. Where the same entity carries out activities of both economic and non-economic nature, the public funding of the non-economic activities will not fall under Article 61(1) of the EEA Agreement if the two kinds of activities and

<sup>(15)</sup> See Article 2(a) of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC), (OJ L 206, 8.8.2009, p. 1).

<sup>(16)</sup> Definition of micro, small and medium-sized enterprises (SMEs) (OJ L 36, 5.2.2009, p. 62 and EEA Supplement No 6, 5.2.2009, p. 1).

<sup>(17)</sup> Case C-118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851 paragraph 36; Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 46.

their costs, funding and revenues can be clearly separated so that cross-subsidisation of the economic activity is effectively avoided. Evidence of due allocation of costs, funding and revenues can consist of annual financial statements of the relevant entity.

19. The Authority considers that the following activities are generally of a non-economic character:
- (a) primary activities of research organisations and research infrastructures, in particular:
- education for more and better skilled human resources. In line with case-law <sup>(18)</sup> and decisional practice of Authority and the Commission <sup>(19)</sup>, and as explained by the Authority in its State aid communications <sup>(20)</sup>, public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State is considered as a non-economic activity <sup>(21)</sup>,
  - independent R & D for more knowledge and better understanding, including collaborative R & D where the research organisation or research infrastructure engages in effective collaboration <sup>(22)</sup>,
  - wide dissemination of research results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases, open publications or open software.
- (b) knowledge transfer activities, where they are conducted either by the research organisation or research infrastructure (including their departments or subsidiaries) or jointly with, or on behalf of other such entities, and where all profits from those activities are reinvested in the primary activities of the research organisation or research infrastructure. The non-economic nature of those activities is not prejudiced by contracting the provision of corresponding services to third parties by way of open tenders.
20. Where a research organisation or research infrastructure is used for both economic and non-economic activities, public funding falls under State aid rules only insofar as it covers costs linked to the economic activities <sup>(23)</sup>. Where the research organisation or research infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside State aid rules in its entirety, provided that the economic use remains purely ancillary, that is to say corresponds to an activity which is directly related to and necessary for the operation of the research organisation or research infrastructure or intrinsically linked to its main non-economic use, and which is limited in scope. For the purposes of these guidelines, the Authority will consider this to be the case where the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activities does not exceed 20 % of the relevant entity's overall annual capacity.

#### 2.1.2. Public funding of economic activities

21. Without prejudice to point 20, where research organisations or research infrastructures are used to perform economic activities, such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research, public funding of those economic activities will generally be considered State aid.

<sup>(18)</sup> Case C-263/86 *Humble and Edel* [1988] ECR I-5365, paragraphs 9-10, 15-18; Case C-109/92 *Wirth* [1993] ECR I-06447, paragraph 15; and judgment of the EFTA Court of 21 February 2008 in Case E-5/07, *Private Barnehagers Landsforbund*, EFTA Ct. Rep [2008] p. 62.

<sup>(19)</sup> See for instance cases NN54/2006, *Prerov logistics College*, and N 343/2008, *Individual aid to the College of Nyíregyháza for the development of the Partium Knowledge Centre*.

<sup>(20)</sup> See points 26-29 of the guidelines on the application of the State aid rules to compensation granted for the provision of services of general economic services (O) L 161, 13.6.2013, p. 12 and EEA Supplement No 34, 13.6.2013, p. 1).

<sup>(21)</sup> Workforce training, in the sense of State aid rules for training aid, does not qualify as a non-economic primary activity of research organisations.

<sup>(22)</sup> Provision of R & D services and R & D carried out on behalf of undertakings are not considered as independent R & D.

<sup>(23)</sup> Where a research organisation or research infrastructure is both publicly and privately funded, the Authority will consider this to be the case where the public funding allocated to the relevant entity for a specific accounting period exceeds the costs of non-economic activities incurred in that period.

22. However, the Authority will not consider the research organisation or research infrastructure to be a beneficiary of State aid if it acts as a mere intermediary for passing on to the final recipients the totality of the public funding and any advantage acquired through such funding. This is generally the case where:
- (a) both the public funding and any advantage acquired through such funding are quantifiable and demonstrable, and there is an appropriate mechanism which ensures that they are fully passed on to the final recipients, for example through reduced prices; and
  - (b) no further advantage is awarded to the intermediary because it is either selected through an open tender procedure or the public funding is available to all entities which satisfy the necessary objective conditions, so that customers as final recipients are entitled to acquire equivalent services from any relevant intermediary.
23. Where the conditions in point 22 are fulfilled, State aid rules apply at the level of the final recipients.

## **2.2. Indirect State aid to undertakings through public funded research and knowledge dissemination organisations and research infrastructures**

24. The question of whether and under which conditions undertakings obtain an advantage within the meaning of Article 61(1) of the EEA Agreement in cases of contract research or research services provided by a research organisation or research infrastructure, as well as in cases of collaboration with a research organisation or research infrastructure must be answered in accordance with general State aid principles. To this purpose, it may in particular be necessary to assess whether the behaviour of the research organisation or research infrastructure can be imputed to the State <sup>(24)</sup>.

### *2.2.1. Research on behalf of undertakings (contract research or research services)*

25. Where a research organisation or research infrastructure is used to perform contract research or provide a research service to an undertaking, which typically specifies the terms and conditions of the contract, owns the results of the research activities and carries the risk of failure, no State aid will usually be passed to the undertaking if the research organisation or research infrastructure receive payment of an adequate remuneration for its services, particularly where one of the following conditions is fulfilled:
- (a) the research organisation or research infrastructure provides its research service or contract research at market price <sup>(25)</sup>; or
  - (b) where there is no market price, the research organisation or research infrastructure provides its research service or contract research at a price which:
    - reflects the full costs of the service and generally includes a margin established by reference to those commonly applied by undertakings active in the sector of the service concerned, or
    - is the result of arm's length negotiations where the research organisation or research infrastructure, in its capacity as service provider, negotiates in order to obtain the maximum economic benefit at the moment when the contract is concluded and covers at least its marginal costs.
26. Where the ownership of, or access rights to intellectual property rights ('IPR') remain with the research organisation or research infrastructure, their market value may be deducted from the price payable for the services concerned.

<sup>(24)</sup> See Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 24.

<sup>(25)</sup> Where the research organisation or research infrastructure provides a specific research service or carries out contract research for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time, the Authority will normally consider the price charged as a market price where that research service or contract research is unique and it can be shown that there is no market for it.

### 2.2.2. Collaboration with undertakings

27. A project is considered to be carried out through effective collaboration where at least two independent parties pursue a common objective based on the division of labour and jointly define its scope, participate in its design, contribute to its implementation and share its financial, technological, scientific and other risks, as well as its results. One or several parties may bear the full costs of the project and thus relieve other parties of its financial risks. The terms and conditions of a collaboration project, in particular as regards contributions to its costs, the sharing of risks and results, the dissemination of results, access to and rules for allocation of IPR, must be concluded prior to the start of the project <sup>(26)</sup>. Contract research and provision of research services are not considered to be forms of collaboration.
28. Where collaboration projects are carried out jointly by undertakings and research organisations or research infrastructures, the Authority considers that no indirect State aid is awarded to the participating undertakings through those entities due to favourable conditions of the collaboration if one of the following conditions is fulfilled:
- (a) the participating undertakings bear the full cost of the project; or
  - (b) the results of the collaboration which do not give rise to IPR may be widely disseminated and any IPR resulting from the activities of research organisations or research infrastructures are fully allocated to those entities; or
  - (c) any IPR resulting from the project, as well as related access rights are allocated to the different collaboration partners in a manner which adequately reflects their work packages, contributions and respective interests; or
  - (d) the research organisations or research infrastructures receive compensation equivalent to the market price for the IPR which result from their activities and are assigned to the participating undertakings, or to which participating undertakings are allocated access rights. The absolute amount of the value of any contribution, both financial and non-financial, of the participating undertakings to the costs of the research organisations or research infrastructures' activities that resulted in the IPR concerned, may be deducted from that compensation.
29. For the purpose of point 28(d), the Authority will consider that the compensation received is equivalent to the market price if it enables the research organisations or research infrastructures concerned to enjoy the full economic benefit of those rights, where one of the following conditions is fulfilled:
- (a) the amount of the compensation has been established by means of an open, transparent and non-discriminatory competitive sale procedure; or
  - (b) an independent expert valuation confirms that the amount of the compensation is at least equal to the market price; or
  - (c) the research organisation or research infrastructure, as seller, can demonstrate that it effectively negotiated the compensation, at arm's length conditions, in order to obtain the maximum economic benefit at the moment when the contract is concluded, while considering its statutory objectives; or
  - (d) in cases where the collaboration agreement provides the collaborating undertaking with a right of first refusal as regards IPR generated by the collaborating research organisations or research infrastructures, where those entities exercise a reciprocal right to solicit more economically advantageous offers from third parties so that the collaborating undertaking has to match its offer accordingly.
30. If none of the conditions in point 28 are fulfilled, the full value of the contribution of the research organisations or research infrastructures to the project will be considered as an advantage for the collaborating undertakings, to which State aid rules apply.

<sup>(26)</sup> This does not include definite agreements on the market value of resulting IPR and the value of contributions to the project.

### 2.3. Public procurement of research and development services

31. Public purchasers may procure research and development services from undertakings, through both exclusive development and pre-commercial procurement procedures <sup>(27)</sup>.
32. As long as an open tender procedure for the public procurement is carried out in accordance with the applicable directives <sup>(28)</sup>, the Authority will generally consider that no State aid within the meaning of Article 61(1) of the EEA Agreement is awarded to the undertakings delivering the relevant services <sup>(29)</sup>.
33. In all other cases, including pre-commercial procurement, the Authority will consider that no State aid is awarded to undertakings where the price paid for the relevant services fully reflects the market value of the benefits received by the public purchaser and the risks taken by the participating providers, in particular where all of the following conditions are fulfilled:
  - (a) the selection procedure is open, transparent and non-discriminatory, and is based on objective selection and award criteria specified in advance of the bidding procedure;
  - (b) the envisaged contractual arrangements describing all rights and obligations of the parties, including with regard to IPR, are made available to all interested bidders in advance of the bidding procedure;
  - (c) the procurement does not give any of the participant providers any preferential treatment in the supply of commercial volumes of the final products or services to a public purchaser in the EFTA State concerned <sup>(30)</sup>; and
  - (d) one of the following conditions is fulfilled:
    - all results which do not give rise to IPR may be widely disseminated, for example through publication, teaching or contribution to standardisation bodies in a way that allows other undertakings to reproduce them, and any IPR are fully allocated to the public purchaser, or
    - any service provider to which results giving rise to IPR are allocated is required to grant the public purchaser unlimited access to those results free of charge, and to grant access to third parties, for example by way of non-exclusive licenses, under market conditions.
34. Where the conditions in point 33 are not fulfilled, EFTA States may rely on an individual assessment of the terms of the contract between the public purchaser and the undertaking, without prejudice to the general obligation to notify R&D&I aid pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

<sup>(27)</sup> See the communication and associated staff working document — communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, 'Pre-commercial procurement: driving innovation to ensure sustainable high quality public services in Europe', COM(2007) 799 final, 14.12.2007.

<sup>(28)</sup> See Article 27 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, not yet incorporated into the EEA Agreement, and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65), incorporated as point 2 into Annex XVI (Procurement) to the EEA Agreement by Decision of the EEA Joint Committee No 68/2006 of 2.6.2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18) and Article 45 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors, not yet incorporated into the EEA Agreement) and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243), incorporated as point 4 into Annex XVI (Procurement) to the EEA Agreement by Decision of the EEA Joint Committee No 68/2006 of 2.6.2006 (OJ L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18). Likewise, in the case of a restricted procedure within the meaning of respectively Articles 28 of Directive 2014/24/EU and 46 of Directive 2014/25/EU, the Authority will also consider that no State aid is awarded to undertakings, unless interested providers are prevented from tendering without valid reasons.

<sup>(29)</sup> This will also be the case where public purchasers procure innovative solutions resulting from a preceding R & D procurement, or non-R & D products and services that are to be delivered to a performance level requiring a product, process or organisational innovation.

<sup>(30)</sup> Without prejudice to procedures that cover both the development and the subsequent purchase of unique or specialised products or services.

### 3. COMMON ASSESSMENT PRINCIPLES

35. To assess whether a notified aid measure can be considered compatible with the functioning of the EEA Agreement, the Authority generally analyses whether the design of the aid measure ensures that the positive impact of the aid towards an objective of common interest exceeds its potential negative effects on trade and competition.
36. The Commission communication on State aid modernisation of 8 May 2012 called for the identification and definition of common principles applicable to the assessment of compatibility of all the aid measures. The Authority acknowledges those common principles and will consider an aid measure compatible with the functioning of the EEA Agreement only if it satisfies each of the following criteria:
- (a) *contribution to a well-defined objective of common interest*: a State aid measure must aim at an objective of common interest in accordance with Article 61(3) of the EEA Agreement (Section 4.1);
  - (b) *need for state intervention*: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern (Section 4.2);
  - (c) *appropriateness of the aid measure*: the proposed aid measure must be an appropriate policy instrument to address the objective of common interest (Section 4.3).
  - (d) *incentive effect*: the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity, which it would not carry out without the aid or would carry out in a restricted or different manner or location (Section 4.4);
  - (e) *proportionality of the aid (aid to the minimum)*: the amount and intensity of the aid must be limited to the minimum needed to induce the additional investment or activity by the undertaking(s) concerned (section 4.5);
  - (f) *avoidance of undue negative effects on competition and trade between the Contracting Parties*: the negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive (section 4.6);
  - (g) *transparency of aid*: EFTA States, the Authority, economic operators, and the public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder (section 4.7).
37. The overall balance of certain categories of aid schemes may further be made subject to a requirement of *ex post* evaluation as described in Section 5. In such cases, the Authority may limit the duration of those schemes (normally to four years or less) with a possibility to re-notify their prolongation afterwards.
38. If a State aid measure or the conditions attached to it (including its financing method when it forms an integral part of the measure) entail a non-severable violation of the EEA Agreement, the aid cannot be declared compatible with the functioning of the EEA Agreement <sup>(31)</sup>.
39. In assessing the compatibility of any individual aid with the EEA Agreement, the Authority will take account of any proceedings concerning infringements of Articles 53 or 54 of the EEA Agreement which may concern the beneficiary of the aid and which may be relevant for the assessment of the aid under Article 61(3) of the EEA Agreement <sup>(32)</sup>.

### 4. COMPATIBILITY ASSESSMENT OF R&D&I AID

40. State aid for R&D&I can be declared compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) of the EEA Agreement where, on the basis of the common assessment principles set out in Section 3, it leads to increased R&D&I activities without adversely affecting trading conditions in a manner contrary to the common interest.

<sup>(31)</sup> See for instance Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks v Rhone Alpes Bourgogne* [2008] ECR I-10807, paragraphs 94-116.

<sup>(32)</sup> See Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 42.

41. In this section, the Authority clarifies how it will apply those common assessment principles and, where applicable, lays down specific conditions for aid schemes and additional ones for individual aid which are subject to the notification obligation <sup>(33)</sup>.

#### 4.1. Contribution to a well-defined objective of common interest

##### 4.1.1. General conditions

42. The general objective of R&D&I aid is the promotion of R&D&I in the EEA. In doing so, R&D&I aid should contribute to the achievement of the objectives referred to by the Commission in its Europe 2020 strategy of delivering smart, sustainable and inclusive growth.
43. EFTA States considering awarding State aid for R&D&I, must precisely define the objective pursued, and in particular explain how the measure intends to promote R&D&I.
44. With respect to aid schemes subject to the notification obligation ('notifiable aid schemes'), the Authority takes a favourable view of aid measures which are an integral part of a comprehensive programme or action plan to stimulate R&D&I activities or smart specialisation strategies, and are supported by rigorous evaluations of similar past aid measures demonstrating their effectiveness.
45. With respect to State aid which is awarded for projects or activities that are also financed by one of the Union programmes incorporated into the EEA Agreement <sup>(34)</sup>, the Authority will consider that the contribution to a well-defined objective of common interest has been established.

##### 4.1.2. Additional conditions for individual aid

46. To demonstrate that individual aid subject to the notification obligation ('notifiable individual aid') contributes to an increased level of R&D&I activities, EFTA States may use the following indicators, together with other relevant quantitative or qualitative elements:
- (a) *increase in project size*: increase in the total project costs (without a decrease in spending by the aid beneficiary when compared to the situation without aid); increase in the number of people assigned to R&D&I activities;
  - (b) *increase in scope*: increase in the number of the expected deliverables of the project; increase in the level of ambition of the project evidenced by a higher number of partners involved, a higher probability of a scientific or technological break-through or a higher risk of failure (notably linked to the long-term nature of the project and uncertainty about its results);
  - (c) *increase in speed*: the completion of the project requires less time when compared to the completion time necessary for the same project carried out without aid;
  - (d) *increase in total amount spent*: increase in total R&D&I spending by the aid beneficiary, in absolute terms or as a proportion of turnover; changes in the committed budget for the project (without a corresponding decrease in the budget allocated to other projects).
47. In order to conclude that the aid contributes to increasing the level of R&D&I in the EEA, the Authority will consider not only the net increase of R&D&I carried out by the undertaking, but also the contribution of the aid to the overall increase of R&D&I spending in the sector concerned, as well as to the improvement of the EEA situation with regard to R&D&I in the international context. A favourable view will be taken regarding aid measures, for which a publicly available *ex post* evaluation of their contribution to the common interest is envisaged.

<sup>(33)</sup> The compatibility conditions laid down in a block exemption Regulation remain fully applicable to all other cases of individual aid, including where such aid is awarded on the basis of an aid scheme which is subject to the notification obligation.

<sup>(34)</sup> See footnote 7.

## 4.2. Need for state intervention

### 4.2.1. General conditions

48. As explained in Section 3, State aid may be necessary to increase R&D&I in the EEA in a situation where the market, on its own, fails to deliver an efficient outcome. In order to assess whether State aid is effective in reaching the objective of common interest, it is first necessary to identify the problem, which needs to be addressed. State aid should be targeted towards situations where it can bring about a material improvement that the market cannot deliver on its own. EFTA States should explain how the aid measure can effectively mitigate the market failure associated with reaching the objective of common interest without that aid.
49. R&D&I takes place through a series of activities, which are usually upstream to a number of product markets and exploit available capabilities to develop new or improved products, services and processes in those product markets or completely new ones, thereby fostering growth in the economy, contributing to territorial and social cohesion or furthering the general consumer interest. However, given the available R&D&I capabilities, market failures may be an obstacle to reaching the optimal output and may lead to an inefficient outcome for the following reasons:

- **positive externalities/knowledge spillovers:** R&D&I often generate benefits for society in the form of positive spillover effects, for example knowledge spillovers or enhanced opportunities for other economic actors to develop complementary products and services. However, if left to the market, a number of projects might have an unattractive rate of return from a private perspective, although they would be beneficial for society, because profit seeking undertakings cannot sufficiently appropriate the benefits of their actions when deciding about the amount of R&D&I they should carry out. State aid may therefore contribute to the implementation of projects which result in an overall societal or economic benefit and which would otherwise not be pursued.

However, neither are all benefits of R&D&I activities externalities, nor does the presence of externalities alone automatically mean that State aid is compatible with the functioning of the EEA Agreement. In general, consumers are willing to pay for the direct benefit of new products and services while firms can appropriate the benefits from their investment through other existing instruments, such as IPR. In some cases, however, those means are imperfect and leave a residual market failure that may be corrected by State aid. For instance, as is often argued for fundamental research, it may be difficult to exclude others from gaining access to the results of some activities, which might therefore have a public good character. On the other hand, more specific knowledge related to production can often be well protected, for example through patents, allowing the inventor to reap a higher return on the invention,

- **imperfect and asymmetric information:** R&D&I activities are characterised by a high degree of uncertainty. Under certain circumstances, due to imperfect and asymmetric information, private investors may be reluctant to finance valuable projects and highly-qualified personnel may be unaware of recruitment possibilities in innovative undertakings. As a result, the allocation of human and financial resources may not be adequate and projects which may be valuable for society or the economy may not be carried out.

In certain cases, imperfect and asymmetric information may also hamper access to finance. However, imperfect information and the presence of risk do not automatically justify the need for State aid. Projects with lower private returns on investments not being financed can very well be a sign of market efficiency. Moreover, risk is part of every business activity and is not a market failure in itself. However, in a context of asymmetric information, risk may exacerbate financing problems,

- **coordination and network failures:** the ability of undertakings to coordinate with each other or to interact in order to deliver R&D&I may be impaired for various reasons, including difficulties in coordinating among a large number of collaboration partners where some of them have diverging interests, problems in designing contracts, and difficulties in coordinating collaboration due for example to sensitive information being shared.

#### 4.2.2. *Additional conditions for individual aid*

50. Whilst certain market failures may hamper the overall level of R&D&I in the EEA, not all undertakings and sectors in the economy are affected by them to the same extent. Consequently, for notifiable individual aid, EFTA States should provide adequate information about whether the aid addresses a general market failure regarding R&D&I in the EEA, or a specific market failure regarding, for example, a particular sector or line of business.
51. Depending on the specific market failure to be addressed, the Authority will take into consideration the following elements:
  - **knowledge spillovers:** level of knowledge dissemination envisaged; specificity of the knowledge created; availability of IPR protection; degree of complementarity with other products and services,
  - **imperfect and asymmetric information:** level of risk and complexity of R&D&I activities; need for external finance; characteristics of the aid beneficiary regarding access to external finance,
  - **coordination failures:** number of collaborating undertakings; intensity of collaboration; diverging interests among collaborating partners; problems in designing contracts; problems to coordinate collaboration.
52. In its analysis of an alleged market failure the Authority will in particular take into account any available sectoral comparisons and other studies, which should be provided by the EFTA State concerned.
53. When notifying investment or operating aid for clusters, EFTA States must provide information on the planned or expected specialisation of the innovation cluster, existing regional potential and presence of clusters in the EEA with similar purposes.
54. With respect to State aid which is awarded for projects or activities that are also financed by one of the Union programmes incorporated into the EEA Agreement <sup>(35)</sup>, the Authority will consider that the need for state intervention has been established.
55. On the other hand, where State aid is awarded for projects or activities which, with respect to their technological content, level of risk and size, are similar to those already delivered within the EEA at market conditions, the Authority will in principle presume that no market failure is present and will require further evidence of and justification for the need for state intervention.

### 4.3. **Appropriateness of the aid measure**

#### 4.3.1. *Appropriateness among alternative policy instruments*

56. State aid is not the only policy instrument available to EFTA States to promote R&D&I activities. It is important to keep in mind that there may be other, better placed instruments such as demand-side measures involving regulation, public procurement or standardisation, as well as an increase in funding of public research and education and general fiscal measures. The appropriateness of a policy instrument in a given situation is normally linked to the nature of the problem that is being addressed. For instance, reducing market barriers may be more appropriate than State aid to deal with a new entrant's difficulty to appropriate R&D&I results. Increased investment in education may be more appropriate to deal with a lack of qualified personnel than awarding State aid.
57. Aid for R&D&I can be authorised as an exception to the general prohibition of State aid, when it is necessary to achieve an objective of common interest. An important element in this respect is therefore whether and to what extent aid for R&D&I can be considered an appropriate instrument to increase R&D&I activities, given that other less distortive instruments may achieve the same results.

<sup>(35)</sup> See footnote 7.

58. In its compatibility analysis, the Authority will take particular account of any impact assessment of the proposed measure carried out by the EFTA State concerned. Measures, for which EFTA States have considered other policy options and for which the advantages of using a selective instrument such as State aid are established and submitted to the Authority, are considered to constitute an appropriate instrument.
59. With respect to State aid which is awarded for projects or activities that are also financed by one of the Union programmes incorporated into the EEA Agreement <sup>(36)</sup>, the Authority will consider that the appropriateness of the aid measure has been established.

#### 4.3.2. Appropriateness among different aid instruments

60. State aid for R&D&I can be awarded in various forms. EFTA States should therefore ensure that the aid is awarded in the form that is likely to generate the least distortions of competition and trade. In this respect, where the aid is awarded in forms that provide a direct pecuniary advantage (such as direct grants, exemptions or reductions in taxes or other compulsory charges, or the supply of land, products or services at favourable prices), the EFTA State concerned must include an analysis of other options and explain why or how other potentially less distortive forms of aid such as repayable advances or forms of aid that are based on debt or equity instruments (such as state guarantees, the purchase of a share-holding or an alternative provision of debt or capital on favourable terms) are less appropriate.
61. The choice of the aid instrument should be made in view of the market failure which it seeks to address. For instance, where the underlying market failure is a problem of access to external debt finance due to asymmetric information, EFTA States should normally resort to aid in the form of liquidity support, such as a loan or guarantee, rather than a grant. Where it is also necessary to provide the firm with a certain degree of risk sharing, a repayable advance should normally be the aid instrument of choice. In particular, where aid is awarded in a form other than liquidity support or a repayable advance for activities that are close to the market, EFTA States must justify the appropriateness of the chosen instrument for tackling the specific market failure in question.

#### 4.4. Incentive effect

##### 4.4.1. General conditions

62. R&D&I aid can only be found compatible with the functioning of the EEA Agreement if it has an incentive effect. An incentive effect occurs where the aid changes the behaviour of an undertaking in such a way that it engages in additional activities, which it would not carry out or it would carry out in a restricted or different manner without the aid. The aid must however not subsidise the costs of an activity that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity <sup>(37)</sup>.
63. The Authority considers that aid does not present an incentive for the beneficiary wherever work on the relevant R&D&I activity <sup>(38)</sup> has already started prior to the aid application by the beneficiary to the national authorities <sup>(39)</sup>. Where start of works takes place before the aid application is submitted by the beneficiary to the national authorities, the project will not be eligible for aid.
64. The aid application must include at least the applicant's name and size, a description of the project, including its location and start and end dates, the amount of public support needed to carry it out, and a list of eligible costs.

<sup>(36)</sup> See footnote 7.

<sup>(37)</sup> Joined Cases C-630/11 P to C-633/11 P *HGA and Others v Commission*. EU:C:2013:387.

<sup>(38)</sup> If the aid application is for an R & D project, this does not exclude that the potential beneficiary would have already carried out feasibility studies which are not covered by the request for aid.

<sup>(39)</sup> In the case of aid for projects or activities that are carried out in successive phases which may be subject to separate aid awarding procedures, this means that start of works must not take place before the first aid application. In the case of aid awarded under an automatic fiscal aid scheme, such scheme must have been adopted and entered into force before any work on the aided project or activity starts.

65. To the extent they constitute State aid, the Authority may consider that fiscal measures have an incentive effect, by stimulating higher R&D&I spending by undertakings, on the basis of evaluation studies <sup>(40)</sup> provided by EFTA States.

#### 4.4.2. Additional conditions for individual aid

66. For notifiable individual aid, EFTA States must demonstrate to the Authority that the aid has an incentive effect and therefore need to provide clear evidence that the aid has a positive impact on the decision of the undertaking to pursue R&D&I activities which would otherwise not have been pursued. To enable the Authority to carry out a comprehensive assessment of the aid measure in question, the EFTA State concerned must provide not only information concerning the aided project but also, to the extent possible, a comprehensive description of what would have happened or could reasonably have been expected to happen without aid, that is to say the counterfactual scenario. The counterfactual scenario may consist in the absence of an alternative project or in a clearly defined and sufficiently predictable alternative project considered by the beneficiary in its internal decision making, and may relate to an alternative project that is wholly or partly carried out outside the EEA.
67. In its analysis, the Authority will take into consideration the following elements:
- **specification of intended change:** the change in behaviour which is expected to result from State aid, that is to say whether a new project is triggered, or the size, scope or speed of a project is enhanced, has to be well-specified,
  - **counterfactual analysis:** the change of behaviour has to be identified by comparing what the expected outcome and level of intended activity would be with and without aid. The difference between the two scenarios shows the impact of the aid measure and its incentive effect,
  - **level of profitability:** where a project would not, in itself, be profitable to carry out for an undertaking, but would generate important benefits for society, it is more likely that the aid has an incentive effect,
  - **amount of investment and time-frame of cash flows:** a high start-up investment, a low level of appropriate cash flows and a significant fraction of the cash flow arising in the very far future or in a very uncertain manner, will be considered positive elements in assessing the incentive effect,
  - **level of risk involved:** the assessment of risk will in particular take into account the irreversibility of the investment, the probability of commercial failure, the risk that the project will be less productive than expected, the risk that the project undermines other activities of the aid beneficiary and the risk that the project costs undermine its financial viability.
68. EFTA States are in particular invited to rely on board documents, risk assessments, financial reports, internal business plans, expert opinions and other studies related to the project under assessment. Documents containing information on demand forecasts, cost forecasts, financial forecasts, documents that are submitted to an investment committee and that describe in detail various investment scenarios, or documents provided to financial institutions could help EFTA States demonstrate the incentive effect.
69. In order to ensure that the incentive effect is established on an objective basis, the Authority may in its assessment compare company-specific data with data concerning the industry in which the aid beneficiary is active. In particular, EFTA States should where possible provide industry-specific data demonstrating that the beneficiary's counterfactual scenario, its required level of profitability and its expected cash flows are reasonable.

<sup>(40)</sup> Even though this may not be possible *ex ante* for a newly introduced measure, EFTA States will be expected to provide evaluation studies on the incentive effect of their own fiscal aid schemes (so that planned or intended methodologies for *ex post* evaluations should normally be part of the design of such measures). In the absence of any evaluation studies, the incentive effect of fiscal aid schemes may be presumed only for incremental measures.

70. In that context, the level of profitability can be evaluated by reference to methodologies which are demonstrably used by the beneficiary undertaking or are standard practice in the particular industry concerned, and which may include methods for evaluating the net present value of the project (NPV) <sup>(41)</sup>, the internal rate of return (IRR) <sup>(42)</sup> or the average return on capital employed (ROCE).
71. If the aid does not change the behaviour of the beneficiary by stimulating additional R&D&I activities, it has no positive effects in terms of promoting R&D&I in the EEA. Therefore, aid will not be considered compatible with the functioning of the EEA Agreement in cases where it appears that the same activities could and would be pursued even without the aid.

#### 4.5. Proportionality of the aid

##### 4.5.1. General conditions

72. For any R&D&I aid to be considered proportional, its amount must be limited to the minimum needed for carrying out the aided activity.

##### 4.5.1.1. Maximum aid intensities

73. In order to ensure that the level of aid is proportionate to the market failures which it is intended to address, the aid must be determined in relation to a predefined set of eligible costs and limited to a certain proportion of those eligible costs ('aid intensity'). The aid intensity must be established for each beneficiary of aid, including in a collaboration project.
74. To ensure predictability and a level playing field, the Authority applies maximum aid intensities for R&D&I aid, which are established on the basis of three criteria: (i) the closeness of the aid to the market, as a proxy for its expected negative effects and the need for it, taking into account the potential higher revenues that can be expected from the aided activities; (ii) the size of the beneficiary as a proxy for the more acute difficulties generally faced by smaller undertakings to finance a risky project; and (iii) the acuteness of the market failure, such as the expected externalities in terms of dissemination of knowledge. Therefore, aid intensities should generally be lower for activities linked to development and innovation than for research activities.
75. The eligible costs for each aid measure covered by these guidelines are set out in Annex I. When an R & D project encompasses different tasks, each eligible task must fall under the categories of fundamental research, industrial research or experimental development <sup>(43)</sup>. When classifying different activities according to the relevant category, the Authority will refer to its own practice as well as to the specific examples and explanations provided in the OECD Frascati Manual <sup>(44)</sup>.
76. The maximum aid intensities generally applicable to all eligible R&D&I measures are set out in Annex II <sup>(45)</sup>.

<sup>(41)</sup> The net present value of a project is the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value (using the cost of capital).

<sup>(42)</sup> The IRR is not based on accounting earnings in a given year, but takes into account the stream of future cash flows that the investor expects to receive over the entire lifetime of the investment. It is defined as the discount rate for which the NPV of a stream of cash flows equals zero.

<sup>(43)</sup> This qualification does not necessarily need to follow a chronological approach, moving sequentially over time from fundamental research to activities closer to the market. Accordingly, nothing will prevent the Authority from classifying a task which is carried out at a later stage of a project as industrial research, while finding that an activity carried out at an earlier stage constitutes experimental development or is not research at all.

<sup>(44)</sup> 'The Measurement of Scientific and Technological Activities, Proposed Standard Practice for Surveys on Research and Experimental Development', Frascati Manual, OECD, 2002, as amended or replaced. For practical purposes, and unless it is shown that a different scale should be used in individual cases, the different R & D categories can also be considered to correspond to Technology Readiness Levels 1 (fundamental research), 2-4 (industrial research) and 5-8 (experimental development) — see communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, 'A European strategy for Key Enabling Technologies — A bridge to growth and jobs', COM(2012) 341 final of 26.6.2012.

<sup>(45)</sup> Without prejudice to specific provisions applying to aid for research and development in the agricultural and fisheries sectors, as laid down in a block exemption Regulation.

77. In the case of State aid for a project being carried out in collaboration between research organisations and undertakings, the combination of direct public support and, where they constitute aid, contributions from research organisations to the same project must not exceed the applicable aid intensities for each beneficiary undertaking.

#### 4.5.1.2. Repayable advances

78. If an EFTA State awards a repayable advance which qualifies as State aid within the meaning of Article 61(1) of the EEA Agreement, the rules laid down in this section apply.
79. Where an EFTA State can demonstrate, on the basis of a valid methodology based on sufficient verifiable data, that it is possible to calculate the gross grant equivalent of a repayable advance, it may notify an aid scheme and the associated methodology to the Authority. If the Authority accepts the methodology and deems the scheme compatible, the aid may be awarded on the basis of the gross grant equivalent of the repayable advance, up to the aid intensities laid down in Annex II.
80. In all other cases, the repayable advance is expressed as a percentage of the eligible costs and may exceed the applicable maximum aid intensities by 10 percentage points, provided that the following conditions are fulfilled:
- (a) in case of a successful outcome, the measure must provide that the advance is to be repaid with an interest rate not less than the discount rate resulting from the application of the Authority method for setting the reference and discount rates <sup>(46)</sup>;
  - (b) in case of a success exceeding the outcome defined as successful, the EFTA State concerned should request payments beyond repayment of the advance amount including interest according to the applicable discount rate;
  - (c) in case the project fails, the advance does not have to be fully repaid. In case of partial success, the repayment should be proportional to the degree of success achieved.
81. For the Authority to assess the measure, it must include detailed provisions on the repayment in case of success, which clearly define what will be considered as a successful outcome, on the basis of reasonable and prudent hypothesis.

#### 4.5.1.3. Fiscal measures

82. To the extent it constitutes State aid, the aid intensity of a fiscal measure can be calculated either on the basis of individual projects or, at the level of an undertaking, as the ratio between the overall tax relief and the sum of all eligible R&D&I costs incurred in a period not exceeding three consecutive fiscal years. In the latter case, the fiscal measure may apply without distinction to all eligible activities, but must not exceed the applicable aid intensity for experimental development <sup>(47)</sup>.

#### 4.5.1.4. Cumulation of aid

83. Aid may be awarded concurrently under several aid schemes or cumulated with ad hoc aid, provided that the total amount of State aid for an activity or project does not exceed the aid ceilings laid down in these guidelines. As recalled in point 9, funding centrally managed by the European Union institutions, agencies, joint undertakings or other bodies that is not directly or indirectly under the control of EFTA States does not constitute State aid and should not be taken into account. Where such funding is combined with State aid, the total amount of public funding awarded in relation to the same eligible costs must however not exceed the most favourable funding rate laid down in the applicable rules of the EEA Agreement.

<sup>(46)</sup> See the Authority guidelines on reference and discount rates (OJ L 105, 21.4.2011, p. 32 and EEA Supplement No 23, 21.4.2011, p. 1).

<sup>(47)</sup> Conversely, where a fiscal aid measure distinguishes between different R & D categories, the relevant aid intensities must not be exceeded.

84. Where the expenditure eligible for R&D&I aid is also potentially eligible in whole or in part for aid for other purposes, the overlapping portion will be subject to the most favourable ceiling under any of the relevant rules.
85. Aid for R&D&I may not be cumulated with *de minimis* support in respect of the same eligible costs if that would result in an aid intensity exceeding those laid down in these guidelines.

#### 4.5.2. Additional conditions for individual aid

86. For notifiable individual aid, mere compliance with a set of predefined maximum aid intensities is not sufficient to ensure proportionality.
87. As a general rule, and in order to establish whether the aid is proportional, the Authority will verify that its amount does not exceed the minimum necessary for the aided project to be sufficiently profitable, for example by making possible to achieve an IRR corresponding to the sector- or firm-specific benchmark or hurdle rate. Normal rates of return required by the beneficiary in other R&D&I projects, its cost of capital as a whole or returns commonly observed in the industry concerned may also be used for this purpose. All relevant expected costs and benefits must be considered over the lifetime of the project, including the costs and revenues stemming from the results of R&D&I activities.
88. Where it is shown, for example by means of internal company documents, that the aid beneficiary faces a clear choice between carrying out either an aided project or an alternative one without aid, the aid will be considered to be limited to the minimum only if its amount does not exceed the net extra costs of implementing the activities concerned, compared to the counterfactual project that would be carried out in the absence of aid. In order to establish the net extra costs, the Authority will compare the expected net present values of the investment in the aided project and the counterfactual project, account being taken of the probabilities of different business scenarios occurring <sup>(48)</sup>.
89. Where aid is awarded for R & D projects or for the construction or upgrade of research infrastructures and the Authority can establish, on the basis of the methodology laid down in points 87 or 88, that the aid is strictly limited to the minimum necessary, higher maximum aid intensities than those laid down in Annex II may be allowed, up to the levels set out in the following table.

(%)

	Small enterprise	Medium-sized enterprise	Large enterprise
Aid for R & D projects			
Fundamental research	100	100	100
Applied research	80	70	60
— subject to effective collaboration between undertakings (for large enterprises cross-border or with at least one SME) or between an undertaking and a research organisation, or	90	80	70
— subject to wide dissemination of results			
Aid for the construction and upgrade of research infrastructures	60	60	60

<sup>(48)</sup> In the particular case where aid merely allows for an increase in the speed of completion of the project, the comparison should mostly reflect the different timelines in terms of cash flows and delayed entry in the market.

90. In order to demonstrate that aid is limited to the minimum necessary, EFTA States must explain how the aid amount has been established. Documentation and calculations used for the analysis of the incentive effect can also be used to assess whether the aid is proportionate. In so far as the identified need for aid relates mainly to difficulties in attracting debt finance from the market, rather than to a lack of profitability, a particularly apt way to ensure that the aid is kept to the minimum may be to provide it in the form of a loan, guarantee or repayable advance instead of a non-repayable form, such as a grant.
91. Where there are multiple potential candidates for carrying out the aided activity, the proportionality requirement is more likely to be met if the aid is awarded on the basis of transparent, objective and non-discriminatory criteria.
92. In order to address actual or potential direct or indirect distortions of international trade, higher intensities than generally permissible under these guidelines may be authorised if, directly or indirectly, competitors located outside the EEA have received in the last three years or are going to receive aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. Where possible, the EFTA State concerned will provide the Authority with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. Where the Authority does not have evidence concerning the awarded or proposed aid, it may also base its decision on circumstantial evidence.
93. When gathering evidence, the Authority may use its investigative powers <sup>(49)</sup>.

#### 4.6. Avoidance of undue negative effects on competition and trade

##### 4.6.1. General considerations

94. For R&D&I aid to be compatible with the functioning of the EEA Agreement, the negative effects of the aid measure in terms of distortions of competition and impact on trade between EFTA States must be limited and outweighed by the positive effects in terms of contribution to the objective of common interest.
95. The Authority identifies two main potential distortions of competition and trade between EFTA States caused by R&D&I aid, namely product market distortions and location effects. Both types may lead to allocative inefficiencies, undermining the economic performance of the EEA, and distributional concerns, in that the aid affects the distribution of economic activity across regions.
96. As far as distortions on the product markets are concerned, State aid for R&D&I may have an impact on competition in innovation processes and in the product markets where the results of the R&D&I activities are exploited.

##### 4.6.1.1. Effects on product markets

97. State aid for R&D&I can hamper competition in innovation processes and product markets in three ways, namely by distorting the competitive entry and exit process, by distorting dynamic investment incentives and by creating or maintaining market power.

##### (i) Distorting the competitive entry and exit processes

98. R&D&I aid may prevent the market mechanism from rewarding the most efficient producers and putting pressure on the least efficient to improve, restructure or exit the market. That might lead to a situation where, due to the

<sup>(49)</sup> See Council Regulation (EU) No 734/2013 of 22 July 2013 (OJ L 204, 31.7.2013, p. 15), not yet incorporated into the EEA Agreement and Article 6 of Part II of the Agreement on the establishment of a Surveillance Authority and a Court of Justice.

aid awarded, competitors that would otherwise be able to stay on are forced out of the market, or never enter in the first place. Similarly, State aid can prevent inefficient firms from leaving the market or even induce them to enter and gain market shares from otherwise more efficient competitors. If not correctly targeted, R&D&I aid may therefore support inefficient undertakings and lead to market structures in which many players operate significantly below efficient scale. In the long run, interfering with the competitive entry and exit processes may stifle innovation and slow down industry-wide productivity improvements.

(ii) Distorting dynamic incentives

99. R&D&I aid may distort the dynamic incentives to invest of competitors of the aid beneficiary. When an undertaking receives aid, the likelihood of successful R&D&I activities on its part generally increases, leading to an increased presence on the relevant product market(s) in the future. That increased presence may lead competitors to reduce the scope of their original investment plans (crowding-out effect).
100. Furthermore, the presence of aid may make potential beneficiaries complacent or more risk-seeking. The long term effect on the overall performance of the sector is in this case likely to be negative. R&D&I aid may therefore, if not correctly targeted, support inefficient undertakings and lead to market structures where many market players operate significantly below efficient scale.

(iii) Creating or maintaining market power

101. Aid for R&D&I may also have distortive effects in terms of increasing or maintaining the degree of market power in product markets. Market power is the power to influence market prices, output, the variety or quality of products and services, or other parameters of competition for a significant period of time, to the detriment of consumers. Even where aid does not strengthen market power directly, it may do so indirectly, by discouraging the expansion of existing competitors or inducing their exit or discouraging the entry of new competitors.

4.6.1.2. Effects on trade and location choice

102. State aid for R&D&I may also give rise to distortions of competition when it influences the choice of a location. Those distortions can arise across EFTA States, either when firms compete across borders or consider different locations. Aid aimed at relocating an activity in another region within the EEA may not lead directly to a distortion in the product market, but it displaces activities or investments from one region into another.

4.6.1.3. Manifest negative effects

103. In principle, an aid measure and the context in which it is applied need to be analysed to identify the extent to which it can be deemed distortive. However, certain situations can be identified where the negative effects manifestly outweigh any positive effects, meaning that aid cannot be found compatible with the functioning of the EEA Agreement.
104. In particular, according to the general principles of the EEA Agreement, State aid cannot be considered compatible with the functioning of the EEA Agreement if the aid measure is discriminatory to an extent not justified by its State aid character. As explained in Section 3, the Authority will thus not allow any measure where such measure or the conditions attached to it entail a non-severable violation of the EEA Agreement. This is particularly the case for aid measures where the award of aid is subject to the obligation for the beneficiary to have its central seat in the relevant EFTA State (or to be predominantly established in that EFTA State) or to use national products or services, as well as for aid measures restricting the possibility for the beneficiary to exploit the R&D&I results in other EEA States.

105. Likewise, aid that merely leads to a change in location of R&D&I activities within the EEA without changing the nature, size or scope of the project will not be considered compatible.

#### 4.6.2. Aid schemes

106. In order to be compatible with the functioning of the EEA Agreement, notifiable aid schemes must not lead to significant distortions of competition and trade. In particular, even where distortions may be considered limited at individual level (provided the aid is necessary and proportional to achieve the common objective), on a cumulative basis aid schemes might still lead to high levels of distortions. Such distortions may for instance result from aid that negatively affects dynamic incentives to innovate on the part of competitors. In the case of a scheme focusing on certain sectors, the risk of that kind of distortions is even more pronounced.
107. Without prejudice to point 122, EFTA States therefore must demonstrate that any negative effects will be limited to the minimum taking into account, for example, the size of the projects concerned, the individual and cumulative aid amounts, the number of expected beneficiaries as well as the characteristics of the targeted sectors. In order to enable the Authority to assess the likely negative effects of notifiable aid schemes, EFTA States may submit any impact assessment as well as *ex-post* evaluations carried out for similar predecessor schemes.

#### 4.6.3. Additional conditions for individual aid

##### 4.6.3.1. Distortions in product markets

108. For notifiable individual aid, in order to enable the Authority to identify and assess potential distortions of competition and trade, EFTA States should provide information on (i) the product markets concerned, that is to say the markets affected by the change in behaviour of the aid beneficiary; and (ii) the competitors and customers or consumers affected.
109. In assessing the negative effects of the aid measure, the Authority will focus its analysis of the distortions of competition on the foreseeable impact of the R&D&I aid on competition between undertakings in the product markets concerned. The Authority will give more weight to risks for competition and trade that arise in the near future and with particular likelihood.
110. To the extent that a specific innovative activity will be associated with multiple future product markets, the impact of State aid will be looked upon on the set of markets concerned. In certain cases the results of R&D&I activities, for example in the form of IPR, are themselves traded in technology markets, for instance through patent licensing or trading. In those cases, the Authority may also consider the effect of the aid on competition in technology markets.
111. The Authority will use various criteria to assess the potential distortions of competition, namely distorting dynamic incentives, creating or maintaining market power, and maintaining inefficient market structures.
- (i) Distorting dynamic incentives
112. In its analysis of the potential distortion of dynamic incentives, the Authority will consider the following elements:

— *market growth*: the more the market is expected to grow in the future, the less likely that the competitors' incentives will be negatively affected by the aid, given that there remain ample opportunities to develop a profitable business,

- *aid amount*: aid measures which involve significant amounts of aid are more likely to lead to significant crowding out effects. The significance of the aid amount will be measured mainly with reference to the amount spent by the main market players on projects of a similar kind,
- *closeness to the market/category of the aid*: the more the aid measure is aimed at activities close to the market, the more it is liable to develop significant crowding-out effects,
- *open selection process*: where the aid is awarded on the basis of transparent, objective and non-discriminatory criteria, the Authority will take a more positive stance,
- *exit barriers*: competitors are more likely to maintain, or even to increase their investment plans when exit barriers to the innovation process are high. That may be the case when many of the competitors' past investments are locked into a particular R&D&I trajectory,
- *incentives to compete for a future market*: R&D&I aid may lead to a situation where competitors of the aid beneficiary renounce competing for a future 'winner takes all' market, because the advantage provided by the aid, in terms of degree of technological advance, economies of scale, network effects or timing, reduces their possibility to potentially successfully enter that future market,
- *product differentiation and intensity of competition*: where product innovation is rather about developing differentiated products, related for example to distinct brands, standards, technologies or consumer groups, competitors are less likely to be affected. The same situation arises where there are many effective competitors in the market.

(ii) Creating or maintaining market power

113. The Authority is concerned mainly about those R&D&I measures which enable the aid beneficiary to strengthen market power held on existing product markets or to transfer it to future product markets. The Authority is therefore unlikely to identify competition concerns related to market power in cases where the aid beneficiary has a market share below 25 % and in markets with a market concentration below 2 000 on the Herfindahl-Hirschman Index (HHI).

114. In its analysis of market power, the Authority will consider the following elements:

- *market power of the aid beneficiary and market structure*: where the aid recipient is already dominant on a product market, the aid measure may reinforce that dominance by further weakening the competitive constraint that competitors can exert on the recipient undertaking. Similarly, State aid measures may have a significant impact in oligopolistic markets where only a few players are active,
- *level of entry barriers*: in the field of R&D&I, there may be significant barriers to entry for new entrants. Those barriers include legal entry barriers (in particular in respect of IPR), economies of scale and scope, access barriers to networks and infrastructure, and other strategic barriers to entry or expansion,
- *buyer power*: the market power of an undertaking may also be limited by the market position of the buyers. The presence of strong buyers can serve to counter a finding of a strong market position if it is likely that the buyers will seek to preserve sufficient competition in the market,
- *selection process*: aid measures which allow undertakings with a strong market position to influence the selection process, for example by having the right to recommend undertakings in the selection process or influencing the research path in a way which disfavors alternative paths on unjustified grounds, are liable to raise concern by the Authority.

(iii) Maintaining inefficient market structures

115. In its analysis of market structures, the Authority will consider whether the aid is awarded in markets featuring overcapacity or in declining industries. Situations where the market is growing or where State aid for R&D&I is likely to change the overall growth dynamics of the sector, notably by introducing new technologies, are less likely to give rise to concerns.

#### 4.6.3.2. Location effects

116. In particular where R&D&I aid is close to the market, it may result in some territories benefiting from more favourable conditions in respect of subsequent production, particularly because of comparatively lower production costs as a result of the aid or due to higher levels of R&D&I activities pursued through the aid. This may lead undertakings to relocate to those territories.

117. Location effects may also be relevant to research infrastructures. If aid is mainly used to attract an infrastructure to a particular region at the expense of another, it will not contribute to promoting further R&D&I activities in the EEA.

118. In its analysis of notifiable individual aid, the Authority will accordingly take into account any evidence that the aid beneficiary has considered alternative locations.

#### 4.7. Transparency

119. As from 1 July 2016, and with the exception of individual aid awards below EUR 500 000, EFTA States must publish on a comprehensive State aid website, at national or regional level, at least the following information on notified State aid measures: the full text of the aid scheme and its implementing provisions or legal basis for individual aid, or a link to it; the identity of the aid awarding authority; the identity of individual beneficiaries; the form and amount of aid awarded to each beneficiary; the date of award; the type of beneficiary (SME or large enterprise); the region in which the beneficiary is located (at statistical region level 2 <sup>(50)</sup>); and the principal economic sector in which the beneficiary has its activities (at NACE group level) <sup>(51)</sup>. Such information must be published within six months after the awarding decision has been taken or, for fiscal measures, within one year from the date of the tax declaration, must be kept for at least 10 years and must be available to the general public without restrictions <sup>(52)</sup>.

#### 5. EVALUATION

120. To further ensure that distortions of competition and trade are limited, the Authority may require that notifiable aid schemes be subject to a time limitation and to the evaluation referred to in point 37. Evaluations should in particular be carried out for schemes where the potential distortions are particularly high, that is to say schemes that may risk to significantly restrict competition if their implementation is not reviewed in due time.

121. Given its objectives and in order not to put a disproportionate burden on EFTA States and on smaller aid measures, the requirement referred to in point 120 will apply only for aid schemes with large budgets, containing

<sup>(50)</sup> The term 'Statistical region' is used instead of the acronym 'NUTS' in the corresponding Commission Guidelines. NUTS is derived from the title 'Nomenclature of Territorial Units for Statistics' according to Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26.5.2003 on the establishment of a common classification of territorial units for statistics (NUTS) (OJ L 154, 21.6.2003, p. 1). This regulation has not been incorporated into the EEA Agreement. However, in order to achieve common definitions in an ever-increasing demand for statistical information at a regional level, the Statistical Office of the European Union, Eurostat, and the National Institutes of the candidate countries and EFTA have agreed that statistical regions would be established similar to the NUTS classification.

<sup>(51)</sup> With the exception of business secrets and other confidential information in duly justified cases and subject to the Authority's agreement (See the Authority Guidelines on professional secrecy in State aid decisions (OJ L 154, 8.6.2006, p. 27 and EEA Supplement No 29, 8.6.2006, p. 1)). For fiscal measures, the information on individual aid amounts can be provided in the following ranges (in EUR million): [0.5-1]; [1-2]; [2-5]; [5-10]; [10-30]; [30 and more].

<sup>(52)</sup> In case of unlawful aid, EFTA States will be required to ensure the *ex post* publication of the same information, at the latest six months after the date of the Authority decision. This information should be available in a format which allows data to be searched, extracted, and easily published on the internet, for instance in CSV or XML format.

novel characteristics or when significant market, technology or regulatory changes are foreseen. The evaluation must be carried out by an expert independent from the aid awarding authority on the basis of a common methodology <sup>(53)</sup> and must be made public. EFTA States must notify, together with the relevant aid scheme, a draft evaluation plan, which will be an integral part of the Authority assessment of the scheme.

122. In the case of aid schemes excluded from the scope of a block exemption Regulation exclusively on the grounds of their large budget, the Authority will assess their compatibility solely on the basis of the evaluation plan.
123. The evaluation must be submitted to the Authority in due time to allow for the assessment of the possible prolongation of the aid scheme and in any case upon its expiry. The precise scope and modalities of each evaluation will be defined in the decision approving the aid scheme. Any subsequent aid measure with a similar objective, including any alteration of aid schemes referred to in point 122, must take into account the results of the evaluation.

#### 6. REPORTING AND MONITORING

124. In accordance with the Surveillance and Court Agreement and the consolidated version of the Authority Decision No 195/04/COL <sup>(54)</sup>, EFTA States must submit annual reports to the Authority.
125. EFTA States must maintain detailed records regarding all aid measures. Such records must contain all information necessary to establish that the conditions regarding eligible costs and maximum aid intensities have been fulfilled. Those records must be maintained for ten years from the date of award of the aid and must be provided to the Authority upon request.

#### 7. APPLICABILITY

126. The Authority will apply the principles set out in these guidelines for the compatibility assessment of all notified R&D&I aid in respect of which it is called upon to take a decision after the date of adoption of these guidelines. Unlawful R&D&I aid will be assessed in accordance with the rules applicable at the date on which the aid was awarded.
127. Pursuant to Article 1(1) of Part I of Protocol 3 to the EEA Agreement, the Authority proposes that EFTA States amend, where necessary, their existing R&D&I aid schemes in order to bring them into line with these guidelines no later than 1<sup>st</sup> January 2015.
128. EFTA States are invited to give their explicit unconditional agreement to the appropriate measures proposed in point 127 within two months from the date of publication of these guidelines on the website of the Authority <sup>(55)</sup>. In the absence of a reply from any of the EFTA States, the Authority will assume that the EFTA State in question does not agree with the proposed measures.

#### 8. REVISION

129. The Authority may decide to review or amend these guidelines at any time should it be necessary for reasons associated with competition policy or in order to take account of other EEA rules and international commitments or for any other justified reason.

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<sup>(53)</sup> Such a common methodology may be provided by the Authority.

<sup>(54)</sup> Available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>

<sup>(55)</sup> See <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

## ANNEX I

## ELIGIBLE COSTS

Aid for R & D projects	<p>(a) Personnel costs: researchers, technicians and other supporting staff to the extent employed on the project.</p> <p>(b) Costs of instruments and equipment to the extent and for the period used for the project. If such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated on the basis of good accounting practice, are considered as eligible.</p> <p>(c) Costs of buildings and land, to the extent and for the period used for the project. With regard to buildings, only the depreciation costs corresponding to the life of the project, as calculated on the basis of good accounting practice are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.</p> <p>(d) Cost of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.</p> <p>(e) Additional overheads incurred directly as a result of the project.</p> <p>(f) Other operating expenses, including costs of materials, supplies and similar products incurred directly as a result of the project.</p>
Aid for feasibility studies	Costs of study.
Aid for the construction and upgrade of research infrastructures	Investment costs in intangible and tangible assets.
Innovation aid for SMEs	<p>(a) Costs for obtaining, validating and defending patents and other intangible assets.</p> <p>(b) Costs for secondment of highly qualified personnel from a research and knowledge dissemination organisation or a large enterprise, working on R&amp;D&amp;I activities in a newly created function within the beneficiary and not replacing other personnel.</p> <p>(c) Costs for innovation advisory and support services.</p>
Aid for process and organisational innovation	Personnel costs; costs of instruments, equipment, buildings and land to the extent and for the period used for the project; costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions; additional overheads and other operating costs, including costs of materials, supplies and similar products, incurred directly as a result of the project.
Aid for innovation clusters	
Investment aid	Investment costs in tangible and intangible assets.
Operating aid	<p>Personnel and administrative costs (including overhead costs) relating to:</p> <p>(a) animation of the cluster to facilitate collaboration, information sharing and the provision or channelling of specialised and customised business support services;</p> <p>(b) marketing of the cluster to increase participation of new undertakings or organisations and to increase visibility;</p> <p>(c) management of the cluster's facilities; and</p> <p>(d) organisation of training programmes, workshops and conferences to support knowledge sharing and networking and transnational cooperation.</p>

## ANNEX II

## MAXIMUM AID INTENSITIES

	(%)		
	Small enterprise	Medium-sized enterprise	Large enterprise
Aid for R & D projects			
Fundamental research	100	100	100
Industrial research	70	60	50
— subject to effective collaboration between undertakings (for large enterprises, cross-border or with at least one SME) or between an undertaking and a research organisation, or	80	75	65
— subject to wide dissemination of results			
Experimental development	45	35	25
— subject to effective collaboration between undertakings (for large enterprises, cross-border or with at least one SME) or between an undertaking and a research organisation; or	60	50	40
— subject to wide dissemination of results			
Aid for feasibility studies	70	60	50
Aid for the construction and upgrade of research infrastructures	50	50	50
Innovation aid for SMEs	50	50	—
Aid for process and organisational innovation	50	50	15
Aid for innovation clusters			
Investment aid	50	50	50
— in assisted regions fulfilling the conditions of Article 61(3)(c) of the EEA Agreement	55	55	55
Operating aid	50	50	50