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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

IV

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

EFTA SURVEILLANCE AUTHORITY DECISION

No 28/09/COL

of 29 January 2009

amending, for the sixty-eighth time, the procedural and substantive rules in the field of State aid by introducing three new chapters on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, and on the temporary framework for State aid measures to support access to finance in the current financial and economic crisis

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

Having regard to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 and Article 5(2)(b) thereof,

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

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

Recalling the Procedural and Substantive Rules in the Field of State Aid adopted on 19 January 1994 by the Authority ⁽⁴⁾,

Whereas, on 13 October 2008, the European Commission ⁽⁵⁾ adopted a Communication relating to 'The application of State

aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' ⁽⁶⁾,

Whereas, on 5 December 2008, the Commission adopted a Communication entitled 'The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition' ⁽⁷⁾,

Whereas, on 17 December 2008, the Commission adopted a Communication entitled 'Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis' ⁽⁸⁾,

Whereas these Communications are also of relevance for the European Economic Area,

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

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

Having consulted the Commission,

Recalling that the Authority has consulted the EFTA States by letters to Iceland, Liechtenstein and Norway on 19 January 2009 on the subject,

⁽¹⁾ Hereinafter referred to as the Authority.

⁽²⁾ Hereinafter referred to as the EEA Agreement.

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

⁽⁴⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ L 231 of 3.9.1994, p. 1), and EEA Supplement No 32 of 3.9.1994 p. 1. The Guidelines were last amended on 17 December 2008. Hereinafter referred to as the State aid Guidelines. The updated version of the State aid Guidelines is published on the Authority's website: http://www.eftasurv.int/fieldsofwork/fieldstateaid/state_aid_guidelines

⁽⁵⁾ Hereinafter referred to as the Commission.

⁽⁶⁾ OJ C 270, 25.10.2008, p. 8.

⁽⁷⁾ OJ C 10, 15.1.2009, p. 2.

⁽⁸⁾ OJ C 16, 22.1.2009, p. 1.

HAS ADOPTED THIS DECISION:

Article 2

Only the English version is authentic.

Article 1

The State aid Guidelines shall be amended by introducing three new chapters on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, and on the temporary framework for State aid measures to support access to finance in the current financial and economic crisis. The three chapters are contained in Annex I, II and III to this Decision.

Done at Brussels, 29 January 2009.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kurt JÄGER
College Member

ANNEX I

The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ⁽¹⁾

1. INTRODUCTION

- (1) The global financial crisis has intensified markedly and has now impacted heavily on the EEA banking sector. Over and above specific problems related in particular to the US mortgage market and mortgage-backed assets or linked to losses stemming from excessively risky strategies of individual banks, there has been a general erosion of confidence in the past months within the banking sector. The pervasive uncertainty about the credit risk of individual financial institutions has dried up the market of interbank lending and has consequently made access to liquidity progressively more difficult for financial institutions across the board.
- (2) The current situation threatens the existence of individual financial institutions with problems that are a result of their particular business model or business practices whose weaknesses are exposed and exacerbated by the crisis in the financial markets. If such institutions are to be returned to long-term viability rather than liquidated, a far reaching restructuring of their operations will be required. Under the prevailing circumstances, the crisis equally affects financial institutions that are fundamentally sound and whose difficulties stem exclusively from the general market conditions which have severely restricted access to liquidity. Long-term viability of these institutions may require less substantial restructuring. In any case however, measures taken by an EFTA State to support (certain) institutions operating within its national financial market may favour these institutions to the detriment of others operating within that EFTA State or in other EEA States.
- (3) The ECOFIN Council on 7 October 2008 adopted Conclusions committing to take all necessary measures to enhance the soundness and stability of the banking system in order to restore confidence and the proper functioning of the financial sector. The recapitalisation of vulnerable systemically relevant financial institutions was recognized as one means, among others, of appropriately protecting the depositors' interests and the stability of the system. It was further agreed that public intervention has to be decided on at national level but within a coordinated framework and on the basis of a number of EU common principles ⁽²⁾. On the same occasion the Commission offered to shortly issue guidance as to the broad framework within which the State aid compatibility of recapitalisation and guarantee schemes, and cases of application of such schemes, could be rapidly assessed.
- (4) Given the scale of the crisis, now also endangering fundamentally sound banks, the high degree of integration and interdependence of European financial markets, and the drastic repercussions of the potential failure of a systemically relevant financial institution further exacerbating the crisis, the Authority recognises that EFTA States may consider it necessary to adopt appropriate measures to safeguard the stability of the financial system. Due to the particular nature of the current problems in the financial sector such measures may have to extend beyond the stabilisation of individual financial institutions and include general schemes.
- (5) While the exceptional circumstances prevailing at the moment have to be duly taken into account when applying the State aid rules to measures addressing the crisis in the financial markets the Authority has to ensure that such measures do not generate unnecessary distortions of competitions between financial institutions operating in the market or negative spill over effects on other EEA States. It is the purpose of this Chapter to provide guidance on the criteria relevant for the compatibility with the EEA Agreement of general schemes as well as individual cases of application of such schemes and *ad hoc* cases of systemic relevance. In applying these criteria to measures taken by EFTA States, the Authority will proceed with the swiftness that is necessary to ensure legal certainty and to restore confidence in financial markets.

⁽¹⁾ This Chapter corresponds to the Communication from the Commission—The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270 25.10.2008, p. 8.

⁽²⁾ The ECOFIN Council conclusions enumerate the following principles:

- interventions should be timely and the support should in principle be temporary,
- Member States will be watchful regarding the interests of taxpayers,
- existing shareholders should bear the due consequences of the intervention,
- Member States should be in a position to bring about a change of management,
- the management should not retain undue benefits—governments may have *inter alia* the power to intervene in remuneration,
- legitimate interest of competitors must be protected, in particular through the State aid rules,
- negative spill-over effects should be avoided.

2. GENERAL PRINCIPLES

- (6) State aid to individual undertakings in difficulties is normally assessed under Article 61(3)(c) of the EEA Agreement and the Chapter on aid for rescuing and restructuring firms in difficulty of the State aid Guidelines⁽¹⁾ (hereinafter 'R&R guidelines') which articulates the Authority's understanding of Article 61(3)(c) of the EEA Agreement for this type of aid. The R&R guidelines are of general application, while foreseeing certain specific criteria for the financial sector.
- (7) In addition, under Article 61(3)(b) of the EEA Agreement the Authority may allow State aid 'to remedy a serious disturbance in the economy of an EC Member State or an EFTA State'.
- (8) The Authority reaffirms that, in line with the case law and the Commission's decision making practice⁽²⁾, Article 61(3)(b) of the EEA Agreement necessitates a restrictive interpretation of what can be considered a serious disturbance of an EFTA State's economy.
- (9) In the light of the level of seriousness that the current crisis in the financial markets has reached and of its possible impact on the overall economy of EEA States, the Authority considers that Article 61(3)(b) is, in the present circumstances, available as a legal basis for aid measures undertaken to address this systemic crisis. This applies, in particular, to aid that is granted by way of a general scheme available to several or all financial institutions in an EFTA State. Should the EFTA State's authorities responsible for financial stability declare to the Authority that there is a risk of such a serious disturbance, this shall be of particular relevance for the Authority's assessment.
- (10) *Ad hoc* interventions by EFTA States are not excluded in circumstances fulfilling the criteria of Article 61(3)(b) of the EEA Agreement. In the case of both schemes and *ad hoc* interventions, while the assessment of the aid should follow the general principles laid down in the R&R guidelines adopted pursuant to Article 61(3)(c) of the EEA Agreement, the current circumstances may allow the approval of exceptional measures such as structural emergency interventions, protection of rights of third parties such as creditors, and rescue measures potentially going beyond 6 months.
- (11) It needs to be emphasised, however, that the above considerations imply that the use of Article 61(3)(b) of the EEA Agreement cannot be envisaged as a matter of principle in crisis situations in other individual sectors in the absence of a comparable risk that they have an immediate impact on the economy of an EFTA State as a whole. As regards the financial sector, invoking this provision is possible only in genuinely exceptional circumstances where the entire functioning of financial markets is jeopardised.
- (12) Where there is a serious disturbance of an EFTA State's economy along the lines set out above, recourse to Article 61(3)(b) of the EEA Agreement is possible not on an open-ended basis but only as long as the crisis situation justifies its application.
- (13) This entails the need for all general schemes set up on this basis, e.g. in the form of a guarantee or recapitalization scheme, to be reviewed on a regular basis and terminated as soon as the economic situation of the EFTA State in question so permits. While acknowledging that it is currently impossible to predict the duration of the current extraordinary problems in the financial markets and that it may be indispensable in order to restore confidence to signal that a measure will be extended as long as the crisis continues, the Authority considers it a necessary element for the compatibility of any general scheme that the EFTA State carries out a review at least every six months and reports back to the Authority on the result of such review.
- (14) Furthermore, the Authority considers that the treatment of illiquid but otherwise fundamentally sound financial institutions in the absence of the current exceptional circumstances should be distinguished from the treatment of financial institutions characterized by endogenous problems. In the first case, viability problems are inherently exogenous and have to do with the present extreme situation in the financial market rather than with inefficiency or excessive risk-taking. As a result, distortions of competition resulting from schemes supporting the viability of such institutions will normally be more limited and require less substantial restructuring. By contrast, other financial institutions, likely to be particularly affected by losses stemming for instance from inefficiencies, poor asset-liability management or risky strategies, would fit with the normal framework of rescue aid, and in particular need a far-reaching restructuring, as well as compensatory measures to limit distortions of competition⁽³⁾. In all cases, however, in the absence of appropriate safeguards, distortions of competition may be substantial from the implementation of guarantee and recapitalization schemes, as they could unduly favour the beneficiaries to the detriment of their competitors or may aggravate the liquidity problems for financial institutions located in other EEA States.

⁽¹⁾ The Guidelines on aid for rescuing and restructuring firms in difficulties were adopted by the Authority with Decision No 305/04/COL of 1 December 2004.

⁽²⁾ Cf. in principle joined cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG v Commission* [1999] ECR II-3663, paragraph 167. Confirmed in Commission Decision 98/490/EC in Case C 47/96 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28), point 10.1, Commission Decision 2005/345/EC in Case C 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), points 153 et seq. and Commission Decision 2008/263/EC in Case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7), point 166. See Commission Decision in Case NN 70/07 *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission Decision in Case NN 25/08 *Rescue aid to WestLB* (OJ C 189, 26.7.2008, p. 3), Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, not yet published.

⁽³⁾ It being understood that the exact nature and timing of the restructuring to be carried out may be affected by the present turmoil in the financial markets.

(15) Moreover, in line with the general principles underlying the State aid rules of the EEA Agreement, which require that the aid granted does not exceed what is strictly necessary to achieve its legitimate purpose and that distortions of competition are avoided or minimized as far as possible, and taking due account of the current circumstances, all general support measures have to be:

- well-targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy,
- proportionate to the challenge faced, not going beyond what is required to attain this effect, and
- designed in such a way as to minimize negative spill over effects on competitors, other sectors and other EEA States.

(16) The observance of these criteria in compliance with the State aid rules and the fundamental freedoms enshrined in the EEA Agreement, including the principle of non-discrimination, is necessary for the preservation of the proper functioning of the internal market. In its assessment, the Authority will take into account the following criteria to decide upon the compatibility of the State aid measures enumerated below.

3. GUARANTEES COVERING THE LIABILITIES OF FINANCIAL INSTITUTIONS

(17) The principles set out above translate into the following considerations as regards guarantee schemes protecting liabilities established by way of a declaration, legislation or contractual regime, it being understood that these considerations are of a general nature and need to be adapted to the particular circumstances of every individual case.

3.1. Eligibility for a guarantee scheme

(18) A significant distortion of competition may arise if some market players are excluded from the benefit of the guarantee. The eligibility criteria of financial institutions for coverage by such a guarantee must be objective, taking due account of their role in the relevant banking system and the overall economy, and non-discriminatory so as to avoid undue distortive effects on neighbouring markets and the internal market as a whole. In application of the principle of non-discrimination on the grounds of nationality, all institutions incorporated in the EFTA State concerned, including subsidiaries, and with significant activities in that EFTA State should be covered by the scheme.

3.2. Material scope of a guarantee—types of liabilities covered

(19) In the present exceptional circumstances, it may be necessary to reassure depositors with financial institutions that they will not suffer losses, so as to limit the possibility of bank runs and undue negative spill over effects on healthy banks. In principle, therefore, in the context of a systemic crisis, general guarantees protecting retail deposits (and debt held by retail clients) can be a legitimate component of the public policy response.

(20) As regards guarantees going beyond retail deposits, the selection of the types of debt and liabilities covered must be targeted, to the extent practicable, to the specific source of difficulties and restricted to what can be considered necessary to confront the relevant aspects of the current financial crisis, as they could otherwise delay the necessary adjustment process and generate harmful moral hazard⁽¹⁾.

(21) In the application of this principle, the drying-up of interbank lending due to an erosion of confidence between financial institutions may also justify guaranteeing certain types of wholesale deposits and even short and medium-term debt instruments, to the extent such liabilities are not already adequately protected by existing investor arrangements or other means⁽²⁾.

(22) The extension of the coverage of any guarantee to further types of debt beyond this relatively broad scope would require a closer scrutiny as to its justification.

(23) Such guarantees should not, in principle, include subordinated debt (tier 2 capital) or an indiscriminate coverage of all liabilities, as it would merely tend to safeguard the interests of shareholders and other risk capital investors. If such debt is covered, thereby allowing expansion of capital and thus of lending activity, specific restrictions may be necessary.

⁽¹⁾ The limitation of the amount of the guarantee available, possibly in relation to the balance sheet size of the beneficiary may also be an element safeguarding the proportionality of the scheme in this respect.

⁽²⁾ Such as, for example, covered bonds and debt and deposits with collateral in government bonds or covered bonds.

3.3. Temporal scope of the guarantee scheme

- (24) The duration and scope of any guarantee scheme going beyond retail deposit guarantee schemes must be limited to the minimum necessary. In line with the general principles set out above, taking into account the currently unpredictable duration of the fundamental shortcomings in the functioning of financial markets, the Authority considers it a necessary element for the compatibility of any general scheme for the EFTA State to carry out a review every six months, covering the justification for the continued application of the scheme and the potential for adjustments to deal with evolution in the situation of financial markets. The results of this review will have to be submitted to the Authority. Provided that such regular review is ensured, the approval of the scheme may cover a period longer than six months and up to two years in principle. It may be further extended, upon the Authority's approval, as long as the crisis in the financial markets so requires. Should the scheme permit guarantees to continue to cover the relevant debt until a maturity date later than the expiry of the issuance period under the scheme, additional safeguards would be necessary in order to prevent excessive distortion of competition. Such safeguards may include a shorter issuance period than that allowed in principle under the present Chapter, deterrent pricing conditions and appropriate quantitative limits on the debt covered.

3.4. Aid limited to the minimum—private sector contribution

- (25) In application of the general State aid principle that the amount and intensity of the aid must be limited to the strict minimum, EFTA States have to take appropriate steps to ensure a significant contribution from the beneficiaries and/or the sector to the cost of the guarantee and, where the need arises, the cost of state intervention if the guarantee has to be drawn upon.

- (26) The exact calculation and composition of such contribution depends on the particular circumstances. The Authority considers that an adequate combination of some or all of the following elements ⁽¹⁾ would satisfy the requirement of aid being kept to the minimum:

- the guarantee scheme must be based on an adequate remuneration by the beneficiary financial institutions individually and/or the financial sector at large ⁽²⁾. Bearing in mind the difficulty of determining a market rate for guarantees of this nature and dimension in the absence of a comparable benchmark, and taking into account the potential difficulties in the current circumstances for beneficiaries to bear the amounts that might properly be charged, the fees charged for the provision of the scheme should come as close as possible to what could be considered a market price. Appropriate pricing mechanisms reflecting the varying degree of risks and the beneficiaries' different credit profiles and needs, will be important contributions to the proportionality of the measure;
- if the guarantee has to be activated, a further significant private sector contribution could consist in the coverage of at least a considerable part of the outstanding liabilities incurred by the beneficiary undertaking (if it continues to exist) or by the sector, the EFTA State's intervention being limited to amounts exceeding this contribution;
- the Authority recognizes that beneficiaries may not immediately be able to pay an appropriate remuneration in its entirety. Therefore, in order to complement or partially substitute the preceding elements, EFTA States could consider a claw back/better fortunes clause that would require beneficiaries to pay either an additional remuneration for the provision of the guarantee as such (in case it does not have to be activated) or to reimburse at least a part of any amounts paid by the EFTA State under the guarantee (in case it needs to be drawn upon) as soon as they are in a position to do so.

3.5. Avoidance of undue distortions of competition

- (27) Given the inherent risks that any guarantee scheme will entail negative effects on non-beneficiary banks, including those in other EEA States, the system must include appropriate mechanisms to minimize such distortions and the potential abuse of the preferential situations of beneficiaries brought about by a state guarantee. Such safeguards, which are also important to avoid moral hazard, should include an adequate combination of some or all of the following elements ⁽³⁾:

- Behavioural constraints ensuring that beneficiary financial institutions do not engage in aggressive expansion against the background of the guarantee to the detriment of competitors not covered by such protection. This can be done, for example by:

- i. restrictions on commercial conduct, such as advertising invoking the guaranteed status of the beneficiary bank, on pricing or on business expansion, e.g. through the introduction of a market share ceiling ⁽⁴⁾,

⁽¹⁾ This is a non-exhaustive list of tools contributing to the objective of keeping the aid to the minimum.

⁽²⁾ E.g. through an association of private banks.

⁽³⁾ This is a non-exhaustive list of tools contributing to the objective of avoiding undue distortions of competition.

⁽⁴⁾ The retention of profits in order to ensure adequate recapitalization could also be an element to be considered in this context.

- ii. limitations to the size of the balance-sheet of the beneficiary institutions in relation to an appropriate benchmark (e.g. gross domestic product or money market growth ⁽¹⁾),
 - iii. the prohibition of conduct that would be irreconcilable with the purpose of the guarantee such as, for example, share repurchases by beneficiary financial institutions or the issuance of new stock options for management,
- Appropriate provisions that enable the EFTA State concerned to enforce these behavioural constraints including the sanction of removing the guarantee protection from a beneficiary financial institution in case of non-compliance.

3.6. Follow-up by adjustment measures

- (28) The Authority considers that, in order to avoid distortions of competition to the maximum extent possible, a general guarantee scheme needs to be seen as a temporary emergency measure to address the acute symptoms of the current crisis in financial markets. Such measures cannot, by definition, represent a fully-fledged response to the root causes of this crisis linked to structural shortcomings in the functioning of the organization of financial markets or to specific problems of individual financial institutions or to a combination of both.
- (29) Therefore, a guarantee scheme needs to be accompanied, in due course, by necessary adjustment measures for the sector as a whole and/or by the restructuring or liquidation of individual beneficiaries, in particular for those for which the guarantee has to be drawn upon.

3.7. Application of the scheme to individual cases

- (30) Where the guarantee scheme has to be called upon for the benefit of individual financial institutions it is indispensable that this emergency rescue measure aimed to keep the insolvent institution afloat, which gives rise to an additional distortion of competition over and above that resulting from the general introduction of the scheme, is followed up as soon as the situation of the financial markets so permits, by adequate steps leading to a restructuring or liquidation of the beneficiary. This triggers the requirement of the notification of a restructuring or liquidation plan for recipients of payments under the guarantee which will be separately assessed by the Authority as to its compliance with the State aid rules ⁽²⁾.
- (31) In the assessment of a restructuring plan, the Authority will be guided by the requirements:
- to ensure the restoration of long-term viability of the financial institution in question,
 - to ensure that aid is kept to the minimum and that there is substantial private participation to the costs of the restructuring,
 - to safeguard that there is no undue distortion of competition and no unjustified benefits deriving from the activation of the guarantee.
- (32) In this assessment, the Authority can build on the experience gathered in the application of State aid rules to financial institutions in the past, having regard to the particular features of a crisis that has reached a dimension to qualify as a serious disturbance of the economy of EEA States.
- (33) The Authority will also take into account the distinction between aid measures necessitated exclusively by the current bottleneck in access to liquidity in relation to an otherwise fundamentally sound financial institution, as opposed to assistance provided to beneficiaries that are additionally suffering from structural solvency problems linked for instance to their particular business model or investment strategy. In principle, assistance to the latter category of beneficiaries is likely to raise greater concerns.

⁽¹⁾ While safeguarding the availability of credit to the economy notably in case of recession.

⁽²⁾ As a matter of principle, the Authority considers that in the event of payments having to be made to beneficiary financial institution, the payment has to be followed within six months by a restructuring plan or a liquidation plan, as the case may be. In order to facilitate the work of the EFTA States and the Authority, the Authority will be prepared to examine grouped notifications of similar restructuring/liquidation cases. The Authority may consider that there is no need to submit a plan for the pure liquidation of an institution, or where the size of the institution is negligible.

4. RECAPITALISATION OF FINANCIAL INSTITUTIONS

- (34) A second systemic measure in response to the ongoing financial crisis would be the establishment of a recapitalisation scheme which would be used to support financial institutions that are fundamentally sound but may experience distress because of extreme conditions in financial markets. The objective would be to provide public funds so as to strengthen the capital base of the financial institutions directly or to facilitate the injection of private capital by other means, so as to prevent negative systemic spill overs.
- (35) In principle, the above considerations in relation to general guarantee schemes apply, *mutatis mutandis*, also to recapitalisation schemes. This holds true for:
- objective and non-discriminatory criteria for eligibility,
 - the temporal scope of the scheme,
 - limitation of the aid to the strict necessary,
 - the need for safeguards against possible abuses and undue distortions of competition, bearing in mind that the irreversible nature of capital injections entails the need for provisions in the scheme which allow the EFTA State to monitor and enforce the observance of these safeguards and to take steps avoiding undue distortions of competition, where appropriate, at a later stage ⁽¹⁾, and
 - the requirement for recapitalisation as an emergency measure to support the financial institution through the crisis to be followed up by a restructuring plan for the beneficiary to be separately examined by the Authority, taking into account both the distinction between fundamentally sound financial institutions solely affected by the current restrictions on access to liquidity and beneficiaries that are additionally suffering from more structural solvency problems linked for instance to their particular business model or investment strategy and the impact of that distinction on the extent of the need for restructuring.
- (36) The particular nature of a recapitalisation measure gives rise to the following considerations.
- (37) Eligibility should be based on objective criteria, such as the need to ensure a sufficient level of capitalisation with respect to the solvency requirements that do not lead to unjustified discriminatory treatment. Evaluation of the need for support by the financial supervisory authorities would be a positive element.
- (38) The capital injection must be limited to the minimum necessary and should not allow the beneficiary to engage in aggressive commercial strategies or expansion of its activities or other purposes that would imply undue distortions of competition. In that context the maintenance of enhanced minimum solvency requirement levels, and/or limitation to the total size of the balance sheet of the financial institution will be evaluated positively. The beneficiaries should contribute as much as possible in the light of the current crisis through their own means including private participation ⁽²⁾.
- (39) Capital interventions in financial institutions must be done on terms that minimise the amount of the aid. According to the instrument chosen (e.g. shares, warrants, subordinated capital, ...) the EFTA State concerned should, in principle, receive rights, the value of which corresponds to their contribution to the recapitalisation. The issue price of new shares must be fixed on the basis of a market-oriented valuation. In order to ensure that the public support is only given in return for an appropriate counterpart, instruments such as preferred shares with adequate remuneration, will be regarded positively. Alternatively the introduction of claw back mechanisms or better fortunes clauses will have to be considered.
- (40) Similar considerations will apply to other measures and schemes aimed at tackling the problem from the financial institutions' asset side, that would contribute to the strengthening of the institutions' capital requirements. In particular, where an EFTA State buys or swaps assets this will have to be done at a valuation which reflects their underlying risks, with no undue discrimination as to the sellers.

⁽¹⁾ According to the principles of the R&R guidelines.

⁽²⁾ The upfront provision of a certain contribution may need to be supplemented by provisions allowing the imposition of additional contributions at a later stage.

(41) The approval of the aid scheme does not exempt EFTA States from submitting a report to the Authority on the use of the scheme every six months and individual plans for the beneficiary undertakings within 6 months from the date of the intervention ⁽¹⁾.

(42) As in the case of guarantee schemes but having regard to the inherently irreversible nature of recapitalisation measures, the Authority will carry out its assessment of such plans in such a way as to ensure the coherence of the overall results of recapitalisation under the scheme with those of a recapitalisation measure taken outside such a scheme according to the principles of the R&R guidelines, taking into consideration the particular features of a systemic crisis in the financial markets.

5. CONTROLLED WINDING-UP OF FINANCIAL INSTITUTIONS

(43) In the context of the current financial crisis an EFTA State may also wish to carry out a controlled winding-up of certain financial institutions in its jurisdiction. Such a controlled liquidation, possibly carried out in conjunction with a contribution of public funds, may be applied in individual cases, either as a second step, after rescue aid to an individual financial institution when it becomes clear that the latter cannot be restructured successfully, or in one single action. Controlled winding-up may also constitute an element of a general guarantee scheme, e.g. where an EFTA State undertakes to initiate liquidation of the financial institutions for which the guarantee needs to be activated.

(44) Again, the assessment of such a scheme and of individual liquidation measures taken under such a scheme follows the same lines, *mutatis mutandis*, as set out above for guarantee schemes.

(45) The particular nature of a liquidation measure gives rise to the following considerations.

(46) In the context of liquidation, particular care has to be taken to minimise moral hazard, notably by excluding shareholders and possibly certain types of creditors from receiving the benefit of any aid in the context of the controlled winding-up procedure.

(47) To avoid undue distortions of competition, the liquidation phase should be limited to the period strictly necessary for the orderly winding-up. As long as the beneficiary financial institution continues to operate it should not pursue any new activities, but merely continue the ongoing ones. The banking licence should be withdrawn as soon as possible.

(48) In ensuring that the aid amount is kept to the minimum necessary in view of the objective pursued, it needs to be taken into account that the protection of financial stability within the current financial turmoil may imply the necessity to reimburse certain creditors of the liquidated bank through aid measures. The choice of criteria for the selection of the types of liabilities for this purpose should follow the same rules as in relation to the liabilities covered by a guarantee scheme.

(49) In order to ensure that no aid is granted to the buyers of the financial institution or parts of it or to the entities sold, it is important that certain sales conditions are respected. The following criteria will be taken into account by the Authority when determining the potential existence of aid:

— the sales process should be open and non-discriminatory,

— the sale should take place on market terms,

— the financial institution or the government, depending on the structure chosen, should maximise the sales price for the assets and liabilities involved,

— in case it is necessary to grant an aid to the economic activity to be sold, this will lead to an individual examination according to the principles of the R&R guidelines.

(50) Where the application of these criteria leads to the finding of aid to buyers or to sold entities, the compatibility of that aid will have to be assessed separately.

⁽¹⁾ In order to facilitate the work of the EFTA States and the Authority, the Authority will be prepared to examine grouped notifications of similar restructuring cases. The Authority may also consider that there is no need to submit a plan relating to a pure liquidation of the institution, or where the size of the residual economic activity is negligible.

6. PROVISION OF OTHER FORMS OF LIQUIDITY ASSISTANCE

(51) In dealing with acute liquidity problems of some financial institutions, EFTA States may wish to accompany guarantees or recapitalisation schemes with complementary forms of liquidity support, with the provisions of public funds (including funds from the central bank). Where an EFTA State/central bank reacts to a banking crisis not with selective measures in favour of individual banks, but with general measures open to all comparable market players in the market (e.g. lending to the whole market on equal terms), such general measures are often outside the scope of the State aid rules and do not need to be notified to the Authority. The Authority considers for instance that activities of central banks related to monetary policy, such as open market operations and standing facilities, are not caught by the State aid rules. Dedicated support to a specific financial institution may also be found not to constitute aid in specific circumstances. Following the Commission's decision-making practice ⁽¹⁾, the Authority considers that the provision of central banks' funds to the financial institution in such a case may be found not to constitute aid when a number of conditions are met, such as:

- the financial institution is solvent at the moment of the liquidity provision and the latter is not part of a larger aid package,
- the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value,
- the central bank charges a penal interest rate to the beneficiary,
- the measure is taken at the central bank's own initiative, and in particular is not backed by any counter-guarantee of the state.

(52) The Authority considers that in the current exceptional circumstances a scheme of liquidity support from public sources (including the central bank) where it constitutes aid, can be found compatible, according to the principles of the R&R guidelines. Provided that the regular review of such a liquidity scheme every six months is ensured ⁽²⁾, the approval of the scheme may cover a period longer than six months and up to two years, in principle. It may be further extended, upon the Authority's approval, in the event that the crisis in the financial markets so requires.

7. RAPID TREATMENT OF STATE AID INVESTIGATIONS

(53) When applying the State aid rules to the measures dealt with in this Chapter in a manner that takes account of prevailing financial market conditions, the Authority, in co-operation with the EFTA States, should ensure both that they achieve their objective and that the related distortions of competition both within and between EEA States are kept to a minimum. In order to facilitate this cooperation and to provide both EFTA States and third parties with the necessary legal certainty on the compliance of the measures undertaken with the EEA Agreement (which is a significant component of restoring confidence to the markets), it is of paramount importance that EFTA States inform the Authority of their intentions and notify plans to introduce such measures as early and comprehensively as possible and in any event before the measure is implemented. The Authority is committed to ensuring the swift authorisation of aid measures upon receipt of complete notifications.

⁽¹⁾ See for instance Northern Rock (OJ C 43, 16.2.2008, p. 1).

⁽²⁾ The principles set out above in point 24 would apply to this review.

ANNEX II

The recapitalisation of financial institutions ⁽¹⁾ in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ⁽²⁾

1. INTRODUCTION

- (1) The EFTA Surveillance Authority's (hereinafter 'the Authority') Guidelines of 29 January 2009 on The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ⁽³⁾ ('the Guidelines on financial institutions') recognize that recapitalisation schemes are one of the key measures that EFTA States ⁽⁴⁾ can take to preserve the stability and proper functioning of financial markets.
- (2) The ECOFIN Council of 7 October 2008 and the Eurogroup meeting of 12 October 2008 addressed recapitalisation in a similar spirit by concluding that 'Governments commit themselves to provide capital when needed in appropriate volume while favouring by all available means the raising of private capital. Financial institutions should be obliged to accept additional restrictions, notably to preclude possible abuse of such arrangements at the expense of non beneficiaries', and 'legitimate interest of competitors must be protected, in particular through the State aid rules.'
- (3) Until December 2008, the Commission approved recapitalisation schemes in three Member States, as well as individual recapitalisation measures, in line with the principles laid down in the so-called Banking Communication ⁽⁵⁾. Recapitalisation, notably in the form of ordinary and preferred shares, has been authorized, subject in particular to the introduction of market-oriented remuneration rates, appropriate behavioural safeguards and regular review. However, as the nature, scope and conditions of recapitalisation schemes currently being envisaged vary considerably, both Member States and potential beneficiary institutions have called for more detailed guidance as to whether specific forms of recapitalisation would be acceptable under State aid rules. In particular, some States envisage the recapitalisation of banks, not primarily to rescue them but rather to ensure lending to the real economy. The present Guidelines provide guidance for new recapitalisation schemes and opens the possibility for adjustment of existing recapitalisation schemes.

Common objectives: Restoring financial stability, ensuring lending to the real economy and dealing with the systemic risk of possible insolvency

- (4) In the context of the current situation in the financial markets, the recapitalisation of banks can serve a number of objectives. First, recapitalisations contribute to the restoration of financial stability and help restore the confidence needed for the recovery of inter-bank lending. Moreover, additional capital provides a cushion in recessionary times to absorb losses and limits the risk of banks becoming insolvent. Under current conditions, triggered in particular by the collapse of Lehman Brothers, fundamentally sound banks may require capital injections to respond to a widespread perception that higher capital ratios are necessary in view of the past underestimation of risk and the increased cost of funding.
- (5) Second, recapitalisations can have as objective to ensure lending to the real economy. Fundamentally sound banks may prefer to restrict lending in order to avoid risk and maintain higher capital ratios. State capital injection may prevent credit supply restrictions and limit the pass-on of the financial markets' difficulties to other businesses.
- (6) Third, State recapitalisation may also be an appropriate response to the problems of financial institutions facing insolvency as a result of their particular business model or investment strategy. A capital injection from public sources providing emergency support to an individual bank may also help to avoid short term systemic effects of its possible insolvency. In the longer term, recapitalisation could support efforts to prepare the return of the bank in question to long term viability or its orderly winding-up.

⁽¹⁾ For the convenience of the reader, financial institutions are referred to simply as 'banks' in this document.

⁽²⁾ These Guidelines correspond to the Commission's Communication 'The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition.', issued on 5 December 2008 (C(2008) 8259 final), hereinafter 'the Recapitalisation Communication'.

⁽³⁾ These Guidelines correspond to the Commission's Communication on 'The application of State aid rules to measures' taken in relation to financial institutions in the context of the current global financial crisis, published in the OJ C 270, 25.10.2008, p. 8.

⁽⁴⁾ In these Guidelines the EFTA States refers to Norway, Iceland and Liechtenstein.

⁽⁵⁾ See Commission decision of 13 October 2008 in case N 507/2008 *Financial Support Measures to the banking Industry in the UK* (OJ C 290, 13.11.2008, p. 4), Commission decision of 27 October 2008 in case N 512/2008 *Support measures for financial institutions in Germany* (OJ C 293, 15.11.2008, p. 2) and Commission decision of 19 November 2008 in case N 560/2008 *Support measures for the credit institutions in Greece*, Commission decision of 12 November 2008 in case N 528/2008 *the Netherlands, Aid to ING Groep N.V.*, Commission decision of 25 November 2008 in case NN 68/2008 *on Latvian State support to JSC Parex Banka*.

Possible competition concerns

- (7) With these common objectives in mind, the assessment of any recapitalisation scheme or measure must take into account possible distortions of competition at three different levels.
- (8) First, recapitalisation by one EFTA State of its own banks should not give those banks an undue competitive advantage over banks in other EEA Member States. Access to capital at considerably lower rates than competitors from other EEA Member States, in the absence of an appropriate risk-based justification, may have a substantial impact on the competitive position of a bank in the wider single European market. Excessive aid in one EFTA State could also prompt a subsidy race among EEA Member States and create difficulties for the economies of other States in the EEA which have not introduced recapitalisation schemes. A coherent and coordinated approach to the remuneration of public capital injections, and to the other conditions attached to recapitalisation, is indispensable to the preservation of a level playing field. Unilateral and uncoordinated action in this area may also undermine efforts to restore financial stability. ('Ensuring fair competition within the EEA')
- (9) Secondly, recapitalisation schemes which are open to all banks within an EFTA State without an appropriate degree of differentiation between beneficiary banks according to their risk profiles may give an undue advantage to distressed or less-performing banks compared to banks which are fundamentally sound and better-performing. This will distort competition on the market, distort incentives, increase moral hazard and weaken the overall competitiveness of European banks ('Ensuring fair competition between banks')
- (10) Thirdly, public recapitalisation, in particular its remuneration, should not have the effect of putting banks that do not have recourse to public funding, but seek additional capital on the market, in a significantly less competitive position. A public scheme which crowds out market-based operations will frustrate the return to normal market functioning. ('Ensuring a return to normal market functioning')
- (11) Any proposed recapitalisation has cumulative competitive effects at each of these three levels. However, a balance must be struck between these competition concerns and the objectives of restoring financial stability, ensuring lending to the real economy and dealing with the risk of insolvency. On the one hand, banks must have sufficiently favourable terms of access to capital in order to make the recapitalisation as effective as necessary. On the other hand, the conditions tied to any recapitalisation measure should ensure a level playing field and, in the longer-term, a return to normal market conditions. State interventions should therefore be proportionate and temporary and should be designed in a way that provides incentives for banks to redeem the State as soon as market circumstances permit, in order for a competitive and efficient European banking sector to emerge from the crisis. Market-oriented pricing of capital injections would be the best safeguard against unjustified disparities in the level of capitalisation and improper use of such capital. In all cases, EFTA States should ensure that any recapitalisation of a bank is based on genuine need.
- (12) The balance to be achieved between financial stability and competition objectives underlines the importance of the distinction between fundamentally sound, well-performing banks on one hand and distressed, less-performing banks on the other.
- (13) In its assessment of recapitalisation measures, whether in the form of schemes or support to individual banks, the Authority will therefore pay particular attention to the risk profile of the beneficiaries⁽⁶⁾. In principle, banks with a higher risk profile should pay more. In designing recapitalisation schemes open to a set of different banks, EFTA States should carefully consider the entry criteria and the treatment of banks with different risk profiles and differentiate in their treatment accordingly (see Annex 1). Account needs to be taken of the situation of banks which face difficulties due to the current exceptional circumstances, although they would have been regarded as fundamentally sound before the crisis.
- (14) In addition to indicators such as compliance with regulatory solvency requirements and prospective capital adequacy as certified by the national supervisory authorities, pre-crisis CDS spreads and ratings should, for example, be a good basis for differentiation of remuneration rates for different banks. Current spreads may also reflect inherent risks which will weaken the competitive situation of some banks as they come out of the general crisis conditions. Pre-crisis and current spreads should in any event reflect the burden, if any, of toxic assets and/or the weakness of the bank's business model due to factors such as overdependence on short-term financing or abnormal leverage.
- (15) It may be necessary, in duly justified cases, to accept lower remuneration in the short term for distressed banks, on the assumption and condition that in the longer term the costs of public intervention in their favour will be reflected in the restructuring necessary to restore viability and to take account of the competitive impact of the support given to them in compensatory measures. Financially sound banks may be entitled to relatively low rates of entry to any recapitalisation, and correspondingly significantly reduced conditions on public support in the longer term, provided that they accept terms on the redemption or conversion of the instruments so as to retain the temporary nature of the State's involvement, and its objective of restoring financial stability/lending to the economy, and the need to avoid abuse of the funds for wider strategic purposes.

⁽⁶⁾ See Annex 1 for more details.

Recommendations of the Governing Council of the European Central Bank (ECB)

- (16) In the Recommendations of its Governing Council of 20 November 2008, the European Central Bank proposed a methodology for benchmarking the pricing of State recapitalisation measures for fundamentally sound institutions in the Euro area. The guiding considerations underlying these Recommendations fully reflect the principles set out in this introduction. In line with its specific tasks and responsibilities, the ECB placed particular emphasis on the effectiveness of recapitalisation measures with a view to strengthening financial stability and fostering the undisturbed flow of credit to the real economy. At the same time, it underlined the need for market-oriented pricing, including the specific risk of the individual beneficiary banks and the need to preserve a level playing field between competing banks.
- (17) Although the EFTA States are not members of the ECB, the Authority welcomes its Recommendations which propose a pricing scheme for capital injections based on a corridor for rates of return for beneficiary banks which, notwithstanding variations in their risk profile, are fundamentally sound financial institutions. This document aims to extend guidance to conditions other than remuneration rates and to the terms under which banks which are not fundamentally sound may have access to public capital.
- (18) In addition, while acknowledging that the current exceptional market rates do not constitute a reasonable benchmark for determining the correct level of remuneration of capital, the Authority is of the view that recapitalisation measures by EFTA States should take into account the underestimation of risk in the pre-crisis period. Without this, public remuneration rates could give undue competitive advantages to beneficiaries and eventually lead to the crowding out of private recapitalisation.

2. PRINCIPLES GOVERNING DIFFERENT TYPES OF RECAPITALISATION

- (19) Closeness of pricing to market prices is the best guarantee to limit competition distortions⁽⁷⁾. It follows that the design of recapitalisation should be determined in a way that takes the market situation of each institution into account, including its current risk profile and level of solvency, and maintains a level playing field by not providing too large a subsidy in comparison to current market alternatives. In addition, pricing conditions should provide an incentive for the bank to redeem the State as soon as the crisis is over.
- (20) These principles translate into the assessment of the following elements of the overall design of recapitalisation measures: objective of recapitalisation, soundness of the beneficiary bank, remuneration, exit incentives, in particular with a view to the replacement of state capital by private investors⁽⁸⁾, to ensure the temporary nature of the State's presence in banks' capital, safeguards against abuse of aid and competition distortions, and the review of the effects of the recapitalisation scheme and the beneficiaries' situation through regular reports or restructuring plans where appropriate.

2.1. Recapitalisations at current market rates

- (21) Where state capital injections are on equal terms with significant participation (30 % or more) of private investors, the Authority will accept the remuneration set in the deal⁽⁹⁾. In view of the limited competition concerns raised by such an operation, unless the terms of the deal are such as to significantly alter the incentives of private investors, in principle there does not appear to be any need for *ex ante* competition safeguards or exit incentives.

2.2. Temporary recapitalisations of fundamentally sound banks in order to foster financial stability and lending to the real economy

- (22) In evaluating the treatment of banks in this category, the Authority will place considerable weight on the distinction between fundamentally sound and other banks which has been discussed in paragraphs 12 to 15.

⁽⁷⁾ See point 39 of the Guidelines on financial institutions.

⁽⁸⁾ All the references to exit incentives or incentives to redeem the State in this document have to be understood as aiming at the replacement of State capital by private capital to the extent necessary and appropriate in the context of a return to normal market conditions.

⁽⁹⁾ See for example Commission decision of 27 October 2008 in case N 512/2008 *Support measures for financial institutions in Germany*, point 54.

- (23) An overall remuneration needs to adequately factor in the following elements:
- (a) Current risk profile of each beneficiary ⁽¹⁰⁾;
 - (b) Characteristics of the instrument chosen, including its level of subordination; risk and all modalities of payment ⁽¹¹⁾;
 - (c) Built-in incentives for exit (such as step-up and redemption clauses);
 - (d) Appropriate benchmark risk-free rate of interest.
- (24) The *remuneration* for state recapitalisations cannot be as high as current market levels (about 15 %) ⁽¹²⁾ since these may not necessarily reflect what could be considered as normal market conditions ⁽¹³⁾. Consequently, the Authority is prepared to accept the *price* for recapitalisations of fundamentally sound banks at rates below current market rates, in order to facilitate banks to avail themselves of such instruments and to thereby favour the restoration of financial stability and ensuring lending to the real economy.
- (25) At the same time, the total expected return on recapitalisation to the State should not be too distant from current market prices because (i) it should avoid the pre-crisis under-pricing of risk, (ii) it needs to reflect the uncertainty about the timing and level of a new price equilibrium, (iii) it needs to provide incentives for exiting the scheme and (iv) it needs to minimise the risk of competition distortions between EEA States, as well as between those banks which raise capital on the market today without any State aid. A remuneration rate not too distant from current market prices is essential to avoid crowding out recapitalisation via the private sector and facilitating the return to normal market conditions.

Entry level price for recapitalisations

- (26) In the 'Recapitalisation Communication' ⁽¹⁴⁾, the Commission described methods to determine the entry level price for recapitalisations. The Authority will apply the methods described below in a similar manner, taking into account that the EFTA States are outside the Eurosystem. The Commission considers that an adequate method to determine the price of recapitalisations is provided by the Eurosystem recommendations of 20 November 2008. The remunerations calculated using this methodology represent in the view of the Eurosystem an appropriate basis (entry level) for the required nominal rate of return for the recapitalisation of fundamentally sound banks. This price may be adjusted upwards to account for the need to encourage the redemption of state capital ⁽¹⁵⁾. The Commission considers that such adjustments will also serve the objective of protecting undistorted competition.
- (27) In line with the Eurosystem recommendations, the required rate of return by the government on recapitalisation instruments for *fundamentally sound banks*—preferred shares and other hybrid instruments—could be determined on the basis of a 'price corridor' defined by: (i) the required rate of return on subordinated debt representing a *lower bound*, and (ii) the required rate of return on ordinary shares representing an *upper bound*. This methodology involves the calculation of a price corridor on the basis of different components, which should also reflect the specific features of individual institutions (or sets of similar institutions) and of EFTA States. The Commission has established that the application of the methodology by using average (mean or median) values of the relevant parameters (government bond yields, CDS spreads, equity risk premium) determines a corridor with an average required rate of return of 7 % on preferred shares with features similar to those of subordinated debt and an average required rate of return of 9,3 % on ordinary shares relating to Euro area banks. As such, this average price corridor represents an indicative range.

⁽¹⁰⁾ See Annex 1 for more details.

⁽¹¹⁾ For example, a number of parameters increase or decrease the value of preferred shares, depending on their exact definition, such as: convertibility into ordinary shares or other instruments, cumulative or non-cumulative dividends, fixed or adjustable dividend rate, liquidation preference before ordinary shares, participation or not in earnings above dividend rate paid to ordinary shares, put option, redemption clauses, voting rights. The Authority will use the general classification of capital instrument among the different regulatory categories as a benchmark (e.g. core/non core, Tier 1/Tier 2).

⁽¹²⁾ Reference is made to Commission Communication on the recapitalisation of financial institutions in the current financial crisis, footnote 10.

⁽¹³⁾ Current levels of remuneration may also reflect present relatively high demand for Tier 1 capital, as banks move away from what is now perceived as the undercapitalised business model of the past, combined with relatively small supply and high market volatility.

⁽¹⁴⁾ See footnote 2, paragraphs 26 and following.

⁽¹⁵⁾ See points 5 to 7 of the ECB Governing Council recommendations on the pricing of recapitalisations of 20 November 2008.

- (28) The Authority will accept a minimum remuneration based on the above methodology for fundamentally sound banks. This remuneration is differentiated at the level of an individual bank on the basis of different parameters:
- (a) the type of capital chosen⁽¹⁶⁾: the lower the subordination, the lower the required remuneration in the price corridor;
 - (b) appropriate benchmark risk-free interest rate;
 - (c) the individual risk profile at national level of all eligible financial institutions, (including both financially sound and distressed banks).
- (29) EFTA States may choose a pricing formula that in addition includes step-up or payback clauses. Such features should be appropriately chosen so that, while encouraging an early end to the State's capital support of banks, they should not result in an excessive increase in the cost of capital.
- (30) The Authority will also accept alternative pricing methodologies, provided they lead to remunerations that are higher than the above methodology.

Incentives for State capital redemption

- (31) Recapitalisation measures need to contain appropriate incentives for state capital to be redeemed when the market so allows⁽¹⁷⁾. The simplest way to provide an incentive for banks to look for alternative capital is for EFTA States to require an adequately high remuneration for the state recapitalisation. For that reason, the Authority considers it useful that an add-on be generally added to the entry price determined⁽¹⁸⁾ to incentivise exit. A pricing structure including increase over time and step-up clauses will reinforce this mechanism to incentivise exit.
- (32) If an EFTA State prefers not to increase the nominal rate of remuneration, it may consider increasing the global remuneration through call options or other redemption clauses, or mechanisms that encourage private capital raising, for instance by linking the payment of dividends to an obligatory remuneration of the State which increases over time.
- (33) EFTA States may also consider using a restrictive dividend policy to ensure the temporary character of state intervention. A restrictive dividend policy would be coherent with the objective of safeguarding lending to the real economy and strengthening the capital basis of beneficiary banks. At the same time, it would be important to allow for dividend payment where this represents an incentive to provide new private equity to fundamentally sound banks⁽¹⁹⁾.
- (34) The Authority will assess proposed exit mechanisms on a case-by-case basis. In general, the higher the size of the recapitalization and the higher the risk profile of the beneficiary bank, the more necessary it becomes to set out a clear exit mechanism. The combination of the level and type of remuneration and, where and to the extent appropriate, a restrictive dividend policy, needs to represent, in its entirety, a sufficient exit incentive for the beneficiary banks. The Authority considers, in particular, that restrictions on payment of dividends are not needed where the level of pricing correctly reflects the banks' risk profile, and step-up clauses or comparable elements provide sufficient incentives for exit and the recapitalisation is limited in size.

Prevention of undue distortions of competition

- (35) The Guidelines on financial institutions stresses, in point 35, the need for safeguards against possible abuses and distortions of competition in recapitalisation schemes. Point 38 of the Guidelines on financial institutions requires capital injections to be limited to the minimum necessary and not to allow the beneficiary to engage in aggressive commercial strategies which would be incompatible with the underlying objectives of recapitalisation⁽²⁰⁾.

⁽¹⁶⁾ Such as ordinary shares, non-core Tier 1 capital, or Tier 2 capital.

⁽¹⁷⁾ Taking into account the type of recapitalisation instrument and its classification by supervisory authorities.

⁽¹⁸⁾ This is all the more important as the method presented above may be affected by under pricing of risk before the crisis.

⁽¹⁹⁾ Taking into account these considerations, restrictions on the payment of dividends could for example be limited in time or to a percentage of the generated profits, or linked to the contribution of new capital, (for example by paying out dividends in the form of new shares). Where the redemption of the State is likely to occur in several steps, it could also be envisaged to foresee the gradual relaxation on any restriction on dividends in tune with the progress of redemption.

⁽²⁰⁾ Given the objectives of ensuring lending to the real economy, balance sheet growth restrictions are not necessary in recapitalisation schemes of fundamentally sound banks. This should in principle apply also to guarantee schemes, unless there is a serious risk of displacement of capital flows between EEA Member States.

- (36) As a general principle, the higher the remuneration the less there is a need for safeguards, as the level of price will limit distortions of competition. Banks receiving state recapitalisation should also avoid advertising it for commercial purposes.
- (37) Safeguards may be necessary to prevent aggressive commercial expansion financed by State aid. In principle, mergers and acquisitions can constitute a valuable contribution to the consolidation of the banking industry with a view to achieving the objectives of stabilising financial markets and ensuring a steady flow of credit to the real economy. In order not to privilege those institutions with public support to the detriment of competitors without such support, mergers and acquisitions should generally be organised on the basis of a competitive tendering process.
- (38) The extent of behavioural safeguards will be based on a proportionality assessment, taking into account all relevant factors and, in particular, the risk profile of the beneficiary bank. While banks with a very low risk profile may require only very limited behavioural safeguards, the need for such safeguards increases with a higher risk profile. The proportionality assessment is further influenced by the relative size of the capital injection by the State and the reached level of capital endowment.
- (39) When EFTA States use recapitalisation with the objective of financing the real economy, they have to ensure that the aid effectively contributes to this. To that end, in accordance with national regulation, they should attach effective and enforceable national safeguards to recapitalisation which ensure that the injected capital is used to sustain lending to the real economy.

Review

- (40) In addition, as indicated in the Guidelines on financial institutions ⁽²¹⁾, recapitalisations should be subject to regular review. Six months after their introduction, EFTA States should submit a report to the Authority on the implementation of the measures taken. The report needs to provide complete information on:
- (a) the banks that have been recapitalised, including in relation to the elements identified in point 12 to 15, Annex 1, and an assessment of the bank' business model, with a view to appreciating the banks' risk profile and viability;
 - (b) the amounts received by those banks and the terms on which recapitalisation has taken place;
 - (c) the use of the capital received, including in relation to (i) the sustained lending to the real economy and (ii) external growth and (iii) the dividend policy of beneficiary banks;
 - (d) the compliance with the commitments made by EFTA States in relation to exit incentives and other conditions and safeguards; and
 - (e) the path towards exit from reliance on State capital ⁽²²⁾.
- (41) In the context of the review, the Authority will assess, amongst others, the need for the continuation of behavioural safeguards. Depending on the evolution of market conditions, it may also request a revision of the safeguards accompanying the measures in order to ensure that aid is limited to the minimum amount and minimum duration necessary to weather the current crisis.
- (42) The Authority recalls that where a bank that was initially considered fundamentally sound falls into difficulties after recapitalisation has taken place, a restructuring plan for that bank must be notified.

2.3. Rescue recapitalisations of other banks

- (43) The recapitalisation of banks which are not fundamentally sound should be subject to stricter requirements.

⁽²¹⁾ See points 34 to 42 of the Guidelines on financial institutions. In line with the Guidelines on financial institutions, individual recapitalisation measures taken in conformity with a recapitalisation scheme approved by the Authority do not require notification and will be assessed by the EFTA Surveillance Authority in the context of the review and the presentation of a viability plan.

⁽²²⁾ Taking into account the characteristics of the recapitalisation instrument.

- (44) As far as remuneration is concerned, as set out above, it should in principle reflect the risk profile of the beneficiary and be higher than for fundamentally sound banks ⁽²³⁾. This is without prejudice to the possibility for supervisory authorities to take urgent action where necessary in cases of restructuring. Where the price cannot be set to levels that correspond to the risk profile of the bank, it would nevertheless need to be close to that required for a similar bank under normal market conditions. Notwithstanding the need to ensure financial stability, the use of State capital for these banks can only be accepted on the condition of either a bank's winding-up or a thorough and far-reaching restructuring, including a change in management and corporate governance where appropriate. Therefore, either a comprehensive restructuring plan or a liquidation plan will have to be presented for these banks within six months of recapitalisation. As indicated in the Guidelines on financial institutions, such a plan will be assessed according to the principles of the rescue and restructuring guidelines for firms in difficulties, and will have to include compensatory measures.
- (45) Until redemption of the State, behavioural safeguards for distressed banks in the rescue and restructuring phases should, in principle, include: a restrictive policy on dividends (including a ban on dividends at least during the restructuring period), limitation of executive remuneration or the distribution of bonuses, an obligation to restore and maintain an increased level of the solvency ratio compatible with the objective of financial stability, and a timetable for redemption of state participation.

2.4. Final remarks

- (46) Finally, the Authority takes into account the possibility that banks' participation in recapitalisation operations is open to all or a good portion of banks in a given EFTA State, also on a less differentiated basis, and aimed at achieving an appropriate overall return over time. Some EFTA States may prefer, for reasons of administrative convenience for instance, to use less elaborated methods. Without prejudice to the possibility for EFTA States to base their pricing on the methodology above, the Authority will accept pricing mechanisms leading to a level of a total expected annualised return for all banks participating in a scheme sufficiently high to cater for the variety of banks and the incentive to exit. This level should normally be set above the upper bound referred to in paragraph 27 for Tier 1 capital instruments ⁽²⁴⁾. This can include a lower entry price and an appropriate step-up, as well as other differentiation elements and safeguards as described above ⁽²⁵⁾.

⁽²³⁾ See paragraph 28 on the extended price corridor implying increased rates of remuneration for distressed banks.

⁽²⁴⁾ The Commission has so far accepted recapitalisation measures with a total expected annualised return of at least 10 % for Tier 1 instruments for all banks participating in a scheme. For EEA States with risk-free rates of return significantly divergent from the Eurozone average such a level may need to be adapted accordingly. Adjustments will also be necessary in function of developments of the risk-free rates.

⁽²⁵⁾ See, as an example of a combination of a low entry price with such differentiation elements, the Commission decision of 12 November 2008 in case N 528/2008 the Netherlands, *Aid to ING Groep N.V* where for the remuneration of a sui generis capital instrument categorized as core Tier 1 capital a fixed coupon (8,5 %) is coupled with over-proportionate and increasing coupon payments and a possible upside, which results in an expected annualised return in excess of 10 %.

ANNEX 1

Pricing of equity

Equity (ordinary shares, common shares) is the best known form of core Tier 1 capital. Ordinary shares are remunerated by uncertain future dividend payments and the increase of the share price (capital gain/loss), both of which ultimately depend on the expectations of future cash flows/profits. In the current situation, a forecast of future cash flows is even more difficult than under normal conditions. The most noticeable factor, therefore, is the quoted market price of ordinary shares. For non-quoted banks, as there is no quoted share price, EFTA States should come to an appropriate market-based approach, such as full valuation.

If assistance is given in the issuance of ordinary shares (underwriting), any shares not taken up by existing or new investors will be taken up by the EFTA State as underwriter at the lowest possible price compared to the share price immediately prior to the announcement of placing an open offer. An adequate underwriting fee should also be payable by the issuing institution ⁽¹⁾. The Authority will take into account the influence that previously received State aid may have on the share price of the beneficiary.

Indicators for the assessment of a bank's risk profile

In evaluating a bank's risk profile for the purpose of the appreciation of a recapitalisation measure under State aid rules, the Authority will take into account the bank's position in particular with respect to the following indicators:

- (a) Capital adequacy: The Authority will value positively the assessment of the bank's solvency and its prospective capital adequacy as a result of a review by the national supervisory authority; such a review will evaluate the bank's exposure to various risks (such as credit risk, liquidity risk, market risk, interest rate and exchange rate risks), the quality of the asset portfolio (within the national market and in comparison with available international standards), the sustainability of its business model in the long term and other pertinent elements;
- (b) Size of the recapitalisation: The Authority will value positively a recapitalisation limited in size, such as for instance no more than 2 % of the bank's risk weighted assets;
- (c) Current CDS spreads: The Authority will consider a spread equal or inferior to the average as an indicator of a lower risk profile;
- (d) Current rating of the bank and its outlook: The Authority will consider a rating of A or above and a stable or positive outlook as an indicator of a lower risk profile.

In the evaluation of these indicators, account needs to be taken of the situation of banks which face difficulties due to the current exceptional circumstances, although they would have been regarded as fundamentally sound before the crisis, as shown, for instance, by the evolution of market indicators such as CDS spreads and share prices.

Table 1

Types of capital

Debt	Tier 2
	Fixed term debt instruments
	Perpetual Subordinated Debt instruments
Greater return required	Cumulative preference shares or other similar instruments
	Tier 1
↓ Greater loss absorbency	Non-cumulative preference shares or other similar instruments
	Other high quality hybrids
	Equity
	Reserves/Retained earnings
	Ordinary shares

⁽¹⁾ See for example, Commission decision of 13 October 2008 in case N 507/2008 *Financial Support Measures to the banking Industry in the UK*, at point 11, Commission decision of 27 October 2008 in case N 512/2008 *Support measures for financial institutions in Germany*, at point 12.

ANNEX III

Temporary framework for State aid measures to support access to finance in the current financial and economic crisis

1. THE FINANCIAL CRISIS, ITS IMPACT ON THE REAL ECONOMY AND THE NEED FOR TEMPORARY MEASURES

1.1. *The financial crisis and its impact on the real economy*

(1) On 26 November 2008, the European Commission (hereinafter '*the Commission*') adopted the Communication 'A European Economic Recovery Plan' (the 'Recovery Plan') to drive Europe's recovery from the current financial crisis ⁽¹⁾. The Recovery Plan is based on two mutually reinforcing main elements. Firstly, short-term measures to boost demand, save jobs and help restore confidence and secondly, 'smart investment' to yield higher growth and sustainable prosperity in the longer term. The Recovery Plan will intensify and accelerate reforms already underway under the Lisbon Strategy.

(2) In this context, the challenge is to avoid public intervention which would undermine the objective of less and better targeted State aid. Nevertheless, under certain conditions, there is a need for new temporary State aid.

(3) The EFTA Surveillance Authority (hereinafter '*the Authority*') takes the view that new instruments must be put in place to enable the application of State aid rules in a way that achieves maximum flexibility for tackling the crisis while maintaining a level playing field and avoiding undue restrictions of competition. These Guidelines give details of a number of additional temporary openings for EFTA States to grant State aid.

(4) First, the financial crisis has had a hard impact on the banking sector in the EEA and of unprecedented magnitude in Iceland. The European Council has stressed that although public intervention has to be decided at national level, this needs to be done within a coordinated framework and on the basis of a number of common Community principles ⁽²⁾. The Commission reacted immediately with various measures including the adoption of the Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ⁽³⁾ and of a number of decisions authorising rescue aid to financial institutions. The Authority has adopted corresponding measures ⁽⁴⁾.

(5) Sufficient and affordable access to finance is a precondition for investment, growth and job creation by the private sector. EFTA States need to use the leverage they have acquired as a result of providing substantial financial support to the banking sector to ensure that this support does not lead merely to an improvement in the financial situation of the banks without any benefit to the economy at large. Support for the financial sector should therefore be well targeted to guarantee that banks resume their normal lending activities. The Authority will take this into account when reviewing State aid to banks.

(6) While the situation on financial markets appears to be improving, the full impact of the financial crisis on the real economy is now being felt. A very serious downturn is affecting the wider economy and hitting households, businesses and jobs. In particular, as a consequence of the crisis on financial markets, banks are deleveraging and becoming much more risk-averse than in previous years, leading to a credit squeeze. This financial crisis could trigger credit rationing, a drop in demand and recession.

(7) Such difficulties could affect not only weak companies without solvency buffers, but also healthy companies which will find themselves facing a sudden shortage or even unavailability of credit. This will be particularly true for small and medium-sized enterprises ('SMEs'), which in any event face greater difficulties with access to finance than larger companies. This situation could not only seriously affect the economic situation of many healthy companies and their employees in the short and medium term but also have longer-lasting negative effects since all EEA investments in the future—in particular, towards sustainable growth and other objectives of the Lisbon Strategy—could be delayed or even abandoned.

⁽¹⁾ Communication from the Commission to the European Council, COM (2008) 800.

⁽²⁾ Conclusions of ECOFIN Council of 7 October 2008.

⁽³⁾ OJ C 270, 25.10.2008, p. 8.

⁽⁴⁾ See chapters of the Guidelines on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis and on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, adopted on 29 January 2009.

1.2. *The need for close EEA coordination of national aid measures*

- (8) In the current financial situation, EFTA States could be tempted to go it alone and, in particular, to wage a subsidy race to support their companies. Past experience shows that individual action of this kind cannot be effective and could seriously damage the internal market. When granting support, taking fully into consideration the specific prevailing economic situation, it is crucial to ensure a level playing field for EEA companies and to avoid EFTA States engaging in subsidy races which would be unsustainable and detrimental to the EEA as a whole. Competition policy is there to ensure this.

1.3. *The need for temporary State aid measures*

- (9) The temporary additional measures provided for in these Guidelines pursue two objectives: first, in the light of the exceptional and transitory financing problems linked to the banking crisis, to unblock bank lending to companies and thereby guarantee continuity in their access to finance. In this respect, SMEs are particularly important for the whole economy in the EEA and improving their financial situation will also have positive effects for large companies, thereby supporting overall economic growth and modernisation in the longer term.

- (10) The second objective is to encourage companies to continue investing in the future, in particular in a sustainable growth economy. There could indeed possibly be dramatic consequences, if, as a result of the current crisis, the significant progress that has been achieved in the environmental field were to be halted or even reversed. For this reason, it is necessary to provide temporary support to companies for investing in environmental projects (which could, inter alia, give a technological edge to EEA industry), thereby combining urgent and necessary financial support with long-term benefits for the EEA.

- (11) These Guidelines first recall the manifold opportunities for public support which are already at the disposal of EFTA States under existing State aid rules, before setting out additional State aid measures that EFTA States may grant temporarily in order to remedy the difficulties which some companies are currently encountering with access to finance and to promote investment pursuing environmental objectives.

- (12) The Authority considers that the proposed aid instruments are the most appropriate ones to achieve those objectives.

2. GENERAL ECONOMIC POLICY MEASURES

- (13) The Recovery Plan was adopted in response to the current economic situation. Given the scale of the crisis, the Community needs a coordinated approach, big enough and bold enough to restore consumer and business confidence. The same is true for recovery in the EFTA States.

- (14) The strategic aims of the Recovery Plan are to:

— swiftly stimulate demand and boost consumer confidence;

— lessen the human cost of the economic downturn and its impact on the most vulnerable. Many workers and their families are or will be hit by the crisis. Action can be taken to help stem the loss of jobs and then to help people return rapidly to the labour market, rather than face long-term unemployment;

— help Europe to prepare to capitalise when growth returns, so that the European economy is in tune with the demands for competitiveness and sustainability and the needs of the future, as outlined in the Lisbon Strategy. That means supporting innovation, building a knowledge economy and speeding up the shift towards a low-carbon and resource efficient economy.

- (15) To achieve those objectives, EFTA States already have at their disposal a number of instruments which are not considered State aid. For instance, some companies may be experiencing even more acute difficulties with access to finance than others, thereby delaying or even jeopardising the financing necessary for their growth and the implementation of investments envisaged. For this purpose, EFTA States could adopt a series of general policy measures, applicable to all companies on their territories and, consequently, falling outside the State aid rules, with the aim of temporarily alleviating financing problems in the short and medium term. For example, payment deadlines for social security and similar charges, or even taxes, could be extended or measures for employees could be introduced. If such measures are open to all undertakings, in principle they do not constitute State aid.

(16) EFTA States may also grant financial support directly to consumers, for instance for scrapping old products and/or buying green products. If such aid is granted without discrimination based on the origin of the product, it does not constitute State aid.

(17) Moreover, general Community programmes, like the Competitiveness and Innovation Framework Programme (2007 to 2013) established by Decision No 1639/2006/EC of the European Parliament and of the Council ⁽⁵⁾ and the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013) established by Decision No 1982/2006/EC of the European Parliament and the Council of 18 December 2006 ⁽⁶⁾ may be used to best effect to deliver support to SMEs, but also to large undertakings.

3. STATE AID POSSIBLE UNDER EXISTING INSTRUMENTS

(18) Over the last few years, the Authority has significantly modernised the State aid rules in order to encourage EFTA States to target public support better on sustainable investments, thus contributing to the Lisbon Strategy. In this context, particular emphasis has been given to SMEs, accompanied by more openings for granting State aid. In addition, the State aid rules have been greatly simplified and streamlined by the recently adopted General Block Exemption Regulation ⁽⁷⁾ which now offers EFTA States a wide panoply of aid measures with minimum administrative burden. In the current economic situation, the following existing State aid instruments are of particular importance:

(19) The *de minimis* Regulation ⁽⁸⁾ as adapted to the EEA Agreement specifies that support measures worth up to EUR 200 000 per company over any three year period do not constitute State aid within the meaning of the EEA Agreement. The same Regulation also states that guarantees of up to EUR 1,5 million do not exceed the *de minimis* threshold and therefore do not constitute State aid. Consequently, EFTA States can grant such guarantees without calculation of the corresponding aid equivalent and without administrative burdens.

(20) The above-mentioned General Block Exemption Regulation (GBER) forms a central element of the State aid rules by simplifying the State aid procedure for certain important aid measures and fostering redirection of State aid to priority EEA objectives. All previously existing block exemptions, along with new areas (innovation, environment, research and development for large companies and risk capital measures for SMEs) have been brought under a single instrument. In all the cases covered by the GBER, EFTA States can grant aid without prior notification to the Authority. Therefore, the speed of the process lies fully in the hands of the EFTA States. The GBER is particularly important for SMEs, in that it provides for special rules on investment and employment aid exclusively for SMEs. In addition, all the 26 measures covered are open to SMEs, allowing EFTA States to accompany SMEs during the different stages in their development, assisting them in areas ranging from access to finance to research and development, innovation, training, employment, environmental measures, etc.

(21) New Guidelines on State aid for environmental protection ⁽⁹⁾ provide that EFTA States may grant State aid, *inter alia*, as follows:

— aid for companies which improve their environmental performance beyond Community standards, or in the absence of Community standards, of up to 70 % of the extra investment costs (up to 80 % in the field of eco-innovation) for small undertakings and of up to 100 % of the extra investment costs if the aid is granted following a genuinely competitive bidding process, even for large companies; aid for early adaptation to future Community standards and aid for environmental studies is also allowed;

— in the field of renewable energies and cogeneration, EFTA States may grant operating aid to cover all extra production costs;

— in order to attain environmental targets for energy saving and for reductions in greenhouse gas emissions, EFTA States may grant aid enabling undertakings to achieve energy savings and aid for renewable energy sources and cogeneration of up to 80 % of the extra investment costs for small undertakings and of up to 100 % of the extra investment costs if the aid is granted following a genuinely competitive bidding process.

⁽⁵⁾ OJ L 310, 9.11.2006, p. 15.

⁽⁶⁾ OJ L 412, 30.12.2006, p. 1.

⁽⁷⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation OJ L 214, 9.8.2008, p. 3) incorporated into the EEA Agreement at point 1j of Annex XV to the Agreement by Decision No 120/2008 of 7 November 2008 (OJ L 339, 18.12.2008, p. 111, and EEA Supplement No 79, 18.12.2008), e.i.f. 8.11.2008.

⁽⁸⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5) incorporated into the EEA Agreement at point 1ea of Annex XV to the Agreement by Decision No 29/2007 (OJ L 209, 9.8.2007, p. 52, and EEA Supplement No 38, 9.8.2007, p. 34), e.i.f. 28.4.2007.

⁽⁹⁾ The updated version of the State aid Guidelines is published on the Authority's website: http://www.efasurv.int/fieldsOfWork/fieldstateaid/state_aid_guidelines

- (22) On 7 February 2007, the Authority adopted new Guidelines for State aid for research and development and innovation. That text contains new provisions on innovation, specially targeted at SMEs and also corresponding to better targeting of aid on job and growth creation along the lines set out in the Lisbon Strategy. In particular, EFTA States may grant State aid, *inter alia*, as follows:
- aid for R&D projects, in particular aid for fundamental research, of up to 100 % of the eligible costs and aid for industrial research of up to 80 % for small enterprises;
 - aid for young innovative enterprises of up to EUR 1 million and even more in assisted regions, aid for innovation clusters, aid for innovation advisory services and aid for innovation support services;
 - aid for the loan of highly qualified personnel, aid for technical feasibility studies, aid for process and organisational innovation in services and aid for industrial property rights costs for SMEs.
- (23) Training is another key element for competitiveness. It is critically important to maintain investment in training, even at a time of rising unemployment, in order to develop new skills. Under the new GBER, EFTA States may grant both general and specific training aid to companies totalling up to 80 % of the eligible costs.
- (24) In 2008, the Authority adopted new Guidelines on State aid in the form of guarantees, which specify the conditions under which public guarantees for loans do not constitute State aid. In accordance with those Guidelines, guarantees are not considered State aid, in particular, when a market price is paid for them. Besides clarifying the conditions which determine whether or not aid in the form of guarantees is present, the new Guidelines also introduce, for the first time, specific safe-harbour premiums for SMEs, allowing easier but safe use of guarantees in order to foster the financing of SMEs.
- (25) New Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises were adopted by the Authority on 25 October 2006. These are aimed at innovative and fast growing SMEs—a key focus of the Lisbon Strategy. The Authority put in place a new safe-harbour threshold of EUR 1,5 million per target SME, a 50 % increase. Beneath that ceiling the Authority accepts that, as a rule, alternative means of funding from financial markets are lacking (that is to say, that a market failure exists). In addition, aid for risk capital has been included in the GBER.
- (26) In disadvantaged regions, EFTA States can grant investment aid for setting up a new establishment, extending an existing establishment or diversifying into new products under the Guidelines on national regional aid 2007–2013, which have applied since January 2007.
- (27) The Guidelines on national regional aid 2007–2013 also introduce a new form of aid to provide incentives to support business start-ups and the early stage development of small enterprises in assisted areas.
- (28) Under the existing Guidelines on State aid for rescuing and restructuring firms in difficulty, EFTA States can also grant aid to companies requiring public support. For that purpose, EFTA States may notify rescue and/or restructuring aid schemes for SMEs.

4. APPLICABILITY OF ARTICLE 61(3)(B)

4.1. General principles

- (29) Pursuant to Article 61(3)(b) of the EEA Agreement the Authority may declare compatible with the functioning of the EEA Agreement aid 'to remedy a serious disturbance in the economy of an EFTA State'. This provision is identical to Article 87(3)(b) EC, in relation to which the European Court of First Instance has ruled that the disturbance must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. This, moreover, is in line with the need to interpret strictly any derogating provision such as Article 61(3)(b) of the EEA Agreement ⁽¹⁰⁾.

⁽¹⁰⁾ Joined cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG v Commission* [1999] ECR II-3663, paragraph 167.

- (30) This strict interpretation has been consistently applied by the Commission in its decision-making⁽¹¹⁾. The Authority has also adopted a strict interpretation of Article 61(3)(b) EEA⁽¹²⁾.
- (31) In this context, the Authority considers that, beyond emergency support for the financial system, the current global crisis requires exceptional policy responses.
- (32) All EFTA States will be affected by this crisis, albeit in different ways and to different degrees, and it is likely that unemployment will increase, demand fall and fiscal positions deteriorate.
- (33) In the light of the seriousness of the current financial crisis and its impact on the overall economy of the EFTA States, the Authority considers that certain categories of State aid are justified, for a limited period, to remedy those difficulties and that they may be declared compatible with the functioning of the EEA Agreement on the basis of Article 61(3)(b) thereof.

4.2. Compatible limited amount of aid

4.2.1. Existing framework

- (34) Article 2 of the *de minimis* Regulation⁽¹³⁾ as adapted to the EEA Agreement states that:

'Aid measures shall be deemed not to meet all the criteria of Article 61(1) of the EEA Agreement and shall therefore be exempt from the notification requirement of Article 2 of Part II of Protocol 3 to the Surveillance and Court Agreement, if they fulfil the conditions laid down in paragraphs 2 to 5 of this Article.

The total *de minimis* aid granted to any one undertaking shall not exceed EUR 200 000 over any period of three fiscal years. The total *de minimis* aid granted to any one undertaking active in the road transport sector shall not exceed EUR 100 000 over any period of three fiscal years. These ceilings shall apply irrespective of the form of the *de minimis* aid or the objective pursued and regardless of whether the aid granted by the EFTA State is financed entirely or partly by resources of Community origin. The period shall be determined by reference to the fiscal years used by the undertaking in the EFTA State concerned'.

4.2.2. New measure

- (35) The financial crisis is affecting not only structurally weak companies but also companies which will find themselves facing a sudden shortage or even unavailability of credit. An improvement in the financial situation of those companies will have positive effects for the whole EEA economy.
- (36) Therefore, in view of the current economic situation, it is considered necessary to temporarily allow the granting of a limited amount of aid that will nevertheless fall within the scope of Article 61(1) of the EEA Agreement, since it exceeds the threshold indicated in the *de minimis* Regulation.
- (37) The Authority will consider such State aid compatible with the functioning of the EEA Agreement on the basis of Article 61(3)(b) of the EEA Agreement, provided all the following conditions are met:
- (a) the aid does not exceed a cash grant of EUR 500 000 per undertaking; all figures used must be gross, that is, before any deduction of tax or other charge; where aid is awarded in a form other than a grant, the aid amount is the gross grant equivalent of the aid;
- (b) the aid is granted in the form of a scheme;
- (c) the aid is granted to firms which were not in difficulty⁽¹⁴⁾ on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis;

⁽¹¹⁾ Commission Decision 98/490/EC in case 47/96 *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28), point 10.1; Commission Decision 2005/345/EC in case 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1), points 153 et seq.; and Commission Decision 2008/263/EC in case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7), point 166. See also Commission Decision in case NN 70/07 *Northern Rock* (OJ C 43, 16.2.2008, p. 1) and Commission Decision of 4 June 2008 in case C 9/08 *SachsenLB*, not yet published.

⁽¹²⁾ The Authority has never approved an aid measure on the basis of Article 61(3)(b) EEA.

⁽¹³⁾ See footnote 8 above.

⁽¹⁴⁾ For large companies, see point 2.1 of the Guidelines on State aid for restructuring firms in difficulty. For SMEs, see Article 1(7) on the definition of the General Block Exemption Regulation.

- (d) the aid is not export aid or aid favouring domestic over imported products;
- (e) the aid is granted no later than 31 December 2010;
- (f) prior to granting the aid, the EFTA State obtains a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid and aid pursuant to this measure, received during the current fiscal year and checks that the aid will not raise the total amount of aid received by the undertaking during the period 1 January 2008 to 31 December 2010 to a level above the ceiling of EUR 500 000;
- (g) the aid scheme does not apply to undertakings active in the primary production of agricultural products; it may apply to undertakings active in the processing and marketing of agricultural products⁽¹⁵⁾ unless the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned, or the aid is conditional on being partly or entirely passed on to primary producers⁽¹⁶⁾.

4.3. Aid in the form of guarantees

4.3.1. Existing framework

- (38) The Guidelines on State aid in the form of guarantees aim at giving EFTA States detailed guidance about the principles on which the Authority intends to base its interpretation of Articles 61 and 62 of the EEA Agreement and the application thereof to state guarantees. In particular, the Guidelines specify the conditions under which State aid can be considered not to be present. It does not provide compatibility criteria for assessment of guarantees.

4.3.2. New measure

- (39) In order to further encourage access to finance and to reduce the current high risk aversion on the part of banks, subsidised loan guarantees for a limited period can be an appropriate and well targeted solution to give firms easier access to finance.
- (40) The Authority will consider such State aid compatible with the functioning of the EEA Agreement on the basis of Article 61(3)(b) thereof, provided all the following conditions are met:
- (a) for SMEs, EFTA States grant a reduction of up to 25 % of the annual premium to be paid for new guarantees granted in accordance with the safe-harbour provisions of the Guidelines on State aid in the form of guarantees⁽¹⁷⁾;
 - (b) for large companies, EFTA States also grant a reduction of up to 15 % of the annual premium for new guarantees calculated on the basis of the same safe-harbour provisions;
 - (c) when the aid element in guarantee schemes is calculated through methodologies already accepted by the Authority following their notification under a regulation incorporated into the EEA Agreement in the field of State aid⁽¹⁸⁾, EFTA States may also grant a similar reduction of up to 25 % of the annual premium to be paid for new guarantees for SMEs and up to 15 % for large companies;

⁽¹⁵⁾ As defined in Article 2.3 and 2.4 of Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

⁽¹⁶⁾ For the State aid provisions in Article 61 to 63 of the EEA Agreement to apply, State aid must be granted to undertakings involved in the production of goods which fall within the product scope of the EEA Agreement. Article 8(3) of the Agreement provides that 'unless otherwise specified, the provisions of this Agreement shall apply only to: (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2; (b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol. Agricultural products, in so far as they do not fall under Chapters 25 to 97 of the Harmonized Commodity Description and Coding System or are specified in Protocol 3, fall outside the scope of application of the EEA Agreement.'

⁽¹⁷⁾ This includes the possibility that for SMEs which do not have a credit history or a rating based on a balance sheet approach, such as certain special purpose companies or start-up companies, EFTA States grant a reduction of up to 25 % on the specific safe-harbour premium, set at 3,8 % in the Guidelines.

⁽¹⁸⁾ Such as the General Block Exemption Regulation or Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29) incorporated into the EEA Agreement at point 1i of Annex XV of the Agreement by Decision No 157/2006 (OJ L 89, 29.3.2007, p. 33, and EEA Supplement No 15, 29.3.2007, p. 26), provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

- (d) the maximum loan does not exceed the total annual wage bill of the beneficiary (including social charges as well as the cost of personnel working on the company site but formally in the payroll of subcontractors) for 2008. In the case of companies created on or after 1 January 2008, the maximum loan must not exceed the estimated annual wage bill for the first two years in operation;
- (e) guarantees are granted until 31 December 2010 at the latest;
- (f) the guarantee does not exceed 90 % of the loan;
- (g) the guarantee may relate to both investment and working capital loans;
- (h) the reduction of the guarantee premium is applied during a maximum period of two years following the granting of the guarantee;
- (i) the aid is granted to firms which were not in difficulty⁽¹⁹⁾ on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis.

4.4. *Aid in the form of a subsidised interest rate*

4.4.1. Existing framework

- (41) The Guidelines on reference and discount rates establish a method for calculation of the reference rate, based on the one-year inter-bank offered rate (IBOR) increased by margins ranging from 60 to 1 000 base points, depending on the creditworthiness of the company and the level of collateral offered. If EFTA States apply that method, the interest rate does not contain State aid.

4.4.2. New measure

- (42) Companies may have difficulties in finding finance in the current market circumstances. Therefore the Authority will accept that public or private loans are granted at an interest rate which is at least equal to the central bank overnight rate plus a premium equal to the difference between the average one year interbank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the Authority's Guidelines on reference and discount rates.
- (43) The aid element contained in the difference between this interest rate and the reference rate defined by the Guidelines on reference and discount rates will be considered, on a temporary basis, to be compatible with the functioning of the EEA Agreement on the basis of Article 61(3)(b) thereof, provided the following conditions are met:
 - (a) this method applies to all contracts concluded on 31 December 2010 at the latest; it may cover loans of any duration: the reduced interest rates may be applied for interest payments before 31 December 2012⁽²⁰⁾; an interest rate at least equal to the rate defined in the Guidelines on reference and discount rates must apply to loans after that date;
 - (b) the aid is granted to firms which were not in difficulty on 1 July 2008⁽²¹⁾; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis.

4.5. *Aid for the production of green products*

4.5.1. Existing framework

- (44) The Guidelines on reference and discount rates establish a method for calculation of the reference rate, based on the one-year inter-bank offered rate (IBOR) increased by margins ranging from 60 to 1 000 base points, depending on the creditworthiness of the company and the level of collateral offered. If EFTA States apply that method, the interest rate does not contain State aid.

⁽¹⁹⁾ See footnote 14 above.

⁽²⁰⁾ EFTA States wishing to use this facility have to publish the daily overnight rates online and make them available to the Authority.

⁽²¹⁾ See footnote 14 above.

4.5.2. New measure

- (45) Because of the current financial crisis, companies are also finding it more difficult to gain access to finance for production of more environmentally friendly products. Aid in the form of guarantees may not be sufficient to finance costly projects aiming at increasing environmental protection by adapting earlier to future standards not yet in force or by going beyond such standards.
- (46) The Authority considers that environmental goals should remain a priority despite the financial crisis. Production of more environmentally friendly, including energy-efficient products, is in the EEA's common interest and it is important that the financial crisis should not impede this objective.
- (47) Therefore, additional measures in the form of subsidised loans could encourage production of 'green products'. However, subsidised loans may cause serious distortions of competition and should be strictly limited to specific situations and targeted investment.
- (48) The Authority considers that, for a limited period, EFTA States should be given the possibility of granting aid in the form of an interest-rate reduction.
- (49) On the basis of Article 61(3)(b) of the EEA Agreement, the Authority will consider compatible with the functioning of the EEA Agreement any interest-rate subsidy for investment loans that meets all the following conditions:
- (a) the aid relates to investment loans for financing projects consisting of production of new products which significantly improve environmental protection;
 - (b) the aid is necessary for launching a new project; in the case of existing projects, aid may be granted if it becomes necessary, due to the new economic situation, in order to pursue the project;
 - (c) the aid is granted only for projects consisting of production of products involving early adaptation to or going beyond future Community product standards ⁽²²⁾ which increase the level of environmental protection and are not yet in force;
 - (d) for products involving early adaptation to or going beyond future Community environmental standards, the investment starts on 31 December 2010 at the latest with the objective of putting the product on the market at least two years before the standard enters into force;
 - (e) the loans may cover the costs of investment in tangible and intangible assets ⁽²³⁾ with the exception of loans for investments which account for production capacities of more than 3 % on product markets ⁽²⁴⁾ where the average annual growth rate, over the last five years before the start of the investment, of the apparent consumption on the EEA market, measured in value data, remained below the average annual growth rate of the EEA's GDP over the same five year reference period;
 - (f) the loans are granted on 31 December 2010 at the latest;
 - (g) for calculation of the aid, the starting point should be the individual rate of the beneficiary as calculated on the basis of the methodology contained in point 4.4.2 of these Guidelines. On the basis of that methodology, the company may benefit from an interest-rate reduction of:
 - 25 % for large companies;
 - 50 % for SMEs.
 - (h) the subsidised interest rate applies during a maximum period of two years following the granting of the loan;

⁽²²⁾ Future Community product standard means a mandatory Community standard setting environmental levels to be attained for products sold in the European Union which has been adopted but is not yet in force.

⁽²³⁾ As defined in point 70 of the Guidelines on State aid for environmental protection.

⁽²⁴⁾ Defined according to point 58 of the Regional aid Guidelines.

- (i) the reduction in the interest rate may be applied to loans granted by the State or public finance institutions and to loans granted by private financial institutions. Non-discrimination between public and private entities should be ensured;
- (j) the aid is granted to firms which were not in difficulty ⁽²⁵⁾ on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis;
- (k) EFTA States ensure that the aid is not directly or indirectly transferred to financial entities.

4.6. Risk capital measures

4.6.1. Existing framework

- (50) The Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises set out the conditions under which State aid supporting risk capital investment may be considered compatible with the functioning of the EEA Agreement in accordance with Article 61(3) of the EEA Agreement.
- (51) Based on the experience gained from applying the Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises, the Authority considers that there is no general risk capital market failure in the EEA. It does, however, accept that there are market gaps for some types of investment at certain stages of enterprises' development which are the result of imperfect matching of supply of and demand for risk capital and can generally be described as an equity gap.
- (52) Point 4.3 of the above-mentioned Guidelines states that for tranches of finance not exceeding EUR 1,5 million per target SME over each period of twelve months, under certain conditions market failure is presumed and does not need to be demonstrated by EFTA States.
- (53) Point 5.1(a) of the same Guidelines states that 'the Authority is aware of the constant fluctuation of the risk capital market and of the equity gap over time, as well as of the different degree by which enterprises are affected by the market failure depending on their size, on their stage of business development, and on their economic sector. Therefore, the Authority is prepared to consider declaring risk capital measures providing for investment tranches exceeding the threshold of EUR 1,5 million per enterprise per year compatible with the functioning of the EEA Agreement, provided the necessary evidence of the market failure is submitted'.

4.6.2. Temporary adaptation of the existing rules

- (54) The turmoil on the financial market has had a negative effect on the risk capital market for early growth SMEs by tightening the availability of risk capital. Due to the currently greatly increased risk perception associated with risk capital linked with uncertainties resulting from possibly lower yield expectations, investors are currently tending to invest in safer assets the risks of which are easier to assess as compared to those associated with risk capital investments. Furthermore the illiquid nature of risk capital investments has proven to be a further disincentive for investors. There is evidence that the resulting restricted liquidity under current market circumstances has widened the equity gap for SMEs. It is therefore considered appropriate to temporarily raise the safe-harbour threshold for risk capital investments to meet the increased equity gap and to temporarily lower the percentage of minimum private investor participation to 30 % also in the case of measures targeting SMEs in non assisted areas.
- (55) Accordingly, on the basis of Article 61(3)(b) of the EEA Agreement, certain limits set out in the Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises are temporarily adapted until 31 December 2010 as follows:
 - (a) for the purposes of point 4.3.1, the maximum permitted tranches of finance are increased to EUR 2,5 million from EUR 1,5 million per target SME over each period of twelve months;
 - (b) for the purposes of point 4.3.4, the minimum amount of funding to be provided by private investors is 30 % both in and outside assisted areas;
 - (c) other conditions laid down in the Guidelines remain applicable;

⁽²⁵⁾ See footnote 14 above.

(d) this temporary adaptation of the guidelines does not apply to risk capital measures covered by the GBER;

(e) EFTA States may adapt approved schemes to reflect the temporary adaptation of the guidelines.

4.7. Cumulation

(56) The aid ceilings fixed under these Guidelines will be applied regardless of whether the support for the aided project is financed entirely from state resources or partly financed by the Community.

(57) The temporary aid measures foreseen by these Guidelines may not be cumulated with aid falling within the scope of the *de minimis* Regulation for the same eligible costs. If the undertaking has already received *de minimis* aid prior to the entry into force of this temporary framework the sum of the aid received under the measures covered by point 4.2 of these Guidelines and the *de minimis* aid received must not exceed EUR 500 000 between 1 January 2008 and 31 December 2010. The amount of *de minimis* aid received from 1 January 2008 must be deducted from the amount of compatible aid granted for the same purpose under points 4.3, 4.4, 4.5 or 4.6.

(58) The temporary aid measures may be cumulated with other compatible aid or with other forms of Community financing provided that the maximum aid intensities indicated in the relevant Guidelines or Block Exemption Regulations are respected.

5. SIMPLIFICATION MEASURES

5.1. Short-term export credit insurance

(59) The Guidelines on short-term export-credit insurance stipulate that marketable risks cannot be covered by export-credit insurance with the support of EFTA States. Marketable risks are commercial and political risks on public and non-public debtors established in countries listed in the Annex to the Guidelines, with a maximum risk period of less than two years. Risks concerning debtors established in the EU Member States and the EFTA States together with six further OECD members are considered marketable.

(60) The Authority considers that, as a consequence of the current financial crisis, a lack of insurance or reinsurance capacity does not exist in every EFTA State, but it cannot be excluded that, in certain countries, cover for marketable risks could be temporarily unavailable.

(61) Point 4, paragraphs 9 to 13, of the above-mentioned Guidelines states that:

'in such circumstances, those temporarily non-marketable risks may be taken on to the account of a public or publicly supported export-credit insurer for non-marketable risks insured for the account of or with the guarantee of the State. The insurer should, as far as possible, align its premium rates for such risks with the rates charged elsewhere by private export-credit insurers for the type of risk in question.

An EFTA State intending to use the escape clause should immediately notify the EFTA Surveillance Authority of its draft decision. That notification should contain a market report demonstrating the unavailability of cover for the risks in the private insurance market by producing evidence thereof from two large, well-known international private export-credit insurers as well as a national credit insurer, thus justifying the use of the escape clause. Alternatively, evidence of unavailability of cover in the private insurance market may possibly be demonstrated by means of a market report by an independent consultant which the Authority considers reliable and impartial. The notification should moreover contain a description of the conditions which the public or publicly supported export-credit insurer intends to apply in respect of such risks.

Within two months of the receipt of such notification, the Authority will examine whether the use of the escape clause is in conformity with the above conditions and compatible with the EEA Agreement.

If the Authority finds that the conditions for the use of the escape clause are fulfilled, its decision on compatibility is limited to two years from the date of the decision, provided that the market conditions justifying the use of the escape clause do not change during that period.

Furthermore, the Authority may, in consultation with the other EFTA States, revise the conditions for the use of the escape clause; it may also decide to discontinue it or replace it with another appropriate system'.

- (62) Those provisions, applicable to large companies and SMEs, are an appropriate instrument in the current economic situation if EFTA States consider that cover is unavailable on the private insurance market for certain marketable credit risks and/or for certain buyers of risk protection.
- (63) In this context, in order to speed up the procedure for EFTA States, the Authority considers that, until 31 December 2010, EFTA States may demonstrate the lack of market by providing sufficient evidence of the unavailability of cover for the risk in the private insurance market. Use of the escape clause will in any case be considered justified if:
- a large well-known international private export credit insurer and a national credit insurer produce evidence of the unavailability of such cover, or
 - at least four well-established exporters in the EFTA State produce evidence of refusal of cover from insurers for specific operations.
- (64) The Authority, in close cooperation with the EFTA States concerned, will ensure swift adoption of decisions concerning the application of the escape clause.

5.2. *Simplification of procedures*

- (65) State aid measures referred to in these Guidelines must be notified to the Authority. Beyond the substantive measures set out in these Guidelines, the Authority is committed to ensuring the swift authorisation of aid measures that address the current crisis in accordance with these Guidelines provided close cooperation and full information is provided by the EFTA States concerned.
- (66) This commitment will complement the on-going process, whereby the Commission is currently drafting a number of improvements to its general State aid procedures, particularly to allow quicker and more effective decision-making in close cooperation with Member States. This general simplification package should, in particular, enshrine joint commitments by the Commission and Member States to more streamlined and predictable procedures at each step of a State aid investigation and allow faster approval of straightforward cases.

6. MONITORING AND REPORTING

- (67) Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement laying down detailed rules for the application of Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement requires EFTA States to submit annual reports to the Authority.
- (68) By 31 July 2009, EFTA States must provide the Authority with a list of schemes put in place on the basis of the present Guidelines.
- (69) EFTA States must ensure that detailed records regarding the granting of aid provided for by these Guidelines are maintained. Such records, which must contain all information necessary to establish that the necessary conditions have been observed, must be maintained for ten years and be provided to the Authority upon request. In particular, EFTA States must have obtained information demonstrating that the aid beneficiaries under the measures provided for in points 4.2, 4.3, 4.4 and 4.5 were not companies in difficulty on 1 July 2008.
- (70) In addition, a report on the measures put in place on the basis of these Guidelines should be provided to the Authority by EFTA States by 31 October 2009. In particular, the report should provide elements indicating the need for the Authority to maintain the measures provided for by these Guidelines after 31 December 2009, as well as detailed information on the environmental benefits of the subsidised loans. EFTA States must also provide this information for any subsequent year during which these Guidelines are applied, before 31 October of each year.
- (71) The Authority may request additional information regarding the aid granted, to check whether the conditions laid down in the Authority's decision approving the aid measure have been met.

7. FINAL PROVISIONS

- (72) The Authority applies these Guidelines from the date of their adoption. These Guidelines are justified by the current exceptional and transitory financing problems related to the banking crisis and will not be applied after 31 December 2010. After consulting the EFTA States, the Authority may review them before that date on the basis of important competition policy or economic considerations. Where this would be helpful, the Authority may also provide further clarifications of its approach to particular issues.
- (73) The Authority applies the provisions of these Guidelines to all notified risk capital measures on which it must take a decision after these Guidelines are adopted, even if the measures were notified prior to adoption of these Guidelines.
- (74) In accordance with the Guidelines on the applicable rules for the assessment of unlawful State aid, the Authority will apply the following in respect of non-notified aid:
- (a) these Guidelines, if the aid was granted after adoption of these Guidelines;
 - (b) the guidelines applicable when the aid was granted in all other cases.
- (75) The Authority, in close cooperation with the EFTA States concerned, ensures swift adoption of the decisions upon complete notification of measures covered by this document. EFTA States should inform the Authority of their intentions and notify plans to introduce such measures as early and comprehensively as possible.
- (76) The Authority wishes to recall that any procedural improvement depends entirely on submission of clear and complete notifications.
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