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Contents

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[1] Text with EEA relevance

EN

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.

EN

II

(Non-legislative acts)

REGULATIONS

COMMISSION REGULATION (EU) No 432/2011

of 4 May 2011

refusing to authorise certain health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods [1], and in particular Article 18(5) thereof,

Whereas:

(1) Pursuant to Regulation (EC) No 1924/2006 health claims made on food are prohibited unless they are authorised by the Commission in accordance with that Regulation and included in a list of permitted claims.

(2) Regulation (EC) No 1924/2006 also provides that applications for authorisations of health claims may be submitted by food business operators to the national competent authority of a Member State. The national competent authority is to forward valid applications to the European Food Safety Authority (EFSA), hereinafter referred to as 'the Authority'.

(3) Following receipt of an application the Authority is to inform without delay the other Member States and the Commission and to deliver an opinion on a health claim concerned.

(4) The Commission is to decide on the authorisation of health claims taking into account the opinion delivered by the Authority.

(5) Following an application from Gencor Pacific Inc, submitted on 10 November 2009 pursuant to Article 13(5) of Regulation (EC) No 1924/2006, the Authority was required to deliver an opinion on a health claim related to the effects of ethanol-water extract of *Caralluma fimbriata* (Slimaluma®) on help to reduce waist circumference (Question No EFSA-Q-2010-00027) [2]. The claim proposed by the applicant was worded, as follows: 'Slimaluma® helps to reduce waist circumference'.

(6) On 12 May 2010 and on 18 May 2010, the Commission and the Member States received the scientific opinion from the Authority and its amendment respectively, which concluded that on the basis of the data submitted, a cause and effect relationship had not been established between the consumption of Slimaluma® and the beneficial physiological effect as defined by the Authority, namely, reduction of waist circumference leading to an improvement in adverse health effects associated with an excess abdominal fat. Accordingly, as the claim does not comply with the requirements of Regulation (EC) No 1924/2006, it should not be authorised.

(7) Following an application from Gencor Pacific Inc, submitted on 10 November 2009 pursuant to Article 13(5) of Regulation (EC) No 1924/2006, the Authority was required to deliver an opinion on a health claim related to the effects of ethanol-water extract of *Caralluma fimbriata* (Slimaluma®) on help to reduce body fat (Question No EFSA-Q-2010-00028) [3]. The claim proposed by the applicant was worded, as follows: 'Slimaluma® helps to reduce body fat'.

[1] OJ L 404, 30.12.2006, p. 9.

[2] The *EFSA Journal* 2010; 8 (5):1602.

[3] The *EFSA Journal* 2010; 8 (5):1602.

(8) On 12 May 2010, the Commission and the Member States received the scientific opinion from the Authority, which concluded that on the basis of the data submitted, a cause and effect relationship had not been established between the consumption of Slimaluma® and the claimed effect. Accordingly, as the claim does not comply with the requirements of Regulation (EC) No 1924/2006, it should not be authorised.

(9) Following an application from Gencor Pacific Inc, submitted on 10 November 2009 pursuant to Article 13(5) of Regulation (EC) No 1924/2006, the Authority was required to deliver an opinion on a health claim related to the effects of ethanol-water extract of *Caralluma fimbriata* (Slimaluma®) on help to reduce body weight (Question No EFSA-Q-2010-00029) ([1]). The claim proposed by the applicant was worded, as follows: 'Slimaluma® helps to reduce body weight'.

(10) On 12 May 2010, the Commission and the Member States received the scientific opinion from the Authority, which concluded that on the basis of the data submitted, a cause and effect relationship had not been established between the consumption of Slimaluma® and the claimed effect. Accordingly, as the claim does not comply with the requirements of Regulation (EC) No 1924/2006, it should not be authorised.

(11) Following an application from Gencor Pacific Inc, submitted on 10 November 2009 pursuant to Article 13(5) of Regulation (EC) No 1924/2006, the Authority was required to deliver an opinion on a health claim related to the effects of ethanol-water extract of *Caralluma fimbriata* (Slimaluma®) on decreased energy intake (Question No EFSA-Q-2010-00030) ([2]). The claim proposed by the applicant was worded, as follows: 'Slimaluma® helps to reduce caloric intake'.

(12) On 12 May 2010, the Commission and the Member States received the scientific opinion from the Authority, which concluded that on the basis of the data submitted, a cause and effect relationship had not been established between the consumption of Slimaluma® and the claimed effect. Accordingly, as the claim does not comply with the requirements of Regulation (EC) No 1924/2006, it should not be authorised.

(13) Following an application from Gencor Pacific Inc, submitted on 10 November 2009 pursuant to Article 13(5) of Regulation (EC) No 1924/2006, the Authority was required to deliver an opinion on a health claim related to the effects of ethanol-water extract of *Caralluma fimbriata* (Slimaluma®) on help to control hunger/appetite (Question No EFSA-Q-2010-00031) ([3]). The claim proposed by the applicant was worded, as follows: 'Slimaluma® helps to control hunger/appetite'.

(14) On 12 May 2010, the Commission and the Member States received the scientific opinion from the Authority, which concluded that on the basis of the data submitted, a cause and effect relationship had not been established between the consumption of Slimaluma® and the beneficial physiological effect as defined by the Authority, namely, reduction of appetite leading to a reduction in subsequent energy intake. Accordingly, as the claim does not comply with the requirements of Regulation (EC) No 1924/2006, it should not be authorised.

(15) Following an application from Leiber GmbH, submitted on 2 October 2009 pursuant to Article 13(5) of Regulation (EC) No 1924/2006, the Authority was required to deliver an opinion on a health claim related to the effects of Yestimun® on immune responses (Question No EFSA-Q-2008-667) ([4]). The claim proposed by the applicant was worded, inter alia, as follows: 'Daily administration of Yestimun® strengthens the body's defence during the cold season'.

(16) On 27 May 2010, the Commission and the Member States received the scientific opinion from the Authority, which concluded that on the basis of the data submitted, a cause and effect relationship had not been established between the consumption of Yestimun® and the initiation of appropriate innate and adaptive immune responses. Accordingly, as the claim does not comply with the requirements of Regulation (EC) No 1924/2006, it should not be authorised.

(17) Following an application from Laboratoires innéov SNC, submitted on 30 December 2008 pursuant to Article 13(5) of Regulation (EC) No 1924/2006, the Authority was required to deliver an opinion on a health claim related to the effects of black-currant seed oil (*Ribes nigrum*), fish oil, lycopene from tomato (*Lycopersicon esculentum*) extract, vitamin C and vitamin E on help to improve dry skin conditions (Question No EFSA-Q-2009-00767) ([5]). The claim proposed by the applicant was worded, inter alia, as follows: 'Helps to improve dry skin condition'.

([1]) The *EFSA Journal* 2010; 8 (5):1604.
([2]) The *EFSA Journal* 2010; 8 (5):1605.
([3]) The *EFSA Journal* 2010; 8 (5):1606.
([4]) The *EFSA Journal* 2010; 8 (5):1607.
([5]) The *EFSA Journal* 2010; 8 (5):1608.

(18) On 25 May 2010, the Commission and the Member States received the scientific opinion from the Authority, which concluded that on the basis of the data submitted, a cause and effect relationship had not been established between the intake of a combination of blackcurrant seed oil (*Ribes nigrum*), fish oil, lycopene from tomato (*Lycopersicon esculentum*) extract, vitamin C and vitamin E and the claimed effect. Accordingly, as the claim does not comply with the requirements of Regulation (EC) No 1924/2006, it should not be authorised.

(19) The comments from the applicants and the members of the public received by the Commission, pursuant to Article 16(6) of Regulation (EC) No 1924/2006, have been considered when setting the measures provided for in this Regulation.

(20) The health claims related to Slimaluma® are health claims as referred to in point (c) of Article 13(1) of Regulation (EC) No 1924/2006 and are therefore subject to the transition period laid down in Article 28(6) of that Regulation. However, as the applications were not made before 19 January 2008, the requirement provided for in point (b) of Article 28(6) of that Regulation is not fulfilled, and therefore those claims may not benefit from the transition period provided for in that Article.

(21) The health claims related to Yestimun®, and to blackcurrant seed oil (*Ribes nigrum*), fish oil, lycopene from tomato (*Lycopersicon esculentum*) extract, vitamin C and vitamin E, are health claims as referred to in point (a) of Article 13(1) of Regulation (EC) No 1924/2006 and are therefore subject to the transition period laid down in Article 28(5) of that Regulation. As the Authority concluded that cause and effect relationships have not been established between the foods and the respective claimed effects, the two claims do not comply with Regulation (EC) No 1924/2006, and therefore they may not benefit from the transition period provided for in that Article.

(22) In order to ensure that this Regulation is fully complied with, both food business operators and the national competent authorities should take the necessary actions to ensure that, at the latest six months following the entry into force of this Regulation, products bearing the health claims listed in its Annex are no longer present on the market.

(23) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health and neither the European Parliament nor the Council have opposed them,

HAS ADOPTED THIS REGULATION:

Article 1

The health claims set out in the Annex to this Regulation shall not be included in the Union list of permitted claims as provided for in Article 13(3) of Regulation (EC) No 1924/2006.

However, products bearing these health claims placed on the market or labelled prior to the date referred to in Article 2 may remain on the market for a maximum period of six months after that date.

Article 2

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 May 2011.

For the Commission
The President
José Manuel BARROSO

ANNEX

Rejected health claims

Application — Relevant provisions of Regulation (EC) No 1924/2006	Nutrient, substance, food or food category	Claim	EFSA opinion reference
Article 13(5). Health claim based on newly developed scientific evidence and/or including a request for the protection of proprietary data	Ethanol-water extract of *Caralluma fimbriata* (Slimaluma®)	Slimaluma® helps to reduce waist circumference	Q-2010-00027
Article 13(5). Health claim based on newly developed scientific evidence and/or including a request for the protection of proprietary data	Ethanol-water extract of *Caralluma fimbriata* (Slimaluma®)	Slimaluma® helps to reduce body fat	Q-2010-00028
Article 13(5). Health claim based on newly developed scientific evidence and/or including a request for the protection of proprietary data	Ethanol-water extract of *Caralluma fimbriata* (Slimaluma®)	Slimaluma® helps to reduce body weight	Q-2010-00029
Article 13(5). Health claim based on newly developed scientific evidence and/or including a request for the protection of proprietary data	Ethanol-water extract of *Caralluma fimbriata* (Slimaluma®)	Slimaluma® helps to reduce caloric intake	Q-2010-00030
Article 13(5). Health claim based on newly developed scientific evidence and/or including a request for the protection of proprietary data	Ethanol-water extract of *Caralluma fimbriata* (Slimaluma®)	Slimaluma® helps to control hunger/appetite	Q-2010-00031
Article 13(5). Health claim based on newly developed scientific evidence and/or including a request for the protection of proprietary data	Yestimun®	Daily administration of Yestimun® strengthens the body's defence during the cold season	Q-2008-667
Article 13(5). Health claim based on newly developed scientific evidence and/or including a request for the protection of proprietary data	Combination of blackcurrant seed oil *(Ribes nigrum)*, fish oil, lycopene from tomato *(Lycopersicon esculentum)* extract, vitamin C and vitamin E	Helps to improve dry skin condition	Q-2009-00767

COMMISSION IMPLEMENTING REGULATION (EU) No 433/2011

of 4 May 2011

amending Annex I to Regulation (EC) No 669/2009 implementing Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [1], and in particular Article 15(5) thereof,

Whereas:

(1) Commission Regulation (EC) No 669/2009 [2] lays down rules concerning the increased level of official controls to be carried out on imports of feed and food of non-animal origin listed in Annex I thereto (the list), at the points of entry into the territories referred to in Annex I to Regulation (EC) No 882/2004.

(2) Article 2 of Regulation (EC) No 669/2009 provides that the list is to be reviewed on a regular basis, and at least quarterly, taking into account at least the sources of information referred to in that Article.

(3) The occurrence and relevance of food incidents notified through the Rapid Alert System for Food and Feed (RASFF), the findings of missions to third countries carried out by the Food and Veterinary Office, as well as the quarterly reports on consignments of feed and food of non-animal origin submitted by Member States to the Commission in accordance with Article 15 of Regulation (EC) No 669/2009 indicate that the list should be amended.

(4) In particular, the list should be amended by deleting the entries for commodities for which those information sources indicate an overall satisfactory degree of compliance with the relevant safety requirements provided for in Union legislation and for which an increased level of official control is therefore no longer justified.

(5) In addition, certain other commodities for which the information sources indicate a degree of non-compliance with the relevant safety requirements, thereby warranting the introduction of increased level of official controls, should be included in the list.

(6) The entries in the list for certain imports from Turkey and Thailand should therefore be amended accordingly.

(7) In the interest of clarity of Union legislation, it is also necessary to make a small precision in the list regarding the entries for imports of okra from India and sweet peppers from Turkey.

(8) The amendment to the list concerning the deletion of the references to commodities should apply as soon as possible, as the original safety concerns have been satisfied. Accordingly, those amendments should apply from the date of entry into force of this Regulation.

(9) Taking into account the number of amendments that need to be made to Annex I to Regulation (EC) No 669/2009, it is appropriate to replace it by the text in the Annex to this Regulation.

(10) Regulation (EC) No 669/2009 should therefore be amended accordingly.

(11) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 669/2009 is replaced by the text in the Annex to this Regulation.

[1] OJ L 165, 30.4.2004, p. 1.
[2] OJ L 194, 25.7.2009, p. 11.

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

It shall apply from 1 July 2011.

However, the deletions of the entries for Turkey for courgettes and pears shall apply from the date of entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 May 2011.

For the Commission
The President
José Manuel BARROSO

ANNEX

'ANNEX I

(A) **Feed and food of non-animal origin subject to an increased level of official controls at the designated point of entry**

Feed and food (intended use)	CN code (1)	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved *(Feed and food)*	— 1202 10 90 — 1202 20 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98	Argentina	Aflatoxins	10
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved *(Feed and food)*	— 1202 10 90 — 1202 20 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98	Brazil	Aflatoxins	10
Dried Noodles *(Food)*	ex 1902	China	Aluminium	10
— Yardlong beans (*Vigna unguiculata* spp. *sesquipedalis*) — Bitter melon (*Momordica charantia*) — Lauki (*Lagenaria siceraria*) — Peppers (*Capsicum* spp.) — Aubergines *(Food — fresh, chilled or frozen vegetables)*	— ex 0708 20 00; ex 0710 22 00 — ex 0709 90 90; ex 0710 80 95 — ex 0709 90 90; ex 0710 80 95 — 0709 60 10; 0709 60 99; 0710 80 51; 0710 80 59 — 0709 30 00; ex 0710 80 95	Dominican Republic	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with single-residue methods (3)	50
— Oranges (fresh or dried) — Peaches — Pomegranates — Strawberries — Green beans *(Food — fresh fruits and vegetables)*	— 0805 10 20; 0805 10 80 — 0809 30 90 — ex 0810 90 95 — 0810 10 00 — ex 0708 20 00	Egypt	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with single-residue methods (7)	10

Feed and food (intended use)	CN code (1)	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter *(Feed and food)*	— 1202 10 90 — 1202 20 00 — 2008 11 10	Ghana	Aflatoxins	50
Curry leaves *(Bergera/ Murraya koenigii)* *(Food — fresh herbs)*	ex 1211 90 85	India	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with Single residue methods (5)	10
— Chilli *(Capsicum annuum)*, whole — Chilli *(Capsicum annuum)*, crushed or ground — Chilli products (curry) — Nutmeg *(Myristica fragrans)* — Mace *(Myristica fragrans)* — Ginger *(Zingiber officinale)* — *Curcuma longa* (turmeric) *(Food — dried spices)*	— ex 0904 20 10 — ex 0904 20 90 — 0910 91 05 — 0908 10 00 — 0908 20 00 — 0910 10 00 — 0910 30 00	India	Aflatoxins	50
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved *(Feed and food)*	— 1202 10 90 — 1202 20 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98	India	Aflatoxins	20
Fresh okra *(Food)*	ex 0709 90 90	India	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with single-residue methods (2)	10
Watermelon *(egusi, Citrullus lanatus)* seeds and derived products *(Food)*	ex 1207 99 97; ex 1106 30 90; ex 2008 99 99;	Nigeria	Aflatoxins	50
Basmati rice for direct human consumption *(Food — milled rice)*	ex 1006 30	Pakistan	Aflatoxins	20

Feed and food (intended use)	CN code (1)	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Chilli *(Capsicum annuum)*, whole — Chilli *(Capsicum annuum)*, crushed or ground *(Food — dried spice)*	— ex 0904 20 10 — ex 0904 20 90	Peru	Aflatoxins and Ochratoxin A	10
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved *(Feed and food)*	— 1202 10 90 — 1202 20 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98	South Africa	Aflatoxins	10
— Fresh chilli peppers (*Capsicum* spp.) *(Food)*	ex 0709 60 10, ex 0710 80 51; ex 0709 60 99, ex 0710 80 59	Thailand	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with single-residue methods (9)	10
— Coriander leaves — Basil (holy, sweet) — Mint *(Food — fresh herbs)*	— ex 0709 90 90 — ex 1211 90 85 — ex 1211 90 85	Thailand	Salmonella (6)	10
— Coriander leaves — Basil (holy, sweet) *(Food — fresh herbs)*	— ex 0709 90 90 — ex 1211 90 85	Thailand	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with single-residue methods (4)	20
— Yardlong beans *(Vigna unguiculata* spp. *sesquipedalis)* — Aubergines — Brassica vegetables *(Food — fresh, chilled or frozen vegetables)*	— ex 0708 20 00; ex 0710 22 00 — 0709 30 00; ex 0710 80 95 — 0704; ex 0710 80 95	Thailand	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with single-residue methods (4)	50

Feed and food (intended use)	CN code (1)	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Sweet Peppers *(Capsicum annuum)* — Tomatoes *(Food — fresh, chilled or frozen vegetables)*	— 0709 60 10; 0710 80 51 — 0702 00 00; 0710 80 70	Turkey	Pesticide residues analysed with multi-residue methods based on GC-MS and LC-MS or with single-residue methods (8)	10
Dried grapes (vine fruit) *(Food)*	0806 20	Uzbekistan	Ochratoxin A	50
— Chilli *(Capsicum annuum)*, crushed or ground — Chilli products (curry) — *Curcuma longa* (turmeric) *(Food — dried spices)* — Red palm oil *(Food)*	— ex 0904 20 90 — 0910 91 05 — 0910 30 00 — ex 1511 10 90	All third countries	Sudan dyes	10

(1) Where only certain products under any CN code are required to be examined and no specific subdivision under that code exists in the goods nomenclature, the CN code is marked "ex" (for example, ex 1006 30: only Basmati rice for direct human consumption is included).
(2) In particular residues of: Acephate, Methamidophos, Triazophos, Endosulfan, Monocrotophos.
(3) In particular residues of: Amitraz, Acephate, Aldicarb, Benomyl, Carbendazim, Chlorfenapyr, Chlorpyrifos, CS2 (Dithiocarbamates), Diafenthiuron, Diazinon, Dichlorvos, Dicofol, Dimethoate, Endosulfan, Fenamidone, Imidacloprid, Malathion, Methamidophos, Methiocarb, Methomyl, Monocrotophos, Omethoate, Oxamyl, Profenofos, Propiconazole, Thiabendazol, Thiacloprid.
(4) In particular residues of: Acephate, Carbaryl, Carbendazim, Carbofuran, Chlorpyriphos, Chlorpyriphos-methyl, Dimethoate, Ethion, Malathion, Metalaxyl, Methamidophos, Methomyl, Monocrotophos, Omethoate, Prophenophos, Prothiophos, Quinalphos, Triadimefon, Triazophos, Dicrotophos, EPN, Triforine.
(5) In particular residues of: Triazophos, Oxydemeton-methyl, Chlorpyriphos, Acetamiprid, Thiamethoxam, Clothianidin, Methamidophos, Acephate, Propargite, Monocrotophos.
(6) Reference method EN/ISO 6579 or a method validated against it as referred to in Article 5 of Commission Regulation (EC) No 2073/2005 (OJ L 338, 22.12.2005, p. 1).
(7) In particular residues of: Carbendazim, Cyfluthrin Cyprodinil, Diazinon, Dimethoate, Ethion, Fenitrothion, Fenpropathrin, Fludioxonil, Hexaflumuron, Lambda-cyhalothrin, Methiocarb, Methomyl, Omethoate, Oxamyl, Phenthoate, Thiophanate-methyl.
(8) In particular residues of: Methomyl, Oxamyl, Carbendazim, Clofentezine, Diafenthiuron, Dimethoate, Formetanate, Malathion, Procymidone, Tetradifon, Thiophanate-methyl.
(9) In particular residues of: Carbofuran, Methomyl, Omethoate, Dimethoate, Triazophos, Malathion, Profenofos, Prothiofos, Ethion, Carbendazim, Triforine, Procymidone, Formetanate.

(B) **Definitions**

For the purposes of this Annex, "Sudan dyes" refers to the following chemical substances:

(i) Sudan I (CAS number 842-07-9);

(ii) Sudan II (CAS number 3118-97-6);

(iii) Sudan III (CAS number 85-86-9);

(iv) Scarlet Red; or Sudan IV (CAS number 85-83-6).'

COMMISSION IMPLEMENTING REGULATION (EU) No 434/2011

of 4 May 2011

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector [2], and in particular Article 138(1) thereof,

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 138 of Regulation (EC) No 1580/2007 are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 5 May 2011.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 May 2011.

For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and Rural Development

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 350, 31.12.2007, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	JO	78,3
	MA	36,6
	TN	109,4
	TR	82,9
	ZZ	76,8
0707 00 05	TR	120,3
	ZZ	120,3
0709 90 70	JO	78,3
	MA	78,8
	TR	105,4
	ZZ	87,5
0709 90 80	EC	33,0
	ZZ	33,0
0805 10 20	EG	49,1
	IL	59,9
	MA	44,1
	TN	57,6
	TR	67,8
	ZZ	55,7
0805 50 10	TR	54,5
	ZZ	54,5
0808 10 80	AR	96,6
	BR	76,7
	CL	80,3
	CN	112,1
	MA	86,7
	NZ	93,2
	US	127,4
	UY	51,8
	ZA	79,7
	ZZ	89,4

(1) Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

IV

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

EFTA SURVEILLANCE AUTHORITY DECISION

No 254/09/COL

of 10 June 2009

amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts

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 25 February 2009, the Commission of the European Communities (hereinafter EC Commission) adopted a Notice on the enforcement of State aid law by national courts [5],

WHEREAS this Notice is 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 European Commission,

HAVING consulted the European Commission,

RECALLING that the Authority by letter of 22 April 2009 invited the EFTA States to submit comments on the subject,

HAS ADOPTED THIS DECISION:

Article 1

The State Aid Guidelines shall be amended by introducing a new chapter on enforcement of state aid law by national courts. The new chapter is contained in the Annex to this Decision.

Article 2

The existing chapter on cooperation between national courts and the EFTA Surveillance Authority in the state aid field shall be deleted.

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[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, 3.9.1994 p. 1 and EEA Supplement No 32, 3.9.1994 p. 1. The Guidelines were last amended on 22 April 2009. 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/guidelines/

[5] OJ C 85, 9.4.2009 p. 1.

Article 3

Only the English version is authentic.

Done at Brussels, 10 June 2009.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kurt JÄGER
College Member

ANNEX

ENFORCEMENT OF STATE AID LAW BY NATIONAL COURTS [1]

INTRODUCTION

1. The European Commission has issued a notice on the enforcement of state aid law by the national courts of the EC Member States [2]. This non-binding act contains principles and rules which the European Commission follows in the field of state aid. It also explains the ways in which cooperation between the European Commission and the national courts of the EC Member States is envisaged to take place.

2. The EFTA Surveillance Authority ("the Authority") considers the above mentioned notice to be EEA relevant. In order to maintain equal conditions of competition and to ensure a uniform application of the EEA state aid rules throughout the European Economic Area, the Authority adopts the present Chapter, always taking account of the independence of national courts of the EFTA States.

3. The Authority is committed to take a strict approach towards unlawful and incompatible state aid. In spite of the fact that genuine private enforcement before national courts has only played a relatively limited role in state aid to date, the Authority considers that private enforcement actions can offer considerable benefits for state aid policy. Proceedings before national courts give third parties the opportunity to address and resolve many state aid related concerns directly at national level. In addition, national courts can offer claimants very effective remedies in the event of a breach of the state aid rules. This can in turn contribute to stronger overall state aid discipline.

4. The main purpose of the present Chapter is to inform national courts and third parties about the remedies available in the event of a breach of the state aid rules and to give them guidance on the practical application of these rules. In addition, the Authority seeks to develop its cooperation with national courts by introducing more practical tools for supporting national judges in their daily work.

5. This Chapter replaces the Chapter of the EFTA Surveillance Authority's State Aid Guidelines on co-operation between national courts and the EFTA Surveillance Authority in the state aid field [3] and is without prejudice to any interpretation of the EEA Agreement and regulatory provisions by the EFTA Court.

1. ROLE OF NATIONAL COURTS IN STATE AID ENFORCEMENT

1.1. **General issues**

1.1.1. *Identifying state aid*

6. The first question which national courts and potential claimants face is whether the measure concerned actually constitutes state aid within the meaning of Article 61 of the EEA Agreement.

7. Article 61(1) of the EEA Agreement covers "any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Contracting Parties".

8. The notion of state aid is not limited to subsidies [4]. It also comprises, inter alia, tax concessions and investments from public funds made in circumstances in which a private investor would have withheld his support [5]. Whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid is immaterial in this respect [6]. But, for public support to be classified as state aid, the aid needs to favour certain undertakings or the production of certain goods ("selectivity"), as opposed to general measures to which

[1] This Chapter corresponds to the Commission Notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1) and replaces the existing Chapter of the Authority's State Aid Guidelines on co-operation between national courts and the EFTA Surveillance Authority in the state aid field (OJ L 274, 26.10.2000, p. 19 and EEA Supplement No 48, 26.10.2000, p. 33).

[2] Commission Notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1).

[3] The Chapter corresponded to the Commission Notice on co-operation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995, p. 8) and introduced mechanisms for cooperation and exchange of information between the Authority and national courts.

[4] Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 69; Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 13; Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 34; Case C-39/94 *SFEI*, paragraph 58; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 42; and Case C-66/02 *Italy v Commission* [2005] ECR I- 10901, paragraph 77.

[5] Cf. Advocate General Jacobs' Opinion in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 28: "State aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying normal commercial criteria and disregarding other considerations of a social, political or philanthropic nature."

[6] Case 290/83 *Commission v France* [1985] ECR 439, paragraph 14; and Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraphs 36 to 42.

Article 61(1) of the EEA Agreement does not apply ([7]). In addition, the aid must distort or threaten to distort competition and must have an effect on trade between Contracting Parties to the EEA Agreement ([8]).

9. The case law of the EFTA Court and the courts of the European Community ([9]) and the decisions taken by the Authority and the European Commission have frequently addressed the question of whether certain measures qualify as state aid. In addition, the Authority has issued detailed guidance on a series of complex issues, such as the application of the private investor principle ([10]) and of the private creditor test ([11]), the circumstances under which state guarantees must be regarded as state aid ([12]), the treatment of public land sales ([13]), export credit insurance ([14]), direct business taxation ([15]), risk capital investments ([16]), and state aid for research, development and innovation ([17]). Also, the Commission Regulation on aid below the de minimis thresholds ([18]) has been incorporated into the EEA Agreement. Case law of the EFTA Court and of the European Court of Justice, guidance from the Authority and decision making practice can provide valuable assistance to national courts and potential claimants concerning the notion of state aid.

10. Where doubts exist as to the qualification of state aid, national courts may ask the Authority for an opinion under section 2 of this Chapter. This is without prejudice to the possibility for a national court to refer the matter to the EFTA Court for an advisory opinion under Article 34 of the Surveillance and Court Agreement.

([7]) A clear analysis of this distinction is to be found in Advocate General Darmon's Opinion in Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* [1993] ECR I-887. See also Joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord a.o. v EFTA Surveillance Authority* [2005] EFTA Court Report 121, paragraphs 76-87 and Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] EFTA Court Report 74, paragraph 33-38.

([8]) See Joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord a.o. v EFTA Surveillance Authority*, paragraphs 93-102. See also Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraphs 33 to 36; Case C-222/04 *Cassa di Risparmio de Firenze and Others* [2006] ECR I-289, paragraphs 139 to 141; and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraphs 84 to 86.

([9]) A good example is the *Altmark* ruling of the ECJ, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747. See also e.g. Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* and Joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord a.o. v EFTA Surveillance Authority*, paragraphs 76-87.

([10]) On the private investor test in general, see Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-959; Case C-305/89 *Italy v Commission (Alfa Romeo)* [1991] ECR I-1603, paragraphs 19 and 20. As to its detailed reasoning, see Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435, paragraph 245 et seq. See also the Chapter of the Authority's State Aid Guidelines on public authorities' holdings (OJ L 231, 3.9.1994, p. 1, EEA Supplement No 32, 3.9.1994, p. 1). The Chapter is based on Bulletin EC 9-1984 on the Application of [ex] Articles 92 and 93 of the EEC Treaty to public authorities' holdings (Bulletin of the European Communities No 9-1984), incorporated into point 9 of Annex XV to the EEA Agreement. See also the Chapter of the Authority's State Aid Guidelines on application of state aid provisions to public enterprises in the manufacturing sector (OJ L 231, 3.9.1994, p. 1, EEA Supplement No 32, 3.9.1994, p. 1). The Chapter corresponds to the Communication of the Commission on the application of Articles [ex] 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307/3, 13.11.1993, p. 3). As regards the application of this principle in relation to the financing of airports, see the Chapter of the Authority's State Aid Guidelines on financing of airports and start up aid to airlines departing from regional airports (OJ L 62, 6.3.2008, p. 30, EEA Supplement No 12, 6.3.2008, p. 3) The Chapter corresponds to the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 09.12.2005, paragraphs 42 to 52, p. 1).

([11]) Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 34; and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 25.

([12]) Chapter of the Authority's State Aid Guidelines on state guarantees (not yet published). The Chapter corresponds to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

([13]) Chapter of the Authority's State Aid Guidelines on state aid elements in sales of land and buildings by public authorities (OJ L 137, 8.6.2000, p. 28, EEA Supplement No 26, 8.6.2000, p. 19). The Chapter corresponds to the Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3).

([14]) Chapter of the Authority's State Aid Guidelines on short-term export-credit insurance (OJ L 120, 23.4.1998, p. 27, EEA Supplement No 16, 23.4.1998, p. 1), last amended by the Authority's Decision No 95/06/COL (OJ L 324, 23.11.2006, p. 38, EEA Supplement No 57, 23.11.2006, p. 28). The Chapter corresponds to the Communication of the Commission to the Member States pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 281, 17.9.1997, p. 4), as last amended by the Communication of the Commission to Member States amending the communication pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 325, 22.12.2005, p. 22).

([15]) Chapter of the Authority's State Aid Guidelines on application of state aid rules relating to direct business taxation (OJ L 137, 8.6.2000, p. 20, EEA Supplement No 26, 8.6.2000, p. 10). The Chapter corresponds to the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

([16]) Chapter of the Authority's State Aid Guidelines on state aid to promote risk capital investments in small and medium-sized enterprises (not yet published). The Chapter is based on the Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2).

([17]) Chapter of the Authority's State Aid Guidelines on state aid for research and development and innovation (not yet published). The Chapter corresponds to the Community Framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

([18]) 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 point 1ea of Annex XV to the EEA Agreement by Decision of the EEA Joint Committee No 29/2007 (OJ L 209, 9.8.2007, p. 52, and EEA Supplement No 38, 9.8.2007, p. 34).

1.1.2. *The standstill obligation*

11. According to the last sentence of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, EFTA States shall not implement state aid measures without the prior approval of the Authority (standstill obligation):

"The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision" ([19]).

12. However, there are a number of circumstances in which state aid can be lawfully implemented without prior approval of the Authority:

(a) This is the case where the measure is covered by the General Block Exemption Regulation ([20]). Where a measure meets all the requirements of the General Block Exemption Regulation, the EFTA State is relieved of its obligation to notify the planned aid measure and the standstill obligation does not apply.

(b) Similarly, existing aid ([21]) is not subject to the standstill obligation. This includes, amongst others, aid granted under a scheme which existed before an EFTA State's accession to the EEA Agreement or under a scheme previously approved by the Authority ([22]).

13. National court proceedings in state aid matters may sometimes concern the applicability of the General Block Exemption Regulation and/or an existing or approved aid scheme. Where the applicability of the Regulation or a scheme is at stake, the national court can only assess whether all the conditions of the Regulation or scheme are met. It cannot assess the compatibility of an aid measure where this is not the case, since this assessment is the exclusive responsibility of the Authority ([23]).

14. If the national court needs to determine whether the measure falls under an approved aid scheme, it can only check whether all conditions of the approval decision are met. Where the issues raised at national level concern the validity of an Authority decision, the national court should rely on the procedure laid down in Article 34 of the Surveillance and Court Agreement ([24]). The possibility to question the validity of the underlying Authority decision by way of an advisory opinion is, however, no longer available where the claimant could undoubtedly have challenged the decision before the EFTA Court under Article 36 of the Surveillance and Court Agreement, but failed to do so ([25]).

15. The national court may ask the Authority for an opinion under section 2 of this Chapter if it has doubts concerning the applicability of the General Block Exemption Regulation or an existing or approved aid scheme.

1.1.3. *Respective roles of the EFTA Surveillance Authority and national courts*

16. Both national courts and the Authority play essential, but distinct roles in the context of state aid enforcement ([26]).

([19]) The standstill obligation is reiterated in Article 3 in Part II of Protocol 3 to the Surveillance and Court Agreement which mirrors Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [93] of the EC Treaty (OJ L 83, 27.3.1999, p. 1) ("the Procedural Regulation"). Regulation (EC) No 659/1999 was further incorporated into Protocol 26 to the EEA Agreement by Decision of the EEA Joint Committee No 164/2001 (OJ L 65, 7.3.2002, p. 46, EEA Supplement No 13, 7.3.2002, p. 26). As regards the exact time of the granting of an aid, see 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) at recital 10. The regulation was incorporated into the EEA Agreement at point 1ea of Annex XV to the Agreement by Decision of the EEA Joint Committee No 29/2007 (OJ L 209, 9.8.2007, p. 52, EEA Supplement No 38, 9.8.2007, p. 34).

([20]) 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 (OJ L 214, 9.8.2008, p. 3), incorporated into point 1j of Annex XV to the EEA Agreement by Decision of the EEA Joint Committee No 120/2008 (OJ L 339, 18.12.2008, p. 111, EEA Supplement No 79, 18.12.2008, p. 20). The rules governing the transition to the new regime are contained in Article 44 of the Regulation. The General Block Exemption regulation replaced Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20), Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ L 337, 13.12.2002, p. 3) and 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).

([21]) See Article 1 (b) in Part II of Protocol 3 to the Surveillance and Court Agreement.

([22]) This does not apply where the scheme itself foresees an individual notification requirement for certain types of aid. On the notion of existing aid, see also Case C-44/93 *Namur-Les assurances du crédit* v *Office national du ducroire and Belgian State* [1994] ECR I-3829, paragraphs 28 to 34 and Joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord a.o. v EFTA Surveillance Authority*, paragraph 157.

([23]) See paragraph 17.

([24]) For recovery decisions, see paragraphs 53 – 57 of the Chapter of the Authority's State Aid Guidelines on recovery of unlawful and incompatible state aid.

([25]) Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833, paragraphs 17, 25 and 26; see also Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 31; and Case C-232/05 *Commission v France* ("Scott") [2006] ECR I-10071, paragraph 59.

([26]) Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 37; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, paragraph 74; and Case C-39/94 *SFEI and Others*, paragraph 41.

17. The Authority's main role is to examine the compatibility of proposed aid measures with the functioning of the EEA Agreement, based on the criteria laid down in Article 61(2) and (3) of the Agreement. This compatibility assessment is the exclusive responsibility of the Authority, subject to review by the EFTA Court. National courts do not have the power to declare a state aid measure compatible with Article 61(2) or (3) of the EEA Agreement ([27]).

18. The role of the national court depends on the aid measure at stake and whether this has been duly notified and approved by the Authority:

(a) National courts may be asked to intervene in cases where an EFTA State authority ([28]) has granted aid without respecting the standstill obligation. This situation can arise either because the aid was not notified at all, or because the national authority implemented it before the Authority's approval. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid ([29]).

(b) National courts also play an important role in the enforcement of recovery decisions adopted under Article 14(1) in Part II of Protocol 3 to the Surveillance and Court Agreement, where the Authority's assessment leads it to conclude that aid granted unlawfully is incompatible with the functioning of the EEA Agreement and enjoins the EFTA State concerned to recover the incompatible aid from the beneficiary. The involvement of national courts in such cases will usually arise from actions brought by beneficiaries for review of the legality of the repayment request issued by national authorities. However, depending on national procedural law, also other types of legal action can be possible (e.g. actions by EFTA State authorities against the beneficiary aimed at the full implementation of an Authority recovery decision).

19. When preserving the interests of individuals, the national courts must take full account of the effectiveness of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement and the interests of the EEA market.

20. The role of national courts in the above settings is set out in more detail under sections 1.2 and 1.3 of this Chapter.

1.2. Role of national courts in giving effect to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement - Unlawful state aid

21. According to the case law of the European Court of Justice, the standstill obligation laid down in Article 88(3) of the EC Treaty, which is mirrored by the last sentence of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, gives rise to directly effective individual rights of affected parties (such as the competitors of the beneficiary) ([30]). These affected parties can enforce their rights by bringing legal action before competent national courts against the granting EC Member State. Dealing with such legal actions and thus protecting competitor's rights under Article 88(3) of the EC Treaty is one of the most important roles of national courts in the state aid field.

22. The national courts in the EFTA States fulfill the same function. However, in the EFTA States the internal effect of EEA law is governed by constitutional law, subject to Protocol 35 to the EEA Agreement. According to Protocol 35 the EFTA States must ensure, if necessary by a separate statutory provision, that in cases of conflict between implemented EEA rules and other statutory provisions, the implemented EEA rules prevail. According to the EFTA Court, individuals and economic operators must be entitled to invoke and to claim at the national level any rights derived from provisions of the EEA law ([31]), as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise. ([32]). In the view of the Authority and in accordance with the case law of the European Court of Justice on the identical provision in Article 88(3) of the EC Treaty, Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement fulfils the implicit criteria in Protocol 35 to the EEA Agreement of being unconditional and sufficiently precise.

([27]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 38; Case C-17/91 *Lornoy and Others v Belgian State* [1992] ECR I-6523, paragraph 30; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, paragraph 14.

([28]) This includes authorities at national, regional and local level.

([29]) Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren*, paragraph 75; and Case C-295/97 *Piaggio*, paragraph 31.

([30]) Case 6/64 *Costa v E.N.E.L.* [1964] ECR 1141; Case 120/73 *Lorenz GmbH v Bundesrepublik Deutschland and Others* [1973] ECR 1471, paragraph 8; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, paragraph 11

([31]) See in this context also the preamble of the Surveillance and Court Agreement, which clarifies that "the objective of the Contracting Parties to the EEA Agreement, in full deference to the independence of the courts, to arrive at and maintain a uniform interpretation and application of the EEA Agreement and those provisions of the Community legislation which are substantially reproduced in that Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition". The preamble furthermore states that "in the applications of Protocols 1 to 4 to this Agreement due account shall be paid to the legal and administrative practices of the Commission of the European Communities prior to the entry into force of this Agreement".

([32]) Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Court Report 15, paragraph 77.

23. The fact that the last sentence of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement has been incorporated in the national legal order of the EFTA States ([33]), gives affected parties a possibility to bring legal actions against a breach of the standstill provision before national courts. A national court should consequently use all appropriate devices and remedies and apply all relevant provisions of national law to give effect to the national law implementing the last sentence of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([34]).

24. The essential role played by national courts in this context also stems from the fact that the Authority's own powers to protect competitors and other third parties against unlawful aid are limited. Most importantly, the Authority cannot adopt a final decision ordering recovery merely because the aid was not notified in accordance with Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([35]). The Authority must therefore conduct a full compatibility assessment, regardless of whether the standstill obligation has been respected or not ([36]). This assessment can be time-consuming and the Authority's powers to issue preliminary recovery injunctions are subject to very strict legal requirements ([37]).

25. As a result, actions before national courts offer an important means of redress for competitors and other third parties affected by unlawful state aid. Remedies available before national courts include:

(a) preventing the payment of unlawful aid;

(b) recovery of unlawful aid (regardless of compatibility);

(c) recovery of illegality interest;

(d) damages for competitors and other third parties; and

(e) interim measures against unlawful aid.

26. Each of these remedies is set out in more detail in sections 1.2.1 to 1.2.6 of this Chapter.

1.2.1. *Preventing the payment of unlawful aid*

27. National courts are obliged to protect the rights of individuals affected by violations of the standstill obligation. National courts must therefore draw all appropriate legal consequences, in accordance with national law, where an infringement of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement has occurred ([38]). However, the national courts' obligations are not limited to unlawful aid already disbursed. They also extend to cases where an unlawful payment is about to be made. National courts must safeguard the rights of individuals against possible disregard of those rights ([39]). Where unlawful aid is about to be disbursed, the national court is therefore obliged to prevent this payment from taking place.

28. The national courts' obligation to prevent the payment of unlawful aid can arise in a variety of procedural settings, depending on the different types of actions available under national law. Very often, the claimant will seek to challenge the validity of the national act granting the unlawful state aid. In such cases, preventing the unlawful

([33]) The standstill provision has been implemented in Iceland by Article 30 of the Competition Act (Samkeppnislög) No 44/2005, with later amendments (The Law Gazette, Section A, 20 May 2005). In Norway it is implemented by §1 of Regulation No 198 of 21.2.2003 (Forskrift om gjennomføring av EØS-avtalens vedlegg til Protokoll 3 om nærmere regler for anvendelsen av EF-traktatens artikkel 93 (prosedyreforordningen)), laid down by Royal Decree of 21 February 2003 pursuant to Act No 117 of 27 November 1992 relating to State aid, cf. Article 61 of the EEA Agreement, with later amendments. Regulation No 198 was last amended by Regulation No 277 of 3.3.2006, laid down by Royal Decree of same date. Since Liechtenstein has a monistic system, the standstill provision is as such part of the internal Liechtenstein legal order (Liechtensteinisches Landesgesetzblatt, Jahrgang 1995, No 72, 28 April 1995).

([34]) While complying with the principle set out in Article 3(1) of the EEA Agreement, it is however, for the internal legal system of every EFTA State to determine the legal procedure leading to this result, see Case 120/73 *Lorenz GmbH v Bundesrepublik Deutschland and Others* [1973] ECR 1471, paragraph 9.

([35]) Case C-301/87 *France v Commission*, ("Boussac") [1990] ECR I-307 and Case C-142/87 *Belgium v Commission* ("Tubemeuse") [1990] ECR I-959.

([36]) Case C-301/87 *France v Commission* ("Boussac"), paragraphs 17 to 23; Case C-142/87 *Belgium v Commission* ("Tubemeuse"), paragraphs 15 to 19; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, paragraph 14; and Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraph 38.

([37]) Cf. Article 11(2) in Part II of Protocol 3 to the Surveillance and Court Agreement, which requires that there are no doubts about the aid character of the measure concerned, that there is an urgency to act and that there is a serious risk of substantial and irreparable damage to a competitor.

([38]) Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, paragraph 12; Case C-39/94 *SFEI and Others*, paragraph 40; Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 47; and Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraph 41.

([39]) Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren*, paragraph 75; and Case C-295/97 *Piaggio*, paragraph 31.

payment will usually be the logical consequence of finding that the granting act is invalid as a result of the EFTA State's breach of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([40])

1.2.2. *Recovery of unlawful aid*

29. Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full recovery of unlawful state aid from the beneficiary ([41]). Ordering the full recovery of unlawful aid is part of the national court's obligation to protect the individual rights of the claimant (e.g. competitor) under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. The recovery obligation of the national court is thus not dependent on the compatibility of the aid measure with Article 61(2) or (3) of the EEA Agreement.

30. Since national courts must order the full recovery of unlawful aid regardless of its compatibility, recovery can be swifter before a national court than through a complaint with the Authority. Indeed, unlike the Authority ([42]), the national court can and must limit itself to determining whether the measure constitutes state aid and whether the standstill obligation applies to it.

31. However, the national courts' recovery obligation is not absolute. According to the "SFEI" case ([43]), there can be exceptional circumstances in which the recovery of unlawful state aid would not be appropriate. The legal standard to be applied in this context should be similar to the one applicable under Articles 14 and 15 in Part II of Protocol 3 to the Surveillance and Court Agreement ([44]). In other words, circumstances which would not stand in the way of a recovery order by the Authority cannot justify a national court refraining from ordering full recovery. The standard which the EFTA Court will apply in this respect is very strict ([45]). In line with the approach taken by the EFTA Court and the European Court of Justice, a beneficiary of unlawful aid cannot in principle plead legitimate expectations against a recovery order by the Authority ([46]). This is because a diligent businessman would have been able to verify whether the aid he received was notified or not ([47]).

32. To justify the national court not ordering recovery with reference to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, a specific and concrete fact must therefore have generated legitimate expectations on the beneficiary's part ([48]). This can be the case if the Authority itself has given precise assurances that the measure in question does not constitute state aid, or that it is not covered by the standstill obligation ([49]).

33. In line with the case law of the European Court of Justice ([50]), the national court's obligation to order full recovery of unlawful state aid ceases if, by the time the national court renders its judgment, the Authority has already decided that the aid is compatible with the functioning of the EEA Agreement. Since the purpose of the standstill obligation is to ensure that only compatible aid can be implemented, this purpose can no longer be frustrated

([40]) On the invalidity of the granting act in cases where an EC Member State has violated Article 88(3) EC, see Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, paragraph 12; see also, as an illustration, German Federal Court of Justice ("Bundesgerichtshof"), judgment of 4 April 2003, V ZR 314/02, VIZ 2003, 340, and judgment of 20 January 2004, XI ZR 53/03, NVwZ 2004, 636.

([41]) Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 49; Case C-39/94 *SFEI and Others*, paragraphs 40 and 68; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, paragraph 12.

([42]) Which needs to conduct a compatibility analysis before ordering recovery.

([43]) Case C-39/94 *SFEI and Others*, paragraphs 70 and 71, referring to Advocate General Jacobs' Opinion in this case, paragraphs 73 to 75; see also Case 223/85 *RSV v Commission* [1987] ECR 4617, paragraph 17; and Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 16.

([44]) On the standard applied in this respect, see Advocate General Jacobs' Opinion in Case C-39/94 *SFEI and Others*, paragraph 75.

([45]) Article 14 only provides for an exemption from the Authority's recovery obligation where a recovery would contravene general principles of EEA law. The only case in which an EFTA State can refrain from implementing a recovery decision by the Authority is where such recovery would be absolutely impossible, cf. paragraph 17 of the Chapter of the Authority's State Aid Guidelines on recovery of unlawful and incompatible state aid (not yet published). The Chapter corresponds to the Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid (OJ C 272, 15.11.2007, p. 4). Also see Case C-177/06 *Commission v Spain* [2007] ECR I-7689, paragraph 46.

([46]) Joined cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord a.o. v EFTA Surveillance Authority*, paragraph 171 and Case E-2/05 *EFTA Surveillance Authority v the Republic of Iceland* [2005] EFTA Court Report 205, paragraph 26. See also Case C-5/89 *Commission v Germany*, paragraph 14; Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 51; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 104.

([47]) Case C-5/89 *Commission v Germany*, paragraph 14; Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25; and Joined Cases C-346/03 and C-529/03 *Atzeni and Others*, paragraph 64.

([48]) Cf. Advocate General Jacobs' Opinion in Case C-39/94 *SFEI and Others*, paragraph 73; and Case 223/85 *RSV v Commission*, paragraph 17.

([49]) Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147.

([50]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 45, 46 and 55; and Case C-384/07 *Wienstrom* judgment of 11 December 2008, not yet published, paragraph 28.

where the Authority has already confirmed compatibility ([51]). Therefore, the national court's obligation to protect individual rights under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement remains unaffected where the Authority has not yet taken a decision, regardless of whether such procedure is pending or not ([52]).

34. While after a positive decision of the Authority, the national court no longer has an obligation under *EEA law* to order full recovery, such recovery obligation may still exist under *national law* ([53]). However, where such a recovery obligation exists, this is without prejudice to the EFTA State's right to re-implement the aid subsequently.

35. Once the national court has decided that unlawful aid has been disbursed in violation of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, it must quantify the aid in order to determine the amount to be recovered. The case law of the EFTA Court and the courts of the European Community on the application of Article 61(1) of the EEA Agreement and Article 87(1) EC and the Authority's guidance and decision making practice should assist the court in this respect. Should the national court encounter difficulties in calculating the aid amount, it may request the Authority's support, as further set out in section 2 of this Chapter.

1.2.3. *Recovery of interest*

36. The economic advantage of unlawful aid is not limited to its nominal amount. In addition, the beneficiary obtains a financial advantage resulting from the premature implementation of the aid. This is due to the fact that, had the aid been notified to the Authority, payment would (if at all) have taken place later. This would have obliged the beneficiary to borrow the relevant funds on the capital markets, including interest at market rates.

37. This undue time advantage is the reason why, if recovery is ordered by the Authority, Article 14(2) in Part II of Protocol 3 to the Surveillance and Court Agreement requires not only recovery of the nominal aid amount, but also recovery of interest from the day the unlawful aid was put at the disposal of the beneficiary to the day when it is effectively recovered. The interest rate to be applied in this context is defined in the Authority's Decision No 195/04/COL of 14 July 2004 ([54]).

38. In line with the case law of the European Court of Justice ([55]), and in view of giving effect to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, national courts should order recovery of the financial advantage resulting from premature implementation of the aid (hereinafter referred to as "illegality interest"). This is because the premature implementation of unlawful aid will at least make competitors suffer depending on the circumstances earlier than they would have to, in competition terms, from the effects of the aid. The beneficiary has therefore obtained an undue advantage ([56]).

39. The national court's obligation to order the recovery of illegality interest can arise in two different settings:

(a) The national court must normally order full recovery of unlawful aid under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. Where this is the case, illegality interest needs to be added to the original aid amount when determining the total recovery amount.

(b) However, the national court must also order the recovery of illegality interest in circumstances in which, exceptionally, there is no obligation to order full recovery. The national court's obligation to order recovery of illegality interest therefore remains in place even after a positive Authority decision ([57]). This can be of central importance to potential claimants, since it offers a successful remedy also in cases where the Authority has already declared the aid compatible with the functioning of the EEA Agreement.

40. In order to comply with their recovery obligation as regards illegality interest, national courts need to determine the interest amount to be recovered. The following principles apply in this respect:

(a) The starting point is the nominal aid amount ([58]).

(b) When determining the applicable interest rate and calculation method, national courts should take account of the fact that recovery of illegality interest by a national court serves the same purpose as the Authority's interest recovery under Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement. In addition,

([51]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraph 49.
([52]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraph 41.
([53]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 53 and 55.
([54]) Article 9 of the Authority's Decision No 195/04/COL of 14 July 2004 (OJ L 139, 25.5.2006, p. 37, EEA Supplement No 26, 25.5.2006, p. 1) as amended by Decision No 789/08/COL of 17 December 2008 (not yet published).
([55]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 50 to 52 and 55.
([56]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 50 to 52 and 55.
([57]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 52 and 55.
([58]) See paragraph 35 above. Taxes paid on the nominal aid amount can be deducted for the purposes of recovery, see Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 83.

claims for the recovery of illegality interest are EEA law claims based on Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([59]). The principles of equivalence and effectiveness described under section 1.4.1 of this Chapter therefore apply to these claims.

(c) In order to ensure consistency with Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement and to comply with the effectiveness requirement, the Authority considers that the method of interest calculation used by the national court may not be less strict than that foreseen in the Authority's Decision No 195/04/COL of 14 July 2004 ([60]). Consequently, illegality interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate ([61]).

(d) Moreover, in the Authority's view, it follows from the principle of equivalence that, where the interest rate calculation under national law is stricter than that laid down in the Authority's Decision No 195/04/COL of 14 July 2004, the national court will have to apply the stricter national rules also to claims based on Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

(e) The start date for the interest calculation will always be the day on which the unlawful aid was put at the disposal of the beneficiary. The end date depends on the situation at the time of the national judgment. If the Authority has already approved the aid, the end date is the date of the Authority's decision. Otherwise, illegality interest accumulates for the whole period of unlawfulness until the date of actual repayment of the aid by the beneficiary. In line with the case law of the European Court of Justice, illegality interest also needs to be applied for the period between the adoption of a positive Authority decision and the subsequent annulment of this decision by the EFTA Court ([62]).

41. In case of doubt, the national court may ask the Authority for support under section 2 of this Chapter.

1.2.4. *Damages claims*

42. National courts may be required to uphold claims for compensation for damage caused to competitors of the beneficiary and to other third parties by the unlawful state aid ([63]). Such damages actions are usually directed at the state aid granting authority. They can be particularly important for the claimant, since, contrary to actions aimed at mere recovery, a successful damages action provides the claimant with direct financial compensation for suffered loss. Such challenges are obviously dependent on national legal rules. In this respect, the Authority emphasises that national courts should use all appropriate devices and remedies and apply all relevant provisions of national law to give effect to the national law implementing the last sentence of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement and protect rights which that law confers on individuals and economic operators.

43. Irrespective of the possibility to claim damages under national law, breaches of the standstill obligation can in principle give rise to damages claims based on the case law of the EFTA Court ([64]). EFTA States are required to compensate for loss and damage caused to individuals as a result of breaches of obligations under both secondary acts of the EEA legislation and the main part of the EEA Agreement ([65]). Such liability exists where: (i) the rule of law infringed is intended to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) there is a direct causal link between the breach of the Member State's obligation and the damage suffered by the injured parties ([66]).

44. The first requirement (EEA law obligation aimed at protecting individual rights) is, in the view of the Authority, met in relation to violations of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. The EFTA Court has held that a rule of law infringed is considered to confer rights on individuals when the relevant provision is unconditional and sufficiently precise ([67]). As stated in paragraph 22 above, the Authority considers this criteria to be fulfilled in Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

45. The requirement of a sufficiently serious breach of EEA law will also generally be met as regards Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. The EFTA Court has held that this depends on whether, in the exercise of its legislative powers, a Contracting Party to the EEA Agreement has manifestly and gravely disregarded the limits on its discretion. In order to determine whether this condition is met, all factors that

([59]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 52 and 55.
([60]) See Articles 9-11 of the Authority's Decision No 195/04/COL of 14 July 2004 as amended by Decision No 789/08/COL of 17 December 2008.
([61]) See footnote 54 above.
([62]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraph 69.
([63]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 53 and 55; Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 56; and Case C-334/07 P *Commission v Freistaat Sachsen* judgment of 11 December 2008, not yet published, paragraph 54.
([64]) Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland* [1998] EFTA Court Report 95, paragraphs 59-63, 66-69 and Case E-4/01 *Karl K. Karlsson v Iceland* EFTA Court Report [2002] 240, paragraphs 32, 37-38, 40, 47.
([65]) Case E-4/01 *Karl K. Karlsson v Iceland*, paragraph 32.
([66]) See Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*, paragraph 66 and Case E-4/01 *Karl K. Karlsson v Iceland*, paragraph 32. See also C-173/03 *Traghetti del Mediterraneo v Italy*, paragraph 45.
([67]) Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark*, paragraph 77.

characterise the situation must be taken into account. This includes, inter alia, the clarity and precision of the rule infringed; the measure of the discretion left by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable ([68]). However, with regard to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, EFTA State authorities have no discretion not to notify state aid measures. They are, in principle, under an absolute obligation to notify all such measures prior to their implementation. Although the EFTA Court may take the excusability of the relevant breach of EEA law into account ([69]), in the presence of state aid, EFTA State authorities should be fully aware of this obligation and cannot normally argue that they were not aware of the standstill obligation. In case of doubt, EFTA States can always notify the measure to the Authority for reasons of legal certainty ([70]).

46. The third requirement that the breach of EEA law must have caused an actual and certain financial damage to the claimant can be met in various ways.

47. The claimant will often argue that the aid was directly responsible for a loss of profit. When confronted with such a claim, the national court should take account of the following considerations:

(a) By virtue of the EEA law requirements of equivalence and effectiveness ([71]), national rules may not exclude an EFTA State's liability for loss of profit ([72]). Damage under EEA law can exist regardless of whether the breach caused the claimant to lose an asset or whether it prevented the claimant from improving his asset position. Should national law contain such an exclusion, the national court would need to leave the provision unapplied as regards damages claims under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

(b) Determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant. The national court can then calculate the revenue which the claimant was likely to generate under this contract. In cases where the contract has already been fulfilled by the beneficiary, the national court would also take account of the actual profit generated.

(c) More complicated damage assessments are necessary where the aid merely leads to an overall loss of market share. One possible way for dealing with such cases could be to compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted.

(d) There may be circumstances where the damage suffered by the claimant exceeds the lost profit. This could, for example, be the case where, as a consequence of the unlawful aid, the claimant is forced out of business (e.g. through insolvency).

48. The possibility to claim damages is, in principle, independent of any parallel investigation by the Authority concerning the same aid measure. Such an ongoing investigation does not release the national court from its obligation to safeguard individual rights under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([73]). Since the claimant may be able to demonstrate that he suffered loss due to the premature implementation of the aid, and, more specifically, as a result of the beneficiary's illegal time advantage, successful damages claims are also not ruled out where the Authority has already approved the aid by the time the national court decides ([74]).

49. National procedural rules will sometimes allow the national court to rely on reasonable estimates for the purpose of determining the actual amount of damages to be granted to the claimant. Where that is the case, and provided the principle of effectiveness ([75]) is respected, the use of such estimates would also be possible in relation to damages claims arising from Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. This can be a useful tool for national courts which face difficulties in relation to the calculation of damages.

([68]) E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*, paragraphs 68-69 and Case E-4/01 *Karl K. Karlsson v Iceland*, paragraph 38. On effect of the amount of discretion enjoyed by the authorities concerned see also Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 55, Case C-278/05 Robins and Others [2007] ECR I-1053, paragraph 71; Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 38; and Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28.

([69]) E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*, paragraph 69, Case E-4/01 *Karl K. Karlsson v Iceland*, paragraph 38. See also Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, paragraph 56.

([70]) Although breaches of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement must therefore generally be regarded as sufficiently serious, there can be exceptional circumstances which stand in the way of a damages claim. In such circumstances, the requirement of a sufficiently serious breach may not be met. See paragraphs 31 and 32 above.

([71]) See section 1.4.1 below.

([72]) Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, paragraphs 87 and 90.

([73]) Case C-39/94 *SFEI and Others*, paragraph 44.

([74]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 53 and 55.

([75]) See Section 1.4.1 below.

50. The legal prerequisites for damages claims under EEA law and issues of damages calculation can also form the basis of requests for assistance from the Authority under section 2 of this Chapter.

1.2.5. *Damages claims against the beneficiary*

51. As described above, potential claimants are entitled to bring damages claims against the state aid granting authority. However, there may be circumstances in which the claimant prefers to claim damages directly from the beneficiary.

52. As Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement does not impose any direct obligation on the beneficiary of state aid, EEA law does not give any basis for such claims ([76]). However, this does not in any way prejudice the possibility of a successful damages action against the beneficiary on the basis of substantive national law. In this context, potential claimants must rely on national rules governing non-contractual liability ([77]).

1.2.6. *Interim measures*

53. The duty of national courts to draw the necessary legal consequences from violations of the standstill obligation is not limited to their final judgments. As part of their role deriving from Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, national courts are also required to take interim measures where this is appropriate to safeguard the rights of individuals ([78]) and the effectiveness of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

54. The power of national courts to adopt interim measures can be of central importance to interested parties where fast relief is required. Because of their ability to act swiftly against unlawful aid, their proximity and the variety of measures available to them, national courts are very well placed to take interim measures where unlawful aid has already been paid or is about to be paid.

55. The most straightforward cases are those where unlawful aid has not yet been disbursed, but where there is a risk that such payments will be made during the course of national court proceedings. In such cases, the national court's obligation to prevent violations of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([79]) can require it to issue an interim order preventing the illegal disbursement until the substance of the matter is resolved.

56. Where the illegal payment has already been made, the role of national courts under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement usually requires them to order full recovery (including illegality interest). Because of the principle of effectiveness ([80]), the national court may not postpone this by unduly delaying proceedings. Such delays would not only affect the individual rights which Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement protects, but also directly increase the competitive harm which stems from the unlawfulness of the aid.

57. However, in spite of this general obligation, there may nevertheless be circumstances in which the final judgment for the national court is delayed. In such cases, the obligation to protect the individual rights under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement requires the national court to use all interim measures available to it under the applicable national procedural framework to at least terminate the anti-competitive effects of the aid on a provisional basis ("interim recovery") ([81]). The application of national procedural rules in this context is subject to the requirements of equivalence and effectiveness ([82]).

58. Where, based on the case law of the EFTA Court and the European Community courts and the practice of the Authority, the national judge has reached a reasonable prima facie conviction that the measure at stake involves unlawful state aid, the most expedient remedy will, in the view of the Authority and subject to national procedural law, be to order the unlawful aid *and* the illegality interest to be put on a blocked account until the substance of the matter is resolved. In its final judgment, the national court would then either order the funds on the blocked account to be returned to the state aid granting authority, if the unlawfulness is confirmed, or order the funds to be released to the beneficiary.

59. Interim recovery can also be a very effective instrument in cases where national court proceedings run parallel to an investigation by the Authority ([83]). An ongoing investigation by the Authority does not release the national court from its obligation to protect individual rights under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([84]). The national court may therefore not simply suspend its own proceedings until the Authority has decided and leave the rights of the claimant under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement unprotected in the meantime. Where the national court wishes to await the

([76]) Case C-39/94 *SFEI and Others*, paragraphs 72 to 74.
([77]) Case C-39/94 *SFEI and Others*, paragraph 75.
([78]) Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, paragraph 12; Case C-39/94 *SFEI and Others*, paragraph 52; and Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 46.
([79]) See section 1.2.1 above.
([80]) See section 1.4.1 below.
([81]) See also Case C-39/94 *SFEI and Others*, paragraph 52; and Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 46.
([82]) See section 1.4.1 below.
([83]) See section 1.3.1 below for guidance on interim measures in recovery cases.
([84]) Case C-39/94 *SFEI and Others*, paragraph 44.

outcome of the Authority's compatibility assessment before adopting a final and irreversible recovery order, it should therefore adopt appropriate interim measures. Here again, ordering the placement of the funds on a blocked account would seem an appropriate remedy. In cases where:

(a) the Authority declares the aid incompatible, the national court would order the funds on the blocked account to be returned to the state aid granting authority (aid plus illegality interest).

(b) the Authority declares the aid compatible, this would release the national court from its EEA law obligation to order full recovery ([85]). The court may therefore, subject to national law ([86]), order the actual aid amount to be released to the beneficiary. However, as described in section 1.2.3 of this Chapter, the national court remains under the obligation to give effect to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement by ordering the recovery of illegality interest ([87]). This illegality interest will therefore have to be paid to the state aid granting authority.

1.3. **Role of national courts in the implementation of negative decisions by the EFTA Surveillance Authority ordering recovery**

60. National courts can also face state aid issues in cases where the Authority has already ordered recovery. Although most cases will be actions for the annulment of a national recovery order, third parties can also claim damages from national authorities for failure to implement a recovery decision by the Authority.

1.3.1. *Challenging the validity of a national recovery order*

61. According to Article 14(3) in Part II of Protocol 3 to the Surveillance and Court Agreement, EFTA States have to implement recovery decisions without delay. Recovery takes place according to the procedures available under national law, provided they allow for immediate and effective execution of the recovery decision. Where a national procedural rule prevents immediate and/or effective recovery, the national court must leave this provision unapplied ([88]).

62. The validity of recovery orders issued by national authorities to implement a recovery decision by the Authority may be challenged before a national court. The rules governing such actions are set out in detail in the Chapter of the EFTA Surveillance Authority State Aid Guidelines on recovery of unlawful and incompatible state aid ([89]), the main principles of which are summarised below.

63. In particular, national court actions cannot challenge the validity of the underlying decision of the Authority where the claimant could have challenged this decision directly before the EFTA Court ([90]). This also means that, where a challenge under Article 36 of the Surveillance and Court Agreement would have been possible, the national court may not suspend the execution of the recovery decision on grounds linked to the validity of the decision of the Authority ([91]).

64. Where it is not clear that the claimant can bring an annulment action under Article 36 of the Surveillance and Court Agreement (e.g. because the measure was an aid scheme with a wide coverage for which the claimant may not be able to demonstrate an individual concern), the national court must in principle offer legal protection. In those circumstances where the legal action concerns the validity and lawfulness of the Authority's decision, the national judge should rely on the procedure laid down in Article 34 of the Surveillance and Court Agreement.

([85]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 46 and 55.
([86]) See paragraph 34 above.
([87]) Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, paragraphs 52 and 55.
([88]) Case C-232/05 *Commission v France* ("Scott"), paragraphs 49 to 53.
([89]) Not yet published. The Chapter corresponds to the Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid (OJ 2007 C 272, 15.11.2007, p. 4).
([90]) See references cited in footnote.
([91]) Case C-232/05 *Commission v France* ("Scott"), paragraphs 59 and 60.

65. Granting interim relief in such circumstances is subject to the very strict legal requirements defined by the European Court of Justice in the "Zuckerfabrik" ([92]) and "Atlanta" ([93]) case law: a national court may only suspend recovery orders under the following conditions (i) the court has serious doubts as regards the validity of the act. If the validity of the contested act is not already in issue before the EFTA Court, it should rely on the procedure laid down in Article 34 of the Surveillance and Court Agreement; (ii) there must be urgency in the sense that the interim relief is necessary to avoid serious and irreparable damage to the party seeking relief; and (iii) the court has to take due account of the EEA interest. In its assessment of all those conditions, the national court must respect any ruling of the EFTA Court on the lawfulness of the decision of the Authority or on an application for interim relief at EEA level ([94]).

1.3.2. *Damages for failure to implement a recovery decision*

66. Like violations of the standstill obligation, failure by the EFTA State authorities to comply with a recovery decision of the Authority under Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement can, in the view of the Authority, give rise to damages claims under the EFTA Court's case law ([95]). In the Authority's view, the treatment of such damages claims mirrors the principles set out above as regards violations of the standstill obligation ([96]). This is because, (i) the EFTA State's recovery obligation is aimed at protecting the same individual rights as the standstill obligation, and (ii) the Authority's recovery decisions do not leave national authorities any discretion; breaches of the recovery obligation are thus in principle to be regarded as sufficiently serious. Consequently, the success of a damages claim for non-implementation of the Authority's recovery decision will again depend on whether the claimant can demonstrate that he suffered loss directly as a result of the delayed recovery ([97]).

1.4. **Procedural rules and legal standing before national courts**

1.4.1. *General principles*

67. National courts are obliged to give effect to the standstill obligation and protect the rights of individuals against unlawful state aid. In principle, national procedural rules apply to such proceedings ([98]). However the application of national law in these circumstances is subject to two essential conditions:

(a) national procedural rules applying to claims under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement may not be less favourable than those governing claims under domestic law (principle of equivalence) ([99]); and

(b) national procedural rules may not render excessively difficult or practically impossible the exercise of the rights conferred by EEA law (principle of effectiveness) ([100]).

68. More generally, national courts must leave national procedural rules unapplied if doing otherwise would violate the principles set out in paragraph 67.

1.4.2. *Legal standing*

69. The principle of effectiveness has a direct impact on the standing of possible claimants before national courts under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. In this respect, EEA law requires that national rules on legal standing do not undermine the right to effective judicial protection ([101]). National rules cannot therefore limit legal standing only to the competitors of the beneficiary ([102]). Third parties who are not affected by the distortion of competition resulting from the aid measure can also have a sufficient legal interest of a different character (as has been recognised in tax cases) in bringing proceedings before a national court ([103]).

([92]) Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn* [1991] ECR I-415, paragraph 33.
([93]) Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761, paragraph 51.
([94]) For further guidance, cf. Chapter of the Authority State Aid Guidelines on recovery of unlawful and incompatible state aid, paragraph 57.
([95]) Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*, paragraphs 59-63, 66-69 and Case E-4/01 *Karl K. Karlsson v Iceland*, paragraphs 32, 37-38, 40, 47.
([96]) See section 1.2.4 above.
([97]) See paragraphs 46 to 49 above.
([98]) Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 45; and Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paragraph 51.
([99]) Case E-4/01 *Karl K. Karlsson v Iceland*, paragraph 33. See also Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 45; Joined Cases C-392/04 and C-422/04 *i-21 Germany* [2006] ECR I-8559, paragraph 57; and Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5.
([100]) Case E-4/01 *Karl K. Karlsson v Iceland*, paragraph 33. See also Case C-368/04 *Transalpine Ölleitung in Österreich*, paragraph 45; Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 18; and Case 33/76 *Rewe*, paragraph 5.
([101]) Case C-174/02 *Streekgewest*, paragraph 18.
([102]) Case C-174/02 *Streekgewest*, paragraphs 14 to 21.
([103]) Case C-174/02 *Streekgewest*, paragraph 19.

1.4.3. *Standing issues in tax cases*

70. The case law cited above is particularly relevant for state aid granted in the form of exemptions from taxes and other financial liabilities. In such cases, persons who do not benefit from the same exemption may challenge their own tax burden based on Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([104]).

71. However, third party tax payers may only rely on the standstill obligation where their own tax payment forms an integral part of the unlawful state aid measure ([105]). This is the case where, under the relevant national rules, the tax revenue is reserved exclusively for funding the unlawful state aid and has a direct impact on the amount of state aid granted in violation of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([106]).

72. If exemptions have been granted from general taxes, the above criteria are usually not met. An undertaking liable to pay such taxes therefore cannot generally claim that someone else's tax exemption is unlawful under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement ([107]). It also results from settled case law of the European Court of Justice that extending an illegal tax exemption to the claimant is no appropriate remedy for breaches of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. Such a measure would not eliminate the anticompetitive effects of unlawful aid, but on the contrary, strengthen them ([108]).

1.4.4. *Gathering evidence*

73. The principle of effectiveness can also influence the process of gathering evidence. For example, where the burden of proof as regards a particular claim makes it impossible or excessively difficult for a claimant to substantiate its claim (e.g. because the necessary documentary evidence is not in its possession), the national court is required to use all means available under national procedural law to give the claimant access to this evidence. This can include, where provided for under national law, the obligation for the national court to order the defendant or a third party to make the necessary documents available to the claimant ([109]).

2. THE EFTA SURVEILLANCE AUTHORITY'S SUPPORT FOR NATIONAL COURTS

74. Article 3 of the EEA Agreement, which is modelled on Article 10 of the EC Treaty, places an obligation on the Contracting Parties to take all appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement and to facilitate co-operation within its framework ([110]). Based on case law of the European Court of Justice, Article 10 of the EC Treaty implies that the European Commission must assist national courts when they apply Community law ([111]). Conversely, national courts may be obliged to assist the European Commission in the fulfilment of its tasks ([112]). The Authority considers that it is under similar obligations of sincere cooperation vis-à-vis national courts of the EFTA States, by virtue of the corresponding Article 3 of the EEA Agreement and Article 2 of the Surveillance and Court Agreement.

75. Given the key role which national courts play in the enforcement of the state aid rules, the Authority is committed to helping national courts where the latter find such assistance necessary for their decision on a pending case. Whilst the previous Chapter of the EFTA Surveillance Authority's State Aid Guidelines on co-operation between national courts and the Authority in the state aid field ([113]) already offered national courts the possibility to ask the

([104]) The imposition of an exceptional tax burden on specific sectors or producers can also amount to state aid in favour of other companies, see Case C-487/06 P *British Aggregates Association v Commission* judgment of 22 December 2008, not yet published, paragraphs 81 to 86.
([105]) Case C-174/02 *Streekgewest*, paragraph 19.
([106]) Joined Cases C-393/04 and C-41/05 *Air Liquide*, paragraph 46; Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Casino France and Others* [2005] ECR I-9481, paragraph 40; and Case C-174/02 *Streekgewest*, paragraph 26.
([107]) Joined Cases C-393/04 and C-41/05 *Air Liquide*, paragraph 48; and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Casino France and Others*, paragraphs 43 and 44.
([108]) Joined Cases C-393/04 and C-41/05 *Air Liquide*, paragraph 45.
([109]) Case C-526/04 *Laboratoires Boiron*, paragraphs 55 and 57.
([110]) See in this context also Article 2 of the Surveillance and Court Agreement, which states that "[t]he EFTA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measures which could jeopardize the attainment of the objectives of this Agreement."
([111]) Case C-39/94 *SFEI and Others*, paragraph 50; Order of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, paragraphs 16 to 22; and Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935, paragraph 53.
([112]) Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 31.
([113]) OJ L 274, 26.10.2000, p. 19 and EEA Supplement No 48, 26.10.2000, p. 33. The Chapter corresponded to the Commission Notice on cooperation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995, p. 8).

Authority for assistance, this possibility has not been used regularly by national courts. The Authority therefore wishes to make a fresh attempt at establishing closer cooperation with national courts by providing more practical and user-friendly support mechanisms. In doing so, it draws inspiration from the Authority's Notice on the co-operation between the EFTA Surveillance Authority and the courts of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement ([114]).

76. The Authority's support to national courts can take two different forms:

(a) The national court may ask the Authority to transmit to it relevant information in its possession (see section 2.1 of this Chapter).

(b) The national court may ask the Authority for an opinion concerning the application of the state aid rules (see section 2.2 of this Chapter).

77. When supporting national courts, the Authority must respect its duty of professional secrecy and safeguard its own functioning and independence ([115]). In fulfilling its duty under Article 3 of the EEA Agreement towards national courts, the Authority is therefore committed to remaining neutral and objective. Since the Authority's assistance to national courts is part of its duty to defend the public interest, the Authority has no intention to serve the private interests of the parties involved in the case pending before the national court. The Authority will therefore not hear any of the parties involved in the national proceedings about its assistance to the national court.

78. The support offered to national courts under this Chapter is voluntary and without prejudice to the possibility for the national court to ask the EFTA Court for an advisory opinion regarding the interpretation or the validity of EEA law in accordance with Article 34 of the Surveillance and Court Agreement.

2.1. **Transmission of information to national courts**

79. The Authority's duty to assist national courts in the application of state aid rules comprises the obligation to transmit relevant information in its possession to national courts ([116]).

80. A national court may, *inter alia*, ask the Authority for the following types of information:

(a) Information concerning a pending Authority procedure; this can, *inter alia*, include information on whether a procedure regarding a particular aid measure is pending before the Authority, whether a certain aid measure has been duly notified in accordance with Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, whether the Authority has initiated a formal investigation, and whether the Authority has already taken a decision ([117]). In the absence of a decision, the national court may ask the Authority to clarify when this is likely to be adopted.

(b) In addition, national courts may ask the Authority to transmit documents in its possession. This can include copies of existing Authority decisions to the extent that these decisions are not already published on the Authority's website, factual data, statistics, market studies and economic analysis.

81. In order to ensure efficiency in its cooperation with national courts, requests for information will be processed as quickly as possible. The Authority will endeavour to provide the national court with the requested information within one month from the date of the request. Where the Authority needs to ask the national court for further clarifications, this one-month period starts to run from the moment when the clarification is received. Where the Authority has to consult third parties who are directly affected by the transmission of the information, the one-month period starts from the conclusion of this consultation. This could, for example, be the case for certain types of information submitted by a private person ([118]), or where information submitted by one EFTA State is being requested by a court in a different EFTA State.

82. In transmitting information to national courts, the Authority needs to uphold the guarantees given to natural and legal persons under Article 122 of the EEA Agreement and Article 14 of the Surveillance and Court Agreement ([119]). Article 14 of the Surveillance and Court Agreement prevents members, officials and other servants of the Authority from disclosing information which is covered by the obligation of professional secrecy. Article 122 of the EEA Agreement requires representatives, delegates and experts of the Contracting Parties, as well as officials and other servants, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy. This can include confidential information and business secrets.

([114]) OJ C 305, 14.12.2006, p. 19, EEA Supplement No 62, 14.12.2006, p. 21, paragraphs 15 to 30. The Notice corresponds to the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.4.2004, p. 54).

([115]) Order of 6 December 1990 in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-4405, paragraphs 10 and 11; and Case T-353/94 *Postbank v Commission* [1996] ECR II-921, paragraph 93.

([116]) Case C-39/94 *SFEI and Others*, paragraph 50; Order of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others*, paragraphs 17 to 22; Case C-234/89 *Delimitis v Henninger Bräu*, paragraph 53; and Case T-353/94 *Postbank v Commission*, paragraphs 64 and 65.

([117]) Upon receipt of this information, the national court may ask for regular updates on the state of play.

([118]) Case T-353/94 *Postbank v Commission*, paragraph 91.

([119]) Case C-234/89 *Delimitis v Henninger Bräu*, paragraph 53; and Case T-353/94 *Postbank v Commission*, paragraph 90.

83. The combined reading of Articles 3 and 122 of the EEA Agreement and Article 14 of the Surveillance and Court Agreement does not lead to an absolute prohibition for the Authority to transmit to national courts information covered by professional secrecy. The courts of the European Community have confirmed that the duty of loyal cooperation requires the European Commission to provide the national court with whatever information the latter may seek ([120]). The Authority, taking the same approach, believes this also to include information covered by the obligation of professional secrecy.

84. Where it intends to provide information covered by professional secrecy to a national court, the Authority will therefore remind the court of its obligations under Article 122 of the EEA Agreement and Article 14 of the Surveillance and Court Agreement. It will ask the national court whether it can and will guarantee the protection of such confidential information and business secrets. Where the national court cannot offer such a guarantee, the Authority will not transmit the information concerned ([121]). Where, on the other hand, the national court has offered such a guarantee, the Authority will transmit the information requested.

85. There are further scenarios in which the Authority may be prevented from disclosing information to a national court. In particular, the Authority may refuse to transmit information to a national court where such transmission would interfere with the functioning of the EEA Agreement. This would be the case where disclosure would jeopardise the accomplishment of the tasks entrusted to the Authority ([122]) (e.g. information concerning the Authority's internal decision making process).

2.2. **Opinions on questions concerning the application of the state aid rules**

86. When called upon to apply the state aid rules to a case pending before it, a national court must respect any relevant EEA rules in the area of state aid and the existing case law of the EFTA Court and the courts of the European Community. In addition, a national court may seek guidance in the Authority's decision-making practice and in the guidelines concerning the application of the state aid rules issued by the Authority. However, there may be circumstances in which the above tools do not offer the national court sufficient guidance on the issues at stake. In the light of its obligations under Article 3 of the EEA Agreement and given the important and complex role which national courts play in state aid enforcement, the Authority therefore gives national courts the opportunity to request the Authority's opinion on relevant issues concerning the application of the state aid rules ([123]).

87. Such Authority opinions may, in principle, cover all economic, factual or legal matters which arise in the context of the national proceedings ([124]). Matters concerning the interpretation of EEA law can obviously also lead the national court to ask for an advisory opinion of the EFTA Court under Article 34 of the Surveillance and Court Agreement.

88. Possible subject matters for Authority opinions include, *inter alia*:

(a) Whether a certain measure qualifies as state aid within the meaning of Article 61 of the EEA Agreement and, if so, how the exact aid amount is to be calculated. Such opinions can relate to each of the criteria under Article 61 of the EEA Agreement (i.e. existence of an advantage, granted by an EFTA State or through State resources, possible distortion of competition and effect on trade between Contracting Parties).

(b) Whether a certain aid measure meets a certain requirement of the General Block Exemption Regulation so that no individual notification is necessary and the standstill obligation under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement does not apply.

(c) Whether a certain aid measure falls under a specific aid scheme which has been notified and approved by the Authority or otherwise qualifies as existing aid. Also in such cases, the standstill obligation under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement does not apply.

(d) Whether exceptional circumstances (as referred to in the "SFEI" judgment of the European Court of Justice ([125])) exist which would prevent the national court from ordering full recovery under EEA law.

(e) Where the national court is required to order the recovery of interest, it can ask the Authority for assistance as regards the interest calculation and the interest rate to be applied.

(f) The legal prerequisites for damages claims under EEA law and issues concerning the calculation of the damage incurred.

([120]) Case T-353/94 *Postbank v Commission*, paragraph 64; and Order of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others*, paragraphs 16 to 22.
([121]) Case T-353/94 *Postbank v Commission*, paragraph 93; and Order of 6 December 1990 in Case C-2/88 Imm. *Zwartveld and Others*, paragraphs 10 and 11.
([122]) Order of 6 December 1990 in Case C-2/88 Imm. *Zwartveld and Others*, paragraph 11; Case C-275/00 *First and Franex* [2002] ECR I-10943, paragraph 49; and Case T-353/94 *Postbank v Commission*, paragraph 93.
([123]) See Case C-39/94 *SFEI and Others*, paragraph 50.
([124]) However, please note paragraph 89 below.
([125]) Case C-39/94 *SFEI and Others*, paragraphs 70 and 71, referring to Advocate General Jacobs' Opinion in this case, paragraphs 73 to 75; see also Case 223/85 *RSV v Commission* [1987] ECR 4617, paragraph 17; and Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 16.

89. As stated in paragraph 17 above, the assessment of the compatibility of an aid measure with the functioning of the EEA Agreement pursuant to Article 61(2) and 61(3) of the EEA Agreement falls within the exclusive competence of the Authority. National courts are not competent to assess the compatibility of an aid measure. Whilst the Authority cannot therefore provide opinions on compatibility, this does not prevent the national court from requesting procedural information as to whether the Authority is already assessing the compatibility of a certain aid measure (or intends to do so) and, if so, when its decision is likely to be adopted ([126]).

90. When giving its opinion, the Authority will limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court. Moreover, the opinion of the Authority does not legally bind the national court.

91. In the interest of making its cooperation with national courts as effective as possible, requests for Authority opinions will be processed as quickly as possible. The Authority will endeavour to provide the national court with the requested opinion within four months from the date of the request. Where the Authority needs to ask the national court for further clarifications concerning its request, this four-month period starts to run from the moment when the clarification is received.

92. In this context, it should be noted, however, that the general obligation of national courts to protect individual rights under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement also applies during the period in which the Authority prepares the requested opinion. This is because, as set out in paragraph 59 above, the national court's obligation to protect individual rights under Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement applies irrespective of whether a statement from the Authority is still awaited or not ([127]).

93. As already indicated in paragraph 77 of this Chapter, the Authority will not hear the parties before providing its opinion to the national court. The introduction of the Authority's opinion to the national proceeding is subject to the relevant national procedural rules, which have to respect the general principles of EEA law.

2.3. **Practical issues**

94. National courts can address all requests for support under sections 2.1 and 2.2 of the present Chapter, and any other written or oral questions about state aid policy that may arise in their daily work to

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95. The Authority will publish a summary concerning its cooperation with national courts pursuant to this Chapter in its annual report. It may also make its opinions and observations available on its website.

3. FINAL PROVISIONS

96. This Chapter is issued in order to assist national courts in application of state aid rules. It does not bind the national courts or affect their independence. The Chapter also does not affect the rights and obligations of EFTA States and natural or legal persons under EEA law.

97. This Chapter replaces the existing Chapter of the Authority's State Aid Guidelines on co-operation between national courts and the EFTA Surveillance Authority in the state aid field.

98. The Authority intends to carry out a review of this Chapter five years after its adoption.

([126]) See paragraph 80 above.
([127]) This can include interim measures as outlined in section 1.2.6 above.

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