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Legislation

Contents

II *Non-legislative acts*

INTERNATIONAL AGREEMENTS

★ **Council Decision (EU) 2016/2044 of 18 November 2016 on the conclusion, on behalf of the European Union, of the Agreement between the European Union and the People's Republic of China on the short-stay visa waiver for holders of diplomatic passports** 1

REGULATIONS

★ **Commission Implementing Regulation (EU) 2016/2045 of 23 November 2016 amending Regulation (EU) No 37/2010 as regards the substance gamithromycin** [1] 3

Commission Implementing Regulation (EU) 2016/2046 of 23 November 2016 establishing the standard import values for determining the entry price of certain fruit and vegetables 6

DECISIONS

★ **Council Implementing Decision (EU) 2016/2047 of 18 November 2016 on the launch of automated data exchange with regard to DNA data in Denmark** 8

★ **Council Implementing Decision (EU) 2016/2048 of 18 November 2016 on the launch of automated data exchange with regard to dactyloscopic data in Denmark** 10

★ **Council Decision (EU, Euratom) 2016/2049 of 21 November 2016 appointing a member, proposed by the Kingdom of the Netherlands, of the European Economic and Social Committee** 12

[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.

★ **Commission Implementing Decision (EU) 2016/2050 of 22 November 2016 as regards the placing on the market of a genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4)** *(notified under document C(2016) 7443)* [1] 13

III *Other acts*

EUROPEAN ECONOMIC AREA

★ **EFTA Surveillance Authority Decision No 216/14/COL of 28 May 2014 amending for the 96th time the procedural and substantive rules in the field of State aid by adopting new Guidelines on State aid to airports and airlines [2016/2051]** 17

★ **EFTA Surveillance Authority Decision No 186/16/COL of 12 October 2016 on the compliance of Norway's unit rate for 2016 under Article 17 of the Act referred to at point 66wm of Annex XIII to the EEA Agreement (Commission Implementing Regulation (EU) No 391/2013 of 3 May 2013 laying down a common charging scheme for air navigation services) [2016/2052]** 52

[1] Text with EEA relevance

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

COUNCIL DECISION (EU) 2016/2044

of 18 November 2016

on the conclusion, on behalf of the European Union, of the Agreement between the European Union and the People's Republic of China on the short-stay visa waiver for holders of diplomatic passports

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (a) of Article 77(2), in conjunction with point (a)(v) of the second subparagraph of Article 218(6), thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament ([1]),

Whereas:

(1) The Commission has negotiated on behalf of the European Union an agreement with the People's Republic of China on the short-stay visa waiver for holders of diplomatic passports (the 'Agreement').

(2) In accordance with Council Decision (EU) 2016/431 ([2]), the Agreement has been signed and is applied on a provisional basis as from 3 March 2016.

(3) The Agreement sets up a Joint Committee of experts for the management of the Agreement. The Union is to be represented within that Joint Committee by the Commission, which should be assisted by the representatives of the Member States.

(4) This Decision constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC ([3]); the United Kingdom is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(5) This Decision constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC ([4]); Ireland is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(6) The Agreement should be approved,

([1]) Consent given on 25 October 2016 (not yet published in the Official Journal).
([2]) Council Decision (EU) 2016/431 of 12 February 2016 on the signing, on behalf of the European Union, and provisional application of the Agreement between the European Union and the People's Republic of China on the short-stay visa waiver for holders of diplomatic passports (OJ L 76, 23.3.2016, p. 17).
([3]) Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43).
([4]) Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ L 64, 7.3.2002, p. 20).

HAS ADOPTED THIS DECISION:

Article 1

The Agreement between the European Union and the People's Republic of China on the short-stay visa waiver for holders of diplomatic passports is hereby approved on behalf of the Union.

Article 2

The President of the Council shall give, on behalf of the Union, the notification provided for in Article 10(1) of the Agreement ([1]).

Article 3

The Commission, assisted by the representatives of the Member States, shall represent the Union within the Joint Committee of experts set up pursuant to Article 7 of the Agreement.

Article 4

This Decision shall enter into force on the day of its adoption.

Done at Brussels, 18 November 2016.

For the Council
The President
R. KALIŇÁK

([1]) The date of entry into force of the Agreement will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2016/2045

of 23 November 2016

amending Regulation (EU) No 37/2010 as regards the substance gamithromycin

(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 470/2009 of the European Parliament and of the Council of 6 May 2009 laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin, repealing Council Regulation (EEC) No 2377/90 and amending Directive 2001/82/EC of the European Parliament and of the Council and Regulation (EC) No 726/2004 of the European Parliament and the Council ([1]), and in particular Article 14 in conjunction with Article 17 thereof,

Having regard to the opinion of the European Medicines Agency formulated by the Committee for Medicinal Products for Veterinary Use,

Whereas:

(1) Article 17 of Regulation (EC) No 470/2009 requires that the maximum residue limit (MRL) for pharmacologically active substances intended for use in the Union in veterinary medicinal products for food-producing animals or in biocidal products used in animal husbandry is established in a Regulation.

(2) Table 1 of the Annex to Commission Regulation (EU) No 37/2010 ([2]) sets out the pharmacologically active substances and their classification regarding MRLs in foodstuffs of animal origin.

(3) Gamithromycin is already included in that table as an allowed substance for bovine species, applicable to fat, liver and kidney, excluding animals producing milk for human consumption and for porcine species, applicable to muscle, skin and fat, liver and kidney.

(4) An application for the extension of the existing entry for gamithromycin to ovine species has been submitted to the European Medicines Agency (EMA).

(5) According to Article 5 of Regulation (EC) No 470/2009, the EMA is to consider using MRLs established for a pharmacologically active substance in a particular foodstuff for another foodstuff derived from the same species, or MRLs established for a pharmacologically active substance in one or more species for other species.

(6) The EMA has considered that the extrapolation of the extended entry for gamithromycin to all ruminants except bovine is appropriate.

(7) Regulation (EU) No 37/2010 should therefore be amended accordingly.

(8) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Veterinary Medicinal Products,

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([1]) OJ L 152, 16.6.2009, p. 11.
([2]) Commission Regulation (EU) No 37/2010 of 22 December 2009 on pharmacologically active substances and their classification regarding maximum residue limits in foodstuffs of animal origin (OJ L 15, 20.1.2010, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

The Annex to Regulation (EU) No 37/2010 is amended as set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the twentieth day following that of 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, 23 November 2016.

For the Commission

The President

Jean-Claude JUNCKER

ANNEX

In Table 1 of the Annex to Regulation (EU) No 37/2010, the entry for the substance 'gamithromycin' is replaced by the following:

Pharmacologically active Substance	Marker residue	Animal Species	MRLs	Target Tissues	Other Provisions (according to Article 14(7) of Regulation (EC) No 470/2009)	Therapeutic Classification
'Gamithromycin	Gamithromycin	All ruminants except bovine	50 µg/kg 50 µg/kg 300 µg/kg 200 µg/kg	Muscle Fat Liver Kidney	Not for use in animals producing milk for human consumption	Anti-infectious agents/ Antibiotics'
		Bovine	20 µg/kg 200 µg/kg 100 µg/kg	Fat Liver Kidney		
		Porcine	100 µg/kg 100 µg/kg 100 µg/kg 300 µg/kg	Muscle Skin and fat in natural proportions Liver Kidney	NO ENTRY	

COMMISSION IMPLEMENTING REGULATION (EU) 2016/2046

of 23 November 2016

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 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ([1]),

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ([2]), and in particular Article 136(1) thereof,

Whereas:

(1) Implementing Regulation (EU) No 543/2011 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 XVI, Part A thereto.

(2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of 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, 23 November 2016.

For the Commission,

On behalf of the President,

Jerzy PLEWA

Director-General

Directorate-General for Agriculture and Rural Development

([1]) OJ L 347, 20.12.2013, p. 671.
([2]) OJ L 157, 15.6.2011, 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	MA	91,2
	TR	83,7
	ZZ	87,5
0707 00 05	TR	153,9
	ZZ	153,9
0709 93 10	MA	101,9
	TR	143,2
	ZZ	122,6
0805 20 10	MA	71,9
	ZZ	71,9
0805 20 30, 0805 20 50, 0805 20 70, 0805 20 90	JM	110,2
	MA	98,3
	PE	116,9
	TR	76,4
	ZZ	100,5
0805 50 10	AR	64,7
	TR	86,7
	ZZ	75,7
0808 10 80	CL	185,9
	NZ	177,5
	ZA	176,7
	ZZ	180,0
0808 30 90	CN	81,3
	TR	126,8
	ZZ	104,1

[1] Nomenclature of countries laid down by Commission Regulation (EU) No 1106/2012 of 27 November 2012 implementing Regulation (EC) No 471/2009 of the European Parliament and of the Council on Community statistics relating to external trade with non-member countries, as regards the update of the nomenclature of countries and territories (OJ L 328, 28.11.2012, p. 7). Code 'ZZ' stands for 'of other origin'.

DECISIONS

COUNCIL IMPLEMENTING DECISION (EU) 2016/2047

of 18 November 2016

on the launch of automated data exchange with regard to DNA data in Denmark

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime ([1]), and in particular Article 33 thereof,

Having regard to the opinion of the European Parliament ([2]),

Whereas:

(1) According to Article 25(2) of Decision 2008/615/JHA, the supply of personal data provided for under that Decision may not take place until the general provisions on data protection set out in Chapter 6 of that Decision have been implemented in the national law of the territories of the Member States involved in such supply.

(2) Article 20 of Council Decision 2008/616/JHA ([3]) provides that the verification that the above condition has been met with respect to automated data exchange in accordance with Chapter 2 of Decision 2008/615/JHA is to be done on the basis of an evaluation report based on a questionnaire, an evaluation visit and a pilot run.

(3) Denmark has informed the General Secretariat of the Council on the national DNA analysis files to which Articles 2 to 6 of Decision 2008/615/JHA apply and the conditions for automated searching as referred to in Article 3(1) of that Decision in accordance with Article 36(2) of that Decision.

(4) According to Chapter 4, point 1.1, of the Annex to Decision 2008/616/JHA, the questionnaire drawn up by the relevant Council Working Group concerns each of the automated data exchanges and has to be answered by a Member State as soon as it believes it fulfils the prerequisites for sharing data in the relevant data category.

(5) Denmark has completed the questionnaire on data protection and the questionnaire on DNA data exchange.

(6) A successful pilot run has been carried out by Denmark with the Netherlands.

(7) An evaluation visit has taken place in Denmark and a report on the evaluation visit has been produced by the Dutch evaluation team and forwarded to the relevant Council Working Group.

(8) An overall evaluation report, summarising the results of the questionnaire, the evaluation visit and the pilot run concerning DNA data exchange has been presented to the Council.

(9) On 12 July 2016, the Council concluded that Denmark had fully implemented the general provisions on data protection set out in Chapter 6 of Decision 2008/615/JHA.

(10) Therefore, for the purposes of automated searching of DNA data, Denmark should be entitled to receive and supply personal data pursuant to Articles 3 and 4 of Decision 2008/615/JHA.

([1]) OJ L 210, 6.8.2008, p. 1.
([2]) Opinion of 25 October 2016 (not yet published in the Official Journal).
([3]) Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210, 6.8.2008, p. 12).

(11) Denmark is bound by Decision 2008/615/JHA and is therefore taking part in the adoption and application of this Decision which implements Decision 2008/615/JHA.

(12) Ireland is bound by Decision 2008/615/JHA and is therefore taking part in the adoption and application of this Decision which implements Decision 2008/615/JHA.

(13) The United Kingdom is bound by Decision 2008/615/JHA and is therefore taking part in the adoption of this Decision which implements Decision 2008/615/JHA,

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of automated searching and comparison of DNA data, Denmark is entitled to receive and supply personal data pursuant to Articles 3 and 4 of Decision 2008/615/JHA as from 25 November 2016.

Article 2

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

This Decision shall apply in accordance with the Treaties.

Done at Brussels, 18 November 2016.

For the Council

The President

R. KALIŇÁK

COUNCIL IMPLEMENTING DECISION (EU) 2016/2048

of 18 November 2016

on the launch of automated data exchange with regard to dactyloscopic data in Denmark

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime ([1]), and in particular Article 33 thereof,

Having regard to the opinion of the European Parliament ([2]),

Whereas:

(1) According to Article 25(2) of Decision 2008/615/JHA, the supply of personal data provided for under that Decision may not take place until the general provisions on data protection set out in Chapter 6 of that Decision have been implemented in the national law of the territories of the Member States involved in such supply.

(2) Article 20 of Council Decision 2008/616/JHA ([3]) provides that the verification that the above condition has been met with respect to automated data exchange in accordance with Chapter 2 of Decision 2008/615/JHA is to be done on the basis of an evaluation report based on a questionnaire, an evaluation visit and a pilot run.

(3) According to Chapter 4, point 1.1, of the Annex to Decision 2008/616/JHA, the questionnaire drawn up by the relevant Council Working Group concerns each of the automated data exchanges and has to be answered by a Member State as soon as it believes it fulfils the prerequisites for sharing data in the relevant data category.

(4) Denmark has completed the questionnaire on data protection and the questionnaire on dactyloscopic data exchange.

(5) A successful pilot run has been carried out by Denmark with Germany.

(6) An evaluation visit has taken place in Denmark and a report on the evaluation visit has been produced by the German evaluation team and forwarded to the relevant Council Working Group.

(7) An overall evaluation report, summarising the results of the questionnaire, the evaluation visit and the pilot run concerning dactyloscopic data exchange has been presented to the Council.

(8) On 12 July 2016, the Council concluded that Denmark had fully implemented the general provisions on data protection set out in Chapter 6 of Decision 2008/615/JHA.

(9) Therefore, for the purposes of automated searching of dactyloscopic data, Denmark should be entitled to receive and supply personal data pursuant to Article 9 of Decision 2008/615/JHA.

(10) Denmark is bound by Decision 2008/615/JHA and is therefore taking part in the adoption and application of this Decision which implements Decision 2008/615/JHA.

(11) Ireland is bound by Decision 2008/615/JHA and is therefore taking part in the adoption and application of this Decision which implements Decision 2008/615/JHA.

(12) The United Kingdom is bound by Decision 2008/615/JHA and is therefore taking part in the adoption of this Decision which implements Decision 2008/615/JHA,

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([1]) OJ L 210, 6.8.2008, p. 1.
([2]) Opinion of 25 October 2016 (not yet published in the Official Journal).
([3]) Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210, 6.8.2008, p. 12).

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of automated searching of dactyloscopic data, Denmark is entitled to receive and supply personal data pursuant to Article 9 of Decision 2008/615/JHA as from 25 November 2016.

Article 2

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

This Decision shall apply in accordance with the Treaties.

Done at Brussels, 18 November 2016.

For the Council

The President

R. KALIŇÁK

COUNCIL DECISION (EU, Euratom) 2016/2049

of 21 November 2016

appointing a member, proposed by the Kingdom of the Netherlands, of the European Economic and Social Committee

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 302 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal of the Government of the Netherlands,

Having regard to the opinion of the European Commission,

Whereas:

(1) On 18 September 2015 and 1 October 2015, the Council adopted Decisions (EU, Euratom) 2015/1600 ([1]) and (EU, Euratom) 2015/1790 ([2]) appointing the members of the European Economic and Social Committee for the period from 21 September 2015 to 20 September 2020.

(2) A member's seat on the European Economic and Social Committee has become vacant following the end of the term of office of Ms Melanie Irmgard BOUWKNEGT,

HAS ADOPTED THIS DECISION:

Article 1

Ms Hester HOUWING, *Policy Adviser at the Christian Trade Union Federation (CNV)*, is hereby appointed as a member of the European Economic and Social Committee for the remainder of the current term of office, which runs until 20 September 2020.

Article 2

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 21 November 2016.

For the Council

The President

P. PLAVČAN

([1]) Council Decision (EU, Euratom) 2015/1600 of 18 September 2015 appointing the members of the European Economic and Social Committee for the period from 21 September 2015 to 20 September 2020 (OJ L 248, 24.9.2015, p. 53).

([2]) Council Decision (EU, Euratom) 2015/1790 of 1 October 2015 appointing the members of the European Economic and Social Committee for the period from 21 September 2015 to 20 September 2020 (OJ L 260, 7.10.2015, p. 23).

COMMISSION IMPLEMENTING DECISION (EU) 2016/2050

of 22 November 2016

as regards the placing on the market of a genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4)

(notified under document C(2016) 7443)

(Only the Dutch text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC ([1]), and in particular the first subparagraph of Article 18(1) thereof,

After consulting the European Food Safety Authority,

Whereas:

(1) Pursuant to Directive 2001/18/EC the placing on the market of a product containing or consisting of a genetically modified organism or a combination of genetically modified organisms is subject to a written consent being granted by the competent authority of the Member State that received the notification for the placing on the market of that product.

(2) In March of 2013 a notification concerning the placing on the market of a genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4) was submitted by Suntory Holdings Limited, Osaka, Japan, to the competent authority of the Netherlands.

(3) The notification covers import, distribution and retailing of genetically modified carnation *Dianthus caryophyllus* L., line SHD-27531-4.

(4) In accordance with Article 14 of Directive 2001/18/EC, the competent authority of the Netherlands prepared an assessment report, which concluded that there are no reasons on the basis of which consent for the placing on the market of cut flowers of the genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4) for ornamental use should be withheld, if specific conditions are fulfilled.

(5) The assessment report was submitted to the Commission and the competent authorities of the other Member States, some of which raised and one maintained objections to the placing on the market of the product.

(6) In its opinion of 10 November 2014, the European Food Safety Authority (EFSA), addressed the objections maintained by a Member State and concluded that, should the propagation of genetically modified carnation SHD-27531-4 (e.g. rooting) by individuals occur, genetically modified carnation would not show any potential for increased survival, fitness or weediness compared with its parental line ([2]). It also concluded that the potential spread of pollen of the genetically modified carnation by Lepidoptera to wild *Dianthus* species is highly unlikely to occur and, if it did occur, it is very unlikely that viable hybrids would be produced, survive and result in adverse environmental effects. Finally, it concluded that plant-to-plant gene transfer of the introduced genes is very unlikely and, if it did occur, it is unlikely to result in viable seed production leading to adverse environmental effects.

([1]) OJ L 106, 17.4.2001, p. 1.

([2]) EFSA GMO Panel (EFSA Panel on Genetically Modified Organisms), 2014. Scientific Opinion on objections of a Member State to a notification (Reference C/NL/13/01) for the placing on the market of the genetically modified carnation SHD-27531-4 with a modified colour, for import of cut flowers for ornamental use, under Part C of Directive 2001/18/EC from Suntory Holdings Limited. *EFSA Journal 2014*; 12(11):3878, 9 pp. doi:10.2903/j.efsa.2014.3878

(7) Following a request from the Commission to have a full EFSA opinion, on 15 December 2015, EFSA published a new opinion which concluded that there is no scientific reason to consider that import, distribution and retailing in the Union of genetically modified carnation SHD-27531-4 cut flowers for ornamental use will cause any adverse effect on human health or the environment ([1]). EFSA also found that the monitoring plan provided by the consent holder was acceptable in the light of the intended uses of the genetically modified carnation.

(8) An examination of the full notification, additional information provided by the notifier, specific objections maintained by a Member State in the light of Directive 2001/18/EC, and the opinions of EFSA, discloses no reason to believe that the placing on the market of cut flowers of the genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4) will adversely affect human health or the environment in the context of its proposed ornamental use.

(9) A unique identifier has been assigned to the genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4) for the purposes of Regulation (EC) No 1830/2003 of the European Parliament and of the Council ([2]) and Commission Regulation (EC) No 65/2004 ([3]).

(10) In light of the EFSA opinions, it is not necessary to establish specific conditions for the intended use with regard to handling or packaging of the product and the protection of particular ecosystems, environments or geographical areas.

(11) The labelling of the product should include information that cut flowers of genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4) may not be used for human or animal consumption nor for cultivation.

(12) A detection method was validated in March 2016 for the genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4) by the European Union Reference Laboratory established by Regulation (EC) No 1829/2003 of the European Parliament and of the Council ([4]).

(13) The Committee set up under Article 30(1) of Directive 2001/18/EC has not delivered an opinion within the time limit laid down by its Chairman. An implementing act was deemed to be necessary and the chair submitted the draft implementing act to the appeal committee for further deliberation. The appeal committee did not deliver an opinion,

HAS ADOPTED THIS DECISION:

Article 1

Consent

1. Written consent shall be granted by the competent authority of the Netherlands to the placing on the market of genetically modified carnation (*Dianthus caryophyllus* L., line SHD-27531-4) notified by Suntory Holdings Limited, Osaka, Japan (Reference C/NL/13/01) and defined in Article 2.

2. The consent shall be given in writing and shall explicitly specify the requirements set out in Articles 3 and 4 and the unique identifier set out in Article 2(2).

3. The consent shall be limited to the placing on the market of cut flowers of the genetically modified carnation as a product.

([1]) EFSA GMO Panel (EFSA Panel on Genetically Modified Organisms), 2015. Scientific Opinion on a Part C notification (reference C/NL/13/01) from Suntory Holdings Limited for the import, distribution and retailing of carnation SHD-27531-4 cut flowers with modified petal colour for ornamental use. *EFSA Journal 2015*;13(12):4358, 19 pp. doi:10.2903/j.efsa.2015.4358

([2]) Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC (OJ L 268, 18.10.2003, p. 24).

([3]) Commission Regulation (EC) No 65/2004 of 14 January 2004 establishing a system for the development and assignment of unique identifiers for genetically modified organisms (OJ L 10, 16.1.2004, p. 5).

([4]) Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ L 268, 18.10.2003, p. 1).

4. The consent shall cover progeny derived through vegetative reproduction of the genetically modified carnation.

5. The period of validity of the consent shall be 10 years starting from the date on which the consent is issued.

Article 2

Product

1. The genetically modified organism to be placed on the market, is a carnation (*Dianthus caryophyllus* L.) with modified flower colour, derived from a *Dianthus caryophyllus* L. cell culture, and transformed with *Agrobacterium tumefaciens*, strain AGL0, using the vector pCGP1991, and resulting in line SHD-27531-4.

The genetically modified carnation contains the following DNA in three cassettes:

(a) Cassette 1

The petunia *dfr* gene encoding dihydroflavonol 4-reductase (DFR), a key enzyme in the anthocyanin biosynthetic pathway, including its own promoter and terminator.

(b) Cassette 2

The promoter sequence from snapdragon chalcone synthase gene, flavonoid 3′5′-hydroxylase (*f3′5′h*) from *Viola hortensis* cDNA encoding F3′5′H, a key enzyme in the anthocyanin biosynthetic pathway, and the terminator from the *D8* petunia gene encoding a putative phospholipid transfer protein.

These two cassettes were inserted into the plant genome to obtain the desired flower colour.

(c) Cassette 3

The *Cauliflower mosaic virus* 35S promoter, the 5′-untranslated region from the petunia gene encoding chlorophyll a/b binding protein, the *SuRB* (*als*) gene coding for a mutant acetolactate synthase protein (ALS) derived from *Nicotiana tabacum*, which confers tolerance to sulfonylurea, including its own terminator. This trait was used as a marker in the selection of transformants.

2. The unique identifier of the genetically modified carnation shall be SHD-27531-4.

Article 3

Conditions for placing on the market

The genetically modified carnation may be placed on the market subject to the following conditions:

(a) the genetically modified carnation may only be used for ornamental purposes;

(b) the cultivation of the genetically modified carnation shall not be allowed;

(c) without prejudice to confidentiality requirements set out in Article 25 of Directive 2001/18/EC, the methodology for detecting and identifying the genetically modified carnation, including experimental data demonstrating the specificity of the methodology, as validated by the European Union Reference Laboratory is publicly available at http://gmo-crl.jrc.ec.europa.eu/valid-2001-18.htm;

(d) without prejudice to the confidentiality requirements set out in Article 25 of Directive 2001/18/EC, the consent holder shall, whenever requested to do so, make positive and negative control samples of the product, or its genetic material, or reference materials available to the competent authorities and to inspection services of Member States as well as to Union control laboratories;

(e) the words ‘This product is a genetically modified organism’ or ‘This product is a genetically modified carnation’, and the words ‘not for human or animal consumption nor for cultivation’ shall appear either on a label or in a document accompanying the genetically modified carnations.

Article 4

Monitoring

1. Throughout the period of validity of the consent, the consent holder shall ensure that the monitoring plan, contained in the notification and consisting of a general surveillance plan to check for any adverse effects on human health or the environment arising from handling or use of the genetically modified carnation, is put in place and implemented.

The monitoring plan is available at [Link: plan published on the internet].

2. The consent holder shall directly inform the operators and users concerning the safety and general characteristics of the genetically modified carnation and of the conditions as to monitoring, including the appropriate management measures to be taken in case of accidental cultivation.

3. The consent holder shall submit to the Commission and to the competent authorities of the Member States annual reports on the results of the monitoring activities.

4. The consent holder shall be in the position to give evidence to the Commission and the competent authorities of the Member States:

(a) that the existing monitoring networks, including national botanic survey networks and plant protection services, as specified in the monitoring plan contained in the notification, gather the information relevant for the monitoring of the genetically modified carnation; and

(b) that these existing monitoring networks referred to in point (a) have agreed to make available that information to the consent holder before the date of submission of the monitoring reports to the Commission and competent authorities of the Member States in accordance with paragraph 3.

Article 5

Addressee

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 22 November 2016.

For the Commission

Vytenis ANDRIUKAITIS

Member of the Commission

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 216/14/COL

of 28 May 2014

amending for the 96th time the procedural and substantive rules in the field of State aid by adopting new Guidelines on State aid to airports and airlines [2016/2051]

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

HAVING REGARD to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('Surveillance and Court Agreement'), in particular to Articles 5(2)(b) and 24 thereof and Article 1 in Part I of Protocol 3 thereof,

Whereas:

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

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

On 4 April 2014, the European Commission published a 'Communication from the Commission, Guidelines on State aid to airports and airlines' ([1]). The Guidelines set out the conditions under which public financing of airports and airlines may constitute State aid and, when it does constitute State aid, the conditions of compatibility. They apply from 4 April 2014 and replace the 1994 and 2005 Aviation Guidelines ([2]) from that date.

These Guidelines are of relevance to the European Economic Area,

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

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

The new Guidelines will replace the current ones on the financing of airports and start-up aid to airlines departing from regional airports ([3]),

HAVING consulted the European Commission,

HAVING consulted the EFTA States by a letter dated 12 May 2014 on the subject,

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([1]) OJ C 99, 4.4.2014, p. 3.

([2]) Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5); and Communication from the Commisison — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

([3]) Financing of airports and start-up aid to airlines departing from regional airports (OJ L 62, 6.3.2008, p. 30 and the EEA Supplement No 12, 6.3.2008, p. 3).

HAS ADOPTED THIS DECISION:

Article 1

The State Aid Guidelines shall be amended by introducing new Guidelines on State aid to airports and airlines. The new Guidelines are annexed to this Decision and form an integral part of it.

Article 2

Only the English version is authentic.

Done at Brussels, 28 May 2014.

For the EFTA Surveillance Authority

Oda Helen SLETNES	Frank BÜCHEL
President	*College Member*

ANNEX

GUIDELINES ON STATE AID TO AIRPORTS AND AIRLINES

CONTENTS

1. Introduction: State aid policy in the aviation sector

2. Scope and definitions

2.1. Scope

2.2. Definitions

3. Presence of State aid within the meaning of Article 61(1) of the EEA Agreement

3.1. Notion of undertaking and economic activity

3.2. Use of State resources and imputability to the State

3.3. Distortion of competition and effect on trade

3.4. Public funding of airports and the application of the Market Economy Operator principle

3.5. Financial relationships between airports and airlines

3.5.1. Comparison with the market price

3.5.2. *Ex ante* profitability analysis

4. Public funding of Services of General Economic Interest

4.1. Definition of a service of general economic interest in the airport and air transport sectors

4.2. Compatibility of aid in the form of public service compensation

5. Compatibility of aid under Article 61(3)(c) of the EEA Agreement

5.1. Aid to airports

5.1.1. Investment aid to airports

5.1.2. Operating aid to airports

5.2. Start-up aid to airlines

6. Aid of a social character under Article 61(2)(a) of the EEA Agreement

7. Cumulation

8. Final provisions

8.1. Annual reporting

8.2. Transparency

8.3. Monitoring

8.4. Evaluation

8.5. Appropriate measures

8.6. Application

8.7. Review

1. INTRODUCTION: STATE AID POLICY IN THE AVIATION SECTOR

1. Linking people and regions, air transport plays a vital role in the integration and the competitiveness of the European Economic Area ('EEA'), as well as its interaction with the world. Air transport contributes significantly to the Union's economy, with more than 15 million annual commercial movements, 822 million passengers transported to and from Union airports in 2011, 150 scheduled airlines, a network of over 460 airports and 60 air navigation service providers ([1]). The Union benefits from its position as a global aviation hub, with airlines and airports alone contributing more than EUR 140 billion to the Union's gross domestic product each year. The aviation sector employs some 2,3 million people in the Union ([2]).

2. The Europe 2020 Strategy ([3]) ('EU 2020') underlines the importance of transport infrastructure as part of the Union's sustainable growth strategy for the coming decade. In particular, the Commission has emphasised in its White Paper 'Roadmap to a Single Transport Area' ([4]) that the internalisation of externalities, the elimination of unjustified subsidies and free and undistorted competition are an essential part of the effort to align market choices with sustainability needs. The 'Roadmap to a Single Transport Area' also emphasises the importance of an efficient use of resources. In practice, transport has to use less and cleaner energy, better exploit a modern infrastructure and reduce its negative impact on the climate and the environment and, in particular, on key natural assets like water, land and ecosystems.

3. The gradual completion of the internal market has led to the removal of all commercial restrictions for airlines flying within the EEA, such as restrictions on routes or number of flights and the setting of fares. Since the liberalisation of air transport in 1997 ([5]), the industry has expanded as never before, and this has contributed to economic growth and job creation. This has also paved the way for the emergence of low-cost carriers, operating a new business model based on quick turn-around times and very efficient fleet use. This development has generated a tremendous increase in traffic, with low-cost carriers' traffic growing at a fast pace since 2005. In 2012, for the first time, low-cost airlines (44,8 %) exceeded the market share of incumbent air carriers (42,4 %), a trend which continued in 2013 (45,94 % for low-cost and 40,42 % for incumbent).

4. While still predominantly publicly owned and managed ([6]), airports across the EEA are currently witnessing growing involvement of private undertakings. New markets have been created in the last decade through partial privatisation of certain airports, as well as through competition for the management of publicly owned airports, including regional airports.

5. Smaller airports display the greatest proportion of public ownership ([7]) and most often rely on public support to finance their operations. The prices of these airports tend not to be determined with regard to market considerations and in particular sound *ex ante* profitability prospects, but essentially having regard to local or regional considerations. Under the current market conditions the profitability prospects of commercially run airports also

([1]) *Sources:* Eurostat, Association of European Airlines, International Air Transport Association.
([2]) Study on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport Sector over the period 1997/2010. Steer Davies Gleave for the European Commission, DG MOVE. Final report of August 2012.
([3]) Communication from the Commission — Europe 2020 — A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final of 3 March 2010.
([4]) Roadmap to a Single Transport Area — Towards a competitive and resource efficient transport system, COM(2011) 144.
([5]) Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), incorporated into point 66b of Annex XIII to the EEA Agreement by Joint Committee Decision No 7/94 of 21 March 1994 (OJ L 160, 28.6.1994, p. 1 and EEA Supplement No 17, 28.6.1994, p. 1); Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), incorporated into point 64a of Annex XIII of the EEA Agreement by Joint Committee Decision No 7/94 of 21 March 1994 (OJ L 160, 28.6.1994, p. 1 and EEA Supplement No 17, 28.6.1994, p. 1); and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15), incorporated into point 65 of Annex XIII of the EEA Agreement by Joint Committee Decision No 7/94 of 21 March 1994 (OJ L 160, 28.6.1994, p. 1 and EEA Supplement No 17, 28.6.1994, p. 1).
([6]) According to Airport Council International Europe, 77 % of airports were fully publicly owned in 2010, while 9 % were fully privately owned, see Airport Council International Europe: The Ownership of Europe's Airports 2010.
([7]) This is exemplified by the fact that, although in 2010 their share of the overall number of airports amounted to 77 %, publicly owned airports accounted for only 52 % of total passenger traffic.

remain highly dependent ([8]) on the level of throughput, with airports that have fewer than 1 million passengers per annum typically struggling to cover their operating costs. Consequently the vast majority of regional airports are subsidised by public authorities on a regular basis.

6. Certain regions are still hampered by poor accessibility from the rest of the EEA, and major hubs are facing increasing levels of congestion ([9]). At the same time, the density of regional airports in certain regions of the EEA has led to substantial overcapacity of airport infrastructure relative to passenger demand and airline needs.

7. The pricing system in most EEA airports has traditionally been designed as a published scheme of airport charges based on passenger numbers and aircraft weight ([10]). However, the evolution of the market and the close cooperation between airports and airlines have gradually paved the way for a wide variety of commercial practices, including long-term contracts with differentiated tariffs and sometimes substantial amounts of incentives and marketing support paid by airports and/or local authorities to airlines. In particular, public funds earmarked for supporting airport operations may be channelled to airlines in order to attract more commercial traffic, thereby distorting air transport markets ([11]).

8. In its communication on State aid Modernisation (SAM) ([12]), the Commission points out that State aid policy should focus on facilitating well-designed aid targeted at market failures and objectives of common interest of the Union, and avoiding waste of public resources. State aid measures can indeed, under certain conditions, correct market failures, thereby contributing to the efficient functioning of markets and enhancing competitiveness. Furthermore, where markets provide efficient outcomes but these are deemed unsatisfactory from a cohesion policy point of view, State aid may be used to obtain a more desirable, equitable market outcome. However, State aid may have negative effects, such as distorting competition between undertakings and affecting trade between EEA States to an extent contrary to the common interests of the EEA. State aid control in the airport and air transport sectors should therefore promote sound use of public resources for growth-oriented policies, while limiting competition distortions that would undermine a level playing field in the internal market, in particular by avoiding duplication of unprofitable airports in the same catchment area and creation of overcapacities.

9. The application of State aid rules to the airport and air transport sectors constitutes part of the Authority's efforts aimed at improving the competitiveness and growth potential of the EEA airport and airline industries ([13]). A level playing field among airlines and airports in the EEA is of paramount importance for those objectives, as well as for the entire EEA Agreement. At the same time, regional airports can prove important both for local development and for the accessibility of certain regions, in particular against the backdrop of positive traffic forecasts for air transport in the EEA.

10. As part of the general plan to create a single airspace of the EEA and taking account of market developments, in 2005 the Authority adopted guidelines on financing of airports and start-up aid to airlines departing from regional airports ([14]) (the '2005 Aviation guidelines'). Those guidelines specified the conditions under which

([8]) As shown in 2002 by the 'Study on competition between airports and the application of State aid rules' — Cranfield University, June 2002, and subsequently confirmed by industry reports.

([9]) 13 airports in the Union are forecasted to be operating at full capacity 8 hours a day every day of the year in 2030, compared to 2007 when only 5 airports were operating at or near capacity 100 % of the time (see communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Airport policy in the European Union — addressing capacity and quality to promote growth, connectivity and sustainable mobility of 1 December 2011, COM(2011) 823) ('the communication on Airport policy in the European Union').

([10]) As evidenced by the International Civil Aviation Organisation's policies on charges for airports and navigation services (Document 9082), last revised in April 2012.

([11]) In particular, where aid is determined on the basis of *ex post* calculations (making good for any deficits as they arise), airports may not have much incentive to contain costs and charge airport charges that are sufficient to cover costs.

([12]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State aid Modernisation (SAM), COM(2012) 209 final.

([13]) See the communication on Airport policy in the European Union.

([14]) Financing of airports and start-up aid to airlines departing from regional airports (OJ L 62, 6.3.2008, p. 30 and EEA Supplement No 12, 6.3.2008, p. 3).

certain categories of State aid to airports and airlines could be declared compatible with the functioning of the EEA Agreement. They supplemented the 1994 Aviation guidelines ([15]), which mainly contained provisions with regard to the restructuring of flag carriers and social aid for the benefit of EEA citizens.

11. These guidelines take stock of the new legal and economic situation concerning the public financing of airports and airlines and specify the conditions under which such public financing may constitute State aid within the meaning of Article 61(1) of the EEA Agreement and, when it does constitute State aid, the conditions under which it can be declared compatible with the functioning of EEA Agreement pursuant to Article 61(3)(c). The Authority's assessment is based on its experience and decision-making practice, as well as on its analysis of current market conditions in the airport and air transport sectors. It is therefore without prejudice to its approach in respect of other infrastructures or sectors. In particular, the Authority considers that the mere fact that an airport operator receives or has received State aid does not automatically imply that its customer airlines are also aid beneficiaries. If the conditions offered to an airline at a given airport would have been offered by a profit-driven airport operator, the airline cannot be deemed to receive an advantage for the purposes of State aid rules.

12. Where public support constitutes State aid, the Authority considers that under certain conditions, certain categories of aid to regional airports and airlines using those airports can be justified, in particular to develop new services and contribute to local accessibility and economic development. Nevertheless, distortions of competition on all markets concerned should be taken into consideration and only State aid which is proportionate and necessary to contribute to an objective of common interest can be acceptable.

13. In this context, it should be pointed out that operating aid constitutes, in principle, a very distortive form of aid and can only be authorised under exceptional circumstances. The Authority considers that airports and airlines should normally bear their own operating costs. Nevertheless, the gradual shift to a new market reality, as described in points 3 to 7, explains the fact that regional airports have received widespread operating support from public authorities prior to the adoption of these guidelines. Against this backdrop, for a transitional period, and to enable the aviation industry to adapt to the new market situation, certain categories of operating aid to airports might still be justified under certain conditions. As explained in point 5, under the current market conditions the available data and industry consensus point to a link between an airport's financial situation and its traffic levels, with financing needs normally being proportionately greater for smaller airports. In the light of their contribution to economic development and territorial cohesion in the EEA, managers of smaller regional airports should therefore be given time to adjust to the new market environment, for example, by gradually increasing airport charges to airlines, by introducing rationalisation measures, by differentiating their business models or by attracting new airlines and customers to fill their idle capacity.

14. At the end of the transitional period, airports should no longer be granted operating aid and they should finance their operations from their own resources. Whilst the provision of compensation for uncovered operating costs of services of general economic interest should remain possible for small airports or to allow for connectivity of all regions with particular requirements, the market changes stimulated by these guidelines should allow airports to cover their costs as in any other industry.

15. Development of new air traffic should, in principle, be based on a sound business case. However, without appropriate incentives, airlines are not always prepared to run the risk of opening new routes from unknown and untested small airports. Therefore, under certain conditions, airlines may be granted start-up aid during and even after the transitional period, if this provides them with the necessary incentive to create new routes from regional airports, increases the mobility of the citizens of the EEA by establishing access points for intra-EEA flights and stimulates regional development. As remote regions are penalised by their poor accessibility, start-up aid for routes from those regions is subject to more flexible compatibility criteria.

([15]) The Chapter of the EFTA Surveillance Authority State aid Guidelines on aid to the aviation sector (OJ L 124, 23.5.1996, p. 41 and EEA Supplement No 23, 23.5.1996, p. 83) refers to the Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector and states that the Authority will apply criteria corresponding to those found in the Commission guidelines.

16. The allocation of airport capacity to airlines should therefore gradually become more efficient (that is to say demand-oriented), and there should be less need for public funding of airports as private investment becomes more widespread. If a genuine transport need and positive externalities for a region can be established, investment aid to airports should nevertheless continue to be accepted after the transitional period, with maximum aid intensities ensuring a level playing field across the EEA.

17. Against this backdrop these guidelines introduce a new approach to the assessment of compatibility of aid to airports:

(a) whereas the 2005 Aviation guidelines left open the issue of investment aid, these revised guidelines define maximum permissible aid intensities depending on the size of the airport;

(b) however, for large airports with a passenger volume of over 5 million per annum, investment aid should in principle not be declared compatible with the functioning of EEA Agreement pursuant to Article 61(3)(c), except in very exceptional circumstances, such as relocation of an existing airport, where the need for State intervention is characterised by a clear market failure, taking into account the exceptional circumstances, the magnitude of the investment and the limited competition distortions;

(c) the maximum permissible aid intensities for investment aid are increased by up to 20 % for airports located in remote regions;

(d) for a transitional period of 10 years, operating aid to regional airports can be declared compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c); however, with regard to airports with passenger traffic of less than 700 000 per annum the Authority will, after a period of 4 years, reassess the profitability prospects of this category of airport in order to evaluate whether special rules should be devised to assess the compatibility with the EEA Agreement market of operating aid in favour of those airports.

18. In addition, the compatibility conditions for start-up aid to airlines have been streamlined and adapted to recent market developments.

19. The Authority will apply a balanced approach which is neutral vis-à-vis the various business models of airports and airlines, and takes into account the growth prospects of air traffic, the need for regional development and accessibility and the positive contribution of the low-cost carriers' business model to the development of some regional airports. But at the same time, a gradual move towards a market-oriented approach is undoubtedly warranted; except in duly justified and limited cases, airports should be able to cover their operating costs and any public investment should be used to finance the construction of viable airports meeting the demand of airlines and passengers; distortions of competition between airports and between airlines, as well as duplication of unprofitable airports should be avoided. This balanced approach should be transparent, easily understood and straightforward to apply.

20. These guidelines are without prejudice to EFTA States' duty to comply with EEA law. In particular, to avoid that the investment would lead to environmental harm, EFTA States must also ensure compliance with EEA environmental legislation, including the need to carry out an environmental impact assessment where appropriate and ensure all relevant permits.

2. SCOPE AND DEFINITIONS

2.1. **Scope**

21. The principles set out in these guidelines apply to State aid to airports and airlines ([16]). They will be applied in accordance with the EEA Agreement and secondary legislation adopted pursuant to the EEA Agreement as well as other EEA guidelines on State aid ([17]).

22. Some airports and airlines are specialised in freight transport. The Authority does not yet have sufficient experience in assessing the compatibility of aid to airports and airlines specialised in freight transport to summarise its practice in the form of specific compatibility criteria. For those categories of undertakings, the Authority will apply the common principles of compatibility as set out in Section 5 through a case-by-case analysis.

23. The Authority will not apply the principles set out in the Guidelines on national regional aid for 2007–2013 ([18]) and the Guidelines on regional State aid for 2014-2020 ([19]) or any future guidelines on regional aid to State aid granted for airport infrastructure.

24. These guidelines replace the 1994 and 2005 Aviation guidelines.

2.2. **Definitions**

25. For the purpose of these guidelines:

(1) 'aid' means any measure fulfilling all the criteria laid down in Article 61(1) of the EEA Agreement;

(2) 'aid intensity' means the total aid amount expressed as a percentage of eligible costs, both figures expressed in net present value terms at the moment the aid is granted and before any deduction of tax or other charges;

(3) 'airline' means any airline with a valid operating licence issued by an EEA State or a Member of the Common European Aviation Area pursuant to Regulation (EC) No 1008/2008 of the European Parliament and of the Council ([20]);

(4) 'airport charge' means a price or a levy collected for the benefit of the airport and paid by the airport users for the use of facilities and services which are exclusively provided by the airport and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight, including charges or fees paid for ground handling services and fees for centralised ground handling infrastructure;

([16]) The principles set out in these guidelines do not apply to aid for the provision of ground handling services regardless of whether they are provided by the airport itself, by an airline or by a supplier of ground handling services to third parties; such aid will be assessed on the basis of the relevant general rules. Pursuant to Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports (OJ L 272, 25.10.1996, p. 36), incorporated into point 64c of Annex XIII of the EEA Agreement by Joint Committee Decision No 79/2000 of 2 October 2000 (OJ L 315, 14.12.2000, p. 20 and EEA Supplement No 59, 14.12.2000, p. 18), or any subsequent legislation on access to the ground handling market at EEA's airports, airports that carry out ground handling are required to keep separate accounts of their ground handling activities and other activities. Moreover, an airport may not subsidise its ground handling activities from the revenue it derives from its airport activities. These guidelines also do not apply to undertakings which, though active at an airport, are engaged in non-aeronautical activities.

([17]) Notably, but not exclusively, Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3), incorporated into point 64a of Annex XIII to the EEA Agreement by Joint Committee Decision No 90/2011 of 19 July 2011 (OJ L 262, 6.10.2011, p. 62 and EEA Supplement No 54, 6.10.2011, p. 78), Directive 96/67/EC, Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70, 14.3.2009, p. 11), incorporated into point 65a of Annex XIII to the EEA Agreement by Joint Committee Decision No 64/2012 of 30 March 2012 (OJ L 207, 2.8.2012, p. 44 and EEA Supplement No 43, 2.8.2012, p. 54), and any subsequent legislation on airport charges.

([18]) Guidelines on national regional aid for 2007-2013 (OJ L 54, 28.2.2008, p. 1 and EEA Supplement No 11, 28.2.2008, p. 1).

([19]) Guidelines on regional State aid for 2014-2020 (not yet incorporated to the EEA Agreement).

([20]) Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

(5) 'airport infrastructure' means infrastructure and equipment for the provision of airport services by the airport to airlines and the various service providers, including runways, terminals, aprons, taxiways, centralised ground handling infrastructure and any other facilities that directly support the airport services, excluding infrastructure and equipment which is primarily necessary for pursuing non-aeronautical activities, such as car parks, shops and restaurants;

(6) 'airport' means an entity or group of entities performing the economic activity of providing airport services to airlines;

(7) 'airport revenue' means the revenue from airport charges net of marketing support or any incentives provided by the airport to the airlines, taking into account revenue stemming from non-aeronautical activities (free of any public support), excluding any public support and compensation for tasks falling within public policy remit, or services of general economic interest;

(8) 'airport services' means services provided to airlines by an airport or any of its subsidiaries, to ensure the handling of aircraft, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services, including the provision of ground handling services and the provision of centralised ground handling infrastructure;

(9) 'average annual passenger traffic' means a figure determined on the basis of the inbound and outbound passenger traffic during the 2 financial years preceding that in which the aid is notified or granted in the case of non-notified aid;

(10) 'capital costs' means the depreciation of the eligible investment costs into airport infrastructure and equipment, including the underlying costs of financing;

(11) 'capital costs funding gap' means the net present value of the difference between the positive and negative cash flows, including investment costs, over the lifetime of the investment in fixed capital assets;

(12) 'catchment area of an airport' means a geographic market boundary that is normally set at around 100 kilometres or around 60 minutes' travelling time by car, bus, train or high-speed train; however, the catchment area of a given airport may be different and needs to take into account the specificities of each particular airport. The size and shape of the catchment area varies from airport to airport, and depends on various characteristics of the airport, including its business model, location and the destinations it serves;

(13) 'costs of financing' means the costs related to debt and equity financing of the eligible costs of the investment; in other words, the costs of financing take into account the proportion of total interest and own capital remuneration that corresponds to the financing of eligible costs of the investment, excluding the financing of working capital, investments in non-aeronautical activities or other investment projects;

(14) 'date of grant of the aid' means the date when the EFTA State took a legally binding commitment to award the aid that can be invoked before a national court;

(15) 'eligible investment costs' means the costs relating to investments in airport infrastructure, including planning costs, but excluding investment costs for non-aeronautical activities, investment costs in relation to equipment for ground handling services, ordinary maintenance costs and costs for tasks falling within the public policy remit;

(16) 'ground handling services' means services provided to airport users at airports as described in the Annex to Directive 96/67/EC, and any subsequent legislation on access to the ground handling market at airports;

(17) 'high-speed train' means a train capable of reaching speeds of over 200 km/h;

(18) 'investment aid' means aid to finance fixed capital assets, specifically, to cover the capital costs funding gap;

(19) 'net present value' means the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value using the cost of capital, that is to say, the normal required rate of return applied by the company in other investment projects of a similar kind or, where not available, the cost of capital of the company as a whole, or expected returns commonly observed in the airport sector;

(20) 'non-aeronautical activities' means commercial services to airlines or other users of the airport, such as ancillary services to passengers, freight forwarders or other service providers, renting out of offices and shops, car parking and hotels;

(21) 'operating aid' means aid to cover the 'operating funding gap', either in the form of an upfront payment or in the form of periodic instalments to cover expected operating costs (periodic lump sum payments);

(22) 'operating costs' means the underlying costs of an airport in respect of the provision of airport services, including cost categories such as cost of personnel, contracted services, communications, waste, energy, maintenance, rent and administration, but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit;

(23) 'operating funding gap' means the operating losses of an airport over the relevant period, discounted to their current value using the cost of capital, that is to say the shortfall (in net present value terms) between airport revenues and operating costs of the airport;

(24) 'reasonable profit margin' means a rate of return on capital, for example, measured as an internal rate of return (IRR), that the undertaking is normally expected to make on investments with a similar degree of risk;

(25) 'regional airport' means an airport with annual passenger traffic volume of up to 3 million;

(26) 'remote regions' mean islands which are part of the territory of an EFTA State, and sparsely populated areas;

(27) 'sparsely populated areas' mean NUTS 2 regions with less than 8 inhabitants per km^2 or NUTS 3 regions with less than 12,5 inhabitants per km^2 (based on Eurostat data on population density);

(28) 'start of works' means either the start of construction works on the investment, or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever comes first, and does not include preparatory works, such as obtaining permits and conducting preliminary feasibility studies.

3. PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 61(1) OF THE EEA AGREEMENT

3.1. **Notion of undertaking and economic activity**

26. In accordance with Article 61(1) of the EEA Agreement, State aid rules apply only where the recipient is an 'undertaking'. The Court of Justice of the European Union ('the Court') has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status or ownership and the way in which they are financed ([21]). Any activity consisting in offering goods and services on a market is an economic activity ([22]). The economic nature of an activity as such does not depend on whether the activity generates profits ([23]).

([21]) See Application of the State aid rules to compensation granted for the provision of services of general economic interest (OJ L 161, 13.6.2013, p. 12, and EEA Supplement No 34, 13.6.2013, p. 1) Part 2.1 and associated case law, in particular joined Cases C-180/98 to C-184/98 *Pavlov and Others*, [2000] ECR I-6451.

([22]) Case 118/85 *Commission* v *Italy*, [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy*, [1998] ECR I-3851, paragraph 36; *Pavlov and Others*, paragraph 75.

([23]) Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, [1980] ECR 3125, paragraph 88; Case C-244/94 *FFSA and Others*, [1995] ECR I-4013, paragraph 21; and Case C-49/07 *MOTOE*, [2008] ECR I-4863, paragraphs 27 and 28.

27. It is now clear that the activity of airlines which consists in providing transport services to passengers or undertakings constitutes an economic activity. The 1994 Aviation guidelines, however, still reflected the view that '[t]he construction [or] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid.' In '*Aéroports de Paris*' ([24]), the Union Courts ruled against this view and held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity. In its judgment in the '*Leipzig-Halle airport*' case ([25]), the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.

28. As far as past financing measures are concerned, the gradual development of market forces in the airport sector ([26]) does not allow for a precise date to be determined, from which the operation of an airport should without doubt be considered as an economic activity. However, the Union Courts have recognised the evolution in the nature of airport activities. In '*Leipzig/Halle airport*', the General Court held that, from 2000, the application of State aid rules to the financing of airport infrastructure could no longer be excluded ([27]). Consequently, from the date of the judgment in '*Aéroports de Paris*' (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.

29. Conversely, due to the uncertainty that existed prior to the judgment in '*Aéroports de Paris*', public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid and, accordingly, that such measures did not need to be notified to the Authority. It follows that the Authority cannot now bring into question, on the basis of State aid rules, financing measures granted ([28]) before the '*Aéroports de Paris*' judgment ([29]).

30. In any event, measures that were granted before any competition developed in the airport sector did not constitute State aid when granted, but could be considered as existing aid pursuant to Article 1(b)(v) of Part II of Protocol 3 of the Surveillance and Court Agreement, if the conditions of Article 61(1) of the EEA Agreement are met.

31. The entity or group of entities performing the economic activity of providing airport services to airlines, that is to say, the handling of aircraft, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services ([30]), will be referred to as the 'airport' ([31]). An airport provides a range of services ('airport services') to airlines, in exchange for payment ('airport charges'). While the exact extent of the services provided by airports, as well as the labelling of charges as 'fees' or 'taxes' varies across the EEA, the provision of airport services to airlines in exchange for airport charges constitutes an economic activity in all EFTA States.

32. The legal and regulatory framework within which individual airports are owned and operated varies from airport to airport across the EEA. In particular, regional airports are often managed in close cooperation with public authorities. In this respect, the Court has ruled that several entities can be deemed to perform an economic activity together, thereby constituting an economic unit, under specific conditions ([32]). In the field of aviation, the

([24]) Case T-128/98 *Aéroports de Paris* v *Commission*, [2000] ECR II-3929, confirmed by Case C-82/01, [2002] ECR I-9297, paragraphs 75-79.
([25]) Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH* v *Commission*, ('*Leipzig-Halle airport*' judgment), [2011] ECR II-1311, in particular paragraphs 93 and 94; confirmed by Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, [2012] not yet reported.
([26]) See point 3, and *Leipzig-Halle airport* judgment, paragraph 105.
([27]) See *Leipzig-Halle airport* judgment, paragraph 106.
([28]) The relevant criterion for the date at which a possible aid measure is deemed to have been granted is the date of the legally binding act by which public authorities undertake to award the measure at stake to its beneficiary. See Case T-358/94 *Compagnie Nationale Air France* v *Commission*, [1996] ECR II-2109, paragraph 79, Case T-109/01, *Fleuren Compost BV* v *Commission*, [2004] ECR II-127, paragraph 74 and Joined Cases T-362/05 and T-363/05 *Nuova Agricast* v *Commission*, [2008] ECR II-297, paragraph 80, and Joined Cases T-427/04 and T-17/05, *France and France Télécom* v *Commission*, [2009] ECR II-4315, paragraph 321.
([29]) Decision C 38/2008 of 3 October 2012 on Munich airport Terminal 2 (OJ L 319, 29.11.2013, p. 8), paragraphs 74 to 81.
([30]) See Directive 2009/12/EC, recital 1.
([31]) The airport may or may not be the same entity that owns the airport.
([32]) The joint exercise of an economic activity is normally assessed by analysing the existence of functional, economic and organic links between the entities. See, for instance, Case C-480/09 P *AceaElectrabel Produzione SpA* v *Commission*, [2010] ECR I-13355, paragraphs 47 to 55; Case C-222/04 *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze SpA and Others*, [2006] ECR I-289, paragraph 112.

Authority considers that significant involvement in an airport's commercial strategy, such as through the direct conclusion of agreements with airlines or the setting of airport charges, would constitute a strong indication that, alone or jointly, the relevant entity performs the economic activity of operating the airport ([33]).

33. In addition to airport services, an airport may also provide other commercial services to airlines or other users of the airport, such as ancillary services to passengers, freight forwarders or other service providers (for example, through the rental of premises to shop and restaurant managers, parking operators, etc.). These economic activities will be collectively referred to as 'non-aeronautical activities'.

34. However, not all the activities of an airport are necessarily of an economic nature ([34]). Since the classification of an entity as an undertaking is always in relation to a specific activity, it is necessary to distinguish between the activities of a given airport and to establish to what extent those activities are of an economic nature. If an airport carries out both economic and non-economic activities, it is to be regarded as an undertaking only with regard to the former.

35. The Court has held that activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid ([35]). At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature ([36]).

36. The public funding of such non-economic activities does not constitute State aid, but should be strictly limited to compensating the costs to which they give rise and may not be used to finance other activities ([37]). Any possible overcompensation by public authorities of costs incurred in relation to non-economic activities may constitute State aid. Moreover, if an airport is engaged in non-economic activities, alongside its economic activities, separated cost accounting is required in order to avoid any transfer of public funds between the non-economic and economic activities.

37. Public financing of non-economic activities must not lead to undue discrimination between airports. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities ([38]). Therefore, when it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature.

3.2. **Use of State resources and imputability to the State**

38. The transfer of State resources may take many forms such as direct grants, tax rebates ([39]), soft loans or other types of preferential financing conditions. State resources will also be involved if the State provides a benefit in kind or in the form of subsidised services ([40]), such as airport services. State resources can be used ([41]) at

([33]) Case T-196/04 *Ryanair Ltd* v *Commission*, [2008] ECR II-3643 ('*Charleroi*' judgment), paragraph 88.
([34]) *Leipzig-Halle airport* judgment, paragraph 98.
([35]) Case C-118/85 *Commission* v *Italy*, [1987] ECR 2599, paragraphs 7 and 8, and Case C-30/87 *Bodson/Pompes funèbres des régions libérées*, [1988] ECR 2479, paragraph 18.
([36]) See, in particular, Case C-364/92 *SAT/Eurocontrol*, [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati* v *Commission*, [2009] ECR I-2207, paragraph 71.
([37]) Case C-343/95 *Cali & Figli* v *Servizi ecologici porto di Genova*, [1997] ECR I-1547. Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001 (OJ C 148, 25.6.2003, p. 7). Commission Decision N 438/2002 of 16 October 2002, Aid in support of public authority functions in the port sector (OJ C 284, 21.11.2002, p. 2).
([38]) See, among others, Case C-172/03 *Wolfgang Heiser* v *Finanzamt Innsbruck*, [2005] ECR I-01627, paragraph 36, and case-law cited in that judgment. See also, Case E-9/12 *Iceland* v *ESA*, judgment of the EFTA Court of 22 July 2013, paragraph 54.
([39]) See Decision N 324/2006 of 24 October 2006 — France, Aid in support of the charter of an ATR 72-500 by Air Caraïbes (OJ C 300, 9.12.2006, p. 10).
([40]) See Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie* v *GEMO SA* [2003] ECR I-13769, paragraph 29.
([41]) Resources of a public undertaking constitute State resources within the meaning of Article 107(1) of the Treaty because the public authorities control these resources. See Case C-482/99 *France* v *Commission*, [2002] ECR I-4397 ('*Stardust Marine*' judgment).

national, regional or local level. Funding from Union funds will likewise constitute State resources, when those funds are allocated at an EFTA State's discretion ([42]).

39. The Court has also ruled that even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed ([43]). Therefore, it needs to be assessed whether measures granted by public undertakings are imputable to the State. The Court has indicated that the imputability to the State of a measure granted by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken ([44]).

40. Against this background, the resources of a public airport constitute public resources. Consequently, a public airport may grant aid to an airline using the airport if the decision to grant the measure is imputable to the State and the other conditions of Article 61(1) of the EEA Agreement are met. The Court has also ruled that whether a measure is granted directly by the State or by public or private bodies established or appointed by it to administer the measure is irrelevant to whether it is considered to be State aid ([45]).

3.3. **Distortion of competition and effect on trade**

41. According to the case law of the Court, financial support distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings ([46]).

42. In general, when an advantage granted by an EFTA State strengthens the position of an undertaking compared with other undertakings competing in a given market of an EFTA State, trade between EEA States must be regarded as being affected by that advantage ([47]).

43. Competition between airports can be assessed in the light of airlines' criteria of choice, and in particular by comparing factors such as the type of airport services provided and the clients concerned, population or economic activity, congestion, whether there is access by land, and the level of charges and overall commercial conditions for use of airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract airlines and may thus significantly distort competition.

44. The Authority further notes that airports are in competition for the management of airport infrastructure, including at local and regional airports. The public funding of an airport may therefore distort competition in the markets for airport infrastructure operation. Moreover, public funding to both airports and airlines can distort competition and have an effect on trade in air transport markets across the EEA. Finally, intermodal competition may also be affected by public funding to airports or airlines.

45. The Court held in the *Altmark* judgment ([48]) that even public funding granted to an undertaking which provides only local or regional transport services may have an effect on trade between EEA States, as the supply of transport services by that undertaking may thereby be maintained or increased with the result that undertakings established in other EFTA States have less chance of providing their transport services. Even the fact that the amount of aid is small or the relatively small size of the undertaking which receives public funding does not, as such, exclude the possibility that trade between EEA States might be affected. Consequently, the public financing of airports or airlines operating services from those airports might affect trade between EEA States.

([42]) The Court has confirmed that once financial means remain constantly under public control and are therefore available to the competent national authorities, this is sufficient for them to be categorised as State aid, see Case C-83/98 P *France* v *Ladbroke Racing Ltd* and *Commission*, [2000] ECR I-3271, paragraph 50.
([43]) See *Stardust Marine* judgment, paragraph 52.
([44]) See *Stardust Marine* judgement, paragraphs 55 and 56.
([45]) Case 78/76, *Steinike & Weinlig v Germany*, [1977] ECR 595, paragraph 21.
([46]) Case C-310/99, *Italy* v *Commission*, [2002] ECR-I-2289, paragraph 65.
([47]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* ('*Altmark*' judgment), [2003] ECR I-7747.
([48]) See *Altmark* judgment, paragraphs 77 to 82.

3.4. **Public funding of airports and the application of the market economy operator principle**

46. Article 125 of the EEA Agreement states that the Agreement in no way prejudices the rules of the EEA States governing the system of property ownership. EEA States can accordingly own and manage undertakings, and can purchase shares or other interests in public or private undertakings.

47. Consequently, these guidelines make no distinction between the different types of beneficiaries in terms of their legal structure or whether they belong to the public or private sector, and all references to airlines and airports or the companies which manage them encompass all types of legal entity.

48. In order to assess whether an undertaking has benefited from an economic advantage, the so-called market economy operator ('MEO') test is applied. This test should be based on available information and foreseeable developments at the time when the public funding was granted and it should not rely on any analysis based on a later situation ([49]).

49. Consequently, when an airport benefits from public funding, the Authority will assess whether such funding constitutes aid by considering whether in similar circumstances a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations ([50]), would have granted the same funding. Public funding granted in circumstances which correspond to normal market conditions is not regarded as State aid ([51]).

50. The Court has also ruled that the conduct of a public investor may be compared with that of a private investor guided by prospects of profitability in the longer term ([52]), over the lifetime of the investment. These considerations are particularly pertinent to investment in infrastructure, which often involve large amounts of financial resources and can produce a positive return only after many years. Any assessment of the profitability of an airport must take into account airport revenues.

51. Consequently, as regards public financing to airports, the analysis of conformity with the MEO test should be based on sound *ex ante* profitability prospects for the entity granting the financing ([53]). Any traffic forecasts used for that purpose should be realistic and subject to a reasonable sensitivity analysis. The absence of a business plan constitutes an indication that the MEO test may not be met ([54]). In the absence of a business plan, EFTA States can provide analysis or internal documents from the public authorities or from the airport concerned showing clearly that an analysis conducted before the granting of the public financing demonstrates that the MEO test is satisfied.

52. Airports can play an important role in fostering local development or accessibility. Nevertheless regional or policy considerations cannot be taken into account for the purposes of the MEO test ([55]). Such considerations can, however, under certain conditions, be taken into account when assessing the compatibility of aid.

([49]) *Stardust Marine* judgment, paragraph 71. Case C-124/10P *European Commission* v *EDF*, [2012], not yet reported, paragraphs 84, 85 and 105.

([50]) Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech Stahlwerke* v *Commission*, [1999] ECR II-17, paragraph 120. See also case C-40/85, *Belgium* v *Commission*, [1986] ECR 02321, paragraph 13.

([51]) *Stardust Marine* judgment, paragraph 69. See also Case C-303/88 *Italy* v *Commission*, [1991] ECR I-1433, paragraph 20.

([52]) Case C-305/89 *Italy* v *Commission* ('*ALFA Romeo*' judgment), [1991] ECR I-1603, paragraph 20. Case T-228/99 *Westdeutsche Landesbank Girozentrale* v *Commission*, [2003] ECR II-435, paragraph 250-270.

([53]) See Commission Decision in Case C 25/2007 — *Finland* — *Tampere Pirkkala airport and Ryanair* (OJ L 309, 19.11.2013, p. 27).

([54]) Case C-124/10 P *Commission* v *EDF* [2012], not yet reported, paragraphs 84, 85 and 105.

([55]) Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech Stahlwerke* v *Commission*, [1999] ECR II-17, paragraph 120. See also case C-40/85 *Belgium* v *Commission*, [1986] ECR 02321, paragraph 13.

3.5. **Financial relationships between airports and airlines**

53. Where an airport has public resources at its disposal, aid to an airline using the airport can, in principle, be excluded where the relationship between the airport and that airline satisfies the MEO test. This is normally the case if:

(a) the price charged for the airport services corresponds to the market price (see Section 3.5.1); or

(b) it can be demonstrated through an *ex ante* analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport (see Section 3.5.2).

3.5.1. *Comparison with the market price*

54. One approach to the assessment of the presence of aid to airlines involves establishing whether the price charged by an airport to a particular airline corresponds to the market price. On the basis of available and relevant market prices, an appropriate benchmark can be identified, taking into account the elements set out in point 60.

55. The identification of a benchmark requires, first, that a sufficient number of comparable airports providing comparable services under normal market conditions can be selected.

56. In this respect the Authority notes that for the moment, a large majority of EEA airports benefit from public funding to cover investment and operating costs. Most of those airports can only remain on the market with public support.

57. Publicly owned airports have traditionally been considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules. Those airports' prices consequently tend not to be determined with regard to market considerations and in particular sound *ex ante* profitability prospects, but essentially having regard to social or regional considerations.

58. Even if some airports are privately owned or managed without social or regional considerations, the prices charged by those airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports as the latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.

59. In those circumstances, the Authority has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. This situation may change or evolve in the future, in particular once the State aid rules apply in full to public financing of airports.

60. In any event, the Authority considers that a benchmarking exercise should be based on a comparison of airport charges, net of any benefits provided to the airline (such as marketing support, discounts or any other incentive), across a sufficient number of suitable 'comparator airports', whose managers behave as market economy operators. In particular, the following indicators should be used:

(a) traffic volume;

(b) type of traffic (business or leisure or outbound destination), the relative importance of freight and the relative importance of revenue stemming from the non-aeronautical activities of the airport;

(c) type and level of airport services provided;

(d) proximity of the airport to a large city;

(e) number of inhabitants in the catchment area of the airport;

(f) prosperity of the surrounding area (GDP per capita);

(g) different geographical areas from which passengers could be attracted.

3.5.2. Ex ante *profitability analysis*

61. At present the Authority considers *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines.

62. In this respect, the Authority considers that price differentiation is a standard business practice, as long as it complies with all relevant competition and sectoral legislation ([56]). Nevertheless, such differentiated pricing policies should be commercially justified to satisfy the MEO test ([57]).

63. The Authority considers that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an *ex ante* standpoint, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin ([58]) on the basis of sound medium-term prospects ([59]).

64. In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activity should be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes ([60]). Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport should be taken into account ([61]). Such incremental costs could encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.

65. Where an airport operator benefits from compatible aid, the advantage resulting from such aid is not passed on to a specific airline ([62]) if the following conditions are met: the infrastructure is open to all airlines ([63]) (this includes infrastructure which is more likely to be used by certain categories, like low-cost operators or charters) and not dedicated to a specific airline; and the airlines pay tariffs covering at least the incremental costs as defined in point 64. Furthermore, the Authority considers that under such conditions, even if there would have been State aid to the airlines, such aid would in any event have been compatible with the functioning of the EEA Agreement for the same reasons that justify the compatibility of the aid at the level of the airport. Where an airport operator benefits from incompatible investment aid, the advantage resulting from such aid is not passed on to a specific airline if the following conditions are met: the infrastructure is open to all airlines and not dedicated to a specific airline; and the airlines pay tariffs covering at least the incremental cost as defined in point 64. The Authority considers that under such conditions a sectorial advantage to the airline industry or other users cannot be excluded but should not lead to recovery from specific airlines or other users.

66. When assessing airport/airline arrangements, the Authority will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term.

([56]) Relevant provisions include Articles 53 and 54 of the EEA Agreement, and Directive 2009/12/EC.

([57]) See Commission Decision in Case C 12/2008 — *Slovakia — Agreement between Bratislava Airport and Ryanair* (OJ L 27, 1.2.2011, p. 24), and Commission Decision in Case C 25/2007 — *Finland — Tampere Pirkkala airport and Ryanair* (OJ L 309, 19.11.2013, p. 27).

([58]) A reasonable profit margin is a 'normal' rate of return on capital, that is to say, a rate of return that would be required by a typical company for an investment of similar risk. The return is measured as an internal rate of return ('IRR') over the envisaged cash flows induced by the arrangement with the airline.

([59]) This does not preclude foreseeing that future benefits over the duration of the arrangements may offset initial losses.

([60]) Any public support, such as for example marketing agreements directly concluded between public authorities and the airline, designed to offset part of the normal costs incurred by the airport in relation to the airport/airline arrangement will likewise be taken into account. This is irrespective of whether such support is directly granted to the airline concerned, or channelled through the airport or another entity.

([61]) *Charleroi* judgment, paragraph 59.

([62]) What is said in this paragraph about airlines applies in the same way to other users of the airport.

([63]) See notably joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH* v *Commission*, [2011] ECR II-1311, paragraph 109.

4. PUBLIC FUNDING OF SERVICES OF GENERAL ECONOMIC INTEREST

67. In some cases, public authorities may define certain economic activities carried out by airports or airlines as services of general economic interest ('SGEI') within the meaning of Article 59(2) of the EEA Agreement and the *Altmark* case-law ([64]), and provide compensation for discharging such services.

68. In such cases, the SGEI Communication ([65]) and Commission Regulation (EU) No 360/2012 ([66]) provide guidance on the conditions under which the public financing of an SGEI constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. Aid in the form of public service compensation will be assessed under Commission Decision 2012/21/EU ([67]) and the SGEI framework ([68]). Together those four documents form the 'SGEI package', which also applies to compensation granted to airports and airlines. What follows illustrates the application of some of the principles set out in the SGEI package in the light of certain sectoral specificities.

4.1. **Definition of a service of general economic interest in the airport and air transport sectors**

69. The first *Altmark* criterion requires a clear definition of the tasks which constitute a service of general economic interest. This requirement coincides with that of Article 59(2) of the EEA Agreement ([69]). According to case law ([70]), undertakings entrusted with the operation of an SGEI must have received that task by an act of a public authority. The Authority has also clarified ([71]) that, for an activity to be considered as an SGEI, it should exhibit special characteristics as compared with ordinary economic activities, and that the general interest objective pursued by public authorities cannot simply be that of the development of certain economic activities or economic areas provided for in Article 61(3)(c) of the EEA Agreement ([72]).

70. As regards air transport services, public service obligations can only be imposed in accordance with Regulation (EC) No 1008/2008 ([73]). In particular, such obligations can only be imposed with regard to a specific route or group of routes ([74]), and not with regard to any generic route originating from a given airport, city or region.

([64]) See *Altmark* judgment, paragraphs 86 to 93. Public funding for the provision of an SGEI does not entail a selective advantage within the meaning of Article 61(1) of the EEA Agreement if the following four conditions are met: (a) the beneficiary of a State funding mechanism for an SGEI must be formally entrusted with the provision and discharge of an SGEI, the obligations of which must be clearly defined (b) the parameters for calculating the compensation must be established beforehand in an objective and transparent manner; (c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the SGEI, taking into account the relevant receipts and a reasonable profit for discharging those obligations and (d) where the beneficiary is not chosen pursuant to a public procurement procedure, that allows for the provision of the service at the least cost to the community, the level of compensation granted must be determined on the basis of an analysis of the costs which a typical undertaking, well run, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.

([65]) See footnote 21.

([66]) Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8), incorporarted into point 1ha of Annex XV to the EEA Agreement by Joint Committee Decision No 225/2012 of 7 December 2012 (OJ L 81, 21.3.2013, p. 27 and EEA Supplement No 18, 21.3.2013, p. 32),

([67]) Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3), incorporarted into point 1h of Annex XV to the EEA Agreement by Joint Committee Decision No 66/2012 of 30 March 2012 (OJ L 207, 2.8.2012, p. 46 and EEA Supplement No 43, 2.8.2012, p. 56).

([68]) Framework for State aid in the form of public service compensation (OJ L 161, 13.6.2013, p. 12 and EEA Supplement No 34, 13.6.2013, p. 1).

([69]) Case T-289/03 *British United Provident Association Ltd (BUPA)* v *Commission* [2008], ECR II-81, paragraphs 171 and 224.

([70]) See Joined Cases T-204/97 and T-270/97 EPAC — *Empresa para a Agroalimentação e Cereais, SA* v *Commission* [2000] ECR II-2267, paragraph 126 and Case T-17/02 *Fred Olsen, SA* v *Commission* [2005] ECR II-2031, paragraphs 186, 188-189.

([71]) See SGEI Communication, paragraph 45.

([72]) See decision N 381/04 — France, Project for a high capacity telecommunications network in the Pyrénées-Atlantiques (DORSAL) (OJ C 162, 2.7.2005, p. 5).

([73]) Articles 16, 17 and 18.

([74]) Both origin and destination airports must be clearly identified see Article 16(1) of Regulation (EC) No 1008/2008.

Moreover, public service obligations can only be imposed with regard to a route to fulfil transport needs which cannot be adequately met by an existing air route or by other means of transport ([75]).

71. In this respect, it should be stressed that compliance with the substantive and procedural requirements of Regulation (EC) No 1008/2008 does not eliminate the need for the EFTA State(s) concerned to assess compliance with Article 61(1) of the EEA Agreement.

72. As far as airports are concerned, the Authority considers that it is possible for the overall management of an airport, in well-justified cases, to be considered an SGEI. In the light of the principles outlined in point 69, the Authority considers that this can only be the case if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the EEA to an extent that would prejudice its social and economic development. Such an assessment should take due account of other modes of transport, and in particular of high-speed rail services or maritime links served by ferries. In such cases, public authorities may impose a public service obligation on an airport to ensure that the airport remains open to commercial traffic. The Authority notes that certain airports have an important role to play in terms of regional connectivity of isolated, remote or peripheral regions of the Union. Such a situation may, in particular, occur in respect of the outermost regions, as well as islands or other areas of the EEA. Subject to a case-by-case assessment and depending on the particular characteristics of each airport and the region which it serves, it may be justified to define SGEI obligations in those airports.

73. In the light of the specific requirements attached to public service obligations for air transport services ([76]), and in view of the complete liberalisation of air transport markets, the Authority considers that the scope of public service obligations imposed on airports should not encompass the development of commercial air transport services.

4.2. **Compatibility of aid in the form of public service compensation**

74. If one of the cumulative criteria of the *Altmark* judgment is not fulfilled, public service compensation provides an economic advantage to its beneficiary, and might constitute State aid within the meaning of Article 61(1) of the EEA Agreement. Such State aid may be regarded as compatible with the functioning of the EEA Agreement pursuant to Article 59(2), if all the compatibility criteria developed for the application of that paragraph are met.

75. State aid in the form of public service compensation is exempt from the notification requirement of Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement if the requirements set out in Decision 2012/21/EU are met. The scope of Decision 2012/21/EU covers public service compensation granted to:

(a) airports where the average annual traffic does not exceed 200 000 passengers ([77]) over the duration of the SGEI entrustment; and

(b) airlines, as regards air links to islands where the average annual traffic does not exceed 300 000 passengers ([78]).

76. State aid not covered by Decision 2012/21/EU can be declared compatible with the functioning of the EEA Agreement pursuant to Article 59(2), if the conditions of the SGEI Framework are met. However, it should be noted that for assessment under both Decision 2012/21/EU and the SGEI Framework, the considerations on the definition of public service obligations imposed on airports or airlines in points 69 to 73 of these guidelines will apply.

5. COMPATIBILITY OF AID UNDER ARTICLE 61(3)(c) OF THE EEA AGREEMENT

77. If public funding granted to airports and/or airlines constitutes aid, that aid can be considered compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c) provided that it complies with the compatibility criteria for airports in Section 5.1 of these guidelines and for airlines in Section 5.2. State aid granted to

([75]) In particular, the Authority considers that it would be difficult to justify PSOs on a route to a given airport if there are already similar services notably in terms of transport time, frequencies, level and quality of service, to another airport serving the same catchment area.
([76]) See point 70 and Regulation (EC) No 1008/2008, recital 12 and articles 16 to 18.
([77]) This threshold refers to a one-way count, that is to say, a passenger flying from the airport and back to the airport would be counted twice. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.
([78]) This threshold refers to a one-way count, that is to say, a passenger flying to the island and back would be counted twice. It applies to individual routes between an airport on the island and an airport on the mainland.

airlines which incrementally decreases the profitability of the airport (see points 63 and 64 of these guidelines) will be deemed incompatible with the functioning of the EEA Agreement pursuant to Article 61(1), unless the compatibility conditions for start-up aid set out in Section 5.2 of these guidelines are met.

78. To assess whether a State aid measure can be considered compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c), the Authority generally analyses whether the design of the aid measure ensures that the positive impact towards an objective of common interest exceeds its potential negative effects on trade and competition.

79. The communication on State aid modernisation (SAM) called for the identification and definition of common principles applicable to the assessment of compatibility of all aid measures carried out by the Authority. An aid measure will be considered compatible with the functioning of the EEA Agreement pursuant to Article 61(3) provided that the following cumulative conditions are met:

(a) contribution to a well-defined objective of common interest: a State aid measure must have an objective of common interest in accordance with Article 61(3) of the EEA Agreement;

(b) need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;

(c) appropriateness of the aid measure: the aid measure must be an appropriate policy instrument to address the objective of common interest;

(d) incentive effect: the aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity which they would not carry out without the aid or they would carry out in a restricted or different manner or location;

(e) proportionality of the aid (aid limited to the minimum): the aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned;

(f) avoidance of undue negative effects on competition and trade between EEA States: the negative effects of the aid must be sufficiently limited, so that the overall balance of the measure is positive;

(g) transparency of aid: EFTA States, the Authority, economic operators, and the interested public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder as outlined in Section 8.2.

80. As regards State aid in the aviation sector, the Authority considers that those common principles are respected when State aid granted to airports or airlines meets all the conditions outlined respectively in Sections 5.1 and 5.2. Therefore, compliance with those conditions implies compatibility of the aid with the functioning of the EEA Agreement pursuant to Article 61(3)(c).

81. However, if an inseparable aspect of a State aid measure and the conditions attached to it (including its financing method when the financing method forms an integral part of the State aid measure) entail a violation of EEA law, the aid cannot be declared compatible with the functioning of the EEA Agreement ([79]).

82. Moreover, in assessing the compatibility of any State aid with the functioning of the EEA Agreement, the Authority will take account of any proceedings concerning infringements of Article 53 or 54 of the EEA Agreement which may concern the beneficiary of the aid and which may be relevant for its assessment under Article 61(3) of the EEA Agreement ([80]).

([79]) See for instance Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks* v *Rhone Alpes Bourgogne* [2008] ECR I-10807, paragraphs 94–116.
([80]) See Case C-225/91 *Matra* v *Commission*, [1993] ECR I-3203, paragraph 42.

5.1. **Aid to airports**

5.1.1. *Investment aid to airports*

83. Investment aid granted to airports either as individual aid or under an aid scheme will be considered compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c) provided that the cumulative conditions in point 79 are fulfilled as set out in points 84 to 108.

(a) Contribution to a well-defined objective of common interest

84. Investment aid to airports will be considered to contribute to the achievement of an objective of common interest, if it:

(a) increases the mobility of EEA citizens and the connectivity of the regions by establishing access points for intra-EEA flights; or

(b) combats air traffic congestion at major EEA hub airports; or

(c) facilitates regional development.

85. Nevertheless, the duplication of unprofitable airports or the creation of additional unused capacity does not contribute to an objective of common interest. If an investment project is primarily aimed at creating new airport capacity, the new infrastructure must, in the medium-term, meet the forecasted demand of the airlines, passengers and freight forwarders in the catchment area of the airport. Any investment which does not have satisfactory medium-term prospects for use, or diminishes the medium-term prospects for use of existing infrastructure in the catchment area, cannot be considered to serve an objective of common interest.

86. Accordingly, the Authority will have doubts as to the medium-term prospects for use of airport infrastructure at an airport located in the catchment area of an existing airport where the existing airport is not operating at or near full capacity. The medium-term prospects for use must be demonstrated on the basis of sound passenger and freight traffic forecasts incorporated in an *ex ante* business plan and must identify the likely effect of the investment on the use of existing infrastructure, such as another airport or other modes of transport, in particular high-speed train connections.

(b) Need for State intervention

87. In order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. State aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver.

88. The conditions that smaller airports face when developing their services and in attracting private financing of their infrastructure investments are often less favourable than those faced by the major airports in the EEA. For those reasons, under present market conditions, smaller airports may have difficulties in ensuring the financing of their investments without public funding.

89. The need for public funding to finance infrastructure investments will, due to high fixed costs ([81]), vary according to the size of an airport and will normally be greater for smaller airports. The Authority considers that, under current market conditions, the following categories of airports ([82]), and their relative financial viabilities, can be identified:

(a) airports with up to 200 000 passengers per annum may not be able to cover their capital costs to a large extent;

(b) airports with annual passenger traffic of between 200 000 and 1 million are usually not able to cover their capital costs to a large extent;

([81]) Between 70 % and 90 % of the airport's costs are fixed.
([82]) The categories of airports for the purposes of these guidelines are based on the available industry data.

(c) airports with annual passenger traffic of 1–3 million should, on average, be able to cover their capital costs to a greater extent;

(d) airports with annual passenger traffic of above 3 and up to 5 million should, in principle, be able to cover, to a large extent, all their costs (including operating costs and capital costs) but, under certain case-specific circumstances, public support might be necessary to finance some of their capital costs;

(e) airports with annual passenger traffic above 5 million are usually profitable and are able to cover all of their costs, except in very exceptional circumstances.

(c) Appropriateness of State aid as a policy instrument

90. The EFTA States must demonstrate that the aid measure is an appropriate policy instrument to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible with the functioning of the EEA Agreement if other less distortive policy instruments or aid instruments allow the same objective to be reached.

91. The EFTA States can make different choices with regard to the use of different policy instruments and forms of aid. In general, where an EFTA State has considered other policy options and the use of a selective instrument, such as State aid in the form of a direct grant, has been compared with less distortive forms of aid (such as loans, guarantees or repayable advances), the measures concerned are considered to constitute an appropriate instrument.

92. Wherever possible, EFTA States are encouraged to design national schemes that reflect the main principles underlying public financing and indicate the most relevant features of the planned public funding of airports. Framework schemes ensure coherence in the use of public funds, reduce the administrative burden on smaller granting authorities and accelerate the implementation of individual aid measures. Further, EFTA States are encouraged to give clear guidance for the implementation of State aid financing for regional airports.

(d) Existence of incentive effect

93. Works on an individual investment can start only after an application has been submitted to the granting authority. If works start before an application is submitted to the granting authority, any aid awarded in respect of that individual investment will not be considered compatible with the functioning of the EEA Agreement.

94. An investment project at an airport may be economically attractive in its own right. Therefore, it needs to be verified that the investment would not have been undertaken or would not have been undertaken to the same extent without any State aid. If this is confirmed, the Authority will consider that the aid measure has an incentive effect.

95. The incentive effect is identified through counterfactual analysis, comparing the levels of intended activity with aid and without aid.

96. Where no specific counterfactual is known, the incentive effect can be assumed when there is a capital cost funding gap, that is to say, when on the basis of an *ex ante* business plan, it can be shown that there is a difference between the positive and negative cash flows (including investment costs into fixed capital assets) over the lifetime of the investment in net present value terms ([83]).

(e) Proportionality of the aid amount (aid limited to the minimum)

97. The maximum permissible amount of State aid is expressed as a percentage of eligible costs (the maximum aid intensity). Eligible costs are the costs relating to the investments in airport infrastructure, including planning costs, ground handling infrastructure (such as baggage belts etc.) and airport equipment. Investment costs relating to non-aeronautical activities (in particular parking, hotels, restaurants and offices) are ineligible ([84]).

([83]) This does not preclude foreseeing that future benefits may offset initial losses.
([84]) Financing of such activities is not covered by these guidelines, as they are of a non-transport character, and will thus be assessed on the basis of the relevant sectoral and general rules.

98. The investment costs relating to the provision of ground handling services (such as buses, vehicles, etc.) are ineligible, insofar as they are not part of ground handling infrastructure ([85]).

99. In order to be proportionate, investment aid to airports must be limited to the extra costs (net of extra revenues) which result from undertaking the aided project/activity rather than the alternative project/activity that the beneficiary would have undertaken in the counterfactual scenario, that is to say, if it had not received the aid. Where no specific counterfactual is known, in order to be proportionate, the amount of the aid should not exceed the funding gap of the investment project (so-called 'capital cost funding gap'), which is determined on the basis of an *ex ante* business plan as the net present value of the difference between the positive and negative cash flows (including investment costs) over the lifetime of the investment. For investment aid the business plan should cover the period of the economic utilisation of the asset.

100. As the funding gap will vary according to the size of the airport and is normally wider for smaller airports, the Authority will use a range of permissible maximum aid intensities to ensure overall proportionality. The aid intensity must not exceed the maximum permissible investment aid intensity and should, in any case, not go beyond the actual funding gap of the investment project.

101. The following table summarises the maximum permissible aid intensity depending on the size of the airport as measured by the number of passengers per annum ([86]).

Size of airport based on average passenger traffic (passengers per annum)	Maximum investment aid intensity (%)
> 3-5 million	up to 25
1-3 million	up to 50
< 1 million	up to 75

102. The maximum aid intensities for investment aid to finance airport infrastructure may be increased by up to 20 % for airports located in remote regions irrespective of their size.

103. Airports with average traffic below 1 million passengers per annum should contribute at least 25 % to the financing of the total eligible investment costs. However, investment projects at certain airports with average traffic below 1 million passengers per annum located in peripheral regions of the EEA may result in a funding gap which is higher than the maximum permissible aid intensities. Subject to a case-by-case assessment and depending on the particular characteristics of each airport, investment project and the region served, intensity exceeding 75 % may be justified in exceptional circumstances for airports with traffic volume below 1 million passengers per annum.

104. In order to take account of the specific circumstances regarding the relocation of an existing airport and cessation of airport activities at an existing site, the Authority will assess, in particular, the proportionality, the necessity and the maximum aid intensity of the State aid granted on the basis of the funding gap analysis or the counterfactual scenario of each specific case, regardless of the average passenger traffic of that airport.

([85]) The principles set out in these guidelines do not apply to aid for the provision of ground handling services regardless whether they are provided by the airport itself, by an airline or by a supplier of ground handling services to third parties; such aid will be assessed on the basis of the relevant general rules.

([86]) Actual average annual passenger traffic during the 2 financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport, the forecasted average annual passenger traffic during the 2 financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying, for example, to the airport and back would be counted twice; it applies to individual routes. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.

105. Additionally, under very exceptional circumstances, characterised by a clear market failure and taking into account the magnitude of the investment, the impossibility to finance the investment on capital markets, a very high level of positive externalities and the competition distortions, airports with average traffic over 5 million passengers per annum may receive aid to finance airport infrastructure. However, in such cases, the Authority will always carry out an in-depth assessment, in particular on the proportionality, the necessity and the maximum aid intensity of the State aid granted on the basis of the funding gap analysis and the counterfactual scenario of each specific case, regardless of the average passenger traffic of that airport.

(f) Avoidance of undue negative effects on competition and trade

106. In particular, the duplication of unprofitable airports or the creation of additional unused capacity in the catchment area of existing infrastructure might have distortive effects. Accordingly, the Authority will, in principle, have doubts as to the compatibility of investment into airport infrastructure at an airport located in the catchment area of an existing airport ([87]) where the existing airport is not operating at or near full capacity.

107. Further, in order to avoid the negative effects of aid that may arise where airports face soft budget constraints ([88]), investment aid to airports with traffic of up to 5 million passengers can be granted either as an upfront fixed amount to cover eligible investment costs or in annual instalments to compensate for the capital cost funding gap resulting from the business plan of the airport.

108. In order to further limit any distortions, the airport, including any investment for which aid is granted, must be open to all potential users and must not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.

Notification requirements for aid schemes and individual aid measures:

109. EFTA States are encouraged to notify State aid schemes for investment aid for airports with average annual traffic below 3 million passengers.

110. When assessing an aid scheme, the conditions relating to the necessity of the aid, the incentive effect and the proportionality of the aid will be considered to be satisfied if the EFTA State has committed itself to granting individual aid under the approved aid scheme only after it has verified that the cumulative conditions in this section are met.

111. Due to a higher risk of distortion of competition, the following aid measures should always be notified individually:

(a) investment aid to airports with average annual traffic above 3 million passengers;

(b) investment aid with an aid intensity exceeding 75 % to an airport with average annual traffic below 1 million passengers, with the exception of airports located in remote regions;

(c) investment aid granted for the relocation of airports;

(d) investment aid financing a mixed passenger/freight airport handling more than 200 000 tonnes of freight during the 2 financial years preceding that in which the aid is notified;

(e) investment aid aimed at the creation of a new passenger airport (including the conversion of an existing airfield into a passenger airport);

(f) investment aid aimed at the creation or development of an airport located within 100 kilometres distance or 60 minutes' travelling time by car, bus, train or high-speed train from an existing airport.

([87]) See Section 5.1.1(a).
([88]) If the aid were to be determined on the basis of *ex post* calculations (making good for any deficits as they arise), airports might not have much incentive to contain costs and charge airport charges that are adequate to cover costs.

5.1.2. *Operating aid to airports*

112. Operating aid granted to airports either as individual aid or under an aid scheme will be considered compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c) for a transitional period of 10 years starting from the date of the publication ([89]) of these guidelines provided that the cumulative conditions in point 79 are fulfilled as set out in points 113 to 134.

(a) Contribution to a well-defined objective of common interest

113. As stated in point 13, in order to give airports time to adjust to new market realities and to avoid any disruptions in the air traffic and connectivity of the regions, operating aid to airports will be considered to contribute to the achievement of an objective of common interest for a transitional period of 10 years, if it:

(a) increases the mobility of EEA citizens and the connectivity of the regions by establishing access points for intra-EEA flights; or

(b) combats air traffic congestion at major EEA hub airports; or

(c) facilitates regional development.

114. Nevertheless, the duplication of unprofitable airports does not contribute to an objective of common interest. Where an airport is located in the same catchment area as another airport with spare capacity, the business plan, based on sound passenger and freight traffic forecasts, must identify the likely effect on the traffic of the other airport located in that catchment area.

115. Accordingly, the Authority will have doubts as to the prospects for an unprofitable airport to achieve full operating cost coverage at the end of the transitional period, if another airport is located in the same catchment area.

(b) Need for State intervention

116. In order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. State aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver.

117. The conditions that smaller airports face when developing their services and in attracting private financing are often less favourable than those faced by the major airports in the EEA. Therefore, under present market conditions, smaller airports may have difficulties in ensuring the financing of their operation without public funding.

118. Under current market conditions, the need for public funding to finance operating costs will, due to high fixed costs, vary according to the size of an airport and will normally be proportionately greater for smaller airports. The Authority considers that, under current market conditions, the following categories of airports, and their relative financial viabilities, can be identified:

(a) airports with up to 200 000 passengers per annum may not be able to cover their operating costs to a large extent;

(b) airports with annual passenger traffic between 200 000 and 700 000 passengers may not be able to cover their operating costs to a substantial extent;

(c) airports with annual passenger traffic of 700 000 to 1 million should in general be able to cover their operating costs to a greater extent;

([89]) References to 'the date of publication' in these guidelines means the date of publication on the website of the Authority.

(d) airports with annual passenger traffic of 1-3 million should, on average, be able to cover the majority of their operating costs;

(e) airports with annual passenger traffic above 3 million are usually profitable at operating level and should be able to cover their operating costs.

119. Therefore, the Authority considers that in order to be eligible for operating aid, the annual traffic of the airport must not exceed 3 million passengers ([90]).

(c) Appropriateness of State aid as a policy instrument

120. The EFTA States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible with the functioning of the EEA Agreement if other less distortive policy instruments or aid instruments allow the same objective to be reached ([91]).

121. In order to provide proper incentives for efficient management of an airport, the aid amount is, in principle, to be established *ex ante* as a fixed sum covering the expected operating funding gap (determined on the basis of an *ex ante* business plan) during a transitional period of 10 years. For these reasons no *ex post* increase of the aid amount should, in principle, be considered compatible with the functioning of the EEA Agreement. The EFTA State may pay the *ex ante* fixed amount as an up-front lump sum or in instalments, for instance on an annual basis.

122. In exceptional circumstances, where future costs and revenue developments are surrounded by a particularly high degree of uncertainty and the public authority faces important information asymmetries, the public authority may calculate the maximum amount of compatible operating aid according to a model based on the initial operating funding gap at the beginning of the transitional period. The initial operating funding gap is the average of the operating funding gaps (that is to say the amount of operating costs not covered by revenues) during the 5 years preceding the beginning of the transitional period (2009 to 2013).

123. Wherever possible, EFTA States are encouraged to design national schemes that reflect the main principles underlying public financing and indicate the most relevant features of the planned public funding of airports. Framework schemes ensure coherence in the use of public funds, reduce the administrative burden on smaller granting authorities and accelerate the implementation of individual aid measures. Furthermore, EFTA States are encouraged to give clear guidance for the implementation of State aid financing for regional airports and airlines using those airports.

(d) Existence of incentive effect

124. Operating aid has an incentive effect if it is likely that, in the absence of the operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced.

(e) Proportionality of the aid amount (aid limited to the minimum necessary):

125. In order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place.

126. The business plan of the airport must pave the way towards full operating cost coverage at the end of the transitional period. The key parameters of this business plan form an integral part of the Authority's compatibility assessment.

([90]) Actual average annual passenger traffic during the 2 financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport the forecasted average annual passenger traffic during the 2 financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.

([91]) See also point 91.

127. The path towards full operating cost coverage will be different for every airport and will depend on the initial operating funding gap of the airport at the beginning of the transitional period. The transitional period will start from the date of the publication of these guidelines.

128. In any event, the maximum permissible aid amount during the whole transitional period will be limited to 50 % of the initial funding gap for a period of 10 years ([92]). For instance, if the annual average funding gap of a given airport over the period 2009 to 2013 is equal to EUR 1 million, the maximum amount of operating aid that the airport could receive as an *ex ante* established fixed sum would be EUR 5 million over 10 years (50 % × 1 million × 10). No further operating aid will be considered compatible for that airport.

129. By 10 years after the beginning of the transitional period at the latest, all airports must have reached full coverage of their operating costs and no operating aid to airports will be considered compatible with the functioning of the EEA Agreement after that date, with the exception of operating aid granted in accordance with horizontal State aid rules, such as rules applicable to the financing of SGEIs.

130. Under the current market conditions, airports with annual passenger traffic of up to 700 000 may face increased difficulties in achieving the full cost coverage during the 10-year transitional period. For this reason, the maximum permissible aid amount for airports with up to 700 000 passengers per annum will be 80 % of the initial operating funding gap for a period of 5 years after the beginning of the transitional period. For instance, if the annual average funding gap of a small airport over the period 2009 to 2013 is equal to EUR 1 million, the maximum amount of operating aid that the airport could receive as an *ex ante* established fixed sum would be EUR 4 million over 5 years (80 % × 1 million × 5). The Authority will reassess the need for continued specific treatment and the future prospects for full operating cost coverage for this category of airport, in particular with regard to the change of market conditions and profitability prospects.

(f) Avoidance of undue negative effects on competition and trade

131. When assessing the compatibility of operating aid the Authority will take account of the distortions of competition and the effects on trade. Where an airport is located in the same catchment area as another airport with spare capacity, the business plan, based on sound passenger and freight traffic forecasts, must identify the likely effect on the traffic of the other airports located in that catchment area.

132. Operating aid for an airport located in the same catchment area will be considered compatible with the functioning of the EEA Agreement only when the EFTA State demonstrates that all airports in the same catchment area will be able to achieve full operating cost coverage at the end of the transitional period.

133. In order to limit further the distortions of competition, the airport must be open to all potential users and not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.

134. Further, in order to limit the negative effects on competition and trade, the Authority will approve operating aid to airports for a transitional period of 10 years beginning from the date of the publication of these guidelines. The Authority will reassess the situation of airports with annual passenger traffic of up to 700 000 4 years after the beginning of the transitional period.

Notification requirements for aid schemes and individual aid measures

135. EFTA States are strongly encouraged to notify national schemes for operating aid for the financing of airports, rather than individual aid measures for each airport. This is intended to reduce the administrative burden both for the EFTA States' authorities and for the Authority.

([92]) The 50 % intensity corresponds to the funding gap over 10 years for an airport which, starting from the initial operating cost coverage at the beginning of the transition period, achieves full operating cost coverage after 10 years.

136. Due to a higher risk of distortion of competition, the following aid measures should always be notified individually:

(a) operating aid financing a mixed passenger/freight airport handling more than 200 000 tonnes of freight during the 2 financial years preceding that in which the aid is notified;

(b) operating aid to an airport, if other airports are located within 100 kilometres or 60 minutes' travelling time by car, bus, train or high-speed train.

Aid granted before the beginning of the transitional period

137. Operating aid granted before the beginning of the transitional period (including aid paid before the publication of these guidelines) may be declared compatible to the full extent of uncovered operating costs provided that the conditions in Section 5.1.2 are met, with the exception of points 115, 119, 121, 122, 123, 126 to 130, 132, 133 and 134. In particular, when assessing the compatibility of operating aid granted before the publication of these guidelines, the Authority will take account of the distortions of competition.

5.2. **Start-up aid to airlines**

138. As mentioned in point 15, State aid granted to airlines for launching a new route with the aim of increasing the connectivity of a region will be considered compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c), if the cumulative conditions in point 79 are fulfilled as set out in points 139 to 153.

(a) Contribution to a well-defined objective of common interest

139. Start-up aid to airlines will be considered to contribute to the achievement of an objective of common interest, if it:

(a) increases the mobility of EEA citizens and the connectivity of the regions by opening new routes; or

(b) facilitates regional development of remote regions.

140. When a connection which will be operated by the new air route is already operated by a high-speed rail service or from another airport in the same catchment area under comparable conditions, in particular in terms of length of journey, it cannot be considered to contribute to a well-defined objective of common interest.

(b) Need for State intervention

141. The conditions that smaller airports face when developing their services are often less favourable than those faced by the major airports in the EEA. Also, airlines are not always prepared to run the risk of opening new routes from unknown and untested airports, and may not have appropriate incentives to do so.

142. On this basis, start-up aid will only be considered compatible for routes linking an airport with less than 3 million passengers per annum ([93]) to another airport within the Common European Aviation Area ([94]).

143. Start-up aid for routes linking an airport located in a remote region to another airport (within or outside the Common European Aviation Area) will be compatible irrespective of the size of the airports concerned.

144. Start-up aid for routes linking an airport with more than 3 million passengers per annum ([95]) and less than 5 million passengers per annum not located in remote regions can be considered compatible with the functioning of the EEA Agreement only in duly substantiated exceptional cases.

([93]) Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport, the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes.

([94]) Decision 2006/682/EC of the Council and of the Representatives of the Member States of the European Union meeting within the Council of 9 June 2006 on the signature and provisional application of the Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the Establishment of a European Common Aviation Area (ECAA) (OJ L 285, 16.10.2006, p. 1).

([95]) See also footnote 93.

145. Start-up aid for routes linking an airport with more than 5 million passengers per annum not located in remote regions cannot be considered compatible with the functioning of the EEA Agreement.

(c) Appropriateness of State aid as policy instrument

146. The EFTA States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible with the functioning of the EEA Agreement if other less distortive policy instruments or aid instruments allow the same objective to be reached ([96]).

147. An *ex ante* business plan prepared by the airline should establish that the route receiving the aid has prospects of becoming profitable for the airline without public funding after 3 years. In the absence of a business plan for a route, the airlines must provide an irrevocable commitment to the airport to operate the route for a period at least equal to the period during which it received start-up aid.

(d) Existence of incentive effect

148. Start-up aid to airlines has an incentive effect if it is likely that, in the absence of the aid, the level of economic activity of the airline at the airport concerned would not be expanded. For example the new route would not have been launched.

149. The new route must start only after the application for aid has been submitted to the granting authority. If the new route begins before the application for aid is submitted to the granting authority, any aid awarded in respect of that individual route will not be considered compatible with the functioning of the EEA Agreement.

(e) Proportionality of the aid amount (aid limited to the minimum necessary)

150. Start-up aid may cover up to 50 % of airport charges in respect of a route for a maximum period of 3 years. The eligible costs are the airport charges in respect of the route.

(f) Avoidance of undue negative effects on competition and trade

151. In order to avoid undue negative effects on competition and trade, where a connection (for example, city-pair) which will be operated by the new air route is already operated by a high-speed rail service or by another airport in the same catchment area under comparable conditions, notably in terms of length of journey, such air route will not be eligible for start-up aid.

152. Any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services.

153. Start-up aid cannot be combined with any other type of State aid granted for the operation of a route.

Notification requirements for aid schemes and individual aid measures:

154. EFTA States are strongly encouraged to notify national schemes for start-up aid to airlines, rather than individual aid measures for each airport. This is intended to reduce the administrative burden both for the EFTA States' authorities and for the Authority.

155. Due to the higher risk of distortion of competition, start-up aid to airports not located in remote regions with average annual traffic above 3 million passengers should always be notified individually.

([96]) See also point 91.

6. AID OF A SOCIAL CHARACTER UNDER ARTICLE 61(2)(a) OF THE EEA AGREEMENT

156. Aid of a social character for air transport services will be considered compatible with the functioning of the EEA Agreement pursuant to Article 61(2)(a), provided that the following cumulative conditions are met ([97]):

(a) the aid must effectively be for the benefit of final consumers;

(b) the aid must have a social character, that is, it must, in principle, only cover certain categories of passengers travelling on a route (for instance passengers with particular needs like children, people with disabilities, people on low incomes, students, elderly people, etc.); however, where the route concerned links remote regions, such as outermost regions, islands and sparsely populated areas, the aid could cover the entire population of that region;

(c) the aid must be granted without discrimination as to the origin of the services, meaning irrespective of the airline which is operating the services.

157. EFTA States are strongly encouraged to notify national schemes for aid of a social character, rather than individual aid measures.

7. CUMULATION

158. The maximum aid intensities applicable under these guidelines apply regardless of whether the aid is financed entirely from State resources or is partly financed by the EEA.

159. Aid authorised under these guidelines may not be combined with other State aid, *de minimis* aid or other forms of EEA financing, if such a combination results in an aid intensity higher than that laid down in these guidelines.

8. FINAL PROVISIONS

8.1. **Annual reporting**

160. In accordance with the Surveillance and Court Agreement and the consolidated version of the Authority Decision No 195/04/COL ([98]), EFTA States must submit annual reports to the Authority. The annual reports will be published on the internet site of the Authority.

8.2. **Transparency**

161. The Authority considers that further measures are necessary to improve the transparency of State aid in the EEA. In particular, steps must be taken to ensure that the EFTA States, economic operators, the interested public and the Authority have easy access to the full text of all applicable aid schemes in the aviation sector and to pertinent information about individual aid measures.

162. EFTA States should publish the following information on a comprehensive State aid website, at national or regional level:

(a) the full text of each approved aid scheme or individual aid granting decision and their implementing provisions;

(b) the identity of the granting authority;

(c) the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME/large company), the region in which the beneficiary is located (at NUTS level II) and the principal economic sector in which the beneficiary has its activities (at NACE group level); such a requirement can be waived with respect to individual aid grants below EUR 200 000.

([97]) See for example, as regards the assessment of aid of a social character granted to individual consumers, Commission decision of 16 May 2006, N 169/2006 — United Kingdom — Aid of social character air services in the Highlands and Islands of Scotland (OJ C 272, 9.11.2006, p. 10); Commission decision of 11 December 2007, N 471/2007 — Portugal — Social allowances to passengers residing in the Autonomous Region of Madeira and students, in air transport services between mainland Portugal and the Autonomous Region (OJ C 46, 19.2.2008, p. 2); and Commission decision of 5 January 2011, N 426/2010 — France — Aid of a social character for certain categories of passenger on air services between La Réunion and metropolitan France (OJ C 71, 5.3.2011, p. 5).

([98]) Available at http://www.eftasurv.int/state-aid/legal-framework/procedural-rules/

163. The information must be published after the decision to grant the aid has been taken, must be kept for at least 10 years and must be available to the interested public without restrictions ([99]).

8.3. **Monitoring**

164. EFTA States must ensure that detailed records are kept regarding all measures involving the grant of State aid in accordance with these guidelines. Such records must contain all information necessary to establish that the compatibility conditions have been observed, in particular, those regarding eligible costs and maximum allowable aid intensity, where applicable. Those records must be maintained for 10 years from the date on which the aid is granted and be provided to the Authority upon request.

165. In order to allow the Authority to monitor the progress of the phasing out of operating aid to airports and its impact on competition, EFTA States must submit a regular report (on a yearly basis) on the progress in terms of reduction of operating aid for each airport benefiting from such aid. In certain cases, a monitoring trustee may be appointed to ensure compliance with any conditions and obligations underpinning the authorisation of the aid.

8.4. **Evaluation**

166. To further ensure that distortions of competition and trade are limited, the Authority may require that certain schemes be subject to a limited duration and to an evaluation. Evaluations should, in particular, be carried out for schemes where the potential distortions are particularly high, that is to say schemes that may risk significantly restricting competition if their implementation is not reviewed in due time.

167. Given its objectives and in order not to put a disproportionate burden on EFTA States and on smaller aid measures, this requirement applies only in respect of aid schemes with large aid budgets, containing novel characteristics or where significant market, technology or regulatory changes are foreseen. The evaluation must be carried out by an expert independent from the aid granting authority on the basis of a common methodology ([100]) and must be made public.

168. The evaluation must be submitted to the Authority in due time to allow for the assessment of the possible prolongation of the aid scheme and in any case upon expiry of the scheme. The precise scope and methodology of the evaluation that is to be carried out will be defined in the decision approving the aid scheme. Any subsequent aid measure with a similar objective must take into account the results of that evaluation.

8.5. **Appropriate measures**

169. EFTA States should, where necessary, amend their existing schemes in order to bring them into line with these guidelines by 12 months at the latest of their publication.

170. EFTA States are invited to give their explicit unconditional agreement to these guidelines within two months following their publication. In the absence of any reply, the Authority will assume that the EFTA State in question does not agree with the proposed measures.

8.6. **Application**

171. The principles in these guidelines will be applied from the date of their publication.. These guidelines replace the 1994 Aviation Guidelines and the 2005 Aviation Guidelines from that date.

172. In the light of the development of the aviation sector, and in particular its liberalisation, the Authority considers that the provisions of its notice on the determination of the applicable rules for the assessment of unlawful State aid ([101]) should not apply to pending cases of illegal operating aid to airports granted prior to the date of publication of these guidelines. Instead, the Authority will apply the principles set out in these guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before the publication of these guidelines and the beginning of the transitional period.

([99]) This information should be regularly updated (e.g. every 6 months) and should be available in non-proprietary formats.
([100]) Such a common methodology may be provided by the Authority.
([101]) Applicable rules for the assessment of unlawful State aid (OJ L 73, 19.3.2009, p. 23 and EEA Supplement No 15, 19.3.2009, p. 1).

173. As regards investment aid to airports, the Authority will apply the principles set out in these guidelines to all notified investment aid measures in respect of which it is called upon to take a decision from the date of the publication of these guidelines, even where the projects were notified prior to that date. In accordance with the Authority's applicable rules for the assessment of unlawful State aid, the Authority will apply to unlawful investment aid to airports the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful investment aid to airports granted before the date of publication of these guidelines.

174. As regards start-up aid to airlines, the Authority will apply the principles set out in these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from the publication of these guidelines, even where the measures were notified prior to that date. In accordance with the Authority notice on the determination of the applicable rules for the assessment of unlawful State aid, the Authority will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before the publication of these guidelines.

8.7. **Review**

175. The Authority may undertake an evaluation of these guidelines at any time and will do so at the latest 6 years after their publication. That evaluation will be based on factual information and the results of wide-ranging consultations conducted by the Authority on the basis of data provided by EFTA States and stakeholders. The Authority will reassess the situation of airports with annual passenger traffic up to 700 000 in order to determine the need for continued specific compatibility rules on operating aid in favour of this category of airport in the light of the future prospects for full operating cost coverage, in particular with regard to the change of market conditions and profitability prospects.

176. After consulting EFTA States, the Authority may replace or supplement these guidelines on the basis of important competition policy or transport policy considerations.

APPENDIX

SUMMARY OF THE COMPATIBILITY CONDITIONS

Table 1

Overview of compatibility conditions for aid to airports

Compatibility conditions	Investment aid to the airport	Operating aid to the airport
(a) Contribution to a well-defined objective of common interest	— Increasing mobility by establishing access points for intra-EEA flights — Combating congestion at major hubs — Facilitating regional development Duplication of airports and unused capacity in absence of satisfactory medium-term prospects for use does not contribute to a well-defined objective of common interest.	
(b) Need for State intervention	< 3 million passengers > 3–5 million passengers under certain case-specific circumstances > 5 million passengers only in very exceptional circumstances	< 3 million passengers
(c) Appropriateness of the aid measure	The aid measure must be an appropriate policy instrument to address the objective of common interest	
	Consideration of less distortive aid instruments (guarantees, soft loans, etc.)	*Ex ante* as a fixed sum covering the expected funding gap of operating costs (determined on the basis of an *ex ante* business plan) during a 10-year transitional period.
(d) Incentive effect	Present, if the investment would not have been undertaken or to a different extent (counterfactual or funding gap analysis based on *ex ante* business plan)	Present, if the level of economic activity of the airport would be significantly reduced in its absence
(e) Proportionality of the aid (aid limited to the minimum)		
Eligible costs:	Costs relating to investments in airport infrastructure and equipment, except investment costs for non-aeronautical activities	Operating funding gap of the airport
Maximum permissible aid intensities:	> 3–5 million up to 25 % 1–3 million up to 50 % < 1 million up to 75 %	During the transitional period: 50 % of the initial average operating funding gap calculated as average of 5 years preceding the transitional period (2009-2013) After transitional period of 10 years: no operating aid allowed (except if granted under horizontal rules)

Compatibility conditions	Investment aid to the airport	Operating aid to the airport
Exceptions:	For airports located in remote regions (irrespective of their size): the maximum aid intensities for investment aid to finance airport infrastructure may be increased by up to 20 % For airports < 1 million passengers per annum located in a peripheral region: intensity may exceed 75 % in exceptional circumstances subject to case-by-case assessment In case of relocation: proportionality, necessity and maximum aid intensity will be assessed regardless of average traffic For airports over 5 million passengers per annum: only under very exceptional circumstances, characterised by a clear market failure and taking into account the magnitude of the investment and the competition distortions	For airports < 700 000 passengers per annum: 80 % of the initial average operating funding gap for 5 years after the beginning of the transitional period
(f) Avoidance of undue negative effects on competition and trade between EEA States	Open to all potential users and not dedicated to one specific user Airports < 5 million passengers per annum: upfront fixed amount or annual instalments to compensate for capital cost funding gap resulting from airport business plan	Assessment of distortion of competition and effect on trade Open to all potential users and not dedicated to one specific user Airports < 700 000 passengers per annum: reassessed 4 years after the beginning of the transitional period
Notification requirements for aid schemes and individual aid measures	Aid schemes: — airports < 3 million passengers per annum Individual notifications: — airports > 3 million passengers per annum — investment aid to an airport < 1 million passengers per annum exceeding 75 % aid intensity — investment aid granted for the relocation of airports — mixed passenger/freight airports > 200 000 tonnes of freight during two financial years preceding the notification year — creation of a new passenger airport (including conversion of existing airfield) — creation or development of an airport located within 100 kilometres or 60 minutes' travelling time from an existing airport	Aid schemes: — airports < 3 million passengers per annum Individual notifications: — mixed passenger/freight airports > 200 000 tonnes of freight during 2 financial years preceding the notification year — operating aid to an airport within 100 kilometres or 60 minutes' travelling time from other airports

Table 2

Overview of compatibility conditions for start-up aid to airlines

Compatibility conditions	Start-up aid to airlines
(a) Contribution to a well-defined objective of common interest	— Increasing mobility by establishing access points for intra-EEA flights — Facilitating regional development No duplication of existing comparable connection operated by a high-speed rail service or by another airport in the same catchment area under comparable conditions
(b) Need for State intervention	— Airports < 3 million passengers per annum — Airports located in remote regions irrespective of their size — Airports between > 3–5 million passengers per annum only in exceptional circumstances — No start-up aid for air links from airports above 5 million passengers per annum
(c) Appropriateness of the aid measure	— Not eligible if the route is already operated by a high-speed rail service or another airport in the same catchment area under the same conditions — *Ex ante* business plan showing profitability of the route at least after 3 years or irrevocable commitment from the airline to operate the route least for a period as long as the period during which it received start-up aid
(d) Incentive effect	Present, if in the absence of the aid, the level of economic activity of the airline at the airport concerned would be significantly reduced (for example the new route would not have been launched). The new route or the new schedule can start only after submitting the application form for aid to the granting authority.
(e) Proportionality of the aid (aid limited to the minimum)	
— Eligible costs:	Airport charges in respect of a route
— Maximum permissible aid intensities:	50 % for a maximum period of 3 years
(f) Avoidance of undue negative effects on competition and trade between EEA States	— Public authorities must make plans public in good time to enable all interested airlines to offer services — No cumulation with other types of State aid for operation of a route
Notification requirements for aid schemes and individual aid measures	Aid schemes: — Airports < 3 million passengers per annum and airports located in remote regions Individual notifications: — Airports > 3 million passengers per annum, except airports located in remote regions

Table 3

Social aid

Compatibility conditions	
(a)	Effectively for the benefit of final consumers
(b)	Of a social character: Only covering certain categories of passengers (e.g. with particular needs like children, people with disabilities, people on low incomes, students, elderly people, etc.) Except: where the route links remote regions (e.g. islands, sparsely populated areas), the aid can cover the entire population of a region
(c)	Without discrimination as to the origin of the airline operating the services

Table 4

Compatibility of aid in the form of public service compensation

Size of airport based on average traffic (passengers per annum)	Applicable legal framework	Notification requirement
Airport managers at airports < 200 000 passengers per annum over the duration of the SGEI entrustment Airlines as regards air links to islands where traffic < 300 000 passengers per annum	Article 59(2) of the EEA Agreement Decision 2012/21/EU	Exempt from the notification requirement
Airports above 200 000 passengers per annum over the duration of the SGEI entrustment	Article 59(2) of the EEA Agreement SGEI Framework	Notification required

EFTA SURVEILLANCE AUTHORITY DECISION

No 186/16/COL

of 12 October 2016

on the compliance of Norway's unit rate for 2016 under Article 17 of the Act referred to at point 66wm of Annex XIII to the EEA Agreement (Commission Implementing Regulation (EU) No 391/2013 of 3 May 2013 laying down a common charging scheme for air navigation services) [2016/2052]

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Act referred to at points 66u of Annex XIII to the EEA Agreement (*Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky* ([1])), and in particular Article 16(1) thereof, and the Act referred to at point 66wm of Annex XIII to the EEA Agreement (*Commission Implementing Regulation (EU) No 391/2013 of 3 May 2013 laying down a common charging scheme for air navigation services* ([2])) ('Implementing Regulation (EU) No 391/2013'), and in particular Article 17(1)(d) thereof, both as adapted to the EEA Agreement by Protocol 1 thereto,

Whereas:

(1) Implementing Regulation (EU) No 391/2013 lays down a common charging scheme for air navigation services. The common charging scheme is an integral element in reaching the objectives of the performance scheme as established under Article 11 of the Act referred to at point 66t of Annex XIII to the EEA Agreement (*Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation)* ([3])) and the act mentioned at point 66xf of Annex XIII to the EEA Agreement (*Commission Implementing Regulation (EU) No 390/2013 of 3 May 2013 laying down a performance scheme for air navigation services and network functions* ([4])) ('Implementing Regulation (EU) No 390/2013').

(2) The Act referred to at point 66xe of Annex XIII to the EEA Agreement (*Commission Implementing Decision 2014/132/EU of 11 March 2014 setting the Union-wide performance targets for the air traffic management network and alert thresholds for the second reference period 2015-19* ([5])) sets the Union-wide performance targets, including a cost-efficiency target for en route air navigation services expressed in determined unit costs for the provision of those services, for the second reference period, which covers the years 2015 to 2019 inclusive.

(3) Pursuant to Article 17(1)(b) and (c) of Implementing Regulation (EU) No 391/2013, the EFTA Surveillance Authority is to assess the unit rates for charging zones for 2016 submitted by Norway to the Authority by 1 June 2015 following the requirements of Article 9(1) and 9(2) of that Regulation. That assessment concerns the compliance of those unit rates with Implementing Regulations (EU) No 390/2013 and (EU) No 391/2013.

(4) The EFTA Surveillance Authority has carried out its assessment of the unit rates with the support of Eurocontrol's Performance Review Unit and Central Route Charges Office, using the data and additional information provided by Norway as well as the report of the national supervisory authority on the assessment of costs exempt from the cost-sharing mechanism.

(5) On the basis of that assessment, the Authority has found, in accordance with Article 17(1)(d) of Implementing Regulation (EU) No 391/2013, that the unit rate for charging zones for 2016 submitted by Norway is in compliance with Implementing Regulations (EU) No 390/2013 and (EU) No 391/2013.

(6) Pursuant to Article 17(1)(d) of Implementing Regulation (EU) No 391/2013, Norway should be notified of that finding,

([1]) OJ L 96, 31.3.2004, p. 10.
([2]) OJ L 128, 9.5.2013, p. 31.
([3]) OJ L 96, 31.3.2004, p. 1.
([4]) OJ L 128, 9.5.2013, p. 1.
([5]) OJ L 71, 12.3.2014, p. 20.

HAS ADOPTED THIS DECISION:

Article 1

Norway's submitted en route unit rate for 2016 of 381,42 NOK is in compliance with the Act referred to at point 66xf of Annex XIII to the EEA Agreement (*Commission Implementing Regulation (EU) No 390/2013 of 3 May 2013 laying down a performance scheme for air navigation services and network functions*) and the Act referred to at point 66wm of Annex XIII to the EEA Agreement (*Commission Implementing Regulation (EU) No 391/2013 of 3 May 2013 laying down a common charging scheme for air navigation services*).

Article 2

This Decision is addressed to Norway.

Done at Brussels, 12 October 2016.

For the EFTA Surveillance Authority

Sven Erik SVEDMAN
President

Helga JÓNSDÓTTIR
College Member

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