

PART III: HORIZONTAL RULES

Aid to Micro, small and medium-sized enterprises (SMEs)

1 Introduction

- (1) The previous Chapter 10 contained the incorporation of the Commission's Recommendation 96/280/EC¹ concerning the definition of small and medium-sized enterprises. Based on a number of interpretation difficulties which had emerged in the application of Commission Recommendation 96/280/EC, and following observations received from enterprises, it was required to make a number of amendments to Commission Recommendation 96/280/EC. However, for the sake of clarity, the Commission decided rather to replace Commission Recommendation 96/280/EC with a new Commission Recommendation 2003/361/EC containing a new definition of micro, small and medium-sized enterprises (hereinafter referred to as "SME").
- (2) The EFTA Surveillance Authority deleted the previous Chapter 10 (incorporating Commission Recommendation 96/280/EC) by Decision No. 198/03/COL of 5 November 2003² due to the fact that the new definition of SMEs, set out in the new Commission Recommendation 2003/361/EC, had also been incorporated into the Annex of a new block exemption Regulation on aid to SMEs.³
- (3) Nonetheless, in view of the fact that the definition of SMEs serves as a general reference tool within the State Aid Guidelines, which contains several references to the definition of SMEs, the Authority considers it useful to incorporate the new definition of SMEs, set forth in the new Commission Recommendation 2003/361/EC, into the State Aid Guidelines. The present new Chapter on aid to micro, small and medium-sized enterprises (SMEs),

¹ Commission's Recommendation 96/280/EC (OJ L 107, 30.4.1996, p. 4).

² College Decision No. 198/03/COL of 5 November 2003 (OJ L 120, 12.5.2005, p. 39).

³ Commission Regulation (EC) No. 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), as amended by Commission Regulation (EC) No. 364/2004 of 25 February 2004 (OJ L 63, 28.2.2004, p. 22). Both Regulations have been incorporated into Section 1f in Annex XV to the EEA Agreement by Joint Committee Decision No. 88/2002 (OJ L 266, 3.10.2002, p. 56 and EEA Suppl. No. 49, 3.10.2002, p. 42) and Joint Committee Decision No. 131/2004 (OJ L 64, 10.3.2005, p. 67 and EEA Supplement No. 12, 10.3.2005, p. 49).

therefore incorporates the new definition of SMEs set out in Commission Recommendation 2003/361/EC.⁴

- (4) It should be made clear that, in accordance with
 - (i) Articles 48, 81 and 82 of the EC Treaty as interpreted by the Court of Justice of the European Communities, and;
 - (ii) Articles 34, 53 and 54 of the EEA Agreement as interpreted by the EFTA Court and the Court of Justice of the European Communities, an enterprise should be considered to be any entity, regardless of its legal form, engaged in economic activities, including in particular entities engaged in a craft activity and other activities on an individual or family basis, partnerships or associations regularly engaged in economic activities.
- (5) The criterion of staff numbers (the "staff headcount criterion") remains undoubtedly one of the most important, and must be observed as the main criterion; introducing a financial criterion is nonetheless a necessary adjunct in order to grasp the real scale and performance of an enterprise and its position compared to its competitors. However, it would not be desirable to use turnover as the sole financial criterion, in particular because enterprises in the trade and distribution sector have by their nature higher turnover figures than those in the manufacturing sector. Thus the turnover criterion should be combined with that of the balance sheet total, a criterion which reflects the overall wealth of a business, with the possibility of either of these two criteria being exceeded.
- (6) The turnover ceiling refers to enterprises engaged in very different types of economic activity. In order not to restrict unduly the usefulness of applying the definition, it should be updated to take account of changes in both prices and productivity.
- (7) As regards the ceiling for the balance sheet total, in the absence of any new element, it is justified to maintain the approach whereby the turnover ceilings are subjected to a coefficient based on the statistical ratio between the two variables. The statistical trend requires a greater increase to be made to the turnover ceiling. Since the trend differs according to the size-category of the enterprise, it is also appropriate to adjust the coefficient in order to reflect the economic trend as closely as possible and not to penalise microenterprises and

⁴ Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

small enterprises as opposed to medium-sized enterprises. This coefficient is very close to 1 in the case of microenterprises and small enterprises. To simplify matters, therefore, a single value must be chosen for those categories for the turnover ceiling and balance sheet total ceiling.

- (8) Microenterprises - a category of small enterprises particularly important for the development of entrepreneurship and job creation - should also be better defined.
- (9) To gain a better understanding of the real economic position of SMEs and to remove from that category groups of enterprises whose economic power may exceed that of genuine SMEs, a distinction should be made between various types of enterprises, depending on whether they are autonomous, whether they have holdings which do not entail a controlling position (partner enterprises), or whether they are linked to other enterprises. The limit set out in the previous Commission Recommendation 96/280/EC of a 25% holding below which an enterprise is considered autonomous, is maintained.
- (10) In order to encourage the creation of enterprises, equity financing of SMEs and rural and local development, enterprises can be considered autonomous despite a holding of 25% or more by certain categories of investors who have a positive role in business financing and creation. However, conditions for these investors have not previously been specified. The case of "business angels" (individuals or groups of individuals pursuing a regular business of investing venture capital) deserves special mention because - compared to other venture capital investors - their ability to give relevant advice to new entrepreneurs is extremely valuable. Their investment in equity capital also complements the activity of venture capital companies, as they provide smaller amounts at an earlier stage of the enterprise's life.
- (11) To simplify matters, in particular for EFTA States and enterprises, use should be made when defining linked enterprises of the conditions laid down in Article 1 of Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts⁵, as last amended by Directive 2001/65/EC of the European Parliament and of the Council⁶, in so far as these conditions are suitable for the purposes of this Chapter. To strengthen the incentives for investing in the equity funding of an SME, the presumption of absence of dominant influence

⁵ Council Directive 83/349/EEC of 13 June 1983 (OJ L 193, 18.7.1983, p. 1), incorporated into Section 4 of Annex XXII to the EEA Agreement.

⁶ Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28), incorporated into Section 4 of Annex XXII to the EEA Agreement by Joint Committee Decision No. 176/2003 of 5.12.2003 (OJ L 88, 25.3.2004, p. 53 and EEA Supplement No. 15, 25.3.2004, p. 14).

on the enterprise in question was introduced, in pursuance of the criteria of Article 5(3), of Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies⁷, as last amended by Directive 2001/65/EC.

- (12) Account should also be taken, in suitable cases, of relations between enterprises which pass through natural persons, with a view to ensuring that only those enterprises which really need the advantages accruing to SMEs from the different rules or measures in their favour actually benefit from them. In order to limit the examination of these situations to the strict minimum, the account taken of such relationships has been restricted to the relevant market or to adjacent markets - reference being had, where necessary, to the Authority's definition of "relevant markets" in Annex I to its Decision on the definition of the relevant market for the purpose of competition law within the EEA.⁸
- (13) In order to avoid arbitrary distinctions between different public bodies of an EFTA State, and given the need for legal certainty, it is considered necessary to confirm that an enterprise with 25% or more of its capital or voting rights controlled by a public body is not an SME.
- (14) In order to ease the administrative burden for enterprises, and to simplify and speed up the administrative handling of cases for which SME status is required, it is appropriate to allow enterprises to use solemn declarations to certify certain of their characteristics.
- (15) It is necessary to establish in detail the composition of the staff headcount for SME definition purposes. In order to promote the development of vocational training and sandwich courses, it is desirable, when calculating staff numbers, to disregard apprentices and students with a vocational training contract. Similarly, maternity or parental leave periods should not be counted.
- (16) The various types of enterprise defined according to their relationship with other enterprises correspond to objectively differing degrees of integration. It is therefore appropriate to apply distinct procedures to each of those types of enterprise when calculating the quantities representing their activities and economic power.

⁷ Council Directive 78/660/EEC of 25 July 1978 (OJ L 222, 14.8.1978, p. 11), incorporated into Section 4 of Annex XXII to the EEA Agreement.

⁸ College Decision No. 46/98/COL of 4 March 1998 (OJ L 200, 16.7.1998, p. 46 and EEA Supplement No. 52, 18.12.1997, p. 10). This Decision corresponds to the Commission notice on the definition of the relevant market for the purpose of Community competition law (OJ C 372, 9.12.1997, p. 5).

2 Definition of micro, small and medium-sized enterprises

2.1 Enterprise

(17) An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.

2.2 Staff headcount and financial ceilings determining enterprise categories

(18) The category of micro, small and medium-sized enterprises is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding Euro 50 million, and/or an annual balance sheet total not exceeding Euro 43 million.

(19) Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed Euro 10 million.

(20) Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed Euro 2 million.

2.3 Types of enterprise taken into consideration in calculating staff numbers and financial amounts

(21) An "autonomous enterprise" is any enterprise which is not classified as a partner enterprise within the meaning of paragraphs 22-23 or as a linked enterprise within the meaning of paragraphs 24-28.

(22) "Partner enterprises" are all enterprises which are not classified as linked enterprises within the meaning of paragraphs 24-28 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraphs 24-28, 25% or more of the capital or voting rights of another enterprise (downstream enterprise).

(23) However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25% threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the

meaning of paragraphs 24-28, either individually or jointly to the enterprise in question:

- a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses ("business angels"), provided the total investment of those business angels in the same enterprise is less than Euro 1 250 000;
- b) universities or non-profit research centres;
- c) institutional investors, including regional development funds;
- d) autonomous local authorities with an annual budget of less than Euro 10 million and fewer than 5000 inhabitants.

(24) "Linked enterprises" are enterprises which have any of the following relationships with each other:

- a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
- b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
- c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
- d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

(25) There is a presumption that no dominant influence exists if the investors listed in paragraph 23 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as stakeholders.

- (26) Enterprises having any of the relationships described in paragraph 24 through one or more other enterprises, or any one of the investors mentioned in paragraph 23, are also considered to be linked.
- (27) Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.
- (28) An "adjacent market" is considered to be the market for a product or service situated directly upstream or downstream of the relevant market.
- (29) Except in the cases set out in paragraph 23, an enterprise cannot be considered an SME if 25% or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.
- (30) Enterprises may make a declaration of status as an autonomous enterprise, partner enterprise or linked enterprise, including the data regarding the ceilings set out in Section 2.2. The declaration may be made even if the capital is spread in such a way that it is not possible to determine exactly by whom it is held, in which case the enterprise may declare in good faith that it can legitimately presume that it is not owned as to 25% or more by one enterprise or jointly by enterprises linked to one another. Such declarations are made without prejudice to the checks and investigations provided for by national or EEA rules.

2.4 Data used for the staff headcount and the financial amounts and reference period

- (31) The data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period and calculated on an annual basis. They are taken into account from the date of closure of the accounts. The amount selected for the turnover is calculated excluding value added tax (VAT) and other indirect taxes.
- (32) Where, at the date of closure of the accounts, an enterprise finds that, on an annual basis, it has exceeded or fallen below the headcount or financial ceilings stated in Section 2.2, this will not result in the loss or acquisition of the status of medium-sized, small or microenterprise unless those ceilings are exceeded over two consecutive accounting periods.

- (33) In the case of newly established enterprises whose accounts have not yet been approved, the data to apply is to be derived from a bona fide estimate made in the course of the financial year.

2.5 Staff headcount

- (34) The headcount corresponds to the number of annual work units (AWU), i.e. the number of persons who worked full-time within the enterprise in question or on its behalf during the entire reference year under consideration. The work of persons who have not worked the full year, the work of those who have worked part-time, regardless of duration, and the work of seasonal workers are counted as fractions of AWU. The staff consists of:

- a) employees;
- b) persons working for the enterprise being subordinated to it and deemed to be employees under national law;
- c) owner-managers;
- d) partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise.

- (35) Apprentices or students engaged in vocational training with an apprenticeship or vocational training contract are not included as staff. The duration of maternity or parental leaves is not counted.

2.6 Establishing the data of an enterprise

- (36) In the case of an autonomous enterprise, the data, including the number of staff, are determined exclusively on the basis of the accounts of that enterprise.

- (37) The data, including the headcount, of an enterprise having partner enterprises or linked enterprises are determined on the basis of the accounts and other data of the enterprise or, where they exist, the consolidated accounts of the enterprise, or the consolidated accounts in which the enterprise is included through consolidation.

- (38) To the data referred to in paragraph 37 are added the data of any partner enterprise of the enterprise in question situated immediately upstream or downstream from it. Aggregation is proportional to the percentage interest in the capital or voting rights (whichever is greater). In the case of cross-holdings, the greater percentage applies.

- (39) To the data referred to in paragraphs 37 and 38 is added 100% of the data of any enterprise, which is linked directly or indirectly to the enterprise in question, where the data were not already included through consolidation in the accounts.
- (40) For the application of paragraphs 37-39, the data of the partner enterprises of the enterprise in question are derived from their accounts and their other data, consolidated if they exist. To these is added 100% of the data of enterprises which are linked to these partner enterprises, unless their accounts data are already included through consolidation.
- (41) For the application of the same paragraphs 37-39, the data of the enterprises which are linked to the enterprise in question are to be derived from their accounts and their other data, consolidated if they exist. To these is added, pro rata, the data of any possible partner enterprise of that linked enterprise, situated immediately upstream or downstream from it, unless it has already been included in the consolidated accounts with a percentage at least proportional to the percentage identified under paragraph 38.
- (42) Where in the consolidated accounts no staff data appear for a given enterprise, staff figures are calculated by aggregating proportionally the data from its partner enterprises and by adding the data from the enterprises to which the enterprise in question is linked.

2.7 Revision

- (43) On the basis of a review of the application of the definition contained in this Chapter, to be drawn up following the issuance of a draft by the European Commission in this respect, and taking account of any amendments to Article 1 of Directive 83/349/EEC on the definition of linked enterprises within the meaning of that Directive, the Authority will, if necessary, adapt the definition contained in this Chapter, and in particular the ceilings for turnover and the balance-sheet total in order to take account of experience and economic developments in the EEA.

3 Adoption

- (44) The new Chapter on aid to micro, small and medium-sized enterprises (SMEs) will apply as of the date of its adoption by the EFTA Surveillance Authority.