


EFTA SURVEILLANCE AUTHORITY

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Dec. No. 148/94/COL
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EFTA SURVEILLANCE AUTHORITY DECISION

OF 9 NOVEMBER 1994

ON THE TOP-Eurofit Programme
(AUSTRIA)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area¹, in particular to Articles 61 to 63,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice², in particular Article 1 of Protocol 3 thereof,

WHEREAS:

I. FACTS

1. The notification

By letter dated 20 July 1994, received by the EFTA Surveillance Authority on 25 July 1994 (Ref. 94-11345 A), the Austrian Government notified, in accordance with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, a proposal for an aid scheme for improving the processing and marketing conditions for the food and beverages industry (TOP-Eurofit Programme). The notification was amended and completed by letter dated 14 October 1994 (Ref. 94-15401), identical in contents to fax dated 17 October 1994 (Ref. 94-15444). Both the letter and the fax were received by the EFTA Surveillance Authority on 17 October 1994.

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

2. The contents of the proposed amendments

The TOP-Eurofit Programme is a special investment aid programme for improving the processing and marketing conditions for agricultural products. It is legally based on Decision of the Council of Ministers (Ministerrat) GZ. 16.360/31-X/A/5/94 dated 4 May 1994 and will be made operational by the notified aid scheme.

The aid recipients will be enterprises of the food and beverages industry (NACE-Rev.¹³ classification: 15.1. - 15.9.) which are or will be located or operate branches in Austria. The purpose of the scheme is to smoothen the adjustment of this sector of the industry to the expected increased competition due to the participation in the EEA Agreement (with regard to products listed in Table I and II of Protocol 3 of the EEA Agreement) and accession to the EU (with regard to other processed agricultural products). Interest rate subsidies will be granted for loans taken up to finance investments for

- improving product quality,
- the utilization of new processing methods, including the development of new or high-grade types of products and by-products and for opening up new markets, as well as for innovative investments,
- improving marketing channels, including greater transparency in price-setting,
- rationalizing and developing product presentation, preservation, treatment and processing of agricultural products or for utilizing by-products or production waste.

The investment categories eligible for aid correspond to the eligible investments enumerated under Article 11 of Council Regulation (EEC) No 866/90 of 29 March 1990⁴. Investments related to products covered by the EEA Agreement, which are excluded from being eligible for aid in accordance with Commission Decision 94/173/EC of 22 March 1994⁵, may not be subsidised under the TOP-Eurofit Programme either.

The aid element will consist in a reduced interest rate for loans awarded consortially by the firms' bank and *Investkredit*. The interest rate will be fixed at 3 percentage points - rounded to the next full 1/8% p.a. - below the refinancing costs of *Investkredit*. The amount of the loan may range from 2,5 to 100 million ATS. As an additional absolute ceiling, the maximum aid intensity under the TOP-Eurofit Programme will be fixed at 11% gross. In cases of cumulation with aid from other public sources the cumulated aid intensity may go up to 20% gross. At least 25% of the investment costs would have to be financed from the enterprises' own resources or from external commercial financing.

³ See Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Communities, OJ 1990 L 293/1, as amended by Commission Regulation (EEC) No 761/93 of 24 March 1993, OJ 1993 L 83/1.

⁴ Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products, OJ 1990 L 91/1.

⁵ Commission Decision of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC (94/173/EC), OJ 1994 L 79/29.

For the new aid scheme no new budget will be allocated on the federal level. The funds for the foreseen interest subsidies will be raised by reallocations from the overall budget of the two existing "TOP"-programmes (TOP FÜ and TOP 2) which amounts to ATS 400 million (estimate for 1994). It is foreseen that the Austrian Länder contribute to the budget for the "TOP Eurofit" scheme with a top up of 40%. The estimated number of recipients of investment aid under the TOP-Eurofit Programme will be 15 - 20 enterprises per year.

The Austrian government undertakes to submit an annual report to the EFTA Surveillance Authority in accordance with Chapter 30 of the EFTA Surveillance Authority's Procedural and Substantive Rules in the Field of State Aid⁶ (see point 21 of the notification form).

The guidelines shall apply until 31 December 1996 (see point 14 of the notification form).

II. APPRECIATION

1. Questions related to the scope of the EEA Agreement

The guidelines foresee aid awards in the form of grants in favour of the food and beverages industry (NACE-Rev.1⁷ classification: 15.1. - 15.9.).

Before appraising the question whether the proposed aid scheme constitutes aid in the meaning of Article 61 (1) of the EEA Agreement and is or may be exempted from the general prohibition to grant aid under one of the exemption clauses stipulated in Article 61 (2) or (3), it has to be clarified, if and to what extent the aid scheme at hand falls within the scope of the EEA Agreement.

The question whether aid to the sector of the industry concerned falls under the provisions on State aid relates to the product coverage of the EEA Agreement, which is dealt with under Article 8 (3)(b) thereof. The provision stipulates that, "unless otherwise specified, the provisions of this Agreement shall apply only to:

- (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;
- (b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol."

Article 8 (3)(b) is further specified by Article 1 of Protocol 3 to the EEA Agreement stipulating that, "subject to the provisions of this Protocol and unless otherwise

⁶ Henceforth referred to as State Aid Guidelines.

⁷ See Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Communities, OJ 1990 L 293/1, as amended by Commission Regulation (EEC) No 761/93 of 24 March 1993, OJ 1993 L 83/1.

specified in the Agreement, the provisions of the Agreement shall apply to products listed in Tables I and II".

The products which are processed or marketed by enterprises eligible for investment aid for the "improvement of conditions to process and market agricultural products" under the proposed aid scheme fall within Chapters 1 - 24 of the Harmonized Commodity Description and Coding System. Therefore, these products fall within the scope of the EEA Agreement only insofar as they are listed in Table I and II of Protocol 3 of the EEA Agreement. The "specific arrangements set out in that Protocol" (Article 8 (3)(b) of the EEA Agreement) refer to the price compensation system, which may be applied for products listed in Table I. The fact that the details of this system have not yet been agreed, should not affect the application of horizontal rules of the EEA Agreement, such as the provisions on State aid set out in the EEA Agreement, to these products.⁸

Therefore it is concluded that the assessment of the compatibility of the proposed aid scheme with the functioning of the EEA Agreement is restricted to investment aid to improve the conditions to process and market agricultural products listed in Tables I and II of Protocol 3 to the EEA Agreement. This position taken by the EFTA Surveillance Authority corresponds to the position on this question taken by the Austrian authorities in the notification, where it is concluded that "in the case of agricultural products the Treaty (i.e. the EEA Agreement) covers only those enumerated in Protocol 3 to Art. 8 (3)(b), Tables I and II".

Consequently, aid awards under the scheme concerned to improve the conditions to process and market agricultural products which do not fall within the so-defined scope of application of the EEA Agreement are not covered by this decision.

2. Application of Article 61 (1) of the EEA Agreement

The measures are granted on a discretionary basis by decision of the *Österreichische Investitionskredit AG (Investkredit)*, which is entrusted with the application and implementation of the proposed aid scheme. By relieving the undertakings concerned of some of their costs, which they normally would have to bear themselves, such aid gives financial advantages and improves their competitive situation. Since the production of the favoured undertakings may be in competition with that of undertakings in other States participating in the EEA, such aid is liable to distort intra-EEA trade. The grants are funded through the federal budget of Austria. Thus, the aid will be granted by the State through State resources. For those reasons, the foreseen measures constitute aid in the meaning of Article 61 (1) of the EEA Agreement.

Consequently, the EFTA Surveillance Authority is obliged to assess whether any of the exemption clauses under Article 61 (2) and (3) are applicable in order to exempt the aid measure from the general prohibition of aid under Article 61 (1).

⁸ For arguments in favour of such an interpretation, see Legal Service Internal Memorandum of 11 October 1994, Doc no 94-15139 I.

3. Application of Articles 61 (2) and (3) of the EEA Agreement

The scheme foresees investment aid for certain enumerated categories of investments of enterprises in the food and beverages industry. Thus, the scheme is a sectoral investment aid scheme. As such, it may be considered compatible with the functioning of the EEA Agreement under Article 61 (3)(c) as "aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest".

The scheme does not foresee any restriction with regard to the region where a plant is located or with regard to the size of the aid receiving enterprise. Therefore, the principles for regional aid or aid to SMEs are not applicable to it. For SME aid schemes the EFTA Surveillance Authority generally assumes that trading conditions are not adversely affected to an extent contrary to the common interest, if the maximum intensity ceilings for SME aid stipulated in Chapter 10 of the State Aid Guidelines are respected. The same applies to regional aid remaining within the maximum ceilings as authorised, with regard to Austria, by the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994. Sectoral investment aid which is not bound to either of these restrictions, may be considered compatible with the functioning of the EEA Agreement only under exceptional circumstances prevailing in the sector concerned. Even then it has to be ensured that "such aid does not adversely affect trading conditions to an extent contrary to the common interest".

With regard to the food and beverages industry, the Austrian authorities consider in the notification that this sector is at present primarily geared to the relatively small domestic market, since there has so far been practically no participation in the EU (EEA) market. Consequently, the competitiveness of the enterprises located in Austria would be limited in comparison to their competitors in the EU (EEA). Furthermore, the Austrian authorities expect that, through mutual opening of the markets, the Austrian food and beverages industry will encounter keener competition and will therefore have to react by restructuring and rationalisation, which would, to a large extent, require capital-intensive investments. Economic disadvantages of this sector of the Austrian industry would lead to job losses and would ultimately have negative repercussions on the entire economy.

It is the intention of the Austrian Government to enable this sector of the Austrian economy, with the help of the TOP-Eurofit Programme, to prepare for the increased competition after accession to the EU. In terms of eligible investments and maximum aid intensities, the scheme mirrors an EC Council Regulation and a Commission Decision governing comparable aid disbursed by EU Member States (see under I.2 above). Moreover, the Austrian authorities refer to the second indent in Declaration No. 31 ("Declaration on the processing industry in Austria and Finland") annexed to the Final Act of the Documents concerning the accession of the Republic of Austria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union⁹ providing for "flexibility on transitional national aid schemes designed to facilitate restructuring".

⁹ OJ 1994 C 241/392.

It shall be noted that the aid falling within the scope of the EEA Agreement has to be assessed on the basis of the provisions of that Agreement, i.e. on Articles 61 to 64 thereof as well as Annex XV thereto and the State Aid Guidelines as the corresponding acts adopted by the EFTA Surveillance Authority. It is not possible directly to base the assessment of the compatibility of an aid scheme with the functioning of the EEA Agreement on Community Acts which are not referred to in the EEA Agreement. This is even more evident in respect of the Declaration referred to.

However, the EFTA Surveillance Authority is obliged to use the discretion entrusted to it under Article 61 (3) of the EEA Agreement to ensure that equal conditions of competition are maintained between the Contracting Parties (Article 1 (1) of the EEA Agreement). The clear-cut sectoral limitation of the scheme as well as its limited duration of three years clearly indicates that it aims at helping the sector concerned to restructure and prepare for enhanced competition. As sectoral aid, it could qualify for exemption only under Article 61 (3)(c) of the EEA Agreement. On the Community side, EU Member States are in a position to introduce, in conformity with Articles 92 to 94 of the EC Treaty and on the basis of certain criteria laid down in Council Regulation (EEC) 866/90 and Commission Decision 94/173/EC¹⁰, aid schemes on improving the processing and marketing conditions for agricultural products. Against this background, it can be held that an aid scheme of an EFTA State participating in the EEA mirroring the criteria of the above quoted Community acts does not adversely affect trading conditions between the Contracting Parties contrary to the common interest.

Given the clearly defined scope of the aid scheme and its limited duration, it may be held that the measures foreseen under the scheme in question - insofar as they concern products listed in Table I and II of Protocol 3 of the EEA Agreement and thus falling within the competence of the EFTA Surveillance Authority - promote objectives which are covered by the exemption clause under Article 61(3)(c) of the EEA Agreement.

Therefore it is concluded that the TOP Eurofit Programme qualifies for exemption under Article 61(3)(c) of the EEA Agreement by facilitating the development of certain economic activities.

¹⁰ See references in footnotes 4 and 5.

HAS ADOPTED THIS DECISION:

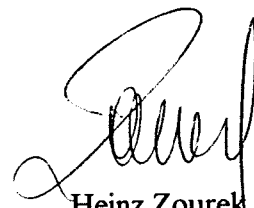
1. The EFTA Surveillance Authority has decided not to raise objections to the TOP Eurofit Programme as notified in letter dated 20 July 1994 (Ref. 94-11345 A) as amended and completed by letter dated 14 October 1994 (Ref. 94-15401) insofar as the aid relates to investment projects for the improvement of conditions to process and market agricultural products specified in Tables I and II of Protocol 3 to the EEA Agreement.
2. This Decision does not affect any aid awards under the TOP Eurofit Programme which relate to investment projects for products falling under Chapters 1 - 24 of the Harmonized Commodity Description and Coding System, but not listed in Tables I and II of Protocol 3 to the EEA Agreement and thus remain outside the scope of the EEA Agreement.
3. The Austrian Government is obliged to submit a detailed annual report (in accordance with chapter 30 of and Annex III to the Procedural and Substantive Rules in the Field of State Aid) on the application of the scheme to the EFTA Surveillance Authority.

Done at Brussels, 9 November 1994

For the EFTA Surveillance Authority



Knut Almestad
President of the EFTA Surveillance Authority



Heinz Zourek
College Member