


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION

OF 9 NOVEMBER 1994

ON THE MODIFICATION OF THE AID SCHEME UNDER THE BUSINESS STRUCTURE IMPROVEMENT ACT (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. 94-11321 A), the Austrian Government notified, in accordance with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, a plan to modify the Aid Scheme under the Business Structure Improvement Act (*Richtlinien für die Gewährung von Förderungen nach dem Gewerbestrukturverbesserungsgesetz 1969 vom 18. November 1991*). The notification was amended and completed by letter dated 23 September 1994, received by the EFTA Surveillance Authority on 26 September

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

1994 (Ref. 94-14204 A). The currently applied guidelines were notified by the Austrian Government as existing aid³.

2. The contents of the proposed amendments

The aid scheme under the Business Structure Improvement Act foresees investment aid for SMEs for certain business activities which are enumerated under heading "B) *Wirtschaftspolitische Schwerpunkte*" ("political-economic priorities") of the guidelines. The supplement is legally based on Decisions of the Council of Ministers (Ministerrat) GZ. 16.360/31-X/A/5/94 dated 4 May 1994 and GZ. 16.360/39-X/A/5/94 dated 18 May 1994 and proposes

- a) to widen the existing priority area "improvement of transport facilities" to forwarding agents which might apply for aid when investing in improvements of forwarding facilities (*Speditionsanlagen*) and individual logistic equipment (*individuelle Logistikeinrichtungen*), and
- b) to introduce, as a new priority area under the scheme, the "improvement of conditions to process and market agricultural products" (*"Verbesserung der Verarbeitungs- und Vermarktungsbedingungen landwirtschaftlicher Erzeugnisse"*).

The aid recipients will be forwarding agents (NACE-Rev.1⁴ classification: 63.4.) and enterprises of the food and beverages industry (NACE-Rev.1 classification: 15.1. - 15.9.) which are or will be located or operate branches in Austria. The purpose of the first supplement is to give an increased incentive to forwarding agents to invest in improvement of transport facilities in order to help them to overcome the structural problems which they are facing due to accession to the EU. The purpose of the second supplement 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). The objectives and selection criteria of the scheme correspond to that of the "TOP Eurofit" Programme (see case 94-029).

In both cases, the aid will be given in the form of a grant of up to 4% p.a. for investments of up to 10 million ATS. The foreseen maximum aid intensity will be restricted to 11,8% gross. With regard to forwarding agents, cumulation with aid from other public sources is forbidden, whereas aid for the processing and marketing of agricultural products may be cumulated with aid from other sources up to an aid intensity of 20%.

For the new supplement under the scheme no new budget will be allocated. The budget for the whole scheme is ATS 469,92 million (estimate for 1994). The estimated

³ See letter dated 3 March 1994, received on 4 March 1994; Ref. 94-3878 A; code number wA 1.0. of the submitted register of existing aid - registered as case 93-232 in SACH.

⁴ 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.

number of recipients of investment aid under the new supplement will be 5 - 10 enterprises in 1994.

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 Aid⁵ (see point 20 of the notification form).

The guidelines shall apply until 31 December 1994 (see point T of the guidelines). However, the Austrian authorities already announced their intention to notify a prolongation of the scheme.

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 forwarding agents (NACE-Rev.1⁶ classification: 63.4.), and the food and beverages industry (NACE-Rev.1 classification: 15.1. - 15.9.).

Before appraising the question whether the proposed amendment to an existing 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. This question is being assessed separately for the two additional "lines" in the scheme, which are aid to forwarding agents on the one hand and aid to the food and beverages industry on the other hand.

Forwarding agents provide services which are covered by the provisions of the EEA Agreement, in particular the provisions on freedom of establishment and the freedom to provide services. Article 1 (1) of the EEA Agreement stipulates that the Agreement shall promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition. The State aid rules (Articles 61 - 64) shall, as part of the competition rules (Article 1 (2)(e) and Part IV of the EEA Agreement), ensure that these equal conditions of competition are not distorted by aid granted by EC Member States, EFTA States or through State resources. This underlying function of the competition rules shows that the rules on State aid do not only relate to the free movement of goods, but also to the free movement of services, persons and capital.

⁵ Henceforth referred to as State Aid Guidelines.

⁶ 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.

Article 61 (1) of the EEA Agreement has to be interpreted in this context. It follows from the wording of that article that State aid only falls under the general prohibition of aid, if it "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods (...), in so far as it affects trade between Contracting Parties". It appears to be clear from the wording of this provision that enterprises in the services sector are covered by the notion "favouring certain undertakings". The above-described overall context, in which the State aid rules are placed, shows that the "trade effect" criterion as second criterion for aid in the meaning of Article 61 (1) is to be interpreted in a wide sense, covering both trade in goods and services.

Therefore it is concluded that aid to forwarding agents falls, as it constitutes aid to economic activities in the services sector, under the scope of application of the EEA Agreement.

Turning to the food and beverages industry, it shall be noted that the question whether aid to this sector of the industry 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 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" ("*Verbesserung der Verarbeitungs- und Vermarktungsbedingungen landwirtschaftlicher Erzeugnisse*") under the proposed amendment to the scheme at hand, 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, to these products.⁷

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

⁷ For arguments in support of such an interpretation, see Legal Service Internal Memorandum of 11 October 1994, Doc no 94-15139 I.

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 *Bürges-Förderungsbank*, which is entrusted with the application and implementation of the aid scheme in accordance with the Business Structure Improvement Act. 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 or the services provided by 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).

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

(a) General remarks

The scheme foresees investment aid for clearly defined purposes. Its objective is to help small and medium-sized enterprises to invest

- a) in the improvement of forwarding facilities and individual logistic equipment, and
- b) in the improvement of conditions to process and market agricultural products.

Regarding the SME component, it shall be noted that the definition of SMEs stated in the notification (point 11 of the notification form) is compatible with the EEA provisions on State aid, as stated in Chapter 10 of the State Aid Guidelines, adopted by the EFTA Surveillance Authority on 19 January 1994.⁸ The EFTA Surveillance Authority expressed, in the same Chapter of the State Aid Guidelines, a general presumption in favour of the compatibility of aid to SMEs with the functioning of the EEA Agreement. It concluded that such aid would be eligible for exemption under

⁸ Hereinafter referred to as State Aid Guidelines.

Article 61 (3)(c) of the EEA Agreement, if the conditions laid down in the State Aid Guidelines, in particular with regard to intensities, are met.

(b) Aid to forwarding agents

With regard to forwarding agents, the foreseen maximum aid intensity is 11,8% gross. This maximum intensity remains, regarding small enterprises, within the limit of 15% gross stipulated in the State Aid Guidelines and, regarding medium-sized enterprises located in assisted areas, well below the maximum intensities of 15 - 40% net as laid down in the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994.

With regard to medium-sized enterprises located outside assisted areas, the maximum aid intensity exceeds the limit of 7,5% gross which is stipulated in the State Aid Guidelines and usually constitutes the upper limit for aid to medium-sized enterprises. Thus, the investment aid exceeding 7,5% gross for such companies cannot be accepted on the basis of the generally applicable principles governing aid to SMEs. However, the wide discretion entrusted to the EFTA Surveillance Authority under Article 61 (3) of the EEA Agreement enables it to accept higher aid intensities, if this can be justified with exceptional circumstances.

With regard to the applicable exemption clause it first has to be stated that the proposal does not envisage to offset regional disadvantages or to strengthen the development of certain economic areas. Nor does the aid promote the execution of an important project of common European interest or remedy the serious disturbance in the economy of an EFTA State. Therefore, the exemption clauses provided for under Articles 61 (3)(a) and (3)(b) as well as the regional angle of (3)(c) cannot be applied. As the aid proposal has clear sectoral objectives, the sectoral angle of Article 61 (3)(c) appears to be the only applicable exemption clause. This implies that the aid may be considered compatible if it facilitates certain economic activities and does not adversely affect trading conditions to an extent contrary to the common interest.

In their justification for the aid proposal submitted to the EFTA Surveillance Authority, the Austrian authorities hold that, as a result of Austria's accession to the EU, Austrian forwarding agents are suddenly losing a considerable part of their value added and about 50% of their gross turnover, basically due to the abolition of customs services at the borders and inland. About 3000 specialised and highly qualified employees would lose their jobs and a further 1500 employees must be retrained. The required restructuring costs to be borne by the forwarding services would amount to an estimated ATS 3,7 bn for a period of 3 years as from accession to the EU. Under such circumstances, investments to preserve the competitiveness of forwarding agents would be unavoidable. The purpose of the scheme would be to facilitate such investments.

It appears that the information on the current and expected situation in the forwarding agents sector provided by the Austrian authorities constitutes only a rough and preliminary estimate. However, the information available to the EFTA Surveillance Authority shows that the sector employs 13 799 people in 380 enterprises, 313 of which are small enterprises employing less than 50 people, 30 employing 50-99 people, 34 employing 100-499 people and 3 employing more than 500 people (all figures from

1988).⁹ Compared to these figures, the estimated lay-off and retraining requirements concern up to approximately one third of the present employees in the sector and show a clear need for re-orientation and restructuring of the business activities in the sector.

The Austrian aid proposal aims at helping the sector concerned to overcome the sudden change of its business environment which is caused by external circumstances, which cannot be influenced by the enterprises concerned themselves. As the aid encourages forwarding agents to invest in improvements of facilities and equipment it can be held that it thus strengthens their remaining activities. This may help the enterprises concerned to maintain or restore their long-term viability. Therefore it can be concluded that the aid "facilitates certain economic activities" in the meaning of Article 61 (3)(c) of the EEA Agreement.

Moreover, the improvement of existing facilities would not, according to the information provided by the Austrian government, lead to capacity increases. Furthermore, the aid is linked to investment and the maximum intensity is restricted to 11,8% gross. It is thus ensured that the benefiting enterprises contribute to at least 88,2% to the investments. This significant contribution of the aid recipients to the re-orientation of their business activities from their own resources or from external commercial financing permits to conclude, together with the limited duration of the scheme (until end 1994, prolongation subject to prior notification), that the aid is limited to the strict minimum needed and does not adversely affect trading conditions to an extent contrary to the common interest.

Therefore it is concluded that the new supplement to the Aid Scheme under the Business Structure Improvement Act (*Richtlinien für die Gewährung von Förderungen nach dem Gewerbestrukturverbesserungsgesetz 1969 vom 18. November 1991*) regarding forwarding agents qualifies for exemption under Article 61(3)(c) of the EEA Agreement by facilitating the development of certain economic activities.

(c) Aid to the food and beverages industry

The scheme foresees investment aid for certain enumerated categories of investments of SMEs in the food and beverages industry. 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 and for regional aid as authorised, with regard to Austria, by the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994, are respected. The foreseen maximum intensities of up to 20% gross in cases of cumulation from aid with other sources in the scheme at hand exceed these generally accepted maximum aid intensities, if the aid recipient is located outside an assisted area as authorised by the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994.

⁹ See Bundeskammer der gewerblichen Wirtschaft (Ed.), Die gewerbliche Wirtschaft. Ausgewählte Resultate der nichtlandwirtschaftlichen Bereichszählungen über das Wirtschaftsjahr 1988 (Vienna 1991), p. 160.

Thus, the scheme has to be regarded as a sectoral investment aid scheme for SMEs. If such investment aid exceeds, as in the present case, the above-mentioned maximum intensities, it may be considered compatible with the functioning of the EEA Agreement, by applying Article 61 (3)(c) 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 SMEs in this sector of the Austrian economy, with the help of the new supplement to the Aid Scheme under the Business Structure Improvement Act, to prepare for the increased competition after accession to the EU. In terms of eligible investments and maximum aid intensities, the scheme mirrors the "TOP Eurofit" Programme (case 94-029, see under I.2 above), which, for its part, mirrors Council Regulation (EEC) No 866/90 of 29 March 1990¹⁰ and respects the exclusions stipulated for investments related to products in Commission Decision 94/173/EC of 22 March 1994¹¹, insofar as products covered by the EEA Agreement are concerned.

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 to directly 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.

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 (until end 1994, prolongation subject to prior notification), clearly indicate that it aims at helping the sector concerned to restructure and prepare for enhanced competition. As sectoral SME aid, it could qualify for exemption only under Article 61

¹⁰ 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.

¹¹ 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.

(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/EC¹², 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 restriction to SMEs, it may be held that the measures foreseen under the scheme in question promote objectives which are covered by the exemption clause under Article 61(3)(c) of the EEA Agreement.

Therefore it is concluded that the new supplement to the Aid Scheme under the Business Structure Improvement Act (*Richtlinien für die Gewährung von Förderungen nach dem Gewerbestrukturverbesserungsgesetz 1969 vom 18. November 1991*) regarding the food and beverages industry qualifies for exemption under Article 61(3)(c) of the EEA Agreement by facilitating the development of certain economic activities.

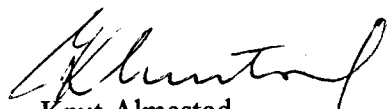
¹² See references in footnotes 11 and 12.

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority has decided not to raise objections to the new supplement to the Aid Scheme under the Business Structure Improvement Act (*Richtlinien für die Gewährung von Förderungen nach dem Gewerbestrukturverbesserungsgesetz 1969 vom 18. November 1991*) as notified in letter dated 20 July 1994 (Ref. 94-11321 A) as amended and completed by letter dated 23 September 1994 (Ref. 94-14204 A).
2. With regard to the food and beverages industry, this Decision only 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.
3. This Decision does not affect any aid awards under the new supplement to the Aid Scheme under the Business Structure Improvement Act 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.
4. The Austrian Government is obliged to submit a simplified annual report (in accordance with chapter 30 of and Annex IV 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