


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION

OF 14 DECEMBER 1994

TO PROPOSE APPROPRIATE MEASURES TO AUSTRIA
ON THE AID GRANTED UNDER THE
INNOVATION AND TECHNOLOGY FUND ACT - ITFG
(EXISTING AID 93-161, 93-162, 93-164,
93-368 AND 93-370 TO 93-374)

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. Introduction

Article 1(1) of Protocol 3 to the Surveillance and Court Agreement provides that the EFTA Surveillance Authority shall, in co-operation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

By letter dated 4 January 1994 (Ref. 94-466 D) the EFTA Surveillance Authority requested information on all existing aid measures in Austria. By letter dated 3 March 1994 (Ref. 94-3878 A) the Austrian authorities provided information on such measures, including the Innovation and Technology Fund Act (*Innovations- und*

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

*Technologiefondsgesetz - ITFG*³ - "BK2"; registered as existing aid no. 93-161) and information on aid schemes thereunder. However, the amendments to the ITFG introduced by BGBl. 1993/972⁴ have not been brought to the attention of the EFTA Surveillance Authority.

Under the law, guidelines for aid awards have been issued (*Richtlinien für die Gewährung von Förderungen gemäß dem Innovations- und Technologiefondsgesetz (ITFG) - lt. Erlaß vom 26. 2. 1988 des Bundesministeriums für öffentliche Wirtschaft und Verkehr, des Bundesministeriums für Wissenschaft und Forschung sowie des Bundesministeriums für Finanzen*).⁵ These guidelines were submitted to the EFTA Surveillance Authority as Annex to both the questionnaire for existing aid for the scheme "WV4" (ITF/ERP - existing aid 93-164) and the scheme "WF2" (ITF/FFF - existing aid 93-162).

Under these guidelines, implementing guidelines for aid awards under the ITFG (*Leitfaden für die Gewährung von Förderungen gemäß dem Innovations- und Technologiefondsgesetz - ITFG - "WV4"*; existing aid 93-368)⁶ have been issued. Under the implementing guidelines to the ITFG, the Austrian authorities informed the EFTA Surveillance Authority of several sub-schemes for specific purposes with different periods of duration. The sub-schemes are:

- Industrial Design (existing aid 93-369)
- Technologies in the field of transport (*Verkehrstechnik*; 93-370)
- Technologies in the field of energy (*Energietechnik*; 93-371)
- Flexible computer-integrated production for SMEs (*FlexCIM, Flexible computerintegrierte Produktion für Klein- und Mittelbetriebe*; 93-372)
- Technologies in the field of environment (*Umwelttechnik*; 93-373)
- Software-technology (*Software-Technologie*; 93-374)
- Seed-Financing (*Finanzierung und Betreuung von jungen High-Tech-Unternehmen*; 93-375)

Besides the schemes and sub-schemes referred to above, which are operated under the responsibility of the Federal Ministry of Public Economy and Transport (*Bundesministerium für öffentliche Wirtschaft und Verkehr*), information on another scheme under the ITFG (ITF/FFF - existing aid 93-161), which is operated by the FFF (*Forschungsförderungsfonds für die gewerbliche Wirtschaft*) under the responsibility of the Federal Ministry of Science and Research (*Bundesministerium für Wissenschaft und Forschung - "WF2"*) was also submitted to the Authority and has been registered as existing aid 93-162.

An initial examination of the ITFG and the guidelines thereunder indicated that the legal provisions were not altogether compatible with the rules on State aid under the

³ Bundesgesetz vom 24. November 1987 über Maßnahmen zur Finanzierung von Forschungen, Entwicklungen und Umstellungen für den Bereich der gewerblichen Wirtschaft (Innovations- und Technologiefondsgesetz - ITFG) in der Fassung der Bundesgesetz BGBl. 1988/407 - hereinafter referred to as ITFG.

⁴ Bundesgesetz: Änderung des Innovations- und Technologiefondsgesetzes, BGBl. 1993/972.

⁵ Hereinafter referred to as "Richtlinien".

⁶ Hereinafter referred to as "Leitfaden".

EEA Agreement. For this reason the matter was taken up at the meeting between officials from the Austrian Federal Government and the EFTA Surveillance Authority in Vienna on 8 November 1994.

However, two sub-schemes are not covered by the present decision to propose appropriate measures to aid awarded under the ITFG. These are, on the one hand, the "Industrial Design" sub-scheme (93-369) which is due to expire on 31 December 1994 and, on the other hand, the Seed-Financing scheme (93-375) which, according to the information received on 3 March 1994, already expired on 31 December 1993. A foreseen prolongation of this scheme in a modified form has been notified as new aid to the Authority and will be subject to a separate decision (case 94-031).

2. Relevant provisions of the ITFG and the guidelines thereunder

The ITFG provides the legal basis for the Innovation and Technology Fund, a State body which is entrusted to provide funds for enterprises to finance research, development and adaptation activities ("*Finanzierung von Forschungen, Entwicklungen und Umstellungen*" - §3(1) ITFG). Aid may be awarded in the form of soft loans, interest subsidies and grants (§3(2) ITFG).

More precise criteria for aid awards are stipulated in the guidelines under the law, which are to be elaborated by a Committee established in accordance with § 4(5) ITFG and proposed by it to the Federal Minister of Public Economy and Transport and the Federal Minister of Science and Research. The decisions on aid awards to individual enterprises are to be taken by the Ministers referred to which ought to take due account of the recommendations of the Committee (§ 4(4) ITFG).

The possible maximum aid intensities, including rules on maximum intensities in the case of cumulation with aid from other public sources, are laid down in the guidelines, whereas the Act itself lacks any such limitations. Both the "*Richtlinien*"⁷ and the "*Leitfaden*"⁸ stipulate that the maximum intensities shall not, as a rule, exceed 50% gross (points V. of both guidelines). In cases of cumulation with aid from other sources, the maximum aid ceiling is set at 75% gross (point VI. of the "*Richtlinien*" and point V. of the "*Leitfaden*").

II. APPRECIATION

1. Restriction of aid awards to guidelines

The fact that the Federal Minister of Public Economy and Transport and the Federal Minister of Science and Research are to decide upon individual awards of aid by taking due account of the recommendations made by the committee in accordance with § 4(7) ITFG, including the obligation of the Committee to elaborate and propose guidelines for the application of the ITFG does not, in principle, exclude the possibility of aid

⁷ Existing aid 93- 162 and 93-164.

⁸ Existing aid 93-368, covering sub-schemes 93-369 to 93- 374.

being awarded by decision of the responsible Minister without observing the criteria set out in the guidelines. Consequently, the schemes at hand, consisting of the ITFG and the guidelines thereunder, do not foresee any binding limits with regard to criteria for aid awards and to maximum aid intensities.

It is a general principle of State aid control that aid shall be or shall be made measurable.⁹ Schemes without any clear-cut criteria for aid awards and without limitations with regard to the possible aid intensities do not fulfil this criterion and thus do not enable the EFTA Surveillance Authority to assess the impact of aid disbursed thereunder to enterprises on competition and trade. Consequently, such schemes cannot be considered compatible with the functioning of the EEA Agreement. The EFTA Surveillance Authority considers that, in a first attempt to adjust aid granted under the ITFG to the requirements of the EEA Agreement, it shall be ensured that the criteria laid down in the guidelines referred to above are respected in all cases of application of the Act.

2. Aid intensities and cumulation control

The ITFG and the schemes thereunder provide possibilities to finance research, development and adaptation activities without any clear distinction between the three categories. However, such a clear-cut distinction between these categories is necessary as the three categories referred to above are, according to the state aid rules as reflected in the State Aid Guidelines¹⁰, subject to different possible maximum aid intensities.

With regard to aid for R&D, the level of aid for basic industrial research should, according to Chapter 14 of the State Aid Guidelines, as a general rule, not exceed 50% of the gross costs of the project. As the activity being aided gets nearer to the market place aid levels should be progressively lower. Thus the EFTA Surveillance Authority generally does not accept aid levels above 25% gross for applied research and development. If aid is awarded not in the form of grants but of conditional repayment credits, which can be written off only if the project is proved to be a failure, such financing may cover up to 40% gross of project costs for applied research and development. The above ceilings can then be increased by 10 percentage points, when the aid is explicitly restricted to small and medium-sized enterprises (SMEs).

According to both the "*Richtlinien*" and the "*Leitfaden*" under the ITFG, the maximum aid intensities may go up to 50% gross. In cases of cumulation with aid from other sources, they may go up to 75% gross of the project costs. The EFTA Surveillance Authority considers the ceiling of 50% gross to exceed the upper limit for applied research and development as well as the ceiling of 75% gross to exceed the upper limit for all categories of R&D aid. Therefore, the stipulated maximum aid intensities are clearly inconsistent with the above rules on aid for R&D.

⁹ See, with regard to regional aid, Chapter 26.2. (Transparency) of the State Aid Guidelines.

¹⁰ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement (OJ No L 231, 3.9.94) - hereinafter referred to as State Aid Guidelines.

As a consequence, the EFTA Surveillance Authority requires a differentiation to be introduced for the three categories of "research, development and adaptation activities" ("*Forschungen, Entwicklungen und Umstellungen*" in the meaning of §3(1) ITFG) to the effect that differentiated maximum aid intensities are introduced in accordance with the criteria laid down in Chapter 14 of the State Aid Guidelines. Moreover, cost categories which fall under the third category ("*Umstellungen*") cannot possibly be regarded to fall under the R&D definition. Consequently, they should be clearly separated from R&D categories and, as they constitute general investment aid, be made subject to SME and regional aid criteria.

3. Annual reporting

For each authorised aid scheme, the EFTA Surveillance Authority requests, as a general rule, the EFTA States to furnish certain basic data in the form of annual reports in order to keep it under constant review.¹¹ The data will enable the EFTA Surveillance Authority to monitor more effectively whether the implementation of the aid scheme fulfils or continues to fulfil the conditions necessary for the application of one of the exemption clauses contained in Article 61(2) and (3) of the EEA Agreement.

In order to enable the EFTA Surveillance Authority to fulfil its review obligation under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement in the same manner also with regard to "pre-EEA" aid in the meaning of para. 7.2. of the State Aid Guidelines, this reporting obligation equally should apply to existing schemes.

4. Specific notification obligations

In certain sensitive sectors (currently synthetic fibres, motor vehicles and steel), the State Aid Guidelines (Chapters 22, 23 and 24) and the Act referred to under point 1a of Annex XV to the EEA Agreement (Commission Decision 3855/91/ECSC, known as Steel Aid Code) contain specific obligations to notify all individual awards of aid to the Authority prior to implementation. In some of these cases, this obligation only applies to aid awards related to investment exceeding a certain threshold. As the aid schemes at hand do not contain any references to these obligations, the EFTA Surveillance Authority considers it appropriate to remind the Austrian Government, in the context of the proposal for appropriate measures, thereof.

¹¹ See Chapter 30 of the State Aid Guidelines.

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority proposes to Austria, on the basis of Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, the following appropriate measures with regard to the aid awards under the Innovation and Technology Fund Act (*Bundesgesetz vom 24. November 1987 über Maßnahmen zur Finanzierung von Forschungen, Entwicklungen und Umstellungen für den Bereich der gewerblichen Wirtschaft (Innovations- und Technologiefondsgesetz - ITFG-existing aid 93-161)*), amended the last time by BGBl. 1993/972) and the aid schemes thereunder (ITF/ERP "WV4" - existing aid 93-164 including "Leitfaden" 93-368 and sub-schemes 93-370 to 93-374, and ITF/FFF "WF2" - existing aid 93-162):

- (i) The guidelines for aid awards under the ITFG shall be binding in all cases of application.
- (ii) The Austrian Government shall introduce detailed provisions for the guidelines under the ITFG referred to in point (i) of this decision which ensure that awards of aid are granted in accordance with the principles laid down in Chapter 14 of the State Aid Guidelines. This means that the provisions must
 - distinguish between the different types of R&D activities by providing definitions for basic industrial research as well as for applied research and development in line with the provisions of paragraph 14.1.(2) of the State Aid Guidelines,
 - define the aid intensities in such a way that as a general rule aid for basic industrial research does not exceed 50% gross and that aid for applied research and development does not exceed 25% gross of the eligible costs. These intensities can, if so desired, be adjusted according to the principles laid down in the State Aid Guidelines and
 - define the eligible costs for the purpose of calculating the aid intensity in compliance with the definitions in paragraph 14.5.(1) of the State Aid Guidelines.
- (iii) All cost categories eligible for aid which cannot possibly be regarded to fall under the R&D definition shall either be deleted from the list of eligible costs or shall be clearly separated from R&D categories. In the latter case, they shall be made subject to SME and regional aid criteria.
- (iv) The text of the aid schemes shall be adjusted in view of the conditions and principles referred to under points (i) to (iii) above as soon as possible and not later than 30 April 1995. The EFTA Surveillance Authority shall be informed of the adjustments made.
- (v) The aid granting authorities shall, when awarding aid, take account of the conditions and principles referred to under points (i) to (iii) above as from 1 February 1995 at the latest.

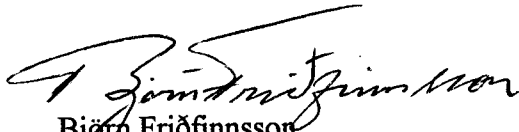
(vi) The Austrian Government is obliged to submit a simplified annual report in accordance with chapter 30 of and Annex IV to the Procedural and Substantive Rules in the Field of State Aid on the application of the schemes to the EFTA Surveillance Authority as from calendar year 1994.

2. The Austrian Government shall signify its agreement to the above proposal or otherwise submit its observations by 20 January 1995.

3. The Austrian Government is reminded of its obligation to notify all individual awards of aid to enterprises in sensitive sectors (currently synthetic fibres, motor vehicles and steel) in accordance with the rules laid down in Chapters 22, 23 and 24 of the State Aid Guidelines and in the Act referred to under point 1a of Annex XV to the EEA Agreement (Commission Decision 3855/91/ECSC, known as Steel Aid Code).

Done at Brussels, 14 December 1994

For the EFTA Surveillance Authority


Björn Friðfinnsson
Acting President


Heinz Zourek
College Member