


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION

OF 14 DECEMBER 1994

TO PROPOSE APPROPRIATE MEASURES TO AUSTRIA
ON AID GRANTED UNDER THE LABOUR MARKET PROMOTION ACT
(ARBEITSMARKTFÖRDERUNGSGESETZ- AMFG - EXISTING AID 93-163) AND
THE SME AID, REGIONAL AID AND RESCUE AND RESTRUCTURING AID SCHEMES
THEREUNDER (93-358, 93-359 AND 93-360)

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 Labour Market Promotion Act (*Arbeitsmarktförderungsgesetz*

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

1969 - AMFG)³ and information on aid awards thereunder. The information related to the AMFG may be structured as follows:

- (a) Provisions of the AMFG on aid to SMEs (§§ 27 (1)(a) together with 27a AMFG) and on regional aid (§§35 (1)(a) together with 35a AMFG) - *registered as existing aid 93-163*;
- (b) SME scheme under §§ 27 (1)(a) together with 27a AMFG - *existing aid 93-358*;
- (c) regional aid scheme under §§35 (1)(a) together with 35a AMFG - *existing aid 93-359*;
- (d) rescue and restructuring aid scheme under §§ 27 (1)(a) together with 27a AMFG) and on regional aid (§§35 (1)(a) together with 35a AMFG - *existing aid 93-360*; and
- (e) other labour market promotion measures under §§ 18a - 39 AMFG - *existing aid 93-376*.

However, information on the amendments to the AMFG introduced by Federal Laws BGBl. 1993/461,⁴ 1993/502⁵ and 1994/25⁶ has not been included in the information on existing aid provided by the Austrian authorities, although these amendments contain relevant changes to certain aid measures under the Act and introduced new possibilities to aid enterprises.

Furthermore, two amendments to the AMFG, introduced by Federal Law BGBl. 1994/314⁷ and 1994/450,⁸ have not been notified to the EFTA Surveillance Authority prior to implementation in accordance with Article 1(3) of Protocol 3 to the Surveillance and Court Agreement. At the meeting between officials from the Austrian Federal Government and the EFTA Surveillance Authority in Vienna on 8 November 1994, the Austrian authorities were informed that the EFTA Surveillance Authority regards the amendments to the AMFG by Federal Laws BGBl. 1994/314 and 1994/450 to constitute unlawful aid on procedural grounds. The Austrian authorities

³ Bundesgesetz vom 12. Dezember 1969 betreffend die Arbeitsmarktförderung (Arbeitsmarktförderungsgesetz), BGBl. 1969/31, as amended the last time by BGBl. 1993/18 - hereinafter referred to as AMFG.

⁴ Bundesgesetz, mit dem das Arbeitsmarktförderungsgesetz und das Arbeitslosenversicherungsgesetz 1977 geändert werden, BGBl. 1993/461.

⁵ Bundesgesetz, mit dem das Arbeitsmarktförderungsgesetz, das Arbeitsverfassungsgesetz, das Ausländerbeschäftigungsgesetz, das Arbeitslosenversicherungsgesetz 1977, das Sonderunterstützungsgesetz, das Allgemeine Sozialversicherungsgesetz, das Urlaubsgesetz, das Angestelltengesetz, das Gutsangestelltengesetz, das Hausgehilfen- und Hausangestelltengesetz, das Landarbeitsgesetz, das Allgemeine Bürgerliche Gesetzbuch, das Schauspielergesetz und das Aufenthaltsgesetz geändert werden (Beschäftigungssicherungsnovelle 1993), BGBl. 1993/502.

⁶ Bundesgesetz, mit dem das Arbeitsmarktförderungsgesetz, das Arbeitslosenversicherungsgesetz 1977 und das Sonderunterstützungsgesetz geändert werden, BGBl. 1994/25 (amendments adopted in 1993, published only in 1994).

⁷ Bundesgesetz, mit dem Anpassungen an das Arbeitsmarktservicegesetz vorgenommen werden (Arbeitsmarktservice-Begleitgesetz, AMS-BegleitG), BGBl. 1994/314.

⁸ Bundesgesetz über Sicherheit und Gesundheitsschutz bei der Arbeit (ArbeitnehmerInnenschutzgesetz - ASchG) und mit dem das Allgemeine Sozialversicherungsgesetz, das Arbeitsvertragsrechts-Anpassungsgesetz, das Arbeitsverfassungsgesetz, das Berggesetz 1975, das Bauern-Sozialversicherungsgesetz, das Arbeitsmarktförderungsgesetz, das Arbeitslosenversicherungsgesetz 1977 und das Ausländerbeschäftigungsgesetz geändert werden, BGBl. 1994/450.

were therefore requested to submit notifications on these measures as soon as possible (see Memorandum dated 14 November 1994, Doc 94-16688 D). These two recent amendments to the AMFG will be subject to separate proceedings. However, this unlawful aid procedure does not apply to the amendment to § 51a AMFG contained in BGBl 1994/450, as this provision was properly notified, together with implementing guidelines, to the EFTA Surveillance Authority (case 94-058).

The amendments referred to under the two preceding paragraphs relate to aid under item (e) above and to the notified case 94-058 (§ 51a and implementing guidelines) and do not affect the criteria to award aid to individual enterprises under the existing aid schemes referred to under items (a) to (d). As a consequence, the existing aid under item (e) will be examined together with the unlawful aid case referred to in the preceding paragraph, whereas the scope of this decision to propose appropriate measures is restricted to the existing aid referred to under (a) to (d) above.

An initial examination of the basic provisions of the AMFG referred to under (a) above as well as the aid schemes referred to under (b) to (d) above indicated that the legal provisions were not altogether compatible with the rules on State aid under the EEA Agreement. For this reason the matter was taken up at the meetings between officials from the Austrian Federal Government and the EFTA Surveillance Authority in Vienna on 23 and 24 June 1994 and again on 8 November 1994.

2. Relevant provisions of the schemes

2.1. The basic provisions for SME aid, regional aid and rescue and restructuring aid in the Labour Market Promotion Act

The AMFG provides, under §§ 27a and 35a, in very general terms the legal basis for aid to SMEs (§ 27a) and to enterprises located in "problem areas" (§ 35a). The purpose of the aid is to create or maintain employment. Eligibility of enterprises for aid is dependant on investment or "other measures" to be taken by the enterprise concerned with regard to which positive repercussions on employment, the enterprise concerned and the economy as a whole are to be expected (§ 27a (2) and 35a (2) AMFG). Further criteria for aid awards and the maximum aid intensities are not laid down in the law. The Federal Minister for Labour and Social Affairs is to issue guidelines for the application of the SME aid and regional aid facilities under these provisions (§ 27a (3) and 35a (3) AMFG).

2.2. Aid to SMEs under §27 (1)(a) and §27a AMFG (existing aid 93-358)

The SME guidelines (*Förderung von kleinen und mittleren Unternehmen aus arbeitsmarktpolitischen Gründen gem. § 27a AMFG*) foresee investment aid for SMEs in accordance with the definitions and maximum intensities as laid down in Chapter 10 of the Guidelines on the application and interpretation of Article 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement.⁹

⁹ OJ 1994 L 231; hereinafter referred to as State Aid Guidelines.

However, the cumulation clause provides the possibility to exceed these limits, as it stipulates that the maximum intensities have to be observed "as a rule" ("*grundsätzlich*").

2.3. Regional aid under §35 (1)(a) and §35a AMFG (existing aid 93-359)

The regional aid guidelines *Förderung von Unternehmen in Problemgebieten aus arbeitsmarktpolitischen Gründen gem. § 35a AMFG*) foresee investment aid for enterprises in "problem areas". These are defined as the assisted areas in accordance with EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994. The scheme has already been linked, by the Decision referred to, to the map of assisted areas for Austria. Therefore, the map and the maximum intensities stipulated therein are to be binding on all aid awards under the scheme, including aid awarded in cumulation with aid from other public sources.

However, the rules on cumulation still foresee that the combined maximum aid intensities for aid under the scheme at hand and other public assistance may go up to 30% net in areas eligible for aid under Article 92 (3)(c) of the EC Treaty and up to 75% net in assisted areas under Article 92 (3)(a) of the EC Treaty.

2.4. Rescue and restructuring aid under §27 (1)(a) and §27a as well as §35 (1)(a) and §35a AMFG (existing aid 93-360)

The rescue and restructuring guidelines (*Restrukturierungs- bzw. Umstrukturierungsbeihilfen gem. §§ 27a und 35a AMFG*) are the implementing guidelines for the "other measures" provided for under §§ 27a and 35a AMFG. The guidelines reflect the principles of rescue and restructuring aid as laid down under Chapter 16 of the State Aid Guidelines¹⁰. The guidelines neither contain an SME definition nor a definition of the "problem areas" to which they refer.

However, reference is made to the general provisions of the SME and regional aid schemes (2.2. and 2.3. above). From that it appears that the guidelines are intended to be applied to enterprises located in assisted areas in accordance with EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994 and, outside assisted areas, to SMEs in accordance with Chapter 10 of the State Aid Guidelines only.

II. APPRECIATION

1. Restriction of the application of the Act

The fact that the Federal Minister for Labour and Social Affairs is to issue guidelines for the application of the SME aid and of the regional aid facilities under §§ 27a (3) and 35a (3) AMFG (see I.2.1. above) does, in principle, not exclude the possibility of aid being awarded by decision of the Minister without observing the criteria set out in the guidelines. Consequently, the schemes at hand, consisting of the AMFG and the

¹⁰ As amended by EFTA Surveillance Authority Decision 123/94/COL of 19 October 1994.

three 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.¹¹ 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.

However, the guidelines issued under the AMFG foresee criteria for aid awards and lay down maximum aid intensities, which are differentiated according to the supported activities. The EFTA Surveillance Authority considers that, in a first attempt to adjust aid granted under §§ 27(1)(a) together with 27a AMFG and §§ 35(1)(a) together with 35a AMFG to the requirements of the EEA Agreement, it suffices to ensure that the criteria laid down in the three guidelines referred to under I.2.2. to I.2.4. above are respected in all cases of application of the Act. By doing so, it is ensured that aid disbursed under the provisions referred to above of the Act is made measurable. This does not, however, preclude an assessment and review with regard to the criteria set out in the guidelines under Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement at a later stage going beyond the proposals made in this decision.

2. Maximum intensities in cases of cumulation (SME and regional aid guidelines)

The cumulation clause contained in the SME guidelines (see I.2.2. above) provides the possibility to exceed the maximum intensities for aid to SME as laid down in Chapter 10 of the State Aid Guidelines by stipulating that these maximum intensities have to be observed "as a rule" ("*grundsätzlich*"). In order to ensure that the combined maximum aid intensity in cases of cumulation with aid from other public sources is respected in all cases of application of the scheme, the word "*grundsätzlich*" shall be deleted in the guidelines.

The cumulation clause contained in the regional aid guidelines (see I.2.3. above) foresees that the combined maximum aid intensities for aid under the scheme at hand and other public assistance may go up to 30% net in areas eligible for aid under Article 92 (3)(c) of the EC Treaty and up to 75% net in assisted areas under Article 92 (3)(a) of the EC Treaty. These intensities clearly exceed the maximum aid intensities as authorised in EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994 on the map of assisted areas for Austria for areas eligible for aid under Article 61 (3)(a) and (c) EEA Agreement, the provisions corresponding to the Articles of the EC Treaty referred to above. As the regional aid scheme is already linked to the map of assisted area (see list of schemes attached to the map - Annex to the EFTA Surveillance Authority Decision referred to), any aid granted in excess of the maximum aid ceilings laid down in the EFTA Surveillance Authority Decision is unlawful if not separately notified. Therefore, the wording of the regional aid guidelines requires to be adjusted.

3. Adaptations required for the rescue and restructuring guidelines

¹¹ See, with regard to regional aid, Chapter 26.2. (Transparency) of the State Aid Guidelines.

As a general rule, rescue and restructuring aid has to be assessed on a case by case basis. Therefore, guidelines for rescue and restructuring purposes which consequently would not enable the EFTA Surveillance Authority to undertake a case-by-case assessment, cannot be accepted unless its scope of application is restricted to SMEs as defined in Chapter 10 of the State Aid Guidelines (see 16.4. of the State Aid Guidelines).

A restriction to that effect is not contained in the present guidelines for rescue and restructuring aid under §§ 27a and 35a AMFG (see I.2.4. above). Therefore, the scheme is considered to be incompatible with Article 61 of the EEA Agreement. In order to make the scheme compatible, the Austrian authorities are requested to restrict the scheme to SMEs as defined in Chapter 10 of the State Aid Guidelines and to notify as individual cases, pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, all cases of rescue and restructuring aid to enterprises not qualifying as SMEs.

4. 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.¹² 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. For the SME aid scheme and for the rescue and restructuring aid scheme under the AMFG, a simplified annual report appears to be sufficient, whereas for the regional aid scheme a detailed report is required in order to obtain information on aid awards to enterprises not qualifying as SMEs in accordance with the definition set out in Chapter 10 of the State Aid Guidelines.

5. 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

¹² See Chapter 30 of the State Aid Guidelines.

Authority considers it appropriate to remind the Austrian Government, in the context of the proposal for appropriate measures, thereof.

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 aid granted under §§ 27(1)(a) together with 27a AMFG and §§ 35(1)(a) together with 35a AMFG:

- (i) The guidelines for aid awards under §§ 27(1)(a) together with 27a AMFG and §§ 35(1)(a) together with 35a AMFG (SME guidelines "*Förderung von kleinen und mittleren Unternehmen aus arbeitsmarktpolitischen Gründen gem. § 27a AMFG*"; regional aid guidelines "*Förderung von Unternehmen in Problemgebieten aus arbeitsmarktpolitischen Gründen gem. § 35a AMFG*"; and rescue and restructuring guidelines "*Restrukturierungs- bzw. Umstrukturierungsbeihilfen gem. §§ 27a und 35a AMFG*") shall be binding in all cases of application.
- (ii) In cases of cumulation with aid from other public sources, the combined maximum aid intensity for aid awarded under the SME scheme shall not exceed the SME limits as laid down in Chapter 10 of the State Aid Guidelines. In order to ensure this, the word "*grundsätzlich*" contained in point 4.3. on page 8 of the guidelines shall be deleted.
- (iii) In cases of cumulation with aid from other public sources, the combined maximum aid intensity for aid awarded under the regional aid scheme shall not, in keeping with the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994, exceed the maximum aid intensities stipulated therein. The wording of the regional aid guidelines allowing, in cases of cumulation, aid intensities of up to 30% in Article 61(3)(c) areas and of up to 75% in Article 61 (3)(a) areas, is to be adjusted accordingly.
- (iv) The application of the rescue and restructuring scheme shall be restricted to SMEs as defined in Chapter 10 of the State Aid Guidelines. Consequently, all cases of rescue and restructuring aid to enterprises not qualifying as SMEs shall be notified prior to implementation as individual cases pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.
- (v) The text of the aid schemes shall be adjusted in view of the conditions and principles referred to under points (i) to (iv) above as soon as possible and not later than 31 December 1995 with regard to the Law and not later than 31 March 1995 with regard to the guidelines of the schemes thereunder. The EFTA Surveillance Authority shall be informed of the adjustments made.
- (vi) The aid granting authorities shall, when awarding aid, take account of the conditions and principles referred to under points (i), (ii) and (iv) above as from 1 January 1995 at the latest.

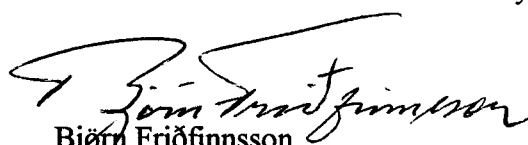
- (vii) The Austrian Government is obliged to submit
- a simplified annual report in accordance with chapter 30 of and Annex IV to the Procedural and Substantive Rules in the Field of State Aid on the application of the SME scheme,
 - a simplified annual report in accordance with chapter 30 of and Annex IV to the Procedural and Substantive Rules in the Field of State Aid on the application of the rescue and restructuring aid scheme, including a list of all beneficiary firms providing the information on the items referred to in Section 16.4 of the State Aid Guidelines, and
 - 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 regional aid scheme
- as from calendar year 1994.

2. The Austrian Government shall signify its agreement to the above proposal or otherwise submit its observations by 30 December 1994.

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