


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION

OF 28 DECEMBER 1994

TO PROPOSE APPROPRIATE MEASURES TO AUSTRIA
ON AID GRANTED UNDER THE GUARANTEE ACT (GARANTIEG - EXISTING AID 93-271),
THE GUARANTEE SCHEME (93-272), GRANTS IN APPLICATION OF § 1b(1) OF THE ACT
(93-273) AND THE RESCUE AND RESTRUCTURING SCHEME THEREUNDER (93-274)

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 Guarantee Act (*Garantiegesetz 1977*)³ and information on aid

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

³ Bundesgesetz vom 12. Mai 1977, BGBl. Nr. 296, betreffend die Erleichterung der Finanzierung von Unternehmungen durch Garantien der Finanzierungsgarantie-Gesellschaft m.b.H. mit

awards thereunder. The information related to the Guarantee Act has been structured by the Austrian authorities as follows:

- (a) The Guarantee Act itself (excluding, however, § 1b (1) of the Act for grants) - *registered as existing aid 93-271*;
- (b) Guidelines for guarantees provided by the Finanzierungsgarantie-Gesellschaft m.b.H.⁴ - *existing aid 93-272*;
- (c) § 1b (1) of the Act for grants - *existing aid 93-273*;
- (d) Guidelines for rescue and restructuring aid under § 1b (2) Guarantee Act - *existing aid 93-274*; and
- (e) Guidelines for guarantees of the East-West-Fund - *existing aid 93-274*.

An initial examination of the basic provisions of the Guarantee Act 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.

The Guidelines for guarantees of the East-West-Fund referred to under (e) above will be subject to separate review procedures.

2. Relevant provisions of the schemes

2.1. The basic provisions of the Guarantee Act (existing aid 93-271)

The Guarantee Act foresees support measures for the financing of enterprises which have their headquarters ("Sitz") in Austria (§§ 1(1), 1a(1), 1b(1), (2) and (3), 11(2) Guarantee Act). Support is provided by the FGG in the form of guarantees, loans and grants. The FGG for its turn is, under the conditions stipulated in the Act, compensated by the Federal State for payments made or losses occurred in accordance with the provisions of this Act.

2.2. Guarantees provided by the FGG under § 1 Guarantee Act and the Guidelines thereunder (existing aid 93-272)

Guarantees in accordance with §1 of the Guarantee Act and the implementing guidelines thereunder may be provided by the FGG to viable enterprises in all sectors of the manufacturing industry as well as for tourism and transport for

- (a) investment projects in assisted areas in accordance with the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994,
- (b) investment projects of SMEs defined in accordance with Chapter 10 of the State aid Guidelines,⁵

Haftungen des Bundes (Garantiegesetz 1977), as amended the last time by BGBl. 1993/255 - hereinafter referred to as Guarantee Act.

⁴ Hereinafter referred to as FGG.

⁵ 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, OJ 1994 L 231; hereinafter referred to as State Aid Guidelines.

- (c) investment in R&D projects,
- (d) investment related to environmental protection, and
- (e) restructuring.

The guarantee scheme (§ 1 Guarantee Act and the guidelines thereunder) has already been linked, by the Decision referred to above under (a), to the map of assisted areas in Austria. Therefore, the map and the maximum intensities stipulated therein are binding on all investment aid awards except for investment aid for R&D projects and environment protection projects as defined in Chapters 14 and 15 of the State aid Guidelines. However, guarantees for rescue and restructuring purposes are at present not restricted to SMEs.

With regard to the aid element of the guarantee facility under § 1 of the Guarantee Act, the Austrian authorities indicated under item 12 of the questionnaire on existing aid that long-term default ratio calculations lead to an aid equivalent of approximately 3% in relation to the guaranteed amount and approximately 1.2% in relation to average total project costs.

2.3. Rescue and restructuring aid under § 1b (2) Guarantee Act and the Guidelines thereunder (existing aid 93-274)

The rescue and restructuring guidelines (*"Verfahrensgrundsätze betreffend die Durchführung der Sanierung von Unternehmen mit Sitz im Inland gemäß § 1b Absatz 2 Garantiegesetz 1977"*) are the implementing guidelines for the financial help for the restoration of enterprises as foreseen by § 1b (2) Guarantee Act. The guidelines reflect the principles of rescue and restructuring aid as laid down under Chapter 16 of the State Aid Guidelines⁶. However, the guidelines do not contain a clear-cut restriction to SMEs.

2.4. Grants under § 1b (1) of the Act (existing aid 93-273)

§ 1b(1) of the Guarantee Act provides the legal basis for investment aid awarded by the FGG in the form of interest subsidies and grants. The only criterion for aid awards laid down in the law is that the aided investment shall be of specific economic interest from a general point of view (*"Investitionen von besonderem gesamtwirtschaftlichen Interesse"*). However, in the questionnaire of existing aid, the Austrian authorities indicated that aid under this provision would be awarded either for R&D purposes or as regional investment aid. Therefore, general investment aid under § 1b(1) of the Guarantee Act has already been restricted to assisted areas by the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994. Consequently, the map and the maximum intensities stipulated therein are binding on all aid awards for general investment under the scheme, including aid awarded in cumulation with aid from other public sources.

According to the information provided orally by the Austrian authorities in the meetings referred to above (see I.1.), this provision is mainly used for big investment projects for which the Austrian authorities considered, since the entry into force of the

⁶ As amended by EFTA Surveillance Authority Decision 123/94/COL of 19 October 1994.

EEA-Agreement, individual notifications in accordance with Article 1(3) of Protocol 3 to the Surveillance and Court Agreement to be appropriate.

2.5. Guarantees under § 1a and cessions under § 1b(3) (existing aid 93-271)

§ 1a Guarantee Act enables the FGG to guarantee to creditors (banks) the soundness of outstanding loans and empowers the Federal Minister of Finance to reimburse the FGG for losses occurred from these guarantees up to a total amount of 4 billion ATS. Such guarantees may be awarded by FGG to creditors (banks) which are located in Austria ("*Unternehmungen mit Sitz in Österreich*") for loans or debts of enterprises located in Austria ("*Unternehmungen mit Sitz in Österreich*") with regard to which

- bankruptcy procedures have been initiated or applied for, or
- the FGG has reasons to believe that the conditions for the initiation of bankruptcy proceedings are fulfilled.

§ 1b(3) Guarantee Act enables the FGG to acquire, by means of cessions, claims up to a total amount of 870 million ATS, which enterprises located in Austria might have with regard to other enterprises which are in the situation described in the preceding paragraph.

Both provisions were introduced in 1981. The purpose of both provisions has been to reduce the risks of creditors (banks and third enterprises) in the case of insolvency of the debtors. According to information provided by the Austrian authorities at an expert meeting on bank aid with the State aid and Monopolies Directorate of the EFTA Surveillance Authority on 31 January 1994, the provisions were in practice applied only until 1991. Since then no state aid has been provided under §§1a and 1b(3) Guarantee Act.

II. APPRECIATION

1. Restriction of the application of the guarantee facility (§ 1) and the rescue and restructuring facility (§ 1b(2)) of the Guarantee Act to implementing guidelines (93-271, 93-272 and 93-274)

The Guarantee Act enables the FGG to aid awards in the form of guarantees, loans and grants in very general terms. More precise criteria for aid awards are stipulated in guidelines, which, however, have been issued by the FGG only for

- guarantees under §1 Guarantee Act (see I.2.2. above; existing aid 93-272),
- rescue and restructuring aid under § 1b(2) Guarantee Act (see I.2.3. above, existing aid 93-274), and
- guarantees for investment and participation abroad under § 11 (East-West-Fund) of the Act (see I.1.e. - subject to separate review procedures).

No guidelines have been issued for the application of §1b(1) Guarantee Act (see I.2.4. above, existing aid 93-273) and of § 1a and 1b(3) Guarantee Act (see I.2.5. above - part of existing aid 93-271).

An obligation to issue guidelines laying down precise criteria for individual awards of aid is foreseen in the law only with regard to guarantees issued in accordance with §11. Therefore, it is not excluded that the FGG can award aid under the first two possibilities without observing the criteria set out in the guidelines. This, however, enables the FGG to award aid without respecting any binding limits with regard to both the criteria for aid awards and the maximum aid intensities.

It is a general principle of State aid control that aid shall be or shall be made measurable.⁷ 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 two guidelines issued under § 1 of the Guarantee Act for guarantees and under § 1b(2) of the Guarantee Act for rescue and restructuring aid foresee criteria for aid awards, which are differentiated according to the supported activities and reflect the principles of State aid control as laid down in the State aid Guidelines. The EFTA Surveillance Authority considers that, in a first attempt to adjust aid granted under § 1 Guarantee Act (guarantees) and § 1b(2) Guarantee Act (rescue and restructuring aid), it suffices to ensure that the criteria laid down in the two guidelines referred to under I.2.2. and I.2.3. above are respected in all cases of application of the Act.

Furthermore, the aid element contained in the guarantee as indicated by the Austrian authorities in the questionnaire on existing aid for the scheme at hand shall be taken into account in cases of cumulation with aid from other public sources. This implies that, in cases of cumulation with aid from other public sources, the combined maximum aid intensity for aid awarded § 1 of the Guarantee Act and other public aid shall not exceed, as the case may be,

- the SME limits as laid down in Chapter 10 of the State Aid Guidelines,
- the maximum aid intensities for regional investment aid in keeping with the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994,
- maximum aid ceiling for applied research and development as laid down in Chapter 14 of the State aid Guidelines, i.e. 25% gross for enterprises regardless of their size and additional 10 percentage points for SMEs as defined in Chapter 10 of the State aid Guidelines, and
- maximum aid ceilings for aid for environment protection as laid down in Chapter 15 of the State aid Guidelines.

By doing so, it is ensured that aid disbursed under the provisions referred to above of the Act is made measurable and brought in line with the requirements of the EEA-Agreement. 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.

⁷ See, with regard to regional aid, Chapter 26.2. (Transparency) of the State Aid Guidelines.

2. Adaptations required for the rescue and restructuring aid (93-272 and 93-274)

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 their 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 neither contained in the present guidelines for rescue and restructuring aid under § 1b(2) of the Guarantee Act nor under the provision for guarantees for restructuring purposes in point II.1.e. of the guarantee guidelines under § 1 of the Guarantee Act. Therefore, the schemes are considered to be incompatible with Article 61 of the EEA Agreement in this respect.

In order to make the schemes compatible, the Austrian authorities are requested to restrict

- the scheme under § 1b(2) Guarantee Act (93-274) in its entirety, and
- the scheme under § 1 Guarantee Act (93-272) with regard to restructuring aid referred to under its point II.1.e.

to SMEs as defined in Chapter 10 of the State Aid Guidelines. As a consequence, all cases of rescue and restructuring aid to enterprises which do not qualify as SMEs as defined in Chapter 10 of the State aid Guidelines, shall be notified as individual cases prior to implementation pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.

Furthermore, it has to be ensured that rescue and restructuring aid is restricted to the strict minimum needed also in cases of cumulation of aid from different public sources.

3. Grants under § 1b (1) of the Act (93-273)

§ 1b(1) of the Guarantee Act allows, in general terms, general investment aid and aid to R&D without laying down any further criteria and without limiting the aid to certain maximum aid intensities. Although investment aid under this provision has already been restricted, by EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994, to assisted areas in Austria, the wording of the provision is too general and does not enable the EFTA Surveillance Authority to assess whether individual awards of aid disbursed under it would be compatible with Article 61 of the EEA-Agreement. Consequently, § 1b(1) of the Guarantee Act cannot be regarded to be compatible with the EEA-Agreement.

In view of the general principles of state aid control, the EFTA Surveillance Authority considers basically three ways of adjusting the provision at hand to the requirements of the EEA-Agreement. The required adjustment could be effected by

- (a) abolishing the provision,
- (b) introducing criteria for R&D aid in accordance with the principles reflected in Chapter 14 of the State aid Guidelines and criteria for regional investment aid in

accordance with the principles reflected in Chapters 25-28 of the State aid Guidelines, or

(c) notifying all individual awards of aid based on this provision prior to implementation pursuant to Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement.

Given that the Austrian authorities intend to apply, according to the information provided to the EFTA Surveillance Authority, this provision only in big investment cases, the EFTA Surveillance Authority considers option (c) to be the most appropriate means of adjusting aid under § 1b(1) Guarantee Act to the principles of State aid control under the EEA-Agreement.

4. Guarantees under § 1a and cessions under § 1b(3)

§§ 1a and 1b(3) Guarantee Act enable the FGG to guarantee or to acquire claims with regard to outstanding loans from enterprises in difficulties. The discriminatory aspects of the provisions ("*Sitz*"-requirement) is dealt with under II.5. below. From the point of view of the state aid rules it suffices to establish that, under the two provisions, guarantees may be issued (§1a Guarantee Act) or debts may be acquired (§ 1b(3) Guarantee Act) for the benefit of a creditor at a point of time when it has already turned out that its debtor(s) is/are in serious difficulties because bankruptcy procedures have been initiated, applied for or are likely to occur.

Thus, these provisions provide a possibility for aid awards to relieve banks or other enterprises acting as creditors from their normal commercial risk that an outstanding loan or debt is not repaid. Moreover, the guarantee (§1a Guarantee Act) or the cession (§ 1b(3) Guarantee Act) is enacted at a point in time when it is already clear that the guarantee will have to be called in or the cession would result in a financial burden for the FGG. Both instruments enable the FGG to bail out banks or other enterprises without asking the benefiting enterprise for any contribution to the rescue operation.

According to the principles established for rescue and restructuring aid, this own contribution of the enterprise benefiting from such aid consists in the implementation of a restructuring plan which enables the enterprise to restore its long-term viability (see Chapter 16 of the State aid Guidelines). Under the provisions at hand, no such restructuring effort is required from the benefiting enterprise. On the contrary, it enables an enterprise which has wrongly calculated its financial risks to remain in the market just by relieving it from losses which occurred or threaten to occur. Thus, both paragraphs provide the possibility to award aid which may have the character of operating aid. Operating aid, however, may only be exempted from the general prohibition of aid provided for under Article 61(1) of the EEA-Agreement under exceptional circumstances in areas qualifying for regional aid under Article 61(3)a.

As § 1a and § 1b(3) of the Guarantee Act neither fulfil the criteria for rescue and restructuring aid as laid down in Chapter 16 of the State aid Guidelines nor qualify for exemption under Article 61(3)a of the EEA-Agreement, the Austrian authorities are obliged to either abolish the two provisions referred above or otherwise ensure that these provisions are not any more applied.

5. Restriction to enterprises having their headquarters ("*Sitz*") in Austria

In the view of the EFTA Surveillance Authority, the restriction of individual aid awards to enterprises having their headquarters in Austria ("*Sitz*" - see the provisions of the Guarantee Acts referred to under I.2.1. above, i.e. §§ 1(1), 1a(1), 1b(1), (2) and (3), 11(2)) seems to discriminate enterprises which are either not yet established or which operate only a branch ("*Betriebsstätte*" in the meaning of § 29 *Bundesabgabenordnung - BAO*) in Austria, as the latter two categories of enterprises appear to be not eligible for aid under the Guarantee Act.

This restriction appears to infringe the provisions on the right of establishment provided for under Articles 31 ff. of the EEA-Agreement.⁸ This is because it excludes enterprises which are established in other EEA States and which may either wish to settle down in Austria or which operate or plan to operate only a branch in Austria from being eligible for aid.

Consequently, the restriction currently contained in the Guarantee Act and the guidelines thereunder shall be abolished in order to enable enterprises located in other EEA States and wishing to establish themselves in Austria to be eligible for aid, regardless whether they operate or plan to operate their headquarters ("*Sitz*") or a branch ("*Betriebsstätte*") in Austria.

6. 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.⁹ 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 guarantee scheme under § 1 Guarantee Act (93-272) and for the rescue and restructuring aid scheme under § 1b(2) Guarantee Act (93-274), a simplified annual is therefore proposed to be submitted. For the latter, the annual report shall include a list of all beneficiary firms providing the information on the items referred to in Section 16.4 of the State Aid Guidelines.

⁸ See e.g. *Beutler, Bieber, Pipkorn, Streil*, Die Europäische Union, 4. Auflage (1993), p.328.

⁹ See Chapter 30 of the State Aid Guidelines.

7. 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.

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 the Guarantee Act:
 - (i) The guidelines for aid awards under § 1 (*"Richtlinien für Garantien der Finanzierungsgarantiesgesellschaft m.b.H." - 93-272*) and under § 1b(2) of the Guarantee Act (*"Verfahrensgrundsätze betreffend die Durchführung der Sanierung von Unternehmen mit Sitz im Inland gemäß § 1b Absatz 2 Garantiegesetz 1977" - 93-274*) shall be binding in all cases of application.
 - (ii) The application of the restructuring part of the guarantee scheme under § 1 of the Guarantee Act (point II.1.e.) and the rescue and restructuring scheme under § 1b(2) of the Guarantee Act 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.
 - (iii) In cases of cumulation with aid from other public sources, the combined maximum aid intensity for aid awarded § 1 of the Guarantee Act and other public aid shall not exceed, as the case may be,
 - the SME limits as laid down in Chapter 10 of the State Aid Guidelines,
 - the maximum aid intensities for regional investment aid in keeping with the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994,
 - maximum aid ceiling for applied research and development as laid down in Chapter 14 of the State aid Guidelines, i.e. 25% gross for enterprises regardless of their size and additional 10 percentage points for SMEs as defined in Chapter 10 of the State aid Guidelines, and
 - maximum aid ceilings for aid for environment protection as laid down in Chapter 15 of the State aid Guidelines.
 - (iv) The Austrian authorities are obliged to notify all individual awards of aid disbursed under § 1b(1) Guarantee Act prior to implementation pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.

- (v) The Austrian authorities are obliged to either abolish § 1a and § 1b(3) of the Guarantee Act or otherwise ensure that these provisions are not any more applied.
- (vi) The restriction currently contained in several provisions of the Guarantee Act and the guidelines thereunder to the effect that only enterprises having their headquarters in Austria ("*Unternehmungen mit Sitz im Inland*") are eligible for aid shall be adjusted in order to enable enterprises located in other EEA States and wishing to establish themselves in Austria to be eligible for aid, regardless whether they already operate their headquarters ("*Sitz*") or a branch ("*Betriebsstätte*") in Austria.
- (vii) The text of the aid schemes shall be adjusted in view of the conditions and principles referred to under points (i) to (vi) above as soon as possible and not later than 31 December 1995 with regard to the Law and to the guidelines thereunder. The EFTA Surveillance Authority shall be informed of the adjustments made.
- (viii) The aid granting authorities shall, when awarding aid, take account of the conditions and principles referred to under points (i) to (vi) above as from 15 February 1995 at the latest.
- (ix) 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 guarantees awarded under § 1 of the Act and the guidelines thereunder, and
 - 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 on the application of rescue and restructuring aid under § 1b(2) of the Guarantee Act and the guidelines thereunder as from calendar year 1994.
2. The Austrian Government shall signify its agreement to the above proposal or otherwise submit its observations by 15 February 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, 28 December 1994

For the EFTA Surveillance Authority



Knut Almestad,
President



Heinz Zourek
College Member