



# *EFTA SURVEILLANCE AUTHORITY*

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## EFTA SURVEILLANCE AUTHORITY DECISION

OF 30 DECEMBER 1994

ON A NEW AID FACILITY INTRODUCED BY §51a (3) TO (5) LABOUR MARKET  
PROMOTION ACT (ARBEITSMARKTFÖRDERUNGSGESETZ - AMFG)  
AND IMPLEMENTING GUIDELINES THEREUNDER (CASE 94-058)  
(AUSTRIA)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area<sup>1</sup>, 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 Justice<sup>2</sup>, in particular Article 1 of Protocol 3 thereof,

WHEREAS:

### I. FACTS

#### 1. The notification

By letter dated 5 December 1994, received by the EFTA Surveillance Authority on 7 December 1994 (Ref. 94-17906 A), the Austrian Government notified, in accordance with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, a plan to introduce a new aid facility under the Labour Market Promotion Act

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<sup>1</sup> Hereinafter referred to as the EEA Agreement.

<sup>2</sup> Hereinafter referred to as the Surveillance and Court Agreement.

(Arbeitsmarktförderungsgesetz - AMFG)<sup>3</sup> by inserting the new § 51a(3) to (5). Together with the amendment to the AMFG, the Austrian authorities notified implementing guidelines laying down the criteria for aid awards under the new aid facility ("*Richtlinien für die Gewährung von Beihilfen (Förderungen) gemäß § 51a Abs. 3-5 AMFG*"). The notification was amended and completed by fax dated 21 December 1994, received on the same day (Ref. 94-18733 A).

The notification covers § 51a(3) to (5) AMFG as introduced by BGBl. 1994/450, but does not relate to other amendments to the AMFG introduced by BGBl. 1994/450 and 1994/314. Already 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 holds the view that the latter amendments to the AMFG constitute unlawful aid on procedural grounds. The Austrian authorities were therefore requested to submit notifications containing complete information on these measures as soon as possible (see Memorandum dated 14 November 1994, Doc 94-16688 D). These two recent amendments to the AMFG are therefore subject to separate proceedings.

## **2. The contents of the proposed aid scheme**

### **2.1. The basic provisions**

§ 51a (3) stipulates that aid under §§ 27(1)(a) and 35(1)(a) and (b) AMFG may be provided to enterprises which are considered to be important in terms of regional or of labour market policy. Under §§ 27a and 35a AMFG, individual awards of aid on the basis of §§ 27(1)(a) and 35(1)(a) and (b) AMFG shall only be awarded to enterprises located in assisted areas or to SMEs. However, the new § 51a (3) stipulates that this restriction shall not apply for rescue and restructuring aid in order to avoid the closure of enterprises. The new paragraph stipulates further that aid shall be awarded on the basis of guidelines which are to be issued by the Federal Minister of Labour and Social Affairs in mutual agreement with the Federal Ministers of Economic Affairs and Finance. § 51a (4) AMFG provides that aid awards under the preceding paragraph shall be defrayed by the federal budget.

Moreover, §51a (5) AMFG empowers the Federal Minister of Finance to award guarantees to projects to pursue important targets in terms of regional or of labour market policy or for rescue and restructuring purposes.

### **2.2. The implementing guidelines**

Aid under § 51a (3) to (5) AMFG will be awarded on the basis of the implementing guidelines "*Richtlinien für die Gewährung von Beihilfen (Förderungen) gemäß § 51a 3-5 AMFG*". The guidelines are divided into two main parts. Part I lays down the

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<sup>3</sup> Bundesgesetz vom 12. Dezember 1969 betreffend die Arbeitsmarktförderung (Arbeitsmarktförderungsgesetz), BGBl. 1969/31, as amended the last time by BGBl. 1994/450 - hereinafter referred to as AMFG.

detailed criteria for investment aid, whereas Part II provides the criteria for rescue and restructuring aid.

The specific notification obligations laid down for certain sectors of the industry (motor vehicles, synthetic fibres, steel and shipbuilding) will be respected when awarding aid under the guidelines.

The foreseen annual budget for the scheme is 400 million ATS for loans, grants and losses arising from guarantees. For the time being, the envisaged maximum frame for loan guarantees is set with 150 million ATS for capital and additional 150 million ATS for interest and costs.

The estimated number of recipients of investment aid under the scheme is 20 - 40 enterprises per year.

The Austrian government undertakes to submit an annual report to the EFTA Surveillance Authority in accordance with Chapter 30 of the State Aid Guidelines (see last point in the notification form).

The guidelines shall apply until 31 December 1997 (see points I.9. and II.11. of the guidelines).

### 2.3. Guidelines for investment aid

Part I aims at creating or securing employment by means of aid to investment of enterprises which are considered to be important in terms of regional or of labour market policy (point I.2 of the guidelines). The scheme is meant to be subordinate to other existing aid schemes in the meaning that aid under it may only be awarded if the objective pursued cannot be achieved by using other schemes (point I.1). Eligible for aid are enterprises of all sectors of the manufacturing industry and "flagship"-companies in the tourism sector providing full-year employment. The enterprises must either qualify as SMEs or must be located in assisted areas (point I.3.3.).

Cost categories eligible for aid are building and equipment costs as well as immaterial investment, training and personnel costs which are directly related to the aided investment. At least 25% of the investment has to be financed from the enterprises own resources or from outside funds raised on commercial terms (point 4).

Aid may be provided in the form of loans, interest subsidies, grants or guarantees (point I.5). Aid in the form of a guarantee may be awarded for loans with a duration of up to 20 years and up to the total amounts which are to be laid down in the annual *Bundesfinanzgesetz- BFG* (Finance Act) or in other specific Acts (see § 66 *Bundeshaushaltsgesetz - BHG* - Act laying down the principles for the Federal Budget). Primarily, the guarantee will be awarded in the form of an *Ausfallhaftung* (deficiency guarantee) for irretrievable debts. Only under exceptional circumstances, a so-called *Bürge- und Zahlerhaftung* in the meaning of § 1357 ABGB (*Allgemeines Bürgerliches Gesetzbuch* - Civil Law Code) may be taken over by the Government.

Under the latter form of a guarantee, a creditor is free to revindicate payable loans either from the debtor or from the guarantor. However, all awards of this extended form of a guarantee (*Bürge- und Zahlerhaftung*) will be notified, according to the additional information provided by the Austrian authorities on 21 December 1994, as individual cases in accordance with Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.

The maximum aid intensities will be expressed as relation of the aid to the total project costs, thus including, besides the cost categories referred to above, costs for land and consultancy help and other costs related to the investment project. However, account will be taken of all aid awarded by other aid granting authorities. Taken together, the maximum aid intensities must not exceed 7.5% gross or 3000 ECU per job created for medium-sized enterprises and 15% gross for small enterprises located outside assisted areas. For enterprises located within assisted areas, reference is made to the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994 and the maximum intensities authorised therein. However, for SMEs located in Article 61(3)(c)-areas the aid intensity may be increased by up to 10% gross with an absolute ceiling of 30% net. For SMEs located in Article 61(3)(a)-areas, this additional aid intensity may exceed the authorised ceiling by up to 15% gross with an absolute ceiling of 40% net.

#### 2.4. Guidelines for rescue and restructuring aid

Part II foresees rescue and restructuring aid in order to avoid closures of enterprises which are considered to be important in terms of regional or of labour market policy (point II.1 of the guidelines). Eligible for aid are enterprises of all sectors of the manufacturing industry and "flagship"-companies in the tourism sector providing full-year employment (point II.2.). Aid under this part of the scheme may only be awarded if it can be realistically assumed that it is possible to restore the long-term viability of a firm after having implemented a restructuring plan. The scheme distinguishes between the rescue and the restructuring phase in terms of forms of aid, duration and the setting up and implementation of a restructuring plan.

In the rescue phase, aid is foreseen in the form of guarantees and loans on market terms whereas for the restructuring period aid may also be given in the form of interest subsidies or grants. The conditions under which guarantees may be awarded are identical to those foreseen under the investment aid part of the scheme (see 2.3. above).

## **II. APPRECIATION**

The provisions referred to in § 51a (3) AMFG (i.e. §§ 27(1)(a) and 35(1)(a) and (b) AMFG) are the main instruments to grant aid to enterprises under the AMFG and foresee aid to secure or promote employment. By §§ 27a and 35a AMFG, individual aid awards have been restricted to SMEs (§ 27a) and to regional aid (§ 35a). Three implementing guidelines for aid to SMEs, regional aid and rescue and restructuring aid have been adopted by the Austrian authorities.

The newly introduced § 51a (3) to (5) AMFG constitutes the legal basis for an additional aid scheme besides the schemes for SME aid, regional aid and rescue and restructuring aid referred to in the preceding paragraph. The new provisions entered into force 1 July 1994. For the application of the new aid facility under the AMFG, implementing guidelines are to be issued by the Federal Minister of Labour and Social Affairs in mutual agreement with the Federal Ministers of Economic Affairs and Finance. Therefore, it can be concluded that no aid can be disbursed solely on the basis of the law. Thus, the new aid facility is put into effect by the implementing guidelines, which will be applied, according to the information provided in the notification of the Austrian authorities, only after authorisation by the EFTA Surveillance Authority.

The measures are granted on a discretionary basis by decision of the responsible federal ministries, which are entrusted with the application and implementation of the aid scheme. By relieving the undertakings concerned of some of their costs, which they normally would have to bear themselves, such aid gives financial advantages and improves their competitive situation. Since the production of 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).

Regarding the investment aid part of the scheme (Part I of the guidelines), it shall be noted that aid may be awarded to all enterprises located in assisted areas or to SMEs outside assisted areas. As the regional component of the scheme refers explicitly to the map of assisted areas as authorised by the EFTA Surveillance Authority Decision 38/94/COL of 11 May 1994, it may be concluded that both the delimitation of the areas and the cumulated maximum intensities apply in each case of application of the scheme.

Turning to the SME component of the scheme, the definition of SMEs and the foreseen maximum aid intensities stated in the notification is compatible with the EEA provisions on State aid, as stated in Chapter 10 of the State Aid Guidelines. 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 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.

The rescue and restructuring aid part of the scheme (Part II) fulfils the conditions for rescue and restructuring aid as reflected in Chapter 16 of the State Aid Guidelines. The rescue aid takes the form of a six-month bridging loan at market rates and/or a

guarantee to keep the firm in business while a restructuring plan is being worked out. The longer term loans, guarantees or, as the case may be, interest subsidies and grants for restructuring also fulfil the usual conditions for such aid.

The type of guarantee which is primarily available under the implementing guidelines to § 51a (3) to (5) AMFG (*Ausfallhaftung* or deficiency guarantee in the meaning of §1356 ABGB) ensures that the guarantee can only be invoked by the creditors in bankruptcy procedures. The second type of guarantee which is available under the scheme is the so-called *Bürge- und Zahlerhaftung* in the meaning of § 1357 ABGB. When receiving this type of guarantee, the creditor does not have to first try to receive payment from the debtor with all legal possibilities including the initiation of bankruptcy procedures, but can immediately demand payment from the guarantor.

As a general rule, the Federal Act laying down the principles for the Federal Budget (*Bundeshaushaltsgesetz - BHG*) obliges the State to recover his payment from the debtor. However, the Minister of Finance may use the discretionary power allotted to him under the *BHG* to defer or to waive such claims. This leads, in the case of a "*Bürge- und Zahler*"-guarantee, to a situation in which it is impossible to estimate the aid element of the guarantee in advance. Moreover, this type of guarantee does not fulfil the condition referred to under Chapter 17 of the State Aid Guidelines that the guarantee can only be invoked in bankruptcy procedures or similar procedures.

However, the Austrian authorities indicated in their fax dated 21 December 1994 (Ref. 18733 A) to notify "*Bürge- und Zahler*"-guarantees under the new scheme as individual cases in accordance with Article 1(3) of Protocol 3 to the Surveillance and Court Agreement. Consequently, the compatibility of such guarantees with the EEA Agreement will be assessed on a case-by-case basis and need not be analysed on the basis of the notification at hand.

Given the clearly defined scope of the aid scheme, the restriction of the investment aid part of it to assisted areas and to SMEs located outside assisted areas as well as the restriction of the rescue and restructuring part of the scheme 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 aid facility under § 51a(3) to (5) AMFG as introduced by BGBl. 1994/450 and the implementing guidelines thereunder ("*Richtlinien für die Gewährung von Beihilfen (Förderungen) gemäß § 51a Abs. 3-5 AMFG*") qualify for exemption under Article 61(3)(c) of the EEA Agreement by facilitating the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest. With regard to investment aid in the Austrian Land *Burgenland*, the aid scheme referred to qualifies for exemption under Article 61(3)(a) of the EEA Agreement.

## HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority has decided not to raise objections to the aid facility under § 51a(3) to (5) of the Labour Market Promotion Act (Arbeitsmarktförderungsgesetz - AMFG) as introduced by BGBl. 1994/450 and the implementing guidelines thereunder ("*Richtlinien für die Gewährung von Beihilfen (Förderungen) gemäß § 51a Abs. 3-5 AMFG*") as notified by letter dated 5 December 1994 (Ref. 94-17906 A) and fax dated 21 December 1994 (Ref. 94-18733 A).

2. The Austrian Government is obliged to notify, in accordance with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, all individual awards of aid to enterprises in the form of a so-called *Bürge- und Zahlerhaftung* in the meaning of § 1357 ABGB, provided for under § 51a (5) AMFG.


3. 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 Part I of the guidelines (investment aid), 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 Part II of the guidelines (rescue and restructuring aid), including a list of all beneficiary firms providing the information on the items referred to in Section 16.4 of the State Aid Guidelines.

4. The Austrian Government is reminded of its obligation to notify, in accordance with Article 1 (3) of Protocol 3 to the Surveillance and Court Agreement, 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, 30 December 1994

For the EFTA Surveillance Authority

  
Knut Almestad,  
President

  
Heinz Zourek  
College Member