

Brussels, 17 December 2008
Case No: 65784
Event No: 502102

EFTA SURVEILLANCE AUTHORITY DECISION NO 195/04/COL
OF 14 JULY 2004

ON THE IMPLEMENTING PROVISIONS REFERRED TO UNDER ARTICLE 27 IN PART II OF
PROTOCOL 3 TO THE AGREEMENT BETWEEN THE EFTA STATES ON THE ESTABLISHMENT OF
A SURVEILLANCE AUTHORITY AND A COURT OF JUSTICE

CONSOLIDATED VERSION¹

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area², in particular to
Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of
a Surveillance Authority and a Court of Justice³, in particular to Articles 5(2)(a) and 24
thereof and Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement⁴,

AFTER CONSULTING the Advisory Committee on State Aid on 8 July 2004 in
accordance with the procedure laid down in Article 29 in Part II of Protocol 3 to the
Surveillance and Court Agreement,

WHEREAS:

- (1) On 21 April 2004, the European Commission adopted Regulation (EC) No 794/2004⁵ implementing Council Regulation (EC) No 659/99 laying down detailed rules for the application of [ex] Article 93 of the EC Treaty [now Article 88]⁶.

¹ Following the adoption of EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Protocol 3 to the Surveillance and Court Agreement as amended by the EFTA States on 10 December 2001. The amendments entered into force on 28 August 2003.

⁵ OJ L 140, 30.04.2004, p.1.

⁶ OJ L 83, 27.03.1999, p. 1.

- (2) On 30 April 2004, the European Commission published a Communication concerning the obsolescence of certain State aid policy documents, which it no longer intends to apply⁷.
- (3) A uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area.
- (4) In order to facilitate the preparation of State aid notifications by the EFTA States, and their assessment by the Authority, it is desirable to establish a compulsory notification form.
- (5) The standard notification form as well as the summary information sheet and the supplementary information sheets cover all existing Guidelines in the State aid field.
- (6) Provision should be made for a simplified system of notification for certain alterations to existing aid. Such simplified arrangements should only be accepted if the Authority has been regularly informed on the implementation of the existing aid concerned.
- (7) In the interests of legal certainty it is appropriate to clarify that small increases of up to 20% of the original budget of an aid scheme, in particular to take account of the effects of inflation, do not need to be notified to the Authority as they are unlikely to affect the Authority's original assessment of the compatibility provided the other conditions of the aid scheme remain unchanged.
- (8) Article 21 in Part II of Protocol 3 to the Surveillance and Court Agreement requires EFTA States to submit annual reports to the Authority on all existing aid schemes or individual aid granted outside an approved aid scheme in respect of which no specific reporting obligations have been imposed in a conditional decision.
- (9) For the Authority to be able to discharge its responsibilities to monitor aid, it needs to receive accurate information from the EFTA States about the types and amounts of aid being granted under existing aid schemes.
- (10) The information required in the annual reports is intended to enable the Authority to monitor overall aid levels and to form a general view of the effects of different types of aid on competition. To this end, the Authority may also request EFTA States to provide, on an ad hoc basis, additional data for selected topics. The choice of the subject matter would be discussed in advance with EFTA States.
- (11) The notification and reporting provisions laid down in this Decision only apply to aid in sectors covered by the EEA Agreement and falling within the competence of the Authority.
- (12) Time-limits for the purposes of Protocol 3 to the Surveillance and Court Agreement should be calculated in accordance with the Act referred to in point 6 of Annex XVI to the EEA Agreement (hereinafter referred to as "the Act on time limits")⁸, supplemented by the specific rules set out in this Decision. In particular,

⁷ OJ C 115, 30.04.2004, p.1.

⁸ Regulation (EEC, EURATOM) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, published in the OJ L 124, 8.6.1971, p.1.

it is necessary to identify the events, which determine the starting point for time-limits applicable in State aid procedures. The rules set out in this Decision should apply to time-limits that have not expired on the date of entry into force of this Decision.

- (13) The purpose of recovery is to re-establish the situation existing before aid was unlawfully granted. To ensure equal treatment the advantage should be measured objectively from the moment when the aid is available to the beneficiary undertaking, independently of the outcome of any commercial decisions subsequently made by that undertaking.
- (14) In accordance with general financial practice it is appropriate to fix the recovery interest rate as an annual percentage rate.
- (15) The volume and frequency of transactions between banks results in an interest rate that is consistently measurable and statistically significant, and should therefore form the basis of the recovery interest rate. In the interest of legal certainty and equal treatment, it is appropriate to fix the precise method by which the interest rate should be calculated, and to provide for the publication of the recovery interest rate applicable at any given moment, as well as relevant previously applicable rates.
- (16) Given the objective of restoring the situation existing before the aid was unlawfully granted, and in accordance with general financial practice, the recovery interest rate to be fixed by the Authority should be annually compounded.
- (17) This Decision should apply to recovery decisions notified after the date of entry into force of this Decision.

HAS ADOPTED THIS DECISION:

Article 1 **Scope**

1. This Decision sets out detailed provisions concerning the form, content and other details of notifications and annual reports referred to in Part II of Protocol 3 to the Surveillance and Court Agreement. It also sets out provisions for the calculation of time limits in all procedures concerning State aid and of the interest rate for the recovery of unlawful aid.
2. This Decision applies to aid in all sectors covered by the EEA Agreement and falling within the competence of the Authority.

Article 2 **Notification forms**

Unless otherwise specified, notifications pursuant to Article 2(1) in Part II of Protocol 3 to the Surveillance and Court Agreement shall be made on the notification form set out in Annex I to this Decision. Supplementary information needed for the assessment of the measure in accordance with other rules applicable to State aid shall be provided on the supplementary information sheets set out in Part III of Annex I. Whenever relevant

guidelines are modified or replaced, the Authority shall adapt the corresponding information sheets in Part III of Annex I.

Article 3

Transmission of notifications

1. 1. The notification shall be transmitted to the Authority by the Mission to the European Union of the EFTA State concerned or any other contact point designated by the EFTA State. It shall be addressed to the Competition and State Aid Directorate of the Authority. All subsequent correspondence shall be transmitted in the same manner to the Competition and State Aid Directorate or to the nominated contact point.
2. The Authority shall address its correspondence to the Mission to the European Union of the EFTA State concerned, or to any other address designated by that EFTA State.
3. As from 1 January 2006, notifications shall be transmitted electronically via the e-notification system on the Authority's website. All correspondence in connection with a notification which has been submitted electronically after 1 January 2006 shall also be transmitted electronically.
4. In exceptional circumstances and upon the agreement of the Authority and the EFTA State concerned, an agreed communication channel other than that referred to in paragraph 3 may be used for submission of a notification or any correspondence in connection with a notification. In the absence of such an agreement, any notification or correspondence in connection with a notification sent to the Authority by an EFTA State through a communication channel other than those referred to in paragraph 3 shall not be considered as submitted to the Authority.
5. Where the notification or correspondence in connection with a notification contains confidential information, the EFTA State concerned shall clearly identify such information and give reasons for its classification as confidential.
6. The EFTA States shall refer to the state aid identification number allocated to an aid scheme by the Authority in each grant of aid to a final beneficiary. The first subparagraph shall not apply to aid granted through fiscal measures.

Article 4

Simplified notification procedure for certain alterations to existing aid

1. For the purposes of Article 1(c) in Part II of Protocol 3 to the Surveillance and Court Agreement, an alteration to existing aid is any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. An increase in the original budget of an existing aid scheme by up to 20% is not considered an alteration to existing aid.

2. By way of derogation from Article 2, the following alterations to existing aid shall be notified on the simplified notification form set out in Annex II to this Decision:
 - (a) increases in the budget of an authorized aid scheme exceeding 20%;
 - (b) prolongation of an existing authorized aid scheme by up to six years, with or without an increase in the budget;
 - (c) tightening of the criteria for the application of an authorized aid scheme, a reduction of aid intensity or a reduction of eligible expenses;

The Authority shall use its best endeavours to take a decision on any aid notified on the simplified notification form within a period of one month.

3. The simplified notification procedure shall not be used to notify alterations to aid schemes in respect of which EFTA States have not submitted annual reports in accordance with Article 5, 6, and 7, unless the annual reports for the years in which the aid has been granted are submitted at the same time as the notification.

Article 5

Form and content of annual reports

1. Without prejudice to any additional specific reporting requirements laid down in a conditional decision adopted pursuant to Article 7(4) in Part II of Protocol 3 to the Surveillance and Court Agreement, or to the respect of any undertakings provided by the EFTA State concerned in connection with a decision to approve aid, EFTA States shall compile the annual reports on existing aid schemes referred to in Article 21(1) in Part II of Protocol 3 to the Surveillance and Court Agreement in respect of each whole or part calendar year during which the scheme applies in accordance with the standardised reporting format set out in Annex III to this Decision.
2. The Authority may request EFTA States to provide additional data for selected topics, to be discussed in advance with the EFTA States.

Article 6

Transmission and publication of annual reports

1. Each EFTA State shall transmit its annual reports to the Authority in electronic form no later than 30 June of the year following the year to which the report relates. In justified cases EFTA States may submit estimates, provided that the actual figures are transmitted at the very latest with the following year's data.
2. Each year the Authority shall publish a State aid score board containing a synthesis of the information contained in the annual reports submitted during the previous year.

Article 7

Status of annual reports

The transmission of annual reports shall not constitute compliance with the obligation to notify aid measures before they are put into effect pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, nor shall such transmission in any

way prejudice the outcome of an investigation into allegedly unlawful aid in accordance with the procedure laid down in Section III of Part II of Protocol 3 to the Surveillance and Court Agreement.

Article 8

Calculation of time-limits

1. Time-limits provided for in Part II of Protocol 3 to the Surveillance and Court Agreement and in this Decision or fixed by the Authority in the application of Article 1 in Part I of Protocol 3 to the Surveillance and Court Agreement shall be calculated in accordance with the Act on time limits⁹, and the specific rules set out in paragraphs 2 to 5 of this Article. In case of conflict, the provisions of this Decision shall prevail.
2. Time limits shall be specified in months or in working days.
3. With regard to time limits for action by the Authority, the receipt of the notification or subsequent correspondence accordance with Article 3(1) and Article 3(3) of this Decision shall be the relevant event for the purpose of Article 3(1) of the Act on time limits.
4. With regard to time limits for action by the EFTA States, the receipt of the relevant notification or correspondence from the Authority in accordance with Article 3(2) of this Decision shall be the relevant event for the purposes of Article 3(1) of the Act on time limits
5. With regard to the time-limit for the submission of comments following initiation of the formal investigation procedure referred to in Article 6(1) in Part II of Protocol 3 to the Surveillance and Court Agreement by third parties and those EFTA States who are not directly concerned by the procedure, the publication of the notice of initiation in the *EEA Section of and the EEA Supplement to the Official Journal of the European Union* shall be the relevant event for the purpose of Article 3(1) of the Act on time limits.
6. Any request for the extension of a time-limit shall be motivated, and shall be submitted in writing to the address designated by the party fixing the time-limit at least 2 working days before expiry.

Article 9

Method for fixing the interest rate

1. Unless otherwise provided for in a specific decision, the interest rate to be used for recovering state aid granted in breach of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement shall be an annual percentage rate which is fixed by the Authority in advance of each calendar year.

⁹ Regulation (EEC, EURATOM) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, published in the OJ L 124, 8.6.1971, p.1, has been incorporated into the EEA Agreement by reference in point 6 of Annex XVI to the EEA Agreement.

2. The interest rate shall be calculated by adding 100 basis points to the one-year money market rate. Where those rates are not available, the three-month money market rate will be used, or in the absences hereof, the yield on State bonds will be used.
3. In the absence of reliable money market or yield on stock bonds or equivalent data, or in exceptional circumstances the Authority may, in close co-operation with the EFTA State(s) concerned, fix a recovery rate on the basis of a different method and on the basis of the information available to it.
4. The recovery rate will be revised once a year. The base rate will be calculated on the basis of the one-year money market recorded in September October and November of the year in question. The rate thus calculated will apply throughout the following year.
5. In addition, to take account of significant and sudden variations, an update will be made each time the average rate, calculated over the three previous months, deviates more than 15 % from the rate in force. This new rate will enter into force on the first day of the second month following the months used for the calculation.

Article 10
Publication

The Authority shall publish current and relevant historical State aid recovery interest rates in the *EEA Section of and the EEA Supplement to the Official Journal of the European Union* and for information on the Internet.

Article 11
Method for calculating interest

1. The interest rate to be applied shall be the rate applicable on the date on which unlawful aid was first put at the disposal of the beneficiary.
2. The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.
3. The interest rate referred to in paragraph 1 shall be applied throughout the whole period until the date of recovery. However, if more than one year has elapsed between the date on which the unlawful aid was first put at the disposal of the beneficiary and the date of the recovery of the aid, the interest rate shall be recalculated yearly intervals, taking as a basis the rate in force at the time of recalculation.

Article 12

Review

The Authority shall, in consultation with the EFTA States, review the application of this Decision within 4 years after its entry into force.

Article 13

Obsolescence of Parts of the Authority's State Aid Guidelines

The provisions of the Authority's State Aid Guidelines (in particular, Chapters 3 to 8, 32 and 34¹⁰) which may differ from the provisions of this Decision will no longer be applicable after the entry into force of this Decision.

Article 14

Entry into force and application

1. This Decision is addressed to the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.
2. This Decision shall enter into force on the day following that of its adoption by the Authority.
3. Articles 2 to 4 shall apply to notifications transmitted to the Authority as of 5 months after adoption of this Decision.
4. Articles 5 to 7 shall apply to annual reports covering aid granted from 1 January 2003 onwards.
5. Article 8 shall apply to any time limit, which has been fixed but not yet expired on the date of entry into force of this Decision.
6. Articles 9 and 11 shall apply in relation to any recovery decision notified after the date of entry into force of this Decision.
7. This Decision is authentic in the English language.

¹⁰ However, in so far as the provisions of Articles 9 to 11 of this decision only apply to decisions ordering the recovery of unlawful aid notified to EFTA States after the date of entry into force of this Decision, Chapter 34 of the Authority's State Aid Guidelines on the interest rates to be applied when aid granted unlawfully is being recovered remains in effect as regards the execution by EFTA States of recovery orders notified before that date.