

## PART II: PROCEDURAL RULES

### Guidelines on Best Practice for the conduct of state aid control procedures<sup>1</sup>

#### 1 Scope and purpose

- (1) The EFTA Surveillance Authority (“the Authority”) issues these Guidelines on Best Practice for the conduct of state aid control procedures in order to make state aid procedures as productive and efficient as possible for all parties concerned.
- (2) This Chapter of the Authority’s Guidelines is built on the experience acquired in the application of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“Part II of Protocol 3”)<sup>2</sup>. The principal aim of this Chapter is to provide guidance on the day-to-day conduct of state aid procedures, thereby fostering a spirit of better co-operation and mutual understanding between the Authority, the EFTA States and the legal and business community.
- (3) A successful improvement of state aid procedures requires discipline on both sides and a mutual commitment from the Authority and the EFTA States. The Authority will endeavour to enhance its cooperation with the EFTA States and interested parties, and will furthermore work to improve the conduct of its investigations and its internal decision-making process, in order to ensure greater transparency, predictability and efficiency of state aid procedures.
- (4) In line with modern state aid architecture, this Chapter is the final part of a simplification package comprising the Authority’s Guidelines on a simplified procedure for treatment of certain types of state aid<sup>3</sup> and the Authority’s Guidelines on the enforcement of state aid law by national courts<sup>4</sup> which contributes to more predictable and transparent procedures.
- (5) The specific features of an individual case may however require an adaptation of, or deviation from, this Chapter<sup>5</sup>.

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<sup>1</sup> This Chapter corresponds to the Commission Code of Best Practice for the conduct of State aid control procedures (OJ C 136, 16.6.2009, p. 13).

<sup>2</sup> Part II of Protocol 3 mirrors Council Regulation (EC) No 659/1999 of 22.3.1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

<sup>3</sup> Not yet published in the OJ or the EEA Supplement, available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/> These Guidelines corresponds to the Commission Notice on a simplified procedure for treatment of certain types of State aid (OJ C 136, 16.6.2009, p. 3).

<sup>4</sup> Not yet published in the OJ or the EEA Supplement. These Guidelines corresponds to the European Commissions Notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1).

<sup>5</sup> In the context of the 2008 banking crisis, the Authority has taken appropriate steps to ensure the swift adoption of decisions upon complete notification, and when necessary within less than two weeks. See the Authority’s guidelines on the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (not yet published in the OJ or the EEA Supplement), which corresponds to the Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8). As regards the real economy, see the Authority’s Temporary framework for state aid measures to support access to finance in the current financial and economic crisis (not yet published in the OJ or the EEA Supplement), which corresponds to the Communication from the

- (6) Moreover, to the extent that the EEA Agreement applies to these sectors, the specificities of the fishery and aquaculture sectors and of the activities in the primary production, marketing or processing of agricultural products may also justify a deviation from this Chapter of the Guidelines.

## **2 Relationship to EEA Law**

- (7) This Chapter is not intended to provide a full or comprehensive account of the relevant legislative, interpretative and administrative measures which govern state aid control. It should be read in conjunction with and as a supplement to the basic rules governing state aid procedures.
- (8) This Chapter therefore does not create or alter any rights or obligations as set out in the EEA Agreement, Protocol 3 and Decision No 195/04/COL of 14 July 2004<sup>6</sup> as amended, as interpreted by the case-law of the EFTA Court and the Courts of Justice of the European Union.
- (9) This Chapter sets out day-to-day Best Practices to contribute to speedier, more transparent and more predictable state aid procedures at each step of the investigation of a notified or non-notified case or a complaint.

## **3 Pre-notification contacts**

- (10) The Authority's experience demonstrates the added value of pre-notification contacts, even in seemingly standard cases. Pre-notification contacts provide the Authority and the notifying EFTA State with the possibility to discuss the legal and economic aspects of a proposed project informally and in confidence prior to notification, and thereby enhance the quality and completeness of notifications. In this context, the EFTA State and the Authority can also jointly develop constructive proposals for amending problematic aspects of a planned measure. This phase thus paves the way for a more speedy treatment of notifications, once formally submitted to the Authority. Successful pre-notifications should effectively allow the Authority to adopt decisions pursuant to Article 4(2), (3) and (4) of Part II of Protocol 3 within two months from the date of notification<sup>7</sup>.
- (11) Pre-notification contacts are strongly recommended for cases where there are particular novelties or specific features which would justify informal prior discussions with the Authority but informal guidance will be provided whenever an EFTA State calls for it.

### **3.1 Content**

- (12) The pre-notification phase offers the possibility to discuss and provide guidance to the EFTA State concerned about the scope of the information to be submitted in the notification form to ensure it is complete as from the date of notification. A fruitful pre-notification phase will also allow discussions, in an open and constructive atmosphere, of any substantive issues raised by a planned measure. This is particularly important as regards projects which could not be accepted as such and should thus be withdrawn or significantly amended. It can also comprise an analysis of the

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Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

<sup>6</sup> Decision No 195/04/COL (OJ L 139, 25.5.2006, p. 37) corresponds to Commission Regulation (EC) No 794/2004 of 21 April 2004 (OJ L 140, 30.4.2004, p. 1), which implements Regulation (EC) No 659/1999.

<sup>7</sup> This time limit cannot be respected where the Authority has to issue several requests for information due to incomplete notifications.

availability of other legal bases or the identification of relevant precedents. In addition, a successful pre-notification phase will allow the Authority and the EFTA State to address key competition concerns, economic analysis and, where appropriate, external expertise required to demonstrate the compatibility of a planned project with the functioning with the EEA Agreement. The notifying EFTA State may thus also request the Authority, in pre-notification, to waive the obligation to provide certain information foreseen in the notification form which in the specific circumstances of the case is not necessary for its examination. Finally, the pre-notification phase is decisive to determine whether a case qualifies *prima facie* for treatment under the simplified procedure<sup>8</sup>.

### 3.2 Scope and timing

- (13) In order to allow for a constructive and efficient pre-notification phase, it is in the interest of the EFTA State concerned to provide the Authority with the information necessary for the assessment of a planned state aid project, on the basis of a draft notification form. In order to facilitate swift treatment of the case, contacts by emails or conference calls will in principle be favoured rather than meetings. Within two weeks from the receipt of the draft notification form, the Authority will normally organise a first pre-notification contact.
- (14) As a general rule, pre-notification contacts should not last longer than 2 months and should be followed by a complete notification. Should pre-notification contacts not bring the desired results, the Authority may declare the pre-notification phase closed. However, since the timing and format of pre-notification contacts depend on the complexity of the individual case, pre-notification contacts may last several months. The Authority therefore recommends that, in cases which are particularly complex (for example, rescue aid, large research and development aid, large individual aid or particularly large or complex aid schemes), EFTA States launch pre-notification contacts as early as possible to allow for meaningful discussions.
- (15) In the Authority's experience, involving the aid beneficiary in the pre-notification contacts is very useful, particularly for cases with major technical, financial and project-related implications. The Authority therefore recommends that beneficiaries of individual aid be involved in the pre-notification contacts.
- (16) Except in particularly novel or complex cases, the Authority will endeavour to provide the EFTA State concerned with an informal preliminary assessment of the project at the end of the pre-notification phase. That non-binding assessment will not be an official position of the Authority, it will only represent an informal guidance on the completeness of the draft notification and the *prima facie* compatibility of the planned project with the functioning of the EEA Agreement. In particularly complex cases, the Authority may also provide written guidance, at the EFTA State's request, on the information still to be provided.
- (17) Pre-notification contacts are held in strict confidence. The discussions take place on a voluntary basis and remain without prejudice to the handling and investigation of the case following formal notification.
- (18) In order to enhance the quality of notifications, the Authority will endeavour to meet requests for training sessions by EFTA States. The Authority will also maintain regular contacts with EFTA States to discuss further improvements of the state aid procedure, in particular as regards the scope and content of the applicable notification forms.

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<sup>8</sup> See Guidelines on a simplified procedure for treatment of certain types of state aid.

## **4 Mutually agreed planning**

(19) In cases which are particularly novel, technically complex or otherwise sensitive, or which have to be examined as a matter of absolute urgency, the Authority will offer mutually agreed planning to the notifying EFTA State to increase the transparency and predictability of the likely duration of a state aid investigation.

### **4.1 Content**

(20) Mutually agreed planning is a form of structured cooperation between the EFTA State and the Authority, based on a joint planning and understanding of the likely course of the investigation and its expected time frame.

(21) In this context, the Authority and the notifying EFTA State could in particular agree on:

- the priority treatment of the case concerned, in return for the EFTA State formally accepting the suspension of the examination<sup>9</sup> of other notified cases originating from the same EFTA State, should this be necessary for planning or resource purposes,
- the information to be provided by the EFTA State and/or the beneficiary concerned, including studies or external expertise, or unilateral information-gathering by the Authority, and
- the likely form and duration of the assessment of the case by the Authority, once notified.

(22) In return for the EFTA State's efforts in providing all the necessary information in a timely manner and as agreed in the context of mutually agreed planning, the Authority will endeavour to respect the mutually agreed time frame for the further investigation of the case, unless the information provided by the EFTA State or interested parties raises unexpected issues.

### **4.2 Scope and timing**

(23) Mutually agreed planning will in principle be reserved for cases which are so novel, technically complex or otherwise sensitive that a clear preliminary assessment of the case by the Authority proves impossible at the end of the pre-notification phase. In such cases, mutually agreed planning will take place at the end of the pre-notification phase, and be followed by the formal notification.

(24) However, the Authority and the EFTA State concerned may also agree, at the latter's request, on mutually agreed planning for the further treatment of the case at the outset of the formal investigation procedure.

## **5 The preliminary examination of notified measures**

### **5.1 Requests for information**

(25) In order to streamline the course of the investigation, the Authority will endeavour to group requests for information during the preliminary examination phase. In principle, there will therefore only be one comprehensive information request, normally to be sent within 4-6 weeks after the date of notification. Unless otherwise agreed in mutually agreed planning, pre-notification should enable EFTA States to submit a complete notification thereby reducing the need for additional information. However,

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<sup>9</sup> See Article 4(5) of Part II of Protocol 3.

the Authority may subsequently raise questions most notably on points that have been raised by the EFTA States' answers, although this does not necessarily indicate that the Authority is experiencing serious difficulties in assessing the case.

- (26) Should the EFTA State fail to provide the requested information within the prescribed period, Article 5(3) of Part II of Protocol 3 will, after one reminder, normally be applied, and the EFTA State will be informed that the notification is deemed to have been withdrawn. The formal investigation procedure will normally be initiated whenever the necessary conditions are met, and generally after two rounds of questions at most.

## **5.2 Agreed suspension of the preliminary examination**

- (27) In certain circumstances, the course of the preliminary examination may be suspended if an EFTA State so requests to amend its project and bring it in line with state aid rules, or otherwise by common agreement. Suspension may only be granted for a period agreed in advance. Should the EFTA State fail to submit a complete, *prima facie* compatible project at the end of the suspension period, the Authority will resume the procedure from the point at which it was halted. The EFTA State concerned will normally be informed that the notification is deemed to have been withdrawn, or the formal investigation procedure opened without delay in case of serious doubts.

## **5.3 State of play contacts**

- (28) At their request, notifying EFTA States will be informed of the state of play of an ongoing preliminary examination. EFTA States are invited to involve the beneficiary of an individual aid in these contacts.

# **6 The formal investigation procedure**

- (29) In the light of the general complexity of cases subject to formal investigation, the Authority is committed to improving the transparency, predictability and efficiency of this phase as a matter of utmost priority, to contribute to meaningful decision-making in line with the needs of modern business. The Authority will therefore streamline the conduct of formal investigations through efficient use of all the procedural means available to it under Part II of Protocol 3.

## **6.1 Publication of the decision and meaningful summary**

- (30) Where the EFTA State concerned does not request the removal of confidential information, the Authority will endeavour to publish its decision to open the formal investigation procedure, including the meaningful summaries, within two months from the date of adoption of that decision.
- (31) Where there is disagreement concerning confidentiality issues, the Authority will apply the principles of its Guidelines on professional secrecy in state aid decisions<sup>10</sup> and use its best endeavours to proceed with publication of the decision within the shortest possible time frame following its adoption. The same will apply to the publication of all final decisions.
- (32) To improve the transparency of the procedure, the EFTA State, the beneficiary and other stakeholders (in particular potential complainants) will be informed of all delays triggered by disagreements concerning confidentiality issues.

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<sup>10</sup> Adopted by College Decision 15/04/COL of 18.2.2004 (OJ L 154, 8.6.2006, p. 27 and EEA Supplement No 29, 8.6.2006, p. 1). These guidelines correspond to the European Commission Communication of 1.12.2003 on professional secrecy in State aid decisions (OJ C 297, 9.12.2003, p. 6).

## 6.2 Comments from interested parties

- (33) According to Article 6 of Part II of Protocol 3, interested parties must submit comments within a prescribed period which must normally not exceed one month following the publication of the decision to initiate the formal investigation procedure. That time limit will not normally be extended, and the Authority will thus usually not accept any belated submission of information from interested parties, including the beneficiary of the aid<sup>11</sup>. Extensions may be granted only in exceptional duly justified cases, such as the provision of particularly voluminous factual information or following contact between the Authority and the interested party concerned.
- (34) In order to improve the factual basis of the investigation of particularly complex cases, the Authority may send a copy of the decision to initiate the formal investigation procedure to identified interested parties including trade or business associations, and invite them to comment on specific aspects of the case<sup>12</sup>. Interested parties' cooperation in this context is purely voluntary, but if an interested party chooses to provide comments, it is in its interest to submit those comments in a timely manner so that the Authority will be able to take them into account. Therefore, the Authority will invite interested parties to react within one month from the date on which the copy of the decision is sent to them. The Authority will not wait any further for those comments to be submitted. In order to ensure equal treatment between interested parties the Authority will send the same invitation to comment to the aid beneficiary. In order to respect the EFTA State's right of defence, it will forward to the EFTA State a non-confidential version of any comments received from interested parties and invite the EFTA State to reply within one month.
- (35) In order to ensure transmission of all comments from interested parties to the EFTA State concerned in the most expedient manner, EFTA States will, as far as possible, be invited to accept transmission of those comments in their original language. If an EFTA State so requests, the Authority will provide a translation, which may have implications as regards the expediency of procedures.
- (36) EFTA States will also be informed of the absence of any comments from interested parties.

## 6.3 EFTA States' comments

- (37) To ensure timely completion of the formal investigation procedure, the Authority will rigorously enforce all time limits applicable to this phase under Part II of Protocol 3. If an EFTA State fails to submit its comments on the Authority's decision to initiate the formal investigation procedure and on interested parties' comments within the one-month time limit set in Article 6(1) of Part II of Protocol 3, the Authority will immediately send a reminder granting the EFTA State concerned an additional period of one month and informing the EFTA State that no further extension will be granted, save in exceptional circumstances. In the absence of a meaningful reply by the EFTA State concerned, the Authority will take a decision on the basis of the information available to it, in accordance with Article 7(7) and Article 13(1) of Part II of Protocol 3.
- (38) In the case of unlawful aid, and in the absence of comments from the EFTA State on the decision to initiate the formal investigation procedure, the Authority will, pursuant

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<sup>11</sup> Without prejudice to Article 10(1) of Part II of Protocol 3.

<sup>12</sup> According to settled case-law of the Community Courts, the Authority is entitled to send the decision to open the formal investigation to identified third parties; see for example, Case T-198/01 *Technische Glaswerke Ilmenau v Commission* (2004) ECR II-2717, paragraph 195; T-198/01R *Technische Glaswerke Ilmenau v Commission* (2002) ECR II-2153; Joined Cases C-74/00 P and C-75/00 P *Falck Spa and others v Commission* (2002) ECR I-7869, paragraph 83.

to Article 10 of Part II of Protocol 3, issue an information injunction. Should the EFTA State fail to reply to that injunction within the time limit set therein, the Authority will take a decision on the basis of the information available to it.

#### **6.4 Request for additional information**

- (39) It cannot be excluded that, in particularly complex cases, the information submitted by the EFTA State in response to the decision to initiate the formal investigation procedure may require the Authority to send a further request for information. A time limit of one month will be set for the EFTA State to reply.
- (40) Should the EFTA State not reply within the time limit, the Authority will immediately send a reminder setting a final deadline of 15 working days and informing the EFTA State concerned that the Authority will thereafter take a decision on the basis of the information available to it, or issue an information injunction in the case of unlawful aid.

#### **6.5 Justified suspension of the formal investigation**

- (41) Only in exceptional circumstances and by common agreement between the Authority and the EFTA State concerned may the formal investigation be suspended. Suspension could, for example, occur if the EFTA State formally requests a suspension in order to bring its project in line with state aid rules, or if there is pending litigation before the EFTA Court or the EU Courts regarding similar issues, the outcome of which is likely to have an impact on the assessment of the case.
- (42) Suspension will normally only be granted once, and for a period agreed in advance between the Authority and the EFTA State concerned.

#### **6.6 Adoption of the final decision and justified extension of the formal investigation**

- (43) In accordance with Article 7(6) of Part II of Protocol 3, the Authority will as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. That time limit may be extended by common agreement between the Authority and the EFTA State concerned. An extension of the duration of the investigation may in particular be appropriate in cases concerning novel projects or raising novel legal issues.
- (44) In order to ensure effective implementation of Article 7(6) of Part II of Protocol 3, the Authority will endeavour to adopt the final decision no later than 4 months after the submission of the last information by the EFTA State, or the expiry of the last time limit without information having been received.

## **7 Complaints**

- (45) The efficient and transparent handling by the Authority of complaints brought before it is of considerable importance to all stakeholders in state aid procedures. The Authority therefore proposes the following Best Practices, designed to contribute to that joint objective.

### **7.1 The complaint form**

- (46) The Authority will systematically invite complainants to use the complaint form available on its website (<http://www.eftasurv.int/media/documents/Complaint-form---State-aid.doc>) and, at the same time, to submit a non-confidential version of the complaint. The submission of complete forms will normally allow complainants to enhance the quality of their submissions.

## 7.2 Indicative time frame and outcome of the investigation of a complaint

- (47) The Authority will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. That time limit does not constitute a binding commitment. Depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the EFTA State or interested parties may extend the investigation of a complaint.
- (48) The Authority is entitled to give different degrees of priority to the complaints brought before it<sup>13</sup>, depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations<sup>14</sup>, it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Authority will, therefore, in principle, endeavour to:
- (a) adopt a decision for priority cases pursuant to Article 4 of Part II of Protocol 3, with a copy addressed to the complainant;
  - (b) send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. The administrative letter is not an official position of the Authority, it only represents a preliminary view, based on the information available and pending any additional comments the complainant might wish to make within one month from the date of the letter. If further comments are not provided within the prescribed period, the complaint will be deemed to be withdrawn.
- (49) As a matter of transparency, the Authority will use its best endeavours to inform the complainant of the priority status of its submission, within two months from the date of receipt of the complaint. In the case of unsubstantiated complaints, the Authority will inform the complainant within two months from receipt of the complaint that there are insufficient grounds for taking a view on the case, and that the complaint will be deemed to be withdrawn if further substantive comments are not provided within one month. As regards complaints which refer to approved aid, the Authority will also endeavour to reply to the complainant within 2 months from receipt of the complaint.
- (50) In the case of unlawful aid, complainants will be reminded of the possibility to initiate proceedings before national courts, which can order the suspension or recovery of such aid<sup>15</sup>.
- (51) When necessary, the non-confidential version of a complaint will be transmitted to the EFTA State concerned for comments. EFTA States and the complainants will systematically be kept informed of the closure or other processing of a complaint. In return, EFTA States will be invited to respect the time limits for commenting and providing information on complaints transmitted to them. They will also be invited to accept, as far as possible, transmission of complaints in their original language. If an EFTA State so requests, the Authority will provide a translation, which may have implications as regards the expediency of procedures.

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<sup>13</sup> Case C-119/97 *Ufex and Others v Commission* (1999) ECR I-1341, paragraph 88.

<sup>14</sup> Case T-475/04 *Bouygues SA v Commission* (2007) ECR II-2097, paragraphs 158 and 159.

<sup>15</sup> See the Authority's Guidelines on the enforcement of state aid law by national courts.

## **8 Internal decision making procedures**

- (52) The Authority is committed to streamlining and further improving its internal decision-making process, in order to contribute to an overall shortening of state aid procedures.
- (53) To this effect, internal decision-making procedures will be applied as efficiently as possible. The Authority will also review its current internal legal framework to optimise its decision-making procedures.
- (54) The Authority will keep its internal decision-making practice under constant review and adapt it if necessary.

## **9 Future review**

- (55) Procedural Best Practices can only be effective if they are based on a shared commitment by the Authority and EFTA States to diligently pursue state aid investigations, respect applicable time limits and thereby ensure the necessary transparency and predictability of procedures. This Chapter and the Best Practices enshrined therein are a first contribution to this joint commitment.
- (56) The Authority will apply this Chapter to measures which have been notified to the Authority or otherwise brought to the Authority's attention as from 1 January 2010.
- (57) This Chapter may be revised to reflect changes to legislative, interpretative and administrative measures or the case-law of the EFTA Court and the Courts of Justice of the European Union, which govern state aid procedure or any experience gained in its application. The Authority further intends to engage, on a regular basis, in a dialogue with the EFTA States and other stakeholders on the experience gained in the application of Part II of Protocol 3 in general, and this Chapter of Best Practice in particular.