

PART III: HORIZONTAL AID RULES

Criteria for the analysis of the compatibility of state aid for the employment of disadvantaged and disabled workers subject to individual notification¹

1 Introduction

- (1) The promotion of employment and social policy are among the aims of the EEA Agreement and of the EFTA States². Unemployment, and in particular, structural unemployment of certain categories of workers, remains a problem in some parts of the EFTA States. State aid in the form of subsidies to wage costs, where wage cost means the total amount actually payable by the beneficiary of the aid in respect of the employment concerned, comprising: (a) the gross wage, before tax; and (b) the compulsory contributions, such as social security charges; and (c) child care and parent care costs ("wage subsidies"), can provide additional incentives to undertakings to increase their levels of employment of disadvantaged and disabled workers. The objective of such aid is thus to encourage the recruitment of the targeted categories of worker.
- (2) This Chapter gives guidance on the criteria the EFTA Surveillance Authority (hereinafter referred to as "the Authority") will apply for the assessment of state aid in form of wage subsidies that needs to be notified individually pursuant to Article 6(1)(h) and (i) of the Act referred to at point 1j of Annex XV to the EEA Agreement (*Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation)*)³, as adapted to the EEA Agreement by Protocol 1 thereto⁴ (hereinafter referred to as "the General Block Exemption Regulation"). This guidance is intended to make the Authority's reasoning transparent and to create predictability and legal certainty.
- (3) This guidance applies to state aid in the form of wage subsidies for disadvantaged workers, severely disadvantaged workers and disabled workers within the meaning of Article 2(18), (19) and (20) of the General Block Exemption Regulation. Any individual measure, whether granted ad hoc or on the basis of a scheme, will be subject to this guidance when its grant equivalent exceeds EUR 5m per undertaking per year for the employment of disadvantaged workers and severely disadvantaged workers (hereinafter referred to together as "disadvantaged workers") and EUR 10 million per undertaking per year for the employment of disabled workers⁵.

¹ This Chapter corresponds to the Communication from the Commission of the European Communities - Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification, OJ C 188, 11.08.2009, p. 6.

² Article 66 *et seq.* of the EEA Agreement and Article 5 of Protocol 31 on social policy to the EEA Agreement

³ OJ L 214, 9.08.2008, p. 3.

⁴ Joint Committee Decision No 120/2008 of 7.11.2008 (OJ L 339, 18.12.2008, p. 111, and EEA Supplement No 79, 18.12.2008), entered into force on 8.11.2008.

⁵ Due to their specific nature, individual measures applying to the compensation for the additional cost of employing disabled workers and additional costs incurred by social enterprises of which the grant equivalent exceeds EUR 10m per undertaking per year will be assessed on the basis of Article 61(3)(c) of the EEA Agreement. For ad-hoc aid for the employment of disadvantaged workers below EUR 5m and ad-hoc aid to

- (4) The criteria set out in this guidance will not be applied mechanically. The level of the Authority's assessment and the kind of information it may require will be proportional to the risk of distortion of competition. The scope of the analysis will depend on the nature of the case.

2 Positive effects on the aid

2.1 Existence of an objective of common interest

- (5) Certain categories of workers experience particular difficulty in finding jobs, because employers consider them to be less productive or have prejudices against them. This perceived or real lower productivity may be due either to lack of recent experience in employment (for example, young workers or long-term unemployed) or to a permanent disability. Because of their perceived or real lower productivity, the workers are likely to be excluded from the labour market unless employers are offered compensation for their employment.
- (6) It is socially desirable that all categories of workers are integrated in the labour market. This means that a share of the domestic income may be redistributed to the categories of workers concerned by the measures. State aid may help disadvantaged and disabled workers to enter the labour market or stay in the labour market by covering the extra costs resulting from their perceived or real lower productivity.
- (7) EFTA States should demonstrate that the aid will address the objective of common interest. In its analysis, the Authority will, among other things, consider the following elements:
 - (a) the number and categories of workers concerned by the measure;
 - (b) employment rates of the categories of workers concerned by the measure on the national and/or regional level and in the undertaking or undertakings concerned;
 - (c) unemployment rates for the categories of workers concerned by the measure on the national and/or regional level;
 - (d) particularly marginalised sub-groups within the broader categories of disabled and disadvantaged workers.

2.2 State aid as an appropriate policy instrument

- (8) State aid in the form of wage subsidies is not the only policy instrument available to EFTA States to encourage employment of disadvantaged and disabled workers. EFTA States can also use general measures such as reduction of the taxation of labour and social costs, boosting investment in education and training, measures to provide guidance and counselling, assistance and training for the unemployed and improvements in labour law.
- (9) Where the EFTA State has considered other policy options, and the advantages of using a selective instrument such as state aid for a specific undertaking are established, the measures concerned are considered to constitute an appropriate instrument. The Authority will in particular take account of any impact assessment of the proposed measure the EFTA State may have made.

2.3 Incentive effect and necessity of the aid

- (10) State aid for the employment of disadvantaged and disabled workers must result in the aid beneficiary changing its behaviour so that the aid results in a net increase in the number of disadvantaged or disabled employees in the undertaking concerned. Newly recruited disadvantaged or disabled employees should only fill newly created posts or posts that have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct. Posts resulting from redundancy are not to be filled with subsidized disadvantaged or disabled workers. Thus, state aid cannot be used to replace workers in respect of whom the undertaking no longer receives a subsidy and who have consequently been dismissed.
- (11) EFTA States should demonstrate to the Authority the existence of the incentive effect and the necessity of the aid. First, the beneficiary must have submitted an application for the aid to the EFTA State concerned before the categories of workers concerned by the measures were employed. Second, the EFTA State must demonstrate that the aid is paid in respect of a disadvantaged or disabled worker in an undertaking, where the recruitment would have not occurred without the aid.
- (12) In its analysis, the Authority will consider, among other things, the following elements:
- (a) internal documents of the aid beneficiary on employment costs in relation to the categories of workers concerned by the measure for two scenarios: with aid and without aid;
 - (b) existing or past wage subsidies in the undertaking concerned: categories and number of workers subject to subsidies;
 - (c) annual turnover of the categories of workers concerned by the measure.

2.4 Proportionality of the aid

- (13) The EFTA State must demonstrate that the aid is necessary and the amount is kept to the minimum in order to achieve the objective of the aid.

EFTA States should provide evidence that the aid amount does not exceed the net additional costs of employing the categories of workers concerned by the measure compared to the costs of employing workers who are not disadvantaged or disabled⁶.

In any case, aid intensities must never exceed those laid down in Articles 40⁷ and 41⁸ of the General Block Exemption Regulation. Eligible costs, to which aid intensities are to be applied, must be calculated in accordance with Articles 40⁹ and 41¹⁰ of the General Block Exemption Regulation.

⁶ Net additional costs take into account the costs corresponding to the employment of the targeted categories of disadvantaged or disabled workers (for example, due to lower productivity) and benefits, which the aid beneficiary extracts from this employment (for example, due to an improvement of the image of the undertaking).

⁷ The aid intensity for disadvantaged workers must not exceed 50% of the eligible costs.

⁸ The aid intensity for disabled workers must not exceed 75% of the eligible costs.

⁹ For the employment of disadvantaged workers eligible costs are the wage costs over a maximum period of 12 months following recruitment. However, where the worker concerned is a severely disadvantaged worker, eligible costs are the wage costs over a maximum period of 24 months following recruitment.

3 Negative effects on the aid

- (14) If the aid is proportionate to achieve the objective of the aid, the negative effects of the aid are likely to be limited and an analysis of the negative effects may not be necessary. However, in some cases, even where the aid is necessary and proportionate for a specific undertaking to increase the employment of categories of workers concerned by the measure, the aid may result in a change in the behaviour of the beneficiary which significantly distorts competition. In those cases the Authority will conduct an analysis of the distortion of competition. The extent of the distortion of competition caused by the aid can vary depending on the characteristics of the aid and of the markets affected¹¹.
- (15) The aid characteristics that may affect the likelihood and the extent of the distortion are:
- (a) selectivity;
 - (b) the size of the aid;
 - (c) the repetition and duration of the aid;
 - (d) the effect of the aid on the undertaking's costs.
- (16) For example, an aid scheme used to encourage undertakings in general in an EFTA State to employ more disadvantaged or disabled workers is likely to have a different effect on the market than a large amount of aid given ad hoc to a single undertaking to enable it to increase its employment of a certain category of workers. The latter is likely to distort competition more significantly as the aid beneficiary's competitors become less able to compete. The distortion will be even greater if the labour costs in the beneficiary's business represent a high share of the total costs.
- (17) In assessing the market characteristics, which can give a much more accurate picture of the likely impact of an aid, the Authority will among other things consider:
- (a) the structure of the market;
 - (b) the characteristics of the sector or industry;
 - (c) the situation on the national/regional labour market.
- (18) The structure of the market will be assessed through the concentration of the market, the size of undertakings¹², importance of product differentiation¹³, and barriers to entry and exit. Market shares and concentration ratios will be calculated once the relevant market has been defined. In general, the fewer undertakings there are, the larger their share of the market, and the less competition one would expect

¹⁰ For the employment of disabled workers eligible costs are the wage costs over any given duration during which the disabled worker is being employed.

¹¹ A number of markets can be affected by the aid, because the impact of the aid may not be restricted to the markets where the aid beneficiary is active but can extend to other markets, for example input markets.

¹² Size of the undertaking can be expressed in the terms of market shares as well as turnover and/or employment.

¹³ The lower the degree of product differentiation, the greater the effect of the aid on competitors' profits will be.

to observe ¹⁴. If the affected market is concentrated with high barriers to entry ¹⁵ and the aid beneficiary is a major player on it then it is more likely that competitors will have to alter their behaviour in response to the aid, for example postpone or abandon the introduction of a new product or technology or exit the market all together.

- (19) The Authority will also look at the characteristics of the sector, such as the existence of overcapacity and whether the markets in the industry are growing ¹⁶, mature or declining. For example, the presence of overcapacity or of mature markets in an industry may increase the risk of aid leading to inefficiency and displacement of output among undertakings which do not have subsidised workers.
- (20) Finally, the measure will be placed in the context of the situation on the labour market, that is to say, unemployment and employment rates, wage levels, and labour law.
- (21) Wage subsidies may in particular cases lead to the distortions of competition discussed in paragraphs 22 to 27.

Substitution and displacement effect

- (22) The substitution effect relates to the situation where jobs given to a certain category of workers simply replace jobs for other categories. A wage subsidy which targets a specific subgroup of workers splits the labour force into subsidised workers and unsubsidised workers, and may induce undertakings to replace unsubsidised workers with subsidised workers. This occurs because relative wage costs for subsidised and unsubsidised workers are changed ¹⁷.
- (23) Since undertakings which employ subsidised workers compete in the same markets for goods or services as those which do not employ subsidised workers, wage subsidies can contribute to the reduction of jobs elsewhere in the economy. Such a situation occurs when an undertaking employing subsidised workers increases output, but displaces output among undertakings which do not employ subsidised workers and, as a result, the aid crowds-out unsubsidised employment.

Market entry and exit

- (24) Employment costs form part of the normal operating costs of any undertaking. It is therefore particularly important that aid should have a positive effect on employment and should not merely enable undertakings to reduce costs which they would otherwise bear. For example, wage subsidies reduce the ongoing costs of production and thus would make entry more appealing and enable undertakings with otherwise poor commercial prospects to enter a market or introduce new products to the detriment of more efficient competitors.
- (25) The availability of state aid may also affect an undertaking's decision to leave a market where it is already operating. Wage subsidies could reduce the size of losses and enable an undertaking to stay in the market for longer — which may mean that other, more efficient undertakings that do not receive aid are forced to exit instead.

¹⁴ However, some markets are competitive despite there being few undertakings present.

¹⁵ However, granting aid sometimes helps to overcome entry barriers and allows new undertakings to enter a market.

¹⁶ The existence of growing markets will usually lead to a less pronounced effect of the aid on competitors.

¹⁷ Such substitution effect depends on the elasticity of demand for labour, both for subsidised and unsubsidised workers.

Investment incentives

- (26) In the markets where wage subsidies are granted, undertakings are discouraged from competing and may reduce their investments and attempts to increase efficiency and innovation. The aid beneficiary may delay the introduction of new less labour intensive technologies because of a change in relative costs for labour intensive and technology intensive production methods. Manufacturers of competing or complementary products may also decrease or delay their investment. As a consequence, the overall investment level in the industry concerned will decline.

Effect on trade flows

- (27) Wage subsidies within a particular region may result in some territories benefiting from more favourable production conditions than others. This may result in the displacement of trade flows in favour of the regions where such aid is given.

4 Balancing and decision

- (28) The last step in the analysis is to evaluate the extent to which the positive effects of the aid outweigh its negative effects. This will be done on a case-by-case basis for all individual measures. In order to balance the positive and the negative effects, the Authority will assess them and make an overall assessment of their impact on producers and consumers in each of the markets affected. Unless quantitative information is readily available the Authority will use qualitative information for the purposes of the assessment.
- (29) The Authority is likely to take a more positive stance and therefore accept a higher degree of distortion of competition if the aid is necessary and well targeted to achieve the objective of the aid and is limited to the net extra costs of compensating for the lower productivity of the categories of workers concerned by the measure.