

PART III: HORIZONTAL RULES

Aid for rescuing and restructuring firms in difficulty¹

1. Introduction

- (1) The EFTA Surveillance Authority (hereinafter: the Authority) adopted its original Guidelines on State aid for rescuing and restructuring firms in difficulty² in 1994. A new version of the guidelines was adopted in 1999³.
- (2) The Authority wishes through this version of the Guidelines, the text of which builds on previous versions, to make certain changes and clarifications prompted by a number of factors.⁴
- (3) The exit of inefficient firms is a normal part of the operation of the market. It cannot be the norm that a company which gets into difficulties is rescued by the State. Aid for rescue and restructuring operations has given rise to some of the most controversial state aid cases in the past and is among the most distortive types of state aid. Hence, the general principle of the prohibition of state aid as laid down in the EEA Agreement should remain the rule and derogation from that rule should be limited.
- (4) The “one time, last time” principle is further reinforced, to avoid the use of repeated rescue or restructuring aids to keep firms artificially alive.
- (5) The 1999 guidelines made a distinction between rescue aid and restructuring aid, whereby rescue aid was defined as temporary assistance to keep an ailing firm afloat for the time needed to work out a restructuring and/or a liquidation plan. In principle, restructuring measures financed through state aid could not be undertaken during this

¹ This Chapter corresponds to the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ No C 244, 1.10.2004, p. 2).

² Adopted 19.01.1994, published in OJ No L 231, 3.09.1994 and in the EEA Supplement thereto No 32 on the same date.

³ Adopted 16.12.1999, published in OJ No L 274, 26.10.2000 and in the EEA Supplement thereto No 48 on the same date.

⁴ In the corresponding Commission Communication, the Commission has stated that closer scrutiny of the distortion created by allowing aid for rescue and restructuring operations seems warranted in the light of conclusions of the meetings of the European Councils of Stockholm on 23 and 24 March 2001 and of Barcelona on 15 and 16 March 2002, which called on Member States to continue to reduce State aid as a percentage of Gross Domestic Product while redirecting it towards more horizontal objectives of common interest including cohesion objectives. This is also consistent with the conclusions of the European Council held in Lisbon on 23 and 24 March 2000 aimed at increasing the competitiveness of the European economy.

phase. However, such strict distinction between rescue and restructuring has given rise to difficulties. Firms in difficulty may already need to take certain urgent structural measures to halt or reduce a worsening of the financial situation in the rescue phase. These guidelines therefore widen the concept of "rescue aid" in order to allow the beneficiary to undertake urgent measures, even of a structural nature, such as an immediate closure of a branch or other form of abandonment of loss-making activities. Given the urgent character of such aids, the EFTA States should be given the opportunity to opt for a simplified procedure to obtain their approval.

- (6) As regards restructuring aids, building on the 1994 guidelines, the 1999 guidelines continued to require a substantial contribution from the beneficiary to the restructuring. Within this revision, it is appropriate to reaffirm with greater clarity the principle that this contribution must be real and free of aid. The beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period. On the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability while limiting distortion of competition. In this respect the Authority will also request compensatory measures to minimise the effect on competitors.
- (7) The provision of rescue or restructuring aid to firms in difficulty may only be regarded as legitimate subject to certain conditions. It may be justified, for instance, by social or regional policy considerations, by the need to take into account the beneficial role played by small and medium-sized enterprises (SMEs) in the economy or, exceptionally, by the desirability of maintaining a competitive market structure when the demise of firms could lead to a monopoly or to a tight oligopolistic situation. On the other hand, it would not be justified to keep a firm artificially alive in a sector with long-term structural overcapacity or when it can only survive as a result of repeated State interventions.

2. Definitions and scope of the guidelines and links with other texts on State aid

2.1. Meaning of "a firm in difficulty"

- (8) There is no EEA definition of what constitutes "a firm in difficulty". However, for the purposes of these Guidelines, the Authority regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

- (9) In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines in the following circumstances:
- a) in the case of a limited liability company⁵, where more than half of its registered capital has disappeared⁶ and more than one quarter of that capital has been lost over the preceding 12 months;
 - b) in the case of a company where at least some members have unlimited liability for the debt of the company⁷, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;
 - c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.
- (10) Even when none of the circumstances set out in point 9 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the firm may already have become insolvent or may be the subject of collective insolvency proceedings brought under domestic law. In the latter case, these Guidelines apply to any aid granted in the context of such proceedings which leads to the firm's continuing in business. In any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources.
- (11) For the purposes of these Guidelines, a newly created firm is not eligible for rescue or restructuring aid even if its initial financial position is insecure. This is the case,

⁵ This refers in particular to the types of company mentioned in the first subparagraph of Article 1(1) of Council Directive 78/660/EEC of 25 July 1978 (OJ No L 222, 14.08.1978, p. 11) as last amended by Directive 2003/51/EEC of the European Parliament and of the Council (OJ No L 178, 17.07.2003, p. 16) as incorporated into point 4 of Annex XXII to the EEA Agreement by Joint Committee Decision No.176/2003 of 5.12.2003 (OJ No L 88, 25.3.2004, p. 53 and EEA Supplement No15, 25.3.2004, p. 14).

⁶ By analogy with the provisions of Council Directive 77/91/EEC of 13 December 1976 (OJ No L 26, 31.01.1977, p. 1) as last amended by the 2003 Act of Accession to the EU. Incorporated into point 2 of Annex XXII to the EEA Agreement by the EEA Enlargement Agreement.

⁷ This refers in particular to the types of company mentioned in the second subparagraph of Article 1(1) of Directive 78/660/EEC (OJ No L 222, 14.08.1978, p. 11) as last amended by Directive 2003/51/EEC of the European Parliament and of the Council (OJ No L 178, 17.07.2003, p. 16) as incorporated into point 4 of Annex XXII to the EEA Agreement by Joint Committee Decision No.176/2003 of 5.12.2003 (OJ No L 88, 25.3.2004, p. 53 and EEA Supplement No15, 25.3.2004, p. 14).

for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets. A firm will in principle be considered as newly created for the first 3 years following the start of operations in the relevant field of activity. Only after that period will it become eligible for rescue or restructuring aid, provided that:

- a) it qualifies as a firm in difficulty within the meaning of these Guidelines, and
- b) it does not form part of a larger business group⁸ except under the conditions laid down in point 12.

(12) A firm belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself. Where a firm in difficulty creates a subsidiary, the subsidiary, together with the firm in difficulty controlling it, will be regarded as a group and may receive aid under the conditions laid down in this point.

2.2. Definition of “rescue and restructuring aid”

(13) Rescue aid and restructuring aid are covered by the same set of guidelines, because in both cases the public authorities are faced with a firm in difficulty and the rescue and restructuring are often two parts of a single operation, even if they involve different processes.

(14) Rescue aid is by nature temporary and reversible assistance. Its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. The general principle is that rescue aid makes it possible temporarily to support a company confronted with an important deterioration of its financial situation reflected by an acute liquidity crisis or technical insolvency. Such temporary support should allow time to analyse the circumstances which gave rise to the difficulties and to develop an appropriate plan to remedy those difficulties. Moreover, the rescue aid must be limited to the minimum necessary. In other words, rescue aid offers a short respite, not exceeding six months, to a firm in difficulty. The aid must consist of reversible liquidity support in the form of loan guarantees or loans, with an interest rate at least comparable to

⁸ To determine whether a company is independent or forms part of a group, the criteria laid down in Annex I to Commission Regulation (EC) No 68/2001 (OJ No L 10, 13.1.2001, p. 20), as amended by Regulation (EC) No 363/2004 (OJ No L 63, 28.2.2004, p. 20) as incorporated into point 1(d) of Annex XV to the EEA Agreement by Joint Committee Decision No. 131/2004 of 25.9.2004 will be taken into account.

those observed for loans to healthy firms and in particular the reference rates adopted by the Authority. Structural measures which do not require immediate action, such as, the irremediable and automatic participation of the State in the own funds of the firm, cannot be financed through rescue aid.

- (15) Once a restructuring or liquidation plan for which aid has been requested has been established and is being implemented, all further aid will be considered as restructuring aid. Measures which need to be implemented immediately to stem losses, including structural measures (for example, immediate withdrawal from a loss-making field of activity), can be undertaken with the rescue aid, subject to the conditions mentioned in Section 3.1 for individual aids and Section 4.3 for aid schemes. Except where use is made of the simplified procedure set out in Section 3.1.2, an EFTA State will need to demonstrate that such structural measures must be undertaken immediately. Rescue aid cannot normally be granted for financial restructuring.
- (16) Restructuring, on the other hand, will be based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability. Restructuring usually involves one or more of the following elements: the reorganisation and rationalisation of the firm's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, the restructuring of those existing activities that can be made competitive again and, possibly, diversification in the direction of new and viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. Restructuring operations within the scope of these Guidelines cannot, however, be limited to financial aid designed to make good past losses without tackling the reasons for those losses.

2.3. Scope

- (17) These Guidelines apply to firms in all sectors covered by the EEA Agreement and subject to the Authority's review in accordance with Article 62 of the EEA Agreement, without prejudice to any rules relating to firms in difficulty in the sector concerned.⁹

2.4. Compatibility with the common market

- (18) Article 61(2) and (3) of the EEA Agreement provide for the possibility that aid falling within the scope of Article 61(1) will be regarded as compatible with the common market. Apart from cases of aid envisaged by Article 61(2), in particular aid

⁹ Specific rules of this nature exist for the aviation sector. See the corresponding Chapter of these Guidelines.

to make good the damage caused by natural disasters or exceptional occurrences, which are not covered here, the only basis on which aid for firms in difficulty can be deemed compatible is Article 61(3)(c). Under that provision the Authority has the power to authorise "aid to facilitate the development of certain economic activities (...) where such aid does not adversely affect trading conditions to an extent contrary to the common interest." In particular, this could be the case where the aid is necessary to correct disparities caused by market failures or to ensure economic and social cohesion.

- (19) Given that its very existence is in danger, a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Consequently, the Authority considers that aid to firms in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the EEA interest only if the conditions set out in these Guidelines are met. Where the firms which are to receive rescue or restructuring aid are located in assisted areas, the Authority will take the regional considerations referred to in Article 61(3)(a) and (c) of the EEA Agreement into account as described in points 54 – 55.
- (20) The Authority will pay particular attention to the need to prevent the use of these Guidelines to circumvent the principles laid down in existing frameworks and Guidelines.
- (21) The assessment of rescue or restructuring aid should not be affected by changes in the ownership of the business aided.

2.5. Recipients of previous unlawful aid

- (22) Where unlawful aid has previously been granted to the firm in difficulty, in respect of which the Authority has adopted a negative decision with a recovery order, and where no such recovery has taken place in compliance with Article 14 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 (hereinafter the Surveillance and Court Agreement)¹⁰, the assessment of any rescue and restructuring aid to be granted to the same undertaking shall take into account, first, the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid¹¹.

¹⁰ The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("The Surveillance and Court Agreement") (OJ No L 344, 31.12.1994, p.1).

¹¹ Case C-355/95 P, *Textilwerke Deggendorf v Commission and others* [1997] ECR I-2549.

3. General conditions for the authorisation of rescue and/or restructuring aid notified individually to the Authority

(23) This Chapter deals exclusively with aid measures that are notified individually to the Authority. Under certain conditions, the Authority may authorise rescue or restructuring aid schemes: those conditions are set out in Section 4.

3.1. Rescue aid

3.1.1. Conditions

(24) In order to be approved by the Authority, rescue aid as defined in point 14 must:

- a) consist of liquidity support in the form of loan guarantees or loans¹²; in both cases, the loan must be granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rates adopted by the Authority; any loan must be reimbursed and any guarantee must come to an end within a period of not more than six months after the disbursement of the first instalment to the firm;
- b) be warranted on the grounds of serious social difficulties and have no undue adverse spill over effects on other Contracting Parties to the EEA Agreement;
- c) be accompanied, on notification, by an undertaking given by the EFTA State concerned to communicate to the Authority, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and /or that the guarantee has been terminated; in the case of non-notified aid the EFTA State must communicate, no later than six months after the first implementation of a rescue aid measure, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated;
- d) be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised; such an amount may include aid for urgent

¹² An exception may be made in the case of rescue aid in the banking sector, in order to enable the credit institution in question to continue temporarily carrying on its banking business in accordance with the prudential legislation in force (Directive 2000/12/EC of the European Parliament and of the Council, OJ No L 126, 26.5.2000, p.1 as incorporated into the point 14 of Annex IX to the EEA Agreement by Joint Committee Decision No. 15/2001 of 1.10.2001 (OJ L 117, 26.4.2001, p. 13 and EEA Supplement No 22, 26.4.2001, p.8). At any rate, aid granted in a form other than loan guarantees or loans fulfilling the conditions set out in point (a), should fulfil the general principles of rescue aid and cannot consist in structural financial measures related to the bank's own funds. Any aid granted in a form other than loan guarantees or loans fulfilling the conditions set out in point(a), will be taken into account when any compensatory measures under a restructuring plan are examined in accordance with points 37 – 41.

structural measures in accordance with point 15; the amount necessary should be based on the liquidity needs of the company stemming from losses; in determining that amount regard will be had to the outcome of the application of the formula set out in the Annex; any rescue aid exceeding the result of that calculation will need to be duly explained;

- e) respect the condition set out in Section 3.3 ("one time, last time").
- (25) Where the EFTA State has submitted a restructuring plan within six months of the date of authorisation or, in the case of non-notified aid, of implementation of the measure, the deadline for reimbursing the loan or for putting an end to the guarantee is extended until the Authority reaches its decision on the plan, unless the Authority decides that such an extension is not justified.
- (26) Without prejudice to Article 23 in Part II of Protocol 3 to the Surveillance and Court Agreement and to the possibility of an action before the EFTA Court, in accordance with the second subparagraph of Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement, the Authority will initiate proceedings under Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement if the EFTA State fails to communicate:
- a) a credible and substantiated restructuring plan or a liquidation plan, or
 - b) proof that the loan has been reimbursed in full and/or that the guarantee has been terminated before the six-month deadline has expired.
- (27) In any event, the Authority may decide to initiate such proceedings, without prejudice to Article 23 in Part II of Protocol 3 to the Surveillance and Court Agreement and to the possibility of an action before the EFTA Court in accordance with the second subparagraph of Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement if it considers that the loan or the guarantee has been misused, or that, after the six-month deadline has expired, the failure to reimburse the aid is no longer justified.
- (28) The approval of rescue aid does not necessarily mean that aid under a restructuring plan will subsequently be approved; such aid will have to be assessed on its own merits.

3.1.2. Simplified procedure

(29) The Authority will as far as possible endeavour to take a decision within a period of one month in respect of rescue aids fulfilling all conditions set out in Section 3.1.1 and the following cumulative requirements:

- a) the firm concerned satisfies at least one of the three criteria set out in point 9;
- b) the rescue aid is limited to the amount resulting from the application of the formula set out in the Annex and does not exceed EUR 10 million.

3.2. Restructuring aid

3.2.1. Basic principle

(30) Aid for restructuring raises particular competition concerns as it can shift an unfair share of the burden of structural adjustment and the attendant social and economic problems onto other producers who are managing without aid, and to other Contracting Parties to the EEA Agreement. The general principle should therefore be to allow the grant of restructuring aid only in circumstances in which it can be demonstrated that it does not run counter to the EEA interest. This will only be possible if strict criteria are met, and if it is certain that any distortions of competition will be offset by the benefits flowing from the firm's survival (for instance, where it is clear that the net effect of redundancies resulting from the firm's going out of business, combined with the effects on its suppliers, would exacerbate employment problems or, exceptionally, where the firm's disappearance would result in a monopoly or tight oligopolistic situation) and that, in principle, there are adequate compensatory measures in favour of competitors.

3.2.2. Conditions for the authorisation of aid

(31) Subject to the special provisions for assisted areas and SMEs (see points 54, 55, 56 and 58), the Authority will approve aid only under the following conditions:

Eligibility of the firm

(32) The firm must qualify as a firm in difficulty within the meaning of these Guidelines (see points 8 - 12).

Restoration of long-term viability

(33) The grant of the aid must be conditional on implementation of the restructuring plan which must be endorsed by the Authority in all cases of individual aid, except in the case of SMEs, as laid down in Section 3.2.5.

- (34) The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the EFTA State concerned commits itself. The plan must be submitted in all relevant detail to the Authority and include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan; it may be based on external factors such as variations in prices and demand over which the company has no great influence, but only if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss-making even after restructuring.
- (35) The restructuring plan must describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It must take account, inter alia, of the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. It must enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet.
- (36) The plan must provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital must be enough to enable the restructured firm to compete in the marketplace on its own merits. Where the firm's difficulties stem from flaws in its corporate governance system, appropriate adaptations will have to be introduced.

Avoidance of undue distortions of competition

- (37) In order to ensure that the adverse effects on trading conditions are minimized as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. Otherwise, the aid will be regarded as "contrary to the common interest" and therefore incompatible with the EEA Agreement. The Authority will have regard to the objective of restoring the long-term viability in determining the adequacy of the compensatory measures.
- (38) These measures may comprise divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned. When assessing whether the compensatory measures are appropriate the Authority will take account of the market structure and the conditions of competition to ensure that any such measure does not lead to a deterioration in the structure of the market, for example

by having the indirect effect of creating a monopoly or a tight oligopolistic situation. If an EFTA State is able to prove that such a situation would arise, the compensatory measures should be construed in such a way to avoid this situation.

- (39) The measures must be in proportion to the distortive effects of the aid and, in particular, to the size¹³ and the relative importance of the firm on its market or markets. They should take place in particular in the market(s) where the firm will have a significant market position after restructuring. The degree of reduction must be established on a case-by-case basis. The Authority will determine the extent of the measures necessary on the basis of the market survey attached to the restructuring plan and, where appropriate on the basis of any other information at the disposal of the Authority including that supplied by interested parties. The reduction must be an integral part of the restructuring as laid down in the restructuring plan. This principle applies irrespective of whether the divestitures take place before or after the granting of the state aid, as long as they are part of the same restructuring. Write-offs and closure of loss-making activities which would at any rate be necessary to restore viability will not be considered reduction of capacity or market presence for the purpose of the assessment of the compensatory measures. Such an assessment will take account of any rescue aid granted beforehand.
- (40) However, this condition will not normally apply to small enterprises, since it can be assumed that ad hoc aid to small enterprises does not normally distort competition to an extent contrary to the common interest, except where otherwise provided by rules on state aid in a particular sector or when the beneficiary is active in a market suffering from long-term overcapacity.
- (41) When the beneficiary is active in a market suffering from long-term structural overcapacity, as defined in the context of the Multisectoral framework on regional aid for large investments¹⁴, the reduction in the company's capacity or market presence may have to be as high as 100%¹⁵.

Aid limited to the minimum: real contribution, free of aid

- (42) The amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of

¹³ In this respect the Authority may also take into account whether the company in question is a medium-sized enterprise or a large one.

¹⁴ Former Chapter 26A on Multisectoral framework on regional aid for large investment projects, incorporated into the Chapter on national regional aid with effect from 1 January 2007.

¹⁵ In such cases, the Authority will only allow aid to alleviate the social costs of the restructuring, in line with Section 16.3.2.6, and environmental aid to clean up polluted sites which might otherwise be abandoned.

the existing financial resources of the company, its shareholders or the business group to which it belongs. Such assessment will take account of any rescue aid granted beforehand. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. Such contribution is a sign that the markets believe in the feasibility of the return to viability. Such contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible.

- (43) The Authority will normally consider the following contributions¹⁶ to the restructuring to be appropriate: at least 25% in the case of small enterprises, at least 40%, for medium-sized enterprises and at least 50% for large firms. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the EFTA State, the Authority may accept a lower contribution.
- (44) To limit the distortive effect, the amount of the aid or the form in which it is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. The Authority will accordingly examine the level of the firm's liabilities after restructuring, including the situation after any postponement or reduction of its debts, particularly in the context of its continuation in business following collective insolvency proceedings brought against it under national law¹⁷. None of the aid should go to finance new investment that is not essential for restoring the firm's viability.

Specific conditions attached to the authorisation of aid

- (45) In addition to the compensatory measures described in points 37 - 41, the Authority may impose any conditions and obligations it considers necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest, in the event that the EFTA State concerned has not given a commitment that it will adopt such provisions. For example, it may require the EFTA State:
- a) to take certain measures itself (for example, to open up certain markets directly or indirectly linked to the company's activities to other EEA operators with due respect to EEA law);

¹⁶ See point 6. This minimum contribution must not contain any aid. This is not the case, for instance, where a loan carries an interest-rate subsidy or is backed by government guarantees containing elements of aid.

¹⁷ See point 9 (c).

- b) to impose certain obligations on the recipient firm;
- c) to refrain from granting other types of aid to the recipient firm during the restructuring period.

Full implementation of restructuring plan and observance of conditions

- (46) The company must fully implement the restructuring plan and must discharge any other obligations laid down in the Authority decision authorising the aid. The Authority will regard any failure to implement the plan or to fulfil the other obligations as misuse of the aid, without prejudice to Article 23 in Part II of Protocol 3 to the Surveillance and Court Agreement and to the possibility of an action before the EFTA Court in accordance with the second subparagraph of Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement.
- (47) Where restructuring operations cover several years and involve substantial amounts of aid, the Authority may require payment of the restructuring aid to be split into instalments and may make payment of each instalment subject to:
 - a) confirmation, prior to each payment, of the satisfactory implementation of each stage in the restructuring plan, in accordance with the planned timetable; or
 - b) its approval, prior to each payment, after verification that the plan is being satisfactorily implemented.

Monitoring and annual report

- (48) The Authority must be put in a position to make certain that the restructuring plan is being implemented properly, through regular detailed reports communicated by the EFTA State concerned.
- (49) In the case of aid to large firms, the first of these reports will normally have to be submitted to the Authority not later than six months after approval of the aid. Reports will subsequently have to be sent to the Authority at least once a year, at a fixed date, until the objectives of the restructuring plan can be deemed to have been achieved. They must contain all the information the Authority needs in order to be able to monitor the implementation of the restructuring programme, the timetable for payments to the company and its financial position and the observance of any conditions or obligations laid down in the decision approving the aid. They must in particular include all relevant information on any aid for any purpose which the company has received, either on an individual basis or under a general scheme,

during the restructuring period (see points 67 – 70). Where the Authority needs prompt confirmation of certain key items of information, for example, on closures or capacity reductions, it may require more frequent reports.

- (50) In the case of aid to SMEs, transmission each year of a copy of the recipient firm's balance sheet and profit-and-loss account will normally be sufficient, except where stricter conditions have been laid down in the decision approving the aid.

3.2.3. *Amendment of the restructuring plan*

- (51) Where restructuring aid has been approved, the EFTA State concerned may, during the restructuring period, ask the Authority to agree to changes to the restructuring plan and the amount of the aid. The Authority may allow such changes where they meet the following conditions:

- a) the revised plan must still show a return to viability within a reasonable time scale;
- b) if the amount of the aid is increased, any requisite compensatory measures must be more extensive than those initially imposed;
- c) if the proposed compensatory measures are smaller than those initially planned, the amount of the aid must be correspondingly reduced;
- d) the new timetable for implementation of the compensatory measures may be delayed with respect to the timetable initially adopted only for reasons outside the company's or the EFTA State's control: if that is not the case, the amount of the aid must be correspondingly reduced.

- (52) If the conditions imposed by the Authority or the commitments given by the EFTA State are relaxed, the amount of aid must be correspondingly reduced or other conditions may be imposed.

- (53) Should the EFTA State introduce changes to an approved restructuring plan without duly informing the Authority, the Authority will initiate proceedings as provided for by Article 16 of Part II of Protocol 3 to the Surveillance and Court Agreement (misuse of aid), without prejudice to Article 23 of Part II of Protocol 3 to the Surveillance and Court Agreement and to the possibility of an action before the EFTA Court in accordance with the second subparagraph of Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement.

3.2.4. *Restructuring aid in assisted areas*

- (54) The Authority will take the needs of regional development into account when assessing restructuring aid in assisted areas. The fact that an ailing firm is located in an assisted area does not, however, justify a permissive approach to aid for restructuring: in the medium to long term it does not help a region to prop up companies artificially. Furthermore, in order to promote regional development it is in the regions own best interest to apply its resources to develop as soon as possible activities that are viable and sustainable. Finally, distortions of competition must be minimised even in the case of aid to firms in assisted areas. In this context, regard must also be had to possible harmful spill-over effects which could take place in the area concerned and other assisted areas.
- (55) Thus, the criteria listed in points 31 - 53 are equally applicable to assisted areas, even when the needs of regional development are considered. In assisted areas, however, and unless otherwise stipulated in rules on state aid in a particular sector, the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures and the size of the beneficiary's contribution. If needs of regional development justify it, in cases in which a reduction of capacity or market presence appear to be the most appropriate measure to avoid undue distortions of competition, the required reduction will be smaller in assisted areas than in non-assisted areas. In those cases, which need to be demonstrated by the EFTA State concerned, a distinction will be drawn between areas eligible for regional aid under Article 61(3)(a) of the EEA Agreement and those eligible under Article 61(3)(c) so as to take account of the greater severity of the regional problems in the former areas.

3.2.5. *Aid for restructuring SMEs*

- (56) Aid to small enterprises¹⁸ tends to affect trading conditions less than that granted to medium-sized and large firms. This also applies to aid to help restructuring, so that the conditions laid down in points 31 - 53 are applied less strictly in the following respects:

¹⁸ As defined in the Commission Recommendation 2003/361/EC (OJ L 124, 20.5.2003, p. 36), incorporated into the EEA Agreement by EEA Joint Committee Decision No 131/2004 of 25.09.2004 (not yet published). Until 31 December 2004, the relevant definition is to be found in the Commission Recommendation 96/280/EC (OJ L 107, 30.4.1996, p. 4). The definition could also be found in annex 1 to the Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), incorporated in the EEA Agreement through Annex XV point 1f) by decision of the EEA Joint Committee No 88/2002 of 25 June 2002 amending Annex XV (State aid) to the EEA Agreement (OJ L 266, 3.10.2002, p. 56 and EEA Supplement No 49, 3.10.2002, p. 42).

- a) the grant of restructuring aid to small enterprises will not usually be linked to compensatory measures (see point 40), unless this is otherwise stipulated in rules on state aid in a particular sector.
- b) the requirements regarding the content of reports will be less stringent for SMEs (see points 48, 49 and 50).

(57) However, the "one time, last time" principle (Section 3.3) applies in full to SMEs.

(58) For SMEs the restructuring plan does not need to be endorsed by the Authority. However, the plan must meet the requirements laid down in points 34 - 36 and be approved by the EFTA State concerned and communicated to the Authority. The grant of aid must be conditional on full implementation of the restructuring plan. The obligation to verify that these conditions are fulfilled lies with the EFTA State.

3.2.6. *Aid to cover the social costs of restructuring*

(59) Restructuring plans normally entail reductions in or abandonment of the affected activities. Such retrenchments are often necessary in the interests of rationalisation and efficiency, quite apart from any capacity reductions that may be required as a condition for granting aid. Whatever the reason for them, such measures will generally lead to reductions in the company's workforce.

(60) The EFTA States' labour legislation may comprise general social security schemes under which redundancy benefits and early retirement pensions are paid direct to redundant employees. Such schemes are not to be regarded as state aid falling within the scope of Article 61(1) of the EEA Agreement.

(61) Besides direct redundancy benefit and early retirement provision for employees, general social support schemes frequently provide for the government to cover the cost of benefits which the company grants to redundant workers and which go beyond its statutory or contractual obligations. Where such schemes are available generally without sectoral limitations to any worker meeting predefined and automatic eligibility conditions, they are not deemed to involve aid under Article 61(1) for firms undertaking restructuring. On the other hand, if the schemes are used to support restructuring in particular industries, they may well involve aid because of the selective way in which they are used¹⁹.

¹⁹ In its judgment in Case C-241/94, *France v Commission* [1996] ECR I-4551), (*Kimberly Clark Sopalin*), the European Court of Justice confirmed that the system of financing on a discretionary basis by the French authorities, through the National Employment Fund, was liable to place certain firms in a more favourable situation than others and thus to qualify as aid within the meaning of

- (62) The obligations a company itself bears under employment legislation or collective agreements with trade unions, to provide redundancy benefits and/or early retirement pensions are part of the normal costs of a business which a firm has to meet from its own resources. That being so, any contribution by the State to these costs must be counted as aid. This is true regardless of whether the payments are made direct to the firm or are administered through a government agency to the employees.
- (63) The Authority has no a priori objection to such aid when it is granted to firms in difficulty, for it brings economic benefits above and beyond the interests of the firm concerned, facilitating structural change and reducing hardship.
- (64) Besides meeting the cost of redundancy payments and early retirement, aid is commonly provided in connection with a particular restructuring scheme for training, counselling and practical help with finding alternative employment, assistance with relocation, and professional training and assistance for employees wishing to start new businesses. The Authority consistently takes a favourable view of such aid when it is granted to firms in difficulty.
- (65) The type of aid described in points 61 - 64 must be clearly identified in the restructuring plan, since aid for social measures exclusively for the benefit of redundant employees is disregarded for the purposes of determining the extent of the compensatory measures referred to in points 37 - 41.
- (66) In the common interest, the Authority will ensure in the context of the restructuring plan that social effects of the restructuring in other Contracting Parties to the EEA Agreement other than the one granting aid are kept to the minimum.

3.2.7. Need to inform the Authority of any aid granted to the recipient firm during the restructuring period

- (67) Where restructuring aid received by a large or medium-sized enterprise is examined under these Guidelines, the grant of any other aid during the restructuring period, even in accordance with a scheme that has already been authorised, is liable to influence the Authority's assessment of the extent of the compensatory measures required.
- (68) Notifications of aid for restructuring a large or medium-sized enterprise must indicate all other aid of any kind which is planned to be granted to the recipient firm

Article 87(1) of the EC Treaty. (The Court's judgment did not call into question the Commission's conclusion that the aid was compatible with the common market.)

during the restructuring period, unless it is covered by the de minimis rule or by exemption regulations.

- (69) The Authority shall take such aid into account when assessing the restructuring aid.
- (70) Any aid actually granted to a large or medium-sized enterprise during the restructuring period, including aid granted in accordance with an approved scheme, must be notified individually to the Authority to the extent that the latter was not informed thereof at the time of its decision on the restructuring aid.
- (71) The Authority shall ensure that the grant of aid under approved schemes is not liable to circumvent the requirements of these Guidelines.

3.3. "One time, last time"

- (72) Rescue aid is a one-off operation primarily designed to keep a company in business for a limited period, during which its future can be assessed. It should not be possible to allow repeated granting of rescue aids that would merely maintain the status quo, postpone the inevitable and in the meantime shift economic and social problems on to other, more efficient producers or other Contracting Parties to the EEA Agreement. Hence, rescue aid should be granted only once ("one time, last time" condition). In accordance with the same principle, in order to prevent firms from being unfairly assisted when they can only survive thanks to repeated State support, restructuring aid should be granted once only. Finally, if rescue aid is granted to a firm that has already received restructuring aid, it can be considered that the beneficiary's difficulties are of a recurrent nature and that repeated State interventions give rise to distortions of competition that are contrary to the common interest. Such repeated State interventions should not be permitted.
- (73) When planned rescue or restructuring aid is notified to the Authority, the EFTA State must specify whether the firm concerned has already received rescue or restructuring aid in the past, including any such aid granted before the date of application of these Guidelines and any unnotified aid²⁰. If so, and where less than 10 years have elapsed since the rescue aid was granted or the restructuring period came to an end or implementation of the restructuring plan has been halted (whichever is the latest), the Authority will not allow further rescue or restructuring aid. Exceptions to that rule are permitted in the following cases:

²⁰ With regard to unnotified aid, the Authority will take account in its appraisal of the possibility that the aid could have been declared compatible with the EEA Agreement other than as rescue or restructuring aid.

- a) where restructuring aid follows the granting of rescue aid as part of a single restructuring operation;
- b) where rescue aid has been granted in accordance with the conditions in Section 3.1.1, and this aid was not followed by a State supported restructuring, if:
 - (i) the firm could reasonably be believed to be viable in the long- term following the granting of rescue aid, and
 - (ii) new rescue or restructuring aid becomes necessary after at least five years due to unforeseeable circumstances²¹ for which the company is not responsible;
- c) in exceptional and unforeseeable circumstances for which the company is not responsible.

In the cases set out in points (b) and (c), the simplified procedure mentioned in Section 3.1.2 cannot be used.

- (74) The application of this rule will in no way be affected by any changes in ownership of the recipient firm following the grant of aid or by any judicial or administrative procedure which has the effect of putting its balance sheet on a sounder footing, reducing its liabilities or wiping out its previous debts where it is the same firm that is continuing in business.
- (75) Where a business group has received rescue or restructuring aid, the Authority will normally not allow further rescue or restructuring aid to the group itself or any of the entities belonging to the group unless 10 years have elapsed since the rescue aid was granted or the restructuring period came to an end or implementation of the restructuring plan has been halted, whichever is the latest. Where an entity belonging to a business group has received rescue or restructuring aid, the group as a whole as well as the other entities of the group remain eligible for rescue or restructuring aid (subject to compliance with the other provisions of these Guidelines), with the exception of the earlier beneficiary of the aid. EFTA States must ensure that no aid will be passed on from the group or other group entities to the earlier beneficiary of the aid.
- (76) Where a firm takes over assets of another firm, and in particular one that has been the subject of one of the procedures referred to in point 73 or of collective insolvency

²¹ An unforeseeable circumstance is one which could in no way be anticipated by the company's management when the restructuring plan was drawn up and which is not due to negligence or errors of the company's management or decisions of the group to which it belongs.

proceedings brought under national law and has already received rescue or restructuring aid, the purchaser is not subject to the "one time, last time" requirement, provided that the following cumulative conditions are met:

- a) the purchaser is clearly separate from the old firm;
- b) the purchaser has acquired the old firm's assets at market prices;
- c) the winding-up or court-supervised administration and purchase of the old company are not merely devices aimed at evading application of the "one time, last time" principle: the Authority may determine that this was the case if, for example, the difficulties encountered by the purchaser were clearly foreseeable when it took over the assets of the old company.

(77) It should, however, be stressed here that, since it constitutes aid for initial investment, aid for the purchase of the assets cannot be authorised under these Guidelines.

4. Aid schemes for SMEs

4.1. General principles

(78) The Authority will authorise schemes for providing rescue and/or restructuring aid to small or medium-sized enterprises in difficulty only where the firms concerned correspond to the definition of SMEs. Subject to the following specific provisions, the compatibility of such schemes will be assessed in the light of the conditions set out in Sections 2 and 3, with the exception of Section 3.1.2 which does not apply to aid schemes. Any aid which is granted under a scheme but does not meet any of those conditions must be notified individually and approved in advance by the Authority.

4.2. Eligibility

(79) Unless otherwise stipulated in rules on state aid in a particular sector, awards of aid under schemes authorised from the date of application of these Guidelines, to small or medium-sized enterprises will be exempted from individual notification only where the enterprise concerned meets at least one of the three criteria set out in point 9. Aid to enterprises that do not meet any of those three criteria must be notified individually to the Authority so that it can assess whether they qualify as firms in difficulty. Aid to enterprises active in a market suffering from long-term structural

overcapacity, irrespective of the size of the beneficiary, must also be notified individually to the Authority so that it can assess the application of point 41.

4.3. Conditions for the authorisation of rescue aid schemes

(80) In order to be approved by the Authority, rescue aid schemes must satisfy the conditions set out in points (a), (b), (d) and (e) of point 24. Furthermore, rescue aid may not be granted for more than six months, during which time an analysis must be made of the firm's position. Before the end of that period the EFTA State must either approve a restructuring plan or a liquidation plan, or demand reimbursement of the loan and the aid corresponding to the risk premium from the beneficiary.

(81) Any rescue aid granted for longer than six months or not reimbursed after six months must be individually notified to the Authority.

4.4. Conditions for the authorisation of restructuring aid schemes

(82) The Authority will authorise restructuring aid schemes only if the grant of aid is conditional on full implementation by the recipient of a restructuring plan that has been approved by the EFTA State concerned and meets the following conditions:

a) restoration of viability: the criteria set out in points 33 - 36 apply;

b) avoidance of undue distortions of competition: since aid to small enterprises tends to distort competition less, the principle set out in points 37 - 41 does not apply unless it is otherwise stipulated in rules on state aid in a particular sector; schemes should nevertheless provide that recipient firms must not increase their capacity during the restructuring; for medium-sized enterprises points 37 - 41 apply;

c) aid limited to the minimum necessary: the principles set out in points 42, 43 and 44 apply;

d) amendment of the restructuring plan: any changes to the plan must comply with the rules set out in points 51, 52 and 53.

4.5. Common conditions for the authorisation of rescue and/or restructuring aid schemes

(83) Schemes must specify the maximum amount of aid that can be awarded to any one firm as part of an operation to provide rescue and/or restructuring aid, including where the plan is modified. Any aid exceeding that amount must be notified individually to the Authority. The maximum amount of aid granted for the combined

rescue and restructuring aid of any one firm may not be more than EUR 10 million, including any aid obtained from other sources or under other schemes.

(84) In addition, the "one time, last time"-principle must be respected. The rule laid down in Section 3.3 applies.

(85) EFTA States must also notify measures individually to the Authority where one firm takes over assets of another firm which has itself already received rescue or restructuring aid.

4.6. Monitoring and annual reports

(86) Points 48, 49 and 50 do not apply to aid schemes. However, it will be a condition of approval that reports are presented on the scheme's operation, normally on an annual basis, containing the information specified in the Authority's instructions on standardised reports²². The reports must also include a list of all beneficiary companies, indicating for each of them:

- a) company name;
- b) the company's sectoral code, using the NACE²³ three-digit sectoral classification codes;
- c) number of employees;
- d) annual turnover and balance sheet value;
- e) amount of aid granted;
- f) amount and form of the beneficiary's contribution;
- g) where appropriate, the form and the degree of the compensatory measures;
- h) where appropriate, any restructuring aid, or other support treated as such, which it has received in the past;
- i) whether or not the beneficiary company has been wound up or subject to collective insolvency proceedings before the end of the restructuring period.

²² See Annex III. A and B (standardised reporting format for existing State aid) to the EFTA Surveillance Authority decision 195/04/COL of 14.07.2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement (not yet published).

²³ Statistical classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

5. Appropriate measures as referred to in Article 1(1) in Part I of Protocol 3 to the Surveillance and Court Agreement

(87) The Authority will propose, by separate letter, pursuant to Article 1(1) in Part I of Protocol 3 to the Surveillance and Court Agreement, that the EFTA States adopt appropriate measures as set out in points 87 - 88 with regard to their existing aid schemes. The Authority will make authorisation of any future scheme conditional on compliance with those provisions.

(88) EFTA States which have accepted the Authority's proposal must adapt their existing aid schemes which are to remain in operation after the adoption within six months in order to bring them into line with these Guidelines.

(89) EFTA States must indicate their acceptance of these appropriate measures within one month following receipt of said letter proposing appropriate measures.

6. Date of application and duration

(90) The present Guidelines shall enter into force on the date of adoption. They shall remain in force, unless otherwise stipulated in any new decision, until 30 November 2012.²⁴

(91) Notifications registered by the Authority prior to the date of adoption will be examined in the light of the criteria in force at the time of notification.

(92) The Authority will examine the compatibility with the EEA Agreement of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement on the basis of these Guidelines if some or all of the aid is granted after their publication in the Official Journal of the European Union and the EEA Supplement thereto. In all other cases it will conduct the examination on the basis of the Guidelines which apply at the time the aid is granted.

²⁴ EFTA Surveillance Authority Decision 433/09/COL of 30/10/2009 amending for the seventy-third time the procedural and substantive rules in the field of state aid.

Annex

Formula²⁵ to calculate maximum amount of rescue aid to qualify for the simplified procedure:

$$\frac{\text{EBIT}_t + \text{depreciation}_t + (\text{working capital}_t - \text{working capital}_{t-1})}{2}$$

The formula is based on the operating results of the company (EBIT, earnings before interest and taxes) recorded in the year before granting/notifying the aid (indicated as t). To this amount depreciation has been added. Then changes in working capital must be added to the total. The change in working capital is calculated as the difference between the current assets and current liabilities²⁶ for the latest closed accounting periods. Similarly, if there would be provisions at the level of the operating result, this will need to be clearly indicated and the result should not include such provisions.

The formula aims at estimating the negative operating cash flow of the company in the year preceding the application for the aid (or before the award of the aid in case of non-notified aids). Half of this amount should keep the company in business for a six-month period. Thus the result of the formula has to be divided by 2.

This formula can only be applied where the result is a negative amount.

In case the formula leads to a positive result, a detailed explanation will need to be submitted demonstrating that the firm is in difficulty as defined in points 9 - 10.

²⁵ EBIT (earnings before interest and taxes as set out in the annual accounts of the year before the application, indicated as t) must be increased with depreciation in the same period plus the changes in working capital over a 2 year period (year before the application and preceding year), divided by two to determine an amount over 6 months, i.e. normal period for permitting rescue aid.

²⁶ Current assets: liquid funds, receivables (client and debtor accounts), other current assets and prepaid expenses, inventories.
Current liabilities: financial debt, trade accounts payable (supplier and creditor accounts) and other current liabilities, deferred income, other accrued liabilities, tax liabilities.

Example:

Earnings before interest and taxes (m €) (12)

Depreciation (m €) 2

Balance Sheet December 31, t-1 December 31, t

(m €)

Current assets

Cash or equivalents 10 5

Accounts receivable 30 20

Inventories 50 45

Prepaid expenses 20 10

Other current assets 20 20

Total current assets 130 100

Current liabilities

Accounts payable 20 25

Accrued expenses 15 10

Deferred income 5 5

Total current liabilities 40 40

Working capital 90 60

Change in working capital (30)

Maximum amount of rescue aid = $[-12 + 2 + (-30)] / 2 = -20$ million €

As the outcome of the formula is higher than 10 million €, the simplified procedure described in point 29 cannot be used. If this limit is exceeded, the EFTA State should provide an explanation of how the future cash-flow needs of the company and the amount of rescue aid have been determined.