

PART IV: SECTOR SPECIFIC RULES

Guidelines on state aid for railway undertakings¹

1 Introduction

1.1 General context: the railway sector

- (1) The railways have unique advantages: they are a safe and clean mode of transport. Rail transport therefore has great potential for contributing to the development of sustainable transport in the European Economic Area.
- (2) The European Commission White Paper “European transport policy for 2010: time to decide”² and its mid-term review³ underline to what extent a dynamic railway industry is necessary for establishing an efficient, clean and safe goods and passenger transport system that will contribute to the creation of a single European market enjoying lasting prosperity. The EEA Consultative Committee resolution and report on “An Ambitious Transport Policy”⁴ further underline the importance of such a dynamic railway industry for the EEA. The road congestion plaguing the towns and certain areas of the EEA, the need to face up to the challenges of climate change, and the increase in fuel prices show how necessary it is to stimulate the development of rail transport. In this respect it should be pointed out that the common transport policy also has to pursue the environmental objectives set by the EEA Agreement⁵ and the Treaty Establishing the European Community.⁶

¹ This Chapter corresponds to the Community Guidelines on State aid for railway undertakings published in OJ C 184, 22.7.2008, p. 13.

² COM (2001) 370 of 12.9.2001, p. 18.

³ Communication from the European Commission ‘Keep Europe moving - Sustainable mobility for our continent - Mid-term review of the Transport White Paper’, COM (2006) 314, 22.6.2006, p. 21.

⁴ Available at the EFTA webpage: <http://www.efta.int/content/advisory-bodies/resolutions-and-opinions/CCRes/transport/view>.

⁵ Paragraph 9 of the Preamble of the EEA Agreement acknowledges the determination of the Contracting Parties to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development, as well as the principle that precautionary and preventive action should be taken. In accordance with Article 1 of the EEA Agreement the parties should strive for closer cooperation on environmental issues. By virtue of Article 73 of the EEA Agreement, the Contracting Parties shall have, amongst others, the objective to “preserve, protect and improve the quality of the environment” when taking action in the area of the four freedoms. Moreover, Article 78 of the EEA Agreement encourages the Contracting Parties to strengthen and broaden cooperation in the framework of the Community’s activities amongst others in the field of environment.

⁶ Article 2 of the EC Treaty stipulates as one of the main objectives of the Community that of promoting “sustainable and non-inflationary growth” respecting the environment. These provisions are supplemented by specific objectives set out in Article 174, which provides that Community environment policy shall contribute in particular to preserving, protecting and improving the quality of the environment. Article 6 of the Treaty provides that “Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development”.

- (3) However, rail transport in Europe has an image problem, having declined steadily from the 1960s to the end of the 20th century. Both goods and passenger traffic volumes have fallen in relative terms compared with the other transport modes. Rail freight has even shown a decline in absolute terms: loads transported by rail were higher in 1970 than in 2000. The traditional railway undertakings were unable to offer the reliability and good timekeeping their customers expected of them, which led to a shift of traffic from rail to the other modes of transport, chiefly road⁷. Although passenger transport by rail might have continued to grow in absolute terms, this increase seems very limited compared with that of road and air transport⁸.
- (4) This trend seems to have reversed recently⁹, but there is still a long way to go for rail transport to become sound and competitive. Particularly in the rail freight transport sector there continue to be major difficulties which call for public-sector action¹⁰.
- (5) The relative decline in Europe's railway industry is largely due to the way transport supply has been organised historically, essentially on national and monopolistic lines.
- (6) First of all, in the absence of competition on the national networks, railway undertakings had no incentive to reduce their operating costs and develop new services. Their activities did not bring in sufficient revenue to cover all the costs and investments necessary. These essential investments were not always made and sometimes the EEA States forced the national railway undertakings into making them when they were not in a position to finance them adequately from their own resources. The result was heavy indebtedness for these undertakings, which itself had a negative impact on their development.
- (7) Secondly, the development of rail transport in Europe was hamstrung by the lack of standardisation and interoperability on the networks, while road hauliers and air carriers had been able to develop a whole range of international services. The EEA has inherited a mosaic of national rail networks characterised by different track gauges and incompatible signalling and safety systems, which do not allow the railway undertakings to benefit from the economies of scale which would result from designing infrastructure and rolling stock for a large single market rather than for 27¹¹ national markets.
- (8) The EEA is conducting a three-pronged policy to revitalise the rail industry by:
 - (a) gradually introducing conditions fostering competition on the rail transport services markets;

⁷ In the EU, from 1995 to 2005 rail freight (expressed in tonne-km) increased by 0,9% per year on average, as against 3,3% average annual growth for road during the same period (source: Eurostat).

⁸ In the EU, from 1995 to 2004 passenger rail transport (expressed in passenger-km) increased by 0,9% per year on average, as against 1,8% average annual growth for private vehicles during the same period (source: Eurostat).

⁹ Since 2002, particularly in those countries which have opened up their markets to competition. In 2006 there was a 3,7% growth on the year in rail freight performance and 3% in the performance of passenger transport. This improvement is likely to continue in 2007.

¹⁰ Communication from the European Commission 'Towards a rail network giving priority to freight' (SEC(2007) 1322, SEC(2007) 1324 and SEC(2007) 1325, 18.10.2007).

¹¹ Iceland, Malta and Cyprus do not have rail transport networks.

- (b) encouraging standardisation and technical harmonisation on the European rail networks, aiming at full interoperability at the European level;
 - (c) granting financial support at the EEA level (in the TEN-T programme and the Structural Funds framework).
- (9) The EEA has thus gradually opened up the rail transport markets to competition. An initial liberalisation package was adopted in 2001 including Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways¹², Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings¹³, Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification¹⁴. That package was followed by a second package in 2004 the main instruments of which were Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency¹⁵, Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification¹⁶, Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system¹⁷ and Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways¹⁸. A third package

¹² OJ L 75, 15.3.2001, p. 1.

¹³ OJ L 75, 15.3.2001, p. 26.

¹⁴ OJ L 75, 15.3.2001, p. 29. The Directive was last amended by Directive 2007/58/EC (OJ L 315, 3.12.2007, p. 44). EEA incorporation of Directive 2007/58/EC is pending. The Directives 2001/12/EC, 2001/13/EC and 2001/14/EC were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 118/2001 of 28 September 2001 (OJ L 322, 6.12.2001, p. 32, and EEA Supplement No 60, 6.12.2001, p. 29). This Decision amended the Decision of the EEA Joint Committee No 7/94 of 21 March 1994 on the incorporation of Council Directive 91/440/EEC (OJ L 160, 28.6.1994, p. 1, and EEA Supplement No 17, 28.6.1994, p.1) and the Decision of the EEA Joint Committee No 71/95 of 15 December 1995 on the incorporation of Council Directive 95/18/EC (OJ L 57, 7.3.1996, p. 37, and EEA Supplement No 11, 7.3.1996, p. 14).

¹⁵ OJ L 164, 30.4.2004, p. 1. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 82/2005 of 10 June 2005 (OJ L 268, 13.10.2005, p. 13, and EEA Supplement No 52, 13.10.2005, p. 7).

¹⁶ OJ L 164, 30.4.2004, p. 44.

¹⁷ OJ L 164, 30.4.2004, p. 114.

¹⁸ OJ L 164, 30.4.2004, p. 164. The Directives 2004/49/EC, 2004/50/EC and 2004/51/EC were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 151/2004 of 29 October 2004 (OJ L 102, 21.4.2005, p. 27, and EEA Supplement No 20, 21.4.2005, p. 17). This Decision amended the Decision of the EEA Joint Committee No 71/95 of 15 December 1995 on the incorporation of Council Directive 95/18/EC (OJ L 57, 7.3.1996, p. 37, and EEA Supplement No 11, 7.3.1996, p. 14), the Decision of the EEA Joint Committee No 118/2001 of 28 September 2001 on the incorporation of Directives 2001/12/EC, 2001/13/EC and 2001/14/EC (OJ L 322, 6.12.2001, p. 32, and EEA Supplement No 60, 6.12.2001, p.29), the Decision of the EEA Joint Committee No 25/97 of 30 April 1997 on the adoption of Directive 96/48/EC (OJ L 242, 4.9.1997, p. 74, and EEA Supplement No 37, 4.9.1997, p.74), the Decision of the EEA Joint Committee No 16/2002 of 1

was adopted in 2007 comprising Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70¹⁹, Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations²⁰, Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure²¹ and Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community²². The rail freight market was opened to competition on 15 March 2003 on the trans-European rail freight network, then on 1 January 2006 for international freight and finally from 1 January 2007 for rail cabotage. The third railway package sets 1 January 2010 as the date for opening up international passenger transport to competition. Some of the EEA States, such as the United Kingdom, Germany, the Netherlands and Italy, have already (partially) opened up their domestic passenger transport markets.

- (10) The relevant provisions of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways²³, put in place a new institutional and organisational framework for the players in the railway industry, involving:
- (a) separating railway undertakings²⁴ from infrastructure managers²⁵ as regards accounts and organisation;
 - (b) management independence of railway undertakings;
 - (c) management of railway undertakings according to the principles which apply to commercial companies;
 - (d) financial equilibrium of railway undertakings according to a sound business plan;

March 2002 on the adoption of Directive 2001/16/EC (OJ L 110, 25.4.2002, p. 11, and EEA Supplement No 21, 25.4.2002, p. 8) and the Decision of the EEA Joint Committee No 7/94 of 21 March 1994 on the incorporation of Council Directive 91/440/EEC (OJ L 160, 28.6.1994, p. 1, and EEA Supplement No 17, 28.6.1994, p. 1).

¹⁹ OJ L 315, 3.12.2007, p. 1. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 85/2008 of 2 July 2008 (not yet published).

²⁰ OJ L 315, 3.12.2007, p. 14. Incorporation into the EEA Agreement is pending.

²¹ OJ L 315, 3.12.2007, p. 44. Incorporation into the EEA Agreement is pending.

²² OJ L 315, 3.12.2007, p. 51. Incorporation into the EEA Agreement is pending.

²³ OJ L 237, 24.8.1991, p. 25. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 7/94 of 21 March 1994. Directive as last amended by Directive 2007/58/EC.

²⁴ Article 3 of Directive 91/440/EEC defines a railway undertaking as "any public or private undertaking licensed according to applicable Community legislation, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking must ensure traction; this also includes undertakings which provide traction only".

²⁵ Article 3 of Directive 91/440/EEC defines an infrastructure manager as "any body or undertaking responsible in particular for establishing and maintaining railway infrastructure. This may also include the management of infrastructure control and safety systems. The functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings".

- (e) compatibility of EEA States' financial measures with the state aid rules²⁶.
- (11) Alongside this liberalisation process, the European Commission and the EEA Joint Committee have undertaken, on a second level, to promote the interoperability of European rail networks. This approach has been accompanied by EEA initiatives to improve the safety standard of rail transport²⁷.
- (12) The third level of public intervention in favour of the railway industry lies in the area of financial support. The European Commission considers this support to be justified in certain circumstances in view of the substantial adaptation costs necessary in that industry.
- (13) The European Commission notes, furthermore, that there has always been considerable injection of public funds in the rail transport sector.
- (14) The granting of state aid to the railway industry can be authorised only where it contributes to the completion of an integrated EEA market, open to competition and interoperable and to EEA objectives of sustainable mobility. The European Commission and the EFTA Surveillance Authority will accordingly make sure that public-sector financial support does not cause distortions of competition contrary to the common interest. Here the European Commission and the EFTA Surveillance Authority will in certain cases be able to ask EEA States for commitments on the EEA objectives in return for the granting of aid.

1.2 Objective and scope of these guidelines

- (15) The objective of these guidelines is to provide guidance on the compatibility with the EEA Agreement of state aid to railway undertakings as it is defined in Directive 91/440/EEC and in the context described above. In addition, chapter 3 also applies to urban, suburban and regional passenger transport undertakings. The guidelines are based in particular on the principles established by the Community legislator in the three successive railway packages. Their aim is to improve the transparency of public financing and legal certainty with regard to the state aid rules in the context of the opening-up of the EEA markets. These guidelines do not concern public financing intended for infrastructure managers.
- (16) Article 61(1) of the EEA Agreement provides that in principle any aid granted by EC Member States or EFTA States which threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between EEA States, incompatible with the common market. Nevertheless, such state aid may in certain situations be justified in the light of the common interest of the EEA. Some of these situations are mentioned in Article 61(3) of the EEA Agreement, and apply to the transport sector as they do to other sectors of the economy.
- (17) Also, Article 49 of the EEA Agreement provides that aid is compatible with the EEA 'if it meets the needs of coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of

²⁶ Article 9(3) of Directive 91/440/EEC states: "Aid accorded by Member States to cancel the debts referred to in this Article shall be granted in accordance with Articles 73, 87 and 88 of the Treaty".

²⁷ In particular, Directive 2004/49/EC incorporated into the EEA Agreement by Decision of the EEA Joint Committee 151/2004 29 October 2004.

a public service'. This Article constitutes a *lex specialis* in the general scheme of the EEA Agreement. On the basis of the corresponding EC Treaty Article 73 the Community legislator has adopted two instruments specific to the transport sector: Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway²⁸ and Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway²⁹. Regulation (EEC) No 1192/69 of the Council of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings³⁰ likewise provides that certain compensation may be granted by Member States to railway undertakings.³¹

- (18) Article 3 of Regulation (EEC) No 1107/70 provides that EEA States are neither to take coordination measures nor to impose obligations inherent in the concept of a public service which involve the granting of aid pursuant to Article 49 of the EEA Agreement except in the cases or circumstances provided for by the Regulation in question, without prejudice, however, to Regulations (EEC) No 1191/69 and (EEC) No 1192/69. According to the judgment of the European Court of Justice in *Altmark*³², it follows that state aid which cannot be authorised on the basis of Regulations (EEC) No 1107/70, (EEC) No 1191/69 or (EEC) No 1192/69 cannot be declared compatible on the basis of Article 73 of the EC Treaty³³. In addition, it should be recalled that public service compensation which does not respect provisions stemming from Article 49 of the EEA Agreement cannot be declared compatible with the common market on the basis of Article 59(2) or any other provision of the EEA Agreement³⁴.
- (19) Regulation (EC) No 1370/2007 ('the PSO Regulation')³⁵, which will enter into force on 3 December 2009 and which repeals Regulations (EEC) No 1191/69 and (EEC) No 1107/70, will put in place a new legal framework. The aspects relating to public service compensation are therefore not covered by these guidelines.
- (20) After the entry into force of Regulation (EC) No 1370/2007 Article 49 of the EEA Agreement will be directly applicable as a legal basis for establishing the compatibility of aid not covered by the PSO Regulation, and in particular aid for the coordination of freight transport. A general interpretation therefore needs to be developed for considering the compatibility of aid for coordination purposes

²⁸ OJ L 156, 28.6.1969, p. 1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

²⁹ OJ L 130, 15.6.1970, p. 1.

³⁰ OJ L 156, 28.6.1969, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

³¹ These three sets of regulations were made part of the EEA Agreement from its conception.

³² Judgment of the Court of Justice of 24 July 2003, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ('*Altmark*') [2003] ECR I-7747.

³³ Judgment in *Altmark*, paragraph 107.

³⁴ See, in that regard, recital 17 of European Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67). This Decision is incorporated to the EEA Agreement by the Decision of the EEA Joint Committee No 91/2006 of 7 July 2006 (OJ L 286, 19.10.2006, p. 31, and EEA Supplement No 52, 19.10.2006, p. 24.). Article 86(2) EC corresponds to Article 59(2) of the EEA Agreement.

³⁵ Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 85/2008 of 4 July 2008 (OJ L 280, 23.10.2008, p. 20 and EEA Supplement No 64, 23.10.2008, p. 13).

with Article 49 of the EEA Agreement. The aim of these guidelines is in particular to establish criteria for this examination and intensity thresholds. In view of the wording of Article 49, the EFTA Surveillance Authority must nevertheless make it possible for the EFTA States to show, where appropriate, the need for and proportionality of any measures which exceed the thresholds established.

- (21) These guidelines concern the application of Articles 49 and 61 of the EEA Agreement and their implementation with regard to public funding for railway undertakings within the meaning of Directive 91/440/EEC. They deal with the following aspects: public financing of railway undertakings by means of infrastructure funding (Chapter 2), aid for the purchase and renewal of rolling stock (Chapter 3), debt cancellation by States with a view to the financial rejuvenation of railway undertakings (Chapter 4), aid for restructuring railway undertakings (Chapter 5), aid for the needs of transport coordination (Chapter 6), and State guarantees for railway undertakings (Chapter 7). However, these guidelines do not deal with the rules for the application of the PSO Regulation, for which neither the European Commission nor the EFTA Surveillance Authority have yet developed any decision-making practice³⁶.

2 Public financing of railway undertakings by means of railway infrastructure funding

- (22) Railway infrastructure is of major importance for the development of the railway sector in Europe. Whether for interoperability, safety or the development of high-speed rail, considerable investments will have to be made in this infrastructure³⁷.
- (23) These guidelines apply only to railway undertakings. Their aim is therefore not to define, in the light of state aid rules, the legal framework which applies to the public financing of infrastructure. This chapter only examines the effects of public financing of infrastructure on railway undertakings.
- (24) Moreover, public financing of infrastructure development can grant an advantage to railway undertakings indirectly and thereby constitute aid. According to the case-law of the European Court of Justice, it should be evaluated whether the infrastructure measure has the economic effect of lightening the burden of charges normally encumbering railway undertakings' budgets³⁸. For that to be the case, a selective advantage would have to be granted to the undertakings concerned, that advantage originating in the financing of the infrastructure in question³⁹.

³⁶ Nor do they concern the application of Regulation (EEC) No 1192/69. This regulation was made part of the EEA Agreement from its conception.

³⁷ Communication from the European Commission 'Keep Europe moving - Sustainable mobility for our continent - Mid-term review of the Transport White Paper'. See also the EEA Consultative Committee resolution and report on "An Ambitious Transport Policy".

³⁸ Judgment of the European Court of Justice of 13 June 2002, Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163.

³⁹ Judgment of the European Court of Justice of 19 September 2000, Case C-156/98 *Germany v Commission* [2000] ECR I-6857.

- (25) Where infrastructure use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with EEA legislation (Directive 2001/14/EC), the European Commission and the EFTA Surveillance Authority normally consider that public financing of the infrastructure does not constitute state aid to railway undertakings⁴⁰.
- (26) The EFTA Surveillance Authority points out that, where public financing of railway infrastructure constitutes aid to one or more railway undertakings, it may be authorised, for example on the basis of Article 49 of the EEA Agreement, if the infrastructure in question meets the needs of transport coordination. In this regard, Chapter 6 of these guidelines is a pertinent reference point for assessing compatibility.

3 Aid for the purchase and renewal of rolling stock

3.1 Objective

- (27) The fleet of locomotives and carriages used for passenger transport is ageing and in some cases worn out, especially in the new EU Member States. In 2005, 70% of the locomotives (diesel and electric) and 65% of the wagons of the EU-25 and Norway were more than 20 years old⁴¹. Taking only the Member States which joined the European Union in 2004, 82% of locomotives and 62% of wagons were more than 20 years old in 2005⁴². According to the information at its disposal, the European Commission estimates that the annual rate of renewal of the fleet is around 1%.
- (28) This trend of course reflects the difficulties of the railway industry in general, which reduce the incentives for railway undertakings and their capacity to invest in an effort to modernise and/or renew their rolling stock. Such investment is indispensable to keeping rail transport competitive with other modes of transport which cause more pollution or entail higher external costs. It is also necessary to

⁴⁰ European Commission Decision of 7 June 2006, N 478/2004, State guarantee for capital borrowings by Córas Iompair Éireann (CIÉ) for infrastructure investment, OJ C 209, 31.8.2006, p. 8; Decision of 8 March 2006, N 284/2005, Ireland - Regional Broadband Programme (OJ C 207, 30.8.2006, p. 3), point 34; and the following Decisions: Decision 2003/227/EC of 2 August 2002 on various measures and the state aid invested by Spain in “Terra Mítica SA”, a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), point 64; Decision of 20 April 2005, N 355/2004 PPP, Belgium - Public-Private-Partnership for tunnelling the Krijgsbaan at Deurne; the development of industrial estates and the operation of Antwerp Airport (OJ C 176, 16.7.2005, p. 11), point 34; Decision of 11 December 2001, N 550/2001, Belgium - Public-private partnership for loading and unloading facilities (OJ C 24, 26.1.2002, p. 2), point 24; Decision of 20 December 2001, N 649/2001, United Kingdom - Freight Facilities Grant (OJ C 45, 19.2.2002, p. 2), point 45; Decision of 17 July 2002, N 356/2002, United Kingdom - Network Rail (OJ C 232, 28.9.2002, p. 2), point 70; N 511/1995 Jaguar Cars Ltd. See also, the European Commission Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector (OJ C 350, 10.12.1994, p. 5), point 12, The EFTA Surveillance Authority adopted corresponding Guidelines by Decision No 124/95/COL of 6 December 1995 (OJ L 124, 23.5.1996, p. 41 and EEA Supplement No 23, 23.5.1996, p. 104); White Paper: Fair Payment for Infrastructure use (COM(1998)466 final, point 43; Communication from the European Commission to the European Parliament and the Council: “Reinforcing Quality Service in Sea Ports: A Key for European Transport” (COM(2001) 35 final, p. 11.

⁴¹ Source: UIC Rolling stock fleet in EU-25 + Norway (2005).

⁴² Source: CER (2005).

limit the impact of rail transport on the environment, particularly by reducing the noise pollution it causes, and to improve its safety. Finally, improving interoperability between the national networks means it is necessary to adapt the existing rolling stock in order to be able to maintain a coherent system.

- (29) In the light of the above it seems that under certain circumstances aid for the purchase and renewal of rolling stock can contribute to several types of objectives of common interest and therefore be considered compatible with the EEA Agreement.
- (30) This chapter seeks to define the conditions in which the EFTA Surveillance Authority is to carry out such a compatibility assessment.

3.2 Compatibility

- (31) The compatibility assessment has to be made according to the common-interest objective to which the aid is contributing.
- (32) The EFTA Surveillance Authority considers that in principle the need to modernise rolling stock can be sufficiently taken into account either in implementing the general state aid rules or by applying Article 49 of the EEA Agreement where such aid is intended for transport coordination (see chapter 6).
- (33) In assessing the compatibility of aid for rolling stock the EFTA Surveillance Authority therefore generally applies the criteria defined for each of the following aid categories in these guidelines or in any other relevant document:
 - (a) aid for coordination of transport⁴³;
 - (b) aid for restructuring railway undertakings⁴⁴;
 - (c) aid for small and medium-sized enterprises⁴⁵;
 - (d) aid for environmental protection⁴⁶;
 - (e) aid to offset costs relating to public service obligations and in the framework of public service contracts⁴⁷;

⁴³ See Chapter 6.

⁴⁴ See chapter 5, see also the EFTA Surveillance Authority Guidelines on state aid for rescuing and restructuring firms in difficulty adopted by Decision No 305/04/COL of 1 December 2004 (OJ L 97, 15.4.2005, p. 41 and EEA Supplement No 21, 28.4.2005, p. 1). See corresponding Community guidelines (OJ C 244, 1.10.2004, p. 2).

⁴⁵ European 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). Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85). The Regulation was incorporated into the EEA Agreement Annex XV by Decision of the EEA Joint Committee No 88/2002 of 25 June 2002 (OJ L 266, 3.10.2002, p. 56 and EEA Supplement No 49, 3.10.2002, p. 42).

⁴⁶ The EFTA Surveillance Authority adopted Guidelines on state aid for environmental protection by Decision No 500/08/COL of 16 July 2008 (Not yet published). See corresponding Community guidelines (OJ C 82, 1.4.2008, p. 1).

⁴⁷ Regulation (EEC) No 1191/69 cited above, incorporated into the EEA Agreement at its conception; PSO Regulation of the European Parliament and of the Council, cited above and incorporated into

- (f) regional aid⁴⁸.
- (34) In the case of regional aid for initial investment, the Guidelines on national regional aid, “the regional aid guidelines”, provide that ‘in the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for aid for initial investment’ (point 39, footnote 40). The EFTA Surveillance Authority considers that a derogation should be made from this rule with regard to rail passenger transport. This is due to the specific characteristics of this mode of transport, and in particular to the fact that it is possible that the rolling stock in this sector may be permanently assigned to specific lines or services. Subject to certain conditions, defined below, the costs of acquisition of rolling stock in the rail passenger transport sector (or for other modes such as light rail, underground or tram) are deemed to be admissible expenditure within the meaning of the guidelines in question⁴⁹. However, the costs of acquisition of rolling stock for exclusive use in freight transport are not admissible.
- (35) In view of the situation described in points 28 and 29, this derogation applies to any kind of investment in rolling stock, whether initial or for replacement purposes, so long as it is assigned to lines regularly serving a region eligible for aid under Article 61(3)(a) of the EEA Agreement or a region of low population density within the meaning of points 69 and 70 of the regional aid guidelines⁵⁰. In the other regions, the derogation applies only to aid for initial investment. For aid for investment for replacement purposes, the derogation applies only when all the rolling stock that the aid is used to modernise is more than 15 years old.
- (36) In order to avoid distortions of competition which would be contrary to the common interest, the EFTA Surveillance Authority does, however, consider that such a derogation has to be made subject to four conditions, which have to be met cumulatively:
- (a) the rolling stock concerned must be exclusively assigned to urban, suburban or regional passenger transport services in a specific region or for a specific line serving several different regions; For the purposes of these guidelines 'urban and suburban transport services' is to be understood as transport services serving an urban centre or conurbation as well as those services

the EEA Agreement by Decision of the EEA Joint Committee No 85/2008, in which attention should be drawn in particular to Article 3(1) of the Regulation: ‘Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract’.

⁴⁸ See point 8 of The EFTA Surveillance Authority Guidelines on national regional aid for 2007-2013 adopted by Decision 85/06/COL of 6 April 2006 (OJ L 54, 28.2.2008, p. 1 and EEA Supplement No 11, 28.2.2008, p. 1). See corresponding Community Guidelines (OJ C 54, 4.3.2006, p. 13, point 8).

⁴⁹ The EFTA Surveillance Authority notes that, depending on the specific circumstances of the case in point, this reasoning may be applied mutatis mutandis to vehicles used for the public transport of passengers by road, where such vehicles meet the latest Community standards applicable to new vehicles. Where that is the case, in the interests of equal treatment the EFTA Surveillance Authority will, in such situations, apply the approach described here for railway rolling stock. The EFTA Surveillance Authority encourages the EFTA State to support the least polluting technologies when awarding this type of aid and will study the extent to which specific financial aid leading to higher aid intensities for such technologies is appropriate.

⁵⁰ The least populated regions represent or belong to regions at NUTS-II level with a population density of no more than 8 inhabitants per km² and extend to adjacent and contiguous smaller areas meeting the same population density criterion.

between that centre or conurbation and its suburbs. 'Regional transport services' is to be understood as transport services intended to meet the transport needs of one or more regions. Transport services serving several different regions, in one or more EEA States, may therefore be covered by the scope of this point if it can be shown that there is an impact on the regional development of the regions served, in particular by the regular nature of the service. In this case, the EFTA Surveillance Authority verifies that the aid does not compromise the effective opening of the international passenger transport market and cabotage following the entry into force of the third railway package;

- (b) the rolling stock must remain exclusively assigned to the specific region or the specific line passing through several different regions for which it has received aid for at least ten years;
 - (c) the replacement rolling stock must meet the latest interoperability, safety and environmental standards⁵¹ applicable to the network concerned;
 - (d) the EFTA State must prove that the project contributes to a coherent regional development strategy.
- (37) The EFTA Surveillance Authority will take care to avoid undue distortions of competition, notably by taking account of the additional revenue that the replaced rolling stock on the line in question could procure for the enterprise aided, for example, through sales to a third party or use on other markets. To this end, the granting of the aid may be made subject to the obligation on the recipient undertaking to sell under normal market conditions all or part of the rolling stock it is no longer using, so as to allow its further use by other operators; in this case the proceeds from the sale of the old rolling stock will be deducted from the eligible costs.
- (38) More generally, the EFTA Surveillance Authority will ensure that no improper use is made of the aid. The other conditions provided for in the regional aid guidelines, notably as regards the intensity ceilings and the regional aid maps and the rules on the cumulation of aid, apply. The EFTA Surveillance Authority notes that the specific lines concerned may in certain cases pass through regions where there are different intensity ceilings in accordance with the regional aid maps. In this case the EFTA Surveillance Authority will apply the highest rate of intensity of the regions regularly served by the line concerned in proportion to the regularity of such service⁵².
- (39) With regard to investment projects with eligible expenditure in excess of EUR 50 million, the EFTA Surveillance Authority considers it appropriate, due to the specificities of the rail passenger transport sector, to derogate from points 49 to 59 of the regional aid guidelines. However, points 53 and 56 of those

⁵¹ Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards is possible within the Guidelines on state aid for environmental protection.

⁵² Where the line or specific service systematically (that is to say, on every journey) serves the region to which the highest rate applies, this rate is applied to all admissible expenditure. Where the region to which the highest rate applies is only occasionally served, this rate is applied only to the part of the admissible expenditure allocated to serving that region.

guidelines remain applicable when the investment project concerns rolling stock assigned to a specific line serving several regions.

- (40) If the recipient undertaking is entrusted with providing services of general economic interest that necessitate buying and/or renewing rolling stock and it already receives compensation for this, that compensation should be taken into account in the amount of regional aid that may be awarded to this undertaking, in order to avoid overcompensation.

4 Debt cancellation

4.1 Objective

- (41) As mentioned in section 1.1, railway undertakings have in the past experienced a state of imbalance between their revenues and their costs, especially their investment costs. This has led to major indebtedness, the financial servicing of which represents a very heavy burden on railway undertakings and limits their capacity to make the necessary investments in both infrastructure and renewal of rolling stock.
- (42) Directive 91/440/EEC explicitly took this situation into account. It follows from the seventh recital thereto that EEA States “should ensure in particular that existing publicly owned or controlled railway transport undertakings are given a sound financial structure” and envisages that a “financial rearrangement” might be necessary for this purpose. Article 9 of the Directive provides: “In conjunction with the existing publicly owned or controlled railway undertakings, Member States shall set up appropriate mechanisms to help reduce the indebtedness of such undertakings to a level which does not impede sound financial management and to improve their financial situation”. Article 9(3) envisages the granting of state aid “to cancel the debts referred to in this Article”, and provides that such aid must be granted in accordance with Articles 49, 61 and 62 of the EEA Agreement.⁵³
- (43) At the beginning of the 1990s, following the entry into force of Directive 91/440/EEC, the EEA States considerably reduced the debts of railway undertakings. The debt restructuring took different forms:
- (a) transfer of all or part of the debt to the body responsible for managing the infrastructure, thus enabling the railway undertaking to operate on a sounder financial footing. It was possible to make this transfer when transport service activities were separated from infrastructure management;
 - (b) the creation of separate entities for the financing of infrastructure projects (for example, high-speed lines), making it possible to relieve railway undertakings of the future financial burden which the financing of this new infrastructure would have meant;
 - (c) financial restructuring of railway undertakings, notably by the cancellation of all or part of their debts.

⁵³ See footnote 26.

- (44) These three types of action have helped to improve the financial situation of railway undertakings in the short term. Their indebtedness has been reduced compared with total liabilities, as has the share of interest repayments in the operating costs. In general the debt reduction has allowed railway undertakings to improve their financial situation through a reduction in their capital and interest repayments. Such reductions have also helped to lower the rates of interest, which has a substantial impact on the financial servicing of the debt.
- (45) However, the EFTA Surveillance Authority notes that the level of indebtedness of many railway undertakings continues to give cause for concern. Several of these undertakings have a level of indebtedness higher than is acceptable for a commercial company, are still not capable of self-financing, and/or cannot finance their investment needs from the revenue from present and future transport operations. Also, in the Member States which joined the European Community after 1 May 2004 the level of indebtedness of the companies in the sector is considerably higher than in the rest of the EEA.
- (46) This fact is reflected in the Community legislator's choice not to amend the provisions of Directive 1991/440/EEC when Directives 2001/12/EC and 2004/51/EC were adopted. These provisions therefore fall within the general framework formed by the successive railway packages.
- (47) This chapter seeks to define how, in the light of this requirement of secondary legislation, the EFTA Surveillance Authority intends to apply the rules on state aid in the EEA Agreement to the mechanisms for reducing the indebtedness of railway undertakings.

4.2 Presence of state aid

- (48) The EFTA Surveillance Authority notes first of all that the principle of incompatibility laid down in Article 61(1) of the EEA Agreement applies only to aid 'which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only 'in so far as it affects trade between Contracting Parties'. Under established case-law of the European Court of Justice, when state aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, these undertakings must be regarded as affected by that aid⁵⁴.
- (49) Any measure attributable to the State which leads to the complete or partial cancellation of debts specifically in favour of one or more railway undertakings and through State resources therefore falls within the scope of Article 61(1) of the EEA Agreement, if the railway undertaking in question is active in markets open to competition and if this debt cancellation strengthens its position in at least one of those markets.
- (50) The EFTA Surveillance Authority notes that Directive 2001/12/EC opened up the international rail freight services market to competition over the whole trans-European rail freight network from 15 March 2003. It therefore considers that,

⁵⁴ Judgment of the Court of Justice of 17 September 1980, Case 730/79 *Phillip Morris Holland v Commission* [1980] ECR 2671, paragraph 11.

generally, the market was opened up to competition at the latest on 15 March 2003.

4.3 Compatibility

- (51) When the cancellation of a railway undertaking's debt constitutes state aid covered by Article 61(1) of the EEA Agreement it must be notified to the EFTA Surveillance Authority in accordance with Article 62 of the EEA Agreement.
- (52) Aid of this kind must generally be examined on the basis of the EFTA Surveillance Authority guidelines on state aid for rescuing and restructuring firms in difficulty of 2004 (“the 2004 guidelines on state aid for restructuring”), subject to Chapter 5 of these Guidelines.
- (53) In specific cases where the debts cancelled exclusively concern transport coordination, compensation of public service obligations or the setting of accounting standards, the compatibility of this aid will be examined on the basis of Article 49 of the EEA Agreement, the regulations adopted for the implementation thereof and the rules for the normalisation of the accounts⁵⁵.
- (54) In the light of Article 9 of Directive 91/440/EEC, the EFTA Surveillance Authority also considers that, under certain circumstances, it should be possible to authorise this aid without financial restructuring if the cancellation concerns old debts incurred prior to the entry into force of Directive 2001/12/EC, which lays down the conditions for opening up the sector to competition.
- (55) The EFTA Surveillance Authority takes the view that this type of aid may be compatible in so far as it seeks to ease the transition to an open rail market, as provided for by Article 9 of Directive 91/440/EEC⁵⁶. Thus it considers that such aid may be regarded as compatible with Article 61(3)(c) of the Agreement⁵⁷, provided that the following conditions are met.
- (56) Firstly, the aid must serve to offset clearly determined and individualised debts incurred prior to 15 March 2001, the date on which Directive 2001/12/EC entered into force. Under no circumstances may the aid exceed the amount of these debts. The logic of Article 9 of Directive 91/440/EEC, repeated in subsequent Directives, was to address a level of debt accumulated at a time when a decision to open the market at EEA level had yet to be taken.
- (57) Secondly, the debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure. Debts incurred for the purpose of investment not directly linked to transport and/or rail infrastructure are not eligible.
- (58) Thirdly, the cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial

⁵⁵ Regulation (EEC) No 1192/69

⁵⁶ The EFTA Surveillance Authority applies, by analogy, certain conditions laid down by the European Commission communication relating to the methodology for analysing state aid linked to stranded costs of 26 July 2001, SEC(2001) 1238.

⁵⁷ Without prejudice to the application of Regulations (EEC) No 1191/69, (EEC) No 1192/69 and (EEC) No 1107/70.

management. The aid must be necessary to remedy this situation, insofar as the likely development of competition in the EEA would not allow them to rectify their financial situation within a foreseeable future. Assessment of this criterion has to take into account any productivity improvements which the undertaking can reasonably be expected to achieve.

- (59) Fourthly, the aid must not go beyond what is necessary for the purpose. In this regard, account must also be taken of future developments in competition. It should not, at any rate, place the undertaking in a situation more favourable than that of an average well-managed undertaking with the same activity profile.
- (60) Fifthly, cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition in the EEA, for example by deterring outside undertakings or new players from entering certain national or regional markets. In particular, aid intended for cancelling debts cannot be financed from levies imposed on other rail operators⁵⁸.
- (61) Where these conditions are met, the debt cancellation measures are contributing to the objective set in Article 9 of Directive 91/440/EEC, without unduly distorting competition and trade between EEA States. They can thus be considered compatible with the common market.

5 Aid for restructuring railway undertakings – restructuring a 'freight' division

5.1 Objective

- (62) Save where specifically provided otherwise, the EFTA Surveillance Authority assesses the compatibility of state aid for restructuring firms in difficulty in the railway industry on the basis of the 2004 guidelines on state aid for restructuring. Those guidelines do not provide for any derogation for railway undertakings.
- (63) Generally speaking, a division of an undertaking, namely an economic entity without legal personality, is not eligible for restructuring aid. The 2004 guidelines on state aid for restructuring apply only to “firms in difficulty”. They also state, at point 12, that a firm “belonging to or being taken over by a larger business group is not normally eligible for 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”. It should be avoided, *a fortiori*, that artificial subdivision allows a loss-making activity within a given company to receive public funds.
- (64) However, the EFTA Surveillance Authority considers that the European rail freight sector currently finds itself in a very specific situation making it necessary, in the common interest, to envisage that aid granted to a railway undertaking allowing it to overcome difficulties in the freight operations of that undertaking might, under certain circumstances, be considered compatible with the common market.

⁵⁸ Without prejudice to the application of Directive 2001/14/EC.

- (65) In today's railway industry, the competitive situation of freight transport operations is quite different from that which applies to passenger transport. The national freight markets are open to competition whereas the rail passenger transport markets are not going to be opened up before 1 January 2010.
- (66) This situation has a financial impact in so far as freight is in principle governed solely by the business relations between shippers and carriers. The financial equilibrium of passenger transport, on the other hand, may also depend on the public authorities taking action by way of public service compensation.
- (67) However, several European railway undertakings have not legally separated their passenger and freight transport activities, or have only just done so. Moreover, current EEA legislation does not provide for the obligation to make this legal separation.
- (68) Furthermore, one of the central priorities of European transport policy has, for many years, been to breathe new life into the railway freight industry. The reasons for this are set out in chapter 1 of these guidelines.
- (69) This specific characteristic of rail freight activities necessitates an adapted approach, as has been recognised in the European Commission's decision-making practice⁵⁹ on the basis of the Community Guidelines on state aid for rescuing and restructuring firms in difficulty of 1999⁶⁰.
- (70) This chapter is intended to show, in the light of the EFTA Surveillance Authority's decision-making practice and taking account of the amendments made by the 2004 guidelines on state aid for restructuring to the corresponding 1999 guidelines, the way in which the EFTA Surveillance Authority intends to implement this approach in future.
- (71) In view of the risks highlighted above, this approach is justified and will be maintained only for the freight divisions of railway undertakings, and for a transitional period, namely for restructurings notified before 1 January 2010, the date on which the rail passenger transport market will be opened up to competition.
- (72) Furthermore, the EFTA Surveillance Authority wishes to take account of the fact that, in a growing number of EEA States, railway undertakings have adapted their organisation to specific developments in rail freight and passenger transport activities by taking steps to legally separate their freight transport activities. The EFTA Surveillance Authority will therefore require, as part of the restructuring efforts and before awarding any aid, the legal separation of the freight division in question by transforming it into a commercial company under common commercial law. The EFTA Surveillance Authority is of the view that this separation will, with other appropriate measures, help considerably to achieve two goals, namely to exclude all cross-subsidisation between the restructured division and the rest of the undertaking and to ensure that all financial relations between these two activities are carried out in a sustainable manner and on a commercial basis.

⁵⁹ See European Commission Decision of 2 March 2005, N 386/2004, Aid for restructuring SNCF Freight (OJ C 172, 12.7.2005, p. 3).

⁶⁰ OJ C 288, 9.10.1999, p. 2. The EFTA Surveillance Authority adopted corresponding Guidelines by Decision No 329/99/COL of 16 December 1999 (OJ L 241, 26.10.2000, p. 1).

- (73) In order to avoid any doubt, the 2004 guidelines on state aid for restructuring will continue to apply in their entirety when examining the aid dealt with in this chapter, except with regard to the express derogations set out below.

5.2 Eligibility

- (74) The eligibility criteria must be adapted to include the situation in which a freight division of a railway undertaking constitutes a coherent and permanent economic unit, which will be legally separated from the rest of the undertaking through the restructuring process before aid is granted, and faces difficulties such that, if it had been separated from the railway undertaking, it would be a 'firm in difficulty' within the meaning of the 2004 guidelines on state aid for restructuring.
- (75) This means, in particular, that that division of the undertaking would be facing serious difficulties of its own, which are not the result of an arbitrary allocation of costs within the railway undertaking.
- (76) In order for the division to be restructured to constitute a coherent and permanent economic unit it must comprise all the freight transport activities of the railway undertaking, whether industrial, commercial, accounting or financial. It must be possible to attribute to it a level of losses, as well as a level of own funds or capital, which sufficiently reflects the economic reality of the situation which the division faces in order to evaluate in a coherent manner the criteria fixed in point 9 of the 2004 guidelines on state aid for restructuring⁶¹.
- (77) When assessing whether a division is in difficulty as described above, the EFTA Surveillance Authority will also take into account the ability of the rest of the railway undertaking to ensure the recovery of the division to be restructured.
- (78) The EFTA Surveillance Authority is of the view that, although the situation described is not directly covered by the 2004 guidelines on state aid for restructuring, point 11 of which excludes newly created firms from the scope of the guidelines, restructuring aid may be granted in this context to enable the firm created by this legal separation to operate in viable market conditions. This is intended to apply only in situations where the firm to be created as a result of legal separation includes the entire freight division, as described by the separate accounting established in accordance with Article 9 of Directive 91/440/EEC, and includes all the division's assets, liabilities, capital, off-balance sheet commitments and workforce.

⁶¹ Point 9 of the guidelines on state aid for restructuring states: "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 company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;" or

"b) in the case of a company where at least some members have unlimited liability for the debt of the company, 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;" or

"c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings".

- (79) The EFTA Surveillance Authority considers that, for the same reasons, when a railway undertaking has recently legally separated its freight division, where this division fulfilled the above criteria, the firm in question must not be considered a newly created firm within the meaning of point 11 of the 2004 guidelines on state aid for restructuring, and is therefore not excluded from the scope of these guidelines.

5.3 Return to long-term viability

- (80) The EFTA Surveillance Authority will make sure not only that the criteria for a return to long-term viability as set out in the 2004 guidelines on state aid for restructuring are fulfilled⁶², but also that restructuring will ensure the freight activity is transformed from a protected activity enjoying exclusive rights into one which is competitive on the open market. This restructuring should therefore concern all aspects of the freight activity, whether industrial, commercial, or financial. The restructuring plan required by the restructuring guidelines⁶³ must make it possible to ensure a standard of quality, reliability and service which meets customers' requirements.

5.4 Prevention of any excessive distortion of competition

- (81) In analysing the prevention of any excessive distortion of competition, as provided for by the 2004 guidelines on state aid for restructuring, the EFTA Surveillance Authority will also base itself on:
- (a) the difference between the economic models for rail and the other modes of transport;
 - (b) the EEA objective of shifting the balance between modes of transport;
 - (c) the competitive situation on the market at the time of restructuring (degree of integration, growth potential, presence of competitors, likely trends).

5.5 Aid limited to a minimum

- (82) The provisions of the 2004 guidelines on state aid for restructuring apply when verifying this criterion. To this end the firm's own contribution will include that of the freight division which will be legally separated from the railway undertaking. However, in the EFTA Surveillance Authority's view, the very specific situation of the European rail freight industry, which is described above, may constitute an exceptional circumstance within the meaning of paragraph 43 of those guidelines. It may therefore accept lower own contributions than those provided for in the 2004 guidelines on state aid for restructuring provided that the freight division's own contribution is as high as possible without jeopardising the viability of the operation.

⁶² See in particular points 33 to 36 of the guidelines on state aid for restructuring.

⁶³ See in particular section 3.2 of the restructuring guidelines.

5.6 ‘One time, last time’ principle

- (83) The ‘one time, last time’ principle applies to the legally separated firm, by taking account of the restructuring aid notified as initial restructuring aid received by the undertaking. However, restructuring aid authorised under the conditions set out in this chapter does not affect application of the ‘one time, last time’ principle with regard to the rest of the railway undertaking.
- (84) To avoid any doubt, if the railway undertaking as a whole has already received restructuring aid, the 'one time, last time' principle means that aid as provided for in this chapter may not be granted to restructure the freight division of the undertaking.

6 Aid for coordination of transport

6.1 Objective

- (85) As already stated, Article 49 of the EEA Agreement was implemented by Regulations (EEC) No 1191/69 and (EEC) No 1107/70, which will be repealed by the PSO Regulation. The PSO Regulation will, however, apply only to land passenger transport. It will not cover rail freight transport, for which aid for coordination of transport will continue to be subject only to Article 49 of the EEA Agreement.
- (86) In addition to this, Article 9 of the PSO Regulation concerning aid for coordination of transport and aid for research and development applies explicitly without prejudice to Article 49 of the EEA Agreement, so it will be possible to use Article 49 directly for justifying the compatibility of aid for coordination of rail passenger transport.
- (87) The objective of this chapter is therefore to establish criteria which will allow the EFTA Surveillance Authority to assess the compatibility, on the basis of Article 49 of the EEA Agreement, of aid for the coordination of transport, both generally (section 6.2) and as regards certain specific forms of aid (section 6.3). The EFTA Surveillance Authority notes that, although the general implementing principles of Article 49 of the Agreement are relevant when assessing state aid under the PSO Regulation, these guidelines do not cover the detailed rules for the implementation of the adopted Regulation in question.

6.2 General considerations

- (88) Article 49 of the EEA Agreement provides for compatibility of aid which meets the needs of coordination of transport. The European Court of Justice has ruled that this Article “acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardise the general interests of the Community”⁶⁴.

⁶⁴ Judgement of the Court of Justice of 12 October 1978, Case 156/77 *Commission v Belgium* [1978] ECR 1881, paragraph 10.

- (89) The concept of ‘coordination of transport’ used in Article 49 of the EEA Agreement has a significance which goes beyond the simple fact of facilitating the development of an economic activity. It implies an intervention by public authorities which is aimed at guiding the development of the transport sector in the common interest.
- (90) The progress made with liberalising the land transport sector has in some respects considerably reduced the need for coordination. In an efficient liberalised sector, coordination can in principle result from the action of market forces. As indicated above, however, the fact remains that investment in infrastructure development continues to be carried out by the public authorities. Moreover, even after the liberalisation of the sector, there may still be various market failures. These in particular are the failures which justify the intervention of the public authorities in this field.
- (91) Firstly, the transport sector entails major negative externalities, for example between users (congestion), or in respect of society as a whole (pollution). These externalities are difficult to take into account, notably due to the inherent limits to the possibility of including external costs, or even simply direct usage costs, in the pricing systems for access to transport infrastructure. As a result there may be disparities between the different modes of transport, which ought to be corrected by public authority support for those modes of transport which give rise to the lowest external costs.
- (92) Secondly, the transport sector may experience “coordination” difficulties in the economic sense of the term, for example in the adoption of a common interoperability standard for rail, or in the connections between different transport networks.
- (93) Thirdly, the railway undertakings may not be able to reap the full rewards of their research, development and innovation efforts (positive externalities), which also amounts to a failure of the market.
- (94) The presence of a specific provision in the EEA Agreement making it possible to authorise aid which meets the needs of transport coordination shows how important these risks of market failures are and the negative impact they have on the development of the EEA.
- (95) In principle, aid which meets the needs of transport coordination has to be considered compatible with the EEA Agreement.
- (96) Nevertheless, for a given aid measure to be considered to ‘meet the needs’ of transport coordination, it has to be necessary and proportionate to the intended objective. Furthermore, the distortion of competition which is inherent in aid must not jeopardise the general interests of the EEA. By way of illustration, aid likely to shift traffic flows from short sea shipping to rail would fail to meet these criteria.
- (97) Finally, in view of the rapid development of the transport sector, and hence the need for coordinating it, any aid notified to the EFTA Surveillance Authority for the purpose of obtaining a decision, on the basis of Article 49 of the EEA

Agreement, that the aid is compatible with the Agreement has to be limited⁶⁵ to a maximum of 5 years, in order to allow the EFTA Surveillance Authority to re-examine it in the light of the results obtained and, where necessary, to authorise its renewal⁶⁶.

- (98) As regards the railway industry more specifically, aid for the needs of transport coordination can take several forms:
- (a) aid for infrastructure use, that is to say, aid granted to railway undertakings which have to pay charges for the infrastructure they use, while other undertakings providing transport services based on other modes of transport do not have to pay such charges;
 - (b) aid for reducing external costs, designed to encourage a modal shift to rail because it generates lower external costs than other modes such as road transport;
 - (c) aid for promoting interoperability, and, to the extent to which it meets the needs of transport coordination, aid for promoting greater safety, the removal of technical barriers and the reduction of noise pollution in the rail transport sector, hereinafter referred to as “interoperability aid”;
 - (d) aid for research and development in response to the needs of transport coordination.
- (99) In the following sections the EFTA Surveillance Authority will specify the conditions which, from the point of view of its decision-making practice, make it possible to ensure, for these different types of aid for coordination of transport, that the aid concerned meets the conditions of compatibility mentioned in Article 49 of the EEA Agreement. In view of the specific nature of research and development aid, the criteria applicable to this type of measure are dealt with separately.

6.3 Criteria for aid for rail infrastructure use, reducing external costs and interoperability

- (100) The assessment of the compatibility of aid for infrastructure use, reducing external costs and interoperability with respect to Article 49 of the EEA Agreement is in keeping with the European Commission's decision-making practice pursuant to Article 3(1)(b) of Regulation (EEC) No 1107/70. In the light of this practice the conditions which follow appear sufficient for determining whether the aid is compatible.

⁶⁵ Ibidem.

⁶⁶ This period is increased to 10 years for measures which fall within the scope of Article 15(1)(e) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003 p. 51; Directive as last amended by Directive 2004/75/EC (OJ L 157, 30.4.2004, p. 100). See in particular European Commission Decision of 2 April 2008, NN 46/B/2006 - Slovakia - Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published. Council Directive 2003/96/EC is not incorporated into the EEA Agreement as it concerns tax harmonisation which is outside the scope of the EEA Agreement.

6.3.1 Eligible costs

- (101) The eligible costs are determined on the basis of the following.
- (102) As regards **aid for rail infrastructure use**, the eligible costs are the additional costs for infrastructure use paid by rail transport but not by a more polluting competing transport mode.
- (103) As regards **aid for reducing external costs**, the eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes.
- (104) In that regard, it should be recalled that Article 10 of Directive 2001/14/EC explicitly allows EEA States to put in place a compensation scheme for the demonstrably unpaid environmental, accident-related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail. If there is not yet any EEA legislation which harmonises methods for calculating infrastructure access charges within or across land transport modes, the EFTA Surveillance Authority will take account of the development of the rules governing the allocation of infrastructure costs and external costs when applying these guidelines⁶⁷.
- (105) Both for aid for rail infrastructure use and for aid for reducing external costs, the EFTA State has to provide a transparent, reasoned and quantified comparative cost analysis between rail transport and the alternative options based on other modes of transport⁶⁸. The methodology used and calculations performed must be made publicly available⁶⁹.

⁶⁷ In this connection the third paragraph of Article 11 of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, OJ L 187, 20.7.1999, p. 42, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 5/2002 of 1 February 2002, (OJ L 88, 4.4.2002, p. 9 and EEA Supplement No 18, 4.4.2002, p. 6), as amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 132/2007 of 26 October 2007 (OJ L 100, 10.4.2008, p. 1 and EEA Supplement No 19, 10.4.2008, p. 1), provides that “No later than 10 June 2008, the European Commission shall present, after examining all options including environment, noise, congestion and health-related costs, a generally applicable, transparent and comprehensible model for the assessment of all external costs to serve as the basis for future calculations of infrastructure charges. This model shall be accompanied by an impact analysis of the internalisation of external costs for all modes of transport and a strategy for a stepwise implementation of the model for all modes of transport”. During the preparation of a communication on the internalisation of external costs to comply with this objective, on 16 January 2008 the European Commission published a handbook on the studies carried out so far on external costs in the transport sector (http://ec.europa.eu/transport/costs/handbook/index_en.htm). This handbook, which was compiled jointly by several transport research institutes, can be used, amongst other factors, to determine eligible costs. Furthermore, the European Commission has published a White Paper COM(1998) 466, Fair payment for infrastructure use - A phased approach to a common transport infrastructure charging framework in the European Union, (Bulletin of the EU - Supplement 3/98).

⁶⁸ EFTA States can find indications of the different methods for evaluating extra costs in Annex 2 to European Commission Green Paper Towards fair and efficient pricing in transport - Policy options for internalising the external costs of transport in the European Union (Bulletin of the EU – Supplement 2/96; COM(1995) 691 final) and in the study which the European Commission published on 16 January 2008 (See Article 11 of Directive 1999/62/EC).

⁶⁹ Article 10 of Directive 2001/14/EC.

- (106) As regards **interoperability aid**, the eligible costs cover, to the extent to which they contribute to the objective of coordinating transport, all investments relating to the installation of safety systems and interoperability⁷⁰, or noise reduction both in rail infrastructure and in rolling stock. In particular they cover investment associated with the deployment of ERTMS (European Rail Traffic Management System) and any like measure which can help to remove the technical barriers in the European rail services market⁷¹.

6.3.2 Necessity and proportionality of the aid

- (107) The EFTA Surveillance Authority considers that there is a presumption of necessity and proportionality of the aid when the intensity of the aid stays below the following values:
- (a) for aid for rail infrastructure use, 30% of the total cost of rail transport, up to 100% of the eligible costs⁷²;
 - (b) for aid for reducing external costs, 30%⁷³ of the total cost of rail transport, up to 50% of the eligible costs⁷⁴;
 - (c) for interoperability aid, 50% of the eligible costs.
- (108) For aid above these thresholds, EFTA States must demonstrate the need and proportionality of the measures in question⁷⁵.

⁷⁰ See, in particular, Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system (OJ L 235, 17.9.1996, p. 6) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 25/97 (OJ No L 242, 4.9.1997, p. 74 and EEA Supplement No 37, 4.9.1997, p. 74) and Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system, (OJ L 110, 20.4.2001, p. 1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 16/2002 (OJ L 110, 25.4.2002, p. 11 and EEA Supplement No 21, 25.4.2002, p. 8). Both Directives as last amended by Directive 2007/32/EC (OJ L 141, 25.6.2007, p. 63) were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 163/07 (OJ L 124, 8.5.2008, p. 30 and EEA Supplement No 26, 8.5.2008, p. 24).

⁷¹ Calculation of the eligible costs will take account of any changes made to charges for infrastructure use based on rolling stock performance (especially sound performance).

⁷² See, by way of illustration, European Commission Decision of 22 December 2006, N 574/05, prolongation of existing aid scheme N 335/03 – Italy (Friuli-Venezia Giulia) – Aid for the setting up of rolling-motorway services (OJ C 133 du 15.6.2007, p. 6); European Commission Decision of 12 October 2006, N 427/2006 – United Kingdom – Rail Environmental Benefit Procurement Scheme (REPS) (OJ C 283, 21.11.2006, p. 10).

⁷³ Annex I to Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second Marco Polo programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003 (OJ L 328, 24.11.2006, p. 1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 70/07 of 29 June 2007 (OJ L 304, 22.11.2007, p. 54 and EEA Supplement No 56, 22.11.2007, p. 8) provides that EEA financial assistance for modal shift actions is limited to a maximum of 35% of the total expenditure necessary to achieve the objectives of the action and incurred as a result of the action. In these guidelines, as regards state aid for transport coordination the criterion is 30% of the total cost of rail transport.

⁷⁴ See, by way of illustration, European Commission Decision of 22 December 2006, N 552/06 – Denmark – Prolongation of environmental aid scheme for the transport of goods by rail (OJ C 133, 15.6.2007, p. 5) and European Commission Decision of 12 October 2006, N 427/2006 – United Kingdom – Rail Environmental Benefit Procurement Scheme (REPS), op. cit.

⁷⁵ This could be the case with interoperability measures on the trans-European transport network as last defined by Decision No 884/2004/EC of the European Parliament and of the Council of 29

- (109) For both aid for rail infrastructure use and aid for reducing external costs, the aid has to be strictly limited to compensation for opportunity costs connected with the use of rail transport rather than with the use of a more polluting mode of transport. Where there are several competing options which cause higher levels of pollution than rail transport, the limit chosen corresponds to the highest cost differential among the various options. Where the intensity thresholds referred to in point 107 are adhered to, it may be presumed that the “no overcompensation” criterion is met.
- (110) At any rate, where the aid recipient is a railway undertaking it must be proved that the aid really does have the effect of encouraging the modal shift to rail. In principle this will mean that the aid has to be reflected in the price demanded from the passenger or from the shipper, since it is they who make the choice between rail and the more polluting transport modes such as road⁷⁶.
- (111) Finally, specifically as regards aid for rail infrastructure use and aid for reducing external costs, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

6.3.3 Conclusion

- (112) Aid for rail infrastructure use, for reducing external costs or for interoperability that is necessary and proportionate and so does not distort competition contrary to the common interest must be considered compatible under Article 49 of the EEA Agreement.

6.4 Compatibility of aid for research and development

- (113) In the area of land transport, Article 3(1)(c) of Regulation (EEC) No 1107/70, adopted on the basis of Article 73 of the EC Treaty, provides for the possibility of granting aid to research and development. The European Commission has recently developed a body of practice in the application of this provision⁷⁷.
- (114) Article 9(2)(b) of the PSO Regulation adopts the text of Article 3(1)(c) of Regulation (EEC) No 1107/70. Under that provision, aid which has the purpose of promoting research into or development of rail passenger transport systems and technologies which are more economic for the EEA in general, which is

April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network (Official Journal L 167, 30.4.2004 p. 1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 62/06 of 2 June 2006 (OJ L 245, 7.9.2006, p. 9 and EEA Supplement No 44, 7.9.2006, p. 8).

⁷⁶ With regard to measures falling under Article 15(1)(e) of Directive 2003/96/EC, an impact on the price of transport may be taken for granted, unless there is proof to the contrary. See in particular the European Commission decision of 2 April 2008, NN 46/B/2006 - Slovakia - Excise duty exemptions and reductions provided for by Council Directive 2003/96/EC (transport sector), not yet published.

⁷⁷ European Commission Decision of 30 May 2007, N 780/06 – The Netherlands – Onderzoek en ontwikkeling composiet scheepsconstructie en multi-purpose laadruim; het “CompoCaNord”-project (OJ C 227, 27.9.2007, p. 5); European Commission Decision of 19 July 2006, N 556/2005 – The Netherlands – Environmental protection and innovation in public transport in the province of Gelderland (OJ C 207, 30.8.2006); European Commission Decision of 20 July 2005, N 63/2005 – Czech Republic – Programme for energy economics and use of alternative fuels in the transport sector (OJ C 83, 6.4.2006).

restricted to the research and development stage and which does not cover the commercial exploitation of such transport systems and technologies, has to be regarded as meeting the needs of transport coordination.

- (115) Article 9(2)(b) of the PSO Regulation applies without prejudice to Article 61 of the EEA Agreement. Thus, aid for research, development and innovation in the field of passenger transport, if not covered by Article 9 of the PSO Regulation, and aid which only concerns freight, may be considered compatible on the basis of Article 61(3)(c) of the EEA Agreement.
- (116) In this regard the EFTA Surveillance Authority has defined, in the Guidelines for state aid for research and development and innovation⁷⁸ (hereinafter the “R&D&I guidelines”) the conditions under which it will declare aid of that type compatible with the EEA on the basis of Article 61(3)(c) of the EEA Agreement. The R&D&I guidelines applies “to aid to support research and development and innovation in all sectors governed by the EEA Agreement. They also apply to those sectors which are subject to specific Community rules on state aid, unless such rules provide otherwise”⁷⁹. The R&D&I guidelines therefore apply to aid for research, development and innovation in the railway transport sector which does not fall within the scope of Article 3(1)(c) of Regulation (EEC) No 1107/70 or Article 9 of the PSO Regulation (following the entry into force of that Regulation).
- (117) It is not excluded that the compatibility of aid for research and development may be analysed directly on the basis of Article 49 of the EEA Agreement, if it is aimed at meeting the needs of transport coordination. In this case the abovementioned conditions should be checked, in particular the fact that the aid must be necessary and proportionate to the intended objective, and must not jeopardise the general interests of the EEA. The EFTA Surveillance Authority considers that the general principles set out in the R&D&I guidelines are relevant in analysing these various criteria.

7 State guarantees for railway undertakings

- (118) The EFTA Surveillance Authority’s Guidelines on state guarantees⁸⁰ sets out the legal requirements applicable to state guarantees, including in the rail transport field.
- (119) These guidelines state, in point 1.2, that the EFTA Surveillance Authority 'regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit state guarantee or coverage of losses by the State'.

⁷⁸ The EFTA Surveillance Authority adopted Guidelines for state aid for research and development and innovation by Decision 14/07/COL of 7 February 2007 (Not yet published in the OJ or the EEA Supplement, however the Guidelines are available on the EFTA Surveillance Authority web page at: http://www.eftasurv.int/fieldsOfWork/fieldStateAid/state_aid_guidelines/).

⁷⁹ See corresponding Community guidelines (OJ C 323, 30.12.2006, p. 1).
Ibidem, point 2.1.

⁸⁰ The EFTA Surveillance Authority adopted Guidelines on state Guarantees by Decision XX/08/COL of 17 December 2008 (Not yet published in the OJ or the EEA Supplement). See corresponding Community guidelines (OJ C 155, 20.6.2008, p.10).

- (120) The European Commission's and the EFTA Surveillance Authority's consistent practice has been to consider unlimited guarantees in a sector open to competition to be incompatible with the EC Treaty and the EEA Agreement respectively. In accordance with the proportionality principle they cannot in particular be justified by tasks of general interest. With an unlimited guarantee it is impossible to check whether the amount of aid exceeds the net costs of providing the public service⁸¹.
- (121) When the state guarantees are granted to undertakings with a presence on both competitive and non-competitive markets, the European Commission's and the EFTA Surveillance Authority's practice is to require the complete removal of the unlimited guarantee granted to the undertaking as a whole⁸².
- (122) Several railway undertakings are enjoying unlimited guarantees. These guarantees are generally a legacy of special cases of historic monopolies set up for railway undertakings before the EEA Agreement entered into force or before the rail transport services market was opened up to competition.
- (123) According to the information available to the European Commission and the EFTA Surveillance Authority, these guarantees do, to a large extent, constitute existing aid. The EFTA States concerned are invited to inform the EFTA Surveillance Authority of the conditions for implementing the schemes for existing aid as well as of the measures envisaged for removing them, in accordance with the procedure defined in section 8.3.

8 Final provisions

8.1 Rules on the cumulation of aid

- (124) The aid ceilings stipulated in these guidelines are applicable irrespective of whether the aid in question is financed wholly or in part from state resources or from Community resources. Aid authorised under these guidelines may not be combined with other forms of state aid within the meaning of Article 61(1) of the EEA Agreement or with other forms of Community financing if such combination produces a level of aid higher than that laid down in these guidelines.
- (125) In the case of aid serving different purposes and involving the same eligible costs, the most favourable aid ceiling will apply.

⁸¹ European Commission Decision 2005/145/EC of 16 December 2003 on the state aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9); European Commission Decision of 24 April 2007, E 12/2005 – Poland – Unlimited guarantee for the Polish post office (Poczta Polska) (OJ C 284, 27.11.2007, p. 2); European Commission Decision of 27 March 2002, E 10/2000 – Germany – State guarantees for public credit institutions in Germany (OJ C 150, 22.6.2002, p. 7); EFTA Surveillance Authority Decision of 15 July 2005, 177/05/COL State guarantee in favour of Liechtensteinische Landesbank (OJ C 310, 8.12.2005, p. 17 and EEA Supplement No 62, 8.12.2005, p. 1).

⁸² Ibidem.

8.2 Date of application

- (126) The EFTA Surveillance Authority will apply these guidelines from the date of their publication in the *Official Journal of the European Union* and the *EEA Supplement*.

The EFTA Surveillance Authority will apply these guidelines to all aid, whether or not notified, in respect of which it is called upon to take a decision after the date of their publication.

8.3 Appropriate measures

- (127) In accordance with Article 62(1) of the EEA Agreement, the EFTA Surveillance Authority proposes that the EFTA States amend their existing aid schemes relating to state aid covered by these guidelines so as to comply with them at the latest two years after their publication in the *Official Journal of the European Union* and the *EEA Supplement*, subject to the specific provisions in the chapter on state guarantees. The EFTA States are invited to confirm that they accept these proposals for appropriate measures in writing at the latest one year after the date of publication in the *Official Journal of the European Union* and the *EEA Supplement*.
- (128) Should an EFTA State fail to confirm its acceptance in writing by that date, the EFTA Surveillance Authority will apply Article 19(2) 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 and, if necessary, initiate the proceedings referred to in that provision.

8.4 Period of validity and reporting

- (129) The EFTA Surveillance Authority reserves the right to amend these guidelines. It will present a report on their application before any amendment and at the latest five years after the date of their publication.