

PART VII: PROCEDURAL RULES

Recovery of unlawful and incompatible state aid¹

1 Introduction

- (1) The EFTA Surveillance Authority (hereinafter referred to as “the Authority”) is prepared to take a strong stance against unlawful aid. Under Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as “Protocol 3”)² the Authority has systematically ordered the EFTA States to recover any unlawful aid found to be incompatible with the functioning of the Agreement on the European Economic Area (hereinafter referred to as “the EEA Agreement”), unless it has considered that this would be contrary to a general principle of EEA law. The Authority has adopted 6 such recovery decisions.
- (2) It is essential for the integrity of the State aid regime that these decisions ordering EFTA States to recover unlawful state aid (hereinafter referred to as “recovery decisions”) are enforced in an effective and immediate manner. The experience of the Authority in recent years indicates that there is cause for real concern in this respect. The State Aid Scoreboard for the EFTA States presented in autumn 2008³ also shows that out of 6 recovery decisions adopted by the Authority, only one has been fully implemented by the EFTA State concerned.⁴
- (3) In 2004, the European Commission (hereinafter referred to as “the Commission”) ordered a comparative study on the enforcement of EU State aid policy in different Member States (hereinafter referred to as the “Enforcement Study”).⁵ One of the objectives of the study was to assess the effectiveness of recovery procedures and practices in a number of Member States. The authors of the Study found that the excessive length of recovery proceedings is a recurring theme in all country reports.
- (4) Based on its own experience, the Authority has noticed that the recovery of unlawful and incompatible aid also faces a number of obstacles in the EFTA States. Recovery proceedings, to which national law provisions are applicable, are particularly lengthy, and, in practice, recovery has not been completed within the deadline set out in any of the recovery decisions of the Authority. Therefore, the Authority wishes to stress the need for an effective enforcement of recovery decisions. It is clear that the implementation of such decisions is a shared responsibility between

¹ This Chapter corresponds to the Commission’s notice entitled Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ 2007 C 272, 15.11.2007, p. 4.

² Protocol 3 of the Surveillance and Court Agreement was amended to reflect the provisions of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty, OJ L 83, 27.03.1999, p. 1.

³ <http://www.eftasurv.int/information/sascoreboard/>

⁴ See the Authority’s Annual Report 2006, p. 56.

⁵ Study on the enforcement of state aid law at national level, Competition studies 6, Luxembourg, Office for Official Publications of the European Communities
http://ec.europa.eu/comm/competition/state_aid/overview/studies.html

the Authority and the EFTA States, and will require considerable efforts by both in order to be successful.

- (5) The purpose of the present communication is to explain the Authority's policy towards the implementation of recovery decisions. It shall not examine the consequences that national courts may draw from the non respect of the notification and standstill obligation of Article 1(3) in Part I of Protocol 3. The Authority considers that there is a need to clarify the measures it intends to take to facilitate the execution of recovery decisions and to set out actions EFTA States could take to ensure that they reach full compliance with the rules and principles as established by the body of EEA law, and, in particular, the case law of the Courts of the European Communities and of the EFTA Court. To this end, the present Chapter will first recall the purpose of recovery and the basic principles underlying the implementation of recovery decisions. It will then present the practical implications of these basic principles for each of the actors involved in the recovery process.

2 The principles of recovery policy

2.1 A short history of recovery policy

- (6) Article 1(3) in Part I of Protocol 3 states that “[t]he EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”
- (7) In cases where an EFTA State does not notify the Authority of its plans to grant or alter aid prior to such aid being put into effect, the aid is unlawful in relation to EEA law from the time that it is granted.
- (8) In its *Kohlegesetz* judgment⁶ of 1973, the European Court of Justice (hereinafter referred to as the ECJ) confirmed for the first time that the Commission had the power to order the recovery of unlawful and incompatible State aid. The Court held that the Commission was competent to decide that a Member State must alter or abolish a state aid that was incompatible with the common market. It should therefore also be entitled to require repayment of this aid.⁷
- (9) In 2001, Protocol 3 was amended by inter alia inserting Part II which amongst others included basic rules on recovery.⁸ Further implementing provisions on recovery were included in Decision No 195/04/COL of 14 July 2004, as amended.⁹

⁶ Case C-70/72, *Commission v Germany*, [1973] ECR 813, paragraph 13.

⁷ Article 6 of the EEA Agreement provides that, without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two treaties, shall in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement. As regards relevant rulings by the Court of Justice given after the date of signature of the EEA Agreement, it follows from Article 3(2) of the Surveillance and Court Agreement that the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by these rulings.

⁸ See footnote 2 above.

⁹ Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Agreement between the EFTA State on the Establishment of a Surveillance Authority and a Court of Justice, OJ L 139 of 25.5.2006, p. 37, as amended. Decision No 195/04/COL corresponds to Commission Regulation (EC) No 794/2004 of 21 April 2004

- (10) **Article 14(1)** in Part II of Protocol 3 confirms the constant case law of the ECJ¹⁰ and establishes an obligation on the Authority to order recovery of unlawful and incompatible aid unless this would be contrary to a general principle of law. This article also provides that the EFTA State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. **Article 14(2)** establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Decision No 195/04/COL elaborates on the methods to be used for the calculation of recovery interest. Finally, **Article 14(3)** states that “[...] *recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the EFTA Surveillance Authority’s decision. [...]*”.
- (11) In a number of recent judgments, the ECJ further clarified the scope and interpretation of Article 14(3) of Council Regulation No 659/1999 (which corresponds to Article 14(3) in Part II of Protocol 3) thereby emphasising the need for an immediate and effective execution of recovery decisions.¹¹ In addition, the Authority has also started to apply the *Deggendorf* case law¹² in a systematic manner. This case law enables the Authority, if certain conditions have been satisfied, to order EFTA States to suspend the payment of a new compatible aid to a company until that company has reimbursed old unlawful and incompatible aid that is subject to a recovery decision.

2.2 Purpose and principles of recovery policy

2.2.1 Purpose of recovery

- (12) The ECJ has held on several occasions that the purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid. This is necessary to ensure that the level-playing field in the internal market is maintained. In this context, the ECJ underlined that the recovery of unlawful and incompatible aid is not a penalty¹³, but the logical consequence of the finding that it is unlawful.¹⁴ It can therefore not be regarded as disproportionate to the objectives of the EC Treaty as regards state aid.¹⁵
- (13) According to the ECJ, the “*re-establishment of the previously existing situation is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored*”.¹⁶ In order to eliminate any financial advantages incidental to unlawful aid, interest is to be recovered on the sums unlawfully granted. Such interest must be equivalent to the financial advantage arising from the availability of the funds in question, free of

implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.04.2004, pp 1-134), as amended.

¹⁰ Case C-301/87 *France v Commission* [1990] ECR I-307.

¹¹ Case C-415/03 *Commission v Greece* (“Olympic Airways”) [2005] ECR I-3875 and Case C-232/05 *Commission v France* (“Scott”) [2006] ECR I-10071.

¹² Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Germany* (“Deggendorf”) ECR [1994] I-833.

¹³ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 65.

¹⁴ Case C-183/91 *Commission v Greece* [1993] ECR I-3131, paragraph 16.

¹⁵ Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

¹⁶ Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 27.

charge, over a given period.¹⁷

- (14) Furthermore, the ECJ has insisted that in order for a recovery decision to be fully executed, the actions undertaken by a Member State must produce concrete effects as regards recovery¹⁸ and that recovery must be immediate.¹⁹ For recovery to reach its objective, it is indeed essential that the repayment of the aid takes place without delay.

2.2.2 *The obligation to recover unlawful and incompatible state aid and its exceptions*

- (15) Article 14(1) in Part II of Protocol 3 specifies that “[w]here negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary”.
- (16) The provisions in Protocol 3 impose two limits on the Authority’s power to order recovery of unlawful and incompatible aid. Article 14(1) in Part II of Protocol 3 provides that the Authority shall not require recovery of the aid if this would be contrary to a **general principle of law**. The general principles of law most often invoked in this context are the principles of the protection of legitimate expectation²⁰ and of legal certainty.²¹ It is important to note that the ECJ has given a very restrictive interpretation to these principles in the context of recovery. Article 15 in Part II of Protocol 3 states that the powers of the Authority to recover aid shall be subject to a limitation period of 10 years (the so-called ‘**prescription period**’). The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Authority or the Commission²² or by an EFTA State, acting at the request of the Authority, with regard to the unlawful aid, shall interrupt the limitation period.
- (17) The EFTA State to which a recovery decision is addressed is obliged to execute this decision.²³ The ECJ has recognised only one exception to the obligation for a Member State to implement a recovery decision addressed to it, namely the existence of exceptional circumstances that would make it **absolutely impossible** for the Member State to execute the decision properly.²⁴

¹⁷ Case T-459/93, *Siemens v Commission* [1995] ECR II-1675, paragraphs 97 to 101.

¹⁸ Case C-415/03, *Commission v Greece*, cited above footnote 11.

¹⁹ Case C-232/05, *Commission v France*, cited above footnote 11.

²⁰ On the principle of the protection of the legitimate expectations, see Case C-24/95 *Alcan* [1997] ECR I-1591, paragraph 25, and Case C-5/89 *BUG-Alutechnik* [1990] ECR I-3437, paragraphs 13 and 14, and Joined cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnjord a.o. v EFTA Surveillance Authority*, [2005] EFTA Court Report, p. 121, paragraph 171. For an example where the ECJ recognised the existence of legitimate expectations on the part of the beneficiary, see Case C-223/85 *RSV* [1987] ECR p. 4617.

²¹ On the principle of legal certainty, see T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39 and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraphs 116 to 118, and Joined cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 140, and Joined cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnjord a.o. v EFTA Surveillance Authority*, cited above in footnote 20, paragraph 172. See also Case T-308/00 *Saltzgitte v Commission* [2004] ECR II-1933 paragraph 166.

²² For an interpretation of “any Commission action”, see Case T-369/00 *Département du Loiret v Commission* [2003] ECR II-1789.

²³ Case 94/87 *Commission v Germany* [1989] ECR 175.

²⁴ Case C-404/00 *Commission v Spain* [2003] ECR I-6695.

- (18) According to the ECJ, absolute impossibility can however not be merely supposed. The Member State concerned must demonstrate that it attempted, in good faith, to recover unlawful aid and it must cooperate with the Commission in accordance with Article 10 of the EC Treaty, with a view to overcoming the difficulties encountered.²⁵
- (19) A review of the jurisprudence shows that the ECJ has interpreted the concept of ‘absolute impossibility’ in a very restrictive manner. The Court has confirmed on several occasions that a Member State may not plead requirements of its national law, such as national prescription rules²⁶ or the absence of a recovery title under national law²⁷, in order to justify its failure to comply with a recovery decision.²⁸ In the same way, the ECJ held that the obligation to recover is not affected by circumstances linked to the economic situation of the beneficiary. It clarified that a company in financial difficulties does not constitute proof that recovery was impossible.²⁹ In such circumstances, the Court pointed out that the absence of any recoverable assets is the only way for a Member State to show the absolute impossibility of recovering the aid.³⁰ In a number of cases, the Member State argued that they had not been able to execute the recovery decision because of the administrative or technical difficulties involved (e.g. the very high number of beneficiaries involved). The Court consistently refused to accept that such difficulties constitute an absolute impossibility to recover.³¹ Finally, the apprehension of even insurmountable internal difficulties cannot justify a failure by a Member State to fulfil its obligations under Community law.³²

2.2.3 *The use of national procedures and the necessity of an immediate and effective execution*

- (20) Article 14(3) in Part II of Protocol 3 specifies that “*recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the EFTA Surveillance Authority’s decision*”.
- (21) If EFTA States are free to choose, according to their national law, the means by which they implement recovery decisions, the measures chosen should give full effect to the recovery decision. It is therefore necessary that the national measures taken by EFTA States lead to an **effective and immediate** execution of the Authority’s decision.
- (22) In its *Olympic Airways* judgment³³, the ECJ underlined that the implementation measures taken by the Member State must be **effective** and produce a concrete outcome in terms of recovery. The actions undertaken by the State must result in the actual recovery of the sums owed by the beneficiary. In its *Scott* judgment³⁴, the ECJ confirmed that line and emphasised that national procedures which do not fulfil the conditions laid down in Article 14(3) of the Procedural Regulation (which

²⁵ Case C-280/95 *Commission v Italy* [1998] ECR I-259.

²⁶ Case C-24/95 *Alcan*, cited above footnote 20, paragraphs 34 to 37.

²⁷ Case C-303/88 *Italy v Commission* [1991] ECR I-1433.

²⁸ Case C-52/84 *Commission v Belgium* [1986] ECR p. 89, paragraph 9.

²⁹ Case C-52/84 *Commission v Belgium* cited above footnote 28, paragraph 14.

³⁰ Case C-499/99 *Commission v Spain* [2002] ECR I-6031.

³¹ Case C-280/95 *Commission v Italy*, cited above footnote 25.

³² Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 34.

³³ Case C-415/03 *Commission v Greece* cited above footnote 11.

³⁴ Case C-232/05 *Commission v France* cited above footnote 11.

corresponds to Article 14(3) in Part II of Protocol 3) should be left unapplied. It refuted, in particular, the Member State's argument that it had taken all steps available in its national system and insisted that these steps should also lead to a concrete outcome in terms of recovery, and this within the deadline set by the Commission.

- (23) Article 14(3) in Part II of Protocol 3 requires that recovery decisions are implemented in a way that is both effective and **immediate**. In the *Scott* case, the ECJ stressed the importance of the time-dimension in the recovery process. The Court specified that the application of national procedures should not impede the restoration of effective competition by preventing the immediate and effective execution of the Commission's decision. National procedures, which prevent the immediate restoration of the previously existing situation and prolong the unfair competitive advantage resulting from unlawful and incompatible aid, do not fulfil the conditions laid down in Article 14(3) in Part II of Protocol 3.
- (24) In this context it is important to recall that an action for annulment of a recovery decision brought under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the Surveillance and Court Agreement) does not have a suspensive effect. In the context of such an action, the beneficiary of the aid may however apply for the suspension of the execution of the recovery decision pursuant to Article 40 of the Surveillance and Court Agreement. Applications for suspension must state the circumstances giving rise to urgency and must contain the pleas of fact and law establishing a prima facie case for the interim measures being applied for.³⁵ The EFTA Court may then, if it considers that the circumstances so require, order that application of the contested decision be suspended.

2.2.4 *The principle of loyal cooperation*

- (25) Article 3 EEA obliges EFTA States to facilitate the achievement of the EEA tasks and imposes mutual duties of cooperation on the EEA institutions and the EFTA States, with a view to attaining the objectives of the EEA Agreement.
- (26) In the context of the implementation of recovery decisions, the Authority and the EFTA States' authorities must therefore cooperate to attain the objective of the restoration of competitive conditions in the internal market.
- (27) If an EFTA State encounters unforeseen or unforeseeable difficulties in executing the recovery decision within the required time-limit or perceives consequences overlooked by the Authority, it should submit those problems for consideration to the Authority, together with proposals for suitable amendments.³⁶ In such a case, the Authority and the EFTA State concerned must work together in good faith to overcome the difficulties, whilst fully observing the EEA Agreement.³⁷ Likewise the principle of loyal cooperation requires that the EFTA States provide the Authority with all the information enabling it to establish that the means chosen constitute an adapted implementation of the decision.³⁸

³⁵ Article 80(2) of the EFTA Court's Rules of Procedure.

³⁶ Case C-404/00 *Commission v Spain*, cited above footnote 24.

³⁷ Case C-94/87 *Commission v Germany*, cited above footnote 23, paragraph 9, and Case C-348/93 *Commission v Italy*, cited above footnote 16, paragraph 17.

³⁸ For an illustration of proposals for implementation see Case C-209/00 *Commission v Germany* [2002] ECR I-11695.

- (28) Informing the Authority of the technical and legal difficulties involved in implementing a recovery decision does however not relieve EFTA States from the duty to take all necessary steps possible to recover the aid from the undertaking in question and to propose to the Authority any suitable arrangements for implementing the decision.³⁹

3 Implementing recovery policy

- (29) Both the Authority and the EFTA States have an essential role to play in the implementation of recovery decisions and may contribute to an effective enforcement of recovery policy.

3.1 The role of the Authority

- (30) The Authority's recovery decision imposes a recovery obligation upon the EFTA State concerned. It requires the EFTA State concerned to recover a certain amount of aid from a beneficiary or a number of beneficiaries within a given time frame. Experience shows that the speed with which a recovery decision is executed is affected by the degree of precision or the completeness of that decision. The Authority will therefore continue its efforts to ensure that recovery decisions provide a clear indication of the amount(s) of aid to be recovered, the undertaking(s) liable to recovery and the deadline within which the recovery should be completed.

Identification of the undertakings from whom the aid must be recovered

- (31) The unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it.⁴⁰ The Authority will continue its present practice of identifying in its recovery decisions, where possible, the identity of the undertaking(s) from whom the aid must be recovered. If, at the stage of the implementation, it appears that the aid was transferred to other entities, the EFTA State may have to extend recovery to encompass all effective beneficiaries to ensure that the recovery obligation is not circumvented.
- (32) The ECJ has given some guidance on the conditions under which the recovery obligation must be extended to companies other than the original beneficiary of the unlawful and incompatible aid. According to the ECJ, a transfer of the undue advantage may occur when the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value, sometimes to a successor company set up in order to circumvent the recovery order.⁴¹ In line with that case law, it will be for the Authority to prove that assets have been sold at a price that is lower than their market value, especially to a successor company set up to circumvent the recovery order, in which case the recovery order can be extended to that third party. Typical cases of circumvention are cases where the transfer does not reflect any economic logic other than the invalidation of the recovery order.⁴²
- (33) As regards transfer of shares of a company that has to reimburse an illegal and

³⁹ Case 94/87 *Commission v Germany*, cited above footnote 23, paragraph 10.

⁴⁰ Case C-303/88 *Italy v Commission*, cited above footnote 27, paragraph 57, and Case C-277/00 *Germany v Commission* ("SMI") [2004] ECR I-3925, paragraph 75.

⁴¹ Case C-277/00 *Germany v Commission*, cited above footnote 40.

⁴² Case C-328/99 and C-399/00, *Italy and SIM 2 Multimedia Spa v Commission* [2003] ECR I-4035. For another example of circumvention, see case C-415/03, *Commission v Greece*, cited above footnote 11.

incompatible aid (share deals), the ECJ held⁴³ that the sale of shares in such a company to a third party does not affect the obligation of the beneficiary to reimburse such aid.⁴⁴ When it can be established that the buyer of the shares paid the prevailing market price for the shares of that company, it cannot be regarded as having benefited from an advantage that could constitute a state aid.⁴⁵

- (34) When it adopts a recovery decision regarding aid schemes, the Authority is normally not in a position to identify, in the decision itself, all the undertakings that have received unlawful and incompatible aid. This will have to be done at the start of the implementation process by the EFTA State concerned, which will have to look at the individual situation of each undertaking concerned.⁴⁶

Determination of the amount to be recovered

- (35) The purpose of recovery is achieved “once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored”.⁴⁷
- (36) As it has done in the past, the Authority will clearly identify the unlawful and incompatible aid measures that are subject to recovery in its recovery decisions. When it has the necessary data at its disposal, the Authority will also endeavour to quantify the precise amount of aid to be recovered. It is clear, though, that the Authority cannot and is legally not required to fix the exact amount to be recovered. It is sufficient for the Authority’s decision to include information enabling the EFTA State to determine the amount, without too much difficulty.⁴⁸
- (37) In the case of an unlawful and incompatible aid scheme, the Authority is not able to quantify the amount of incompatible aid to be recovered from each beneficiary. This would require a detailed analysis by the EFTA State of the aid granted in each individual case on the basis of the scheme in question. The Authority therefore indicates in its decision that EFTA States will have to recover all aid, unless it has been granted to a specific project, which, at the time of granting, fulfilled all conditions of the block exemption regulations or in an aid scheme approved by the Authority.
- (38) According to Article 14(2) in Part II of Protocol 3, the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate level to be fixed by the Authority. Interest shall be payable from the time the unlawful aid was at the

⁴³ Case C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission*, cited above footnote 42, paragraph 83.

⁴⁴ In the event of a privatisation of a company that received state aid declared compatible by the Authority, the EFTA State can introduce a liability clause in the privatisation agreement to protect the buyer of the company against the risk that the initial Authority’s decision approving the aid would be overturned by the EFTA Court and replaced by an Authority’s decision ordering the recovery of that aid from the beneficiary. Such a clause could provide for an adjustment of the price paid by the buyer for the privatised company to take due account of the new recovery liability.

⁴⁵ Case C-277/00 *Germany v Commission*, cited above footnote 40, paragraph 80.

⁴⁶ Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 91.

⁴⁷ Case C-277/00 *Germany v Commission*, cited above footnote 40, paragraphs 74-76.

⁴⁸ Case C-480/98 *Spain v Commission* [2000] ECR I-8717, paragraph 25, and Joined cases C-67/85, C-68/85, and C-70/85 *Kwekerij van der Kooy BV and others v Commission* [1988] ECR p. 219.

disposal of the beneficiary until the date of its recovery.⁴⁹ Decision No 195/04/COL establishes that the interest rate shall be applied on a compound basis until the date of the recovery of the aid.⁵⁰

Timetable for the implementation of the decision

- (39) In the past, the Commission's recovery decisions specified a single time-limit of two months, within which the Member State concerned was required to communicate to the Commission the measures it had taken to comply with a given decision. The ECJ acknowledged that this deadline is to be regarded as the deadline for the execution of the decision itself.⁵¹
- (40) The ECJ further concluded that contacts and negotiations between the Commission and the Member State, in the context of the execution of the Commission's decision, could not relieve the Member State from the duty to take all necessary measures to execute the decision within the prescribed time-limit.⁵²
- (41) The Authority recognises that the two month deadline for the execution of its decisions is too short in the majority of cases. Therefore, the deadline will be prolonged to four months for the execution of recovery decisions. From now on, the Authority will specify two time-limits in its decisions:
1. a first time-limit of two months following the entry into force of the decision, within which the EFTA State must inform the Authority of the measures planned or taken;
 2. a second time-limit of four months following the entry into force of the decision, within which the Authority's decision must have been executed.
- (42) If an EFTA State encounters serious difficulties preventing it from respecting either one of these deadlines, it must inform the Authority of these difficulties, providing an appropriate justification. The Authority may then prolong the deadline in accordance with the principle of loyal cooperation.⁵³

3.2 The role of the EFTA States: implementing the recovery decisions

3.2.1 Who is responsible for the implementation of the recovery decision?

- (43) The EFTA State is responsible for the implementation of the recovery decision. Article 14(1) in Part II of Protocol 3 provides that the EFTA State concerned is to take all necessary measures to recover the aid from the beneficiary.
- (44) In this context, it is important to keep in mind that the ECJ has recalled on several occasions that a Commission decision addressed to a Member State is binding on all the organs of that State, including the courts of that State.⁵⁴ This implies that each

⁴⁹ See, in that context, the exception of Case C-480/98 *Spain v Commission*, cited above footnote 48, paragraphs 36 and following.

⁵⁰ Further guidance as to calculation of interests is contained in Decision No 195/04/COL.

⁵¹ See Case C-207/05 *Commission v Italy* [2006] ECR I-70, paragraphs 31 to 36, Case C-378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 28, and Case C-232/05 *Commission v France*, cited above footnote 11.

⁵² Case C-5/86 *Commission / Belgium* [1987] ECR p. 1773.

⁵³ Case C-207/05 *Commission v Italy*, cited above footnote 51.

⁵⁴ Case 249/85 *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR p. 2345.

organ of the EFTA State involved in the implementation of a recovery decision must take all necessary measures to secure the immediate and effective application of such a decision.

- (45) EEA law does not prescribe which organ of the EFTA State should be in charge of the practical implementation of a recovery decision. It is for the domestic legal system of each EFTA State to designate the bodies that will be responsible for the implementation of the recovery decision. In general, the choice in the EFTA States has been to appoint one central body (for instance a Ministry) which is in charge of monitoring the recovery process and that is in constant contact with the Authority.⁵⁵

3.2.2 *Implementation of the recovery obligation*

- (46) Article 14(3) of Protocol 3 obliges the EFTA States to initiate recovery proceedings without any delay. As mentioned in section 3.1 above, the recovery decision will specify a time-limit within which the EFTA State is to submit precise information on the measures it has taken and planned to execute the decision. In particular, the EFTA State will be required to provide complete information on the identity of the beneficiaries of the unlawful and incompatible aid, the amounts of aid involved and the national procedure applied to obtain recovery. In addition, the EFTA State will be required to provide documentation showing that it notified the beneficiary of its obligation to repay the aid.

Identification of the aid beneficiary and the amount to be recovered

- (47) The recovery decision will not always contain complete information on the identity of the beneficiaries, nor on the amounts of aid to be recovered. In such cases, the EFTA State must identify without any delay the undertakings concerned by the decision and quantify the precise amount of aid to be recovered from each of them.
- (48) In the case of an unlawful and incompatible aid scheme, the EFTA State will be required to carry out a detailed analysis of each individual aid granted on the basis of the scheme in question. To quantify the precise amount of aid to be recovered from each individual beneficiary under the scheme, it will need to determine the extent to which the aid has been granted to a specific project, which, at the time of granting, fulfilled all conditions of the block exemption regulations or in an aid scheme approved by the Authority. In such cases, the EFTA State may also apply the substantive *de minimis* criteria applicable at the time of the granting of the unlawful and incompatible aid that is subject to the recovery decision.
- (49) National authorities are allowed to take into account the incidence of the tax system in order to determine the amount to be reimbursed. Where a beneficiary of unlawful and incompatible aid has paid tax on the aid received, the national authorities may, in accordance with their national tax rules, take account of the earlier payment of tax by recovering only the net amount received by the beneficiary.⁵⁶ The Authority considers that in such cases, the national authorities will need to ensure that the

⁵⁵ The authors of the Enforcement Study referred to above note that “a principle common to all countries reviewed is that recovery must be effected by the authority that granted the aid”. They also point out that, in countries which charge one central body with the task of overseeing the recovery process, the existence of such a body appears to contribute to a more efficient implementation of recovery decisions (see page 521 of the Study).

⁵⁶ Case T-459/93 *Siemens v Commission*, cited above footnote 17, paragraph 83. See also Case C-148/04 *Unicredito Spa v Agenzia delle Entrate, Ufficio Genova I* [2005] ECR I-11137, paragraphs 117 to 120.

beneficiary will not be able to enjoy a further tax deduction by claiming that the reimbursement has reduced his taxable income, since this would mean that the net amount of the recovery was lower than the net amount initially received.

The applicable recovery procedure

- (50) EEA law does not prescribe which procedure the EFTA State should apply to execute a recovery decision. However, EFTA States should be aware that the choice and application of a national procedure is subject to the condition that such procedure allows for the immediate and effective execution of the Authority's decision. This implies that the authorities responsible should carefully consider the full range of recovery instruments available under national law and select the procedure most likely to secure the immediate execution of the decision. They should use fast-track procedures where possible under national law. According to the principle of equivalence and effectiveness, these procedures must not be less favourable than those governing similar domestic actions, and that they should not render practically impossible or excessively difficult the exercise of rights conferred by EEA law.⁵⁷
- (51) More generally, EFTA States should not be able to place any obstacles in the way of carrying out a recovery decision.⁵⁸ Consequently, EFTA State authorities are under an obligation to set aside any provisions of national law, which might impede the immediate execution of the recovery decision.⁵⁹

The notification and enforcement of recovery orders

- (52) Once the beneficiary, the amount to be recovered and the applicable procedure have been determined, recovery orders should be sent to the beneficiaries of the unlawful and incompatible aid without delay and within the deadline prescribed by the Authority's decision. The authorities responsible for carrying out the recovery must ensure that these recovery orders are enforced and that recovery is completed within the time-limit specified in the decision. Where a beneficiary does not comply with the recovery order, EFTA States should seek the immediate enforcement of its recovery claims under national law.

3.2.3 Litigation before national courts

- (53) The implementation of recovery decisions can give rise to litigation in national courts. Two main categories of recovery-related litigation can be distinguished: actions brought by the recovering authority seeking a court order to force an unwilling recipient to refund the unlawful and incompatible aid and actions brought by beneficiaries contesting the recovery order.
- (54) The execution of a recovery decision can be delayed for many years when the national measures taken for the implementation of a recovery decision are challenged in court. This is even more the case when the recovery decision is itself challenged before the EFTA Court, especially if national judges are asked to suspend the implementation of national measures until the EFTA Court has ruled on the validity of the recovery decision.
- (55) In line with the case law of the ECJ, the beneficiary of an aid who could without any

⁵⁷ Case C-13/01 *Safalero* [2003] ECR I-8679, paragraphs 49-50.

⁵⁸ Case C-48/71 *Commission v Italy* [1972] ECR p. 529.

⁵⁹ Case C-232/05 *Commission v France*, cited above footnote 11.

doubt have challenged a recovery decision under Article 36 of the Surveillance and Court Agreement before the EFTA Court can no longer challenge the validity of the decision in proceedings before the national court on the ground that the decision was unlawful.⁶⁰ It derives from this that the beneficiary of an aid who could have asked for interim relief before the EFTA Court in accordance with Articles 40 and 41 of the Surveillance and Court Agreement and has failed to do so, cannot ask for a suspension of the measures taken by the national authorities for implementing that decision on grounds linked to the validity of the decision.

- (56) On the other hand, in cases where it is not self-evident that an action for annulment brought against the contested decision by the beneficiary of the aid would have been admissible, an adequate legal protection must be offered to the aid beneficiary. In the event that the aid beneficiary challenges the implementation of the decision in proceedings before the national court on the ground that such recovery decision was unlawful, the national judge should rely on the procedure laid down in Article 34 of the Surveillance and Court Agreement.⁶¹
- (57) In case the beneficiary also asks for interim relief of the national measures adopted to implement the recovery decision because of an alleged illegality of the Authority's recovery decision, the national judge has to assess whether the case at hand fulfils the conditions established by the ECJ in the *Zuckerfabrik*⁶² and *Atlanta*⁶³ cases. This means that a national court should only order interim relief if:

that court entertains serious doubts as to the validity of the act and, if the validity of the contested act is not already in issue before the EFTA Court, itself acts in accordance with the second sentence in paragraph 56 above;

there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

the court takes due account of the EEA interest; and

in its assessment of all those conditions, it respects any decisions of the EFTA Court ruling on the lawfulness of the act or on an application for interim measures seeking similar interim relief at EEA level.⁶⁴

3.2.4 The specific case of insolvent beneficiaries

- (58) As a preliminary observation, it is important to recall that the ECJ has consistently held that the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid.⁶⁵
- (59) In the majority of cases involving an insolvent aid beneficiary, it will not be possible to recover the full amount of unlawful and incompatible aid (including interest), as the beneficiary's assets will be insufficient to satisfy all creditors' claims. Consequently, it is not possible to fully re-establish the *ex ante* situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion

⁶⁰ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Germany*, cited above footnote 12.

⁶¹ Case C-346/03 *Atzeni a.o.* [2006] ECR I-1875, paragraph 30-34.

⁶² Joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen A.G. a.o.* [1991] ECR I-415, paragraphs 23 and following.

⁶³ Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH a.o.* [1995] ECR I-3761, paragraph 51.

⁶⁴ Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH a.o.*, cited above footnote 66, paragraph 51.

⁶⁵ Case C-42/93 *Spain v Commission* ("Merco") [1994] ECR I-4175.

of competition, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases.⁶⁶ The Authority is therefore of the view that a decision ordering the EFTA State to recover unlawful and incompatible aid from an insolvent beneficiary may be considered to be properly executed either when full recovery is completed or, in case of partial recovery, when the company is liquidated and its assets are sold at market conditions.

- (60) When implementing recovery decisions concerning insolvent beneficiaries, EFTA State authorities should ensure that due account is taken, throughout the insolvency proceedings, of the EEA interest and more in particular of the need to end immediately the distortion of competition caused by the granting of unlawful and incompatible aid.
- (61) However, the sole registration of claims in bankruptcy proceedings may not always be sufficient to ensure the immediate and effective implementation of the Authority's recovery decisions. The application of certain provisions of national bankruptcy laws may frustrate the effect of recovery decisions by allowing the company to operate despite the absence of full recovery, thus allowing the distortion of competition to continue. The Authority therefore considers that there is a need to define the obligations of the EFTA States at the different steps of the bankruptcy proceedings.
- (62) The EFTA State should immediately register its claims in the bankruptcy proceedings.⁶⁷ According to the ECJ case law, recovery will be done according to national bankruptcy rules.⁶⁸ The recovery debt will thus be refunded by virtue of the status given to it by national law.
- (63) In the past, there have been cases, dealt with by the Commission, in which the insolvency administrator refused to register a recovery claim in the bankruptcy proceedings, and this because of the form of the illegal and incompatible aid granted (for example when the aid had been granted in the form of a capital injection). This situation is problematic, especially if such a refusal would deprive the authorities responsible for the execution of the recovery decision of any means to ensure that due account is taken of the Community and EEA interest in the course of the insolvency proceedings. Therefore the Authority considers that the EFTA State should dispute any refusal by the insolvency administrator to register its claims.⁶⁹
- (64) To ensure the immediate and effective implementation of a recovery decision, the Authority is of the view that the authorities responsible for the execution of the recovery decision should also appeal any decision by the insolvency administrator or the insolvency court to allow a continuation of the insolvent beneficiary's activity beyond the time limits set in the recovery decision. Likewise, national courts, when faced with such a request, should take the EEA interest fully into account, and more in particular the need to ensure that the execution of the Authority's decision is

⁶⁶ Case C-52/84 *Commission v Belgium*, cited above footnote 28.

⁶⁷ Case C-142/87 *Commission v Belgium* [1990] ECR I-959, paragraph 62.

⁶⁸ Case C-142/87 *Commission v Belgium*, cited above footnote 70, and Case C-499/99 *Commission v Spain*, cited above footnote 30, paragraphs 28-44.

⁶⁹ See, in that context, the judgment of the Commercial Chamber of the Amberg Court of 23 July 2001 in relation to the aid granted by Germany to "Neue Maxhütte- Stahlwerke GmbH" (Commission Decision of 18 October 1995, OJ L 53 of 2.3.1996, p. 41-49). In that case, the German court over-ruled the refusal of the insolvency administrator to register a recovery claim resulting from an illegal and incompatible aid granted in the form of a capital injection, as this would render the execution of the recovery decision impossible.

immediate and that the distortion of competition caused by the unlawful and incompatible aid is ended as soon as possible. The Authority considers that they should therefore not allow for a continuation of an insolvent beneficiary's activity in the absence of full recovery.

- (65) In the case where a continuation plan is proposed to the creditors' committee implying a continuation of the activity of the beneficiary, the national authorities responsible for the execution of the recovery decision can only support this plan if it ensures that the aid is repaid in full within the time limits foreseen in the Authority's recovery decision. In particular, the EFTA State cannot waive part of its recovery claim, nor can it accept any other solution that would not result in the immediate ending of the activity of the beneficiary. In the absence of a full and immediate repayment of the unlawful and incompatible aid, the authorities responsible for the execution of the recovery decision should take all measures available to oppose the adoption of a continuation plan and should insist on the ending of the activity of the beneficiary within the time limit set in the recovery decision.
- (66) In the case of liquidation, and as long as the aid has not been fully recovered, the EFTA State should oppose any transfer of assets that is not carried out on market terms and/or that is organised so as to circumvent the recovery decision. To achieve a "correct transfer of assets", the EFTA State has to ensure that the undue advantage created by the aid is not transferred to the acquirer of the assets. This may be the case if the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value or to a successor company set up in order to circumvent the recovery order. In such a case, the recovery order needs to be extended to that third party.⁷⁰

4 Consequences of the failure to implement the AUTHORITY'S recovery decisions

- (67) An EFTA State is deemed to comply with the recovery decision when the aid has been fully reimbursed within the prescribed time limit or, in the case of an insolvent beneficiary, when the company is liquidated under market conditions.
- (68) The Authority may also accept, in duly justified cases, a provisional implementation of the decision when it is subject to litigation before a national court or the EFTA Court (e.g. the payment of the full amount of unlawful and incompatible aid into a blocked account⁷¹). The EFTA State must ensure that the advantage linked to the unlawful and incompatible aid leaves the company.⁷² The EFTA State should submit, for approval by the Authority, a justification for the adoption of such provisional measures and a full description of the provisional measure envisaged.
- (69) Where the EFTA State concerned has not complied with the recovery decision, and where it has not been able to demonstrate the existence of absolute impossibility, the Authority may initiate infringement proceedings. In addition, if certain conditions

⁷⁰ Case C-277/00 *Germany v Commission*, cited above footnote 40.

⁷¹ In practical terms, the payment of the total amount of aid and the interests on a blocked account may be ruled by a specific contract, signed by the bank and the beneficiary, and by which the parties agree that the sum will be released in favour of one or the other party once the litigation has come to an end.

⁷² Contrary to the constitution of a blocked account, the use of bank guarantees may not be considered as an adequate provisional measure since the total amount of the aid is still at the recipient's disposal.

are satisfied, it may require the EFTA State concerned to suspend the payment of a new compatible aid to the beneficiary or beneficiaries concerned in application of the *Deggendorf* principle.

4.1 Infringement proceedings

- Actions on the basis of Article 1(2) in Part I in conjunction with Article 23(1) in Part II of Protocol 3
- (70) If the EFTA State concerned does not comply with the recovery decision within the prescribed time limit and if it has not been able to demonstrate absolute impossibility, the Authority, or any other interested EFTA State, may refer the matter directly to the EFTA Court pursuant to Article 1(2) in Part I read in conjunction with Article 23(1) in Part II of Protocol 3. The Authority may then invoke arguments concerning the behaviour of the executive, legislative or judicial organs of the EFTA State concerned, as the EFTA State should be considered in its entirety.⁷³
- (71) In accordance with Article 33 of the Surveillance and Court Agreement, the EFTA States concerned should take the necessary measures to comply with the judgments of the EFTA Court.
- Actions on the basis of Article 23(2) in Part II of Protocol 3
- (72) If the Authority considers that the EFTA State concerned has not complied with the judgment of the EFTA Court, the Authority may refer the matter to the EFTA Court directly in accordance with Article 1(2) in Part II read in conjunction with Article 23(2) in Part II of Protocol 3.

4.2 Applying the *Deggendorf* case-law

- (73) In its judgment on the *Deggendorf* case, the Court of First Instance of the European Communities held that, “*when the Commission considers the compatibility of a State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that previous decision may have imposed on a Member State. It follows that the Commission has the power to take into consideration, first, any accumulated effect of the old [...] aid and the new [...] aid and, secondly, the fact that the [old] aid declared unlawful [...] had not been repaid*”.⁷⁴ In application of this judgment, and to avoid a distortion of competition contrary to the common interest, the Authority may order an EFTA State to suspend the payment of a new compatible aid to an undertaking that has at its disposal an unlawful and incompatible aid subject to an earlier recovery decision, and this until the EFTA State has reassured itself that the undertaking concerned has reimbursed the old unlawful and incompatible aid.
- (74) In practice, in the course of the preliminary investigation of a new aid measure, the Authority will request a commitment from the EFTA State to suspend the payment of new aid to any beneficiary that still needs to reimburse an unlawful and incompatible aid subject to an earlier recovery decision. If the EFTA State does not give this commitment and/or in the absence of clear data on the aid measures

⁷³ Case C-224/01, *Köbler*, [2003], ECR I-10239, paragraphs 31-33; Case C-173/03, *Traghetti del Mediterraneo*, [2003], page I-05177, paragraphs 30-33.

⁷⁴ Case T-244/93 and T-486/93 *TWD Deggendorf v Commission* [1995] ECR II-2265, paragraph 56.

involved⁷⁵ preventing the Authority from assessing the global impact of the old and the new aid on competition, the Authority will take a final conditional decision on the basis of Article 7 (4) in Part II of Protocol 3, requiring the EFTA State concerned to suspend payment of the new aid until it is satisfied that the beneficiary concerned has reimbursed the old unlawful and incompatible aid, including any recovery interests due.

- (75) The *Deggendorf* principle has been integrated into the Chapter on aid for rescuing and restructuring firms in difficulty of the Authority's State Aid Guidelines⁷⁶ and into Decision No 195/04/COL as well as into Block Exemption Regulations which have been incorporated into the EEA Agreement.⁷⁷ The Authority intends to integrate this principle into all forthcoming state aid rules and decisions.

5 Conclusion

- (76) The maintenance of a system of free and undistorted competition is one of the cornerstones of the European Economic Area. As part of the EEA competition policy, state aid discipline is essential to ensure that the internal market remains a level playing field in all economic sectors in Europe. In this key task, the Authority and the EFTA States have the joint responsibility to ensure a proper enforcement of state aid discipline and in particular of recovery decisions.
- (77) By issuing this communication, the Authority is willing to increase the awareness of the principles of recovery policy as defined by the Courts of the European Communities and the EFTA Court and to clarify the Authority's practice as regards its recovery policy. The Authority commits itself to abide by these recalled principles and invites EFTA States to ask for advice when facing difficulties in implementing recovery decisions. The services of the Authority remain at the disposal of the EFTA States to provide further guidance and assistance if required.
- (78) In return, the Authority expects EFTA States to abide to the principles of recovery policy. It is only through a joint effort of both the Authority and the EFTA States that state aid discipline will be ensured and will produce its desired objective, i.e. the maintenance of undistorted competition within the internal market.

⁷⁵ For instance in the case of illegal and incompatible schemes where the amount and the beneficiaries are not known to the Authority.

⁷⁶ Chapter on aid for rescuing and restructuring firms in difficulty was adopted on 1 December 2004.

⁷⁷ Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid, OJ L 302, of 1 November 2006, p 29, as referred to at point 1i of Annex XV to the EEA Agreement, OJ L 89 of 29 March 2007, p. 33 and EEA Supplement No 15 of 29 March 2007, p. 26, entry into force on 9 December 2006 and Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3, as referred to at point 1j of Annex XV to the EEA Agreement, not published yet, entry into force on 8 November 2008.