

Official Journal

of the European Union

L 79



English edition

Legislation

Volume 53

25 March 2010

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II

(Non-legislative acts)

REGULATIONS

COMMISSION REGULATION (EU) No 248/2010

of 24 March 2010

amending Regulation (EC) No 1484/95 laying down detailed rules for implementing the system of additional import duties and fixing representative prices in the poultry meat and egg sectors and for egg albumin, and Regulation (EC) No 504/2007 laying down detailed rules for the application of the arrangements for additional import duties in the milk and milk products sector

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾, and in particular Article 143(b), in conjunction with Article 4 thereof,

Having regard to Council Regulation (EC) No 614/2009 of 7 July 2009 on the common system of trade for ovalbumin and lactalbumin ⁽²⁾, and in particular Article 3(4) thereof,

Whereas:

- (1) Article 3(3) of Commission Regulation (EC) No 1484/95 ⁽³⁾, and Article 4(3) of Commission Regulation (EC) No 504/2007 ⁽⁴⁾ provide that, when the cif import price of a consignment is higher than the applicable representative price, the importer has to lodge the security referred to in Article 248(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code ⁽⁵⁾, equal to the amount of additional duty which he would have paid if the calculation of the additional duty had been made on the basis of the representative price applicable to the product in question.
- (2) However, in a similar case, Article 38(3) of Commission Regulation (EC) No 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector ⁽⁶⁾, provides that the importer has to lodge the security referred to in

Article 248(1) of Regulation (EEC) No 2454/93, equal to the difference between the amount of additional import duty calculated on the basis of the representative price applicable to the product in question and the amount of additional import duty calculated on the basis of the cif import price of the consignment in question.

- (3) For sake of harmonisation of the calculation methods applicable in the different sectors, it is appropriate to align the method provided for in Article 3(3) of Regulation (EC) No 1484/95 and Article 4(3) of Regulation (EC) No 504/2007 to the method provided for in Article 38(3) of Regulation (EC) No 951/2006.
- (4) Article 3(4) of Regulation (EC) No 1484/95 and Article 4(4) of Regulation (EC) No 504/2007 determine the time-limits by which the importer has to prove that the consignment was disposed of under the conditions confirming the correctness of the cif import price. It appears that in practice the procedure for the import and the sale of the goods under the system have become far more differentiated. Where previously a single operator was in general dealing with the purchase in the third country, the release into free circulation and the sale in the Community, nowadays several operators are involved in the different operations making often impossible the respect of those time-limits. It is therefore appropriate to extend those time-limits.
- (5) Regulations (EC) No 1484/95 and (EC) No 504/2007 should therefore be amended accordingly.

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 181, 14.7.2009, p. 8.

⁽³⁾ OJ L 145, 29.6.1995, p. 47.

⁽⁴⁾ OJ L 119, 9.5.2007, p. 7.

⁽⁵⁾ OJ L 253, 11.10.1993, p. 1.

⁽⁶⁾ OJ L 178, 1.7.2006, p. 24.

(6) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

In Article 3 of Regulation (EC) No 1484/95, paragraphs 3 and 4 are replaced by the following:

‘3. In the case referred to in paragraph 2, the importer must lodge the security referred to in Article 248(1) of Regulation (EEC) No 2454/93, equal to the difference between the amount of additional import duty calculated on the basis of the representative price applicable to the product in question and the amount of additional import duty calculated on the basis of the cif import price of the consignment in question.

4. The importer shall have two months from the sale of the products in question, subject to a limit of nine months from the date of acceptance of the declaration of release for free circulation, to prove that the consignment was disposed of under conditions confirming the correctness of the prices referred to in paragraph 2. Failure to meet one or other of these deadlines shall entail the loss of the security lodged. However, the time limit of nine months may be extended by the competent authorities by a maximum of three months at the request of the importer, which must be duly substantiated.

The security lodged shall be released to the extent that proof of the conditions of disposal is provided to the satisfaction of the customs authorities. Otherwise, the security shall be forfeit by way of payment of the additional duties.’

Article 2

In Article 4 of Regulation (EC) No 504/2007, paragraphs 3 and 4 are replaced by the following:

‘3. In the case referred to in paragraph 2, the importer must lodge the security referred to in Article 248(1) of Commission Regulation (EEC) No 2454/93 (*), equal to the difference between the amount of additional import duty calculated on the basis of the representative price applicable to the product in question and the amount of additional import duty calculated on the basis of the cif import price of the consignment in question.

4. The importer shall have two months from the sale of the products in question, subject to a limit of nine months from the date of acceptance of the declaration of release for free circulation, to prove that the consignment was disposed of under conditions confirming the correctness of the prices referred to in paragraph 2. Failure to meet one or other of these deadlines shall entail the loss of the security lodged. However, the time limit of nine months may be extended by the competent authorities by a maximum of three months at the request of the importer, which must be duly substantiated.

The security lodged shall be released to the extent that proof of the conditions of disposal is provided to the satisfaction of the customs authorities. Otherwise, the security shall be forfeit by way of payment of the additional duties.

(*) OJ L 253, 11.10.1993, p. 1.’

Article 3

This Regulation shall enter into force on the seventh day following its publication in the *Official Journal of the European Union*.

It shall apply as from 1 May 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2010.

For the Commission
The President
José Manuel BARROSO

COMMISSION REGULATION (EU) No 249/2010**of 24 March 2010****entering a name in the register of protected designations of origin and protected geographical indications (Chorizo Riojano (PGI))**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs ⁽¹⁾, and in particular the first subparagraph of Article 7(4) thereof,

Whereas:

- (1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006, Spain's application to register the name 'Chorizo Riojano' was published in the *Official Journal of the European Union* ⁽²⁾.

- (2) As no statement of objection pursuant to Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, that name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name contained in the Annex to this Regulation is hereby entered in the register.

Article 2

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2010.

For the Commission

The President

José Manuel BARROSO

⁽¹⁾ OJ L 93, 31.3.2006, p. 12.

⁽²⁾ OJ C 186, 8.8.2009, p. 14.

ANNEX

Agricultural products intended for human consumption listed in Annex I to the Treaty:

Class 1.2. Meat products (cooked, salted, smoked, etc.)

SPAIN

Chorizo Riojano (PGI)

COMMISSION REGULATION (EU) No 250/2010**of 24 March 2010****entering a name in the register of protected designations of origin and protected geographical indications (Farine de Petit Épeautre de Haute Provence (PGI))**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs ⁽¹⁾, and in particular the first subparagraph of Article 7(4) thereof,

Whereas:

- (1) Pursuant to the first subparagraph of Article 6(2) and in accordance with Article 17(2) of Regulation (EC) No 510/2006, France's application to register the name 'Farine de Petit Épeautre de Haute Provence' was published in the *Official Journal of the European Union* ⁽²⁾.

- (2) As no statement of objection pursuant to Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, that name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name contained in the Annex to this Regulation is hereby entered in the register.

Article 2

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2010.

For the Commission

The President

José Manuel BARROSO

⁽¹⁾ OJ L 93, 31.3.2006, p. 12.

⁽²⁾ OJ C 185, 7.8.2009, p. 17.

ANNEX

Agricultural products intended for human consumption listed in Annex I to the Treaty:

Class 1.6. Fruit, vegetables and cereals, fresh or processed

FRANCE

Farine de Petit Épeautre de Haute Provence (PGI)

COMMISSION REGULATION (EU) No 251/2010**of 24 March 2010****entering a name in the register of protected designations of origin and protected geographical indications (Yorkshire Forced Rhubarb (PDO))**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs ⁽¹⁾, and in particular the first subparagraph of Article 7(4) thereof,

Whereas:

- (1) Pursuant to the first subparagraph of Article 6(2) of Regulation (EC) No 510/2006, the United Kingdom's application to register the name 'Yorkshire Forced Rhubarb' was published in the *Official Journal of the European Union* ⁽²⁾.

- (2) As no statement of objection pursuant to Article 7 of Regulation (EC) No 510/2006 has been received by the Commission, that name should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name contained in the Annex to this Regulation is hereby entered in the register.

Article 2

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2010.

For the Commission

The President

José Manuel BARROSO

⁽¹⁾ OJ L 93, 31.3.2006, p. 12.

⁽²⁾ OJ C 189, 12.8.2009, p. 29.

ANNEX

Agricultural products intended for human consumption listed in Annex I to the Treaty:

Class 1.6. Fruit, vegetables and cereals, fresh or processed

UNITED KINGDOM

Yorkshire Forced Rhubarb (PDO)

COMMISSION REGULATION (EU) No 252/2010**of 24 March 2010****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾,Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector ⁽²⁾, and in particular Article 138(1) thereof,

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 138 of Regulation (EC) No 1580/2007 are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 25 March 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2010.

*For the Commission,
On behalf of the President,*

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*⁽¹⁾ OJ L 299, 16.11.2007, p. 1.⁽²⁾ OJ L 350, 31.12.2007, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	IL	74,8
	JO	59,4
	MA	95,7
	TN	128,2
	TR	97,7
	ZZ	91,2
0707 00 05	JO	68,6
	MA	74,6
	MK	124,9
	TR	123,4
	ZZ	97,9
0709 90 70	JO	97,9
	MA	147,9
	TR	103,1
	ZZ	116,3
0805 10 20	EG	40,2
	IL	59,5
	MA	43,6
	TN	55,8
	TR	62,6
	ZZ	52,3
0805 50 10	EG	66,4
	IL	91,6
	MA	49,1
	TR	63,1
	ZZ	67,6
0808 10 80	AR	89,0
	BR	89,0
	CA	99,1
	CL	85,2
	CN	74,1
	MK	24,7
	US	132,2
	UY	68,2
	ZA	107,6
0808 20 50	ZZ	85,5
	AR	79,6
	CL	69,2
	CN	94,1
	US	134,2
	UY	118,7
	ZA	94,0
	ZZ	98,3

⁽¹⁾ Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EU) No 253/2010**of 24 March 2010****amending the representative prices and additional import duties for certain products in the sugar sector fixed by Regulation (EC) No 877/2009 for the 2009/10 marketing year**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (single CMO Regulation) ⁽¹⁾,

Having regard to Commission Regulation (EC) No 951/2006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 318/2006 as regards trade with third countries in the sugar sector ⁽²⁾, and in particular Article 36(2), second subparagraph, second sentence thereof,

Whereas:

- (1) The representative prices and additional duties applicable to imports of white sugar, raw sugar and certain syrups

for the 2009/10 marketing year are fixed by Commission Regulation (EC) No 877/2009 ⁽³⁾. These prices and duties have been last amended by Commission Regulation (EU) No 236/2010 ⁽⁴⁾.

- (2) The data currently available to the Commission indicate that those amounts should be amended in accordance with the rules and procedures laid down in Regulation (EC) No 951/2006,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties applicable to imports of the products referred to in Article 36 of Regulation (EC) No 951/2006, as fixed by Regulation (EC) No 877/2009 for the 2009/10, marketing year, are hereby amended as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 25 March 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 March 2010.

*For the Commission,
On behalf of the President,*

Jean-Luc DEMARTY
*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 178, 1.7.2006, p. 24.

⁽³⁾ OJ L 253, 25.9.2009, p. 3.

⁽⁴⁾ OJ L 72, 20.3.2010, p. 15.

ANNEX

Amended representative prices and additional import duties applicable to white sugar, raw sugar and products covered by CN code 1702 90 95 from 25 March 2010

(EUR)

CN code	Representative price per 100 kg net of the product concerned	Additional duty per 100 kg net of the product concerned
1701 11 10 ⁽¹⁾	33,42	1,26
1701 11 90 ⁽¹⁾	33,42	4,88
1701 12 10 ⁽¹⁾	33,42	1,13
1701 12 90 ⁽¹⁾	33,42	4,58
1701 91 00 ⁽²⁾	35,05	7,71
1701 99 10 ⁽²⁾	35,05	3,82
1701 99 90 ⁽²⁾	35,05	3,82
1702 90 95 ⁽³⁾	0,35	0,31

⁽¹⁾ For the standard quality defined in point III of Annex IV to Regulation (EC) No 1234/2007.⁽²⁾ For the standard quality defined in point II of Annex IV to Regulation (EC) No 1234/2007.⁽³⁾ Per 1 % sucrose content.

DECISIONS

COMMISSION DECISION

of 15 December 2009

on State aid granted by Germany in respect of certain activities of the Bavarian Animal Health Service (C 24/06 (ex NN 75/2000))

*(notified under document C(2009) 9954)***(Only the German text is authentic)**

(2010/178/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union and in particular the first subparagraph of Article 108(2) thereof,

Having given interested parties notice to submit their comments pursuant to that Article, and having regard to those comments,

Whereas:

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments.

(6) The Commission received written comments from interested parties by letters dated 30 October 2006, 2 November 2006 and 7 November 2006.

(7) Germany sent its comments to the Commission by letters dated 6 November 2006, 22 January 2007, 25 July 2008 and 9 February 2009.

I. PROCEDURE

(1) By letter of 21 February 2000 a complaint was lodged with the Commission regarding measures taken by the Bavarian Animal Health Service (TGD). The same complainant subsequently sent further letters regarding the same complaint. The State aid case was registered under number NN 75/00.

(2) The Commission wrote a number of letters to Germany in connection with the complaint. In reply to these letters, Germany submitted information in letters dated 4 July 2000, 22 December 2000, 22 November 2002, 10 April 2003, 1 December 2003 and 27 June 2005. A meeting with German officials took place on 17 July 2003.

(3) The measure had been in operation since 1974. Despite enquiries, it was not possible to find proof of the measure having been notified. The aid was therefore entered in the register of non-notified aid measures.

(4) By letter dated 7 July 2006, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU ⁽¹⁾ in respect of the aid.

⁽¹⁾ On 1 December 2009, Articles 87 and 88 of the EC Treaty were replaced by Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

II. DESCRIPTION

(8) The measure is taken pursuant to Article 14(1) of the Law on support for Bavarian agriculture (*Gesetz zur Förderung der bayerischen Landwirtschaft — LwFöG*).

(9) The objective of the measure is to safeguard and improve the hygiene of foodstuffs of animal origin.

(10) The beneficiaries are farmers and fishermen (hereinafter referred to collectively as farmers).

(11) A further beneficiary is the Bavarian Animal Health Service (TGD).

(12) The measure is financed from the resources of the Land of Bavaria and the Bavarian Animal Disease Fund (hereinafter: BTSK).

(13) Although described as 'general measures' (*Globalmaßnahmen*), the measures in question benefit only farmers in Bavaria. Moreover, according to the information provided by Germany, they are very specific and of a purely preventive nature relating to the production of milk and meat and to the rearing of pigs, poultry,

⁽²⁾ OJ C 244, 11.10.2006, p. 15.

sheep and fish. Stocks (*Tierbestände*) are examined according to an established programme that takes account of specific animal disease risks or criteria for the prevention and eradication of animal diseases. Germany has also specified that the support is granted only for general measures in the public interest that go beyond the legal requirements for the individual farmer (letter of 6 November 2006, p. 4).

- (14) The following types of measure are taken on agricultural holdings: continuous monitoring by means of tests and/or precautionary examinations, sampling and (laboratory/serial) analyses, veterinary advice, drawing up prevention and eradication plans and developing vaccination programmes.
- (15) Germany has indicated that the measures listed above in recital 14 constitute a basis for specific advice to farmers for appropriate preventive or curative action. According to Germany, however, services normally provided by practising veterinary surgeons (e.g. treatment with medicinal products or preventive vaccination) are not part of these 'general measures'.
- (16) These 'general measures' are free of charge for farmers. However, farmers cannot request the measures; the TGD — which has been entrusted with taking them — undertakes them on its own initiative.
- (17) The Land of Bavaria reimburses the cost of the measures to the TGD. Pursuant to the second sentence of Article 14(1) of the LwFöG, State payments are granted for 50 % of essential expenditure.
- (18) A further percentage of the TGD's personnel and non-personnel costs is reimbursed from other State resources, namely the BTKS (see State aid case numbers NN 23/07, N 426/03 and N 81/04). Together, this amounts to reimbursement of up to 100 % of the costs.
- (19) The benefits to the TGD are set out below.
- (20) Under the wording of the LwFöG, the TGD is reimbursed only half of the essential expenditure from State resources. According to the information provided by Germany, however, up to 100 % reimbursement can be obtained.
- (21) The aid has been paid to the TGD since 1974. Under Article 15(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹⁾, the powers of the Commission to recover aid are subject to a limitation period of ten years. The Commission investigation started

in 2000. The ten-year period laid down in Article 15(2) of Regulation (EC) No 659/1999 therefore goes back to 1990. Therefore, aid paid before this period will not be investigated further.

- (22) Accordingly, the budgetary data provided by Germany and presented in the Annex concern the payments to the TGD for the costs incurred in discharging public service obligations during the period from 1990 to 2008.

Reasons for initiating the formal investigation procedure and the scope thereof

- (23) It was not clear, after initial examination, whether the budget payments and the payments from the BTKS favoured the TGD or not.
- (24) Furthermore, the complainant alleged that the veterinary surgeons employed by the TGD provide certain clinical/diagnostic and therapeutic services (care services) at up to 90 % below cost price. This was the sphere in which the TGD became a commercial operator.
- (25) According to the complainant, this is possible only because the TGD receives financial assistance for the 'general measures', which enables it to offer clinical/diagnostic and therapeutic services considerably cheaper than veterinary surgeons in independent practice, since the latter have to manage without financial assistance and are not on site, whereas the TGD veterinarians are already on site, thus saving transport costs and giving them the opportunity to acquire business.
- (26) In line with its notice on the determination of the rules applicable for the assessment of unlawful State aid⁽²⁾, the Commission always assesses the compatibility of unlawful State aid with the internal market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted. The Commission did not have, at the time it initiated the procedure, sufficient information to be sure that the aid for farmers complied with the relevant Community provisions, i.e. the Guidelines for State aid in the agricultural sector and the Guidelines for examining State aid to fisheries and aquaculture. The Commission therefore requested the relevant information from Germany.
- (27) By letter of 12 December 2008, the Commission services asked Germany to confirm whether the aid under investigation continued being granted after 1 January 2008 and, if so, to provide the information necessary to assess the compatibility of the aid with the Community Guidelines for State aid in the agriculture and forestry

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ C 119, 22.5.2002, p. 22.

sector 2007 to 2013 ⁽¹⁾ (hereinafter 'Guidelines'), which replaced the Community Guidelines for State aid in the agriculture sector ⁽²⁾ (hereinafter 'Community Guidelines') as of 1 January 2007, and the Guidelines for the examination of State aid to fisheries and aquaculture ⁽³⁾ (hereinafter 'the 2008 Guidelines'). By letter of 9 February 2009, Germany declared that the aid would continue to be granted in the agriculture sector after 2008 and provided the requested information.

III. GERMANY'S COMMENTS

- (28) Germany argued that the payments granted by the Land of Bavaria and the BSTK for the general measures are to be considered as compensation for providing official services in the public interest, and referred to the jurisprudence under which State compensatory payments for services provided in order to discharge public service obligations, do not, under certain conditions, fall under the heading of State aid. Therefore the measures are not, in Germany's view, to be considered as State aid within the meaning of Article 107(1) TFEU.
- (29) Germany was of the opinion that the general measures serve the health and welfare of animals, consumer protection and the protection of animals. Thus, the general measures are primarily in the interest of the general public.
- (30) In Germany's view, extensive knowledge is gained from the implementation of these general measures which is then made available nationally and internationally through specialist publications and scientific lectures. Thus, a substantial part of the results obtained from the general measures is accessible to experts in the EU.
- (31) Germany also stated that care services, i.e. services normally provided by practising veterinary surgeons (e.g. treatment with medical products or preventive vaccinations), were not provided under the programme of general measures. Outside this subsidised programme the TGD pursues some profit-oriented activities (the care services), which constitute less than 5 % of all veterinary activities. The profit-oriented activities accounted for 2,6–2,85 % of the TGD's total annual turnover.
- (32) Cross-subsidising can be excluded by a clear and understandable separation between 'general measures' and 'profit-oriented activities'. Strict separation is guaranteed by very detailed accounting as well as extensive controls.

⁽¹⁾ OJ C 319, 27.12.2006, p. 1.

⁽²⁾ OJ C 28, 1.2.2000, p. 2.

⁽³⁾ OJ C 84, 3.4.2008, p. 10.

IV. THIRD-PARTY OBSERVATIONS

- (33) The third parties reiterated that, through the veterinary surgeons it engages, the TGD not only provides preventive treatment but also care services.
- (34) The third parties did not allege that direct financial support was granted for these care services, but insisted that the TGD was able to offer comparable services under more favourable conditions than independent veterinarians.
- (35) The claim that the aid for farmers was not in accordance with the Community guidelines on State aid in the agriculture sector or the applicable legislative provisions was not maintained, nor did anybody object to the financing of the aid.

V. ASSESSMENT OF THE MEASURE

Presence of aid for farmers

- (36) As laid down in Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (37) The Court of Justice has ruled that, when considering whether a State measure constitutes aid within the meaning of Article 107 TFEU, it is to be determined whether the recipient undertaking has received an economic advantage which it would not have received under normal market conditions ⁽⁴⁾ or has been spared costs which it would normally have had to bear from its own resources ⁽⁵⁾.
- (38) *Prima facie*, these conditions would seem to be met.
- (39) The measure is financed from State resources. It benefits certain undertakings, namely Bavarian farmers, as they receive the subsidised services for free. As these undertakings are active in a highly competitive international market, the measure distorts or threatens to distort competition ⁽⁶⁾ and also affects trade between Member States ⁽⁷⁾.

⁽⁴⁾ Judgment in Case C-39/94 *SFEI* [1996] ECR I-3547, paragraph 60.

⁽⁵⁾ Judgment in Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

⁽⁶⁾ According to European Court of Justice case-law, the strengthening of an undertaking's position vis-à-vis its competitors as a result of financial aid granted by a Member State is an indication of a distortion of competition (Judgment in Case C-730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraphs 11 and 12).

⁽⁷⁾ In 2007, the value of German intra-EU trade in agricultural products was EUR 45 327 million (imports) and EUR 37 514 million (exports) (*Source: Eurostat*).

- (40) Therefore, the measure constitutes aid and Article 107(1) TFEU applies. It must consequently be examined whether derogation might be granted from the general principle of the incompatibility of State aid under Article 107(1) TFEU.

Legality of the aid

- (41) The 'general measures' for farmers (as from 1990) and the compensation granted to the TGD for undertaking the 'general measures' during the period from 1990 to 2004 were granted without having been notified to the Commission. They are unlawful because they were granted in breach of Article 108(3) TFEU.

Compatibility of aid to farmers in the agriculture and fisheries sector

Aid for combating animal diseases

- (42) The ban on granting State aid under Article 107(1) TFEU does not apply without exception, however. The Commission has examined whether any of the exceptions to the ban in principle on aid under Article 107(1) TFEU apply.
- (43) The exceptions provided for in Article 107(2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, are irrelevant in the present context.
- (44) The Commission considers that the exceptions provided for in Article 107(3)(a) TFEU concerning the development of certain areas are not applicable to the scheme at issue because the measure does not comprise aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.
- (45) As for the exception provided for in Article 107(3)(b) TFEU, it is sufficient to note that the aid scheme at issue is not an important project of common European interest and does not seek to remedy a serious disturbance in the German economy. Neither is the objective to promote culture and heritage conservation within the meaning of the exception provided for in Article 107(3)(d) TFEU.
- (46) Neither Germany nor any interested parties invoked the above-mentioned exceptions in the course of the investigation procedure.

- (47) The only exception that could be considered is therefore that contained in Article 107(3)(c) TFEU, under which aid may be declared compatible if 'it facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

- (48) Given that the measure involves aid to farmers, the Community guidelines for State aid in the agriculture and forestry sector and the Guidelines for the examination of State aid to fisheries and aquaculture are applicable here. As mentioned in recital 26 above, given that these measures constitute unlawful State aid, the Commission assesses their compatibility with the internal market in accordance with the conditions of the provisions in force at the time when the aid was granted.

Aid granted in the agriculture sector until 2007

- (49) According to the Commission's notice on the determination of the rules applicable for the assessment of unlawful State aid, the Community Guidelines apply to the measures at issue here, whereas the aid granted before the entry into force of the Community Guidelines (i.e. before 1 January 2000) are to be assessed in light of the Commission working document of 10 November 1986 ⁽¹⁾.
- (50) The Community Guidelines state in point 11.4.1 that 'where a farmer loses livestock as a result of animal disease, or where his crops are affected by plant disease, this does not normally constitute a natural disaster or an exceptional occurrence within the meaning of the Treaty'.
- (51) In such cases, aids to provide compensation for the losses incurred and aids to prevent future losses may be permitted by the Commission only on the basis of Article 107(3)(c) TFEU, which provides that aid to facilitate the development of certain activities may be considered compatible with the internal market provided that it does not affect trading conditions to an extent contrary to the common interest.
- (52) Point 11 of the Community Guidelines applies to the aid for farmers considered here as the measures serve to prevent and combat animal diseases. The Commission bases its examination of aid to prevent and combat animal diseases on point 11.4 of the Community Guidelines. Such aid is regarded as compatible with Articles 107 and 108 TFEU if the following conditions are met.

⁽¹⁾ Commission working document No VI/5934/86 of 10 November 1986.

- (53) The measure should form part of a programme at EU, national or regional level for the prevention, control or eradication of the disease concerned (point 11.4.2 of the Community Guidelines). Under point 11.4.2 of the Community Guidelines, an alert system is to be set up in combination with aid to encourage the individuals in question to take part in preventive measures on a voluntary basis, where appropriate. Accordingly, only diseases which are a matter of concern for the public authorities, and not measures for which farmers must reasonably take responsibility themselves, may be the subject of aid measures.
- (54) The aid measures should be preventive or compensatory, or a combination of the two (point 11.4.3 of the Community Guidelines).
- (55) They should be compatible with the specific provisions laid down in Community veterinary and phyto-sanitary legislation (point 11.4.4 of the Community Guidelines).
- (56) The aid may be granted for up to 100 % of costs incurred (point 11.4.5 of the Community Guidelines). No aid may be granted where Community legislation stipulates that the costs in question are to be borne by farmers themselves.
- (57) These conditions are met as follows.
- (58) The measures form part of a programme at regional level (Bavaria). Their purpose is the prevention and control of animal diseases, as proven by the explicit objective of the LwFöG (to safeguard and improve the hygiene of foodstuffs of animal origin) and the 'general measures' applied. The measures under scrutiny serve the purpose of fighting infectious animal diseases, including factorial diseases and zoonoses. They are also intended to optimise and reduce the use of pharmaceuticals. The main diseases for particular groups of animals are: for bovines and sheep — zoonoses, Q-fever, paratuberculosis, transmissible spongiform encephalopathy and mastitis; for pigs and poultry — zoonoses, salmonella, escherichia coli and enteritis. In addition, methods and procedures for the detection and diagnosis of viral diseases are developed and evaluated.
- (59) The general measures contribute to the EU's objective of ensuring a high level of animal health. In addition, the Commission has no evidence that they could contravene relevant EU veterinary legislation.
- (60) The scheme provides for a maximum aid intensity of 100 %. It does not provide any support where

Community legislation states that the farmers have to bear the costs themselves.

- (61) 50 % of the costs incurred for the general measures concerning the agriculture and fisheries sector are borne by the Land of Bavaria. Germany informed the Commission in its comments following the opening of the procedure that another part of the costs is financed by the BTKS. The BTKS is a public body financed by parafiscal levies. The combined financing of the aid through the resources of the Land of Bavaria and of the BTKS is limited to 100 % and is in practice even less. In the past, the Commission has upon several occasions approved financing through the parafiscal levies by the BTKS ⁽¹⁾. The Commission has therefore no reason to re-examine these parafiscal levies in depth. Neither the plaintiff nor the third parties objected to the mode of financing of the BTKS (i.e. that part of the financing of the aid at issue).
- (62) The Community Guidelines are based on the same principles as the Commission working document of 10 November 1986. Therefore, the same assessment also applies to the aid given to farmers from 1990 to 1999, which also has to be considered in line with these principles. The State aid can therefore be regarded as compatible with the internal market.

Aid granted in the agriculture sector from 2007

- (63) As for the situation after 2007, point 133 of the Guidelines states that the Commission will declare State aid for combating animal and plant diseases compatible with Article 107(3)(c) TFEU if it fulfils the conditions of Article 10 of Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 ⁽²⁾. In this context only disease prevention measures need to be considered, as no aid is given to curative measures or to compensate losses.
- (64) Were the aid to farmers to cover consultancy costs, this would constitute technical support within the meaning of point 103 of the Guidelines. In line with this point, the Commission will declare State aid for technical support compatible with Article 107(3)(c) TFEU if it fulfils the conditions of Article 15 of Regulation (EC) No 1857/2006.
- (65) Article 10 of Regulation (EC) No 1857/2006 allows aid for the following.

⁽¹⁾ State aids NN 23/97, N 426/03 and N 81/04 (still in force).

⁽²⁾ OJ L 358, 16.12.2006, p. 3.

- (66) Aid to compensate farmers for the costs of prevention and eradication of animal or plant diseases or pest infestations incurred for the costs of health checks, tests and other screening measures, purchase and administration of vaccines, medicines and plant protection products, slaughter and destruction costs of animals and costs of destruction of crops is compatible with the internal market. Aid must be granted in the form of services subsidised by up to 100 % and must not involve direct payments of money to the producers (Article 10(1) of Regulation (EC) No 1857/2006).
- (67) Any amount received under insurance schemes and costs not incurred because of the disease must be deducted from the eligible cost and losses (Article 10(3) of Regulation (EC) No 1857/2006).
- (68) Payments must be made in relation to diseases or pests for which EU or national legislative or administrative provisions exist. Payments must thus be made as part of a public programme at EU, national or regional level for the prevention, control or eradication of the disease or pest concerned. The diseases or pest infestation must be clearly identified in the programme, which must also contain a description of the measures concerned (Article 10(4) of Regulation (EC) No 1857/2006).
- (69) The aid must not relate to disease in respect of which EU legislation provides for specific charges for control measures or that the cost of such measures is to be borne by the agricultural holding, unless the cost of such measures is entirely offset by compulsory charges on producers (Article 10(5) and (6) of Regulation (EC) No 1857/2006).
- (70) As regards animal diseases, the aid must be granted in respect of diseases mentioned in the list of animal diseases established by the World Organisation for Animal Health and/or in the Annex to Council Decision 90/424/EEC of 26 June 1990 on expenditure in the veterinary field ⁽¹⁾ (Article 10(7) of Regulation (EC) No 1857/2006).
- (71) Aid schemes must be introduced within three years following the occurrence of the expense or loss. The aid must be paid out within four years following the occurrence (Article 10(8) of Regulation (EC) No 1857/2006).
- (72) These conditions are met as follows:
- (73) As described above in recital 14, the aid relates to a variety of measures (continuous monitoring, sampling and (laboratory/serial) analyses, veterinary advice, drawing up prevention and eradication plans and developing vaccination programmes), whose direct purpose is the prevention of diseases. Germany confirmed by letter of 9 February 2009 that the aid is given in the form of subsidised services. Therefore aid for such costs can be authorised under Article 10(1) of Regulation (EC) No 1857/2006.
- (74) Germany confirmed by letter of 9 February 2009 that where the projects concern animal diseases, these diseases are contained in the list established by the World Organisation for Animal Health and/or in the Annex to Council Decision 90/424/EEC.
- (75) Article 10(3) of Regulation (EC) No 1857/2006 is not relevant as aid is granted for preventive measures only.
- (76) Where specific ailments are concerned, the aid is given under a regional programme in which the diseases and/or illnesses and corresponding measures are clearly identified. Article 10(4) of Regulation (EC) No 1857/2006 is therefore satisfied.
- (77) Costs that the producers have to pay themselves under EU legislation are not eligible. Article 10(5) of Regulation (EC) No 1857/2006 is therefore satisfied.
- (78) Expenses incurred before the services are given are not eligible. Article 10(8) of Regulation (EC) No 1857/2006 is therefore satisfied.
- (79) Germany has not excluded that the measures referred to in recital 14 may relate to other animal health aspects than specific and identified diseases, illnesses or pests, for instance to production hygiene. Hence measures would constitute aid for consultancy where the advice and plans are adapted to the situation of certain farmers or groups of farmers.
- (80) Article 15(2)(c) of Regulation (EC) No 1857/2006 allows aid to cover the fees for consultancy services, provided by third parties, which do not constitute a continuous or periodic activity nor relate to the enterprise's usual operating expenditure, such as routine tax consultancy
- ⁽¹⁾ OJ L 224, 18.8.1990, p. 19.

services, regular legal services, or advertising. Article 15(3) of Regulation (EC) No 1857/2006 provides that the aid may cover up to 100 % of the eligible costs and must be given in the form of subsidised services.

(81) These conditions are met as follows:

(82) It appears from the documentation submitted by Germany (see recital 14) that the subsidised consultancy services are in the form of projects that relate to specific one-off animal health issues of public interest. Although certain measures may require continuous monitoring or testing, these appear to be linked to the particular project and not to represent routine ongoing veterinary or quality controls of the stock. Neither can the cost of such measures be considered as usual operating expenditure within the meaning of Article 15(2)(c) of Regulation (EC) No 1857/2006, as costs of routine visits for prevention and treatment by a veterinary specialist are not eligible for aid. All aid is given in the form of subsidised services and limited to 100 % of the eligible costs. The State aid can therefore be regarded as compatible with the internal market.

Aid granted in the fish farming sector

(83) The measures have also been carried out in the fish farming sector. The Guidelines for the examination of State aid to fisheries and aquaculture from 1988, 1992, 1994, 1997 and 2001, which correspond to the Guidelines for agriculture, establish the following conditions for deeming State aids in the veterinary and health fields compatible with the internal market⁽¹⁾: A public authority must combat a disease so as to ensure that action is taken in the common interest and not only in a particular interest. The objectives of the aid measures must be either preventive or compensatory or both. The TGD was put in charge of the measures by the Land Bavaria and executes them on its own initiative, as stated in another context in recital 16. The measures serve preventive objectives. The State aid can therefore be regarded as compatible with the internal market.

⁽¹⁾ See letter E of the Guidelines for the examination of State aid to fisheries and aquaculture from 1988 (OJ C 313, 8.12.1988, p. 21); point 2.5 of those from 1992 (OJ C 152, 17.6.1992, p. 2); point 2.9 of those from 1994 (OJ C 260, 17.9.1994, p. 3); point 2.9 of those from 1997 (OJ C 100, 27.3.1997, p. 12); point 2.8 of those from 2001 (OJ C 19, 20.1.2001, p. 7).

(84) The State aids granted between 1 November 2004 and 31 March 2008 are assessed case-by-case in accordance with point 3.10 of the Guidelines for the examination of State aid to fisheries and aquaculture⁽²⁾ (hereinafter 2004 Guidelines), which refers to Article 4 of Commission Regulation (EC) No 1595/2004⁽³⁾, which in turn refers to Article 15(3) of Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector⁽⁴⁾. Under point 3.1(2) of the 2004 Guidelines, these State aids are compatible with the internal market and in accordance with the objectives of the Common Competition and the Common Fisheries Policy as set out in Regulations (EC) No 2371/2002⁽⁵⁾ and (EC) No 2792/1999. Under Article 15(2) of Regulation (EC) No 2792/1999, operations of collective interest with a broader scope than usually undertaken by private business may be encouraged. Examples of such operations are listed in Article 15(3)(e) and (l). The Commission notes firstly that the purpose of the 'general measures' meets with the aims of those examples. Secondly, the TGD carries out those activities on its own initiative and not at the farmers' request. Moreover (see point 3.4 of the 2004 Guidelines), the farmers would not necessarily have taken the measures under pure market conditions. Finally, the measures also lead to lasting improvements in the sector within the meaning of point 3.5 of the 2004 Guidelines.

(85) By letter of 9 February 2009, Germany confirmed that the aid is still paid in the agriculture sector and gave examples of typical projects. These do not include projects in the fisheries sector. As it cannot be ruled out that aid may be granted for the aquaculture sector after 1 April 2008, it must be examined whether such aid would be compatible with the provisions applicable to the agriculture and fisheries sector after that date. In connection with aid falling within the scope of other provisions, point 4.2 of the 2008 Guidelines refers to the respective conditions under those provisions, in this case under Commission Regulation (EC) No 736/2008 of 22 July 2008 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products⁽⁶⁾. The relevant provision for aid for veterinary measures is Article 14 of Regulation (EC) No 736/2008. This provides that aid for veterinary measures is compatible with the internal market provided it meets the conditions under Articles 28 and 32 of Council

⁽²⁾ OJ C 229, 14.9.2004, p. 5.

⁽³⁾ OJ L 291, 14.9.2004, p. 3.

⁽⁴⁾ OJ L 337, 30.12.1999, p. 10.

⁽⁵⁾ OJ L 358, 31.12.2002, p. 59.

⁽⁶⁾ OJ L 201, 30.7.2008, p. 16.

Regulation (EC) No 1198/2006 ⁽¹⁾ and Article 12 of Commission Regulation (EC) No 498/2007 ⁽²⁾. In respect of the aid in question, the conditions under these Regulations and the general principles under point 3 of the 2008 Guidelines have remained the same in terms of substance as the provisions that applied to the aid granted before 1 April 2008. Therefore the assessment carried out for that aid can also be applied to the aid granted after 1 April 2008. As the aid granted before 1 April 2008 is compatible with the applicable provisions and as the aid and the way in which it was granted remained unchanged after 1 April 2008, the Commission concludes that the aid meets the conditions under the provisions applying in the fisheries and aquaculture sector.

- (86) It follows from the above that the State aid granted to farmers under the measure under investigation meets the conditions set out in the relevant EU rules in the agriculture and fisheries sector. The Commission notes in this respect that neither the plaintiffs nor the other parties concerned have substantiated any infringement of the relevant EU provisions. The State aid can therefore be regarded as compatible with the internal market.

Presence of aid to the TGD

- (87) To constitute a State aid, a measure must confer on recipients an advantage.
- (88) It is apparent from the case-law of the European Court of Justice that public service compensation does not constitute State aid within the meaning of Article 107(1) TFEU if it fulfils certain conditions ⁽³⁾. However, if these conditions are not fulfilled but the general criteria for the applicability of Article 107(1) TFEU are nevertheless satisfied, such compensation constitutes State aid.
- (89) In the *Altmark* judgment, the Court laid down the conditions under which public service compensation does not constitute State aid as follows (principle 3):

‘(a) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.

(b) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner [...].

(c) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

(d) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means [...] so as to be able to meet the necessary public service requirements, would have incurred in discharging these obligations, taking into account the relevant receipts and a reasonable profit from discharging the obligations.’

- (90) Where these four criteria are met, public service compensation does not constitute State aid and Articles 107(1) and 108 TFEU do not apply. If the Member States do not respect these conditions and if the general criteria for the applicability of Article 107(1) TFEU are met, the public service compensation constitutes State aid, which must be notified to the Commission pursuant to Article 108(3) TFEU.

- (91) When the procedure was opened, there was some doubt as to whether conditions (c) and (d), in particular, were met.

- (92) Regarding condition (a), the Commission recalls that Article 14(1) LwFöG provides for a public service obligation in that it specifies a clear objective (healthy nutrition) and the means to reach it (high quality of foodstuffs) via a number of measures (see recital 14). Under its statutes, the TGD promotes animal welfare for the safe production of animal-based food products and for the protection of both consumers and animals. To fulfil its aims, it uses its own staff and its own facilities. The measures it takes are laid down in agreement No R1-4010/1393 of 1974 and framework agreement No T-7482-100 of 13 July 1993 between the Land of Bavaria and the TGD. The details are established every year in yearly agreements and administrative decisions.

- (93) Regarding condition (b), it should be noted that each of the individual activities was established in advance and that the financial compensation was calculated using a points system based on the anticipated time and costs. This was also the case for new services added in

⁽¹⁾ OJ L 223, 15.8.2006, p. 1.

⁽²⁾ OJ L 120, 10.5.2007, p. 1.

⁽³⁾ Judgments in Case C-280/00 *Altmark* [2003] ECR I-7747 and Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243.

subsequent years. It should be noted in this regard that the operations of the TGD have been audited and approved by the Bavarian High Court of Auditors (Bayerischer Oberster Rechnungshof). The accounts have been also audited and approved by independent auditing companies for the period covered by this Decision.

(94) Regarding condition (c), Germany has submitted data proving that the costs incurred in discharging the public service obligations have not been overcompensated (see annex). Indeed, the data show that the TGD did not make a profit in the years 1990 to 2004. The costs of the general measures are calculated using a point-based calculation, the points representing a certain value in euro. This calculation method is the outcome of an initiative of the Bavarian Court of Auditors. It is comparable to the method by which services in human medicine are calculated. Germany has stated that the method used since 2002 fulfils the requirements of Commission Directive 2005/52/EC ⁽¹⁾.

(95) Regarding condition (d), Bavaria awarded the public service obligation to TGD as a result of an open public procurement procedure as of 1 January 2005. As a result of discussions with the Commission, Bavaria initiated the public procurement by launching an EU-wide tender for a service agreement entitled 'Projektierte Maßnahmen im Bereich der Tiergesundheit landwirtschaftlicher Nutztiere in Bayern' in June 2004. The overall measures were valued at EUR 8 million per year for a duration of five years. The call for tender was published in the supplement to the *Official Journal of the European Union* (S series) ⁽²⁾ and in the Bavarian Government Gazette. Three competitors took part in the tender. The five-year contract was awarded to TGD as it was able to provide the requested services in the most cost-effective manner. A new public procurement by tender will be launched in 2009.

(96) As regards the second alternative under condition (d), Germany claimed that for the period until 31 December 2004 it is impossible to identify a normal enterprise that is fully comparable to the TGD.

(97) Germany has therefore not demonstrated that for the period 1990 to 2004 the TGD was compensated in accordance with an analysis of the costs of a typical well-run undertaking providing such a public service. Thus, it can be concluded that, until 31 December

2004, the particular measure in question conferred an economic advantage upon the TGD within the meaning of Article 107(1) TFEU.

(98) The annual compensation granted to the TGD over the period 1990 to 2004 therefore constitutes State aid within the meaning of Article 107(1) TFEU, whereas the annual compensation granted to the TGD from 1 January 2005 following a public procurement procedure complies with all the conditions cited in the Altmark judgment and therefore does not constitute State aid to the TGD. In this context the Commission takes note of the information submitted by Germany concerning the payments to the TGD from 1 January 2005 to end 2008 which shows that these payments did not cover the total costs of the general measures.

(99) No specific complaint or third-party observation has been made regarding fulfilment of the conditions set out in the Altmark judgment.

Compatibility of the aid with Article 106(2) TFEU

(100) In order to assess the compatibility of the public service compensation granted to the TGD with the TFEU, the provisions in force at the time the aid was granted to the TGD should be taken into account.

(101) In the Commission Communication on services of general economic interest in Europe ⁽³⁾ (hereinafter the Communication) which is applicable under point 26(b) of the Community framework for State aid in the form of public service compensation ⁽⁴⁾ for non-notified cases, the question of State compensation should be examined in the light of three principles:

— neutrality as regards the public or private ownership of companies,

— freedom of Member States to define what they regard as public services,

— proportionality, requiring that the restriction of competition and limitation of the freedom of the single market do not exceed what is necessary to guarantee effective fulfilment of the general interest mission.

⁽¹⁾ OJ L 234, 10.9.2005, p. 9.

⁽²⁾ 2004/p. 112-09421.

⁽³⁾ OJ C 17, 19.1.2001, p. 4.

⁽⁴⁾ OJ C 297, 29.11.2005, p. 4.

- (102) The first principle, neutrality, means that the Commission does not indicate whether undertakings responsible for providing general interest services should be public or private. Compliance with this principle is not called into question in the present case.
- (103) The freedom of Member States to define a service of general economic interest means that Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of activities. The Commission intervenes in respect of this definition only in the event of abuses or manifest errors. In every case, however, for the exceptions in Article 106(2) TFEU to apply, the public service mission needs to be clearly defined and explicitly entrusted through an act of a public authority (including contracts). This is necessary to ensure legal certainty and public transparency and is essential for the Commission to carry out its proportionality assessment.
- (104) The general measures entrusted to the TGD qualify as a service of general economic interest and were clearly defined and entrusted to the TGD, as stated in recital 92.
- (105) In view of the proportionality principle, Article 106(2) TFEU should be taken as meaning that the means used to fulfil the general interest mission must not create unnecessary distortion of trade or exceed what is necessary to guarantee actual fulfilment of the mission. In line with point 26 of the Communication and the Court's case law at the time, the compensation should not exceed the net extra costs of the particular task entrusted to the undertaking. The performance of the general interest service must be ensured and the undertaking entrusted with such a task must be able to bear the specific additional cost of the task.
- (106) It is therefore necessary in this case to quantify the net extra costs of the public service obligation (general measures) imposed on the TGD by the two agreements and then compare these costs with the State aid. If the compensation granted to the TGD is not higher than the additional costs of the public service obligation, the proportionality principle can be regarded as having been fulfilled.
- (107) Over the relevant period of 1990 to 2004, the additional costs arising from the general measures exceeded the aid granted to the TGD (see Annex to this Decision).
- (108) As a consequence, the payments the TGD received for the general measures that are the object of this Decision did not lead to overcompensation of the additional costs it incurred in carrying out the measures.
- (109) Accordingly, the public service compensation granted to the TGD over the period 1990 to 2004 constitutes State aid under Article 107(1) TFEU which is compatible with Article 106(2) TFEU.
- (110) The Commission notes in this respect, however, that it is difficult to see how the State compensation that did not even cover the total additional costs of the public service obligation could have been used to subsidise the profit-oriented activities of the TGD, as alleged by the plaintiff. In addition, the plaintiff's claim that the veterinary surgeons employed by the TGD provide certain clinical, diagnostic and therapeutic services at up to 90 % below cost price has not been proven, either by the plaintiff or by another concerned party.
- (111) Because of this claim, Germany carried out a specific audit of the TGD. There was no evidence to confirm the claim. Should any concrete data confirming any such claim arise, Germany has requested to be informed so that it can investigate the case individually.
- (112) The Commission also notes that the Bayerische Landestierärztekammer (Bavarian Association of Independent Veterinarians) and the Bundesverband praktizierender Tierärzte — Landesverband Bayern (Bavarian branch of the Federal Association of Veterinary Practitioners) support the activities of the TGD — including the profit-oriented elements.
- ## VI. CONCLUSIONS
- (113) The Commission concludes that Germany granted the aid in question in breach of Article 108(3) TFEU.
- (114) On the basis of its assessment, however, it has decided that the State aid in the form of 'general measures' for farmers (as from 1990), as referred to in recitals 13 and 14, and the State compensation granted to TGD to discharge the related public service obligation entrusted to it during the period 1990 to 2004, as referred to in recital 17 and 18, are compatible with the TFEU. In fact, as explained above, part of it does not even constitute State aid. The annual compensation referred to in recitals 17 and 18, granted to the TGD from 1 January 2005 to discharge a public service obligation, complies with all the conditions of the *Altmark* judgment and therefore does not constitute State aid,
- HAS ADOPTED THIS DECISION:
- ### Article 1
- The aid granted to farmers and fishermen by Germany in the form of general measures is compatible with the internal market.

The aid granted to the Animal Health Service (TGD) by Germany in the period 1990 to 2004 in the form of compensation for the TGD's discharging of the general measures is compatible with the internal market.

The compensation granted to the Animal Health Service since 1 January 2005 for discharging the general measures does not represent aid within the meaning of Article 107(1) TFEU.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 December 2009.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

ANNEX

Year	Cost of the general measures	Payments from Land of Bavaria (LwFöG)	Payments from the Bavarian Animal Disease Fund	Payments from Land of Bavaria and the Bavarian Animal Disease Fund	Share of total payments in costs of general measures (%)
1990	7 676,94	3 059,57	4 588,84	7 648,42	99,63
1991	6 992,48	3 127,06	3 711,98	6 839,04	97,81
1992	8 953,42	3 203,55	4 588,84	7 792,40	87,03
1993	9 063,52	3 361,03	4 679,34	8 040,37	88,71
1994	9 547,05	3 496,01	4 588,84	8 084,85	84,68
1995	8 392,14	3 554,50	4 588,84	8 143,35	97,04
1996	8 336,35	3 599,49	4 588,84	8 188,34	98,22
1997	8 620,18	3 361,23	4 486,59	7 847,82	91,04
1998	8 613,61	3 310,10	4 397,11	7 707,21	89,48
1999	8 280,91	3 419,52	4 397,11	7 816,63	94,39
2000	9 267,13	3 419,52	4 453,35	7 872,87	84,95
2001	8 471,71	3 419,52	4 448,24	7 867,76	92,87
2002	10 002,90	3 890,00	4 453,35	8 343,35	83,41
2003	9 953,20	3 722,00	4 614,73	8 336,73	83,78
2004	8 415,84	2 807,47	4 496,00	7 303,47	86,78
2005	9 439,37	3 200,00	4 021,00	7 221,00	76,50
2006	8 608,75	2 730,00	4 021,00	6 751,00	78,42
2007	9 084,88	3 130,00	4 021,00	7 151,00	78,71
2008	9 047,96	3 080,00	4 086,00	7 166,00	79,20

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

EFTA SURVEILLANCE AUTHORITY DECISION

No 329/08/COL

of 28 May 2008

on aid granted in favour of Sementsverksmiðjan hf. (Iceland)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

Whereas:

I. FACTS

1. PROCEDURE

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 thereof,

HAVING REGARD to Article 1(2) of Part I and Articles 4(4), 6, 7(5) and 14 of Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾,

HAVING REGARD to the Authority's Guidelines ⁽⁵⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular the Chapter on Aid for rescuing and restructuring firms in difficulty thereof,

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 ⁽⁶⁾,

HAVING CALLED on interested parties to submit their comments pursuant to those provisions ⁽⁷⁾ and having regard to their comments,

Pursuant to Article 1(3) of Part I of Protocol 3, the Icelandic authorities notified the sale of the State's shares in Sementsverksmiðjan hf. by letter dated 19 August 2003 from the Icelandic Mission to the European Union, forwarding a letter from the Ministry of Finance dated 19 August 2003 (Doc No 03-5685 A).

On 17 December 2003, the company Aalborg Portland Íslandi ehf. lodged a complaint with the Authority against the terms and conditions of the sale by the Icelandic State of its shares in Sementsverksmiðjan hf. The Authority received and registered this letter on 23 December 2003 (Doc No 03-9059 A). The complainant requested this complaint to be processed simultaneously with the notification of the sale of the company made by the Government.

After various exchanges of correspondence ⁽⁸⁾, by letter dated 21 December 2004 the Authority informed the Icelandic authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 in respect of the sale by the Icelandic State of its shares in Sementsverksmiðjan hf. (Event No 296878). The Authority raised doubts regarding the market value of Sementsverksmiðjan hf. at the time the State's shares were sold, the market value of the assets repurchased by the State, the right of Sementsverksmiðjan hf. to use some of the assets located in Reykjavik sold to the National Treasury without any payment as well as its right to reacquire certain properties and ground rights in Reykjavik for a pre-determined price.

The Authority's Decision No 421/04/COL to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto ⁽⁹⁾. The Authority called on interested parties to submit their comments thereon. The Icelandic authorities submitted comments on this Decision by letter dated 24 February 2005 (Event No 311243). On 20 June 2005, the Authority received comments from Íslenskt sement ehf., the purchaser of Sementsverksmiðjan hf. (Event No 323552). On 2 September 2005, Aalborg Portland Íslandi ehf. submitted further comments (Event No 333018).

⁽¹⁾ Hereinafter referred to as 'the Authority'.

⁽²⁾ Hereinafter referred to as 'the EEA Agreement'.

⁽³⁾ Hereinafter referred to as 'the Surveillance and Court Agreement'.

⁽⁴⁾ Hereinafter referred to as 'Protocol 3'.

⁽⁵⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, and in EEA Supplement No 32, 3.9.1994. The Guidelines were last amended on 19 December 2007. Hereinafter referred to as 'the State Aid Guidelines'. An updated version of the State Aid Guidelines is available on the Authority's website: <http://www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/>

⁽⁶⁾ Published in OJ L 139, 25.5.2005, p. 37.

⁽⁷⁾ The Authority's Decision No 421/04/COL was published in OJ C 117, 19.5.2005, p. 17 and in EEA Supplement No 24, 19.5.2005. The Authority's Decision No 368/06/COL was published in OJ C 77, 5.4.2007, p. 21, and in EEA Supplement No 17, 5.4.2007, p. 1.

⁽⁸⁾ For more detailed information on the various correspondence between the Authority and the Icelandic authorities, reference is made to the Authority's Decision to open the formal investigation procedure, Decision No 421/04/COL.

⁽⁹⁾ See footnote 7.

In a letter dated 17 February 2006 (Event No 363608), the Icelandic authorities forwarded to the Authority an English copy of an Agreement between Sementsverksmiðjan hf. and the Ministry of Industry on behalf of the Government of Iceland on the basis of which the company's option to repurchase some assets in Reykjavik was withdrawn. Further, according to Article 2 of this Agreement, the company leased the assets it used as of 1 January 2004 for an undefined period of time for which it would pay a monthly lease established in accordance with market prices.

In light of the comments made by the complainant and in light of the further information and clarifications made by the Icelandic authorities during the formal investigation procedure, the Authority considered it necessary to extend the formal investigation procedure to cover the take-over by the Icelandic State of pension-related liabilities of Sementsverksmiðjan hf. Accordingly, it adopted Decision No 367/06/COL of 29 November 2006 on the Icelandic State's take-over of pension-related liabilities of Sementsverksmiðjan hf. By letter dated 29 November 2006 (Event No 399095), the Authority informed the Icelandic authorities that it had decided to extend the formal investigation procedure in respect of this measure. The Icelandic authorities did not submit any comments to the Authority's decision.

On the same date, 29 November 2006, the Authority closed the formal investigation procedure regarding the aid measures in favour of Íslenskt Sement ehf., the group of investors which acquired the State's shares in Sementsverksmiðjan hf. The Authority concluded that no aid had been involved in this transaction.

The Authority's Decision No 367/06/COL was published in the *Official Journal of the European Union* and the EEA Supplement thereto ⁽¹⁰⁾. The Authority called on interested parties to submit their comments thereon. The Authority received comments from Íslenskt sement ehf. on 7 May 2007 (Event No 420691). By letter dated 14 May 2007 (Event No 421504), the Authority forwarded these to the Icelandic authorities, who were given the opportunity to reply to the submitted comments. The Icelandic authorities replied on 18 April 2008 (Event No 474416).

2. BACKGROUND

2.1. THE SALE PROCESS OF SEMENTSVERKSMIÐJAN HF.

Until 2000, when an importer of cement from Denmark entered into the Icelandic market, Sementsverksmiðjan hf. had enjoyed a *de facto* monopoly in the market for cement. As a result of the new competitive situation, Sementsverksmiðjan hf. experienced economic difficulties and started cumulating losses. Therefore, in March 2003, the State decided to sell the undertaking and announced a tender to purchase 100 % of its shares in Sementsverksmiðjan hf. ⁽¹¹⁾.

The tender procedure led to the selection of a group of investors ⁽¹²⁾, which created Íslensk Sement ehf. for the

purpose of acquiring the State's shares. The Government initiated negotiations for the sale of the State's shares in Sementsverksmiðjan hf. with these investors. The outcome of the negotiations between the Government and Íslensk Sement ehf. was that the company was sold mainly in accordance with the agreements described below.

On 2 October 2003, the Ministry of Industry signed, on behalf of the Government of Iceland, a Share Purchase Agreement with Íslenskt Sement ehf. On the basis of this Agreement, the State, owner of 100 % of the shares in Sementsverksmiðjan hf. for a nominal value of ISK 450 million, sold them to Íslenskt Sement ehf. for a price of ISK 68 million.

Pursuant to Article 4 of the Share Purchase Agreement, the Government of Iceland took over the pension debts and obligations of the Sementsverksmiðjan hf. It also took over all existing and future obligations regarding the annual compensation settlement of the individuals who are paying into Section B of the Pension Fund of State Employees as long as they are employees of the Sementsverksmiðjan hf.

On behalf of the State Treasury, the Ministry of Finance took over the remainder of the bonds issued to pay the accrued obligations of Sementsverksmiðjan hf. as settled in the agreement of 1997, as well as existing and future obligations of current employees of the company affiliated to Section B, by an Agreement signed on 23 October 2003 with the Pension Fund of State Employees. The Government thereby fulfilled the obligation laid down in Article 4 of the Share Purchase Agreement between the Ministry of Industry and Íslenskt sement ehf.

According to Article 5 of the Share Purchase Agreement, the Government of Iceland was to purchase some assets from Sementsverksmiðjan hf. in a separate agreement. As indicated in Section 3 of Article 5, the purchase price for these assets was ISK 450 million.

On the same date, 2 October 2003, Sementsverksmiðjan hf. and the National Treasury of Iceland signed a Purchase Contract on the basis of which the Treasury purchased the properties and assets of the company in Reykjavík, the office building of the company in Akranes with the exception of one and half floors, and the shares and bonds owned by Sementsverksmiðjan hf. in other companies, for the price of ISK 450 million. As stated in Article 5 of the Purchase Contract, Sementsverksmiðjan hf. was allowed to keep a part of the sold properties in Reykjavík ⁽¹³⁾, use them for purposes of its own industrial operations and return them to the National Treasury no later than 31 December 2011. Sementsverksmiðjan hf. would pay for all maintenance and improvements to these properties but would not pay any compensation for this right of

⁽¹⁰⁾ See footnote 7.

⁽¹¹⁾ For more detailed information about the sales process, reference is made to the Authority's Decision No 421/04/COL.

⁽¹²⁾ The investment group was made out of Framtak fjárfestingarbanki hf, Björgun ehf., BM Vallá ehf. and originally Steypustöðin, which was later replaced by the Norwegian company Norcem AS.

⁽¹³⁾ Two cement storage tanks, cement delivery/packaging building, stairs and hallway, cement pipe casing, fence and gate, steel silo with accompanying equipment, air compressors, dryer and electric equipment in a storage shed by the dock, quayside crane, piping in cement pipe casing, vehicle scale and accompanying computer equipment.

use. According to Article 6 of the Purchase Contract, until 31 December 2009, Sementsverksmiðjan hf. had the right to re-purchase the abovementioned sold properties in Reykjavik for a total price of ISK 95 million with a fixed annual interest of 7 % as of 1 August 2003.

This purchase contract was amended on 16 February 2006 by an agreement signed between Sementsverksmiðjan hf., the Ministry of Industry on behalf of the Government of Iceland and Íslenskt sement ehf. The parties to this Agreement agreed to depart from Section 5.4 of the Share Purchase Agreement with regard to the re-purchase option of certain assets, from Section 6 of the Purchase Contract and replace it by a lease provision on certain assets⁽¹⁴⁾. The monthly lease was established at ISK [...] and would be adjusted according to the building cost index. Regarding the delivery time of the assets sold to the National Treasury, the parties agreed to replace the date 31 December 2011 by 1 January 2004.

2.2. SEMENTSVERKSMIÐJAN HF.'S DEBT TOWARDS THE STATE PENSION FUND

2.2.1. *The functioning of the Pension Fund of State Employees*

The Pension Fund of State Employees was originally governed by the provisions of Act No 29/1963. In the 1990, the premiums to the Pension Fund of State Employees seemed insufficient to cover its pension payments. On that basis, the State decided to reform the system and adopted Act No 1/1997 'The Government Employees Pension Fund Act'. The Pension Fund of State Employees was divided into two Sections: a new Section A was created and the existing pension fund changed into Section B. All new employees were to join Section A whereas existing employees could choose between membership in Section A or retaining their right to membership in Section B, closed henceforth to new members. According to the Icelandic authorities, with the splitting of the former Pension Fund of State Employees into Section A and B, the fund was made self-sustaining and would no longer cumulate a negative balance between premiums and commitments which would eventually have to be made up by the National Treasury⁽¹⁵⁾.

In contrast, as a result of the provisions for Section B, there is normally a deficit which has to be covered on a regular basis. The provisions for Section B foresee the payment of premiums to Section B of the Pension Fund of State Employees only on

the basis of the basic salary of the affiliated employees, not on their total pay. The affiliated employees acquire a right to receive a certain percentage of the basic pay for the post from which they retire. Thereafter, the pension is linked to the average rise in the pay of government employees. According to Article 33 Act No 1/1997, it is the employer of the members of Section B of the Pension Fund of State Employees who must cover this difference. Nevertheless, in case of payment default by the employer, by virtue of Article 32 of Act No 1/1997, the Treasury guarantees the payment of a pension to the employee according to the Act.

2.2.2. *The establishment of a debt from Sementsverksmiðjan hf. towards the Pension Fund of State Employees*

With the reform carried out in 1996, a new provision was introduced in the law governing the Pension Fund of State Employees requiring employers to refund the increase in pension payments.

Article 33 of Act No 1/1997 provides that 'in the case where a previously determined [...] pension increases due to a general increase in the salary of public employees, the Treasury and other employers who insure their employees in the Fund **refund**⁽¹⁶⁾ the increase which thus takes place in pension payments. [...]'.

On 8 October 1997, the Ministry of Finance signed an Agreement with the Civil Servants' Pension Fund on payment of National Treasury obligations pursuant to Article 33 of Act No 1/1997 on the Civil Servants' Pension Fund with respect to employees of the Iceland State Cement Works, to the end of 1996. These obligations corresponded to the accrued increased pension obligation for Sementsverksmiðjan hf.'s employees minus the share of the company in the Fund's assets.

Article 3 of this Agreement reads as follows: 'Using an imputed interest rate of 3,5 %, the present value of the LSR's⁽¹⁷⁾ accrued obligations with respect to employees of the Iceland State Cement Works at year-end 1996 was assessed as ISK 494 816 380. LSR's assets for payment of obligations are considered to be 19 % of the Fund's accrued unsettled obligations. The State's obligations on behalf of Sementsverksmiðjan hf. Ltd is thus ISK 400 801 268.'

The new Article 33 of Act No 1/1997 foresees the possibility to pay with bonds.

⁽¹⁴⁾ Pressure room, 2 silos, delivery of cement, pump shed, weighing equipment for cars and attached computer equipment in delivery room, crane, pipes and steel silo with attached equipment, machinery and toilets, transformer station, stairway and hallway.

⁽¹⁵⁾ Premiums to Section A of the Pension Fund of State Employees are paid on the basis of the total income of the affiliated employees who earn retirement rights on the basis of total premiums paid. As is the case with the majority of mandatory occupational pension funds, the pension rights of Section A are linked to the consumer price index. The rights of the affiliated employees to a pension are bound by law and employers must periodically adjust their premiums to ensure that the Fund's premium income matches its commitments.

⁽¹⁶⁾ Emphasis added by the Authority.

⁽¹⁷⁾ Acronym in Icelandic for Pension Fund of State Employees.

'The board of the Fund may [...] accept a debenture in payment of accrued commitments. [...] The commitment thus settled shall be based on an actuarial assessment as at the settlement date. An employer who has settled his/her commitment with the issue of a debenture in accordance with this paragraph shall have no further responsibility for the Fund's commitments [...] in respect of the period and those employees to which the settlement applies'.

According to Article 4 of the same agreement 'The National Treasury will make payment to LSR of its obligation pursuant to Article 2 by presenting it with Iceland Cement Ltd bonds for a total amount of ISK 326 488 714 [...]. The bonds are inflation-indexed to the Consumer Price Index (CPI) with the base index 178.6. Annual interest is 5,5 % (2,75 % for half-year) and shall be calculated as of 1 January 1997. Interest for the period 1 January 1997 to 30 August 1997 shall be paid separately on 1 November 1997. The present value of the bonds as of 1 September 1997, at 3,5 % imputed interest, is ISK 400 801 268. The National Treasury shall guarantee LSR of payment of instalments and interest of these bonds. With these bonds the National Treasury has fully settled its obligations towards LSR with respect to pension supplements pursuant to Article 33 of Act No 1/1997 on the Civil Servants' Pension Fund, arising from membership of employees of the Iceland State Cement Works to LSR until the end of 1996'.

Therefore, following the application of Article 33 last paragraph of Act No 1/1997, once Sementsverksmiðjan hf. had settled its commitment with the issue of bonds for the amount determined in the Agreement of 8 October 1997, the company would have no further responsibility for the Fund's commitments to pay pensions to those of its former employees regarding the period until the end of 1996 to which the settlement applied. These bonds are thus simply a postponement of the payment of the debt.

On 30 March 1999, Sementsverksmiðjan hf. and the Pension Fund of State Employees signed a second agreement pursuant to Article 33 of Act No 1/1997. On the basis of this agreement, the Fund would assess yearly the accrued pension obligation arisen during the year with respect to the employees of the company affiliated to Section B of the Fund still active in the company. The company would settle these obligations, after deducting all contributions already paid by the employees and the company with respect to the rights earned during the year. According to the information provided by the Icelandic authorities, in 2003, five employees of Sementsverksmiðjan hf. were still affiliated to Section B of the Pension Fund of State Employees.

2.2.3. *The taking over by the State of Sementsverksmiðjan hf.'s pension liabilities*

With an agreement dated 23 October 2003 between the Ministry of Finance and the Pension Fund of State Employees, on behalf of the State Treasury, the Ministry of Finance took over the remainder of the bonds issued by Sementsverksmiðjan hf. to pay the accrued obligations of the company as settled in

the agreement of 1997. The Government also took over Sementsverksmiðjan hf.'s obligations towards the Pension Fund of State Employees to pay and settle annually the compensation settlement for the employees of the company affiliated to Section B of the Pension Fund of State Employees (as settled in an Agreement between the Pension Fund of State Employees and Sementsverksmiðjan hf. dated 30 March 1999).

With this Agreement, the Ministry of Finance fulfilled the obligation entered into under Article 4 of the Share Purchase Agreement signed on 2 October 2003 with the investors group, Íslenskt sement ehf. According to that provision, '[t]he Seller shall take over the pension debts and obligations of the Company, which carry Government guarantee, and were taken over by the Company in 1997 with a special agreement. The Seller shall as well take over all existing and future obligations regarding the annual compensation settlement for the individuals who are now paying in the Section B of the Pension Fund of State Employees as long as they are employees of the Company.'

Even if the Ministry of Finance itself decided to take over these debts and obligations of Sementsverksmiðjan hf. in the Share Purchase Agreement with the investors group Íslenskt sement ehf., it is on the basis of a distinct legal act, namely the agreement between the Ministry of Finance and the Pension Fund of State Employees of 23 October 2003, that Sementsverksmiðjan hf. was relieved of these obligations.

According to the information provided by the Icelandic authorities⁽¹⁸⁾, the pension obligations for employees already retired were estimated at ISK 412 million in 2003. As far as the future obligations for the employees of Sementsverksmiðjan hf. still affiliated to Section B of the Pension Fund of State Employees were concerned, they were estimated to amount to ISK 10-15 million, depending on the time the employees remained in the company.

3. *THE MEASURES UNDER ASSESSMENT IN THE CURRENT DECISION*

As already stated, the formal investigation procedure initiated with Decision No 421/04/COL was extended to cover the takeover by the State of pension-related liabilities of the company with Decision No 367/06/COL.

⁽¹⁸⁾ The Icelandic authorities provided information on the affiliation of Sementsverksmiðjan hf.'s employees in various correspondence. They provided these estimated figures in a letter dated 12 November 2003. In a letter dated 18 April 2006, the Icelandic authorities further explained that at the time of the incorporation of the company in 1993, 6 employees were affiliated to the Pension Fund of State Employees and 93 to private pension funds. As the Icelandic authorities explained, white-collar employees of Sementsverksmiðjan hf. had access to the Pension Fund of State Employees, whereas blue-collar employees were affiliated to the private pension fund system, i.e. the pension funds of their trade unions. After the incorporation of the company in 1993, new white-collar employees could still affiliate to the State Pension Fund. After the sale of the State's shares in Sementsverksmiðjan hf. carried out in 2003, all new employees have to affiliate to a private pension fund.

On the same date, 29 November 2006, the Authority adopted Decision No 368/06/COL to close the formal investigation procedure regarding the sale of the State's shares in Sementsverksmiðjan hf. to Íslenskt sement ehf. on 29 November 2006 for a price of ISK 68 million and concluded that the sale did not contain State aid.

In the current Decision, the Authority will assess the possible existence and compatibility of State aid in favour of Sementsverksmiðjan hf. concerning the following measures where a decision has not been taken so far by the Authority:

1. The purchase of properties, assets, shares and bonds of Sementsverksmiðjan hf. by the State.

In Decision No 421/04/COL, the Authority raised the issue that State aid could be involved in the acquisition by the National Treasury of Iceland of assets belonging to Sementsverksmiðjan hf.⁽¹⁹⁾ for the price of ISK 450 million if this price did not correspond to their market value.

2. The right of Sementsverksmiðjan hf. to keep part of the assets and repurchase them at a fixed price.

In Decision No 421/04/COL, the Authority also opened the formal investigation procedure regarding the possibility for Sementsverksmiðjan hf. to keep part of the sold properties in Reykjavík⁽²⁰⁾, use them for purposes of its own industrial operations and return them to the National Treasury no later than 31 December 2011. Sementsverksmiðjan hf. had to pay for all maintenance and improvements to these properties but did not pay any compensation for this right of use. Moreover, according to Article 6 of the Purchase Contract, until 31 December 2009, Sementsverksmiðjan hf. had the right to re-purchase the abovementioned sold properties in Reykjavík for a total price of ISK 95 million with a fixed annual interest of 7 % as of 1 August 2003.

In Decision No 421/04/COL, the Authority preliminarily considered the lack of remuneration for the use of assets located in Reykjavík which were sold to the Treasury to constitute State aid. The Authority considered that should Sementsverksmiðjan hf. make use of the abovementioned re-purchase price, the State might lose revenue if it would sell the assets for a price below its market value.

⁽¹⁹⁾ The assets concerned are the properties and assets of the company in Reykjavík, the office building of the company in Akranes with the exception of one and half floors, and the shares and bonds owned by Sementsverksmiðjan hf. in other companies.

⁽²⁰⁾ Two cement storage tanks, cement delivery/packaging building, stairs and hallway, cement pipe casing, fence and gate, steel silo with accompanying equipment, air compressors, dryer and electric equipment in a storage shed by the dock, quayside crane, piping in cement pipe casing, vehicle weighing equipment and accompanying computer equipment.

3. Take-over by the State Treasury of Sementsverksmiðjan hf.'s pension obligations.

In Decision 367/06/COL, the Authority preliminarily concluded that the take-over by the State of Sementsverksmiðjan hf.'s pension-related liabilities constituted State aid within the meaning of Article 61(1) of the EEA Agreement. The Authority had doubts whether any of the exceptions to the general prohibition of State aid foreseen under Article 61(2) or (3) of the EEA Agreement would be applicable. In case State aid would be involved, the Authority expressed its doubts as to whether it could be declared compatible with the functioning of the EEA Agreement. More specifically, the Authority raised concerns whether the aid could be considered compatible on the basis of the provisions of the State Aid Guidelines on Rescue and Restructuring Aid.

4. COMMENTS FROM THE ICELANDIC AUTHORITIES

In a letter dated 23 February 2005, the Icelandic authorities commented on the doubts expressed by the Authority in Decision No 421/04/COL. The Icelandic authorities explained that the repurchase of assets from Sementsverksmiðjan hf. took place as part of a restructuring: 'The State would buy from the Company all assets that were not elemental to the production and operation, to lessen the operational costs and make the operation of the Company viable.'

Regarding the correct value of the assets repurchased, the Icelandic authorities argued that the most correct valuation was the one made by the experts of AV and VSO Ráðgjöf in September 2003. These experts valued the property at Reykjavík at ISK 276 million and the office building in Akranes at ISK 74,4 million. The Icelandic authorities considered that the valuation of the assets in Reykjavík was very favourable to the State since they had a strategic value, based on projected future value, 'since plans were at the time of sale being made for a large bridge project closing off the Company's harbour at Saeverhöfði in Reykjavík and thus rendering the facilities useless for the operations of the Company. This bridge will however lead to changed city planning for the area and it is expected that the land will be reserved for a residential area, increasing its value greatly.'

As far as the repurchase right of certain assets laid down in Article 6 of the Purchase Agreement of 2 October 2003 is concerned, the Icelandic authorities indicated in this letter their will to amend the agreement and replace this option with a right of first refusal at market value.

Finally, the Icelandic authorities brought forward arguments to justify that if aid had been involved in the sales process of Sementsverksmiðjan hf., this aid could be considered compatible on the basis of the State Aid Guidelines on Rescue and Restructuring Aid. To this extent, they enclosed a restructuring plan for Sementsverksmiðjan hf.

The Icelandic authorities did not comment on the Authority's Decision No 367/06/COL on the taking over by the Icelandic State of pension-related liabilities of Sementsverksmiðjan hf.

5. COMMENTS FROM ÍSLENSKT SEMENT EHF.

Íslenskt sement ehf. submitted comments to the Authority's Decision No 421/04/COL on 20 June 2005 (Event No 323552). In this letter, the company argued that the assets repurchased by the State from Sementsverksmiðjan hf. were not sold individually but in connection with the sale of the shares. That sale was therefore an integral part of the overall purchase agreement regarding the sale of shares of Sementsverksmiðjan hf. as a whole. Further, Íslenskt sement ehf. considered the rights of Sementsverksmiðjan hf. to use some of the repurchased assets as an integral part of the privatisation of the company, which was taken into account when negotiating the overall purchase price. This notwithstanding, in the opinion of Íslenskt sement ehf. the objective market value of the right to use these assets would be negligible 'if not considered absolutely worthless' since they could only be used by Sementsverksmiðjan hf. as the only cement producer in Iceland. Finally, Íslenskt sement ehf. contested that the company's right to reacquire the assets it has the right to use for a total of ISK 95 million contains State aid since these specialised cement production facilities were of little market value.

In a letter dated 7 May 2007 (Event No 421504), Íslenskt sement ehf. firstly expressed its views on the approach taken by the Authority to divide the case in two parts, i.e. the sale of the shares and the other measures. In the view of this company, the different transactions had to be viewed as a whole. 'It was a precondition, both on behalf of the seller (the Icelandic Government) and the buyer (Íslenskt sement ehf.), that the agreements concluded on the same day constituted one transaction that could not be split up. One or more of the agreements would thus not have been concluded without all the others being concluded at the same time and in relation to each other.'

Second, Íslenskt sement ehf. provided arguments to demonstrate that no State aid was involved in the take-over by the Icelandic State of Sementsverksmiðjan hf.'s pension-related liabilities. Íslenskt sement ehf. explained that the pension liabilities were not included in the balance sheet of the annual accounts for 1996 but only noted as an off balance sheet contingent liability. In 1997, the pension liabilities of the company were released against the issuing of bonds. This means that they were financed through a debt (bonds) to the Pension Fund of State Employees, which was then booked as a long-term liability in the balance sheet of the annual accounts for 1997 and the following years. Íslenskt sement ehf. further explained that in connection with the sale of its shares in Sementsverksmiðjan hf., the State took over the debt that the company had to the Pension Fund of State Employees in 2003. Thus, in the annual accounts for 2003 the amount of ISK 388 028 317 had been deducted from the liabilities in the balance sheet at the same time as the retained earnings of the company were increased by the same amount.

Third, Íslenskt sement ehf. referred to the sale of assets from Sementsverksmiðjan hf. to the State for a purchase sum of ISK 450 million, which was addressed in the Authority's Decision No 421/04/COL. All the shares and bonds were sold to the State at market value⁽²¹⁾. The Saevarhófdi property in Reykjavík and the part of the office building in Akranes were respectively valued at ISK 276 million and ISK 74,4 million and sold to the State for ISK 280 million and ISK 72,5 million.

Íslenskt sement ehf. also referred to the liquidation costs of Sementsverksmiðjan hf. as established by MP Investment Bank Ltd in 2003 and re-states that the liquidation cost had been calculated to be ISK 506 498 730 including the cleaning of the site in Akranes.

Íslenskt sement ehf. concluded that '[a]pplying the method established by the ECJ in e.g. Gröditzer Stahlwerke GmbH, the question of this case is whether the State's total liquidation costs for the Company would exceed the cost of the State to take over the debts and sell the shares of the Company. If the answer to this question is affirmative it must be considered that the State has acted in accordance with the market economy investor principle, since a private investor would have taken over the debt and sold the shares in the Company based on sound economic reasoning.' Therefore, Íslenskt sement ehf. was of the opinion that 'the total liquidation costs exceeded the total cost for selling the Company by 70 376 683 ISK⁽²²⁾ and thus the State has acted in accordance with the market economy investor principle. Therefore, there can be no State aid involved in the State's taking-over by the Company's debt towards the Pension Fund in connection to the State's sale of the shares in the Company.'

6. COMMENTS FROM AALBORG PORTLAND ÍSLANDI EHF.

By letter dated 2 September 2005, the complainant Aalborg Portland Íslandi ehf. submitted observations to the Authority's Decision No 421/04/COL. It expressed its agreement with the Authority's concerns but pointed out that the taking over of Sementsverksmiðjan hf.'s pension obligations had not been addressed in the opening decision. That notwithstanding, Aalborg Portland Íslandi ehf. did not present any comments on the Authority's Decision No 367/06/COL to extend the opening to cover the taking over by the Icelandic State of pension-related liabilities of Sementsverksmiðjan hf.

⁽²¹⁾ The shares in the company Geca were valued to ISK 46,5 million, the shares in the company Spölur to ISK 40 million and the bonds issued by Spölur to ISK 11 million.

⁽²²⁾ Íslenskt Sement explains that the total liquidation costs for the Company were ISK 390,4 million, including the purchase sums paid by the State for the land in Reykjavík and Akranes. Should the State have decided to wind-up the company, the liquidation cost would have amounted to the liquidation value for the fixed assets, ISK 69,9 million less the contractual obligation to clean-up the plant site giving a total liquidation cost of the company amounting to ISK 390,4 million. The State's decision to take over the debt the Company had to the Pension Fund of State Employees amount to ISK 388 028 317 and to sell the shares in the Company to Íslenskt Sement for ISK 68 million, resulted in a net cost amounting to ISK 320 028 317. Thus, the liquidation costs exceeded the total sales cost for the Company by ISK 70 376 683.

7. FURTHER COMMENTS FROM ICELAND

In a letter dated 8 April 2008, the Icelandic authorities put forward additional information on a previously submitted restructuring plan and included a market survey which had not been yet presented to the Authority.

II. ASSESSMENT

1. THE PRESENCE OF STATE AID

Article 61(1) of the EEA Agreement reads as follows:

'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade

between Contracting Parties, be incompatible with the functioning of this Agreement.'

1.1. THE PURCHASE OF PROPERTIES, ASSETS, SHARES AND BONDS

On the basis of the Purchase Contract, the National Treasury of Iceland purchased the properties and assets of the company in Reykjavík, the office building of the company in Akranes with the exception of one and half floors, and the shares and bonds owned by Sementsverksmiðjan hf. in other companies, for the price of ISK 450 million.

The following table provides a comparison between the market value of Sementsverksmiðjan hf.'s properties and assets in Reykjavík and Akranes as well as of the shares and bonds as established by independent experts⁽²³⁾ and the price the National Treasury paid for them:

	(ISK million)	
	Valuation made by independent experts	Price paid by the National Treasury of Iceland
Land, real estate and equipment at Saeverhöfði 31 in Reykjavík	276	280
Office building in Akranes (minus one and a half floors)	74,4	72,5
Shares in Geca	46,5	46,5
Shares in Spölur	40	40
Bonds in Spölur	11	11
Total	447,9	450

There is therefore a difference of 2,1 MISK (equivalent to 21 214 euros) which the National Treasury paid above the market value of the purchased assets as estimated by independent experts. The difference relates to the sale of the properties in Reykjavík which were sold for ISK 4 million more than the valuation and the office building in Akranes which was sold for ISK 1,9 million less than the valuation.

According to case law, the Authority cannot arbitrarily fix a market price in this decision on the sole basis of an expert assessment⁽²⁴⁾. Rather, when determining the market price of land and buildings, the Authority 'must take into account the uncertainty surrounding such a determination, which is by nature retrospective, of such market prices'⁽²⁵⁾. It can often not be concluded that one single estimate by definition represents the market value a buyer would be ready to accept. An acceptable market value, after testing the market, may rather be found within a reasonable margin. In the Authority's view, there is no obvious answer to how

wide such a margin should be. That would possibly differ from case to case.

In the opinion of the Authority, this difference in net price of ISK 2,1 million between the estimations made by the independent expert and the price finally paid by the State Treasury is so minimal that it provides no evidence that the purchase price did not reflect market terms. The price established by the independent expert may be considered as an orientation. Strong deviations from that estimate may indicate the existence of State aid. However, in the opinion of the Authority⁽²⁶⁾, such a minor difference as the one in this case is not sufficient to establish the existence of State aid in favour

⁽²³⁾ Almenna Verkfræðistofan (AV) made a partial valuation of Sementsverksmiðjan hf.'s properties in Reykjavík in February 2003 and a complete valuation in November 2003. The value of bonds and shares was established by MP Verðbref when establishing the liquidation value of the company prior to the sale of the State's shares. Mr Daníel Rúnar Elíasson, authorised real estate agent at Hákot real estate agency valued the building in Akranes in August 2003.

⁽²⁶⁾ According to the Court's jurisprudence, the Authority 'must not be faulted because its assessment is approximate' since such assessment are by nature approximate, cf Case T-366/00, *Scott SA v Commission*, cited above, paragraph 96.

⁽²⁴⁾ Joined Cases T-127/99, T-129/99 & T-148/99 *Diputación Foral de Alava and others v Commission* [2002] ECR II-1275, paragraph 71.

⁽²⁵⁾ Case T-366/00, *Scott SA v Commission* [2007] ECR II-797, paragraph 93.

of Sementsverksmiðjan hf. Rather, it indicates that the payment constituted a fair market price. Hence, the Authority considers that Sementsverksmiðjan hf. did not receive State aid within the meaning of Article 61(1) of the EEA Agreement with the sale of properties, assets, shares and bonds to the National Treasury of Iceland.

1.2. THE RIGHT TO KEEP PART OF THE ASSETS AND REPURCHASE THEM AT A FIXED PRICE

Article 5 of the Purchase Contract gave Sementsverksmiðjan hf. the possibility of keeping parts of the sold properties in Reykjavík⁽²⁷⁾, using them for purposes of its own industrial operations and returning them to the National Treasury no later than 31 December 2011. Sementsverksmiðjan hf. had to pay for all maintenance and improvements to these properties but did not pay any compensation for this right of use. Moreover, according to Article 6 of the Purchase Contract, until 31 December 2009, Sementsverksmiðjan hf. had the right to re-purchase the abovementioned sold properties in Reykjavík for a total price of ISK 95 million with accrued interests calculated on the basis of a fixed annual interest of 7 % as of 1 August 2003.

In a letter dated 17 February 2006 (Event No 363608), the Icelandic authorities forwarded to the Authority an English copy of an Agreement between Sementsverksmiðjan hf. and the Ministry of Industry on behalf of the Government of Iceland. On the basis of this Agreement, the company's option to repurchase some assets in Reykjavík was withdrawn. The assets sold to the Treasury were delivered to it with effect as of 1 January 2004. From that date on, according to Article 2 of this Agreement, the company leased the assets it used for an undefined period of time. The monthly lease for the assets⁽²⁸⁾ is ISK [...]. The lease is adjusted once a year according to the building cost index. The Icelandic authorities explained that the lease amount was calculated using the normal ratio for the Icelandic real estate market.

The Authority does not have a reason to doubt about the veracity and accuracy of the information provided by the Icelandic authorities according to which Sementsverksmiðjan hf. pays a market price for the lease of these assets⁽²⁹⁾. Thus, following the abovementioned amendments to the agreement,

⁽²⁷⁾ Two cement storage tanks, cement delivery/packaging building, stairs and hallway, cement pipe casing, fence and gate, steel silo with accompanying equipment, air compressors, dryer and electric equipment in a storage shed by the dock, quayside crane, piping in cement pipe casing, vehicle weighing equipment and accompanying computer equipment.

⁽²⁸⁾ The assets leased are a pressure room, two silos, delivery of cement and a pump shed which comprise a surface of 290 sqm. Moreover, weighing equipment for cars, lot, crane, pipes and steel silo, machinery and toilets, transformer station, stairway and hallway are also leased.

⁽²⁹⁾ The Icelandic authorities have informed the Authority that the use of most of the land in Sævarhöfði in Reykjavík previously owned by Sementsverksmiðjan hf. was leased to Jarðboranir hf. for a price of [...] ISK per square meter. The lease price requested to Sementsverksmiðjan hf. was [...] ISK. The Icelandic authorities have also explained that the rent of the land of Sævarhöfði was advertised in the newspaper Morgunblaðið at the end of 2003 and that the most advantageous offer was made by Jarðboranir hf. for the aforementioned price. For these reasons, the Icelandic authorities brought forward that the lease price corresponded to market prices in Iceland.

the Authority considers that no State aid within the meaning of Article 61(1) of the EEA Agreement is involved.

1.3. THE TAKE-OVER OF THE PENSION OBLIGATIONS

By an agreement signed on 23 October 2003 between the Ministry of Finance and the Pension Fund of State Employees, the Ministry of Finance, on behalf of the State Treasury, took over the remainder of the bonds issued to pay the accrued obligations of Sementsverksmiðjan hf. as settled in the Agreement of 1997. Further, by virtue of the same agreement, the State Treasury took over the obligations of Sementsverksmiðjan hf. regarding employees still active in the company. These obligations were to be paid and settled annually.

1.3.1. *Presence of state resources*

To constitute State aid, the aid measure must firstly be granted by the State or through state resources. On the basis of the Agreement between the Ministry of Finance and the Pension Fund of State Employees signed in October 2003, the Treasury will pay to the Pension Fund, on behalf of Sementsverksmiðjan hf., the amounts due by the company. At the time the Agreement was signed, the liabilities of Sementsverksmiðjan hf. towards the Pension Fund for the payment of pensions to already retired employees were estimated at ISK 412 million. Further, future liabilities for the remaining employees of the company affiliated to Section B of the Pension Fund still in active service, were estimated within a range between ISK 10 to 15 million. Taking over the pension-related liabilities and paying it from the Treasury involves state resources.

1.3.2. *Favouring certain undertakings or the production of certain goods*

Secondly, the aid measure must confer on the recipient advantages that relieve it of charges that are normally borne from its budget.

The State took over the debt Sementsverksmiðjan hf. had towards the Pension Fund of State Employees for the payment of pensions of its own employees. Sementsverksmiðjan hf. had been established in 1955 as part of the State administration. The employees of the cement producer, called Iceland State Cement Works at the time, were affiliated to the Pension Fund of State Employees like any other employees of the State administration.

In 1997, the State reformed the Pension Fund of State Employees. The Pension Fund of State Employees made an actuarial assessment of the liabilities it had towards its affiliates in future pension payments. The result of this assessment was then compared with the assets of the Fund and the share of liabilities amongst the different employers with affiliated employees. The liabilities of the Pension Fund of State Employees for already retired employees of Sementsverksmiðjan hf. at the end of 1996 corresponded to ISK 400 million⁽³⁰⁾.

⁽³⁰⁾ According to Article 3 of the Agreement between the Civil Servants' Pension Fund and the Ministry of Finance on the payment of National Treasury obligations pursuant to Article 33 of Act No. 1/1997, on the Civil Servants' Pension Fund, with respect to employees of the Iceland State Cement Works to year-end 1996, the obligations on behalf of Iceland Cement Ltd were ISK 400 801 268.

The Treasury paid this liability to the Pension Fund of State Employees with bonds of the company. This liability stayed in the accounts of Sementsverksmiðjan hf. until 23 October 2003 when the State took over a debt of Sementsverksmiðjan hf. towards the Pension Fund. This debt concerned on the one hand, the payment of pensions to employees of Sementsverksmiðjan hf. already retired at the time of establishment of the debt in 1997. On the other hand, the debt also concerned the estimated payment of pensions to 5 employees then currently active at Sementsverksmiðjan hf. which were still affiliated to Section B of the Pension Fund of State Employees ⁽³¹⁾.

In so far as the payment of pension obligations belongs to the normal costs an undertaking has to put up with in the course of business, the takeover by the State of these payments relieved Sementsverksmiðjan hf. of an operating cost. By so doing, the State granted a selective advantage to this undertaking as other undertakings have to put up with all pension related costs for their own employees.

1.3.3. *Distortion of competition and effect on trade between Contracting Parties*

Thirdly, the aid measure must distort competition and affect trade between the Contracting Parties.

Undertakings benefiting from an economic advantage granted by the State which reduces their normal burden of costs, are placed in a better competitive position than those who cannot enjoy this advantage. There is competition in the market for cement within the EEA. Currently there are two companies active in the Icelandic market of cement: Sementsverksmiðjan hf. and Aalborg Portland Íslandi ehf. Any advantage granted to Sementsverksmiðjan hf. which reduces the costs it should normally incur, places this undertaking in a better competitive position vis-à-vis the other actual or potential market players in the Icelandic cement market which does not receive this advantage. Thus, the support granted by the State to Sementsverksmiðjan hf. has the effect of distorting competition.

Fourthly, for Article 61(1) of the EEA Agreement to be applicable, the notified measure must have an effect on trade between the Contracting Parties to the EEA Agreement.

The direct competitor of Sementsverksmiðjan hf. in the Icelandic market is a subsidiary of an undertaking located in another State party to the EEA Agreement which does not produce cement in Iceland, but imports it from other EEA countries into Iceland. For this reason, the measure affects trade between the Contracting Parties to the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

⁽³¹⁾ The pension obligations concerning employees already retired amounted to ISK 412 million by October 2003. On the same date, the debt corresponding to future obligations for current employees was estimated to amount at approximately ISK 10-15 million.

1.3.4. *Conclusion*

For the abovementioned reasons the Authority considers that the State granted State aid to Sementsverksmiðjan hf. with the takeover of pension obligations with the Agreement signed in October 2003 between the Ministry of Finance and the State Pension Fund.

2. *PROCEDURAL REQUIREMENTS*

Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, 'the 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 the procedure has resulted in a final decision.'

Although the Icelandic authorities submitted a notification, by letter dated 29 August 2003, on the planned sale of the State's shares at Sementsverksmiðjan hf., the signature of the abovementioned agreements by the Icelandic authorities put any possible State aid measure granted on the basis of these agreements into effect before the Authority had taken a final decision on the notification. For this reason, the State aid granted in the framework of this transaction constitutes unlawful State aid within the meaning of Article 1(f) of Part II of Protocol 3, that is, new aid put into effect in contravention of Article 1(3) of Part I of the same Protocol.

3. *COMPATIBILITY OF THE AID*

Under Article 61(3)(c) of the EEA Agreement, aid to facilitate the development of certain economic activities or of certain economic areas, may be considered compatible with the functioning of the EEA Agreement, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. Restructuring aid is to be assessed under the Authority's Rescue and Restructuring aid guidelines (hereinafter referred to as 'the R & R guidelines').

In Decision No 421/04/COL, the Authority emphasised that the Icelandic authorities had not provided any arguments or respective documentary evidence to assess the compatibility of the aid with the R & R guidelines. The Icelandic authorities forwarded a restructuring plan for Sementsverksmiðjan hf. with a letter dated February 2005. Further, in February 2008, the Icelandic authorities submitted additional information on the restructuring plan. In the following, the Authority will assess whether this new information makes it possible to conclude that the aid satisfies the requirements of the R & R guidelines ⁽³²⁾.

⁽³²⁾ Case T-157/01 *Danske Busvognmænd v Commission*, [2004] ECR II-917, paragraph 116.

3.1. APPLICABLE GUIDELINES

The aid was granted in October 2003 when the State relieved Sementsverksmiðjan hf. from its pension liabilities. The assessment of the compatibility of this aid measure will be based on the R & R guidelines from 1999⁽³³⁾, applicable at the time the aid was granted.

3.2. FIRM IN DIFFICULTY

According to Section 16.2.1 of the R & R guidelines, in any event and irrespective of its size, a limited company is regarded as a firm in difficulty for the purposes of the guidelines, 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. Whatever the type of company concerned, the R & R guidelines consider a firm to be in difficulty for the purposes of the guidelines, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings. The usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

The registered capital of Sementsverksmiðjan hf. decreased from ISK 1 096 million in 2000 to ISK 458 million in 2003. The company's turnover decreased from ISK 1,06 billion in 2000 to ISK 863 million in 2001 and ISK 598 million in 2002. The sales of the company decreased from [...] in 2000 to [...] in 2001 and [...] in 2002. Consequently, production went down by more than [...]%. Operational results were worsening rapidly during the same period. Sementsverksmiðjan hf. had a profit of ISK 70 million in 2000 but sustained a loss of ISK 230 million in 2001. The loss of the company for 2002 was ISK 220 million. Between 2000 and 2002, the total debt of Sementsverksmiðjan hf. went from ISK 733 million to ISK 1 157 million. Current assets decreased from ISK 750 million to ISK 640 million.

In the annual accounts of Sementsverksmiðjan hf. for 2002, the accountants raised serious concerns about the financial status of the company. The accumulated losses and the strong likelihood of continued operational losses in the year 2003, lead to the conclusion that the possibility of continued operation of the company was questionable.

According to the explanations and information provided by the Icelandic authorities, Sementsverksmiðjan hf. was on the brink of bankruptcy and could not recover through its own resources.

Therefore, the Authority considers that Sementsverksmiðjan hf. was a firm in difficulty within the meaning of the R & R guidelines at the time of the grant.

3.3. DEFINITION OF RESTRUCTURING AID

Restructuring aid should be based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability. According to Section 16.2.2 of the R & R guidelines, restructuring aid usually involves one or more of the following elements: the reorganisation and rationalisation of the firm's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, the restructuring of those existing activities that can be made competitive again and, possibly, diversification in the direction of new and viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. The provisions of the R & R guidelines however stress that restructuring operations cannot be limited to financial aid designed to make good past losses without tackling the reasons for those losses.

The restructuring plan for Sementsverksmiðjan hf. consisted of a wide range of measures. It covered the financial restructuring of the company, the restructuring of workforce and production costs and the incorporation of alternative revenue sources. Thus, in light of the R & R guidelines, this restructuring plan was not limited to the financial restructuring but tackled various other aspects of the restructuring of Sementsverksmiðjan hf. At the outset therefore, the aid was of the type that falls to be assessed under the R & R guidelines.

3.4. CONDITIONS FOR THE AUTHORISATION OF RESTRUCTURING AID

State aid for helping firms in difficulty to restructure may be regarded as legitimate only under certain conditions. It may be justified, for instance, by social or regional policy considerations, by the need to take into account the beneficial role played by small and medium-sized enterprises (SMEs) in the economy or by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation.

3.4.1. *Restoration of viability*

According to Section 16.3.2.2(b) of the R & R guidelines, the grant of aid should be conditional on implementation of the restructuring plan which must be endorsed by the Authority. The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must be linked to a viable restructuring plan to which the EFTA State concerned commits itself. The plan must be submitted in all relevant detail to the Authority and include, in particular, a market survey.

The improvement in viability must derive mainly from internal measures contained in the restructuring plan and may be based on external factors such as variations in prices and demand over which the company has no great influence only if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss-making even after restructuring.

⁽³³⁾ Published in OJ L 274, 26.10.2000, p. 1, and in EEA Supplement No 48, 26.10.2000.

The provisions of Section 16.3.2.2(b) of the R & R guidelines require the restructuring plan to describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It should take account, *inter alia*, of the present state of and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. It should enable the firm to progress towards a new structure that offers it prospects for long term viability and enables it to stand on its own feet.

The plan should provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. According to the R & R guidelines, the expected return on capital should be enough to enable the restructured firm to compete in the marketplace on its own merits.

The restructuring plan of Sementsverksmiðjan hf. consisted of four different measures:

- financial restructuring;
- restructuring of workforce;
- restructuring of production costs;
- alternative revenue sources.

Financial restructuring

The Icelandic authorities have explained that one of the key measures of the restructuring was to reduce debts through sale of assets. During autumn 2003, Sementsverksmiðjan hf. liquidated all assets not directly related to the production and delivery of cement to the Icelandic market. With the money obtained from this sale, the company was able to reduce existing debts and was able at least to reduce the losses of operations. Total proceeds from the sale of assets were ISK 580 million and were used to reduce long and short term debt. The main aim of the company was to minimise capital expenses during the period of restructuring. All remaining long term debts were then renegotiated so that the company would not reduce the principal of the loan for two years following the sale.

According to the information provided, the most difficult part of the restructuring for the company was the re-negotiation of debt with creditors. It seems that the company had increased its short and long terms lending significantly over the three years prior to the sale, due to the losses incurred. The company had signed loans with various institutions. The credit institutions regarded these loans with Sementsverksmiðjan hf. as loans acquired by the State and were not willing to grant more credit to the company once privatised unless the outstanding loans were repaid. Therefore, the debt levels had to be reduced

significantly which was achieved through the sale of assets redundant for cement production and/or distribution.

The Icelandic authorities have indicated that 'it was a critical factor in [the financial] negotiations that the pension debt would be removed from the balance sheet of the company, so that it could provide a viable and plausible repayment schedule. It is clear, and this view was shared by the buyers and creditors, that the company could not have serviced both the pension debt and other short and long term loans, as well as maintaining a critical level of fixed asset investments to keep the company operational.'

To remove the pension debt along with a partial repayment of other debt was an essential part of gaining approval for the financial restructuring.

Restructuring of workforce

At the time of the sale, 63 employees worked for Sementsverksmiðjan hf. An analysis of the economic characteristics of the undertaking and of the market in which it was active showed that the workforce would have to be reduced by at least 20 employees. A minimum of 41 employees were needed to operate the factory. The contracts with redundant staff were terminated, whereby, due to the long employment history of some employees, the severance costs were high.

Secondly, the company operated a bonus scheme related to production for the majority of its employees. The amount to be distributed to employees was fixed so that the costs for the production bonus remained the same for the undertaking regardless of the number of employees. A negotiation was initiated with the trade union to apply this production bonus per employee so that the reduction in the overall number of staff would correspond to a reduction in the overall amount of production bonus paid.

Restructuring of production costs and alternative revenue sources

According to the Icelandic authorities, the most important measure was to re-negotiate the prices of raw materials. Moreover, the composition of cement was changed to reduce the energy costs for production.

Regarding the re-negotiation of prices for raw materials, a significant part of the variable operational costs of Sementsverksmiðjan hf. was related to international/national market prices and could not be altered. This was the case for coal, electricity, silica dust and other raw materials. However, the price for the supply of shell sand, the single most significant domestic raw material, could be reduced by [...] %. The price for other domestic raw materials could also be negotiated.

Moreover, Sementsverksmiðjan hf. had started to burn waste fluids as an alternative source of revenue and as a means to reduce the overall fuel costs.

Compliance with the restructuring requirements

On the basis of the measures described above, the Authority finds that the restructuring plan for Sementsverksmiðjan hf. complies with the requirements of the R & R guidelines. The restructuring plan described the circumstances that led to Sementsverksmiðjan hf.'s difficulties. Sementsverksmiðjan hf. was not in the position to face competition and the economic weaknesses of the construction sector at the beginning of the 2000s. The plan comprised a thorough financial restructuring covering debt re-negotiation with creditors and the taking over by the Icelandic State of the pension liabilities towards the State Pension Fund. Financial restructuring was accompanied by measures of physical restructuring including the restructuring of the workforce (termination of contracts with workers, re-negotiation of advantages for workers) and in particular the re-structuring of production costs, the most costly part of the re-structuring plan. The production costs were reduced, the composition of cement was changed, the contracts with suppliers were re-negotiated, market initiatives were started to increase revenues. The restructuring plan of Sementsverksmiðjan hf. foresaw the return to viability within a short deadline of two years, which seems a reasonable timescale. The plan has now been fully implemented and has enabled the company to compete in the marketplace on its own merits. For these reasons, on the basis of the information provided by the Icelandic authorities, the Authority considers that the restructuring plan in favour of Sementsverksmiðjan hf. complies with the requirements of Section 16.3.2.2(b) of the R & R guidelines.

3.4.2. Avoidance of undue distortions of competition

Section 16.3.2.2(c) of the R & R guidelines requires measures to be taken to mitigate as far as possible any adverse effects of the aid on competitors. Otherwise, the aid should be regarded as contrary to the common interest and therefore incompatible with the functioning of the EEA Agreement. This condition usually takes the form of a limitation on the presence which the company can enjoy on its market after the end of the restructuring period. Where the size of the relevant market is negligible at EEA level, or the firm's share of the relevant market is negligible, it should be considered that there is no undue distortion of competition.

According to the provisions of Section 16.3.2.2(c) of the R & R guidelines, the Authority shall determine the extent of the limitation or reduction necessary to assure that there is no undue distortion of competition on the basis of the market survey attached to the re-structuring plan and, where the procedure has been initiated, on the basis of information supplied by interested parties.

In the case at hand, the Authority opened the formal investigation procedure in December 2004 and extended it in November 2006. However, there were no comments from interested parties that could provide any information as regards the need to impose compensatory measures and the extent of the same.

The R & R guidelines have a more favourable view on those undertakings regarding which the continuation of operation is unlikely to have significant effects on the competitive situation in the EEA. The Icelandic authorities have provided a market survey on Sementsverksmiðjan hf. and the Icelandic market of cement, which is the only market in which the company is active. According to this survey, the total market for cement in Iceland is limited because of the small population of the country. There are two companies active in the cement market in Iceland: Sementsverksmiðjan hf. and Aalborg Portland Ísland hf. Whereas the former produces and sells cement and slag cement, the latter imports cement from Denmark and sells it in Iceland. In 2002, the consumption of cement in Iceland added up to 122 899 tons ⁽³⁴⁾. In 2002, the consumption of cement in the EU amounted to 217,6 million. Therefore, it can be considered that the Icelandic cement market share in the EEA is negligible.

Moreover, according to the provisions of Section 16.1(3) of the R & R guidelines, restructuring aid may be considered justified not only by social or regional policy considerations but also by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or a tight oligopoly situation. This would be the case in Iceland if Sementsverksmiðjan hf. were to disappear from the market, which would most likely become a monopoly market for cement depending on the imports from the sole other competitor in the Icelandic market for cement. The fact that the market for cement in Iceland has been characterised by either a monopoly or a tight oligopoly of two market players shows that the possibility and attractiveness of this market for other players is very limited due to the reduce scope of the market and its possibilities of development (reference is made in this respect to the findings of the market survey mentioned above).

The Authority does therefore not consider it necessary to require any further measures to limit the presence of the company in the market.

3.4.3. Aid limited to the minimum

In line with the provisions of Section 16.3.2.2(d) of the R & R guidelines, the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. To limit the distortive effect, the provisions of Section 16.3.2.2(d) of the R & R guidelines require the amount of the aid or the form in which the aid is granted to be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process.

⁽³⁴⁾ 38,215 tons of cement were imported to Iceland and 84,684 tons were produced in the country.

In line with the R & R guidelines, the Authority shall examine the level of the firm's liabilities after re-structuring, including after any postponement or reduction of its debts. The Authority shall also examine whether any of the aid goes to finance new investment that is not essential for restoring the firm's viability. In any event, it must be demonstrated that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity, except in so far as this is essential for restoring viability without thereby unduly distorting competition.

A fundamental part of Sementsverksmiðjan hf.'s re-structuring consisted on the sale of assets that were not essential to the firm's survival, such as land and buildings as well as shares and bonds in other undertakings of which the company could dispose to obtain cash to pay its debts. Moreover, debts of

the company were paid back to the extent possible and re-negotiated to facilitate its reimbursement for continuing operation of the company. Workforce and production costs and structures were accordingly restructured and financed with own means of the company. The only intervention from the State consisted in the takeover of pension related liabilities of Sementsverksmiðjan hf. for an amount corresponding to approximately ISK 425 million. This was considered as *conditio sine qua non* for the creditors of the company to make its restructuring feasible. Therefore, the Authority concludes that the aid granted by the Treasury was restricted to the necessary minimum as it only concerned the takeover by the Icelandic State of Sementsverksmiðjan hf.'s debt towards the Pension Fund of State Employees.

The restructuring costs can be summarised as follows:

(a) renegotiations with creditors	ISK 10 811 853 ISK 2 648 904 (fee for carrying out the financial restructuring)
(b) restructuring of workforce	ISK 19 098 479 ISK 2 702 963 (fee for carrying out the restructuring of workforce)
(c) restructuring in production costs and alternative revenue sources	ISK 1 018 200 000
(d) re-evaluation of assets	ISK 511 856 488

The Authority considers that the participation of the Icelandic State in the restructuring of Sementsverksmiðjan hf. by taking over the pension-related liabilities of the company towards the Pension Fund of State Employees constitute a fundamental element for the accomplishment of Sementsverksmiðjan hf.'s restructuring. The taking over by the State of the pension-related liabilities was considered by the creditors of the company as a preliminary condition to renegotiate any other debts and liabilities. This aid granted by the State allowed Sementsverksmiðjan hf. to obtain the necessary resources to finance the pure restructuring measures.

Although the takeover of the pension liabilities was not a cost to Sementsverksmiðjan hf. but to the State, it should be included in the whole assessment of the restructuring of Sementsverksmiðjan hf. The aid was necessary to undertake the various restructuring measures. Taking this into account and in light of the amount of expenditure necessary for the return to viability of Sementsverksmiðjan hf., the Authority considers that the amount of aid involved in this restructuring was limited to the minimum required.

3.4.4. Restructuring aid in assisted areas

In accordance with Section 16.3.2.5 of the R & R guidelines, the Authority will take the needs of regional development into account when assessing re-structuring aid in assisted areas. In assisted areas, the conditions for authorising aid may be less stringent as regards, in particular, the implementation of compensatory measures. This does not, however, mean that the Authority will have a permissive approach to aid for the re-structuring of ailing firms located in assisted areas to help a region prop up companies artificially. On the contrary, it is in the region's own best interest to develop alternative activities that are viable and sustainable as soon as possible.

The factory of Sementsverksmiðjan hf. is situated in Akranes, in the mid-west region of Iceland. This area is covered by the Regional Aid Map of Iceland as approved by the Authority in Decision No 253/01/COL of 8 August 2001. The area is characterised by unemployment above the national average and depopulation. The cement factory has been in Akranes since 1958 and has constituted an important element in the economic life of the area. In a town with a population of approximately 5 500 inhabitants the closure of this factory would have a very detrimental effect adding further to the ongoing depopulation and general social and economical decline.

3.4.5. Full implementation of the restructuring plan

In accordance with the provisions of the R & R guidelines, the company must fully implement the restructuring plan that has been accepted by the Authority and must discharge any other obligations laid down in the Authority's decision ⁽³⁵⁾. The Authority will regard any failure to implement the plan or to fulfil the other obligations as misuse of the aid.

This is the timetable foreseen for the restructuring plan:

Measure	Start of restructuring	Finalisation of restructuring
Financial restructuring measures (negotiation and repayment of debts with credit institutions, takeover by the State of pension liabilities)	September 2003	October 2003
Restructuring of workforce (dismissal of employees, renegotiation with trade unions)	October 2003	April 2004
Restructuring of production costs (price renegotiation with suppliers, alternative revenues and reduction of costs)	October 2003	December 2004

The restructuring plan foresaw the generation of profit following restructuring of the company in July 2005. The Icelandic authorities have informed the Authority that Sementsverksmiðjan hf. had completed the restructuring plan and was able to reach break even in 2005. From June 2003 to May 2004, Sementsverksmiðjan hf. generated a loss of ISK 83 million, compared with the loss of ISK 250 million generated in 2002. From June 2004 to May 2005, the company generated a profit of ISK 22 million.

On the basis of this information, it seems that the restructuring plan for Sementsverksmiðjan hf. had the shortest duration possible, managed to restore the viability of the firm within a reasonable timescale and thus was based on realistic assumptions as to future operating conditions.

3.4.6. Monitoring and annual report

The Authority must be in a position to make certain that the restructuring plan is implemented properly. This is normally done by way of detailed regular reports communicated by the EFTA State concerned to the Authority. In the case at hand, however, the re-structuring has already finished with the establishment of the company's viability. There are no re-structuring measures pending but all have been successfully concluded. Therefore, in this case, there is no need to report on the implementation of the re-structuring plan.

⁽³⁵⁾ In principle, the restructuring plan should have been submitted in full with the notification before the aid was granted. In the present case, the plan was not submitted in advance but the main elements of the restructuring plan were laid down before the restructuring took place. Thus, the Authority considers that it can be approved under the R & R guidelines.

3.5. THE 'ONE TIME, LAST TIME' CONDITION

In order to prevent firms from being unfairly assisted, restructuring aid should be granted only once. When planned restructuring aid is notified to the Authority, Section 16.3.2.3 of the R & R guidelines requires the EFTA State to specify whether the firm concerned has in the past already received re-structuring aid, including aid granted before entry into force of the R & R guidelines and any non-notified aid.

The Icelandic authorities have stated that the 'one time, last time' condition is fulfilled. They have further stated that the company has not received any aid earlier on and there are no plans to grant aid to it in the future.

4. CONCLUSION

For the above mentioned reasons, the Authority considers that the aid granted to Sementsverksmiðjan hf. in connection with the takeover by the Icelandic State of the company's pension related liabilities constitutes re-structuring aid is compatible with the functioning of the EEA Agreement on the basis of the provisions of the Rescue and Re-structuring Aid Guidelines applicable at the time of the grant of the aid,

HAS ADOPTED THIS DECISION:

Article 1

The takeover by the State of pension obligations of Sementsverksmiðjan hf. towards the Pension Fund of State Employees constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

Article 2

The aid mentioned in Article 1 is compatible with the functioning of the EEA Agreement on the basis of Article 61(3)(c) of the EEA Agreement in conjunction with the Rescue and Re-structuring Guidelines adopted by the Authority in 1999.

Article 3

This Decision is addressed to the Republic of Iceland.

Article 4

Only the English text is authentic.

Done at Brussels, 28 May 2008.

For the EFTA Surveillance Authority,

Per SANDERUD
President

Kristján Andri STEFÁNSSON
College Member

EFTA SURVEILLANCE AUTHORITY DECISION

No 405/08/COL

of 27 June 2008

**to close the formal investigation procedure with regard to the Icelandic Housing Financing Fund
(Iceland)**THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

Whereas:

Having regard to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 59(2), 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 thereof,

Having regard to Article 1(2) of Part I and Articles 4(4) and 6 of Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾,

Having regard to the Authority's Guidelines ⁽⁵⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

Having regard to the Authority's Decision No 195/04/COL on the implementing provisions referred to under Article 27 of Part II of Protocol 3 ⁽⁶⁾,

Having regard to the judgment of the EFTA Court in Case E-9/04 concerning an application for annulment of Decision No 213/04/COL regarding the Icelandic Housing Financing Fund ⁽⁷⁾,

Having regard to the Authority's Decision No 185/06/COL to initiate the formal investigation procedure with regard to the Icelandic Housing Financing Fund ⁽⁸⁾,

Having called on interested parties to submit their comments pursuant to those provisions and having regard to their comments,

⁽¹⁾ Hereinafter referred to as the Authority.

⁽²⁾ Hereinafter referred to as the EEA Agreement.

⁽³⁾ Hereinafter referred to as the Surveillance and Court Agreement (SCA).

⁽⁴⁾ Hereinafter referred to as Protocol 3.

⁽⁵⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ) L 231, 3.9.1994, p. 1, and the EEA Supplement 1994 No 32. The Guidelines were last amended on 19 December 2007. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/>

⁽⁶⁾ Published in OJ L 139, 25.5.2006, p. 37, and the EEA Supplement No 26.

⁽⁷⁾ Judgment of 7 April 2006, Case E-9/04 *The Bankers' and Securities' Dealers Association of Iceland v EFTA Surveillance Authority* [2006] EFTA Court Report, p. 42.

⁽⁸⁾ Decision No 185/06/COL of 21 June 2006 to initiate the formal investigation procedure with regard to the Icelandic Housing Financing Fund (OJ C 314, 21.12.2006, p. 89, EEA Supplement No 63).

I. FACTS

1. PROCEDURE

By letter of 20 November 2003 from the Icelandic Mission to the European Union, forwarding a letter from the Icelandic Ministry of Finance of the same date, both received and registered by the Authority on 25 November 2003 (Doc No 03-8227 A, now Event No 255584), the Icelandic authorities notified, pursuant to Article 1(3) in Part I of Protocol 3, an increase of the maximum level of lending by the Icelandic Housing Financing Fund (hereinafter referred to as the HFF) up to 90 % of the purchase price of housing.

On 11 August 2004, the Authority adopted Decision No 213/04/COL. In this Decision the Authority found, without initiating the formal investigation procedure, that the Icelandic legislation pertaining to HFF entailed aid to HFF, but that this aid was compatible with the state aid rules read in conjunction with Article 59(2) of the EEA Agreement.

This Decision was challenged before the EFTA Court by an application of the Bankers' and Securities' Dealers Association of Iceland; an association which has since merged with other financial and insurance associations, and which is now active under the name Icelandic Financial Services Association (hereinafter referred to as SFF). By the judgment of 7 April 2006 in case E-9/04, the EFTA Court sustained the application and annulled the Authority's Decision No 213/04/COL.

As the Authority, on the basis of the information available to it, came to the preliminary conclusion that the contested aid measures constituted new aid, it adopted, on 21 June 2006, Decision No 185/06/COL to initiate the formal investigation procedure with regard to the HFF system. The Authority sent this Decision to the Icelandic authorities by letter dated 21 June 2006 (Event No 377864).

Decision No 185/06/COL was published in the Official Journal of the European Union and the EEA Supplement thereto ⁽⁹⁾. The Authority called on interested parties to submit their comments on this Decision.

By letter from the Icelandic Mission to the European Union dated 20 November 2006, received and registered by the Authority on 21 November 2006, the Authority received comments on the Decision from the Icelandic authorities (Event No 399173).

⁽⁹⁾ See footnote 8.

By way of a letter dated 24 November 2006 (Event No 399801), the Authority forwarded the comments made by Icelandic authorities to the SFF and invited SFF to make observations on the forwarded submission.

The Authority received further comments from the Icelandic authorities in a letter from the Icelandic Mission to the European Union dated 3 January 2007, received and registered by the Authority on 4 January 2007 (Event No 405009).

By letter dated 31 January 2007, received and registered by the Authority on 2 February 2007 (Event No 408361), the SFF responded to the Authority's letter dated 24 November 2006, and this response was forwarded to the Icelandic authorities on 5 February 2007 (Event No 408509).

By letter dated 28 February 2007, received and registered by the Authority on 1 March 2007 (Event No 411962), the SFF commented on the Authority's Decision No 185/06/COL. The Authority forwarded this submission to the Icelandic authorities for comments by a letter dated 5 March 2007 (Event No 412290).

By letter from the Icelandic Mission to the European Union dated 5 March 2007, received and registered by the Authority on 9 March 2007 (Event No 412950), the Icelandic authorities responded to the comments made by the SFF on 31 January 2007.

By letter dated 4 April 2007 (Event No 415881), the Authority requested certain clarifications from the Icelandic authorities.

By letter from the Icelandic Mission to the European Union dated 30 April 2007, received and registered by the Authority 30 April 2007 (Event No 419451), the Icelandic authorities responded to the Authority's letter dated 5 March 2007.

By letter from the Icelandic Mission to the European Union dated 14 June 2007, received and registered by the Authority 14 June 2007 (Event No 425255), the Icelandic authorities replied to the letter from the Authority dated 4 April 2007.

Further information was provided by the representatives of the Icelandic authorities by means of an e-mail on 21 August 2007 (Event No 435379).

By letter dated 28 September 2007 (Event No 442805), the Authority requested additional information from the Icelandic authorities regarding state guarantees under Icelandic law. By letter from the Icelandic Mission to the European Union dated 24 October 2007, received and registered by the Authority 25 October 2007 (Event No 448739), the Icelandic authorities responded to this request.

The case was further subject to discussions between the representatives of the Authority and the Icelandic Government in several meetings, the last one being the package meeting on 29 October 2007 in Reykjavik.

By e-mail dated 27 November 2007, the legal representatives of the SFF submitted additional information regarding the HFF investigation (Event No 454226).

The case was discussed with the complainant in a meeting on 6 March 2008 following which the complainant made a further submission dated 28 March 2008 (Event No 471552).

The Icelandic Government submitted its observations on this latest submission of the complainant by a letter of 15 April 2008 (Event No 473576).

2. BACKGROUND FOR THE ICELANDIC RULES RELATING TO HOUSING SECTOR

2.1. INTRODUCTION

In the following section the Authority will describe the situation under Icelandic law as regards the housing system. The description will cover the law as it stood at the time of the entry into force of the EEA Agreement and outline legislative changes where those have been enacted at a later point in time.

In Section 3 there will be a description of the legal basis under Icelandic law for each of the potential state aid elements identified in Decision No 185/06/COL opening the formal investigation procedure. The legal provisions in force at the time of the entry into force of the EEA Agreement, as well as legislative changes will be discussed.

2.2. THE HOUSING SYSTEM

2.2.1. *Introduction*

For the past 50 years, public intervention in the Icelandic housing market has been aimed at encouraging private home ownership. In 1955, a basis for a systematic State involvement was laid, both as regards policy-making in the field of housing affairs and the provision of loans for private housing. The State Housing Agency (*Húsnæðisstofnun ríkisins*) was established by Act No 51/1980 and provided, inter alia, loans on preferential terms to private home buyers.

In 1986 the housing loan system underwent certain changes entailing, inter alia, that pension funds provided partial funding of the system. The Icelandic banks did not generally provide funding for private housing. As the State Housing Agency issued housing loans below market rates, the result was a substantial increase in demand, which in turn stretched the resources of the pension funds beyond their limits. In order to remedy this situation, and to generate more financial resources to finance housing, a housing bond system was introduced in 1989, which will be described in detail below.

2.2.2. Act No 97/1993 on the State Housing Agency

2.2.2.1. Introduction

At the time of the entry into force of the EEA Agreement on 1 January 1994, the State Housing Agency was governed by Act No 97/1993 (*lög nr. 97/1993, um Húsnæðisstofnun ríkisins*). This Act was in fact a consolidated version of Act No 86/1988 of the same name which had been subject to numerous amendments ⁽¹⁰⁾.

According to Article 1 of the Act No 97/1993, its purpose was to promote the security of Icelanders as regards housing, through the granting of loans and through the organisation of matters relating to housing and housing construction. Furthermore, it was to promote equal rights as regards housing by provision of funds for the specific purpose of increasing people's chances of acquiring or renting housing on manageable terms.

Under the terms of Act No 97/1993 four different public bodies operated in the housing system, namely: the State Housing Agency, the State Housing Board, the State Building Fund and the Workers' Housing Fund.

2.2.2.2. The State Housing Agency and the State Housing Board

The legal basis for the State Housing Agency was laid down in Article 2 of the Act. According to that provision, the Agency was a state institution subject to a separate board of directors (the State Housing Board) within the administrative purview of the Minister of Social Affairs, who was in supreme charge of matters relating to housing. The Agency was to manage and implement the functions relating to housing entrusted to public authorities by the Act.

The Minister of Social Affairs was permitted to issue a regulation to decide in greater detail on the structure of the Agency (cf. Article 3 of the Act). The Minister was also given authorisation to merge the overall management, operations and human resources of two or more divisions, departments and funds provided for in the Act. Costs of the operation of the State Housing Agency was to be divided between the funds operated by the Agency, having taken into account the scope of their operation and outstanding assets at the close of the fiscal year.

The State Housing Agency was governed by the State Housing Board (the Board) that was composed of seven members elected by Parliament following each Parliamentary election (cf. Article 4 of the Act). According to Article 5 of the Act, the Board was to manage the finances, operations and other activities of the State Housing Agency, the State Building Fund and the Workers' Housing Fund. It should also ensure that the Agency conducted its activities in accordance with the prevailing law and administrative provisions. Moreover, the Board was, *inter alia*, given the responsibility of allocating funds to developers for social housing.

The State Housing Board was also empowered, subject to approval by the Minister of Social Affairs, to create new lending categories (cf. paragraph 2 of Article 11). Further specifications regarding the loans were laid down in Articles 12 to 15 of the Act.

⁽¹⁰⁾ The consolidation was done in accordance with Act No 61/1993, amending Act No 86/1988, and entered into force on 12 August 1993.

2.2.2.3. State Building Fund

The role and task of the State Building Fund was laid down in Article 8 of Act No 97/1993. According to that provision, the Fund was to engage in lending activities and housing bond transactions in accordance with the provisions of the Act and regulations set pursuant to the Act. The Fund was also responsible for the borrowing and lending that had taken place with respect to the fund or that might be decided in the future. Article 9 of the Act laid down how the State Building Fund was to be financed, as follows:

- '1. By returns on the Fund's own capital, i.e. instalments, interests and price indexation payments on granted loans.
2. Through the annual State Treasury contributions as provided for in the Budget Act.
3. Through the sale of bonds to the Unemployment Insurance Fund, to pension funds as agreed between the State Housing Agency and the funds, and by any other borrowing as may be decided in further detail in the investment and credit plan applicable at any time.'

Article 11 of the Act allowed the State Building Fund to grant loans in the following categories, provided that funding had been made available in its budget for the relevant year:

- '1. Loans for the construction of homes for the elderly and day-care institutions for children and the elderly.
2. Special loans for those with special needs.
3. Loans or grants for technical innovations and other reforms in the construction industry.'

All loans from the State Building Fund were to be fully indexed (cf. Article 16 of the Act). Each loan should be secured by a first- or second-rank mortgage in the housing for which the loan had been granted. Moreover, it was permissible to require that the granted loan and mortgage should not exceed a particular proportion of the purchase price, real estate assessment or fire insurance valuation.

2.2.2.4. Housing Bonds

As mentioned above, the so-called housing bond system was established in 1989. Accordingly, Article 18 of Act No 97/1993, authorised the State Building Fund to operate a separate Housing Bonds Division, whose finances were to be kept separate from the Fund's other activities. According to Article 19 of the Act, the role of the Housing Bonds Divisions was:

- '(a) To issue categories of marketable bonds in the name of the State Building Fund, hereafter referred to as housing bonds, subject to the terms and conditions laid down in this Act, or by regulation.
- (b) To exchange debt instruments secured by mortgage upon residential housing issued in connection with the purchase of real estate, construction of new housing, or extensive additions or improvements to, or renovation of, used residential housing [...].
- (c) To promote the saleability of housing bonds in the market at all times.'

The housing bond system was not a traditional mortgage loan system, but a bond swap system, meaning that homebuyers applied to the Housing Bonds Division to issue a mortgage bond, which was secured against the property to be bought. The Housing Bonds Division then bought this bond from the homebuyer and paid for it by issuing housing bonds to the seller. These housing bonds could then be freely traded in the securities market. The seller could sell the bonds on the securities market, use them as means of payment or keep them.

According to Article 21 of the Act, the Housing Bonds Division was permitted to claim an interest margin to cover its operating expenses and estimated losses from outstanding loans. The Minister of Social Affairs was to determine the level of the interest margin following the proposal of the State Housing Board.

The mortgage instruments purchased by the Housing Bonds Division were to be issued for a maximum loan period of 25 years (cf. Article 26 of the Act). According to Article 27, these mortgage instruments could be exchanged for housing bonds amounting to a maximum of 75 % of a property's reasonably assessed price. The Minister of Social Affairs was empowered to decide on the maximum percentage through a Regulation whereby he could decide on a higher percentage for new construction and the first-time purchase of residential housing. According to Article 29 of the Act, the Housing Bonds Division was to promote the saleability of the housing bonds on the market. For that purpose the Division was to seek cooperation with banks, pension funds and other entities on the financial market. Furthermore, the State Building Fund was permitted to dispose of a proportion of its funds for transaction in housing bonds to promote equilibrium on the market.

The Act did not itself contain provisions on who was eligible for loans under the housing bonds system. Instead, such rules were laid down in Regulation No 467/1991 on the Housing Bonds Division and housing bonds transactions (*um húsbrefadeild og húsbrefaviðskipti*). With regard to lending to undertakings the Regulation provided that building contractors qualified for loans from the system. A building contractor was defined as any recognised entity building and selling completed apartments in accordance with the relevant industrial standard (cf. Article 1 of the Regulation). Rules regarding loans for new

buildings were laid down in Article 10 of the Regulation and Article 25 imposed a special requirement on contractors under which they were required to submit a guarantee from a financial institution or a municipality.

2.2.2.5. Workers' Housing Fund

The role of the Workers' Housing Fund was to take care of the provision of loans for social housing with the aim of solving the housing needs of those who require special assistance thereto (cf. Article 47 of the Act). Article 48 concerned the financing of the Workers' Housing Fund, which was achieved as follows:

- '(a) by returns on the Fund's own capital, i.e. instalments, interest and price indexation payments on granted loans;
- (b) by annual State Treasury contributions as provided for in the Budget Act from time to time;
- (c) by loans from municipalities to the State Housing Agency (cf. Article 42);
- (d) by the sale of bonds to pension funds in accordance with agreements made between the State Housing Agency and pension funds;
- (e) by special borrowings, decided in the investment and credit plans from time to time, when disposable funds pursuant to sub-paragraphs a to d are not sufficient for planned developments.'

The loan categories of the Workers' Housing Fund were listed in Article 50 of the Act and were the following:

- '1. Loans for lease-purchase social housing (for 90 % of the purchase price).
2. Loans for privately owned social housing (for 90 % of the purchase price).
3. Loans for rented social housing (for 90 % of the purchase price).
4. Loans for general lease-purchase housing (for 70 % and 20 % of the purchase price). [...]

Loans for social housing were granted by the State Housing Board from the Workers' Housing Fund (cf. Article 52 of the Act). The loan could be up to 90 % of the construction cost or purchase price, however, not exceeding 90 % of the costs basis approved by the State Housing Board, less a 3,5 % special contribution of the municipalities for each social assistance apartment (cf. paragraph 2 of Article 42 of the Act) ⁽¹¹⁾. With regard to entitlement to social assistance, Article 64 of the Act stated that the right to loans for private owned social housing was limited to those who fulfilled the following conditions:

⁽¹¹⁾ Chapter VIII of Act No 97/1993 laid down rules regarding housing cooperatives. These rules were not carried over to the Housing Act of 1998. Currently housing cooperatives are governed by a separate Act No 66/2003. As regards the entitlement of these cooperatives to loans from the Housing Financing Fund, that is governed by the provisions in Chapter VIII of the Housing Act (cf. sub-paragraph (d) of Article 5 of Act No 66/2003).

- '(a) Do not already own an apartment or a comparable asset in another form.
- (b) Have had an average income over the past three years before allocation takes place of an amount not exceeding [...]. These income limits shall be determined by the State Housing Board at the beginning of each year [...].
- (c) Demonstrate payment ability which is assessed by the housing committee of a municipality [...].'

Article 65 provided that those applying for rental apartments had to fulfil the conditions in sub-paragraphs (a) and (b).

The owner of a social assistance apartment who intended to sell this apartment was to notify the housing committee or other developer of such intentions (cf. Article 85 of the Act). The developer was to purchase the apartment and resell it in accordance with the Act and regulations set pursuant to the Act. On the purchase of an apartment, its seller should be refunded the contribution he provided on the purchase of the apartment and the instalments he had paid on the loan from the Workers' Housing Fund from the time the purchase agreement was entered into. Article 86 entrusted the municipalities with the task of calculating the sales price of social housing.

2.2.3. *The Housing Act No 44/1998*

2.2.3.1. *Introduction — main changes*

The Housing Act No 44/1998 entered into force on 1 January 1999. By that Act the Housing Financing Fund was established. At the same time the abovementioned Act No 97/1993 on the State Housing Agency was repealed. According to Article 1 of the Housing Act, the purpose of the Act is to promote security and equal rights as regards housing to Icelanders, through the granting of loans and through organisation of matters relating to housing, and that funds are provided for the specific purpose of increasing people's chances of acquiring or renting housing on manageable terms. In other words, the purpose of the Act corresponds fully to that laid down in the abovementioned Article 1 of the former Act No 97/1993.

In the bill, which subsequently became the Housing Act, the main amendments were described in the following terms:

'The main changes contained in the bill concern the social housing system. The principal change being proposed is that the building and purchase of privately owned social apartments will be stopped and instead a new social lending system will be established. The current provisions on the building of rental apartments will remain in place but it is proposed that the Articles on lease-purchase be abolished. In addition to the abovementioned, an independent bill will concern building and housing cooperatives.

In other respects, the main changes in the bill may be simplified into three issues. First, they concern social assistance. Second, the participation of municipalities in such assistance and third changes concerning the organisational set-up of housing affairs.' ⁽¹²⁾

When the Minister of Social Affairs submitted the bill to Parliament, he explained the main legislative changes foreseen under the new bill in the following manner:

'The main items are as follows:

The State Housing Agency will be abolished.

The State Building Fund and the Workers' Housing Fund will be merged into the Housing Financing Fund and the assets of the State Housing Agency will also become part of the Fund. [...]

The housing bond system will remain unchanged as regards real estate transactions on the general market. The Housing Financing Fund shall in the fullness of time become self-sustainable. One item in that regard is that it is presupposed that older loans taken by the Fund will be restructured. With the restructuring it will be possible to achieve substantially better rates than the Building Funds enjoy today. This Fund will be very strong. It will have a capital of 26 billion ISK and will have access to the best lending rates.' ⁽¹³⁾

2.2.3.2. *Institutional set-up*

The Housing Financing Fund is an independent State-owned institution subject to a separate board of directors within the administrative purview of the Minister of Social Affairs (cf. Article 4 of the Housing Act). The Fund replaced the previous State Housing Agency. According to Article 7, the Minister shall appoint the five-member board of directors of the Fund for a four-year term. Article 8 provides that the board hires a managing director, who is responsible for the day-to-day operation of the Fund, hiring of staff, etc.

As outlined above, the Housing Act abolished both the State Building Fund and the Workers' Housing Fund. The funds were to be merged and abolished as of the entry into force of the Act. From the same date, the Housing Financing Fund took over the functions, rights, assets, liabilities and obligations of both funds (cf. Article 53 of the Act). The rights and privileges afforded to them by law applied to the Housing Financing Fund. The Housing Financing Fund similarly took over all rights and duties related to debt certificates owned by the State Building Fund and the Workers' Housing Fund and was to take their place in any litigation against them or conducted on their behalf.

⁽¹²⁾ The Authority's unofficial translation. The original Icelandic text can be found at <http://www.althingi.is/altext/122/s/0877.html>

⁽¹³⁾ The Authority's unofficial translation. The original Icelandic text can be found at <http://www.althingi.is/altext/122/03/r06115030.sgml>

The tasks entrusted to the Housing Financing Fund by law are listed in Article 9 of the Housing Act and include:

- ‘1. Lending and administration of housing bonds transactions in accordance with the provisions of this Act.
2. Lending to municipalities, companies and associations for construction or purchase of residential housing. [...]’

As was the case for the State Building Fund and the Workers’ Housing Fund under the previous Act No 97/1993, also the Housing Financing Fund is financed by 1) a return on their own capital and 2) by the issuing and sale of bonds (cf. Article 10 of the Housing Act). However, in contrast the system laid down in Act No 97/1993 with regard to financing via direct contributions from the Treasury was not continued in the Housing Act.

According to Article 11 of the Housing Act, the Housing Financing Fund shall preserve and earn a return on the monies in its charge. Having obtained the approval of the Minister of Social Affairs, the Fund may decide to commit the safe-keeping of its assets to others, in part or in whole. Care shall be taken that the Fund possesses, at all times, adequate liquid funds to honour its obligations.

2.2.3.3. Loan categories

2.2.3.3.1. *The three types of loans*

Article 15 of the Housing Act laid down the three categories of loans extended by the Housing Financing Fund⁽¹⁴⁾. The categories were:

- general loans under Chapter VI of the Act for the construction and purchase of residential housing,
- additional loans to individuals under Chapter VII of the Act for construction and purchase of residential housing,
- loans for rental housing to municipalities, associations and companies under Chapter VIII of the Act for construction or purchase of residential housing to be rented.

According to paragraph 1 of Article 16, the Fund was permitted to create new categories of loans, subject to the approval of the Minister of Social Affairs.

2.2.3.3.2. *General loans*

The Housing Act continued the system with general housing loans that had been introduced by the housing bonds system in 1989 and also applied under Act No 97/1993. The new act did

not introduce changes regarding this loan category. In order to administer general loans, the Housing Financing Fund was to operate a Housing Bonds Division, as previously operated by the State Housing Agency, whose finances were to be kept separate from other activities of the Fund’s operation (cf. Article 17 of the Housing Act)⁽¹⁵⁾.

The Housing Bond Division was to:

- ‘1. issue categories of marketable housing bonds in the name of the Housing Financing Fund subject to the terms and conditions laid down in this Act, or by regulation;
2. exchange debt instruments secured by mortgage and housing bonds;
3. promote the saleability of housing bonds in the market. [...]’

A mortgage bond was to be index linked and have the same lending terms as the housing bonds, exchanged for the mortgage bond, in addition to interest margin (cf. Article 19 of the Act). This margin could be set so that it covered the Housing Bonds Division’s operating expenses and estimated losses from outstanding loans (cf. Article 28 of the Act). The Minister of Social Affairs was to determine the level of the interest margin after having obtained a proposal from the Board of the Housing Financing Fund.

Mortgage instruments and housing bonds could be exchanged for an amount not exceeding 70 % of the appraised value of property, if the owner was building or buying his first residential housing, but 65 % of the value in all other instances (cf. Article 19 of the Act); in other words a reduction from the former ceiling of 75 % of the assessed price laid down in the abovementioned Article 27 of the previous Act No 97/1993. The Minister of Social Affairs was permitted to decide in a Regulation the maximum number of mortgage instruments bought by the Housing Bond Division for each property. According to Article 21 of the Act, the maximum loan period of mortgage instruments bought by the Housing Bond Division was to be 40 years. Further rules regarding housing bonds were laid down in Regulation No 7/1999 on the Housing Bonds Division and housing bonds transactions (*um húsbrefadeild og húsbrefaviðskipti*).

As regards lending to building contractors the rules in that Regulation mirrored those laid down in the previous Regulation 467/1991 of the same name applicable under the former Act⁽¹⁶⁾.

⁽¹⁴⁾ As will outlined below, one of the categories, the additional loans was abolished by Act No 120/2004 (cf. 2.2.3.4.2).

⁽¹⁵⁾ By Act No 57/2004 the provisions related to Housing Bonds were abolished as the Fund started granting loans in cash (cf. 2.2.3.4.1).

⁽¹⁶⁾ Cf. 2.2.2.4 above.

As can be seen from the above, the housing bond swapping system remained the same after the entry into force of the Housing Act. The Housing Bond Division of the Housing Financing Fund was entrusted with the same functions as the same Division had carried out in the State Housing Agency (cf. Article 19 of the Act No 97/1993 and Article 17 of the Housing Act, both quoted above). This is also borne out by the comments to chapter VI of the bill which became the Housing Act, that the chapter contained substantively corresponding provisions as chapter IV of the Act No 97/1993 ⁽¹⁷⁾.

2.2.3.3.3. *Additional loans*

With the Housing Act a new loan category, called additional loans, for people with lower income, was added to the housing system. Those loans could be granted on top of the general loans replacing several social loans granted under Act No 97/1993 but were subsequently repealed ⁽¹⁸⁾. According to Article 30, following a request from a municipal housing committee, the Housing Financing Fund could grant individuals who had a right to a general loan for the purchase of an apartment additional loans which could cover 25 % of the estimated value of the apartment. As was the case for social loans under the previous system in Act No 97/1993 before the establishment of the Housing Financing Fund, total lending from the Housing Financing Fund (general loan and addition loan) could never exceed 90 % of the estimated value of the apartment.

The Minister of Social Affairs was to set a regulation further outlining the requirements for granting additional loans. The following criteria were to be considered for granting those loans: family size, assets, income, apartment size and type of housing. The Minister of Social Affairs issued Regulation No 783/1998 on Additional Loans, which laid down in greater detail the conditions applicants had to satisfy in order to be eligible for additional loans. Articles 5 and 6 of the Regulation provided that the applicant could not exceed certain thresholds as regards income and assets in order to qualify for an additional loan ⁽¹⁹⁾. Article 8 stated that the applicant had to pass an evaluation of payment ability. In Article 4 it was stated that the municipalities were permitted to create further guidelines for the housing committees to take into consideration. These issues could include current housing situations; the state and type of current housing and family size and health ⁽²⁰⁾. Hence, the main criteria for determining whether someone qualified for 'social'

loans continued to be lack of assets and low income just as was the case under the rules in place before the enactment of the Housing Act.

As opposed to the previous rules under Act No 97/1993, the Housing Act did not contain provisions for loans for the so-called lease-purchase social housing. Furthermore, the Housing Act did not contain any provisions related to the sale of social apartments as they could be sold on the general market subject to the conditions laid down in Article 32 of the Housing Act.

2.2.3.3.4. *Rental apartments*

The third loan category, loans for rental apartments, is regulated by Chapter VIII of the Housing Act. According to Article 33, the Housing Financing Fund may extend loans for construction or purchase of housing intended for lease, to municipalities, associations or companies having the objective of constructing, owning and managing such housing. Loans may be granted for up to 90 % of the construction cost or purchase price but not exceeding 90 % of the cost basis approved by the board of the Fund (cf. Article 36 of the Act). According to Article 37 of the Act, the right to rental housing shall depend on the social circumstances of an applicant and whether the applicant's income and assets fall within the limits laid down in further detail in a Regulation issued by the Minister of Social Affairs.

In the general comments accompanying Chapter VIII of the bill to the Housing Act it was stated that as regards this type of loans, for the greater part the same rules as under the former Act No 97/1993 would continue to apply ⁽²¹⁾. Accordingly, this loan category is essentially the same as previously provided for in the rules regarding the Workers' Housing Fund. The maximum loan for this loan category was 90 % of construction cost or purchase price, both under the terms of the Housing Act and Act No 97/1993. Similarly, the entitlement to these rental apartments was based on criteria of social need such as lack of assets and low income.

2.2.3.4. **Amendments made in 2004**

2.2.3.4.1. *Act No 57/2004*

In 2004, two Acts amending the Housing Act were enacted, Act No 57/2004 and Act No 120/2004. Act No 57/2004, which entered into force on 1 July 2004, abolished the housing bond swapping system. Instead the general loans provided by the Housing Financing Fund were paid out in cash. The main objective of the changes was described in the following terms in the bill:

⁽¹⁷⁾ <http://www.althingi.is/altext/122/s/0877.html>

⁽¹⁸⁾ These additional loans were abolished by Act No 120/2004 (cf. Section 2.2.3.4.2 below).

⁽¹⁹⁾ An individual could not earn more than 1 620 000 ISK and have assets in excess of 1 900 000 ISK. These figures were to be adjusted annually.

⁽²⁰⁾ With regard to the losses that the Housing Financing Fund might incur with the granting of these additional loans, Article 43 of the Housing Act provided that the municipalities should own and operate a so-called reserve fund administered by the Housing Financing Fund. According to Article 44 the reserve fund compensates the Housing Financing Fund losses it incurs on additional loans. Article 45 provided that the municipalities should initially pay a contribution of 5 % of each additional loan granted in the municipality.

⁽²¹⁾ <http://www.althingi.is/altext/122/s/0877.html>

'The bill, which is here submitted, has the purpose of ensuring Icelanders more favourable housing loans through the Housing Financing Fund by cheaper financing in the general loan market. This objective shall be achieved by the reorganisation of the bond issuing of the Housing Financing Fund, which will enhance the efficiency of the financing and will cut away the main shortcomings with the current issuance [...].⁽²²⁾

After the amendments Article 19 of the Housing Act stated:

'Loans extended by the Housing Financing Fund shall be paid out in cash. Before a loan is paid out, the borrower shall issue a borrower's mortgage instrument and have it officially recorded. Each borrower's mortgage shall be price-indexed by the consumer price index (cf. the Consumer Price Index Act), and shall bear interest as provided for in Article 21.'

Sub-paragraphs 2 and 3 of Article 10 of the Act, concerning the financing of the Fund were amended to correspond to the abolition of the housing bond system:

'The Housing Financing Fund shall finance the tasks committed to by this Act in the following manner:

1. By returns on the Fund's own capital, i.e. instalments, interest and price indexation payments on extended loans.
2. By the issue and sale of HFF bonds, and by borrowing as may be provided for the Budget Act at any particular time.
3. By service charges as provided for in Article 49.'

Even though the service charges were not previously listed in Article 10 as a means of financing, the referred Article 49 was a part of the Act from its entry into force and had not been changed. By Article 5 of the Act No 57/2004, two new paragraphs were added to Article 11 of the Housing Act on management of assets and liabilities:

'The Housing Financing Fund shall keep its revenues and expenses in balance, and shall make advance plans in this regard. The Fund shall establish a risk management system for this purpose.

The Housing Financing Fund may conduct trade in its own financing bonds and other securities. Having obtained the opinion of the board of the Fund and the Financial Supervisory Authority, the Minister shall, by Regulation, issue provisions on the Fund's risk criteria, risk management, internal control and its trade in securities.'

Several other amendments were made by Act No 57/2004. They were mostly related to issues, which can be termed as technical changes connected with the abolition of the bond

swap system (cf. Articles 9 to 20 of the amending Act). This Act did not change anything regarding the substance of the general loans or who was eligible to receive them.

2.2.3.4.2. Act No 120/2004

By Act No 120/2004, which entered into force on 3 December 2004, the limit of the Housing Financing Fund's general loans was raised to 90 % of the appraised value of property from the former maximum value of 70 %, and the Minister of Social Affairs was given the power to change that amount by way of administrative regulation (cf. Article 19 of the Housing Act). Furthermore, as a consequence of the raising of the limit for general loans, Chapter VII of the Act, on additional loans, was abolished. In the comments to Article 4 of the bill, which abolished Chapter VII of the Housing Act on additional loans, inter alia, the following explanations were provided:

'If the bill should become law, all property buyers will have the possibility of 90 % loans and the need for additional loans will therefore no longer exist. The interest rate of additional loans were, in the first part of 2004, 5,3 % or considerably higher than the rate of general loans after the amendments made to the bond issuance of the Housing Financing Fund which entered into force on 1 July 2004. As of September, additional loans have borne the same interest rate as general loans. This change has resulted in substantially better terms for buyers with few assets and low income. Therefore, under the current circumstance there is no reason to provide for a separate loan category for that group.'⁽²³⁾

The Minister of Social Affairs has made use of his competence granted by the above Act. The maximum limit has been lowered to 80 % and raised again to 90 % but then lowered again to 80 % which is the current limit⁽²⁴⁾.

3. LEGAL BASIS UNDER ICELANDIC LAW FOR POSSIBLE STATE AID ELEMENTS

In its decision to initiate a formal investigation procedure, the Authority identified the following five possible state aid measures:

- the state guarantee,
- exemption from income and property tax,
- interest support,
- no dividend payments,
- the HFF not being subject to capital adequacy requirements and minimum solvency ratio rules.

⁽²³⁾ The Authority's unofficial translation. The original Icelandic text can be found at: <http://www.althingi.is/altext/131/s/0223.html>

⁽²⁴⁾ See Regulation No 540/2006, as last amended by Regulation No 587/2007. The Regulation also lays down a nominal lending cap which is currently 18 million ISK.

⁽²²⁾ The Authority's unofficial translation.'

3.1. STATE GUARANTEE

The Housing Financing Fund is a State institution governed by public law (cf. Article 4 of the Housing Act No 44/1998 and compare Article 2 of the previous Act No 97/1993). As such, under the general unwritten rules of Icelandic public law applicable to all State institutions, it enjoys a State guarantee on all its obligations.

The said unwritten principle of Icelandic law predates the entry into force of the EEA Agreement. In the general comments to the bill which became Act No 121/1997, on State Guarantees (*lög um ríkisábyrgðir*) the following was stated: 'This is based on the unequivocal rule of Icelandic law that the State is liable for the obligations of its institutions and undertakings, unless the guarantee is limited by an explicit legal provision [...] or the liability of the State in a limited liability company is limited to the share capital contribution.'⁽²⁵⁾ The guarantee is applicable to all State institutions, regardless of when they are established or their activities, or changes in those activities. Hence, it also applied to the former State Housing Agency and the three other bodies performing house financing activities before the entry into force of the Housing Act.

3.2. EXEMPTION FROM INCOME AND PROPERTY TAX

In the opening decision, the Authority identified as a second potential State aid measure the exemption that HFF enjoys from income and property tax.

The State Treasury, all State institutions and all State undertakings for which the State carries unlimited liability have, long before the entry into force of the EEA Agreement, been exempted from income and property taxes (cf. now paragraph 1 of Article 4 of the Income Tax Act No 90/2003). This general tax exemption applies to the Housing Financing Fund by virtue of it being a State institution.

The legal basis for the tax exemption was at the time of entry into force of the EEA Agreement laid down in paragraph 1 of Article 4 of Act No 75/1981 on Income and Property Tax. The present Act on Income Tax is a consolidated version of Act No 75/1981 on Income and Property Tax. Hence, the predecessors of the Housing Financing Fund, also fell under this tax exemption.

With regard to property tax, it was abolished, *erga omnes*, by Act No 129/2004 and was levied for the last time on assets at the end of the year 2005. Until the adoption of Act No 129/2004,

paragraph 1 of Article 4 Act No 90/2003 exempted the above-mentioned institutions from the payment of property tax as well. Hence, the predecessors of the Housing Financing Fund, also fell under this tax exemption.

3.3. INTEREST SUPPORT

In the opening decision, the Authority identified as a third potential State aid measure, interest support, which in fact corresponds to direct budgetary contributions to HFF to cover obligations resulting from lending below market rates for the building of social rental housing.

One of the loan categories of the Workers' Housing Fund was loans for rented social housing (cf. Article 50 of Act No 97/1993, quoted above). Chapter VIII of the Housing Act provides for the current rules on loans for social rental apartments, and as referred to above, they are for the greater part the same as previously applicable. Therefore, both the State Housing Agency, through the Workers' Housing Fund, and the HFF respectively were given the task of providing this category of loans.

As stated above, one of the means of financing for the Workers' Housing Fund were direct budgetary contributions (cf. Article 48 of Act No 97/1993). Those contributions were to cover partially the operating costs of the Fund, including those related to social rental apartments. The interest rate for this loan category was decided upon annually by the Government (cf. Article 52 of the Act).

As regards the situation after the entry into force of the Housing Act, provisional Article IX of the Housing Act, as adopted in 1998, provided that, until the end of the year 2000, loans for social rental apartments would continue to be granted at the same rates as were applicable at the time.

On 21 August 2001, the Minister of Social Affairs and the Minister of Finance entered into a special agreement providing for a subsidised interest rate for this loan category as regards up to 400 rental apartments every year⁽²⁶⁾. On 26 September 2005, the Ministers entered into a new agreement, adjusting the contribution to the HFF in view of the lowering of interest rates and the increase of the maximum contribution for each apartment. According to those agreements HFF would receive a budgetary contribution for the losses it incurred related to this loan category to the extent provided for in the agreements.

⁽²⁵⁾ The Authority's unofficial translation. The original Icelandic text can be found at: <http://www.althingi.is/alttext/122/s/0099.html>

⁽²⁶⁾ The Icelandic Government's letter of 3 January 2007, p. 10.

3.4. NO DIVIDEND PAYMENTS

In the opening decision, the Authority identified as a fourth potential State aid measure that HFF is not required to pay any dividends to the State. This results from the general principles of Icelandic public law, which do not require State institutions, organised such as HFF, to pay dividends⁽²⁷⁾. As such, this principle predates the entry into force of the EEA Agreement and the legal situation for the predecessors to HFF was therefore the same.

This general principle is, inter alia, a reflection of the fact that the objective of these institutions is not to make a profit but to provide services that Parliament has decided should be undertaken by the State. Under Icelandic public law, a State institution requires a legal basis to charge for its services and the charge may not exceed the cost of providing them⁽²⁸⁾. Where a State institution is permitted by law to charge more than costs or, as for example in the case of HFF, earn a return on funds it keeps (cf. Article 11 of the Housing Act), a separate legal basis is required for the institution to pay dividends to the Icelandic State.

This understanding of Icelandic law is confirmed in the Icelandic Government's letter of 15 April 2008 where the following is stated: In accordance with the Government Financial Reporting Act No 88/1997, the general practice is that public entities are only required to generate profit if they are obliged to do so by law. Furthermore, a legal basis is required if a public entity is required to pay dividends. If a public entity generates profits it shall turn in a normal share of the profits as dividends to the Treasury, as laid down in Article 42 of Act No 88/1997. Public entities which pay dividends, such as *Landsvirkjun*, for example, have a special legal obligation to do so. Reference can be made to Article 4 of Act No 42/1983 on *Landsvirkjun*. Therefore there is no general legal provision requesting public entities to pay dividends.

Neither the Housing Act nor Act No 97/1993 contained any legal provision requiring the HFF or its predecessors to pay dividends. Hence, HFF has in this respect always been governed by the said general principle of Icelandic public law.

3.5. HFF IS NOT COVERED BY CAPITAL ADEQUACY REQUIREMENTS AND MINIMUM SOLVENCY RATIO RULES

The Act referred to at point 14 of Chapter II of Annex IX to the EEA Agreement (Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, as amended, hereafter referred to as the 'Banking Directive')⁽²⁹⁾, sets out the requirements for capital adequacy and the rules for

a minimum solvency ratio applicable to credit institutions throughout the EU and EFTA Member States. Article 2(3) of the directive contains a catalogue of institutions exempted from the application of the provisions of the Banking Directive. In the decision of the EEA Joint Committee this list was expanded, inter alia, by adding the 'Byggingarsjóðir ríkisins' in Iceland (literally translated 'the State's Building Funds')⁽³⁰⁾. This term covered the State Building Fund and the Workers' Housing Fund, which, as described above, were merged and taken over by the HFF (cf. Article 53 of the Housing Act). Accordingly, Article 116 of Act No 161/2002, on Financial Institutions (*lög um fjármálafyrirtæki*) exempts the HFF from the application of the Act, which is among the measures implementing the directive into Icelandic law.

4. COMMENTS BY THE ICELANDIC AUTHORITIES

In its letters of 20 November 2006 and 15 April 2008, the Icelandic Government maintained that the HFF system was to be regarded as existing aid. First, the principal features of the system pre-dated the entry into force of the EEA Agreement and were not changed by the adoption of the Housing Act. The changes made to the housing system, at that time, were exclusively aimed at the social housing system and were not substantive. Second, the State aid elements identified in the opening decision of the Authority were general measures that remained unaltered by the enactment of the Housing Act. Hence, for example the implicit state guarantee has been the same both before and after the entry into force of the EEA Agreement. In this respect, the Icelandic Government argued that it follows from the judgment of the European Court of Justice in *Namur* that only substantive legislative changes were capable of altering the classification of the aid⁽³¹⁾. Third, there was no change made in 1999 with the introduction of the Housing Act that was likely to alter the appreciation of the compatibility of the system with the State aid rules. Fourth, and alternatively, the changes made to the social housing system relating to, for example, the so-called additional loans are severable from the general lending system.

5. COMMENTS FROM THIRD PARTIES

The SFF has claimed that the changes made by the Housing Act cause the system to be classified as new aid as these changes implied that the housing system did not remain in place more or less unchanged until today. In its letter of 31 January 2007 the SFF referred, inter alia, to:

— the existence of a new Act, i.e. that the Housing Act had replaced the State Housing Agency Act,

⁽²⁷⁾ This is different when the State owns companies that are organised as limited liability companies and are governed by private law.

⁽²⁸⁾ For an application of this principle, see e.g. judgment of the Icelandic Supreme Court of 5 November 1998 in case No 50/1998.

⁽²⁹⁾ OJ L 126, 26.5.2000, p. 1. The Act was incorporated by Decision No 15/2001 of the EEA Joint Committee and entered into force 1 October 2001.

⁽³⁰⁾ This translation has been provided by the Icelandic Government.

⁽³¹⁾ Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829.

- the creation of a new legal entity, the Housing Financing Fund which replaced the State Housing Board/State Housing Agency and took over the assets and obligations of the State Building Fund and the Workers' Housing Fund,
- the introduction of new lending instruments, with cash loans instead of housing bonds and less social assistance in housing matters, change of maximum level of funding of the purchase, lifting of restrictions on sale of owner-occupied social housing, abolition of priority right and changes with regard to the nature of the entities eligible for loans,
- the change in the sources of financing: Under the Housing Act the Housing Financing Fund, unlike its predecessors, does not receive any direct state contributions.

In its letter of 28 March 2008, the SFF has argued that the relevant legal test should consist of a comprehensive assessment of the HFF system rather than an individual analysis of the identified possible aid measures. In the opinion of SFF, the individual components of the system are so closely interwoven that it would amount to an unjustified artificial division to split them up in the assessment of whether the measures have the character of new or existing measures. Such an approach would, in the opinion of SFF, not be in line with the practice of the European Commission in similar cases. Finally, the SFF invites the Authority to take account of the factual development with regard to the amount of loans granted by the HFF and its market share compared to that of the private banks.

II. ASSESSMENT

1. THE HFF NOT BEING SUBJECT TO CAPITAL ADEQUACY REQUIREMENTS AND MINIMUM SOLVENCY RATIO RULES, IS NOT STATE AID

The Authority has found it useful to start its assessment with the question of whether the fact that the HFF is not subject to capital adequacy requirements and minimum solvency ratio rules constitutes State aid.

As already indicated, the Banking Directive sets out the requirements for capital adequacy and the rules for a minimum solvency ratio applicable to credit institutions throughout the EEA. In the opening decision, the Authority took the preliminary view that the exemption of HFF from the Banking Directive did not constitute State aid. However, it found that the question raised such doubts that it was useful to assess the question under the formal investigation procedure. This assessment has led the Authority to confirm its preliminary opinion for the following reasons:

First, as also indicated in the opening decision, HFF does not constitute a credit institution covered by the Banking Directive as it is not permitted to receive any deposits or other repayable funds from the public.

Second, Article 2(3) of the Banking Directive contains a catalogue of institutions exempted from the application of the provisions of the directive. The decision of the EEA Joint Committee included the 'Byggingarsjóðir ríkisins', in that list. That term was traditionally used for the funds which have now been taken over by the HFF. Hence, regardless of whether that provision is constitutive or merely restates what already follows from the normal rules of the directive, it is the Banking Directive as adapted to the EEA itself that exempts HFF from its ambit and the capital adequacy requirements and minimum solvency ratio laid down therein. Even when assuming that an exemption from the directive entailed that the HFF would be granted an advantage, the measure would not be imputable to the Icelandic State, but to the EEA Joint Committee, and would accordingly not constitute State aid ⁽³²⁾.

Third, even if HFF had been covered by the Banking Directive, any exemption would not have entailed a transfer of State resources, as the State would not forego any revenue in such a situation.

2. JOINT CONSIDERATIONS PERTAINING TO THE STATE GUARANTEE, THE INTEREST SUPPORT, THE EXEMPTION FROM INCOME AND PROPERTY TAX AND THE LACK OF DIVIDEND PAYMENTS

2.1. THE DIFFERENT PROCEDURES FOR NEW AND EXISTING AID

The procedure for new aid is laid down in Article 1(3) in Part I of Protocol 3 SCA (corresponding to Article 88(3) EC). If the Authority is in doubt about the compatibility of such an aid measure, it shall open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 SCA (corresponding to Article 88(2) EC) and in Article 4(4) of Section II in Part II of Protocol 3 SCA.

The procedure for existing aid is different from that pertaining to new aid and is laid down in Article 1(1) in Part I of Protocol 3 SCA. Pursuant to that provision, the Authority shall, in co-operation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

According to the European Court of Justice:

'[...] when the Commission examines aid measures under Article 87 EC to determine whether they are compatible with the common market, it is required to initiate the procedure under Article 88(2) EC where, after the preliminary examination, it has been unable to overcome all the

⁽³²⁾ Case T-351/02 *Deutsche Bahn v Commission* [2006] ECR II-1047, paragraphs 100-103.

difficulties involved in determining whether those measures are compatible with the common market [...] The same principles must naturally apply where the Commission also entertains doubts as to the actual classification as aid, within the meaning of Article 87(1) EC, of the measure examined. The Commission cannot therefore be criticised for initiating the procedure even where, in the decision adopted for that purpose, it expresses doubts as to the status as aid, within the meaning of Article 87(1) EC, of the measures covered by it.

[...] the Commission must undertake an adequate examination ... on the basis of the information already communicated to it by that stage by the Member State, even if the outcome of that examination is a non-definitive classification of the measures examined. [...] If that information enables it, for the purposes of a provisional assessment, to take the view that the measures at issue probably in fact constitute existing aid, the Commission must then deal with them within the procedural framework provided for in Article 88(1) and (2) EC. On the other hand, if the information provided by the Member State is not such as to justify that provisional conclusion or if the Member State provides no information on the matter, the Commission must deal with those measures within the procedural framework provided for in Article 88(3) and (2).⁽³³⁾

In other words, any assessment made in a decision to open the formal investigation procedure as to whether a potential aid measure constitutes new or existing aid is necessarily only of a preliminary nature. It therefore follows from case law that even if the Authority, in an opening decision, initially took the view that the measure in question constituted new aid, it can still, in the decision concluding that procedure, find that the measure in fact constitutes existing aid or that it does not amount to aid at all. Where existing aid is involved, the Authority has to follow the procedure for existing aid⁽³⁴⁾. Accordingly, in such a case the Authority would have to close the formal investigation procedure and open the different procedure for existing aid laid down in Articles 17 to 19 in Part II of Protocol 3 SCA⁽³⁵⁾. Under this latter procedure, and only under that, the Authority would assess whether an existing aid measure is compatible with the functioning of the EEA Agreement.

The information presented to the Authority at the time when it decided to initiate the formal investigation procedure was 'not such as to justify' the provisional conclusion of the aid being existing and the Authority therefore dealt with these measures in the framework of the rules pertaining to new aid. However, as this initial view has been contested by the Icelandic Government, the Authority will in the following assess the question anew in the light of the material now presented by the Government and by the SFF.

⁽³³⁾ Case C-400/99 *Italy v Commission* [2005] ECR I-3657, paragraphs 47, 54-55.

⁽³⁴⁾ Case T-190/00 *Regione Siciliana v Commission* [2003] ECR II-5015, paragraph 48.

⁽³⁵⁾ Case C-312/90 *Spain v Commission* [1992] ECR I-4117, paragraphs 14-17, Case C-47/91 *Italy v Commission* [1992] ECR I-4145, paragraphs 22-25, Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* [2002] ECR II-2309, and Joined Cases T-297/01 and T-298/01 *SIC II* [2004] ECR II-743.

As already indicated, the Authority will conclude on the existence and compatibility of new aid measures under the formal investigation procedure. In contrast, if the instruments in question do not constitute new aid, the Authority cannot under the present procedure make a binding assessment as to whether they instead constitute existing aid within Article 61(1) EEA. Nor can the Authority make a binding assessment as to whether such existing aid measures would be compatible with the Agreement. Hence, before concluding on the question of new or existing measures, the Authority will in the following base itself on the assumption that the following measures are state aid: state guarantee, tax exemption, interest support and relief from paying dividends.

2.2. THE LEGAL TEST

Article 4 of the Authority's Decision 195/04/COL provides that an alteration to existing aid is any change, other than modifications of a purely formal or administrative nature, which cannot affect the evaluation of the compatibility of the aid measure with the common market. Moreover, as regards the legal assessment of whether aid is new or existing, the Court of Justice stated in *Namur-Les Assurances du Crédit*, that:

'[...] the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.

The decision which entered into force on 1 February 1989 did not amend the legislation which accorded to the OND the advantages which it enjoyed, either in regard to the nature of those advantages or even in regard to the activities of the public establishment to which they applied, since the Law of 31 August 1939 set that establishment a very general aim of reducing the risks of providing credit for exports. It does not therefore affect the aid arrangements put in place by that legislation.'⁽³⁶⁾

The Court went on to conclude that a factual extension of the undertaking's activities would not suffice to alter the classification of an aid measure:

'To take the contrary view would in effect be tantamount to requiring the Member State concerned to notify to the Commission and submit for its preventive review not only new aid or alterations of aid properly so-called granted to an undertaking in receipt of existing aid but also all measures which affect the activity of the undertaking and which may have an impact on the functioning of the common market, on competition or simply on the actual amount, over a specific period, of aid which is available in principle but which necessarily varies in amount according to the undertaking's turnover.

⁽³⁶⁾ Case cited above, *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraphs 28-29 (underlined by the Authority). See also paragraph 23 of the judgment where the Court referred to changes 'not affecting the substance of those advantages'.

Ultimately, in the case of a public undertaking such as the OND, each new insurance operation which, according to the information provided at the hearing by the Belgian Government, must be submitted to the supervisory authorities, could thus be regarded as a measure to which the procedure laid down in Article 93(3) of the Treaty applies.

Such an interpretation, which does not correspond to either the letter or the purpose of Article 93(3), nor to the division of responsibility between the Commission and the Member States for which it provides, would give rise to legal uncertainty for undertakings and Member States, which would thus be obliged to notify in advance widely differing measures, which could not then be put into effect despite doubts as to whether they could be classified as new aid. [...]’⁽³⁷⁾

In *Government of Gibraltar v Commission*, the Court of First Instance held that:

‘it is only where the alteration [in national law] affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.’⁽³⁸⁾

In the assessment of whether a change to an aid measure has the effect of turning hitherto existing aid into new aid, the Commission has examined whether the change is substantive in nature⁽³⁹⁾. In this respect the Commission has taken account of the nature of the advantage, the aim pursued with the advantage, the basis on which the advantage is made, the persons and bodies affected by it and the relevant sources of finance. In contrast, the Commission has not looked into legal changes, which are not a part of the aid measure in question.

In relation to individual aid measures, such as licence fees for a public broadcaster, this approach has led the Commission to examine the conditions under which the relevant fee is being used, the reason being that these conditions form an integral part of the aid measure concerned⁽⁴⁰⁾.

Where the aid measure concerned has consisted of an aid scheme not granted for any particular activity, such as for example public undertakings benefiting from a state guarantee merely because the undertaking is organised as part of the State, the Commission focussed on whether the aid measure itself (the scheme consisting of a State guarantee for all such undertakings) had been subject to substantial changes. As in this latter situation the rules pertaining to each aid beneficiary do not form part of the aid measure, the Commission has not looked into the specific rules regulating the activities of the each of the aid beneficiaries. In other words, the Commission has not found that changes to rules pertaining to individual beneficiaries could have the effect of turning the aid scheme into new aid, be that with effect for the scheme as such or merely for the particular undertaking subject to the legislative changes⁽⁴¹⁾. Indeed, to do so would have implied that a measure having the character of a scheme would convert from existing aid to new aid in relation to some of the beneficiaries, but not in relation to others solely because the rules pertaining to the former, but not to the latter, had changed. Such a result would be incompatible with the fact that the measure consisted of one single measure.

⁽³⁷⁾ Case cited above, *Namur-Les Assurances du Crédit*, paragraphs 32-33.

⁽³⁸⁾ Joined cases cited above, *Government of Gibraltar v Commission* [2002], paragraph 111. See similarly Opinion of AG Fennelly in Joined Cases C-15/98 and C-105/98 *Italy and Sardegna Lines, Servizi Marittimi della Sardegna v Commission* [2000] ECR I-8855, paragraph 64.

⁽³⁹⁾ Commission Decision of 24 April 2007 in case E 10/2005 (ex C 60/1999), paragraph 33, Commission Decision of 4 April 2007 in case E 7/2005 regarding Finnish guarantee schemes, paragraph 16, Commission decision of 20 April 2005 in case E 8/2005 in favour of Spanish Broadcaster RTVE, point 2.2, and Commission Decision in case E 22/2004 — Direct tax incentives in favour of export related activities, paragraphs 34-35.

⁽⁴⁰⁾ Commission Decision of 24 April 2007 in Case aid E 3/2005 — Financing of public service broadcasters in Germany, paragraphs 200-214, Commission Decision E-14/2005 — Portugal, compensation payments to public service broadcaster RTP, paragraphs 61-80.

⁽⁴¹⁾ Commission Decision of 24 April 2007 in Case aid E 3/2005 — Financing of public service broadcasters in Germany, paragraph 215. As a result of being publicly owned institutions, German public banks had traditionally benefited from an implicit State guarantee, the so-called *Anstaltslast*. In case E-10/2000 regarding the German *Landesbanken*, the Commission concluded that *Anstaltslast* was an institute predating the EC Treaty. The aid to the banks flowing from this guarantee was therefore existing, and that applied also where *Anstaltslast* did not merely follow from a general principle of law, but later had been introduced explicitly in written legal provisions (cf. Letter from the Commission to Germany of 8 May 2000 proposing appropriate measures in case E 10/2000, point 7, first paragraph. To the Authority's knowledge, the German banks benefiting from *Anstaltslast* are normally established by a separate law regulating the establishment and operation of the individual bank. Several of these banks seem to have been established after the entry into force of the EC Treaty. Changes in the legislation regulating the operation of the public banks have frequently taken place. Establishing new banks by law, merging and splitting up public banks and other changes in the legislation governing the public banks may certainly affect the activity of the undertaking and may have an impact on the functioning of the common market, on competition or simply on the actual amount of aid which is available to the undertakings. Nevertheless, the Commission neither examined when the different banks benefiting from the guarantee were established nor did it analyse changes in the operations of the banks or other measures relating to individual banks before it concluded that the advantage flowing from the *Anstaltslast* was existing aid. See similarly, Commission decision of 16 October 2002 in Case C 68/02 — France, *Electricité de France (EDF)*, paragraph 68, where one of the aid measures to EDF, a State guarantee, followed from a general principle in French law predating the EC Treaty. The operation of EDF had changed significantly over the years and the company had also expanded into new markets. That notwithstanding, the Commission saw no need to examine these factual changes, nor did it look into any changes to the legislation pertaining to EDF, subsequent to the entry into force of the EC Treaty, when establishing whether that aid measure constituted new or existing aid (cf. also similarly Commission Decision of 16 December 2003 on the State aid granted to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9, paragraph 59), and the Commission's invitation to submit comments pursuant to Article 88(2) EC in Case E 3/2002, EDF (OJ C 164, 15.7.2003, p. 7, paragraphs 53-55).

Hence, before going into which legislative changes are relevant for the assessment of whether an aid measure is new or existing, it first has to be determined whether rules pertaining to one or more of the recipients of the aid form part of the aid measure or not. Moreover, where the undertaking concerned receives aid from several measures having different purposes and legal basis, adopted at different times, and some being individual and others having the character of schemes, the different aid measures should be assessed one by one and not merged together in one overall assessment, just because the measures wholly or partially have the same beneficiary ⁽⁴²⁾.

2.3. CLASSIFICATION OF THE DIFFERENT AID MEASURES AS NEW OR EXISTING AID

2.3.1. *The State guarantee*

The State guarantee on all State institutions for all their obligations follows from general unwritten rules of Icelandic public law predating the entry into force of the EEA Agreement. The guarantee is applicable to all State institutions, regardless of when they are established, or of their activities, or changes in those activities. This possible aid measure must be regarded as a scheme falling within the definition in Article 1(d) in part II of Protocol 3 to the Surveillance and Court Agreement. Again assuming that it is aid, the scheme must, at the outset, be regarded as existing aid as it existed prior to the entry into force of the EEA Agreement (cf. Article 1(b) in part II of Protocol 3 to the Surveillance and Court Agreement).

Since the entry into force of the EEA Agreement there have been no substantive, or even non-substantive changes to the extent and function of the guarantee as such. Act No 121/1997 on State Guarantees, with subsequent amendments, introduced a minor guarantee premium at a rate of 0,00625 % per quarter (0,00375 % per quarter on domestic commitments until 2001). However, this premium only reduces the aid following from the original State guarantee scheme which predates the EEA Agreement. The original scheme can therefore not, regardless of any advantage connected to it, be classified as new aid ⁽⁴³⁾.

Moreover, none of the changes to the operation of HFF described above in Section I.2 implied any such change. The nature of the advantage was exactly the same and so was the legal basis for the aid. Nor did the purpose of this non-individual measure, which goes far beyond the particularities of the

housing loan system and applies generally to all State institutions, change as a consequence of the changes to the housing loan system brought about by the Housing Act ⁽⁴⁴⁾. In other words, those legislative changes were not only separable from this possible aid measure, but wholly unconnected thereto. Hence, the guarantee scheme cannot constitute a new aid measure that can be assessed under the present formal investigation procedure.

2.3.2. *Exemption from income and property tax*

The State Treasury, all State institutions and all State undertakings for which the State carries unlimited liability have, long before the entry into force of the EEA Agreement, been exempted from income and property taxes.

The *income tax* exemption is today provided by paragraph 1 of Article 4 of the Income Tax Act No 90/2003 which is a consolidated version of Act No 75/1981 on Income and Property Tax. Assuming that the tax exemption constitutes aid, it must at the outset be regarded as a general scheme falling within the definition in Article 1(d) in part II of Protocol 3 to the Surveillance and Court Agreement. Since the entry into force of the EEA Agreement there has been no substantive, or even non-substantive changes to the extent, financing or function of this scheme. Nothing in these general tax provisions, be that in relation to the HFF or to any other beneficiary of the exemption, was changed as a consequence of the changes to the housing loan system brought about after 1 January 1994. Moreover, the changes to the housing loan system neither intrinsically nor remotely affected this scheme. Indeed, the Housing Act did not bring about any change in the purpose and nature of the tax exemption. Nor did it alter the source of financing or the legal basis for the tax exemption. The tax exemption cannot, therefore, constitute a new aid measure that can be pursued under the formal investigation procedure.

Until the adoption of Act No 129/2004, abolishing property tax, paragraph 1 of Article 4 of the Income and Property Tax Act No 90/2003 exempted the abovementioned institutions from the payment of that tax as well. Also with respect to property tax, this Act merely consolidated rules already found in the abovementioned Act No 75/1981 on Income and Property Tax. The property tax is now abolished altogether. Until its abolition in 2004, the exemptions for these institutions from that tax must, in the event they constitute aid, be assessed as a scheme falling within the definition in Article 1(d) in part II

⁽⁴²⁾ Commission Decision of 24 April 2007 in case E 3/2005 — Financing of public service broadcasters in Germany, paragraphs 192-216, Commission Decision of 20 April 2005 in Case E 8/2005 — State aid in favour of the Spanish national public broadcaster RTVE, point 2.2, and Commission Decision of 20 April 2005 in case E 9/2005 — Italy, RAI, paragraphs 25-48.

⁽⁴³⁾ Another question is whether the exemption of HFF from the guarantee premium introduced in 1998 would be new aid. The Authority has today, by Decision No 406/08/COL opened formal investigation procedures regarding the exemptions from the guarantee premiums prescribed in Act No 121/1997 on State Guarantees.

⁽⁴⁴⁾ In this respect, the situation is parallel to the following decisions of the Commission, German Broadcasters, Poczta Polska, La Poste, EDF etc. In those decisions, the Commission had to assess whether State guarantees to public undertakings qualified as new or existing aid. In all decisions the Commission made the finding that the guarantee itself had either not changed or had remained substantially unchanged. The Commission did not, in its assessment of the aid following from the guarantee, venture into an assessment as to whether the particular undertaking at hand had changed its operations as this question did not relate to the aid measure as such, but as to one of the beneficiaries of an abstractly defined aid scheme.

of Protocol 3 to the Surveillance and Court Agreement. In the time between the entry into force of the EEA Agreement and the general abolition of the property tax there was no substantive, or even non-substantive changes to the extent, financing or function of the tax exemption and the changes to the housing loan system affected neither the nature, aim, functioning or financing of the tax exemption. Hence, this tax exemption cannot constitute a new aid measure that could have been pursued under the present formal investigation procedure.

2.3.3. *The interest support*

As referred to above, the Workers' Housing Fund provided loans for social rental apartments at low interest rates set by the Government. The Fund received direct budgetary contribution, *inter alia*, to cover its expenses for these loans. As the Workers' Housing Fund was a public institution, the Icelandic State was ultimately liable for the losses related to this lending category if the direct contributions were not sufficient to cover the Fund's losses.

The loan category, social rental apartments, was to a great extent unchanged by the Housing Act and HFF was to grant these loans, initially at the same rate as previously applied (cf. Provisional Article IX of the Act). That Article also provided that the State would provide contributions from the budget to meet the losses of HFF. These issues have subsequently been regulated by agreements between the Minister of Social Affairs and the Minister of Finance (cf. Section I.3.3 above).

With regard to the institutional change, constant Commission practice demonstrates that bodies benefiting from aid may change their legal personality, by merger, de-merger or other reasons without this affecting the classification of the aid. This is the case both when that change in legal personality takes place by way of a private law measure and when the change is provided for in a law or other public law measure ⁽⁴⁵⁾. Indeed,

⁽⁴⁵⁾ Commission Decision of 29 November 2007, C(2007) 5778, State aid C 56/07 — France, Garantie illimitée de l'Etat en faveur de La Poste, paragraphs 93-97, Commission Decision E-14/2005 — Portugal, compensation payments to public service broadcaster RTP, paragraphs 78-80, Commission Decision of 20 April 2005 in State aid case E 10/2005 (ex C 60/99) — Redevance radiodiffusion TF1, paragraph 33, and Letter from the Commission to Germany of 8 May 2000 proposing appropriate measures in case E 10/2000, Landesbank, point 7, first paragraph. As regards the exemption the HFF enjoys from paying a guarantee fee pursuant to Act No 121/1997 on State Guarantees, the Authority's preliminary assessment is that it constitutes new aid and that measure is being dealt with separately (cf. the Authority's Decision No 406/08/COL of 27 June 2008).

the change from the four public bodies operated under Act No 97/1993 compared with the Housing Act cannot in itself have any bearing on the compatibility assessment of the relevant measures. As will be recalled, the Housing Financing Fund took over all assets, rights and obligations from its predecessors and continued their tasks, demonstrating that the reform aimed at maintaining the continuity between these organisations ⁽⁴⁶⁾.

Consequently, both the Workers' Housing Fund and the HFF were given the task of providing these social loans for rental apartments at an interest rate set by the Government, which provided funds via the Budget Act, as these interest rates were too low to cover the costs of the lending. The difference between the two is that the contribution to the HFF is targeted to this particular lending category whereas the Workers' Housing Fund received budgetary contributions common to all its social loans categories. That difference stems from the fact that the Housing Act abolished the other social loan categories of the Workers' Housing Fund and that the additional loans, the main social loan category under the Housing Act in its original form, were not funded through budgetary contributions to the HFF.

Hence, the changes brought about by the Housing Act did not alter the task of providing loans to rental social housing; in other words the purpose of this measure remained the same ⁽⁴⁷⁾. Moreover, the fact that the budgetary contribution is now targeted only at these loans is a result of the abolition of the direct state contributions for other social loans. The abolition of direct state contributions to certain activities, does not constitute a change in the financing of another measure. Hence, such abolition cannot have an impact on the classification of the character of the remaining measure. Rather, it constitutes an abolition of a separate support measure ⁽⁴⁸⁾.

⁽⁴⁶⁾ According to Article 35 of Act No 1/1997, the Government Employees Pension Fund Act, a fund member may opt for having his pension increased corresponding to the increase in salary for the post they last occupied. The Director of the State Housing Agency considered that his post was comparable to that of the Director of the HFF, which was not considered the case by the Pension Fund. In a judgment of 22 January 2004 in case No 344/2003 the Supreme Court of Iceland decided the case in favour of the Director. In the judgment it was, *inter alia*, stated that the Housing Financing Fund was for the main part charged with the same role as the State Housing Agency, acting as a mortgage lending institution for Icelanders. The Court considered that the post of Director of the Agency was comparable to the Director of the Fund with regard to nature of the duties, their scope and responsibility.

⁽⁴⁷⁾ In its Decision E-14/2005 — Portugal, compensation payments to public service broadcaster RTP, paragraphs 63 and 74, the Commission found that changes made to a Portuguese aid measure did not convert the measure into a new aid, *inter alia*, because the alterations to the national rule did not change the aim pursued by the subsidies.

⁽⁴⁸⁾ Commission Decision 2006/240/EC of 16 November 2004 on aid granted by Germany to grain brandy distilleries (Kornbranntwein) (OJ L 88, 25.3.2006, p. 50, paragraph 83-84). See also the Commission's Article 17(2) letter of 14 July 2005 in case E 2/2005 concerning Dutch aid to the housing sector where the Commission found that the aid was existing even if the regime of direct subsidies had been replaced with a regime of state loans and a tax exemption after the entry into force of the EC Treaty. This was so as these changes, taken together, had resulted in a lesser obstacle to competition (cf. paragraphs 16-26 of the letter).

SFF has referred to various changes brought about by the Housing Act and claimed that these should lead to the aid to HFF being classified as new aid. Irrespective of the nature of these changes they did not concern this aid measure, which only provides for losses incurred by the Fund in relation to loans for social rental apartments. Indeed, the raising of the ceiling for general loans was not connected to this loan category. Similarly, the changes by Act no 57/2004, whereby the housing bonds system was abolished and replaced by cash loans did not concern this loan category. The requirement laid down in Article 11 of Act No 97/1993 to the effect that loans were secured by first or second mortgage did not apply to this loan category but only to certain loans from the State Building Fund. Hence, the fact that this provision was not carried over to the Housing Act is of no significance for these loans.

In conclusion, the Authority considers that the advantage following from the interest support cannot constitute new aid that can be examined under the present formal investigation procedure.

2.3.4. *No dividend payments*

As stated in Section 3.4 above, the general principles of Icelandic public law provide that State institutions, organised as HFF, are not required to pay dividends. The principle predates the entry into force of the EEA Agreement and is applicable to State institutions irrespective of when they are established, their activities or any change in their activities. Since the entry into force of the EEA Agreement there have been no substantive, or even non-substantive changes to this general principle. Moreover, neither the Housing Act nor its predecessors have ever deviated from this principle by having in place a legal provision requiring HFF to pay dividends. Hence, the nature of any advantage and state funding following from a non-duty to pay dividends did not change as a consequence of the Housing Act or modifications to that Act. Nor did the purpose of the principle, which goes far beyond the particularities of the housing loan system and applies generally to all State institutions, change as a consequence of the alterations made to the housing loan system. In other words, those legislative changes were not only separable from this possible aid measure, but wholly unconnected thereto. Hence, to the extent that non-payment of dividends must be considered as an aid measure, the measure must therefore be regarded as an aid scheme falling within the definition in Article 1(d) in part II of Protocol 3 to the Surveillance and Court Agreement. Moreover, the scheme would constitute existing aid as it existed prior to the entry into force of the EEA Agreement (cf. Article 1(b) in part II of Protocol 3 to the Surveillance and Court Agreement).

Only if it were found that the relief from the payment of dividends could not be derived from the general principles of Icelandic public law, but rather followed from the Housing Act and its predecessors, could the conditions under which the different housing bodies were operated become part of the

compatibility assessment on new aid. Hence, it would only be in that hypothetical situation that changes to the house financing system that have taken place after 1 January 1994 could potentially imply that any aid connected to the non-payment of dividends changed from existing to new aid.

2.4. CONCLUSION AS TO NEW VERSUS EXISTING CHARACTER OF FOUR POTENTIAL STATE AID MEASURES

On the basis of the foregoing assessment, the Authority considers that following measures: state guarantee, interest support, tax exemption and relief from paying dividends, identified in the opening decision, do not constitute new aid measures that can be assessed under the present formal investigation procedure.

Accordingly, the Authority will close the formal investigation procedure and open proceedings under Article 1(1) of Part I and Section V in Part II of Protocol 3 to the Surveillance and Court Agreement, which concerns existing aid.

For the sake of being exhaustive, the Authority would like to add that even if one were to take the approach suggested by SFF and find that the Housing Act with subsequent amendments was indeed relevant for the assessment of the classification of the possible aid measures identified above, the Authority would still have concluded that the concrete changes made to the housing system were not of such a kind as to trigger a reclassification from existing to new aid:

— First, the mere fact that Iceland chose the legislative technique of enacting a new act rather than amending an already existing act cannot in itself lead to a reclassification of an hitherto existing aid measure⁽⁴⁹⁾. What matters is solely whether the new act implied a substantive changes in the relevant aid measures such as to influence the appreciation of the compatibility of these measures. In that respect, the Authority finds of considerable importance that the Housing Act was, as regards all essential characteristics, a continuation of the previous system with the same objective of securing affordable housing for all residents in Iceland. As shown above in Section 2.2.3.1, the aim of the Housing Act is the same as the one pursued under the Act No 97/1993.

— Second, as referred to above, there is consistent Commission practice to the effect that a change of legal personality of the aid recipient is not relevant for the classification of the aid.

⁽⁴⁹⁾ Commission Decision E 12/2005 — Poland, unlimited State guarantee in favour of Poczta Polska, paragraphs 39-47.

- Third, the financing of the potential aid measures in favour of the HFF, currently in force, has not changed as a consequence of the enactment of the Housing Act and subsequent amendments to that Act.

- Fourth, the Housing Act did not change anything as regards the issuance of the housing bonds, the main loan category. A new loan category the so-called additional loan category was introduced as a part of the reform of social housing under the Housing Act. However, in fact this loan category replaced the categories of social loans which could be granted pursuant to Act No 97/1993. As referred to Section I.2.2.3.3.3, the maximum percentage of these types of loans and the criteria governing entitlement were almost identical. Thus, the main difference in the rules regarding these types of loans is that the Housing Act provides that these apartments could, subject to certain conditions, be sold on the general market for a market price. The Authority is of the opinion that these legislative changes did neither materially change the circle of possible recipients of social loans nor extend the activities of the HFF in that field compared to its predecessors. Furthermore, abolition of social loan categories (cf. Section I.2.2.3.3.3 above) cannot cause an aid scheme to be categorised as new aid. Such changes could, at most, be regarded as abolition of aid.

- Fifth, the Authority cannot agree with the SFF that the Housing Act entailed a substantial expansion of the possibility for the HFF to lend to undertakings building rental apartments⁽⁵⁰⁾. As outlined above in Section I.2.2.3.3.2, both under the terms of the regulations issued on the basis of the Housing Act and its predecessor, loans from the housing bonds system could be granted to undertakings involved in the construction of apartments.

- Sixth, as described above, the housing bonds system was abolished by Act No 57/2004 and replaced by direct cash loans granted by the HFF. SFF has claimed that this change calls for a qualification as new aid. However, this Act changed nothing as regards the scope of potential recipients and alike, nor did it entail a change in the purpose and financing of any possible aid measure to HFF. Therefore, the Authority is of the opinion that the changes are to be regarded as administrative and technical rather than substantive.

- Seventh, by Act No 120/2004, the limit of the HFF's general loan category was raised to 90 % of the appraised value of property. As a consequence, Chapter VII of the Act on additional loans was abolished. Act No 120/2004 altered nothing with the regard to the public service activities of the HFF system. The aim of the Housing Act remained the same, the aid recipient was still only the HFF and its operations were essentially unchanged. Furthermore, it did not change who was eligible for loans from the HFF, it only meant that the 90 % maximum was open to everyone⁽⁵¹⁾. The situation here can be contrasted with *Keller* where the Court of First Instance held that an increase from 7 billion ITL to 80 billion ITL in the maximum fixed assets an undertaking was permitted to hold in order to come within an approved aid scheme, constituted a substantive amendment that should have been notified to the Commission. The Court stated that this change had entailed an increase in potential aid recipients and had indeed opened the scheme for applicants⁽⁵²⁾. Changing the aid scheme thereby potentially increasing the number of aid beneficiaries is an alteration to one of the basic features of a scheme capable of having an impact on its compatibility with EC Treaty. However, in this case, whether general loans are 70 % or 90 % of the appraised value of a real estate is not significant with regard to whether such loans might be classified as public service pursuant to Article 59(2) of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The possible aid measures in the form of State guarantee, interest support, tax exemptions and no dividend payments in favour of the HFF would be existing aid. The formal investigation procedure applicable to new aid is therefore closed.

Article 2

The exemption of HFF from the application of the provisions of the Act referred to at point 14 of Chapter II of Annex IX to the EEA Agreement does not constitute State aid.

⁽⁵⁰⁾ In that respect the SFF referred to the statements made by the Chairman of the Parliamentary Committee when the word 'individual' was deleted from paragraph 1 of Article 15, concerning the general loan category, of the bill which later became the Housing Act. See item 7 in the speech (see <http://www.althingi.is/altext/122/05/r13133243.sgm1>).

⁽⁵¹⁾ In its decision in the German public service broadcasting case, the Commission concluded that increases in the level of the licence fee should not be regarded as new aid: 'The increase is rather the consequence of an increased financial need of public service broadcasters in fulfilling their public service mission. It is therefore — and in line with previous Commission practice — not severable from the initial funding regime and does not constitute a substantive amendment provided that the public service mission as such has not substantively been changed.' Commission Decision of 24 April 2007, cited above, paragraph 206.

⁽⁵²⁾ Case T-35/1999 *Keller SpA v Commission* [2002] ECR II-261, paragraph 62.

Article 3

This Decision is addressed to the Republic of Iceland.

Article 4

Only the English version is authentic.

Done at Brussels, 27 June 2008.

For the EFTA Surveillance Authority,

Per SANDERUD
President

Kurt JAEGER
College Member

CORRIGENDA

Corrigendum to Commission Regulation (EC) No 670/2009 of 24 July 2009 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards public intervention by invitation to tender for the purchase of durum wheat or paddy rice, and amending Regulations (EC) No 428/2008 and (EC) No 687/2008

(Official Journal of the European Union L 194 of 25 July 2009)

On page 24, Article 2(2)(b):

for: '(b) a minimum stock exit capacity to allow, for each storage site, the removal of at least 5 % of the storage capacity per working day, or 1 000 tonnes for durum wheat and 500 tonnes for rice.',

read: '(b) a minimum stock exit capacity to allow, for each storage site, the removal of at least 5 % of the quantity stored per working day, or 1 000 tonnes for durum wheat and 500 tonnes for rice.'.

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