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II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

Notice concerning the entry into force, between the European Union and the Kingdom of Norway, of the Arrangement between the European Union and the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation on the participation by those States in the work of the committees which assist the European Commission in the exercise of its executive powers as regards the implementation, application and development of the Schengen *acquis*

The abovementioned Arrangement ⁽¹⁾ was signed in Brussels on 22 September 2011. As the procedures necessary for the entry into force of this Arrangement between the European Union and the Kingdom of Norway have been completed on 31 October 2012, this Arrangement will enter into force as far as the Kingdom of Norway is concerned, in accordance with Article 7 of the Arrangement, on 1 December 2012.

⁽¹⁾ OJ L 103, 13.4.2012, p. 4.

REGULATIONS

COUNCIL REGULATION (EU) No 1088/2012

of 20 November 2012

fixing for 2013 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy ⁽¹⁾ requires that measures governing access to waters and resources and the sustainable pursuit of fishing activities be established taking into account available scientific, technical and economic advice and, in particular, the report drawn up by the Scientific, Technical and Economic Committee for Fisheries (STECF) as well as in the light of any advice received from Regional Advisory Councils.

(2) It is incumbent upon the Council to adopt measures on the fixing and allocation of fishing opportunities by fishery or group of fisheries, including certain conditions functionally linked thereto, as appropriate. Fishing opportunities should be distributed among Member States in such a way as to assure each Member State relative stability of fishing activities for each stock or fishery with due regard to the objectives of the common fisheries policy established in Regulation (EC) No 2371/2002.

(3) The total allowable catches (TACs) should be established on the basis of the available scientific advice, taking into account biological and socioeconomic aspects whilst ensuring fair treatment between fishing sectors, as well as in the light of opinions expressed during the consultation of stakeholders, in particular at meetings with the Advisory Committee on Fisheries and Aquaculture and the Regional Advisory Councils concerned.

(4) For stocks subject to specific multiannual plans, the fishing opportunities should be established in accordance with the rules laid down in those plans. Consequently, catch limits and fishing effort limits for the cod stocks in the Baltic Sea should be established in accordance with the rules laid down in Council Regulation (EC) No 1098/2007 of 18 September 2007 establishing a multi-annual plan for the cod stocks in the Baltic Sea and the fisheries exploiting those stocks ⁽²⁾ ('the Baltic Sea Cod Plan').

(5) In the light of the most recent scientific advice, flexibility in the management of the fishing effort for cod stocks in the Baltic Sea can be introduced without jeopardising the objectives of the Baltic Sea Cod Plan and without causing an increase in fishing mortality. Such flexibility would allow for more efficient management of the fishing effort where quotas are not allocated equally among the fleet of a Member State and would facilitate swift reactions to quota exchanges. A Member State should, therefore, be allowed to allocate to vessels flying its flag additional days absent from port where an equal amount of days absent from port is withdrawn from other vessels flying the flag of that Member State.

(6) The use of fishing opportunities as set out in this Regulation should be subject to Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy ⁽³⁾, and in particular provisions concerning the recording of catches and fishing effort and the information on data on the exhaustion of fishing opportunities. It is therefore necessary to specify the codes relating to landings of stocks subject to this Regulation which are to be used by the Member States when sending data to the Commission.

(7) In accordance with Council Regulation (EC) No 847/96 of 6 May 1996 introducing additional conditions for year-to-year management of TACs and quotas ⁽⁴⁾, the stocks that are subject to the various measures referred to therein must be identified.

⁽¹⁾ OJ L 358, 31.12.2002, p. 59.

⁽²⁾ OJ L 248, 22.9.2007, p. 1.

⁽³⁾ OJ L 343, 22.12.2009, p. 1.

⁽⁴⁾ OJ L 115, 9.5.1996, p. 3.

- (8) In order to avoid interruption of fishing activities and to ensure the livelihoods of Union fishermen, it is important to open the fisheries in question as from 1 January 2013. For reasons of urgency, this Regulation should enter into force immediately after its publication,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation fixes the fishing opportunities for certain fish stocks and groups of fish stocks in the Baltic Sea for 2013.

Article 2

Scope

This Regulation shall apply to Union vessels operating in the Baltic Sea.

Article 3

Definitions

For the purposes of this Regulation the following definitions shall apply:

- (a) 'International Council for the Exploration of the Sea (ICES) zones' means the geographical areas specified in Annex I to Council Regulation (EC) No 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound ⁽¹⁾;
- (b) 'Baltic Sea' means ICES Subdivisions 22-32;
- (c) 'Union vessel' means a fishing vessel flying the flag of a Member State and registered in the Union;
- (d) 'total allowable catch' (TAC) means the quantity that can be taken from each stock each year;
- (e) 'quota' means a proportion of the TAC allocated to the Union, a Member State or a third country;
- (f) 'day absent from port' means any continuous period of 24 hours or part thereof during which a vessel is absent from port.

⁽¹⁾ OJ L 349, 31.12.2005, p. 1.

CHAPTER II

FISHING OPPORTUNITIES

Article 4

TACs and allocations

The TACs, the quotas and the conditions functionally linked thereto, where appropriate, are set out in Annex I.

Article 5

Special provisions on allocations

1. The allocation of fishing opportunities among Member States as set out in this Regulation shall be without prejudice to:

- (a) exchanges made pursuant to Article 20(5) of Regulation (EC) No 2371/2002;
- (b) reallocations made pursuant to Article 37 of Regulation (EC) No 1224/2009;
- (c) additional landings allowed under Article 3 of Regulation (EC) No 847/96;
- (d) quantities withheld in accordance with Article 4 of Regulation (EC) No 847/96;
- (e) deductions made pursuant to Articles 37, 105, 106 and 107 of Regulation (EC) No 1224/2009.

2. Except where otherwise specified in Annex I to this Regulation, Article 3 of Regulation (EC) No 847/96 shall apply to stocks subject to a precautionary TAC, and Article 3(2) and (3) and Article 4 of that Regulation shall apply to stocks subject to an analytical TAC.

Article 6

Conditions for landing catches and by-catches

Fish from stocks for which catch limits are established shall be retained on board or landed only if the catches have been taken by vessels of a Member State having a quota and that quota is not exhausted.

Article 7

Fishing effort limits

- 1. Fishing effort limits are set out in Annex II.
- 2. The limits referred to in paragraph 1 shall also apply to ICES Subdivisions 27 and 28.2, unless the Commission has taken a decision in accordance with Article 29(2) of Regulation (EC) No 1098/2007 to exclude those Subdivisions from the restrictions provided for in Article 8(1)(b), Article 8(3), (4) and (5), and Article 13 of that Regulation.
- 3. The limits referred to in paragraph 1 shall not apply to ICES Subdivision 28.1, unless the Commission has taken a decision in accordance with Article 29(4) of Regulation (EC) No 1098/2007 that the restrictions provided for in Article 8(1)(b), and Article 8(3), (4) and (5) of Regulation (EC) No 1098/2007 shall apply to that Subdivision.

CHAPTER III

FINAL PROVISIONS*Article 8***Data transmission**

When, pursuant to Articles 33 and 34 of Regulation (EC) No 1224/2009, Member States send the Commission data relating to landings of quantities of stocks caught, they shall use the stock codes set out in Annex I to this Regulation.

*Article 9***Entry into force**

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

It shall apply from 1 January 2013.

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

Done at Brussels, 20 November 2012.

For the Council

The President

A. D. MAVROYIANNIS

ANNEX I

TACs APPLICABLE TO UNION VESSELS IN AREAS WHERE TACs EXIST BY SPECIES AND BY AREA

The following tables set out the TACs and quotas (in tonnes live weight, except where otherwise specified) by stock, and conditions functionally linked thereto, where appropriate.

The references to fishing zones are references to ICES zones, unless otherwise specified.

Within each area, fish stocks are referred to following the alphabetical order of the Latin names of the species.

For the purposes of this Regulation, the following comparative table of Latin names and common names is provided:

Scientific name	Alpha-3 code	Common name
<i>Clupea harengus</i>	HER	Herring
<i>Gadus morhua</i>	COD	Cod
<i>Pleuronectes platessa</i>	PLE	Plaice
<i>Salmo salar</i>	SAL	Atlantic salmon
<i>Sprattus sprattus</i>	SPR	Sprat

Species: Herring <i>Clupea harengus</i>	Zone: Subdivisions 30-31 HER/3D30.; HER/3D31.
Finland	86 905
Sweden	19 095
Union	106 000
TAC	106 000
Analytical TAC	

Species: Herring <i>Clupea harengus</i>	Zone: Subdivisions 22-24 HER/3B23.; HER/3C22.; HER/3D24.
Denmark	3 617
Germany	14 234
Finland	2
Poland	3 357
Sweden	4 590
Union	25 800
TAC	25 800
Analytical TAC Article 3 of Regulation (EC) No 847/96 does not apply. Article 4 of Regulation (EC) No 847/96 does not apply.	

Species: Herring <i>Clupea harengus</i>		Zone: Union waters of Subdivisions 25-27, 28.2, 29 and 32 HER/3D25.; HER/3D26.; HER/3D27.; HER/3D28.2; HER/3D29.; HER/3D32.
Denmark	1 984	
Germany	526	
Estonia	10 131	
Finland	19 776	
Latvia	2 500	
Lithuania	2 633	
Poland	22 468	
Sweden	30 162	
Union	90 180	
TAC	Not relevant	Analytical TAC
Species: Herring <i>Clupea harengus</i>		Zone: Subdivision 28.1 HER/03D.RG
Estonia	14 120	
Latvia	16 456	
Union	30 576	
TAC	30 576	Analytical TAC
Species: Cod <i>Gadus morhua</i>		Zone: Union waters of Subdivisions 25-32 COD/3D25.; COD/3D26.; COD/3D27.; COD/3D28.; COD/3D29.; COD/3D30.; COD/3D31.; COD/3D32.
Denmark	14 143	
Germany	5 626	
Estonia	1 378	
Finland	1 082	
Latvia	5 259	
Lithuania	3 464	
Poland	16 285	
Sweden	14 328	
Union	61 565	
TAC	Not relevant	Analytical TAC

Species: Cod <i>Gadus morhua</i>		Zone: Subdivisions 22-24 COD/3B23.; COD/3C22.; COD/3D24.
Denmark	8 749	
Germany	4 277	
Estonia	194	
Finland	172	
Latvia	724	
Lithuania	469	
Poland	2 341	
Sweden	3 117	
Union	20 043	
TAC	20 043	Analytical TAC Article 3 of Regulation (EC) No 847/96 does not apply. Article 4 of Regulation (EC) No 847/96 does not apply.
Species: Plaice <i>Pleuronectes platessa</i>		Zone: Union waters of Subdivisions 22-32 PLE/3B23.; PLE/3C22.; PLE/3D24.; PLE/3D25.; PLE/3D26.; PLE/3D27.; PLE/3D28.; PLE/3D29.; PLE/3D30.; PLE/3D31.; PLE/3D32.
Denmark	2 443	
Germany	271	
Poland	511	
Sweden	184	
Union	3 409	
TAC	3 409	Precautionary TAC

Species: Atlantic salmon <i>Salmo salar</i>		Zone: Union waters of Subdivisions 22-31 SAL/3B23.; SAL/3C22.; SAL/3D24.; SAL/3D25.; SAL/3D26.; SAL/3D27.; SAL/3D28.; SAL/3D29.; SAL/3D30.; SAL/3D31.
Denmark	22 538 ⁽¹⁾	
Germany	2 508 ⁽¹⁾	
Estonia	2 291 ⁽¹⁾	
Finland	28 103 ⁽¹⁾	
Latvia	14 335 ⁽¹⁾	
Lithuania	1 685 ⁽¹⁾	
Poland	6 837 ⁽¹⁾	
Sweden	30 465 ⁽¹⁾	
Union	108 762 ⁽¹⁾	
TAC	Not relevant	Analytical TAC Article 3 of Regulation (EC) No 847/96 does not apply. Article 4 of Regulation (EC) No 847/96 does not apply.

⁽¹⁾ Expressed by number of individual fish.

Species: Atlantic salmon <i>Salmo salar</i>		Zone: Union waters of Subdivision 32 SAL/3D32.
Estonia	1 581 ⁽¹⁾	
Finland	13 838 ⁽¹⁾	
Union	15 419 ⁽¹⁾	
TAC	Not relevant	Precautionary TAC

⁽¹⁾ Expressed by number of individual fish.

Species: Sprat <i>Sprattus sprattus</i>		Zone: Union waters of Subdivisions 22-32 SPR/3B23.; SPR/3C22.; SPR/3D24.; SPR/3D25.; SPR/3D26.; SPR/3D27.; SPR/3D28.; SPR/3D29.; SPR/3D30.; SPR/3D31.; SPR/3D32.
Denmark	24 659 ⁽¹⁾	
Germany	15 622 ⁽¹⁾	
Estonia	28 634 ⁽¹⁾	
Finland	12 908 ⁽¹⁾	
Latvia	34 583 ⁽¹⁾	
Lithuania	12 510 ⁽¹⁾	
Poland	73 392 ⁽¹⁾	
Sweden	47 670 ⁽¹⁾	
Union	249 978	
TAC	Not relevant	Analytical TAC

⁽¹⁾ At least 92 % of landings counted against the quota must be of sprat. By-catches of herring are to be counted against the remaining 8 % of the quota (HER/*3BCDC).

ANNEX II

FISHING EFFORT LIMITS

- Member States shall allocate the right to vessels flying their flag and fishing with trawls, Danish seines or similar gear of a mesh size equal to or larger than 90 mm, with gillnets, entangling nets or trammel nets of a mesh size equal to or larger than 90 mm, with bottom set lines, longlines except drifting lines, handlines and jigging equipment, to be up to:
 - 163 days absent from port in ICES Subdivisions 22-24, with the exception of the period from 1 to 30 April when Article 8(1)(a) of Regulation (EC) No 1098/2007 applies; and
 - 160 days absent from port in ICES Subdivisions 25-28, with the exception of the period from 1 July to 31 August when Article 8(1)(b) of Regulation (EC) No 1098/2007 applies.
- The maximum number of days absent from port per year for which a vessel may be present within the two areas referred to in point 1(a) and (b) fishing with the gear specified in point 1 may not exceed the maximum number of days absent from port allocated for one of these two areas.
- By way of derogation from points 1 and 2, and where efficient management of fishing opportunities so requires, a Member State may allocate to vessels flying its flag the right to additional days absent from port where an equal amount of days absent from port is withdrawn from other vessels flying its flag that are subject to effort restriction in the same area and where the capacity, in terms of kW, of each of the donor vessels is equal to, or larger than, that of the receiving vessels. The number of receiving vessels may not exceed 15 % of the total number of vessels of the Member State concerned, as indicated in point 1.

COMMISSION IMPLEMENTING REGULATION (EU) No 1089/2012
of 19 November 2012
concerning the classification of certain goods in the Combined Nomenclature

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff⁽¹⁾, and in particular Article 9(1)(a) thereof,

Whereas:

- (1) In order to ensure uniform application of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation.
- (2) Regulation (EEC) No 2658/87 has laid down the general rules for the interpretation of the Combined Nomenclature. Those rules apply also to any other nomenclature which is wholly or partly based on it or which adds any additional subdivision to it and which is established by specific provisions of the Union, with a view to the application of tariff and other measures relating to trade in goods.
- (3) Pursuant to those general rules, the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2), by virtue of the reasons set out in column (3) of that table.

(4) It is appropriate to provide that binding tariff information which has been issued by the customs authorities of Member States in respect of the classification of goods in the Combined Nomenclature but which is not in accordance with this Regulation can, for a period of three months, continue to be invoked by the holder, under Article 12(6) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code⁽²⁾.

(5) The measures provided for in this Regulation are in accordance with the opinion of the Customs Code Committee,

HAS ADOPTED THIS REGULATION:

Article 1

The goods described in column (1) of the table set out in the Annex shall be classified within the Combined Nomenclature under the CN code indicated in column (2) of that table.

Article 2

Binding tariff information issued by the customs authorities of Member States, which is not in accordance with this Regulation, can continue to be invoked for a period of three months under Article 12(6) of Regulation (EEC) No 2913/92.

Article 3

This Regulation shall enter into force on the twentieth day following that of 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, 19 November 2012.

For the Commission,
On behalf of the President,
Algirdas ŠEMETA
Member of the Commission

⁽¹⁾ OJ L 256, 7.9.1987, p. 1.

⁽²⁾ OJ L 302, 19.10.1992, p. 1.

ANNEX

Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
An electronic apparatus (so-called 'multi-switch') in a housing with dimensions of approximately 26 × 12 × 7 cm, equipped with the following interfaces: — four intermediate frequency inputs with level adjuster for low noise block (LNB) down-converters, — one input with level adjuster for terrestrial TV aerials, — four outputs for connection of satellite receivers. It has a built-in amplifier for compensating cable loss. The apparatus is designed for use in multi-subscriber systems for television reception via satellite, such as 'quad LNB' systems. It enables several satellite receivers to receive different television signals via one satellite dish, but does not convert nor modify the signals. The apparatus also allows distribution of one terrestrial TV signal.	8543 70 90	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8543, 8543 70 and 8543 70 90. Given that the apparatus only allows the distribution of television signals, and given that the satellite aerial can function without the apparatus, the apparatus is not considered essential for the functioning of the aerial. Consequently, classification as a part of an aerial of heading 8529 is excluded. The apparatus is therefore to be classified under CN code 8543 70 90 as an apparatus having an individual function not specified or included elsewhere in Chapter 85.

COMMISSION IMPLEMENTING REGULATION (EU) No 1090/2012**of 21 November 2012****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 Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ⁽²⁾, and in particular Article 136(1) thereof,

Whereas:

- (1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multi-lateral 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 XVI, Part A thereto.

- (2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of 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, 21 November 2012.

*For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 157, 15.6.2011, 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	AL	35,4
	MA	46,4
	MK	32,3
	TN	73,5
	TR	69,6
	ZZ	51,4
0707 00 05	AL	56,9
	EG	209,3
	MK	42,0
	TR	119,2
	ZZ	106,9
0709 93 10	MA	129,8
	TR	103,8
	ZZ	116,8
0805 20 10	MA	91,9
	ZZ	91,9
0805 20 30, 0805 20 50, 0805 20 70, 0805 20 90	CN	65,5
	HR	57,9
	TR	83,0
	ZA	193,6
	ZZ	100,0
0805 50 10	TR	86,1
	ZA	49,1
	ZZ	67,6
0808 10 80	CA	156,2
	CN	79,8
	MK	37,9
	US	174,2
	ZA	128,2
	ZZ	115,3
0808 30 90	CN	76,4
	TR	106,9
	US	136,8
	ZZ	106,7

⁽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 IMPLEMENTING REGULATION (EU) No 1091/2012

of 21 November 2012

fixing the allocation coefficient to be applied to applications for import licences lodged from 9 November to 16 November 2012 under subquota III in the context of the tariff quota opened by Regulation (EC) No 1067/2008 for common wheat of a quality other than high quality

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 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences ⁽²⁾, and in particular Article 7(2) thereof,

Whereas:

- (1) Commission Regulation (EC) No 1067/2008 ⁽³⁾ opens an overall annual import tariff quota of 3 112 030 tonnes of common wheat of a quality other than high quality. That quota is divided into four subquotas.
- (2) Article 3(3) of Regulation (EC) No 1067/2008 divides subquota III (order number 09.4125) into four quarterly subperiods and has fixed the quantity at 594 596 tonnes for subperiod 4, for the period from 1 October to 31 December 2012.
- (3) Based on the notification made pursuant to Article 4(3) of Regulation (EC) No 1067/2008, the applications lodged from 13.00 on 9 November 2012 to 13.00 on 16 November 2012 (Brussels time) in accordance with Article 4(1), subparagraph 2, of that Regulation, relate to

quantities in excess of those available. The extent to which import licences may be issued should therefore be determined and the allocation coefficient to be applied to the quantities applied for should be fixed.

- (4) No further import licences should be issued under subquota III as referred to in Regulation (EC) No 1067/2008 for the current quota period.
- (5) In order to ensure sound management of the procedure for issuing import licences, this Regulation should enter into force immediately after its publication,

HAS ADOPTED THIS REGULATION:

Article 1

1. Each import licence application in respect of subquota III referred to in Article 3(1) of Regulation (EC) No 1067/2008 and lodged from 13.00 on 9 November 2012 to 13.00 on 16 November 2012 (Brussels time) shall give rise to the issue of a licence for the quantities applied for, multiplied by an allocation coefficient of 50 %.

2. The issue of licences for the quantities applied for from 13.00 on 16 November 2012 (Brussels time) falling within subquota III as referred to in Article 3(1) of Regulation (EC) No 1067/2008 is hereby suspended for the current quota period.

Article 2

This Regulation shall enter into force on the day of 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, 21 November 2012.

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

José Manuel SILVA RODRÍGUEZ
*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 238, 1.9.2006, p. 13.

⁽³⁾ OJ L 290, 31.10.2008, p. 3.

COMMISSION IMPLEMENTING REGULATION (EU) No 1092/2012**of 21 November 2012****amending the representative prices and additional import duties for certain products in the sugar sector fixed by Implementing Regulation (EU) No 892/2012 for the 2012/13 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 2012/13 marketing year are fixed by Commission Implementing Regulation (EU) No 892/2012 ⁽³⁾. Those prices and duties were last amended by Commission Implementing Regulation (EU) No 1087/2012 ⁽⁴⁾.

- (2) The data currently available to the Commission indicate that those amounts should be amended in accordance with Article 36 of Regulation (EC) No 951/2006.

- (3) Given the need to ensure that this measure applies as soon as possible after the updated data have been made available, this Regulation should enter into force on the day of its publication,

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 Implementing Regulation (EU) No 892/2012 for the 2012/13 marketing year, are hereby amended as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on the day of 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, 21 November 2012.

*For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
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 263, 28.9.2012, p. 37.

⁽⁴⁾ OJ L 322, 21.11.2012, p. 6.

ANNEX

Amended representative prices and additional import duties applicable to white sugar, raw sugar and products covered by CN code 1702 90 95 from 22 November 2012

(EUR)

CN code	Representative price per 100 kg net of the product concerned	Additional duty per 100 kg net of the product concerned
1701 12 10 ⁽¹⁾	36,41	0,23
1701 12 90 ⁽¹⁾	36,41	3,68
1701 13 10 ⁽¹⁾	36,41	0,36
1701 13 90 ⁽¹⁾	36,41	3,98
1701 14 10 ⁽¹⁾	36,41	0,36
1701 14 90 ⁽¹⁾	36,41	3,98
1701 91 00 ⁽²⁾	40,96	5,18
1701 99 10 ⁽²⁾	40,96	2,05
1701 99 90 ⁽²⁾	40,96	2,05
1702 90 95 ⁽³⁾	0,41	0,27

⁽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

COUNCIL DECISION

of 13 November 2012

on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Lithuania

(2012/713/EU)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime ⁽¹⁾, in particular Article 25 thereof,

Having regard to Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA ⁽²⁾, in particular Article 20 and Chapter 4 of the Annex thereto,

Whereas:

- (1) According to the Protocol on Transitional Provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community, the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted prior to the entry into force of the Treaty of Lisbon are preserved until those acts are repealed, annulled or amended in implementation of the Treaties.
- (2) Accordingly, Article 25 of Decision 2008/615/JHA is applicable and the Council must unanimously decide whether the Member States have implemented the provisions of Chapter 6 of that Decision.
- (3) Article 20 of Decision 2008/616/JHA provides that decisions referred to in Article 25(2) of Decision 2008/615/JHA are to be taken on the basis of an evaluation report based on a questionnaire. With respect to automated data exchange in accordance with Chapter 2 of Decision 2008/615/JHA, the evaluation report is to be based on an evaluation visit and a pilot run.
- (4) According to Chapter 4, point 1.1, of the Annex to Decision 2008/616/JHA, the questionnaire drawn up by the relevant Council Working Group concerns each of the automated data exchanges and has to be answered by

a Member State as soon as it believes it fulfils the prerequisites for sharing data in the relevant data category.

- (5) Lithuania has completed the questionnaire on data protection and the questionnaire on Vehicle Registration Data (VRD).
- (6) A successful pilot run has been carried out by Lithuania with the Netherlands.
- (7) An evaluation visit has taken place in Lithuania and a report on the evaluation visit has been produced by the Belgian/Dutch evaluation team and forwarded to the relevant Council Working Group.
- (8) An overall evaluation report, summarising the results of the questionnaire, the evaluation visit and the pilot run concerning VRD has been presented to the Council,

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of automated searching of vehicle registration data (VRD), Lithuania has fully implemented the general provisions on data protection of Chapter 6 of Decision 2008/615/JHA and is entitled to receive and supply personal data pursuant to Article 12 of that Decision as from the date of the entry into force of this Decision.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Brussels, 13 November 2012.

For the Council
The President
V. SHIARLY

⁽¹⁾ OJ L 210, 6.8.2008, p. 1.

⁽²⁾ OJ L 210, 6.8.2008, p. 12.

COMMISSION DECISION**of 21 November 2012****confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation**

(2012/714/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 328(1) and 331(1) thereof,

Having regard to Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation ⁽¹⁾,

Having regard to Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ⁽²⁾,

Having regard to the notification by Lithuania of its intention to participate in enhanced cooperation in the area of the law applicable to divorce and legal separation,

Whereas:

- (1) On 12 July 2010, the Council decided to authorise enhanced cooperation between Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia in the area of the law applicable to divorce and legal separation.
- (2) On 20 December 2010, the Council adopted Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.
- (3) Lithuania has notified its intention to participate in enhanced cooperation in the area of the law applicable to divorce and legal separation by letter dated 25 May 2012, which the Commission registered as received on 19 June 2012.
- (4) The Commission notes that Decision 2010/405/EU does not prescribe any particular conditions of participation in enhanced cooperation in the area of the law applicable to divorce and legal separation and that Lithuania's participation should strengthen the benefits of this enhanced cooperation.
- (5) The participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation should thus be confirmed.

(6) The Commission should adopt transitional measures for Lithuania necessary with regard to the application of Regulation (EU) No 1259/2010.

(7) Regulation (EU) No 1259/2010 should enter into force in Lithuania on the day following that of the publication of this Decision in the *Official Journal of the European Union*,

HAS ADOPTED THIS DECISION:

*Article 1***Participation of Lithuania in enhanced cooperation**

1. The participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation authorised by Decision 2010/405/EU is confirmed.
2. Regulation (EU) No 1259/2010 shall apply to Lithuania in accordance with this Decision.

*Article 2***Information to be provided by Lithuania**

By 22 August 2013 Lithuania shall communicate to the Commission its national provisions, if any, concerning:

- (a) the formal requirements applicable to agreements on the choice of applicable law pursuant to Article 7(2) to (4) of Regulation (EU) No 1259/2010; and
- (b) the possibility of designating the applicable law in accordance with Article 5(3) of Regulation (EU) No 1259/2010.

*Article 3***Transitional provisions for Lithuania**

1. Regulation (EU) No 1259/2010 shall apply to Lithuania only as regards legal proceedings instituted and to agreements of the kind referred to in Article 5 of Regulation (EU) No 1259/2010 concluded as from 22 May 2014.

However, effect shall also be given for Lithuania to an agreement on the choice of the applicable law concluded before 22 May 2014, provided that it complies with Articles 6 and 7 of Regulation (EU) No 1259/2010.

2. Regulation (EU) No 1259/2010 shall be for Lithuania without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seized before 22 May 2014.

⁽¹⁾ OJ L 189, 22.7.2010, p. 12.

⁽²⁾ OJ L 343, 29.12.2010, p. 10.

*Article 4***Entry into force and date of application of Regulation (EU) No 1259/2010 in Lithuania**

Regulation (EU) No 1259/2010 shall enter into force in Lithuania on the day following that of the publication of this Decision in the *Official Journal of the European Union*.

Regulation (EU) No 1259/2010 shall apply to Lithuania from 22 May 2014.

*Article 5***Entry into force**

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

Done at Brussels, 21 November 2012.

For the Commission

The President

José Manuel BARROSO

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 206/11/COL

of 29 June 2011

on the Mortgage Loan Scheme (Iceland)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area, and in particular Articles 61 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, and in particular Article 24 thereof,

Having regard to Article 1 of Part I and Article 7(5) of Part II of Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'),

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 ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to Article 6(1) of Part II of Protocol 3 ⁽²⁾ and having regard to their comments,

WHEREAS:

I. FACTS

1. PROCEDURE

From October to December 2008, the EFTA Surveillance Authority (the 'Authority') and the Icelandic authorities had pre-notification discussions in relation to the introduction of a scheme for the purchase of mortgage loans (the 'Mortgage Loan Scheme'). In this context, the Icelandic authorities submitted three letters to the Authority, dated 14 October 2008 (Event No 494902), 3 November 2008 (Event No 496979) and 3 December 2008 (Event No 500670).

On 27 May 2009, the Icelandic authorities notified the Mortgage Loan Scheme to the Authority (Event No 519720).

By letter dated 25 June 2009 (Event No 520515) and e-mail dated 29 June 2009 (Event No 523605), the Authority

requested the Icelandic authorities to provide additional information. The Icelandic authorities replied by letter on 27 July 2009 (Event No 525671) and on 28 August 2009 (Event No 528493).

The case was also discussed during a conference call between the Authority and the Icelandic authorities on 1 July 2009, and again on 4 November 2009 in the context of the State Aid Package Meeting in Iceland.

By letter dated 16 November 2009 (Event No 536644), the Authority requested information to follow up on the discussions. The Icelandic authorities replied on 25 November 2009 (Event No 538088).

By letter dated 10 March 2010 (Event No 548915), 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 to the Surveillance and Court Agreement in respect of the Mortgage Loan Scheme.

The Authority's Decision No 76/10/COL to initiate that procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto on 14 October 2010 ⁽³⁾. The Authority called on interested parties to submit comments but did not receive any such comments.

By letter received on 3 May 2010, the Icelandic authorities submitted comments in respect of the Authority's Decision No 76/10/COL to open the formal investigation procedure (Event Nos 555824 and 555999).

The Icelandic authorities submitted further information, including an expert opinion, on 25 May 2010 (Event Nos 558177 and 558531).

On 1 June 2010, the case was discussed between the Authority and the Icelandic authorities in the context of the State Aid Package Meeting in Iceland.

⁽¹⁾ Decision 195/04/COL of 14.7.2004, published in OJ L 139, 25.5.2006, p. 37, and EEA Supplement No 26, 25.5.2006, p. 1, as amended. A consolidated version of the Decision can be found on www.eftasurv.int

⁽²⁾ OJ C 277, 14.10.2010, p. 4, and EEA Supplement No 57, 14.10.2010, p. 4.

⁽³⁾ See footnote 2 above.

2. DESCRIPTION OF THE MEASURES

2.1. Background

As a result of turmoil in the global financial markets during 2008 and 2009, a number of Icelandic financial institutions faced a shortage of liquidity and a limited supply of credit. In response to the crisis, the Icelandic authorities adopted a series of measures aimed at securing the functioning of financial markets in Iceland.

One such measure was to introduce the Mortgage Loan Scheme, which authorises the Icelandic housing agency, the Housing Financing Fund (*Íbúðalánasjóður*), to take over mortgage loans from certain financial institutions in Iceland in exchange for Housing Financing Fund (HFF) bonds, a form of permanent asset swap. A financial institution may then use the HFF bonds as collateral in order to take cash loans from the Central Bank of Iceland ⁽⁴⁾.

The overall objective of the Mortgage Loan Scheme is to provide liquid funds to eligible financial institutions and to ensure the availability of loans on the residential housing market (and thereby safeguard the interests of property owners) ⁽⁵⁾.

The Icelandic authorities have explained that the Mortgage Loan Scheme is a follow up to an earlier scheme, approved by the Authority on 27 March 2009 (Decision No 168/09/COL), which authorised HFF to intervene on behalf of the Icelandic State in the context of the financial crisis by temporarily refinancing mortgage loans (the 'Temporary Mortgage Loan Scheme') ⁽⁶⁾. Under the Temporary Mortgage Loan Scheme, mortgages could be swapped on a temporary basis. The Mortgage Loan Scheme allows for a permanent asset swap. Mortgages subject to the Temporary Mortgage Loan Scheme must be returned to the beneficiary prior to any swap agreement under the Mortgage Loan Scheme.

The Mortgage Loan Scheme is directed principally at small savings banks which are dependent on access to liquidity

from other domestic financial institutions also facing liquidity problems ⁽⁷⁾. The savings banks mainly provide traditional banking services to local communities (individuals, corporate customers and local authorities), of which they form an integrated part. In many regional areas, the savings banks are the only financial institutions in operation ⁽⁸⁾.

2.2. Legal basis

The Mortgage Loan Scheme is based on Chapter V of Act No 125/2008 of 6 October 2008 on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances etc. (the 'Emergency Act') ⁽⁹⁾, which amended, *inter alia*, Act No 44/1998 on Housing Affairs (the 'Housing Act'). Further detail is set out in Regulation No 1081/2008 of 26 November 2008 on the authority of the Housing Financing Fund to purchase bonds secured by mortgages in residential housing and issued by financial undertakings (the 'Regulation'). The Regulation was adopted and entered into force on 27 November 2008.

In addition, the Board of HFF has issued *Rules regarding the purchase of mortgage loans from financial undertakings* (the 'Supplementary Rules') ⁽¹⁰⁾. Following approval by the Minister of Social Affairs and Social Security, the Supplementary Rules were published on 15 January 2009 and entered into force on the same day. The Mortgage Loan Scheme also entered into operation on that day.

2.3. Applications under the Mortgage Loan Scheme

Under the Mortgage Loan Scheme, eligible financial institutions may apply to swap assets (mortgage loans) with HFF. A swap results in HFF permanently taking over the mortgage loans (or 'mortgage loan pool') of the applicant financial institution in exchange for existing HFF bonds, which are transferred to the applicant financial institution.

All banks, saving banks and credit institutions which have been granted a licence to operate in Iceland pursuant to Act No 161/2002 on Financial Undertakings may apply for an asset

⁽⁴⁾ The Icelandic authorities have explained that it was not possible for financial institutions to raise liquid funds on the open market as, at the time, there was no functioning inter-bank market in Iceland due to the financial crisis, and that the smaller saving banks did not have assets which would qualify as collateral with the central bank.

⁽⁵⁾ See Government Declaration of 19.6.2008 concerning measures relating to the real estate and financial markets, and the Government's press release of 18.7.2008. Due to the financial crisis in Iceland the length of the mortgage loans prolonged to 70 years.

⁽⁶⁾ OJ C 241, 8.10.2009, p. 16, and EEA Supplement No 52, 8.10.2009, p. 1. The Decision is also available on the Authority's website: http://www.eftasurv.int/fieldsOfWork/fieldStateAid/stateAidRegistry/sadecice09/168_09_col.pdf

⁽⁷⁾ Before the financial crisis, the Icelandic banking sector essentially consisted of two segments, the first comprising the three former major banks Glitnir, Landsbanki and Kaupthing, which had relatively large international exposure; and the second comprising small savings banks, which relied on financing from the bigger banks.

⁽⁸⁾ See Decision No 168/09/COL, p. 3.

⁽⁹⁾ Act No 125/2008 entered into force upon publication, i.e. on 7.10.2008.

⁽¹⁰⁾ The amended Housing Act and the Regulation authorise HFF to purchase (or refinance) bonds secured by mortgages in residential housing. However, the Supplementary Rules concern the purchase of mortgage loans themselves. The Icelandic Authorities have explained that this was meant to refer to the same thing.

swap under the Mortgage Loan Scheme. This includes subsidiaries and branches of foreign banks established in Iceland.

In order to apply, a financial institution must send a written application, which includes information on the estimated size of the mortgage loan pool it wishes to swap with HFF. On this basis, HFF negotiates the terms of the transaction with the applicant financial institution. An important element in this process is the determination of the value of the mortgage loans (see section 2.4 below). If the application is accepted, HFF takes over the mortgage loan pool from the applicant financial institution without needing to seek permission for the transfer from the debtor (borrower).

Following the asset swap, HFF assumes the role of lender vis-à-vis the borrower under the mortgage loan, subject to formal transfer of the mortgage deeds.

The Icelandic authorities have informed the Authority that between 22 October 2008 and 18 December 2008 seven financial institutions submitted applications for an asset swap under the Mortgage Loan Scheme: Keflavik Savings Bank, BYR Savings Bank, Bolungarvik Savings Bank, Ólafsfjarðar Saving Bank, Mýrasýsla Saving Bank, Höfðhverfinga Saving Bank and SPRON.

Keflavik Savings Bank, BYR Savings Bank and Bolungarvik Savings Bank entered into swap agreements with HFF on 23 March 2009, 20 May 2009, and 3 July 2009 and 5 August 2009 ⁽¹¹⁾ respectively.

The first agreement made under the Mortgage Loan Scheme was a mortgage loan transfer agreement signed on 23 March 2009 between HFF and Keflavik Savings Bank for a total value of ISK 9 959 972 471,00 ⁽¹²⁾. The agreements with BYR Savings Bank and Bolungarvik Savings Bank were to the value of ISK 2 707 559 690,00 and ISK 477 141 823,00 and ISK 425 924 422,00, respectively.

The applications from the other four banks referred to above were rejected.

2.4. Valuation of mortgage loans and HFF bonds under the Mortgage Loan Scheme

Under the Mortgage Loan Scheme, HFF is required to go through several steps in order to assess the value of the mortgage loan pool of an applicant financial institution and of the HFF bonds to be swapped.

⁽¹¹⁾ There were two agreements between HFF and Bolungarvik Savings Bank.

⁽¹²⁾ According to the agreement between the parties to the swap, the final price was to be settled on 15.4.2009.

Article 3 of the Regulation ⁽¹³⁾ and Article 6 ⁽¹⁴⁾ of the Supplementary Rules provide that HFF 'shall perform the assessment of the value of the bonds offered to the Fund' and that 'the book value of the loan shall as a rule be the basis for their price.' In other words, HFF itself carries out an 'in-house' assessment of the value of the mortgage loans. It bases that assessment on the book value of the loans.

2.4.1. Selection of mortgage loans by HFF ⁽¹⁵⁾

Prior to estimating the value of a mortgage loan pool, HFF considers whether it has an interest in taking over the loans at all. For this purpose, HFF assesses the loans on the basis of the payment status of the debtor, the loan-to-value (LTV) ratio of the mortgage loan, its default status, and the terms of the mortgage loan contract. On this basis HFF divides the mortgage loans into three categories:

- (a) non-defaulted mortgage loans that meet all of HFF's general loan requirements;
- (b) other non-defaulted mortgage loans that do not meet all of HFF's general loan requirements;
- (c) defaulted mortgage loans.

⁽¹³⁾ Regarding the pricing of bonds, Article 3 of the Regulation provides that: '[t]he Housing Financing Fund shall perform an independent assessment of the value of the bonds offered to the Fund. When assessing the value of bonds, the Fund shall, among other things, take account of the payment status of the debtor, the mortgage proportion of that residential housing when the bond is taken over, defaults of the bond and its terms so that the pricing of the bond reflects its market value. The contract terms and purchase price, moreover, shall be designed to minimise the credit risks of the Fund.'

⁽¹⁴⁾ Article 6 of the Supplementary Rules, concerning the '[p]urchase price', provides that:

'[t]he purchase price of mortgage loans shall be based on their market value. In mortgage loan purchase agreements the book value of the loan shall as a rule be the basis for their price allowing for prepayment risk, operation costs and other factors. The final price of the mortgage pool is determined by its performance and the expected loss at the final settlement of the purchase price.

The purchase price amount paid at the time of signing the agreement shall never exceed 80 % of the pool's market price. This percentage shall decrease in proportion to an increased estimated loss, (EL) pursuant to Art.5. The retained portion of the purchase price shall always be higher than the estimated loss (EL). Mortgage loan purchase agreements shall specify the final settlement of the purchase price. As a rule, such a settlement shall take place 8 to 10 years after the purchase date. At the time of final settlement, HFF shall pay the seller the remainder of the purchase price less depreciation of the mortgage pool that has already taken place and the estimated loss (EL), of the pool throughout its duration pursuant to Art. 5.'

⁽¹⁵⁾ Article 4 of the Supplementary Rules.

Mortgage loans falling into the first two categories are eligible for a swap under the Mortgage Loan Scheme. However, mortgage loans in category (c) are eligible only if the mortgage loan is removed from debt collection and all fees and expenses are paid prior to the swap.

2.4.2. *Establishing the value of mortgage loans by HFF*

Article 3 of the Regulation and Article 6 of the Supplementary Rules provide that HFF is required to base the purchase price of mortgage loans on their market value. However, Article 6 also provides that HFF must base the market value on the book value of the mortgage loans (allowing for prepayment risk, operation costs and other factors). The latter has been confirmed to the Authority by the Icelandic authorities⁽¹⁶⁾. The Icelandic authorities have also confirmed that the book value of each individual loan is the principal amount lent to the borrower, without write-downs⁽¹⁷⁾. A financial institution applying to participate in the Mortgage Loan Scheme is required to provide to HFF the book value of each individual loan⁽¹⁸⁾.

2.4.3. *Determining the credit risk and the 'credit buffer' by HFF*

The third step is to determine the credit risk associated with the mortgage loans at issue. Pursuant to Article 3 of the Regulation and Article 5 of the Supplementary Rules, HFF employs a credit risk model in that regard, provided by KPMG Iceland, pursuant to which the assessment of the credit risk of mortgage loan pools is carried out on the basis of the international standard, Basel II on the capital risk assessment of financial institutions. The assessment involves calculating the expected loss by multiplying the following three factors: probability of default, loss-given default and exposure to default. Each of those variables is assessed for each mortgage loan and for each year of the loan period.

The model is based on a number of parameters designed to assess the likely credit loss for individual loans, as well as on a number of macroeconomic factors likely to influence mortgage loans. The parameters used in the assessment of individual loans are: (i) loan to value; and (ii) payment history. The macroeconomic analysis is a medium-term forecast (until 2014) of real estate prices, inflation, wage developments, and other factors likely to impact upon the mortgage loan pool in a general way. After 2014, a flat credit loss figure is assumed based on historical experience.

⁽¹⁶⁾ Letter from the Icelandic authorities to the Authority dated 27.8.2009.

⁽¹⁷⁾ The Authority understands this to mean the outstanding principal amount lent to the borrower (without write-downs).

⁽¹⁸⁾ According to Article 3 of the Supplementary Rules, '[t]he financial firm shall submit computer-readable information that HFF considers essential in order to assess the value and the credit risk of mortgage pools to be sold to HFF'.

Following determination of a credit risk by HFF, the book value is not immediately reduced by the value of the credit risk. The value of the credit risk is used only to determine the value of the bonds that the applicant financial institution will receive at the time of the swap.

Pursuant to Article 3 of the Regulation and Article 6 of the Supplementary Rules, HFF uses the expected credit risk to establish a 'credit buffer'. This means that the financial institution initially will only receive HFF bonds corresponding to a maximum of 80 % of the aggregated book value of the mortgage loan pool. The credit buffer may be more than that 20 % depending on the estimated loss (EL) in relation to the mortgage loan pool, and will increase by the amount of that estimated loss (Article 5 of the Supplementary Rules). The credit buffer will always be higher than the estimated loss. In practice, HFF calculates the credit buffer by adding an additional 10 % to the estimated loss.

Approximately 8 to 10 years after the initial agreement, the performance of the loan pool during that period is assessed. In addition, the forward-looking credit risk of the pool is assessed at that time. Depending on both of those elements, the financial institution will receive additional HFF bonds up to the value of the credit buffer. In other words, if, after 8 to 10 years, the credit risk has materialised only in part, that is, if the actual losses are less than estimated at the time of the agreement, HFF will transfer bonds up to the value of the credit buffer less the actual losses, subject to the forward-looking credit risk estimate. However, if the credit risk materialises in full, that is, if all expected losses materialise, HFF will not transfer any additional bonds to the financial institution. Finally, in the event that actual losses are greater than the credit buffer, HFF will bear such losses.

2.4.4. *Establishing the corresponding amount of HFF bonds by HFF*

Pursuant to Article 5 of the Regulation and Article 7 of the Supplementary Rules⁽¹⁹⁾, HFF determines the value of HFF bonds to be transferred to the financial undertaking under the mortgage loan pool swap (subtracting the credit buffer).

HFF determines the value of the HFF bonds on the basis of the 'end-of-day dirty price' on the transaction day, as quoted by the OMX Iceland exchange. That price is adjusted by the weighted average interest rate of the mortgage loans (which has been

⁽¹⁹⁾ Article 7 of the Supplementary Rules, concerning the '[p]ayment for mortgage bonds', provides that: 'HFF shall pay for the mortgage loans by handing over HFF bonds in exchange. The yield of HFF bonds shall be based on the duration and terms of the mortgage loans. Prepayment risk and operating costs shall be considered as well, in addition to other factors.'

reduced by the prepayment risk, operational costs and credit losses). Based on the information provided by the Icelandic authorities, it is unclear whether this implies a reduction or an increase in the value of the bonds.

2.4.5. Settlement of the swap under the Mortgage Loan Scheme

When the value of the mortgage loan pool has been determined, it is transferred to HFF in exchange for HFF bonds, which are transferred to the financial institution ⁽²⁰⁾.

Final settlement takes place approximately 8 to 10 years after the agreement is entered into ⁽²¹⁾. At that time, subject to the assessment described in section 2.4.3 above, HFF transfers additional bonds to the financial institution up to the value of the credit buffer (less any actual losses and less any estimated losses throughout the remainder of the period of the mortgage loan) ⁽²²⁾.

2.5. Duration and budget

The Mortgage Loan Scheme is not limited in time. That is, there is no final date for the application of the Scheme or a fixed period during which applications under the Scheme can be made. Currently, the Mortgage Loan Scheme is therefore still in force and applications may be made by eligible financial institutions.

As regards the budget, the Icelandic authorities have not provided the Authority with estimated annual or total expenditure under the Mortgage Loan Scheme.

2.6. Further relevant market information

On 22 April 2010, the Financial Supervisory Authority (FME) issued a decision on the transfer of the assets and liabilities of Keflavik Savings Bank to Spkef Savings Bank ⁽²³⁾. On 5 March 2011, the Financial Supervisory Authority issued a decision on the transfer of the assets and liabilities of Spkef Savings Bank to NBI hf. (New Landsbanki) ⁽²⁴⁾.

Following the collapse of Byr Savings Bank (Old Byr) in April 2010, the Icelandic State founded Byr hf (New Byr), a fully State-owned limited liability company. Old Byr is now in a winding-up procedure. New Byr will take over all assets and certain liabilities and operations of Old Byr ⁽²⁵⁾.

⁽²⁰⁾ Article 5 of the Regulation provides that: '[c]ompensation for bonds purchased by the Housing Financing Fund shall generally be in the form of HFF bonds.' On this basis, the Regulation allows, in principle, for other forms of compensation, such as cash payments. However, to date, only compensation in the form of HFF bonds has been used.

⁽²¹⁾ The actual time of final settlement is normally specified in the agreement.

⁽²²⁾ Article 3 of the Regulation and Article 6 of the Supplementary Rules.

⁽²³⁾ See <http://www.fme.is/lisalib/getfile.aspx?itemid=7199>

⁽²⁴⁾ See <http://www.fme.is/lisalib/getfile.aspx?itemid=7997>

⁽²⁵⁾ See ESA decision No 126/11/COL of 13.4.2011 regarding State aid for the establishment and capitalisation of Byr hf., not yet published, available on the Authority's website: <http://www.eftasurv.int/media/decisions/126-11-COL.pdf>

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

In March 2010, the Authority decided to initiate the formal investigation procedure in this case because it had doubts in relation to whether transactions carried out under the Mortgage Loan Scheme were made on market terms, and therefore, whether the Scheme might involve elements of State aid within the meaning of Article 61(1) of the EEA Agreement ⁽²⁶⁾.

The Authority also had doubts as to whether the potential aid could be regarded as compatible with the State aid provisions of the EEA Agreement and considered that the appropriate framework for assessing the compatibility of the measure was the Impaired Assets Guidelines (IAG) ⁽²⁷⁾. On the basis of the IAG, the Authority had doubts as to whether (i) the market value of the assets had been calculated correctly (and reflected in the transfer price); and (ii) the swap agreements included sufficient remuneration for the State, ensuring proper burden sharing between the parties.

Finally, the Authority objected to the fact that the Icelandic authorities had not limited the time period ('entrance window') during which eligible financial institutions could apply under the Mortgage Loan Scheme, or specified the amount of the total or annual budget of the Scheme. In other words, the Mortgage Loan Scheme was unlimited in terms of its budget and its duration.

4. COMMENTS FROM THIRD PARTIES

The Authority did not receive any comments from third parties following publication of Decision No 76/10/COL to initiate the formal investigation procedure.

5. COMMENTS BY THE ICELANDIC AUTHORITIES

The Icelandic authorities have argued that the transfer of mortgage loans under the Mortgage Loan Scheme takes place on market terms, thereby ensuring that no State aid is involved in the transfer of HFF bonds to applicant financial institutions.

The Icelandic authorities also question whether it is correct to assess the Mortgage Loan Scheme under the IAG, on the basis that the mortgage loans to be swapped under the Scheme are not impaired. The Icelandic authorities argue that the reason for offering the savings banks the possibility to swap their mortgage loans for HFF bonds is not that the assets are impaired, but rather that they are not sufficiently liquid ⁽²⁸⁾.

⁽²⁶⁾ See footnote 2 above.

⁽²⁷⁾ The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁽²⁸⁾ The Authority notes that this is in contrast to the notification of the Mortgage Loan Scheme to the Authority on 27.5.2009 (Event No 519720), where the Icelandic authorities argue that the IAG would be the correct guidelines under which to assess the Scheme (in the event that the Authority were to come to the conclusion that the Scheme involved aid).

In the event that the Authority nevertheless concludes that the Mortgage Loan Scheme involves State aid and must be assessed under the IAG, the Icelandic authorities argue that the aid is compatible with the criteria of using an independent expert. They explain that the credit risk model used in the valuation of mortgage loans carried out by HFF is based on a credit risk model designed by KPMG Iceland, an independent expert valuator. The Icelandic authorities also argue that the inclusion of a 'credit buffer' ensures that the book value of the mortgage loans is adjusted to their market value ⁽²⁹⁾.

After the Authority's decision to initiate the formal investigation procedure, the Icelandic authorities also submitted a valuation prepared by an independent financial expert (ALM Finance Ltd (ALM) ⁽³⁰⁾ of the mortgage loan pool and HFF bonds already subject to the Scheme. The ALM valuation relies on a probability weighted cash flow model and on the risk-free rate of return in order to calculate the present value (real economic value) of the mortgage loan pools subject to the Scheme. The calculation of the real economic value of the loan pools was performed for two economic scenarios: an expected scenario and a stressed scenario. The ALM valuation approximately confirms the valuation carried out by HFF.

The Icelandic authorities also argue that the Mortgage Loan Scheme includes remuneration for the granting authority, HFF, on the basis that HFF adjusts the value of the HFF bonds to cover operating costs, prepayment risk and credit losses ⁽³¹⁾.

The Icelandic authorities also argue that the Mortgage Loan Scheme should be regarded as part of a wider plan for the restructuring of savings banks in Iceland, and that it should therefore be assessed under the Authority's restructuring guidelines ⁽³²⁾. Both the Ministry of Finance and the Central Bank of Iceland have initiated measures designed to recapitalise savings banks in Iceland. As part of that wider restructuring plan, the FME has been overseeing the restructuring of the savings banks and has laid down certain requirements in that regard.

⁽²⁹⁾ As regards compatibility of the Mortgage Loan Scheme, the Icelandic authorities also refer to previous arguments made to the Authority regarding the systemic importance of the savings banks in Iceland – see, for example, a letter from the Central Bank of Iceland dated 19.5.2009, confirming the necessity of the measures (Annex 5 to the notification). In support, the Icelandic authorities have submitted a study by the Centre for European Policy Studies (CEPS) ('Investigating Diversity in the Banking Sector in Europe: The Performance and Role of Savings Banks', CEPS, 26.6.2009).

⁽³⁰⁾ The report was prepared by Hjörtur H. Jónsson of ALM.

⁽³¹⁾ The premium charged in respect of Spkef was 95 basis points (bp) to cover prepayment risk, operational costs and excess credit losses. 95 bp is the current premium that HFF generally charges customers: 25 bp for operating costs, 50 bp for prepayment risk and 20 bp for credit losses.

⁽³²⁾ The Authority assumes that the Icelandic authorities are referring to the Authority's Guidelines on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules.

Finally, as regards the proportionality of the measure, the Icelandic authorities note that they are willing to take the necessary steps to meet the Authority's concerns regarding limiting the duration and budgetary scope of the Mortgage Loan Scheme.

II. ASSESSMENT

1. THE PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 61(1) OF THE EEA AGREEMENT

Article 61(1) of the EEA Agreement provides 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.'

In order for a measure to constitute aid within the meaning of Article 61(1) of the EEA Agreement, the following four cumulative criteria must be met: the measure must (i) confer on recipients an economic advantage which is not received in the normal course of business; (ii) be granted by the State or through State resources; (iii) be selective by favouring certain undertakings or the production of certain goods; and (iv) distort competition and affect trade between Contracting Parties.

1.1. Presence of State resources

The measure must be granted by the State or through State resources.

In line with settled case law, aid may be granted directly by the State or by public or private bodies established or appointed by the State to administer the aid ⁽³³⁾.

In exchange for mortgage loans, the applicant financial institutions receive HFF bonds. HFF was established by the Housing Act as a State housing agency, wholly owned by the Icelandic State and under the administrative surveillance of the Minister of Welfare. The Minister of Welfare appoints HFF's five-member Board of Directors. The tasks of HFF (to give loans to individuals, municipalities and companies for financing the acquisition or construction of residential housing) are laid down and regulated in statutory rules: the Housing Act and secondary legislation (for example, Regulation No 57/2009 on the loan categories of HFF).

⁽³³⁾ Case 78/76 *Steinike and Weinlig v Federal Republic of Germany* [1977] ECR 595, paragraph 21.

The measures at issue in this case were therefore executed through a public agency, HFF, which is subject to the full control of the State. The actions of HFF are therefore imputable to the State. Therefore, the transfer of HFF bonds to financial institutions involves State resources.

1.2. Favouring undertakings or the production of goods

1.2.1. *Economic advantage*

The measure must confer on beneficiaries advantages that relieve them of charges that are normally borne from their budgets.

As explained by the Icelandic authorities, the Mortgage Loan Scheme was established in order to enable certain financial institutions to obtain financing from sources other than inter-bank loans due to the fact that inter-bank lending was drying up as a result of global difficulties in the financial sector.

The Authority considers it unlikely that, in the financial crisis, financing would have been provided by a market economy investor on a comparable scale and on similar conditions to financial institutions eligible to participate in the Mortgage Loan Scheme. Therefore, the transaction as such gives the participating banks an economic advantage which would not have been available to them under the market conditions at the time.

The Mortgage Loan Scheme improves the position of beneficiary financial institutions by increasing the liquidity of their assets and removing a source of volatility on their balance sheets. That, in turn, improves their position on the market.

1.2.2. *Selectivity*

To constitute State aid, the measure must favour certain undertakings, the production of certain goods or the provision of certain services.

The Mortgage Loan Scheme is selective in that it favours only certain financial institutions. The fact that all undertakings in a given sector may benefit from a measure does not lead to the conclusion that the measure is of a general nature. On the contrary, the measure is selective in that it favours only one sector of the economy⁽³⁴⁾.

1.3. Distortion of competition and effect on trade between Contracting Parties

The Mortgage Loan Scheme is liable to distort competition and affect trade between the Contracting Parties. The Scheme improves the position of beneficiary financial institutions by

increasing the liquidity of their assets and removing a source of volatility on their balance sheets, thereby strengthening their position compared to their competitors in other EEA countries.

All banks, saving banks and credit institutions which have been granted a licence to operate in Iceland, whatever their size, are in principle eligible to apply for support under the Mortgage Loan Scheme. Services and products in the banking and financial sectors are traded internationally. In that light also, the Mortgage Loan Scheme is liable to distort competition and affect trade between Contracting Parties.

2. PROCEDURAL REQUIREMENTS

Pursuant to Article 1(3) of Part I of Protocol 3, '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.'

The Icelandic authorities notified the Mortgage Loan Scheme to the Authority by letter dated 27 May 2009 (Event No 519720). However, the Supplementary Rules of the Board of HFF regarding the purchase of mortgage loans from financial undertakings entered into force on 15 January 2009, that is, before the Authority had taken a final decision in respect of the notification.

In that light, the Icelandic authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

3. COMPATIBILITY OF THE AID

Support measures designated as State aid under Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless one of the exemptions in Articles 61(2) or (3) of the EEA Agreement applies. The derogation in Article 61(2) is not applicable to the aid at issue in this case, which is not designed to achieve any of the aims listed in that Article. Similarly, the derogations in Articles 61(3)(a) and (c) of the EEA Agreement do not apply to the aid measure under investigation. In particular, the aid measure is not granted with the aim of promoting or facilitating the economic development of certain areas or of certain economic activities.

The aid at issue is not linked to any investment in production capital. It merely reduces the costs which companies would normally have to bear in the course of pursuing their day-to-day business activities, and must, therefore, be classified as operating aid. Operating aid is normally not considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement. Operating aid is only allowed under special circumstances (for example, for certain types of environmental or regional aid), when the relevant Guidelines of the Authority provide for such an exemption.

⁽³⁴⁾ Joined Cases E-5/04, E-6/04 and E-7/04 Fesil and Finnþjórð [2005] EFTA Court Report p. 117, paragraph 77. This judgment confirms the case law of the European Court of Justice as laid down in Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 33. See also Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 95.

Article 61(3)(b) of the EEA Agreement enables the Authority to declare aid compatible with the functioning of the EEA Agreement if it is designed 'to remedy a serious disturbance in the economy of an EC Member State or an EFTA State'. The Authority recalls that, in line with the case law of the European Court of Justice and the decision-making practice of the Authority and the European Commission (the 'Commission'), Article 61(3)(b) is to be applied restrictively and the measures at issue must tackle a disturbance in the entire national economy ⁽³⁵⁾.

The Authority acknowledges that the Mortgage Loan Scheme was adopted during and in response to the current international financial crisis. In Iceland, small saving banks in particular have faced liquidity problems as a result of the financial difficulties suffered by the larger banks, which have traditionally provided funding to small savings banks. Unlike the larger financial undertakings, the savings banks do not have direct access to funding from the Icelandic Central Bank.

As stated in its decision to open the formal investigation procedure, the Authority considers that the appropriate framework for assessing the compatibility of the Mortgage Loan Scheme is the Impaired Assets Guidelines (IAG), which are based on Article 61(3)(b) of the EEA Agreement. The Mortgage Loan Scheme must therefore be assessed under Article 61(3)(b) of the EEA Agreement and the IAG.

Prior to determining whether the Mortgage Loan Scheme is compatible under the IAG, it is relevant, in the present case, to determine whether the Scheme qualifies as a 'scheme' within the meaning of Protocol 3 to the Surveillance and Court Agreement. Article 1(d) of Part II of Protocol 3 provides that:

"aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any

act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.

The Authority has taken the view (which has not been disputed by the Icelandic authorities) that the Mortgage Loan Scheme is based on rules — the Housing Act, the Regulation and the Supplementary Rules — on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined in those rules in a general and abstract manner. The Mortgage Loan Scheme therefore qualifies as an aid scheme within the meaning of Article 1(d) of Part II of Protocol 3. In that regard, the Authority recalls that in Case C-310/99, the European Court of Justice held that: 'There was no need for the contested decision to include an analysis of the aid granted in individual cases on the basis of the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned.' ⁽³⁶⁾.

In line with that case law, the Authority has assessed the Mortgage Loan Scheme on the basis of the characteristics of the Scheme (as opposed to the specifics of individual awards made under the Scheme).

As described above, the Icelandic authorities have argued that the Authority should consider the Mortgage Loan Scheme as part of the ongoing restructuring of the Icelandic savings banks sector and that it should be assessed under the Authority's restructuring guidelines applicable to financial institutions under the financial crisis (the 'banking restructuring guidelines') ⁽³⁷⁾. However, the swap under the Mortgage Loan Scheme does not require any general restructuring of the financial institutions benefiting from the Scheme. The Mortgage Loan Scheme may be applied to any financial institution irrespective of whether such financial institutions are being restructured. In such circumstances the Authority considers that the appropriate guidelines applicable to the measure are not the banking restructuring guidelines. As established above, the characteristics of the Mortgage Loan Scheme are such that the conditions are in place for applying the IAG.

3.1. Application of the IAG — eligibility of assets

In order to be declared compatible with Article 61(3)(b) of the EEA Agreement, the aid must be granted on the basis of non-discriminatory criteria, be appropriate in terms of being well

⁽³⁵⁾ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG v Commission* [1999] ECR II-3663, paragraph 167. See the Commission's Decisions in Case NN 70/07 *Northern Rock* (OJ C 43, 16.2.2008, p. 1), and in Case NN 25/08 *Rescue aid to WestLB* (OJ C 189, 26.7.2008, p. 3); and Commission's Decision of 4.6.2008, C 9/08 *SachsenLB* (OJ L 104, 24.4.2009). See also the Authority's Decision No. 36/09/COL of 30.1.2009 on the Agreement between the Norwegian State and Eksportfinans ASA concerning State funding of Eksportfinans (OJ C 156, 9.7.2009, p. 17, and EEA Supplement No 36, 9.7.2009, p. 9); Decision No 205/09/COL of 8.5.2009 on the scheme for temporary recapitalisation of fundamentally sound banks in order to foster financial stability and lending to the real economy (OJ L 29, 3.2.2011, p. 36, and EEA Supplement No 6, 3.2.2011, p. 1); Decision 235/09/COL of 20.5.2009 on the Norwegian Temporary Small Aid Scheme (OJ L 46, 19.2.2011, p. 59, and EEA Supplement No 8, 17.2.2011, p. 1); Decision No. 168/09/COL of 27.3.2009 on an additional loan category of the Icelandic Housing Financing Fund on lending to banks, saving banks and other financial institutions for the purpose of temporarily refinancing mortgage loans (OJ C 241, 8.10.2009, p. 16, and EEA Supplement No 52, 8.10.2009, p. 1).

⁽³⁶⁾ Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 91. In Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 91, the Court stated 'In the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies [...] in order to establish whether the scheme involves elements of aid.'. See also Case E-2/05 *ESA v Iceland* [2005] EFTA Court Report p. 202, paragraph 24 and Case C-71/09 P, C-73/09 P and C-76/09 P, *Comitato Venezia vuole vivere v Commission*, not yet reported, paragraphs 63-64.

⁽³⁷⁾ See footnote 32.

targeted to remedy a serious disturbance in the economy, and be necessary and proportionate thereto, limiting negative spill-over effects for competitors. The IAG translate these general principles into specific conditions for impaired asset relief.

As already mentioned, the Icelandic authorities have questioned the applicability of the IAG to the asset swap provided for under the Mortgage Loan Scheme on the basis that the mortgage loans subject to the swap agreements are not impaired assets. The Icelandic authorities argue that the mortgage loans represent the most financially attractive assets possessed by the banks and are not therefore impaired.

The IAG define impaired assets as: ‘assets commonly referred to as ‘toxic assets’ (e.g. US mortgage backed securities and associated hedges and derivatives), which have triggered the financial crisis and have largely become illiquid or subject to severe downward value adjustments...’. The IAG also provide that when determining whether assets are impaired it is necessary to take a pragmatic approach and allow for some flexibility⁽³⁸⁾.

As already noted, the savings banks currently taking part in the Mortgage Loan Scheme normally finance their activities through customer deposits and taking loans from the principal Icelandic banks. If that does not prove sufficient, in order to continue operations, the normal course of business for a savings bank would be to sell some of its assets (for example, mortgage loans).

However, the Icelandic authorities have explained that the principal Icelandic banks are bankrupt and undergoing restructuring, which rules out loans from those banks. In addition, customer deposits alone are not sufficient to cover the financing needs of the savings banks. The Icelandic authorities have informed the Authority that the third possibility — of selling assets — has not been possible due to the financial crisis. It was against this background that the Mortgage Loan Scheme was introduced.

The Authority considers that the fact that the savings banks have been unable to sell their mortgage loans on the market implies that those assets are illiquid and, therefore, impaired. Annex 3 of the IAG contains a list of categories of impaired assets which are considered eligible for asset relief measures. The list includes housing mortgages.

In that light, in order to be found compatible with the EEA Agreement, the Mortgage Loan Scheme must fulfil the conditions for the compatibility of asset relief as set out in the IAG. The relevant conditions are considered in sections 3.2-3.6 below.

3.2. Valuation of the mortgage loan — independent expert

Paragraph 20, 1st bullet point, of the IAG provides that: ‘Applications for aid should be [...] based on adequate valuation, certified by recognised independent experts [...]’.

Article 3 of the Regulation provides that HFF must perform an assessment of the value of the mortgage loans assets offered to the Fund. This is also what happens in practice: the assets swapped under the Mortgage Loan Scheme are valued by HFF. Thus, the assets swapped under the Mortgage Loan Scheme are not valued by an independent expert, contrary to the requirements of the IAG.

The fact that one element of the valuation assessment — the credit risk method — has been prepared by an independent expert (KPMG Iceland) does not automatically mean that the entire assessment must be deemed to be carried out by an independent expert. Other important element of the assessment, namely determining the basis for the assessment (i.e. the choice of eligible mortgage loans, the basis for the value (book value), the performance of the credit risk assessment, and the decision on how to calculate the credit buffer and determine the corresponding amount due in HFF bonds) is determined by regulation or by HFF alone. The fact that an independent expert has provided a method for assessing the credit risk does not alter the fact that HFF itself actually applies that method; in other words, it performs the valuation itself. There is no scrutiny over whether, and if so, how HFF applies the method.

In such circumstances, the Authority concludes that the asset valuation carried out under the Mortgage Loan Scheme is not in accordance with paragraph 20 of the IAG.

As already described, during the formal investigation, the Icelandic authorities put forward an asset valuation report carried out by independent financial expert, ALM, in respect of mortgage loans already subject to swaps under the Mortgage Loan Scheme. However, that does not change the fact that under the Mortgage Loan Scheme itself, as well as pursuant to the relevant legal provisions, HFF itself must carry out the valuation of mortgage loans taken over by it under the Scheme.

As stated in Part II, Section 3 above, the Authority will only consider the Mortgage Loan Scheme as an ‘aid scheme’ within the meaning of Article 1(d) of Part II of Protocol 3. Thus, without prejudice to the valuation carried out in individual cases under the Scheme, the Mortgage Loan Scheme itself does not fulfil the conditions laid down in the IAG.

On the basis of the above, the Authority concludes that the system for valuing the mortgage loans does not satisfy the conditions laid down in the IAG.

⁽³⁸⁾ See paragraph 32 of the IAG.

3.3. Valuation of the mortgage loan — basis for valuation

The IAG also sets out a method for the valuation of impaired assets in the context of an asset-relief measure. Paragraphs 39 and 40 of the IAG and annex 3 introduce the concepts of 'cost', 'current market value', 'real economic value' and 'transfer value'. Those concepts are defined in the IAG as follows ⁽³⁹⁾:

- Cost means the carrying amount or nominal value of the loans minus impairment.
- Current market value is the value the impaired assets could have obtained in the market.
- The real economic value is the underlying long-term economic value of the assets on the basis of underlying cash flows and broader time horizons. This should be calculated both for a base case scenario and a stress case scenario.
- The transfer value is the value attributed to impaired assets in the context of an asset-relief programme.

Normally, the IAG provide that if the transfer value is higher than the current market value, State aid is involved. In order for the aid to be declared compatible, the transfer value must be less than or equal to the real economic value.

Article 6 of the Supplementary Rules states that the value of the mortgage loan pools is based on the book value of each individual mortgage. The book value is normally not the same as the real economic value of the assets, which is based on underlying cash flows and broader time horizons.

In the light of the above, the Authority considers that the Icelandic Government has failed to show (or calculate) that the transfer value is based on the real economic value. The

⁽³⁹⁾ Paragraph 39 provides that: '[a]s a first stage, assets should be valued on the basis of their current market value, whenever possible. In general, any transfer of assets covered by a scheme at a valuation in excess of the market price will constitute State aid. The current market value may, however, be quite distant from the book value of those assets in the current circumstances, or non-existent in the absence of a market (for some assets the value may effectively be as low as zero)'.

Paragraph 40 provides that: '[a]s a second stage, the value attributed to impaired assets in the context of an asset-relief programme (the "transfer value") will inevitably be above current market prices in order to achieve the relief effect. To ensure consistency in the assessment of the compatibility of aid, the Authority would consider a transfer value reflecting the underlying long-term economic value (the "real economic value") of the assets, on the basis of underlying cash flows and broader time horizons, an acceptable benchmark indicating the compatibility of the aid amount as the minimum necessary'.

In addition, Table 1, Non-securitised loans, introduces the concepts of 'Cost', 'Economic Value' and 'Transfer Value' as the basis for valuation under the Scheme.

arguments of the Icelandic authorities to the effect that the inclusion of a 'credit buffer' ensures that the book value is adjusted to a market value cannot be accepted. First, the 'credit buffer' is only designed to protect HFF against a credit risk (by postponing part of the consideration for the mortgage loans), and not to establish a market value. Secondly, upon final settlement, financial institutions will receive HFF bonds corresponding to the book value of the mortgage loans less any realised and future expected impairment, and not corresponding to the actual economic value of the mortgage loans.

Therefore, on the basis of the available information, and in accordance with the principles set out in the IAG, the Authority cannot exclude that incompatible State aid is involved in the Mortgage Loan Scheme.

3.4. Burden sharing

As regards burden sharing, the IAG set out, in paragraphs 21 to 25, a general principle that financial institutions ought to bear the losses associated with impaired assets to the maximum extent possible. That implies that they should bear the loss resulting from the difference between the current market value and the real economic value of impaired assets.

As HFF has not carried out a valuation in accordance with the IAG, it is not possible to assess to what extent eligible financial institutions bear a share of the burden as required by the IAG.

3.5. Remuneration

The Authority notes that that the EFTA States must also ensure that 'any pricing of asset relief must include remuneration for the State that adequately takes account of the risks of future losses exceeding those that are projected in determination of the 'real economic value' and any additional risk stemming from a transfer value above the real economic value' ⁽⁴⁰⁾.

The IAG suggest that such remuneration may be provided by setting the transfer value of assets sufficiently below the 'real economic value' so as to provide for adequate compensation for the risk taken on by the State ⁽⁴¹⁾. Any pricing system would have to ensure that the overall contribution of beneficiary financial institutions reduces the extent of net State intervention to the minimum necessary. However, as the Mortgage Loan Scheme does not meet the requirements of the IAG with regard to valuation, it is not possible to assess whether the Icelandic authorities have complied with the remuneration requirement.

⁽⁴⁰⁾ Annex 4.II to the IAG.

⁽⁴¹⁾ Annex 4.II to the IAG.

As already described, the Icelandic authorities have argued that beneficiary financial institutions are charged a fee of 95 basis points (bp), which is added to HFF's cost of capital, when entering into an agreement pursuant to the Mortgage Loan Scheme. However, according to the information available to the Authority, 95 bp is the current premium that HFF generally charges customers to cover operating costs (25 bp), prepayment risk (50 bp) and credit losses (20 bp) for regular mortgage loans.

Thus, while the Authority understands that this will affect the value of HFF bonds transferred to a beneficiary financial institution; however, HFF will incur such costs in connection with management of the transferred mortgages loans in the course of the term of the mortgages. To date, the Authority has not received any documentary evidence to the contrary⁽⁴²⁾. In that light, the 95 bp charge cannot be considered as remuneration paid by beneficiary financial institutions to the State.

3.6. Unlimited scope and duration

The Icelandic authorities have neither specified any time-limit for the Mortgage Loan Scheme, nor specified any time-limit within which the financial institutions can apply to enter the Mortgage Loan Scheme (the so-called 'entrance window')⁽⁴³⁾.

The IAG require, in order for asset relief measures to be found compatible with the EEA Agreement, that their duration must not go beyond the period of the financial crisis⁽⁴⁴⁾. Asset relief measures are not approved for an unlimited period of time.

Based on the decisional practice of the European Commission, the entrance window of asset relief measures is usually approved for a maximum of six months. Any extensions to the duration of the entrance window (usually for an additional six months) must be re-notified well in advance and take account of the evolution of the situation on the relevant financial markets. Asset relief schemes may be approved for a period of up to two years, provided that biannual reports are submitted to the Authority⁽⁴⁵⁾.

⁽⁴²⁾ Even if the 95 bp charge were to be accepted as remuneration for the asset swap, the question remains as to whether the level of that charge is sufficient to represent appropriate remuneration, see Annex 4.II of IAG.

⁽⁴³⁾ The argument of the Icelandic authorities that the nature of the Emergency Act is temporary and thus that schemes implemented under it are by definition not of a permanent nature cannot be accepted. There is no provision in any of the relevant legislation which would prevent the Icelandic authorities from continuing the Mortgage Loan Scheme indefinitely. This contradicts the general principle of proportionality and necessity at the core of the guidelines concerning State aid during the financial crisis. The fact that the Icelandic Parliament intended to review the Emergency Act by 1.1.2010 does not alter that conclusion. In any event, according to information available to the Authority, to date, the Icelandic Parliament has not carried out such a review.

⁽⁴⁴⁾ The Authority's Guidelines on financial institutions, paragraph 12.

⁽⁴⁵⁾ The Authority's Guidelines on financial institutions, paragraph 24.

Similarly, the Icelandic authorities have not specified a total budget for the Mortgage Loan Scheme, or estimated annual expenditure under the Scheme. They have not submitted an estimated number of beneficiaries or a limit to the value of the assets potentially eligible for an asset swap pursuant to the Scheme. Thus, the Mortgage Loan Scheme appears to be unlimited in scope, and, therefore, is not proportionate, as required pursuant to the IAG.

4. CONCLUSION

Based on the information submitted by the Icelandic authorities, the Authority concludes that the Mortgage Loan Scheme involves the grant of State aid within the meaning of Article 61(1) of the EEA Agreement which is not compatible with the functioning of the EEA Agreement for the reasons set out above. However, individual aid grants awarded under the Mortgage Loan Scheme which fulfil the criteria laid down in the State Aid Guidelines on impaired assets, are compatible with the functioning of the EEA Agreement⁽⁴⁶⁾.

The Mortgage Loan Scheme was notified to the Authority after it entered into force and before the Authority had taken a final decision in respect of the notification. Thus, the Icelandic authorities have unlawfully implemented the aid at issue in breach of Article 1(3) of Part I of Protocol 3.

It follows from Article 14 of Part II of Protocol 3 that unlawful aid which is incompatible with the State aid rules under the EEA Agreement must be recovered from the beneficiaries,

HAS ADOPTED THIS DECISION:

Article 1

The Mortgage Loan Scheme constitutes State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

Article 2

In view of the failure by the Icelandic authorities to comply with the requirement to notify the EFTA Surveillance Authority before implementing the Mortgage Loan Scheme, in accordance with Article 1(3) of Part I of Protocol 3, the Mortgage Loan Scheme involves unlawful State aid.

⁽⁴⁶⁾ See, for example, Commission Decision of 16.12.2003 on the aid scheme implemented by France for the takeover of firms in difficulty (OJ L 108, 16.4.2004, p. 38), and Commission Decision of 20 December 2001 on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Vizcaya (Spain) (OJ L 40, 14.2.2003, p. 11). See also ESA Decision 754/08/COL of 3 December 2008 on the Wood-based Innovation Scheme (OJ C 58, 12.3.2009, p. 12, and EEA Supplement No 14, 12.3.2009, p. 5).

Article 3

The Icelandic authorities shall abolish the Mortgage Loan Scheme with immediate effect and take all necessary measures to recover any incompatible and unlawful aid granted under the Mortgage Loan Scheme, as referred to in Article 1 and Article 2.

Article 4

By 30 August 2011, the Icelandic authorities shall inform the EFTA Surveillance Authority of the measures taken to comply with this decision.

Article 5

Recovery shall be effected without delay, and in any event not later than 30 October 2011. Recovery shall be effected in accordance with the procedures of national law provided that they allow for the immediate and effective execution of the Decision. The aid to be recovered shall include interest (including compound interest) from the date on which it was

at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of Article 9 of Decision No 195/04/COL.

Article 6

This Decision is addressed to the Republic of Iceland.

Article 7

Only the English language version of this Decision is authentic.

Done at Brussels, 29 June 2011.

For the EFTA Surveillance Authority

Per SANDERUD
President

Sabine MONAUNI-TÖMÖRDY
College Member

EFTA SURVEILLANCE AUTHORITY DECISION

No 232/11/COL

of 13 July 2011

on the notification of the sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the municipality of Asker (Norway)

THE EFTA SURVEILLANCE AUTHORITY ("the Authority"),

Having regard to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Article 61 and Protocol 26,

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

Having regard to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1(2) of Part I and Articles 7(5) and 14 of Part II,

Having regard to the consolidated version of the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 ("the Implementing Provisions Decision") ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to those provisions ⁽²⁾ and having regard to their comments,

Whereas:

I. FACTS

1. PROCEDURE

By letter of 15 December 2008 (Event No 508884), received by the Authority on 13 February 2009, the Norwegian authorities notified a sale of land at Nesøyveien 8, gnr. 32 bnr. 17 by the municipality of Asker, pursuant to Article 1(3) of Part I of Protocol 3.

By letter dated 8 April 2009 (Event No 512188), the Authority requested additional information. The Norwegian authorities replied by letter dated 11 May 2009 (Event No 518079).

By letter of 7 July 2009 (Event No 521778), the Authority sent a second request for information. The Norwegian authorities responded by letter dated 14 August 2009 (Event No 527555).

The Authority thereafter informed the Norwegian 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 of land.

The Authority's Decision No 538/09/COL to initiate the procedure was published in the Official Journal of the European Union and the EEA Supplement thereto on 8 July 2010 ⁽³⁾. The Authority called on interested parties to submit their comments thereon.

The Authority received comments from one interested party, namely the buyer Asker Brygge AS. The letter dated 29 January 2010 was forwarded by the Municipality of Asker as an attachment to the Municipality's letter of the same date.

At 14 October 2010 a meeting between the Authority and the Norwegian authorities was held where the case was discussed. After the meeting the Norwegian Authorities submitted their final comments on the case on 19 November 2010.

2. DESCRIPTION OF THE NOTIFICATION

The Norwegian authorities notified a sale of a plot of land by the municipality of Asker to the company Asker Brygge AS ("Asker Brygge"). The property is registered in the Norwegian property register as Nesøyveien 8, gnr. 32 bnr. 17 in the municipality of Asker ("gbnr. 32/17") and is approximately 9 700 m². There were no buildings on the property. Slepden Båtforening rented part of the property from the Municipality.

The municipality of Asker and Asker Brygge entered into an agreement in 2001 ("the option agreement"), according to which Asker Brygge was granted an option, lasting until 31 December 2009, to buy land for a fixed sum of NOK 8 million, adjusted according to the consumer price index. According to the option agreement the municipality intended to give Asker Brygge the option to buy the property at market price provided that Asker Brygge undertook extensive planning and research with the aim of obtaining a reregulation of the property and then developing the property.

In 2004 the option agreement was renewed, and the validity of the option was extended until 31 December 2014 under similar conditions regarding the progress of the reregulation work.

In 2005, Asker Brygge called upon the option to buy the land. The parties entered into a sales agreement on 21 March 2007 for the price of NOK 8 727 462. The land was transferred to Asker Brygge on the same date although only the first instalment of 30 % of the sales sum was paid on the date of the transfer of the property. The second and largest instalment, 70 % of the sales sum (NOK 6 109 223), is due at the latest 31 December 2011. The municipality of Asker will not charge any interest rate on the second instalment.

The municipality of Asker and Asker Brygge are of the opinion that the sales contract does not entail any state aid because the sales price reflects the market value. The Norwegian authorities nonetheless decided to notify the transaction for reasons of legal certainty.

⁽¹⁾ Available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>

⁽²⁾ Published in OJ C184 of 8.7.2010, p. 20 and EEA Supplement No 35 of 8.7.2010.

⁽³⁾ See OJ C 184, 8.7.2010 and the EEA Supplement to the Official Journal No 35, 8.7.2010.

3. COMMENTS FROM THE NORWEGIAN AUTHORITIES

The municipality of Asker is of the opinion that the sales contract does not entail any state aid because the sales price reflects the market value. The municipality of Asker has stressed that the sales price was not subject to negotiations as it was established in 2001. Though no independent value assessment was made at the time of the option agreement in 2001, the municipality at the time made its own assessment based on its extensive experience in the property market in Asker.

The municipality has submitted that it must enjoy a margin of judgment. The value assessments carried out in June 2006 and June 2008 assessed the market value in 2001 to be NOK 9,6 (with a possible variation of +/- 15 %) million and NOK 8 million respectively. The assessments are thus in accordance with the sales price in 2001, which is the relevant period for the assessment to be made. The assessment dated 18 January 2008 is based on wrong premises, and did not take into consideration important factors for the assessment.

The option cannot be considered granted without remuneration, since Asker Brygge in return undertook obligations related to planning and research. The municipality considered the property difficult to develop, and it did not want to undertake the research necessary to uncover the risks related to difficult soil conditions and pollution. The research by Asker Brygge removed the said risks, and the municipality could then sell the property without having to argue vis-à-vis potential buyers regarding these risks. Thus the obligation that Asker Brygge undertook was of value to the municipality.

The municipality accepts that a private investor would not have granted postponed payment of 70 % of the sales sum free of interest, but any possible state aid due to lack of such interest would be considered de minimis aid.

4. COMMENTS FROM THIRD PARTIES

Asker Brygge has submitted that the Authority can not conclude that state aid has been involved in the sale.

4.1. The value in 2001

Asker Brygge submitted that the assessment of the alleged aid measures shall be based on the facts available to the Municipality at the time it entered into an option agreement in which Asker Brygge was given a right to purchase the property in question, i.e. in 2001. Thus, the market value of the property has to be assessed at the time of the conclusion of the Option Agreement. It is not the role of the Authority to replace the Municipality's judgment with regard to the economic assessment of the property's value in 2001. Thus, Asker Brygge submits that the Municipality enjoyed a margin of discretion in its assessment of the property's market price in 2001.

In 2001, the agreement with Slependsen Båttforening (Slependsen) and the obligation to provide a future solution for Slependsen must be regarded as an encumbrance on the property which clearly influenced its market value.

A reregulation of the property would be necessary to develop the land for business activity. This was not a realistic alternative for the municipality in 2001. The preparatory works that would be required prior to a complete reregulation are both expensive and time consuming. Moreover, there was a potential risk for Asker Brygge that the Municipality and other public institutions would not accept an application for reregulation, such as the Public Road Administration or the County Governor.

Further, it must be taken into consideration that the property is in close proximity to the motorway E18, which means that the property is exposed to both the noise from the road as well as pollution. In addition, the proximity to the motorway considerably limits the possibility to develop the property. According to the motorway development plan, it was prohibited to build anything closer to the road than 35 m. As the property is very narrow and situated close to the road, this limitation implies that nearly 90 % of the property was subject to that prohibition. Moreover, as follows from Section 1 of the Agreement and pursuant to a public road development plan, a part of the property was planned to be used in a new road situated beside the existing motorway. Approximately 1/3 of the property would be comprised by the new road.

Asker Brygge would also like to emphasize the uncertainty with regard to the conditions of the property. As stated above, the property in question was regarded very difficult to develop due to its soil conditions. In addition it was regarded as likely that the soil and shoreline was highly polluted. Thus, when Asker Brygge contacted the Municipality in 2001 with the purpose to buy the land, it was regarded by the Municipality as almost impossible to develop the land for business activity. Neither Asker Brygge nor the Municipality had sufficient or exact information regarding these issues, and development would require considerable analysis of the property's conditions. Asker Brygge submits that the limitations mentioned above must be regarded as encumbrances on the property which clearly influenced its market value.

Further, the Authority cannot base its assessment on subsequent factual circumstances. Doing so would imply that the Authority bases its decision using facts that were not available to the Municipality when entering into the Agreement. Any increase in value of the property after 2001 is due to work which is undertaken by Asker Brygge. Without the work undertaken by Asker Brygge the area would likely still remain undeveloped with a very limited monetary value for the municipality.

4.2. The relevance of the value in 2007

To the extent the 2007 value is relevant, the Authority shall take into consideration and deduct the added value which is a result of the work undertaken by Asker Brygge from 2001–2007.

4.3. Remuneration for the option

The obligation to finance research work, which amounts approximately to NOK 4 or 5 million, must, in the view of Asker Brygge be taken into consideration when assessing the remuneration for the option given to Asker Brygge. In general this methodology is not unusual as a basis for fixing the price of an option as regards undeveloped land as in this case.

4.4. The value assessments

None of the value assessments of the property sufficiently takes into consideration the factual circumstances in 2001. Asker Brygge's main objection to the valuations is that the estimation of the market price *inter alia* has been based on a presumption that further development of the marina was possible and intended for by the Municipality and Asker Brygge. Reference is made to the value assessment undertaken by TJB Eiendomstaksering page 6-9, in which the valuer bases its assessment on the fact that it is possible to dredge the shoreline to establish further boat spaces and to establish storage yards for boats on the land area. Reference is also made to Takstsenteret's value assessment page 14 and 15, which also bases its assessment on such development of the property.

However, when the Agreement was concluded in 2001 such development of the property was neither intended nor regarded as possible by the Municipality and Asker Brygge. Further, due to the conditions of the shoreline below the land area, and to avoid displacement of mass and damaging the foundation of a road bridge close to the property, the Public Road Administration prohibited further dredging in the area.

II. ASSESSMENT

1. THE PRESENCE OF STATE AID

State aid within the meaning of Article 61(1) EEA Agreement

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. Market investor principle

1.1.1. Introduction

If the transaction was carried out in accordance with the market economy investor principle, i.e., if the municipality sold the land for its market value and the conditions of the transaction would have been acceptable for a private seller, the transaction would not involve the grant of state aid. The sale of land could qualify as state aid if the sale was not carried out at market price. As a point of departure, the assessment of whether a property has been sold at market value should be assessed at the time of the conclusion of the contract. The circumstances of this sale of land are somewhat particular in the sense that there exist several agreements concerning the sale: An option agreement from 2001, an extended option agreement from 2004 and a sales agreement from 2007.

The option agreement not only gave Asker Brygge a right to acquire the property at any given time over the years to come but also fixed the price for a later transfer. The option thereby

entailed a possibility for Asker Brygge to observe the development of property prices over a number of years, and thereafter to take up the option to buy the property for the price agreed in 2001. While the Authority fully recognises the right for public authorities also to operate in a market on commercial terms, it nevertheless finds reason to consider carefully whether a similar agreement would have been concluded by a private market operator. The Authority has in that regard considered whether Asker Brygge paid for the option as such, and whether the favourable conditions for the buyer appear to be balanced by corresponding obligations for the buyer or rights for the seller.

The Authority has concluded that the option agreement as such cannot be said to comply with the private market investor principle. The Authority has then assessed whether the property was transferred at market value when the sales agreement was concluded in 2007 based on the price agreed in 2001. The Authority has on this point concluded that the property was sold below market value in 2007. Thus, the Authority has in the following firstly assessed the option agreement of 2001 (and the extension signed in 2004), and, secondly, whether the actual sale of land in 2007 was accomplished at market price.

1.1.2. The market price of the option agreement signed in 2001

As regards the option agreement, it has to be examined whether a private investor operating in a market economy would have chosen to enter into a similar agreement regarding the price and terms as the one signed between the municipality of Asker and Asker Brygge in 2001. In making that assessment, the Authority cannot replace the municipality's commercial judgement with its own, which implies that the municipality, as the seller of the plot of land, must enjoy a margin of judgement. There can be a number of commercially sound reasons to enter into an agreement under given conditions. When there is no plausible explanation for the municipality's choice the measure could qualify as state aid.

On the basis of the information available to the Authority, the conditions for the later sale were laid down in the option agreement signed in 2001. This agreement gave Asker Brygge a right, but not an obligation, to buy the property on predetermined conditions at any given time until 31 December 2009. On the other hand, the municipality was barred from selling the property to someone else in the same period. The main features of the option agreement which are relevant for the state aid assessment are (i) the agreed price of NOK 8 million, adjusted in accordance with the consumer price index, (ii) the right of renegotiation agreed for Asker Brygge in case property prices should decrease considerably before the option was invoked (there was no corresponding right of renegotiation for the municipality should the property prices increase considerably), (iii) the payment in two instalments, whereby 70% of the sales price would be paid before 31 December 2011 at the latest, but no interest would be charged for this delay.

In 2004 the municipality and Asker Brygge prolonged the option agreement until 2014, but did not modify any of the other conditions for the transaction ⁽⁴⁾.

According to the information available to the Authority, the municipality did not carry out any independent value assessment of the property before it entered into the agreement with Asker Brygge in 2001. The Municipality has explained that it assessed the value based on its experience in the real estate market, but no details other than that has been provided to the Authority. Thus, it is not clear to the Authority on which basis the municipality arrived at the agreed price of NOK 8 million for the sale of the land.

Even if it is assumed that NOK 8 million represented the market price for the property as such in 2001 ⁽⁵⁾, the market value of the other elements agreed upon in the option agreement should be assessed. In the Authority's view, if only the market value for the property had to be considered, that would entail that Asker Brygge got the option as such for free without any economic consideration for this preferential right of purchase.

As mentioned above, this option enabled the company to observe the development of property prices for a number of years. Statistically, property prices tend to increase over time. Furthermore, Asker is located close to Oslo and has experienced a continuous growth in population, something that would usually influence property prices positively.

The option agreement barred the municipality from selling the property to another buyer, and thus tied up capital for which the municipality could have found alternative uses or received interest. However, the municipality would not receive any payment or compensation in case Asker Brygge would decide not to buy the property.

Additionally, the extension in 2004 prolonged the option with 5 additional years without remuneration. It enabled Asker Brygge to actively approach the municipality in order to reregulate the property for purposes that would increase the market value.

Under the option agreement, some aspects of a possible future sales contract were also agreed upon. In particular, regarding the reregulation of the area, Asker Brygge had an obligation to finish the preparatory works that would lead to the reregulation process. If this condition was not met, the municipality of Asker could terminate the contract.

The Norwegian authorities have argued that the option cannot be considered granted without remuneration, since Asker Brygge in return undertook obligations related to planning and research. Even if the municipality considered the property difficult to develop, and it did not want to undertake the research necessary to uncover the risks related to difficult soil conditions and pollution, the option agreement gave Asker Brygge the opportunity to work on it for several years before deciding to buy the property, which in the opinion of the

Authority reduced the risk considerably. In addition, if the property was reregulated, this would increase the value of the property. Hence, the option agreement did not entail any real risk for Asker Brygge. The amounts spent on research would benefit the buyer, and if the research was to show that the property was unsuitable for development, the research works could be stopped and costs minimized, without any obligation to buy the property.

Asker Brygge has argued that the obligation to finance research work, which it is said to amount to approximately NOK 4 or 5 million, must be taken into consideration when assessing the remuneration for the option. It is argued that this methodology is not unusual as a basis for fixing the price of an option as regards undeveloped land as in this case. The Authority notes that Asker Brygge has not submitted any documentation on the claims mentioned above. The Norwegian Authorities have not been able to confirm neither the amounts spent on research, nor that this is a common method to fix the price on undeveloped land.

In the Authority's view, the option itself, independent of whether it was exercised or not, had a value in 2001 when the agreement was concluded. From the documentation and explanations the Authority has received so far, there is no information that the buyer paid remuneration for the option as such which a private investor would have accepted.

The option agreement refers to Asker Brygge's possibility to conduct research works on the property with a view to its regulation for other purposes in exchange for the option to buy the property at market price. However, there was no guarantee that the property actually would be properly researched. There was no unconditional obligation to carry out any particular type of research as the buyer could instead chose not to conclude a sales agreement, e.g. if the initial research works would show the project to be unprofitable, or for any other reason. Thus, the risks on the buyer under the option agreement were minimal, while the municipality would not profit from it if the research showed that the property could be developed. The buyer would then be in a position to await the development of the real estate market over a long period, and could chose to buy the property for a fixed price at the time when it was considered to be most profitable for the buyer. Moreover, on the basis of the information available to the Authority, the requirement that Asker Brygge would have to carry out research works within certain time limits in order to maintain the option cannot be considered as a proper payment for the possibility to buy the land within the meaning of the market investor principle.

The option agreement also included other elements that appear to be capable of increasing the value of the option. The first element concerns the mechanism to regulate the price. Asker Brygge had the right to request renegotiations of the price if property prices in Asker should decrease considerably before the option was invoked. As mentioned above, the agreement did not provide a corresponding right of renegotiation for the municipality should the property prices increase considerably. According to the Norwegian authorities, the background for including a right for Asker Brygge to renegotiate the agreement was that the municipality of Asker considered the property to be difficult to develop, inter alia due to the short distance to the highway (E18), and the transaction would therefore involve substantial economic risk. The Authority

⁽⁴⁾ Event # 518079, enclosure 1.

⁽⁵⁾ Whether this corresponds to the market price will be assessed in Section 1.1.2 below.

finds however, that a private market investor would not have entered into such an agreement without a mutual right to adjustment if property prices should increase or decrease considerably. In this regard, the right for the municipality to adjust the price in accordance with the consumer price index appears not to be sufficient to compensate for the lack of a corresponding right of renegotiation.

In the Authority's view, the consumer price index is not the correct index to use when adjusting for changes in property prices. The consumer price index is a measure estimating the change in the average price of consumer goods and services purchased by households, and does not reflect the price movements of the property market. Property prices develop at a different pattern than other prices, and real estate prices for property such as the one at issue in the case at hand are therefore normally not taken into account when determining the consumer price index.

In addition, the Option Agreement contains the municipality of Asker's agreement to postpone the payment of 70 % of the agreed sales price until 31 December 2011 at the latest⁽⁶⁾ without charging any interest for this deferral. According to the Norwegian authorities, the postponement of full payment without any interest was accepted because the property was considered difficult to develop. The Authority finds that a private operator would not have agreed to postpone the payment over such a long period of time without requiring any interest payments. Moreover, it finds that a private operator would not have transferred full ownership of the property before full payment had been received. The municipality of Asker agrees that a private investor would have required remuneration for the postponed payment. Although the municipality of Asker has brought forward that any aid in this respect would be below the *de minimis* threshold, it has not provided any documentation to this extent.

For the reasons outlined above, the Authority finds that a private operator would not have entered into such a long option agreement, on similar conditions as the municipality of Asker without requiring remuneration for the option and the favourable conditions as such. By simply requiring a remuneration corresponding to the value of the property in 2001, the municipality of Asker ran the risk of granting state aid later in particular if property prices should increase.

The Authority therefore concludes that the Option Agreement was not entered into on market conditions and accordingly the presence of state aid cannot be excluded.

It is therefore necessary to examine whether the property was sold at a price below market value.

⁽⁶⁾ According to the sales contract clause 3, the payment shall take place prior to any building activity starts and in any case within 31.12.2011, see event # 508884, enclosure 1.

1.1.3. *The market value of the property at the time of the sales agreement*

In 2005, Asker Brygge called upon the option. Although the conditions for the sale were laid down in the 2001 option agreement, the sales contract was not concluded until 21 March 2007. The Norwegian authorities have explained that the sales price was not subject to negotiations in 2007 but had been agreed in 2001.

The value of the property in 2001 is not decisive for the assessment of whether state aid was granted with the current transaction since the sale was not carried out in 2001, but in 2007. Whereas the option agreement of 2001 gave Asker Brygge a right to buy the property for the next 10 years, the property remained with the municipality in the meantime, for as long as Asker Brygge did not call upon the option. Thus, the relevant point in time for the Authority's state aid assessment is the time when the property was sold and transferred to a new owner, in 2007.

In the following, the Authority will therefore compare the price of NOK 8 727 462 paid by Asker Brygge at the time the sale was carried out in 2007 with the market value of the property.

According to the Authority's State Aid Guidelines on sale of land, a sale of land and buildings following a sufficiently well-publicised and unconditional bidding procedure, comparable to an auction, accepting the best or only bid, is by definition at market value and consequently does not contain state aid. Alternatively, to exclude the existence of aid when a sale of land is conducted without an unconditional bidding procedure, an independent valuation should be carried out by one or more independent asset valuers prior to sales negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The valuer should be independent in the execution of his tasks, i.e. public authorities should not be entitled to issue orders as regards the result of the valuation. In the case at hand, the municipality of Asker did not arrange for an unconditional bidding procedure nor collect an independent expert evaluation before entering into the agreement. Thus, the existence of state aid cannot automatically be excluded.

In the notification, the Norwegian authorities have submitted 3 value assessments of the property in question. None of the value assessments were conducted before the option agreement was entered into in 2001 but established the value of the property afterwards.

The first report dated 30 June 2006 was conducted by licensed property surveyors of Verdita AS, Takst Senteret and Agdestein⁽⁷⁾. According to this report the estimated value of the land in 2001, the time the option contract was entered into, was NOK 9,6 million, with a possible variation of +/- 15%. However, this appears to be a very approximate estimation. The assessors have simply considered the property's value based on the allowed usage (mainly to marina purposes)

⁽⁷⁾ Event # 508884, Enclosure 9 to the notification.

according to the existing regulatory regime at the time of the assessment (which was the same as in 2001), and the value with an alternative combined usage of marina, housing and industry, and assessed the property's value as being the middle value of these two alternatives⁽⁸⁾. However, as explained above, it is the value of the land in 2007 when the property was sold and transferred to the new owner which is relevant for a state aid assessment.

The Norwegian authorities enclosed with the notification two additional value assessments which TJB Eiendomstaksering – Ek & Mosveen AS – Bjørn Aarvik had carried out on behalf of the municipality. In the first report dated 18 January 2008⁽⁹⁾, the market value of the land in 2007 was estimated at NOK 26 million. As the contract between the municipality and Asker Brygge was entered into in 2001, this price was discounted to 2001 values. The discounted value of NOK 26 million of 2007 using a rate of 5,5 % over 7,5 years corresponded to NOK 17 million in 2001.

In the second report dated 16 June 2008⁽¹⁰⁾, TJB Eiendomstaksering – Ek & Mosveen AS – Bjørn Aarvik estimated the market value of the land in 2007 at NOK 12 million. The discounted value of NOK 12 million of 2007 using the same discount rate as before (i.e. 5,5 % over 7,5 years) corresponded to NOK 8 million in 2001. Thus, the discrepancy between the two reports is NOK 9 million for the value of the property in 2001 and NOK 14 million for the value of the property in 2007.

The Norwegian authorities have explained that this difference is based mainly on the estimated value reduction of an additional obligation on Asker Brygge with regard to the use of part of the property by Slependsen Båtförening AS⁽¹¹⁾. The option agreement of 2001 includes a clause stating that a part of the property is let to Slependsen Båtförening as a marina for small boats, and that Asker Brygge would have to compensate for its right to a small-boat marina/compensation vis-à-vis the municipality of Asker if development of the property started before the rental contract expires. The rental contract expired in June 2009. Furthermore, in clause 3 of the option agreement it is stated that Asker Brygge will, together with the municipality of Asker, reach a satisfying solution regarding the needs of Slependsen Båtförening within the scope of the activity at the time of the agreement.

When the option agreement was entered into in 2001, Slependsen Båtförening paid an annual lease of NOK 19 500 to the municipality of Asker⁽¹²⁾. Although it was difficult to state the exact economic consequence of the obligation for Asker Brygge at the time the option agreement was entered into, Asker Brygge and Slependsen Båtförening signed an

agreement on 1 June 2006 according to which the latter was to pay NOK 850 000 (cf. clause 2,4 in the agreement)⁽¹³⁾. According to the explanations provided by the Norwegian authorities, the value assessment from January 2008 was based on an incorrect interpretation of an agreement between Asker Brygge and Slependsen Båtförening since it did not reflect the latter's right to pay only NOK 850 000 for the area in question. The asset valuers interpreted the clause in the option agreement in such a way that Slependsen Båtförening would have had the right to rent or buy the boat places at market price after the expiry of the rental contract. However, the Norwegian authorities are of the opinion that the sum of NOK 850 000, which represents the fulfilment of the obligation towards Slependsen Båtförening, had to be taken into consideration when the market value of the property was assessed for 2001 and 2007. Thus, the municipality of Asker instructed TJB Eiendomstaksering – Ek & Mosveen AS – Bjørn Aarvik to use NOK 850 000 as the basis for the value estimation of Slependsen Båtförenings's 65 boat places in their assessment dated 16 June 2008. The Authority considers that this sum is relevant for the assessment of the 2007 property value, as this was known information at the time.

In addition, the assessment of June 2008 took into consideration the risks in relation to pollution in the ground, as pointed out by the municipality⁽¹⁴⁾. Finally, the assessment of June 2008 no longer included storage for boats under the road (E18), as pointed out by the municipality⁽¹⁵⁾.

Asker Brygge has disputed the validity of the assessments. Its main objection is that the assessments include the possibility to dredge the shoreline to establish further boat spaces, and to establish storage yards for boats on the land area. According to Asker Brygge no development of the property would be foreseeable at all in 2001, and the public road administration had prohibited further dredging in the area⁽¹⁶⁾.

The Authority notes that Asker Brygge has not provided any documentation that the factual premises for the assessment of June 2008 are incorrect. Further, the Authority notes that the municipality has not disputed the validity of the assessment of June 2008, which it seems to consider as fairly accurate⁽¹⁷⁾. On the contrary, the municipality in its comments to the Authority quotes the assessment on the part where it considers dredging (in relation to the assessment of pollution in the ground) and makes no comment on that dredging would not be possible

⁽⁸⁾ Event # 508884, Enclosure 9 to the notification, the assessment at page 15.

⁽⁹⁾ Event # 508884, Enclosure 5 to the notification.

⁽¹⁰⁾ Event # 508884, Enclosure 3 to the notification.

⁽¹¹⁾ Event # 518079, the municipality's letter to the Authority dated 11.5.2009, pages 2–3.

⁽¹²⁾ This sum was determined on the basis of an agreement signed in 1999 between the Municipality of Asker and Slependsen Båtförening. Enclosure 8 to the letter dated 11.5.2009, event # 518079.

⁽¹³⁾ The agreement is assessed by the law firm Hjort, see event # 508884, enclosure 7.

⁽¹⁴⁾ Event # 508884, see enclosure 3 to the notification, the assessment at page 5, and the Municipality's letter to the assessors dated 5.5.2008, enclosure 8 to the notification, and the municipality's comments in its letter to the Authority dated 29.1.2010 at page 3–4, event # 544706.

⁽¹⁵⁾ Event # 508884, see enclosure 3 to the notification, the assessment at pages 4 and 7, and the municipality's letter to the assessors dated 5.5.2008, enclosure 8 to the notification, and the municipality's comments in its letter to the Authority dated 29.1.2010 at page 4 (point 3.3, last paragraph), event # 544706.

⁽¹⁶⁾ Event # 545173, comments from Asker Brygge, point 4.

⁽¹⁷⁾ Event # 544706, see pages 3–4, and event # 518079, the municipality's letter to the Authority where it uses the assessment as its basis for explaining the calculations of the amount of aid possibly granted as stated in the notification to the Authority.

at all. Thus, the Authority can not see that there has been provided documentation which gives reason to question the factual premises for the assessment of June 2008.

The two TBJ Eiendomstaksering – Ek & Mosveen AS – Bjørn Aarvik reports have determined the price of the land in 2007. The first report prepared in January 2008 estimated the value of the land at NOK 26 million, well above the price of NOK 8,7 million paid by Asker Brygge AS. The latest (and lowest) value assessment, the second report, dated 16 June 2008⁽¹⁸⁾, estimated the market value of the land in 2007 at NOK 12 million, which is NOK 3 272 538 more than the price paid. Contrary to the first report, according to the information provided by the municipality of Asker, this second report takes into account more accurate information which was known in 2007, at the time the sale was finalised.

Asker Brygge has claimed that to the extent the 2007 value is relevant, the Authority shall take into consideration and deduct added value resulting from the works undertaken by Asker Brygge from 2001–2007. The works consisted of Asker Brygge's research of the property⁽¹⁹⁾.

The Authority finds that there is no basis for deducting from the value the works conducted by Asker Brygge in the period of 2001–2007. In this respect, the Authority notes that the value assessments of 2008 are based on the regulatory status of the property as it was in 2001 and 2007. The regulations were unchanged since 1998, according to the value assessment of June 2008⁽²⁰⁾. The expected usage of the property was thus considered to be as a marina and storage area for boats in 2001 and in 2007⁽²¹⁾. The Authority can not see that this assessment was affected due to the research carried out by Asker Brygge. In addition, the assessment of June 2008 mentions the risk of pollution in the ground, but adds that the assessors have not conducted any closer research into this matter⁽²²⁾. Thus, it appears that the research carried out by Asker Brygge was rightly not taken into consideration by the assessors when determining the value of the plot of land.

As mentioned, the assessment of June 2008 was based on usage of the area as a marina, according to the existing regulations. It seems however, that already in 2001 Asker Brygge saw that there was a potential in developing the property. Such a potential would normally correspond to an added value. Thus, the municipality pointed out in its letter to the assessors dated 11 April 2008, that the assessors should take into consideration whether the likelihood of adjusted regulations (presumably to a more profitable usage) should be assessed. The assessors refused however to take the possibility of adjusted regulations into consideration, as they regarded this as speculative. The

assessors added that the valuation would be quite different (meaning considerably higher) if the assessment should be based on that housing and industry were to be allowed on the property⁽²³⁾.

The Authority has some doubt as to whether a private investor would have taken into account the likelihood that the property would be regulated for other and more valuable usage in the future and whether such possibilities would have led to a higher market value, i.e. (considerably) higher than the assessment of June 2008. The Authority has however taken note of the particular uncertainties connected to the future use of the property in question, inter alia pollution and regulatory requirements connected to the motorway near to the property. Thus, the assessment of June 2008, which did not take into account any potential of developing the property into another form of usage than the existing, is moderate but appears in the Authority's view accurate when one takes into account the particular characteristics of the property under assessment.

For these reasons, the Authority concludes that the sale of the land gbnr. 32/17 in 2007 for the price of NOK 8 727 462 was below its market price of NOK 12 million as established by the independent expert assessment carried out in June 2008, which the Norwegian authorities submitted.

1.1.4. Conclusion on the market investor principle

For the above-mentioned reasons, the Authority finds that the price agreed upon in the option agreement did not corresponded to the market price for such an agreement, which should reflect the property value at the time of the agreement combined with the value of the option and the special arrangements granted to the buyer. Moreover, the Authority finds that the actual price agreed upon in the sales agreement did not corresponded to the market price of the property at the time the sales agreement was concluded. Therefore, the Authority concludes that the sale of the concerned plot of land gbnr. 32/17 to Asker Brygge AS for the sales price of NOK 8 727 462 was not carried out in accordance with the market investor principle.

1.2. State resources

In order to qualify as state aid, the measure must be granted by the State or through state resources. The concept of State does not only refer to the central government but embraces all levels of the state administration (including municipalities) as well as public undertakings.

Given that the municipality has sold the land below its market price, it has foregone income. In such circumstances, Asker Brygge should have paid more for the land and therefore there is a transfer of resources from the municipality.

⁽¹⁸⁾ Enclosure 3 to the notification.

⁽¹⁹⁾ Event # 545173, point 3.

⁽²⁰⁾ See event # 508884, enclosure 3.

⁽²¹⁾ See event # 508884, enclosure 3, the value assessment at page 6–7.

⁽²²⁾ See event # 508884, enclosure 3, the value assessment at page 5.

⁽²³⁾ See event # 508884, enclosure 8, the municipality's letter at page 2, and the assessors' (undated) letter at page 1.

For these reasons, the Authority considers that since the sale did not take place in accordance with market conditions, state resources within the meaning of Article 61(1) of the EEA Agreement are involved.

1.3. Favouring certain undertakings or the production of certain goods

First, the measure must confer on Asker Brygge advantages that relieve the undertaking of charges that are normally borne from its budget. Since the transaction was carried out under favourable terms, in the sense that Asker Brygge would have had to pay a higher price for the property if the sale of land had been conducted according to the market investor principle, and to have paid market interest rates for the loan if it was to borrow the same amount from a bank, the company received an advantage within the meaning of the state aid rules.

In the letter dated 11 May 2009 ⁽²⁴⁾, the municipality explained how it calculated the level of eventual aid, estimated to NOK 5,3 million in the notification form to the Authority, point 5 ⁽²⁵⁾. The estimation is based on the difference between the value assessment of June 2008 ⁽²⁶⁾ (which determined the value of the land in 2007, when the sales agreement was entered into) and the sales sum, which gives approximately NOK 3,3 million. In addition the municipality has added the economic advantage of the postponed payment of the remaining 70 % of the sales price. The municipality has based its calculations on 7 % interest over a period of 4 years and 9 months related to a sum of NOK 6 million, and found that the maximum advantage conferred by the soft loan is NOK 2 million.

Second, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. There is only one possible beneficiary of the measure under assessment, i.e. Asker Brygge. The measure is thus selective.

1.4. Distortion of competition and effect on trade between Contracting Parties

The aid must distort competition and affect trade between the Contracting Parties of the EEA Agreement.

A support measure granted by the State would strengthen the position of Asker Brygge vis-à-vis other undertakings that are competitors active in the same business areas of real estate and property development. Any grant of aid strengthens the position of the beneficiary vis-à-vis its competitors and accordingly distorts competition within the meaning of Article 61(1) of the EEA Agreement. To the extent that the company is active in areas subject to intra-EEA trade, the requirements of Article 61(1) of the EEA Agreement for a measure to constitute state aid are fulfilled. The business of

developing real estate is in principle and in practice open to intra-EEA trade. Thus, the Authority concludes that the aid threatens to distort competition and effects trade contrary to article 61(1) EEA.

1.5. Conclusion

For the above mentioned reasons, the Authority finds that the transaction concerning the sale of the plot of land gbnr 32/17 to Asker Brygge as laid down in the option agreement signed in 2001 and later agreements entail the grant of state aid.

2. PROCEDURAL REQUIREMENTS

The Norwegian authorities submitted a notification of the sale on 13 February 2009 (Event No 508884). However, the Norwegian authorities signed the Option Agreement laying down the conditions for the purchase of the plot of land in 2001 and put the sale into effect on 21 March 2007 when the sales contract was entered into. Thus, the sale was put into effect before the Authority had taken a final decision as to its validity. The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

3. COMPATIBILITY OF THE AID

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement.

The derogation of Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor does Article 61(3)(a) or Article 61(3)(b) of the EEA Agreement apply to the case at hand. Further, the area where the property is located cannot benefit from any regional aid within the meaning of Article 61(3)(c) of the EEA Agreement.

The Authority therefore finds that the transaction under assessment can not be justified under the state aid provisions of the EEA Agreement.

4. RECOVERY

According to Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement, in cases of unlawful aid, should it be found incompatible, the Authority orders, as a rule, the EFTA State concerned to reclaim aid from the recipient.

The Authority is of the opinion that no general principles preclude repayment in the present case. According to settled case-law, abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Consequently, the recovery of state aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the EEA Agreement in regard to state aid. By repaying the aid, the recipient forfeits the advantage which

⁽²⁴⁾ Event # 518079 at pages 1–2.

⁽²⁵⁾ Event # 508884, annex 1, the notification form, point 5.

⁽²⁶⁾ Of the three assessments, the valuation of June 2008 which estimated the market value of the land in 2007 at NOK 12 million gives in the view of the Authority the best indication on the property's market value in 2007.

it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored⁽²⁷⁾. It also follows from that function of repayment of aid that, as a general rule, save in exceptional circumstances, the Authority will not exceed the bounds of its discretion, recognised by the case-law of the Court, if it asks the EFTA State concerned to recover the sums granted by way of unlawful aid since it is only restoring the previous situation⁽²⁸⁾. Moreover, in view of the mandatory nature of the supervision of state aid by the Authority under Protocol 3 of the Surveillance and Court Agreement, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the provisions of that Protocol⁽²⁹⁾. There are no exceptional circumstances visible in this case, which would have led to legitimate expectations on the side of the aid beneficiaries.

The recovery of the unduly granted state aid amounts should include compound interests, in line with Article 14 (2) in Part II of Protocol 3 to the Surveillance and Court Agreement and Article 9 and 11 of the Authority's Decision 195/04/COL of 14 July 2004.

5. CONCLUSION

The Authority concludes that the Norwegian authorities have unlawfully implemented the aid in question in breach of Article 1(3) of Part I to Protocol 3.

The conditions of the sale of the property at Nesøyveien 8, gnr. 32 bnr. 17 to Asker Brygge AS entail state aid which – for the reasons set out above – is not compatible with the functioning of the EEA Agreement and should be recovered, from the date of the sales agreement signed on 21 March 2007.

HAS ADOPTED THIS DECISION:

Article 1

The sale of the plot of land at Nesøyveien 8, gnr. 32 bnr. 17 by the Municipality of Asker to Asker Brygge AS entails state aid which is not compatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

Article 2

The Norwegian authorities shall take all necessary measures to recover from Asker Brygge AS the aid referred to in Article 1 and unlawfully made available to the beneficiary.

Article 3

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of Asker Brygge AS until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.

Article 4

By 13 September 2011, Norway shall inform the Authority of the total amount (principal and recovery interests) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid.

By 13 November 2011, Norway must have executed the Authority's decision and fully recovered the aid.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English language version of this Decision is authentic.

Done at Brussels, 13 July 2011.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sverrir Haukur GUNNLAUGSSON
College Member

⁽²⁷⁾ Case C-350/93 *Commission v Italy* [1995] ECR I-699, paragraph 22.

⁽²⁸⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 66, and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 99.

⁽²⁹⁾ Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 51.

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