

Case No: 64864
Event No: 541995
Dec. No: 364/11/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 23 November 2011

to close the formal investigation procedure concerning the relief of the Icelandic Housing Financing Fund *Íbúðalánasjóður* (HFF) from payment of a state guarantee premium

(ICELAND)

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 Article 1(3) of Part I and 7(2) of Part II of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement) (Protocol 3),

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,²

Whereas:

I. FACTS

1. Procedure

- (1) By letter dated 28 September 2007 (Event No 442805), the Authority requested information from the Icelandic authorities regarding state guarantees and the obligation to pay a state guarantee premium under the Icelandic Act on State Guarantees. By letter from the Icelandic Mission to the European Union dated 24 October 2007, forwarding the letter from the Icelandic Ministry of Finance of the same date, received and registered by the

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

² EFTA Surveillance Authority Decision No 406/08/COL of 27.6.2008 to initiate the formal investigation procedure with regard to the relief of the Icelandic Housing Financing Fund from payment of a State guarantee premium, published in OJ C 64, 19.3.2009, p. 21 and EEA Supplement No 15, p. 9.

Authority on 25 October 2007 (Events No 448739 and 449598), the Icelandic authorities responded to this request.

- (2) The case was subject to discussions between the representatives of the Authority and the Icelandic Government on 7 September 2007 in Brussels and on 29 October 2007 in Reykjavik as well as between the representatives of the Authority and the Icelandic Financial Services Association in a meeting on 6 March 2008 in Brussels.
- (3) The Authority's Decision No 406/08/COL of 27 June 2008 to initiate the formal investigation procedure with regard to the relief of the Icelandic Housing Financing Fund from payment of a state guarantee premium was published in the Official Journal of the European Union and in the EEA Supplement to it.³ By means of this Decision, the Authority called on interested parties to submit their comments. The Authority has not received any comments from interested parties. By letter dated 8 September 2008 (Event No 490696), the Icelandic authorities submitted comments on the Authority's Decision No 406/08/COL.
- (4) In October 2008, the Authority put the case on hold due to the collapse of the Icelandic banking sector. However, some discussions concerning this case took place at a Package Meeting in Reykjavik on 4-5 November 2009. Following this meeting, on 16 November 2009, a letter was sent by the Authority with a reminder to submit information concerning compatibility assessment of the measure under investigation. A reply was provided by the Icelandic authorities by letter dated 7 December 2009 (Event No 539538).
- (5) In a parallel investigation concerning state aid measures granted to the Icelandic Housing Financing Fund, the Authority concluded in its Decision No 405/08/COL of 27 June 2008⁴ that the state guarantee granted to HFF constitutes an existing aid measure. Subsequently, on 18 July 2011, the Authority adopted Decision No 247/11/COL on a proposal for appropriate measures in the financing of the Icelandic Housing Financing Fund *Íbúðalánasjóður* (HFF),⁵ *inter alia* in the form of the state guarantee.

2. Description of the measure under investigation

2.1. The beneficiary

- (6) The Housing Financing Fund *Íbúðalánasjóður* (HFF) is a state-owned institution, which operates on an arms-length basis under the Icelandic Housing Act No 44/1998 (*lög um húsnæðismál*).⁶ HFF is managed by a board of directors within the administrative purview of the Minister of Welfare. The purpose of HFF is to promote security of, and equal rights to, housing. This is done through the granting of mortgages to individuals and loans to entities that provide rental accommodation, and through general organisation of matters relating to housing. Funding is provided for the specific purpose of increasing people's prospects of acquiring or renting housing on manageable terms (cf. Article 1 of the Housing Act).

³ See footnote 2 above for the publication references.

⁴ EFTA Surveillance Authority Decision No 405/08/COL of 27.6.2008 to close the formal investigation procedure with regard to the Icelandic Housing Financing Fund, OJ L 79, 25.3.2010, p. 40 and EEA Supplement No 14, p. 20.

⁵ A non-confidential text of Decision No 247/11/COL is available on the Authority's website: <http://www.eftasurv.int/media/decisions/247-11-COL.pdf>

⁶ The original predecessor of HFF, the State Housing Agency, was established in 1980.

- (7) HFF is not directly funded by the State, but is financed through returns on its own equity (*i.e.* instalments, interest and price indexation payments on extended loans), through interests paid on issuing and sale of HFF bonds (*ibúðarbréf*) which are listed on the Icelandic Stock Exchange, and through service fees from its customers. HFF also benefits from a state guarantee which follows from the State's unlimited liability for the HFF's debts as its owner.⁷ Furthermore, HFF receives interest support directly from the State budget to cover losses resulting from lending below market rates to entities that construct and provide rental housing.
- (8) For a more detailed description of the HFF system under the Housing Act, reference is made to the Authority's Decision No 405/08/COL.

2.2. The state guarantee

- (9) HFF is a state institution governed by public law (cf. Article 4 of the Housing Act) and as such, under the general unwritten rules of Icelandic public law applicable to state institutions, it enjoys a state guarantee on all its obligations. The guarantee is applicable to all state institutions, regardless of when they were established or the type of their activities. As mentioned above, such guarantee follows from the State's unlimited liability for the HFF's debts as its owner. That means that the State is liable for the entirety of the HFF's obligations, since the guarantee is neither linked to any specific financial transaction of the HFF, nor limited to any fixed maximum amount. This is also reflected in paragraph 3 of Article 5 of the Insolvency Act No 21/1991 (*lög um gjaldþrotaskipti o.fl.*) which rules out the applicability of bankruptcy or other insolvency procedures to institutions such as the HFF.
- (10) In the preamble to the bill which became Act No 121/1997 on State Guarantees (*lög um ríkisábyrgðir*) the following was stated:

*“This is based on the unequivocal rule of Icelandic law that the State is liable for the obligations of its institutions and undertakings, unless the guarantee is limited by an explicit legal provision [...] or the liability of the State in a limited liability company is limited to the share capital contribution.”*⁸

- (11) The state guarantee was also available to the predecessors of HFF: the State Housing Agency, the State Building Fund and the Workers' Housing Fund operated by the State Housing Agency, as well as the State Housing Board (cf. Act No 97/1993 on the State Housing Agency (*lög um Húsnæðisstofnun ríkisins*)).

2.3. The state guarantee premium

- (12) At the moment of the establishment of HFF and its predecessors, the unlimited state guarantee provided in their favour and covering the entirety of their obligations was not made subject to a risk premium or a guarantee premium. According to the Icelandic

⁷ Case E-9/04 *The Bankers' and Securities' Dealers Association of Iceland v EFTA Surveillance Authority* [2006] EFTA Court Report, p. 42, paragraph 72.

⁸ The Authority's unofficial translation. The original Icelandic text can be found at: <http://www.althingi.is/altext/122/s/0099.html>.

authorities, ever since the inception of HFF, the relevant rules of domestic law have been construed so as to exclude HFF from paying any fee for the state guarantee it enjoys.⁹

- (13) Provisional Act No 68/1987 on Fiscal Measures introduced for the first time a general obligation to pay a guarantee premium to the State for state guarantees that were not subject to the risk premium. Subsequently, Article 8 of the Act No 37/1961 on State Guarantees (lög um ríkisábyrgðir), as amended by Act No 65/1988 on State Guarantees, (lög um breyting á lögum nr. 37/1961, um ríkisábyrgðir, með síðari breytingum) required banks, credit funds, financial institutions, enterprises and other such entities that, according to law, enjoy a state guarantee whether through the ownership of the State or other reasons, to pay a guarantee premium to the State as regards their commitments towards foreign entities. The premium was set at 0.0625% per quarter on the principal of foreign commitments based on their average for each period (cf. paragraph 2 of Article 8 of Act No 37/1961).¹⁰
- (14) Originally, no similar premium was imposed on domestic commitments. However, Act No 121/1997 on State Guarantees¹¹ introduced an obligation to pay a premium amounting to 0.0375% in respect of domestic commitments. This rate was later raised to 0.0625% by means of Act No 180/2000.¹²
- (15) Act No 121/1997 also provided for an exemption from payment of any premium for state guarantee in respect of housing bonds issued by the Housing Bond Division of the State Housing Agency. As regards other HFF's obligations, the Supplementary Budget Act for the year 2001 retroactively cancelled HFF's debts relating to unpaid premiums that HFF has accrued under Act No 121/1997. Finally, a general exemption of HFF from payment of a state guarantee premium in respect of all commitments was stipulated in Act No 70/2000 which entered into force on 26 May 2000.
- (16) For a more detailed description of the legislation on state guarantees and subsequent changes to the generally applicable premium rates and the special provisions on HFF, reference is made to the Authority's Decision No 406/08/COL.

3. Grounds for initiating the procedure

- (17) In Decision No 406/08/COL, the Authority explained that the state guarantee in favour of HFF, that existed before the EEA Agreement entered into force on 1 January 1994, as such was not being dealt with under the procedure on the guarantee premium concerning new aid but under a separate procedure for existing aid (Case No 64865, now Case No 70382). The Decision No 406/08/COL dealt with the fact that HFF is exempted from paying a guarantee premium which other undertakings organised in a similar way as HFF are obliged to pay. In this context, in the Authority's preliminary view, it was not relevant for the assessment of the classification of the aid as new or existing whether or not the Act on State Guarantees, as a matter of fact, changed the situation of HFF as regards the payment of guarantee premium. What was considered decisive was that the new Act No 121/1997 on State Guarantees introduced a new system where, for the first time, HFF was being treated more favourably than provided for under the general rule for undertakings

⁹ See p. 4 of the submission dated 8.9. 2008 (Event No 490696).

¹⁰ Loans for which a risk premium had been paid, certain export guarantees and commitments due to credit balance in domestic currency accounts did not constitute a basis for calculation of the guarantee premium (cf. paragraph 2 of Article 9 of Act No 37/1961).

¹¹ Entry into force on 1.1.1998.

¹² Entry into force on 11.1.2001.

benefiting from the implicit state guarantee. It was therefore the Authority's preliminary opinion that any advantage to HFF following from the exemption granted to the Housing Bond Division introduced by Article 7 of Act No 121/1997 would constitute new aid. The same would apply to the exemption/relief from paying the premium relating to other operations of HFF, cf. Act No 70/2000 amending Act No 121/1997 and Supplementary Budget Act 2001.

- (18) In the preliminary view of the Authority, the exemption of HFF from paying a guarantee premium amounted to state aid in the meaning of Article 61(1) of the EEA Agreement. The following state aid elements were identified in the decision to initiate a formal investigation procedure:
- i) exemption (either originally or *ex post facto*) from payment of state guarantee premium amounting to 0.0625% per quarter of the value of foreign commitments relating both to housing bonds and other commitments in the period from 1 January 1998 to date,
 - ii) exemption (either originally or *ex post facto*) from payment of state guarantee premium amounting to 0.0375% per quarter of the value of domestic commitments relating both to housing bonds and other commitments in the period from 1 January 1998 to 10 January 2001,
 - iii) exemption from payment of state guarantee premium amounting to 0.0625% per quarter of the value of all HFF's domestic commitments in the period from 11 January 2001 to date.
- (19) Moreover, the Authority doubted that the above state aid elements can be considered compatible with the EEA Agreement. The Authority explained that, while certain lending for house financing may be defined to be a service of general economic interest in the meaning of Article 59(2) of the EEA Agreement and therefore possibly eligible for aid, the Authority's preliminary view was that the general loans system of the HFF is too broadly set up to comply with the conditions of Article 59(2). The Authority had not been presented with any information that would give it reason to believe that the market would not be able to provide for housing finance on manageable terms in general. Under the general loans scheme of HFF, loans are available to anyone irrespective of income and assets and irrespective of cost and size limitations of the dwelling to be financed. Moreover, loans may also be granted anywhere irrespective of whether local housing finance may be readily available or not.

4. Comments by the Icelandic authorities

- (20) The comments of the Icelandic Government are focused on the fact that any aid element involved derives directly from the implicit state guarantee in favour of HFF, which has already been established to constitute existing aid. In view of the Icelandic authorities, any fee payment is an integral part of the state guarantee as such. Therefore, in view of lack of severable and substantive changes to the state guarantee and the payment of the fee, there is no new aid present and the issue should be dealt within the existing aid case. The Icelandic Government also expressed its view that in the case any new aid was considered to exist it was compatible aid, due to the social character of HFF and the fact that the aid granted to HFF fulfilled the conditions established in Altmark case law.¹³

¹³ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

- (21) As regards the fact of introducing an obligation to pay a premium on state guarantees for foreign commitments of certain financial institutions by Act No 68/1987, the Icelandic authorities argue that HFF has in fact never paid any premium, as it did not have any foreign commitments.
- (22) Furthermore, in view of the Icelandic authorities, liability to pay premium on other domestic commitments than housing bonds, based on Act 121/1997, was “*based on questionable legal basis*”, as it was never intended that the predecessors of the HFF pay a guarantee premium. Icelandic authorities also point to the fact that HFF’s debts relating to any unpaid guarantee premium were retroactively cancelled in the 2001 Supplementary Budget Act, as an indication of the legislator’s intention that HFF should have been exempted from paying a guarantee premium at all times.
- (23) And finally, the exemption from the state guarantee premium for HFF was due to the fact that HFF collected an interest margin of 0.0375% of mortgage instruments guaranteeing commitments relating to housing bonds.¹⁴ The Icelandic authorities call it a “*special state guarantee fee*”. It is collected into a special reserve fund.

II. ASSESSMENT

- (24) 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.”

- (25) This implies that for measures to be classified as state aid within the meaning of Article 61(1) of the EEA Agreement, they must involve a grant by the State or through state resources, confer an advantage on the recipient undertaking, be selective, distort competition and be liable to affect trade between the Contracting Parties.
- (26) The Authority’s State Aid Guidelines on state guarantees¹⁵ stipulate that guarantees given directly by the State, namely by central, regional or local authorities may constitute state aid. Moreover, more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or which benefit from an explicit state guarantee or coverage of any losses by the State provide for a benefit from an open-ended exposure of the State which is referred to as an unlimited state guarantee.¹⁶ Furthermore,

“[t]he benefit of a state guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State

¹⁴ Originally, it was not intended to exempt the entirety of HFF’s obligations guaranteed by the State from the guarantee premium.

¹⁵ Available at <http://www.eftasurv.int/?1=1&showLinkID=15646&1=1>.

¹⁶ See Chapter 1.2. point 4 of the Guidelines on state guarantees and Chapter 7.2.(2) of the State Aid Guidelines on the application of state aid provisions to public enterprises in the manufacturing sector, available at <http://www.eftasurv.int/?1=1&showLinkID=16995&1=1>.

forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.”¹⁷

- (27) In Decision No 247/11/COL, the Authority concluded that the implicit and unlimited state guarantee in favour of HFF constitutes state aid in the meaning of Article 61(1) of the EEA Agreement as it represents a drain on state resources of the Icelandic State and gives HFF an economic advantage. The Authority referred to the fact that, in line with the Authority’s Guidelines on state guarantees, enterprises whose legal form rules out bankruptcy or other insolvency procedures or which benefit from an explicit state guarantee or coverage of any losses by the State, can be regarded as beneficiaries of aid. Moreover, it is not necessary that the State makes any payments under the guarantee in question. The aid is granted continuously from the moment when the guarantee is given and not just at the moment at which the guarantee is invoked or the moment at which payments are made under the terms of guarantee.¹⁸
- (28) In view of the direct link between the presence of state aid elements in a measure consisting of a state guarantee and the necessity to establish (and pay) a (market) premium for such state intervention, the crucial question is whether the relief from the payment of a guarantee fee can be identified as a separate state aid element as compared to the advantage deriving from the guarantee as such. An appropriate premium can neutralise at least part of the advantage granted to the beneficiary of the aid. Had it been possible to establish a market premium for the guarantee at hand, corresponding to the risk for the State associated with the guarantee and had such premium been paid by HFF, the criteria of Article 61(1) of the EEA Agreement concerning the presence of state resources and of an economic advantage for HFF had not been met. Therefore, the premium constitutes an integral element of the calculation of the amount of state aid granted in the form of a guarantee. Such conclusion also follows from the Guidelines on state guarantees, as referred to above.
- (29) The Icelandic authorities expressed a similar view in their comments to the decision to initiate a formal investigation procedure (Decision No 406/08/COL). Moreover, the Icelandic authorities emphasised that the Act on State Guarantees was intended to be a general legislation on the conditions for granting state guarantees. The Act itself did not grant any guarantees as such, but just laid down conditions in respect of guarantees.¹⁹
- (30) Bearing in mind the above, the Authority considers that, due to the special nature of aid elements contained in a state aid measure in the form of a state guarantee, the relief of HFF from payment of a state guarantee premium does not constitute a separate state aid measure from the implicit and unlimited state guarantee provided by the Icelandic State, within the meaning of Article 61(1) of the EEA Agreement. The lack of payment of a premium constitutes a part of the advantage and state resources engaged in the state guarantee granted to HFF. Given that the advantages deriving from this state guarantee are dealt with by the Authority in the state aid procedure on existing aid (cf. Case No 70382 (former 64865), Decision No 247/11/COL), the formal investigation procedure concerning the relief of HFF from payment of a state guarantee premium is without object and can be closed.

¹⁷ Chapter 2.1. of the Guidelines on state guarantees.

¹⁸ Chapter 2.1. of the Guidelines on state guarantees.

¹⁹ Letter dated 8.9.2008, p. 5.

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure concerning the relief of HFF from payment of a state guarantee premium is closed.

Article 2

This Decision is addressed to the Republic of Iceland.

Article 3

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 23 November 2011.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member