

Case No: 60192
Event No: 476272
Dec. No.: 405/08/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 27 June 2008

to close the formal investigation procedure with regard to the Icelandic Housing Financing Fund
(ICELAND)

THE EFTA SURVEILLANCE AUTHORITY¹,

Having regard to the Agreement on the European Economic Area², in particular to Articles 59(2), 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

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

Having regard to the Authority's Guidelines⁵ on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

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

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

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

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

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

⁴ Hereinafter referred to as Protocol 3.

⁵ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) 1994 L 231 and EEA Supplement 1994 No 32. The Guidelines were last amended on 19.12.2007. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/fieldsOfWork/fieldStateAid/guidelines/>

⁶ Published in OJ 2006 C 139/57 and EEA Supplement 2006 No 26.

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

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

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

Whereas:

I. FACTS

1 Procedure

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

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

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

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

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

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

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

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

⁹ See footnote 8.

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

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

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

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

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

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

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

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

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

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

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

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

2 Background for the Icelandic rules relating to housing sector

2.1 Introduction

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

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

2.2 The housing system

2.2.1 Introduction

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

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

2.2.2 Act No 97/1993 on the State Housing Agency

2.2.2.1 Introduction

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

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

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

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

2.2.2.2 The State Housing Agency and the State Housing Board

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

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

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

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

2.2.2.3 State Building Fund

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

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

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

“1. Loans for the construction of homes for the elderly and day-care institutions for children and the elderly.

2. Special loans for those with special needs.

3. Loans or grants for technical innovations and other reforms in the construction industry.”

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

2.2.2.4 Housing Bonds

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

“a. To issue categories of marketable bonds in the name of the State Building Fund, hereafter referred to as housing bonds, subject to the terms and conditions laid down in this Act, or by regulation.

b. To exchange debt instruments secured by mortgage upon residential housing issued in connection with the purchase of real estate, construction of new housing, or extensive additions or improvements to, or renovation of, used residential housing [...].

c. To promote the saleability of housing bonds in the market at all times.”

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

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

The mortgage instruments purchased by the Housing Bonds Division were to be issued for a maximum loan period of 25 years, cf. Article 26 of the Act. According to Article 27, these mortgage instruments could be exchanged for housing bonds amounting to a maximum of 75% of a property's reasonably assessed price. The Minister of Social Affairs was empowered to decide on the maximum percentage through a Regulation whereby he could decide on a higher percentage for new construction and the first-time purchase of residential housing. According to Article 29 of the Act, the Housing Bonds

Division was to promote the saleability of the housing bonds on the market. For that purpose the Division was to seek co-operation with banks, pension funds and other entities on the financial market. Furthermore, the State Building Fund was permitted to dispose of a proportion of its funds for transaction in housing bonds to promote equilibrium on the market.

The Act did not itself contain provisions on who was eligible for loans under the housing bonds system. Instead, such rules were laid down in Regulation no. 467/1991 on the Housing Bonds Division and housing bonds transactions (*um húsbrefadeild og húsbrefaviðskipti*). With regard to lending to undertakings the Regulation provided that building contractors qualified for loans from the system. A building contractor was defined as any recognised entity building and selling completed apartments in accordance with the relevant industrial standard, cf. Article 1 of the Regulation. Rules regarding loans for new buildings were laid down in Article 10 of the Regulation and Article 25 imposed a special requirement on contractors under which they were required to submit a guarantee from a financial institution or a municipality.

2.2.2.5 Workers' Housing Fund

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

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

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

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

Loans for social housing were granted by the State Housing Board from the Workers' Housing Fund, cf. Article 52 of the Act. The loan could be up to 90% of the construction

cost or purchase price, however, not exceeding 90% of the costs basis approved by the State Housing Board, less a 3,5% special contribution of the municipalities for each social assistance apartment, cf. paragraph 2 of Article 42 of the Act.¹¹ With regard to entitlement to social assistance, Article 64 of the Act stated that the right to loans for private owned social housing was limited to those who fulfilled the following conditions:

“a. Do not already own an apartment or a comparable asset in another form.

b. Have had an average income over the past three years before allocation takes place of an amount not exceeding [...]. These income limits shall be determined by the State Housing Board at the beginning of each year [...].

c. Demonstrate payment ability which is assessed by the housing committee of a municipality [...].”

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

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

2.2.3 *The Housing Act No 44/1998*

2.2.3.1 Introduction – main changes

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

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

“The main changes contained in the bill concern the social housing system. The principal change being proposed is that the building and purchase of privately owned social apartments will be stopped and instead a new social lending system will be established. The current provisions on the building of rental apartments

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

will remain in place but it is proposed that the Articles on lease-purchase be abolished. In addition to the above-mentioned, an independent bill will concern building- and housing co-operatives.

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

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

“The main items are as follows:

The State Housing Agency will be abolished.

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

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

2.2.3.2 Institutional set-up

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

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

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

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

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

“1. Lending and administration of housing bonds transactions in accordance with the provisions of this Act.

2. Lending to municipalities, companies and associations for construction or purchase of residential housing. [...]”

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

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

2.2.3.3 Loan categories

2.2.3.3.1 The three types of loans

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

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

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

2.2.3.3.2 General loans

The Housing Act continued the system with general housing loans that had been introduced by the housing bonds system in 1989 and also applied under Act No 97/1993. The new act did not introduce changes regarding this loan category. In order to administer general loans, the Housing Financing Fund was to operate a Housing Bonds Division, as previously operated by the State Housing Agency, whose finances were to be kept separate from other activities of the Fund’s operation, cf. Article 17 of the Housing Act.¹⁵

The Housing Bond Division was to:

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

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

“1. To issue categories of marketable housing bonds in the name of the Housing Financing Fund subject to the terms and conditions laid down in this Act, or by regulation.

2. To exchange debt instruments secured by mortgage and housing bonds.

3. To promote the saleability of housing bonds in the market. [...]”

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

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

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

As can be seen from the above, the housing bond swapping system remained the same after the entry into force of the Housing Act. The Housing Bond Division of the Housing Financing Fund was entrusted with the same functions as the same Division had carried out in the State Housing Agency, cf. Article 19 of the Act No 97/1993 and Article 17 of the Housing Act, both quoted above. This is also borne out by the comments to chapter VI of the bill which became the Housing Act, that the chapter contained substantively corresponding provisions as chapter IV of the Act No 97/1993.¹⁷

2.2.3.3.3 Additional loans

With the Housing Act a new loan category, called additional loans, for people with lower income, was added to the housing system. Those loans could be granted on top of the general loans replacing several social loans granted under Act No 97/1993 but were subsequently repealed.¹⁸ According to Article 30, following a request from a municipal housing committee, the Housing Financing Fund could grant individuals who had a right to a general loan for the purchase of an apartment additional loans which could cover 25% of the estimated value of the apartment. As was the case for social loans under the previous system in Act No 97/1993 before the establishment of the Housing Financing

¹⁶ Cf. 2.2.2.4 above.

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

¹⁸ These additional loans were abolished by Act No 120/2004, cf. section 2.2.3.4.2 below.

Fund, total lending from the Housing Financing Fund (general loan and addition loan) could never exceed 90% of the estimated value of the apartment.

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

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

2.2.3.3.4 Rental apartments

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

In the general comments accompanying Chapter VIII of the bill to the Housing Act it was stated that as regards this type of loans, for the greater part the same rules as under the former Act No 97/1993 would continue to apply.²¹ Accordingly, this loan category is essentially the same as previously provided for in the rules regarding the Workers’ Housing Fund. The maximum loan for this loan category was 90 % of construction cost or purchase price, both under the terms of the Housing Act and Act No 97/1993. Similarly,

¹⁹ An individual could not earn more than 1.620.000 ISK and have assets in excess of 1.900.000 ISK. These figures were to be adjusted annually.

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

²¹ <http://www.althingi.is/alttext/122/s/0877.html> .

the entitlement to these rental apartments was based on criteria of social need such as lack of assets and low income.

2.2.3.4 Amendments made in 2004

2.2.3.4.1 Act No 57/2004

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

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

After the amendments Article 19 of the Housing Act stated:

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

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

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

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

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

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

²² The Authority’s unofficial translation.

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

Several other amendments were made by Act No 57/2004. They were mostly related to issues, which can be termed as technical changes connected with the abolition of the bond swap system, cf. Articles 9 to 20 of the amending Act. This Act did not change anything regarding the substance of the general loans or who was eligible to receive them.

2.2.3.4.2 Act No 120/2004

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

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

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

3 Legal basis under Icelandic law for possible state aid elements

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

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

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

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

3.1 State guarantee

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

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

3.2 Exemption from income and property tax

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

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

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

With regard to property tax, it was abolished, *erga omnes*, by Act No 129/2004 and was levied for the last time on assets at the end of the year 2005. Until the adoption of Act No 129/2004, paragraph 1 of Article 4 Act No 90/2003 exempted the above mentioned institutions from the payment of property tax as well. Hence, the predecessors of the Housing Financing Fund, also fell under this tax exemption.

3.3 Interest support

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

One of the loan categories of the Workers’ Housing Fund was loans for rented social housing, cf. Article 50 of Act No 97/1993, quoted above. Chapter VIII of the Housing Act provides for the current rules on loans for social rental apartments, and as referred to above, they are for the greater part the same as previously applicable. Therefore, both the

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

State Housing Agency, through the Workers' Housing Fund, and the HFF respectively were given the task of providing this category of loans.

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

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

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

3.4 No dividend payments

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

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

This understanding of Icelandic law is confirmed in the Icelandic Government's letter of 15 April 2008 where the following is stated: "*In accordance with the Government Financial Reporting Act, No. 88/1997, the general practice is that public entities are only required to generate profit if they are obliged to do so by law. Furthermore, a legal basis is required if a public entity is required to pay dividends. If a public entity generates profits it shall turn in a normal share of the profits as dividends to the Treasury, as laid down in Article 42 of Act No 88/1997. Public entities which pay dividends, such as*

²⁶ The Icelandic Government's letter of 3 January 2007, page 10.

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

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

Landsvirkjun, for example, have a special legal obligation to do so. Reference can be made to Article 4 of Act No 42/1983 on Landsvirkjun. Therefore there is no general legal provision requesting public entities to pay dividends.”

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

3.5 HFF is not covered by capital adequacy requirements and minimum solvency ratio rules

The Act referred to at point 14 of Chapter II of Annex IX to the EEA Agreement (*Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions*, as amended, hereafter referred to as the “Banking Directive”),²⁹ sets out the requirements for capital adequacy and the rules for a minimum solvency ratio applicable to credit institutions throughout the EU and EFTA Member States. Article 2(3) of the directive contains a catalogue of institutions exempted from the application of the provisions of the Banking Directive. In the decision of the EEA Joint Committee this list was expanded, *inter alia*, by adding the “*Byggingarsjóðir ríkisins*” in Iceland (literally translated “the State’s Building Funds”³⁰). This term covered the State Building Fund and the Workers’ Housing Fund, which, as described above, were merged and taken over by the HFF, cf. Article 53 of the Housing Act. Accordingly, Article 116 of Act no. 161/2002, on Financial Institutions (*lög um fjármálafyrirtæki*) exempts the HFF from the application of the Act, which is among the measures implementing the directive into Icelandic law.

4 Comments by the Icelandic authorities

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

5 Comments from third parties

The SFF has claimed that the changes made by the Housing Act cause the system to be classified as new aid as these changes implied that the housing system did not remain

²⁹ The Act was incorporated by Decision No 15/2001 of the EEA Joint Committee and entered into force 1 October 2001.

³⁰ This translation has been provided by the Icelandic Government

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

in place more or less unchanged until today. In its letter of 31 January 2007 the SFF referred, *inter alia*, to;

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

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

II. ASSESSMENT

1 The HFF not being subject to capital adequacy requirements and minimum solvency ratio rules, is not State aid

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

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

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

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

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

2 Joint considerations pertaining to the state guarantee, the interest support, the exemption from income and property tax and the lack of dividend payments

2.1 The different procedures for new and existing aid

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

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

According to the European Court of Justice:

“[...]when the Commission examines aid measures under Article 87 EC to determine whether they are compatible with the common market, it is required to initiate the procedure under Article 88(2) EC where, after the preliminary examination, it has been unable to overcome all the difficulties involved in determining whether those measures are compatible with the common market [...] The same principles must naturally apply where the Commission also entertains doubts as to the actual classification as aid, within the meaning of Article 87(1) EC, of the measure examined. The Commission cannot therefore be criticised for initiating the procedure even where, in the decision adopted for that purpose, it expresses doubts as to the status as aid, within the meaning of Article 87(1) EC, of the measures covered by it.

[...] the Commission must undertake an adequate examination ... on the basis of the information already communicated to it by that stage by the Member State, even if the outcome of that examination is a non-definitive classification of the measures examined. [...] If that information enables it, for the purposes of a provisional assessment, to take the

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

view that the measures at issue probably in fact constitute existing aid, the Commission must then deal with them within the procedural framework provided for in Article 88(1) and (2) EC. On the other hand, if the information provided by the Member State is not such as to justify that provisional conclusion or if the Member State provides no information on the matter, the Commission must deal with those measures within the procedural framework provided for in Article 88(3) and (2).”³³

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

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

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

2.2 The legal test

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

“[...] the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at

³³ Case C-400/99 *Italy v Commission* [2005] ECR I-3657, paragraphs 47-48.

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

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

any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it".

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

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

"To take the contrary view would in effect be tantamount to requiring the Member State concerned to notify to the Commission and submit for its preventive review not only new aid or alterations of aid properly so-called granted to an undertaking in receipt of existing aid but also all measures which affect the activity of the undertaking and which may have an impact on the functioning of the common market, on competition or simply on the actual amount, over a specific period, of aid which is available in principle but which necessarily varies in amount according to the undertaking's turnover. Ultimately, in the case of a public undertaking such as the OND, each new insurance operation which, according to the information provided at the hearing by the Belgian Government, must be submitted to the supervisory authorities, could thus be regarded as a measure to which the procedure laid down in Article 93(3) of the Treaty applies.

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

In *Gibraltar*, the Court of First Instance held that

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

In the assessment of whether a change to an aid measure has the effect of turning hitherto existing aid into new aid, the Commission has examined whether the change is substantive

³⁶ Case C-44/93 *Namur-Les Assurances du Crédit SA* [1994] ECR I-3829, paragraphs 28-29 (underlined by the Authority). See also paragraph 23 of the judgment where the Court referred to changes "not affecting the substance of those advantages".

³⁷ Case C-44/93, *Namur-Les Assurances du Crédit SA*, cited above, paragraphs 32-33.

³⁸ Joined cases T-195/01 & T-207/01, *Government of Gibraltar v Commission* [2002] ECR II-2309, paragraph 111. See similarly Opinion of AG Fennelly in Joined Cases C-15/98 and C-105/98 *Italy and Sardegna Lines, Servizi Marittimi della Sardegna SpA v Commission* [2000] ECR I-8855, paragraph 64.

in nature.³⁹ In this respect the Commission has taken account of the nature of the advantage, the aim pursued with the advantage, the basis on which the advantage is made, the persons and bodies affected by it and the relevant sources of finance. In contrast, the Commission has not looked into legal changes, which are not a part of the aid measure in question.

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

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

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

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

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

implied that a measure having the character of a scheme would convert from existing aid to new aid in relation to some of the beneficiaries, but not in relation to others solely because the rules pertaining to the former, but not to the latter, had changed. Such a result would be incompatible with the fact that the measure consisted of one single measure.

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

2.3 Classification of the different aid measures as new or existing aid

2.3.1 *The State guarantee*

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

Since the entry into force of the EEA Agreement there have been no substantive, or even non-substantive changes to the extent and function of the guarantee as such. Act No. 121/1997 on State Guarantees, with subsequent amendments, introduced a minor guarantee premium at a rate of 0.00625% per quarter (0.00375% per quarter on domestic commitments until 2001). However, this premium only reduces the aid following from the original State guarantee scheme which predates the EEA Agreement. The original scheme can therefore not, regardless of any advantage connected to it, be classified as new aid.⁴³

Moreover, none of the changes to the operation of HFF described above in Section I.2 implied any such change. The nature of the advantage was exactly the same and so was the legal basis for the aid. Nor did the purpose of this non-individual measure, which goes far beyond the particularities of the housing loan system and applies generally to all State institutions, change as a consequence of the changes to the housing loan system brought about by the Housing Act.⁴⁴ In other words, those legislative changes were not only

Commission's invitation to submit comments pursuant to Article 88(2) EC in Case E 3/2002, EDF, OJ 2002 C 164/7, paragraphs 53-55.

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

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

⁴⁴ In this respect, the situation is parallel to the following decisions of the Commission German Broadcasters, Poczta Polska, La Poste, EDF etc. In those decisions, the Commission had to assess whether State guarantees to public undertakings qualified as new or existing aid. In all decisions the Commission

separable from this possible aid measure, but wholly unconnected thereto. Hence, the guarantee scheme cannot constitute a new aid measure that can be assessed under the present formal investigation procedure.

2.3.2 *Exemption from income and property tax*

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

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

Until the adoption of Act No 129/2004, abolishing property tax, paragraph 1 of Article 4 of the Income and Property Tax Act No 90/2003 exempted the above mentioned institutions from the payment of that tax as well. Also with respect to property tax, this Act merely consolidated rules already found in the above-mentioned Act No 75/1981 on Income and Property Tax. The property tax is now abolished altogether. Until its abolition in 2004, the exemptions for these institutions from that tax must, in the event they constitute aid, be assessed as a scheme falling within the definition in Article 1 (d) in part II of Protocol 3 to the Surveillance and Court Agreement. In the time between the entry into force of the EEA Agreement and the general abolition of the property tax there was no substantive, or even non-substantive changes to the extent, financing or function of the tax exemption and the changes to the housing loan system affected neither the nature, aim, functioning or financing of the tax exemption. Hence, this tax exemption cannot constitute a new aid measure that could have been pursued under the present formal investigation procedure.

2.3.3 *The interest support*

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

made the finding that the guarantee itself had either not changed or had remained substantially unchanged. The Commission did not, in its assessment of the aid following from the guarantee, venture into an assessment as to whether the particular undertaking at hand had changed its operations as this question did not relate to the aid measure as such, but as to one of the beneficiaries of an abstractive defined aid scheme.

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

With regard to the institutional change, constant Commission practice demonstrates that bodies benefiting from aid may change their legal personality, by merger, de-merger or other reasons without this affecting the classification of the aid. This is the case both when that change in legal personality takes place by way of a private law measure and when the change is provided for in a law or other public law measure.⁴⁵ Indeed, the change from the four public bodies operated under Act No 97/1993 compared with the Housing Act cannot in itself have any bearing on the compatibility assessment of the relevant measures. As will be recalled, the Housing Financing Fund took over all assets, rights and obligations from its predecessors and continued their tasks, demonstrating that the reform aimed at maintaining the continuity between these organisations.⁴⁶

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

Hence, the changes brought about by the Housing Act did not alter the task of providing loans to rental social housing; in other words the purpose of this measure remained the same.⁴⁷ Moreover, the fact that the budgetary contribution is now targeted only at these

⁴⁵ Commission Decision of 29 November 2007, C (2007) 5778, State aid C 56/2007 – France, Garantie illimitée de l'Etat en faveur de La Poste, paragraphs 93-97., Commission Decision E-14/2005 / Portugal, compensation payments to public service broadcaster RTP, paragraphs 78-80, Commission Decision of 20 April 2005 in State aid case E 10/2005 (ex C 60/1999) – Redevance radiodiffusion TF1, paragraph 33, and Letter from the Commission to Germany of 8 May 2000 proposing appropriate measures in case E 10/2000, Landesbank, point 7, first paragraph. As regards the exemption the HFF enjoys from paying a guarantee fee pursuant to Act no. 121/1997 on State Guarantees, the Authority's preliminary assessment is that it constitutes new aid and that measure is being dealt with separately; cf. the Authority's decision 406/08/COL of 27 June 2008.

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

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

loans is a result of the abolition of the direct state contributions for other social loans. The abolition of direct state contributions to certain activities, does not constitute a change in the financing of another measure. Hence, such abolition cannot have an impact on the classification of the character of the remaining measure. Rather, it constitutes an abolition of a separate support measure.⁴⁸

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

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

2.3.4 *No dividend payments*

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

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

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

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

2.4 Conclusion as to new vs. existing character of four potential state aid measures

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

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

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

- First, the mere fact that Iceland chose the legislative technique of enacting a new act rather than amending an already existing act cannot in itself lead to a reclassification of an hitherto existing aid measure.⁴⁹ What matters is solely whether the new act implied a substantive changes in the relevant aid measures such as to influence the appreciation of the compatibility of these measures. In that respect, the Authority finds of considerable importance that the Housing Act was, as regards all essential characteristics, a continuation of the previous system with the same objective of securing affordable housing for all residents in Iceland. As shown above in Section 2.2.3.1, the aim of the Housing Act is the same as the one pursued under the Act No 97/1993.
- Second, as referred to above, there is consistent Commission practice to the effect that a change of legal personality of the aid recipient is not relevant for the classification of the aid.
- Third, the financing of the potential aid measures in favour of the HFF, currently in force, has not changed as a consequence of the enactment of the Housing Act and subsequent amendments to that Act.
- Fourth, the Housing Act did not change anything as regards the issuance of the housing bonds, the main loan category. A new loan category the so-called additional loan category was introduced as a part of the reform of social housing under the Housing Act. However, in fact this loan category replaced the categories of social loans which could be granted pursuant to Act No 97/1993. As referred to section I.2.2.2.3.3, the maximum percentage of these types of loans and the criteria governing entitlement were almost identical. Thus, the main difference in the rules regarding these types of loans is that the Housing Act provides that these apartments

⁴⁹ Commission decision E 12/2005 – Poland, unlimited State guarantee in favour of Poczta Polska, paragraphs 39-47.

could, subject to certain conditions, be sold on the general market for a market price. The Authority is of the opinion that these legislative changes did neither materially change the circle of possible recipients of social loans nor extend the activities of the HFF in that field compared to its predecessors. Furthermore, abolition of social loan categories, cf. section I.2.2.3.3.3 above, cannot cause an aid scheme to be categorised as new aid. Such changes could, at most, be regarded as abolition of aid.

- Fifth, the Authority cannot agree with the SFF that the Housing Act entailed a substantial expansion of the possibility for the HFF to lend to undertakings building rental apartments.⁵⁰ As outlined above in section I.2.2.3.3.2, both under the terms of the regulations issued on the basis of the Housing Act and its predecessor, loans from the housing bonds system could be granted to undertakings involved in the construction of apartments.
- Sixth, as described above, the housing bonds system was abolished by Act No 57/2004 and replaced by direct cash loans granted by the HFF. SFF has claimed that this change calls for a qualification as new aid. However, this Act changed nothing as regards the scope of potential recipients and alike, nor did it entail a change in the purpose and financing of any possible aid measure to HFF. Therefore, the Authority is of the opinion that the changes are to be regarded as administrative and technical rather than substantive.
- Seventh, by Act No 120/2004, the limit of the HFF's general loan category was raised to 90% of the appraised value of property. As a consequence, Chapter VII of the Act on additional loans was abolished. Act No 120/2004 altered nothing with the regard to the public service activities of the HFF system. The aim of the Housing Act remained the same, the aid recipient was still only the HFF and its operations were essentially unchanged. Furthermore, it did not change who was eligible for loans from the HFF, it only meant that the 90% maximum was open to everyone.⁵¹ The situation here can be contrasted with *Keller* where the Court of First Instance held that an increase from 7 billion ITL to 80 billion ITL in the maximum fixed assets an undertaking was permitted to hold in order to come within an approved aid scheme, constituted a substantive amendment that should have been notified to the Commission. The Court stated that this change had entailed an increase in potential aid recipients and had indeed opened the scheme for applicants.⁵² Changing the aid scheme thereby potentially increasing the number of aid beneficiaries is an alteration to one of the basic features of a scheme capable of having an impact on its compatibility with EC Treaty. However, in this case, whether general loans are 70% or 90% of the appraised value of a real estate is not significant with regard to whether such loans might be classified as public service pursuant to Article 59(2) of the EEA Agreement.

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

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

⁵² Case T-35/1999, *Keller SpA v Commission*, paragraph 62.

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

This Decision is addressed to the Republic of Iceland.

Article 4

Only the English version is authentic.

Done at Brussels, 27 June 2008

For the EFTA Surveillance Authority,

Per Sanderud
President

Kurt Jaeger
College Member