



# *EFTA SURVEILLANCE AUTHORITY*

Doc. No. 97-1394-I  
Dec. No. 51/97/COL  
Ref. No. SAM 030.95013  
and SAM030.95019

## EFTA SURVEILLANCE AUTHORITY DECISION

OF 19 MARCH 1997

TO PROPOSE APPROPRIATE MEASURES TO ICELAND  
WITH REGARD TO PROVISIONS UNDER THE HARBOUR ACT  
ON STATE GRANTS FOR DOCKING CONSTRUCTIONS FOR SHIPS

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area<sup>1</sup>, in particular to Articles 61 to 63 and 109,

Having regard to the Act referred to in point 1b of Annex XV to the EEA Agreement on aid to shipbuilding (Council Directive No. 90/684/EEC as amended by Council Directive No. 93/115/EC and Council Directive No. 94/73/EC)<sup>2</sup>,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice<sup>3</sup>, in particular Article 1 of Protocol 3 thereof,

WHEREAS:

## I. FACTS

### 1. Background

Article 1(1) of Protocol 3 to the Surveillance and Court Agreement provides that "the EFTA Surveillance 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

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<sup>1</sup>Hereinafter referred to as the EEA Agreement

<sup>2</sup> This Council Directive, as adapted for the purpose of the EEA Agreement by decisions of the EEA Joint Committee No 21 of 5 April 1995 and No 16/96 of 4 March 1996, will hereinafter be referred to as the Shipbuilding Directive.

<sup>3</sup>Hereinafter referred to as the Surveillance and Court Agreement

any appropriate measures required by the progressive development or by the functioning of the EEA Agreement."

In September 1994 the EFTA Surveillance Authority received a complaint concerning alleged infringements of Articles 61 and 62 of the EEA Agreement in relation to certain support measures under the Icelandic Harbour Act No 23/1994, in particular regarding public support for investments in docking constructions for ship repairs ("upptökumannvirki fyrir skip"), under Articles 24 to 26 of the Act.

The complaint concerns on the one hand certain provisions of the Harbour Act No 23/1994, which allow for State contributions to investments in docking constructions for ships, and on the other hand alleged State aid in support of an investment in a floating dock by the Akureyri Harbour, which was subsequently leased to the shipyard Slippstöðin Oddi hf

In December 1995 the Authority received another complaint concerning application of the above provisions of the Harbour Act, which focused in particular on alleged State aid in the form of subsidised leasing by municipal harbour funds of docking facilities for ships, in favour of certain companies in the shipbuilding and ship repair industry in Iceland. In this context reference was made to the above project by the Akureyri Harbour.

By Decision No. 50/97/COL, of which the Icelandic authorities are informed by letter of 19 March 1997 (Doc. No. 97-1271-D), the Authority has assessed and authorised the aid which has been awarded to the project in the Akureyri Harbour. It suffices to refer to these documents for a more detailed account of the background and substantive issues involved in that aid case, which has prompted the Authority to review by the present decision the provisions of the Harbour Act, which relate to state support for investments in docking constructions for ship repairs.

By letter dated 24 October 1995 (Doc. no. 95-6144-D) the EFTA Surveillance Authority requested the Icelandic authorities to provide certain information on the matters raised by the first complaint. By letter of 7 December 1995 the Icelandic Mission to the EU transmitted a letter from the Icelandic Ministry of Transport of 30 November 1995 containing a detailed response to the Authority's request for information.

By letter dated 16 October 1996 (Doc. no. 96-5779-D) the Surveillance Authority requested certain additional information, to which the Icelandic authorities responded by letter from the Icelandic Mission to the EU, transmitting a letter by the Ministry of Finance dated 9 December 1996.

The issues raised by the complaints have been discussed at meetings with the Icelandic authorities in Reykjavík on 3 March 1995 and 26 February 1996 as well as in numerous informal contacts.

## **2. Relevant provisions of the Harbour Act**

The Harbour Act is a general framework legislation containing *inter alia* provisions on the co-ordination of harbour affairs by the central authorities, the management and operation of harbours, investments in harbours and their financing, investment plans, and a so-called Harbour improvement fund. The present decision relates only to the provisions of the Harbour act on State grants for the financing of docking constructions for ships.

The first paragraph of Article 24 of the Harbour Act lists seven different types of harbour construction projects which are eligible for financing contributions from the State Treasury. Amongst these are, in point 6, construction projects in port areas regarding docking facilities for ships (in Icelandic "*Framkvæmdir á hafnarsvæðum við upptökumannvirki fyrir skip*"). Article 26 specifies, in point 3, that state financing of such projects can be up to 60% of the initial costs of the constructions. Article 25 makes the award of these state grants subject to certain conditions, *inter alia* that the owners of the harbour have established a harbour fund to administer and operate the harbour. According to Article 8, harbours are owned by municipalities. This in turn implies that only municipal harbour funds are eligible for State grants; other owners of docking facilities for ships, e.g. privately owned shipyards, do not qualify for such grants.

## **3. Claims made by complainants**

The complainants submitted that while certain docking constructions for ships in Iceland are owned by private companies, state support for the building of such facilities is according to the Harbour Act reserved to public enterprises (i.e. municipal harbour funds) and not available to private companies.

It has furthermore been alleged that when docking constructions are owned by harbour funds it is quite customary that they are leased to private companies at a rent which is far below the operating costs. It is claimed that local authorities of the municipalities concerned consider it important to maintain employment and therefore have decided to subsidise the operation. Both complainants consider that the aid arrangement for docking constructions for ships provided for under the Harbour Act infringes the provisions of Article 61 of the EEA Agreement. One of the two complainants also claims that this aid arrangement distorts competition between private and public operators and considers it to be an essential prerequisite for such aid, if it is deemed to be necessary, that companies have equal access to it, regardless of their legal status.

## **4. Submission by the Icelandic authorities**

The following gives a summarised account of those parts of the reply by the Icelandic authorities to the Authority's request for information, which relate to the provisions of the Harbour Act.

The objective of the Icelandic legislator in providing grants for docking constructions for ships is based on safety considerations and broad national economic interests, but is not directed to supporting the operation of individual companies in the shipbuilding industry nor to increase capacity in the shipbuilding industry.

The Icelandic authorities emphasise the vital importance of fishing and maritime transport for Iceland and the hazardous conditions in the seas round the country. Hence, there is a need for safe harbours round the country, with adequate docking facilities, to allow mandatory inspection and necessary repairs and to ensure minimum disruption of the fishing operations, when repairs and service are needed. It has also been necessary to ensure that the type and size of docking facilities for ships match the requirements of the fleet at any given time and thus to respond to a general increase in the size of ships from the time when previous facilities were constructed.

The Ministry of Transport considers that the provisions of the Harbour Act are not caught by Article 61 of the EEA Agreement. It is also of the view that by the revised Harbour Act enacted in 1994 (no. 23/1994), no significant change was made of the relevant articles (24 - 26), the only substantive change being that the State's maximum financing contribution for investments in docking constructions for ships was raised from 40% to 60% of costs. Hence, it was not considered necessary to notify the act.

It appears from the submission of the Ministry of Transport that it is under the impression that only newbuildings of ships and not repairs are covered by the Shipbuilding Directive, and that only if support for docking facilities directly or indirectly promotes newbuildings would it be caught by the Directive or Article 61 of the EEA Agreement.

In the event that the EFTA Surveillance Authority would not agree with the view that Article 61 of the Agreement does not apply, the Ministry refers to the exemption clauses in Article 61(3) of the EEA Agreement and has submitted certain information relating to structural difficulties in recent years in the Icelandic shipbuilding and - repair industry.

## **II. APPRECIATION**

### **1. The presence of State aid**

Article 61(1) of the EEA Agreement provides that "any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement".

It is beyond doubt that measures taken by central and municipal authorities to support an investment, which will be used for ship repairs - a mobile service in which considerable trade between Iceland and other Contracting Parties takes place - are

measures taken through State resources, which are liable to affect trade between Contracting Parties.

The question whether certain undertakings or the production of certain goods are favoured must be considered in more detail. It must be kept in mind that on the one hand Article 125 of the EEA Agreement provides that the Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership, and on the other hand that according to Article 59, public undertakings shall be subject to the rules of the Agreement on competition, including those on State aid. On this basis the rules in Chapters 19 and 20 of the Authority's State Aid Guidelines<sup>4</sup> have been developed. By applying the test of the so-called "market economy investor principle", these rules clarify under which circumstances the financial relations between the State and public enterprises may be considered to involve State aid. According to this principle, State aid is considered to be involved when the State provides finance to a company in circumstances that would not be acceptable to an investor operating under normal market conditions.

The provision by the State Treasury of a grant to harbour funds to finance docking constructions need not automatically imply State aid. This depends on the policy of the recipient. If a harbour fund receiving such grants only makes the investment, provided it is commercially viable even without the State's contribution and, when operating or leasing the facilities, charges for them to cover full costs (i.e. gross costs without taking account of state grants) and normal return on the investment, then such grants would not involve State aid, but only a transfer of funds between central and regional authorities. However, it must be considered unlikely, a priori, that this is the typical behaviour of the harbour funds.

Information submitted by the Icelandic authorities in relation to questions from the Authority concerning an investment by the Akureyri Harbour in a floating dock and slipways for ship repairs - an investment which subsequently has received State grants under the Harbour Act -, shows that the Akureyri Harbour or the Icelandic harbour authorities collectively did not act as can be expected of a private investor, when deciding to make the investment, as the expected return on the investment seems to have been quite low. When deciding to lease these facilities to the shipyard Slippstöðin Oddi hf., the rent was set at a level, which clearly reflects the anticipated state grant, i.e. the benefits of the state grant were transferred to the end user, the shipyard. The Akureyri Harbour has moreover confirmed that when taking the relevant decisions it was also guided by industrial considerations.

On the above basis it must be concluded that the provisions in Articles 24-26 of the Harbour Act, on the State's financing contribution towards docking constructions for ships, give room for an application constituting State aid or forming the basis for State aid being awarded through local authorities, and that the provisions are also in practice so applied.

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<sup>4</sup>Procedural and Substantive Rules in the Field of State Aid. 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. Initially adopted and issued by the EFTA Surveillance Authority on 19 January 1994 and published in the EEA Section of the Official Journal of the European Communities (No L231) and the EEA Supplement thereto (Nr. 32) on 3.9.1994.

## 2. Application of the relevant State aid rules

In the above circumstances the Authority is obliged to examine whether the aid measures concerned can benefit from any of the exemptions provided for in the second or third paragraph of Article 61.

Under Article 24 of the Harbour Act, the State Treasury can provide grants to contribute to the financing of investments in docking constructions for ships. Such facilities can be and are primarily used for ship repairs.

The act referred to in point 1b of Annex XV to the EEA Agreement (Council Directive 90/684/EEC on aid to shipbuilding)<sup>5</sup>, hereinafter referred to as the Shipbuilding Directive, which is based on Article 61(3)(d) of the Agreement, covers *inter alia* State aid to enterprises engaged in ship repairs of metal-hulled sea-going vessels of not less than 100 GT. Article 6 of that act contains provisions on investment aid for such companies. It follows that aid to finance investments in ship repair facilities, such as provided for under Article 24 of the Harbour Act, is covered by the Shipbuilding Directive and must be assessed in relation to Article 6 of that directive.

### Material rules of the Shipbuilding Directive

As regards investment aid to ship repair yards, Article 6(1) of the Shipbuilding Directive provides that such aid may not be granted unless it is linked to a restructuring plan which results in a reduction in the overall ship repair capacity in the EEA country concerned. In this context the EFTA Surveillance Authority may take into account capacity reductions carried out in the immediately preceding years.

Article 6(3) establishes that the amount and intensity of aid must be justified by the extent of the restructuring involved and that the aid must be limited to supporting expenditure directly related to the investment.

Article 6(4) states that when examining the aid, the Authority shall take account of the extent of the contribution of the investment programme concerned to such common objectives for the sector as innovation, specialization, working conditions, health, safety and the environment.

As has been stated above, the Harbour Act provides that investments by municipal harbour funds in docking facilities for ships are eligible for a state grant up to 60% of the investment costs. It does not make the award of such grants subject to any conditions of the type stipulated in Article 6 of the Shipbuilding Directive. The legislation does therefore not ensure that the above requirements in Article 6 of the Shipbuilding Directive are respected. This does not exclude, of course, that the conditions might be met in individual cases.

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<sup>5</sup> This act was integrated in the EEA Agreement by Decision of the EEA Joint Committee No 21/95, which entered into force on 1 April 1995.

### Other applicable State aid rules

Investment aid for shipyards or ship repair yards is normally also to be assessed in conjunction with other relevant State aid rules governing investment aid, in particular either the rules on aid to small and medium-sized enterprises (SMEs) or on regional investment aid or both, depending on the circumstances. Provided certain conditions are fulfilled, the SME rules allow up to 7,5% gross of investment aid to companies qualifying as SMEs and 15% to companies qualifying as "small". According to the map of assisted areas for Iceland, investment aid of up to 17% net is admissible for companies located in assisted areas, plus a top-up of 10% gross for SMEs.

It is evident that the ceiling of 60% on grants to docking constructions for ships stipulated in Article 26 of the Icelandic Harbour Act exceeds by far any admissible ceiling under the State aid rules.

It shall finally be noted that neither the Shipbuilding Directive nor other relevant State aid rules limit the freedom of the Icelandic authorities to restrict aid of the current kind to certain types of enterprises, e.g. to public enterprises (harbour funds).

### **3. Conclusions**

Assessment of the Icelandic Harbour Act has led to the following conclusions:

- Although the objectives indicated by the Icelandic authorities underlying the relevant provisions in the Harbour Act may be relevant for assessment of individual cases, the law does not ensure compliance with the material provisions in Article 6 of the Shipbuilding Directive. There is also a clear risk that the same provisions of the Harbour Act may lead to the relevant ceilings on investment aid under the rules on State aid for SMEs or regional investment aid being exceeded.
- In view of the above, any aid to finance docking facilities for ships, as is foreseen under Art. 24 of the Harbour Act, or related aid measures by municipal harbour authorities in Iceland must be notified in advance to the EFTA Surveillance Authority in order that they may be carefully examined on a case-by-case basis, to ensure their compliance with the relevant State aid rules.

### **HAS ADOPTED THIS DECISION:**

1. The EFTA Surveillance Authority proposes to Iceland, on the basis of Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, the following appropriate measures with regard to the State aid arrangement for docking facilities for ships provided for under Articles 24 to 26 of the Harbour Act No. 23/1994:

- (i) The Icelandic Government shall undertake not to apply the provisions of the Harbour Act on the state's financing contribution to docking constructions for

ships, without prior notification to and approval by the EFTA Surveillance Authority, pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement and Article 11 of the act referred to in point 1b of Annex XV to the EEA Agreement.

- (ii) The Icelandic Government shall take the necessary steps to ensure that any future decisions by municipalities or municipal harbour funds on investments in docking facilities for ships or on the leasing of such facilities be notified in advance to the EFTA Surveillance Authority pursuant to the provisions referred to in point (i) above.
- (iii) The Icelandic Government shall signify its agreement to the above proposal or otherwise submit its observations by 23 April 1997.
- (iv) The complainants shall be informed by means of a copy of this decision.

Done at Brussels, 19 March 1997

For the EFTA Surveillance Authority

Knut Almestad  
President

Hannes Hafstein  
College Member