

IV

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

EFTA SURVEILLANCE AUTHORITY DECISION

No 328/09/COL

of 15 July 2009

on the Icelandic Harbour Acts (Iceland)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

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

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

Whereas:

I. FACTS

1. Procedure

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

By letter of 7 May 2007 (Event No 420581), the Icelandic authorities notified, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, amendments to the Icelandic Harbour Acts which (among other matters) provided for support for quay installations and the use of pilot vessels, and damage compensation for ship lift/hoist facilities, quay installations and pilot vessels. The support is provided through a Harbour Improvement Fund created in 1984 ("the Fund").

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

After various exchanges of correspondence ⁽⁸⁾, by letter dated 12 December 2007 the Authority informed the Icelandic authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 in respect of these measures.

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement ⁽⁵⁾, and in particular the Chapter on state aid to shipbuilding and the Chapter on National Regional Aid,

The Authority's Decision No 658/07/COL to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement to it ⁽⁹⁾ and through that process the Authority called on interested parties to submit their comments.

HAVING REGARD to the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁶⁾,

The Icelandic authorities responded by letter dated 15 February 2008 (Event No 465549).

The Authority received one comment from an interested party on 23 April 2008 (Event No 476888). By letter dated 20 May 2008 (Event No 477796), the Authority forwarded this to the Icelandic authorities, who were given the opportunity to respond. No formal (written) response to that correspondence was received.

⁽¹⁾ Referred to throughout as the "Authority".

⁽²⁾ Referred to throughout as the "EEA Agreement".

⁽³⁾ Referred to throughout as the "Surveillance and Court Agreement".

⁽⁴⁾ Referred to throughout 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* (referred to as "OJ") L 231, 3.9.1994 p. 1, and EEA Supplement No 32, 3.9.1994, p. 1 (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/state-aid/legal-framework/state-aid-guidelines/>.

⁽⁶⁾ Decision No 195/04/COL of 14 July 2004 (OJ L 139, 25.5.2006 p. 37 and EEA Supplement No 26, 25.5.2006 p. 1 as amended). See the Authority's website: <http://www.eftasurv.int/fieldsOfWork/fieldstateaid/legaltexts>.

⁽⁷⁾ OJ C 96, 17.4.2008, p. 3, and EEA Supplement No 20, 17.4.2008, p. 2.

⁽⁸⁾ For more detailed information on the various correspondence between the Authority and the Icelandic authorities, reference is made to the Decision to open the formal investigation procedure.

⁽⁹⁾ See footnotes 7 and 8 above.

2. Description of the proposed measure

The Icelandic Harbour Act framework legislation – Harbour Act No 61/2003 (as amended by Act No 11/2006 and Act No 28/2007) allows for⁽¹⁰⁾ the funding of municipality-owned Icelandic harbour infrastructure and facilities, and to compensate for damage to them.

For a detailed explanation of the relevant legislative provisions relating to Icelandic harbours, reference is made to the Authority's Decision No 658/07/COL to open the formal procedure of 12 December 2007. The Authority will hereinafter focus on the specific provisions that caused concern and which were the subject of the formal investigation.

The specific provisions are as follows:

- (a) Pilot vessels: A provision under Article 24(2)(a) of the Harbour Act 2003 ("the 2003 Act") under which the "initial costs for pilot vessels where conditions in and near the harbour require such safety equipment" may be met from the Fund. The fund may cover up to 75 % of these initial costs under this provision.
- (b) Quay installations: Provisions under Article 24(2)(b) and (c) of the 2003 Act relating to the use of the Fund to pay for "quay installations". Funding may be provided up to 90 % of the cost of the quay installations under sub-paragraph (b) and up to 40 % under sub-paragraph (c).
- (c) Damage compensation: A provision under Article 26(3) of the 2003 Act under which the harbours eligible for support from the Fund under Article 24 of the 2003 Act may claim compensation for damages caused to their operational facilities. There is no limit on the amount of compensation that may be provided.
- (d) Ship hoist/lift facilities: A provision inserted into Article 26(3) of the 2003 Act by a 2007 amendment act, which is intended to extend the scope of the damage that harbour operators may receive compensation for so as to include damage to ship hoist/lift facilities. Again, the amount of compensation is not limited.

2.1. Grounds for initiating the procedure

In Decision No 658/07/COL, the Authority expressed doubts as to whether support to the pilot vessels could be considered a general measure and valid expenditure incurred by the state in

developing a maritime transport system in the interest of the general public. It could not exclude that support to pilot vessels could be considered selective as public support to investments in mobile assets and operational services generally favours certain undertakings.

Similarly, on the basis of the information available, the Authority could not draw any conclusion as to whether support for quay installations could qualify as general measure.

Finally, the Authority preliminarily considered that damage compensation could constitute state aid if available in respect of installations that are not general measures.

The Authority also expressed doubts that the measures in question could be considered compatible with the EEA Agreement. This was on the basis (most notably) that the derogation in Article 61(2)(b) appeared not to be applicable given the extension of the damage compensation beyond making good damage caused by natural disasters, and due to the apparent inapplicability of either the Regional aid or Ship-building Chapters of the State Aid Guidelines. The Authority also noted that support from the Fund was not available to privately owned harbours, and that a valid justification for this differentiation was not apparent.

3. Comments from third parties

One comment was received from a third party in a letter addressed to the Authority dated 23 April 2008. Stálsmiðjan, a private harbour operator based in Reykjavik, agreed with the initial views expressed by the Authority in its opening decision.

4. Comments by the Icelandic authorities

In a letter dated 15 February 2008, the Icelandic authorities argued first of all that despite changes to the legislation, interim provisions within the 2003 Act meant that the provisions relating to support from the Fund "may be postponed" and that the legal position set out in the 1994 Harbour Act was to be maintained until the end of 2008. The Authority was also informed that this interim provision was extended by Act No 145/2007 so that it now applies until the end of 2010.

It is also the Icelandic authorities' view that "docking facilities" ("hafnarmannvirki") – a term said to incorporate the measures subject to investigation – are regarded as public infrastructure in Iceland, serving a public purpose, with open access and forming an integral part of a harbour.

⁽¹⁰⁾ Funding under the new provisions has not yet been implemented.

More specifically in respect of the measures which are the subject of the formal investigation, the Icelandic authorities argued that pilot vessels are an essential part of the activity and infrastructure of a harbour where conditions require. It is stated that their use is strictly for safety purposes (including in emergency situations), and is in some circumstances obligatory by law. The authorities also stress that their use is a burden borne by harbours due to their cost. In so far as quay installations are concerned, the Icelandic authorities again argue that they are part of the general infrastructure of a harbour, referring to them as “berthing constructions”.

The Icelandic authorities also argue that the measures do not distort competition or affect trade between EEA states. The basis for this argument is geographical, with reference made to the travel time (of 47 hours) between Iceland and mainland Europe and to information provided by the Federation of Industries in Iceland that it is “for the most part unknown for foreign vessels [to] come to Iceland for repair work”. Whilst it is acknowledged by the Icelandic authorities that there is international competition in ship repair (and therefore the use of ship lifts and hoists and dry docks), it is argued that no such competition exists in Iceland.

II. ASSESSMENT

1. The presence of state aid

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

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

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

1.1. Presence of state resources

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

It is envisaged that each of the measures provide support to the harbours through the Fund, which is allocated resources from the Icelandic Treasury. The budgetary allocation of the Treasury constitutes state resources within the meaning of Article 61(1) of the EEA Agreement. The classification as state resources is not altered by the fact that the state's money is channelled through the Fund. Article 26(l) of the 2003 Act provides that the Fund is owned by the State and that the Harbour Council (hafnaráð) acts as its board of directors on behalf of the Minister

of Transport. The Harbour Council is appointed by the Minister of Transport pursuant to Article 4 of Act No 7/1996 on the Maritime Agency (lög um Siglingastofnun Íslands). The Fund is therefore a public law body. Part of the financing of the Fund comes directly from the State budget as decided by Parliament. According to Article 26(3) of the 2003 Act, the Harbour Council allocates the income of the Fund following recommendations from the Maritime Agency and subject to the approval of the Minister of Transport, as further laid down in subparagraphs 1 to 3. The Maritime Agency is responsible for the administration of the Fund according to paragraph 4 of that Article. The Fund also carries out public tasks as laid down in the 2003 Act.

The Authority concludes therefore that support granted by the Fund is imputable to the State and constitutes state resources within the meaning of Article 61(l) of the EEA Agreement.

1.2. Favouring certain undertakings or the production of certain goods

Selectivity

The aid measure must be selective in that it favours “certain undertakings or the production of certain goods”.

The issue in this context is whether the Icelandic municipalities, as recipients of state support, are undertakings engaged in economic activities or whether they act as a public authority. As referred to in the European Commission's decision on “Financial Support for infrastructure works in Flemish ports”⁽¹¹⁾, maritime ports are concerned not only with public policy responsibilities of maintaining a functioning maritime transport system but are also increasingly engaged in commercial activities, such as the provision of port facilities and services.

The fact that, for the exercise of part of its activities, an entity is vested with statutory powers does not, in itself, prevent it from being characterised as an undertaking within the meaning of Article 61(1) of the EEA Agreement. In the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed⁽¹²⁾. In order to determine whether the activities in question are those of an undertaking within the meaning of Article 61(1), it is necessary to establish the nature of those activities⁽¹³⁾. It is settled case-law that any activity consisting in offering goods and services on a given

⁽¹¹⁾ State aid No N 520/2003, p. 7.

⁽¹²⁾ See, *inter alia*, joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 17.

⁽¹³⁾ See, *inter alia*, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 19.

market is an economic activity⁽¹⁴⁾. To the extent, therefore, that the harbour operators are engaged in economic activities, the Authority takes the view that the measures are selective given that they favour only a certain number of operators within a specific sector.

In the European Commission's Communication on Reinforcing Quality Services in Sea Ports⁽¹⁵⁾, the Commission distinguishes between "Public (general)" infrastructure, "user-specific" infrastructure, and "superstructures". These distinctions provide a useful guide when assessing whether port authorities, owners or operators are engaged in economic activities. The position is however evolving and the Authority has taken into consideration not only the Commission's Communication, but also subsequent decisions of the Commission (including in particular the case regarding support for Flemish ports referred to above), as well as the information provided by the Icelandic authorities.

Public financing of transport infrastructure may raise State aid issues at two different levels; at the level of the end-users of the infrastructure and at the level of the manager or operator of the infrastructure in question. The Authority takes the view that, in general, no State aid elements within the meaning of Article 61(1) of the EEA Agreement are present at the users' level where transport infrastructure is directly financed and managed by the State and is open to all potential users on equal and non-discriminatory terms, as no particular undertaking or production may be shown to be favoured over others in a way that distorts competition and affects trade between Member States⁽¹⁶⁾. The Authority is content that this is the case in respect of the Icelandic harbours.

At the level of the manager or operator of the transport infrastructure – in this case the Icelandic municipality-owned port authorities – the Authority must assess whether the body managing the infrastructure carries out economic activities. As noted above, a port manager carries out many different activities, of which several may be deemed economic in character. It is necessary to distinguish therefore, where possible, between those activities that are economic in nature and those that are not, and assess the financing of each distinct activity on its own merits.

- (a) Pilot vessels. The Authority considers that pilot vessels are a form of navigation aid which is essential for safety purposes

⁽¹⁴⁾ See, *inter alia*, Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36 and Case C-475/99 *Glöckner* [2001] ECR I-8089, paragraph 19.

⁽¹⁵⁾ Communication from the Commission to the European Parliament and the Council, Reinforcing Quality Service in Sea Ports; A Key for European Transport, COM (2001) 35 final, section 3.3.

⁽¹⁶⁾ Cf. Commission White Paper COM (1998) 466 final of 22.7.1998, Fair Payment for Infrastructure Use: A phased approach to a common transport infrastructure charging framework in the EU, Chapter 5, para 42–43.

in certain harbours. It accepts that expenditure on pilot vessels is an essential function of the state acting in the public interest. The Authority concludes therefore that support granted to the harbour operators for pilot vessels is not granted to them in their capacity of undertakings performing an economic activity. The measure does therefore not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

- (b) Quay installations. Although quay installations could be said to be of a public character, necessary for the proper functioning of a port serving the public interest, they may also serve commercial purposes. In light of the Commission's approach to "mooring infrastructure" (including quays) in the Flemish ports⁽¹⁷⁾ case, the Authority took the initial view that quay installations form part of the facilities of the port that are capable of generating commercial revenue for the port authorities. The Icelandic authorities have not provided information to suggest that the use of quay installations is an essential function of the state acting in the public interest, and is not economic in nature. The Authority is therefore of the opinion that the quay installations facilitate economic activity which favours the operator of a port acting as an undertaking.
- (c) Damage compensation for ship hoist/lift facilities and for quay installations. The Authority remains of the view that ship hoist/lift facilities are assets used for economic activity, through which port operators may facilitate, for example, the repair of ships. To the extent therefore that the damage compensation provisions fund harbour authorities to pay for damage to facilities which are used for economic activity, they constitute a selective measure in favour of an undertaking (the harbour authority itself). The Authority concludes, therefore, that expanding the damage compensation provisions to include damage to ship lifts and hoists and quay installations favours specific undertakings.

Advantage

The measure must confer on a recipient advantages that relieve it of charges that are normally borne from its budget.

Harbour owners will have to bear some of the costs following the support under the Harbour Act since state support can be granted for up to between 40 and 60 % of the investment necessary for quay installations. However, these undertakings will be subject to lower investment costs than other undertakings that do not benefit from the scheme. The harbour owners therefore receive an advantage through the measure.

⁽¹⁷⁾ Paragraphs 46 to 50, case N 520/2003.

Such an advantage also exists regarding damage compensation. The harbour authorities can receive state support for repair of damage to ship hoist/lift facilities and for quay installations. This compensates the recipients of funding for a cost they would normally have to bear.

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

For a measure to qualify as aid it must distort competition and affect trade between the Contracting Parties.

The Authority remains of the view that operators of ship lifts and hoists and dry docks as ship repair facilities are in international competition. In addition, as mentioned in the decision opening the formal investigation, the market for port services has been gradually opened to competition⁽¹⁸⁾. The European Commission noted in its LeaderSHIP 2015 programme⁽¹⁹⁾ that commercial shipbuilding and ship repair operate in a truly global market with exposure to world-wide competition.

It is the Authority's view that the state support distorts or has the potential to distort competition, and this is evidenced by the response received from the third party. The Icelandic authorities also accept (despite arguing that there is no distortion of competition) that the 2003 Act distinguishes between state-owned harbours (who receive state support) and privately-owned harbours (who do not receive support). Given that some of the activities of the state supported harbours are economic in nature, it can be established that there is the potential that competition can be distorted in such a case.

While the Authority accepts that for geographical reasons the distortion of competition is likely to have less of an effect on trade than would be the case in mainland Europe, the Authority does not agree with the Icelandic authorities that there is no effect (or no potential effect) on trade. These activities, specifically services provided to shipping and freight undertakings, are not purely local in nature given the mobility of those undertakings. There are established shipping routes between Iceland and other EEA States and to an extent therefore the recipients of port services are able to choose where (for example) to undertake routine maintenance, or dock in any periods of inactivity.

It is also notable (as referred to by the European Commission in the case of the *JadeWeserPort* Project⁽²⁰⁾) that there is increased

private investment in maritime ports, such that an undertaking from another EEA State could own or operate competing ports in Iceland. Providing state support to Icelandic harbour operators could therefore also affect trade by impacting upon such private investment.

The Authority therefore concludes that as the measure will strengthen the recipients' position in relation to other competitors within the EEA, the measures distort or threaten to distort competition and affect trade between the Contracting Parties.

1.4. *Conclusion*

For the reasons referred to above, the Authority considers the funding of quay installations and damage compensation in respect of quay installations and ship lift facilities constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

The Authority further concludes that the support granted to the harbour operators for pilot vessels does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

2. *Procedural requirements*

Pursuant to Article 1(3) of Part I of Protocol 3, "the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision".

As referred to in the decision opening the formal investigation, the Icelandic authorities did not notify the 2003 Act with regard to the support to quay installations and damage compensations to quay installation to the Authority before the measure was put into effect. Furthermore, the notified amendment including ship hoists in the damage compensation scheme in 2007 entered into effect on 29 March 2007. However, in their comments to the Authority's decision opening the formal investigation, the Icelandic authorities stated that interim provision II of the 2003 Act stipulated that the rules of the Act regarding state aid would not be applicable until the end of 2008. By Act 145/2007, the postponement of the application of the state aid provisions was extended until the end of 2010. Hence, even though the Act had entered into force, the application of the state aid provisions of the Act was suspended awaiting the final decision of the Authority. The Authority therefore concludes that the Icelandic authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 with regard to these measures.

⁽¹⁸⁾ Port Communication, cited in fn. 15, section 2.

⁽¹⁹⁾ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, LeaderSHIP 2015, Defining the Future of the European Shipbuilding and Repair Industry, Competitiveness through Excellence, COM(2003) 717 final, section 2.1.

⁽²⁰⁾ State aid Case Number N 110/2008.

The support to pilot vessels does not constitute state aid, and there was hence no obligation to notify that measure.

3. Compatibility of the aid

Support measures that fall within Article 61(1) of the EEA Agreement are incompatible with the functioning of the EEA Agreement unless they qualify for derogation under Article 61(2) or (3) of the EEA Agreement.

The Authority has therefore assessed the measures under Article 61(2) and (3) of the EEA Agreement in conjunction with the State Aid Guidelines ⁽²¹⁾.

Investments in quay installations

Under the Guidelines on National Regional Aid for 2007–2013 and the regional aid map for Iceland, initial investment aid can be granted against eligible costs for harbours situated within the regional aid map up to 15 % Gross Grant Equivalent (“GGE”) (with a bonus of 20 % GGE for aid granted to small enterprises and by 10 % GGE for aid granted to medium sized enterprises). Any support in excess of these thresholds cannot be considered compatible under the Regional Aid Guidelines 2007–2013. These thresholds are not complied with in this case.

Damage compensation for quay installations and ship lift/hoist facilities

The aid provided by way of damage compensation is not linked to investment but is a means through which costs that an undertaking would usually have to bear as part of its day-to-day activities can be reduced (or eliminated). The Authority therefore considers this to be operating aid.

In the Authority’s view this operating aid does not fall within the scope of Article 61(2)(b) of the EEA Agreement, given that it is not limited to natural disasters or exceptional occurrences.

The Authority considers that damage compensation for ship lifts and hoists must be assessed under the Authority’s State Aid Guidelines on shipbuilding. As *lex specialis*, the Shipbuilding Guidelines preclude the application of the Regional Aid Guidelines ⁽²²⁾. The Shipbuilding Guidelines cover aid to “any shipyard, related entity, ship owner and third party, which is

granted, whether directly or indirectly, for building, repair or conversion of ships” ⁽²³⁾. The Shipbuilding Guidelines allow aid to be granted to ship repair installations as aid to research and development and innovation, closure aid, employment aid, export credits, development aid and regional investment aid. The Authority is of the view however that damage compensation for ship lifts and hoists does not fall under any of these categories and cannot therefore be considered compatible under the provisions of the Shipbuilding Guidelines.

Operating aid to compensate for damage to quay installations must be assessed as regional aid. The measure must be assessed under both the Guidelines for National Regional Aid 2000–2006 and the Guidelines for National Regional Aid 2007–2013. The former guidelines did not open up for operating aid for schemes such as the present. According to the provisions of Section 5 of the current guidelines, operating aid must normally be temporary and reduced over time (paragraph 68), or granted for least populated regions (paragraph 69) or granted for offsetting additional transport costs (paragraph 70). From the information available to the Authority, the envisaged support for damage compensation is not limited in that way and cannot therefore be considered compatible with the Guidelines for Regional Aid 2007–2013.

Entrustment of a service of general economic interest under Article 59(2) of the EEA Agreement

To the extent that the measures in question involve the provision of services that are economic in nature, it is possible that they may qualify as services of general economic interest (“SGEI”). Such SGEI may not amount to state aid in accordance with the *Altmark* ⁽²⁴⁾ principles, or may be aid that could be considered compatible with the EEA Agreement under Article 59(2). The Icelandic authorities do not, however, contend that the funding has been provided in order to ensure the provision of SGEI; and the Authority notes that the harbour operators have not been specifically entrusted with providing such services and funding is not awarded on the basis of compensating operators for costs incurred in providing the services. The measures are therefore not compatible with the EEA Agreement under Article 59(2).

Compatibility directly under Article 61(3)(c) of the EEA Agreement

Article 61(3)(c) of the EEA Agreement provides that the Authority may consider aid to facilitate the development of certain economic activities to be compatible with the EEA Agreement, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest.

⁽²¹⁾ <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

⁽²²⁾ See the Authority’s State Aid Guidelines on national regional aid 2007–2013, point 2(8), footnote 8.

⁽²³⁾ State aid case N 554/06 – Germany, Rolandwerft which concerned the adaptation of a ship lift to lift heavier ships and state aid case C 612/06 – Germany, Volkswerft Stralsund OJ L 151, 13.6.2007, p. 33, also for the extension of a ship lift.

⁽²⁴⁾ Case C-280/00 *Altmark Trans GmbH* [2003] ECR I-7747.

The Authority notes that maritime ports play an important role within the EEA, necessary to facilitate a balanced and sustainable transport system, and as centres of regional development. The Authority also notes that ports play an important role in facilitating trade and can assist in the process of moving freight transfer away from roads to more environmentally sustainable modes of transport. The Authority also acknowledges that better port infrastructure is unlikely to be developed through market means alone and that some form of state intervention is likely to be inevitable.

The Harbour Act, however, differentiates between privately owned and municipality owned harbours as only the latter can apply for support under the scheme. Although it does not appear that this differentiation entails an infringement of the provisions of free movement under the EEA Agreement, the question of discrimination regarding aid between the public and private sectors under the EC Treaty was examined by the Court of Justice in its judgment in the case of *Falck*. After emphasizing that the responsibility for granting aid falls primarily upon the government concerned, the Court of Justice clarified the role of the Commission in the following terms: “[i]t is true ... that although any aid measure is likely to favour one undertaking in relation to another, the Commission cannot approve aid the grant of which may result in manifest discrimination between public and private sectors. In such a case the grant of aid would involve distortion of competition to an extent contrary to the common interest” ⁽²⁵⁾.

For this reason, even if the aid could be authorised under the EEA Agreement, the Authority considers that the scheme cannot be compatible with the functioning of the EEA Agreement because it favours only undertakings that are state owned without an objective justification.

On the basis of the above assessment therefore, the Authority concludes that the investment in quay installations and the damage compensation for ship lifts and hoists and quay installations is not compatible with the functioning of the EEA Agreement.

4. Conclusion

With the exception of the funding of pilot vessels, which does not constitute state aid, the aid measures are not compatible with the functioning of the EEA Agreement for the reasons set out above.

According to the information available to the Authority, the scheme has not been implemented yet, meaning that no aid has been paid out to any of the potential beneficiaries of the scheme.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that Article 24(2)(a) of the Harbour Act under which the “initial costs for pilot vessels where conditions in and near the harbour require such safety equipment” is supported does not constitute state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

Article 24(2)(b) and (c) of the Harbour Act regarding investment support to quay installations and Article 26(3) of the Harbour Act regarding damage compensation for harbour constructions which qualify under Article 24(2)(b) and for ship lifts and hoists constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

These aid measures are not compatible with the functioning of the EEA Agreement.

Article 3

The measures referred to in Article 2 above may not be implemented.

Article 4

This Decision is addressed to the Republic of Iceland.

Article 5

Only the English language version is authentic.

Done at Brussels, 15 July 2009.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kristján Andri STEFÁNSSON
College Member

⁽²⁵⁾ Case 304/85 *Falck v Commission* [1987] ECR 871, paragraph 27. See similarly Case T-244/94 *Wirtschaftsvereinigung Stahl* [1997] ECR II-1963, and Case T-239/94 *EISA* [1997] ECR II-1839, paragraph 100.