

DECISIONS

COMMISSION DECISION

of 13 July 2011

on State aid No C 6/08 (ex NN 69/07) implemented by Finland for Ålands Industrihus Ab

(notified under document C(2011) 4905)

(Only the Finnish and Swedish texts are authentic)

(Text with EEA relevance)

(2012/252/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) Through a complaint lodged on 5 September 2006, the Commission was informed of a variety of measures granted by the Local Government of Åland ('the LG') in favour of the real estate company Ålands Industrihus Ab ('ÅI'). By letters dated 25 October 2006 and 14 February 2007, the Commission requested information from Finland which was submitted by letters dated 11 January 2007 and 3 April 2007. The Finnish authorities submitted further information on 31 May 2007 and 12 July 2007. The complainant submitted additional information in November 2006 and May 2007.
- (2) By letter dated 30 January 2008, the Commission informed Finland that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') ⁽²⁾ in respect of the aid ('the opening decision').

⁽¹⁾ OJ C 76, 27.3.2008, p. 15.

⁽²⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are identical in substance. For the purpose of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

- (3) The Commission's opening decision was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the aid.

- (4) The Commission received no comments from interested parties.

- (5) Further to the opening decision, Finland submitted information which was registered with the Commission on 6 May 2008, 21 January 2010, 26 February 2010, 21 May 2010, 18 June 2010, 18 April 2011, 27 June 2011 and 28 June 2011. A meeting between the Commission services, the Finnish authorities and representatives of ÅI took place on 4 June 2010.

2. DESCRIPTION OF THE AID

2.1. THE BENEFICIARY

- (6) ÅI is registered in the City of Mariehamn, the capital of Åland, an archipelago in the Baltic Sea between mainland Finland and Sweden with a total population of some 28 000. Åland is a province of Finland but enjoys a high degree of autonomy. ÅI is owned mainly by the LG (84,43 %) and the City of Mariehamn (15,01 %). Other local authorities in Åland make up the remaining shareholders ⁽⁴⁾.
- (7) ÅI's business is the construction, ownership and letting of buildings for industrial and commercial use. According to Finland, the objective of the company's activities is to provide buildings to companies in Åland in order to contribute to a diversified and competitive economy.

⁽³⁾ See footnote 1.

⁽⁴⁾ With the exception of a negligible share held by the local business organisation 'Ålands företagareförening rf' (3 shares out of a total of 30 392).

(8) Up until 1999 ÅI's business activities were modest in size⁽⁵⁾. The balance sheet of ÅI grew very slowly, if at all⁽⁶⁾. In this context the board of ÅI decided to start searching for new business opportunities in order to expand. At the same time, the local business community (made up almost exclusively of small enterprises) expressed a wish for a 'technology park', i.e. a cluster of office properties where local firms could locate under the same roof in order to facilitate cooperation, generate new ideas and enhance entrepreneurship in general. This would eventually become the 'iTiden' office park (kvarteret iTiden). The genesis of the project is explained in more detail in Section 2.2.

2.2. THE iTiden PROJECT⁽⁷⁾

- (9) Discussions between representatives of the local business community and the LG concerning the possibility of building a 'technology park' started back in 1999. Joint study trips were made to similar facilities in Sweden.
- (10) In 2000 the project was assigned to a working group, which presented a proposal to the LG and the City of Mariehamn in the spring of 2000. The project and the LG's plans to build and finance it were mentioned in the LG budget for 2000⁽⁸⁾ and confirmed in the 2001 budget, in which the LG also requested funds for possible capital increases for infrastructure projects, including for ÅI (a similar request was made in the 2000 budget)⁽⁹⁾.
- (11) On 12 July 2001, with the help of a capital increase, ÅI bought land in the 'Västra Klinten' district of Mariehamn, where iTiden was to be built. In connection with this purchase, ÅI also secured the changes necessary for the iTiden project in the town planning.
- (12) In the budget for 2002 the LG declared that ÅI would start building the iTiden project in 2002 and that this would in all likelihood require a capital increase (for which the LG requested the necessary budgetary appropriations)⁽¹⁰⁾.

⁽⁵⁾ In 1999: total balance sheet EUR 733 341; turnover EUR 101 486; overall result EUR 27 719.

⁽⁶⁾ Balance sheet reduced from EUR 834 645 (1997) to EUR 733 341 (1999).

⁽⁷⁾ Most of the information in this Section is taken from the iTiden website (www.itiden.ax), complemented by information (consistent with the public information) submitted by the Finnish authorities.

⁽⁸⁾ 'The LG will strive to increase the offer of industrial property and office space suitable for IT and service sectors through the public property companies. These may consequently require more capital.' Budget för landskapet Åland 2000, page 304.

⁽⁹⁾ 'The LG will work [...] to become more efficient in facilitating the growth of new firms and business projects. The LG will continue its efforts to realise the project of an "IT village" [...].' Budget för landskapet Åland 2001, pages 319 and 321.

⁽¹⁰⁾ Budget för landskapet Åland 2002, page 291.

- (13) At the beginning of 2002 a working group for the building of iTiden was appointed and an architect commissioned. Potential tenants were sounded out for their interest in renting property in iTiden. The preparatory land works were carried out in the spring of 2003 and the construction of phase 1 (the project was designed in two consecutive construction phases) started in the summer of 2003. The first tenants moved into the completed 'phase 1' part of iTiden on 1 December 2004.
- (14) The construction of phase 2 of iTiden was launched in the autumn of 2006 and completed in 2007.

2.3. THE STATE AID MEASURES

- (15) The Commission's formal investigation has covered several capital injections ('capital increases') and guarantees for bank loans ('loan guarantees') granted by the LG in favour of ÅI between 1997 and 2007. The measures are set out in the table below (capital injections are numbered C-I to C-XI and guarantees G-I to G-III).

Measure	Date of the measure	Capital increases (in EUR)	Loan guarantees (in EUR)
C-I (*)	18.6.1997	84 094,39	
C-II (*)	22.6.2000	340 582,27	
C-III (*)	10.10.2000	114 368,37	
C-IV	20.7.2001	353 199,00	
C-V	15.8.2002	599 933,73	
C-VI	13.3.2003	799 911,64	
G-I	9.10.2003		2 600 000,00
C-VII	6.5.2004	515 165,97	
C-VIII	30.9.2004	669 896,95	
G-II	2.11.2004		1 160 000,00
C-IX	16.6.2005	199 977,91	
C-X	16.6.2005	234 961,43	
G-III	13.12.2005		2 600 000,00
C-XI	15.2.2007	1 379 998,95	
	TOTAL	5 292 090,61	6 360 000,00

(*) These measures were granted before the euro was introduced; hence they were denominated in Finnish Mark (FIM). C-I was FIM 500 003, C-II FIM 2 025 010 and C-III FIM 680 003. At the time of conversion, the exchange rate was fixed at EUR 1 = FIM 5,94573.

(16) Compared with the table of the measures in point 7 of the opening decision, a loan guarantee of EUR 2 587 500 dated 26 October 2006 has been removed, as it was never put into effect (following a decision by Finnish courts). Furthermore, capital increase C-XI, dated 12 June 2006 in the opening decision, is dated 15 February 2007 here as it became clear in the investigation that this measure had been put into effect at that later date. The LG's decision to grant this capital increase has recently (6 April 2011) been annulled by Finland's Supreme Administrative Court (see recital 114 below). However, as the capital was paid to ÅI in 2007 and has not been paid back, the Commission considers that the national court decision does not remove this measure from the scope of its investigation.

(17) According to the Finnish authorities, all capital increases were provided to finance the iTiden project, with the exception of the following:

C-I: Capital injection of 18 June 1997 (EUR 84 094,39)

C-II: Capital injection of 22 June 2000 (EUR 340 582,27)

C-III: Capital injection of 10 October 2000 (EUR 114 368,37)

C-VIII: Capital injection of 30 September 2004 (EUR 669 896,95)

C-IX: Capital injection of 16 June 2005 (EUR 199 977,91).

(18) All the loan guarantees, according to Finland, were issued with the purpose of financing the iTiden project. More details on the loan guarantees are given in recitals 66 to 86 below.

3. GROUNDS FOR INITIATING THE PROCEDURE UNDER ARTICLE 108(2) TFEU

(19) In the opening decision, the Commission questioned whether the capital increases and loan guarantees were compatible with the internal market on the following grounds.

(20) As regards the existence of State aid within the meaning of Article 107(1) TFEU, the Commission noted that the measures involved State resources, as they were granted by the local authorities, and that they were selective, as they were targeted at ÅI. As regards the criterion of whether the measures granted an 'advantage which it would not have obtained under normal market conditions' because a private investor, guided by the prospect of profitability in the long run, would not

have given the same support, the Commission doubted that a private investor would have provided capital as the LG did, given ÅI's long record of losses or, at best, very modest profits. With respect specifically to the loan guarantees, the Commission doubted that ÅI would have been able to obtain comparable financial support on the markets, and that they consequently provided ÅI with an advantage. The Commission also considered that any such advantages would be liable to distort competition and intra-Community trade.

(21) If the measures were considered State aid, the Commission doubted that they could be viewed as compatible with the internal market.

(22) Finally, the Commission questioned Finland's claim that the measures, if they were indeed considered to constitute State aid, had been granted in compliance with aid schemes that applied already prior to Finland's accession to the EU and would thus be lawful.

4. COMMENTS FROM FINLAND

4.1. THE MEASURES ARE NOT STATE AID

(23) Finland has taken the view that the LG has acted in accordance with the market investor principle, i.e. that the measures were guided by the LG's prospects of return on its investment. Finland has argued that the investment decisions were motivated by the company's programme of new investments, chiefly by the iTiden project. The measures were thus not intended to cover previous losses, or to support a loss-making business. The LG has obtained concrete value for its investments in new shares in ÅI, as the company's value increased in line with the share subscription. ÅI did not, therefore, obtain any advantage that it would not have been able to obtain from a private investor.

(24) Irrespective of any possible advantage, Finland has also taken the view that the measures cannot be classified as State aid, because there is no concrete evidence of a significant effect on competition in the Åland real estate market.

4.2. IF STATE AID, IT IS LAWFUL UNDER EXISTING AID SCHEMES

(25) However, if the measures were found to include a State aid element, the aid, according to Finland, should be considered as lawful. Finland has argued that both the capital injections and the guarantees were covered by existing aid schemes that were put into place prior to Finland's EU membership.

4.3. IF IT IS NEW STATE AID, IT IS NEVERTHELESS COMPATIBLE WITH THE INTERNAL MARKET

- (26) Should the measures constitute unlawful State aid, they should nonetheless be considered compatible with the internal market under Article 107(3)(c) TFEU, as their purpose has been the development of the region and the creation of new jobs, mainly by contributing to the diversification of the region's economy, which relies too heavily on the shipping industry.

4.4. POSSIBLE RECOVERY

- (27) Should the Commission find that the aid constitutes unlawful and incompatible aid that needs to be recovered, Finland put forward the following arguments.
- (28) Under Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹¹⁾ the Commission will not require recovery of aid where this would be contrary to a general principle of Community law. This would be the case here, since Finland had legitimate reasons to expect that the above-mentioned schemes, which pre-dated accession, were and still are valid, and thus that any aid granted under these rules would be lawful.
- (29) Should the Commission nevertheless consider that the aid is to be recovered, Finland argues that the aid element in the capital increases is not necessarily the full nominal amount of the transactions that comprise State aid. In respect of the guarantees, any aid to be recovered cannot be larger than the interest advantage obtained by the firm as a result of the guarantee (by comparison to non-guaranteed loans). Similarly, concerning the capital injections, any aid cannot be more than ÅI's cost of obtaining equivalent capital on the market.

5. ASSESSMENT

5.1. QUALIFICATION AS STATE AID

- (30) According to Article 107(1) TFEU, 'any aid granted by a Member State 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, insofar as it affects trade between Member States, be incompatible with the internal market'.
- (31) The qualification of a measure as State aid requires that the following conditions are met: (a) it must be financed by a Member State or through State resources; (b) it must

grant a selective advantage liable to favour certain undertakings or the production of certain goods; and (c) it must distort or threaten to distort competition and have the potential to affect trade between Member States. These conditions being cumulative, they must all be present before a measure is characterised as State aid.

5.1.1. STATE RESOURCES AND SELECTIVITY

- (32) For the reasons indicated in the opening decision (and which have not been contested by Finland), these two criteria are met. The measures are granted by individual decisions taken by the LG to make use of funds that it has been allocated in its annual budget by the regional assembly of Åland. The measures are thus clearly financed by the State and individually targeted at ÅI.

5.1.2. ADVANTAGE

- (33) Finland has argued that the measures are not State aid because they did not provide ÅI with an advantage that it would not have been able to obtain on the markets, be it from a private shareholder or from a private creditor.
- (34) It is a settled principle of State aid law (usually referred to as the Market Economy Investor Principle, or MEIP) that an investment by public authorities in the capital of undertakings constitutes State aid unless in similar circumstances a private investor, having regard in particular to the prospects of achieving a return, might have provided the same capital⁽¹²⁾. Similarly, under point 3.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees⁽¹³⁾ ('the Guarantee Notice'), a guarantee provided by public authorities will constitute State aid unless funding is made available on conditions which would be acceptable for a private operator under the normal conditions of a market economy.
- (35) In the opening decision, the Commission expressed doubts that the MEIP was met in relation to the capital injections and guarantees, based in particular on two observations concerning ÅI:
- (a) ÅI's long record of losses or negligible profits in the years in which the measures were granted. Indeed, ÅI made losses in every year between 2001 and 2005. The profits between 1998 and 2000 were small

⁽¹¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹²⁾ See, among others, the judgment in cases 234/84, *Belgium v Commission* [1986] ECR 2263, paragraph 14; C-305/89 [1991] ECR I-1603, paragraphs 18 and 19; joined cases C-278/92, C-279/92 and C-280/92 *Hytasa* [1994] ECR I-4103, paragraphs 20 and 21; C-303/88 *Eni-Lanerossi* [1991] ECR I-1433, paragraphs 20 et seq.; case T-11/95 *BP Chemicals* [1995] ECR II-599, paragraph 161.

⁽¹³⁾ OJ C 155, 20.6.2008, p. 10.

and decreasing (respectively EUR 38 000, 28 000 and 9 000). Similarly, when ÅI eventually again showed a profit in 2006 this was a mere EUR 557,43. The profit forecasted for 2007 in 2006 (i.e. what was anticipated when the decision to grant the last measures were taken) was only EUR 5 868,46 ⁽¹⁴⁾.

(b) In addition, it appeared to the Commission that ÅI's cash flow was insufficient to cover its costs, and had been so since 2000, which led to the presumption that the measures had been necessary simply to cover this cash drain ⁽¹⁵⁾.

(36) Finland has dismissed this view. Its arguments will be discussed below separately for the capital increases and the loan guarantees.

5.1.2.1. *The capital injections*

(37) First of all, Finland dismisses the view that ÅI had a liquidity problem. In fact, although the company's operations had been limited in size prior to the iTiden project, its operational result and liquidity had been satisfactory and remained so throughout the period covered by the investigation. The measures have thus not been necessary to cover the operations' costs. Rather, the measures were intended to finance the expansion of the company and should consequently be considered investments. In the light of the conditions of these investments, they were justified under the Market Economy Investor Principle and consequently do not constitute State aid.

(38) In this context, Finland argues that most capital increases were used to finance the iTiden project, whereas the rest were intended for ÅI's other projects (see recital 17 above).

(39) The Commission makes the following assessment.

(40) As a preliminary point the Commission underscores that the capital that a shareholder provides to a firm is by definition not earmarked for a certain use but becomes part of the tangible equity of the company. It is therefore normal, when an investment is provided as general equity, to assess its compliance with the MEIP against the general performance prospects of the firm as a whole. This does not exclude, where evidence thereof is available, making an assessment of the expected return on specific planned investments, provided of course that such information was available at the time when the investment decision was made.

(41) As regards the general financial performance of ÅI, the Commission accepts, based on the evidence submitted in the investigation, that the operational result of ÅI consistently covered its losses and ensured liquidity. The evidence available does not allow the conclusion that the capital increases (or the loans obtained through the guarantees) were used to cover losses stemming from ÅI's operations.

(42) However, the fact remains that the LG made available to ÅI important additional capital that prima facie generated no or very little profits between 1997 and 2006. The crux therefore is — as Finland itself argues — whether the LG had reason to expect a return on its capital that would have been sufficient for a private investor to have made the same investment. This has to be assessed on the basis of what was known to the LG at the time of the capital increases.

(43) Finland has argued that the lion's share of the capital increases was intended to finance the iTiden project, phases 1 and 2, whereas the remaining capital increases were assigned to various other investments. For reasons of clarity, the capital increases that were used to finance the iTiden project are dealt with first in the analysis presented below.

The iTiden capital increases

(44) Finland argues that all capital increases with the exception of C-I, C-II, C-III, C-VIII and C-IX were made with the purpose of funding iTiden, which was by far ÅI's biggest single project. The earliest capital increase assigned to the iTiden project was thus made in 2001 (C-IV).

(45) As regards the conditions on which these capital increases were made by the LG, and crucially the return that was expected at the time of the decision, Finland has provided the following information:

(46) The LG's decisions to proceed with the capital increases related to iTiden were made on the basis of information provided at informal meetings involving the LG and representatives of ÅI. Finland states that no minutes were kept of these meetings. Finland has nevertheless submitted to the Commission presentations made at such informal meetings or at meetings of ÅI's board. These contain succinct accounts of the background and main features of the iTiden project and profitability calculations for iTiden phase 1 and phase 2. This evidence consequently allows the Commission to ascertain what return was anticipated by the LG at the time it made the capital increases related to iTiden.

⁽¹⁴⁾ See point 25 of the opening decision.

⁽¹⁵⁾ See point 26 of the opening decision.

- (47) On 31 January 2002, ÅI held an informal meeting with the LG in order to secure its approval to launch the construction of iTiden in 2002 (subsequent to the purchase of the land which had taken place in 2001). At this meeting, ÅI presented a profitability calculation, where the assumption was that the project would yield a yearly return of 3 % on ÅI's own equity.
- (48) Another informal meeting between ÅI and the LG was held on 4 March 2003 in order to prepare ÅI's general assembly on 5 March 2003. The general assembly was to decide on launching the construction of phase 1 of iTiden, which had not been carried out in 2002. An updated profitability calculation was provided. In this calculation it was estimated that phase 1 would yield a surplus of only EUR 700 assuming no return on ÅI's own equity.
- (49) On 2 January 2006 the board of ÅI met to discuss the launch of the construction of phase 2 and the call for a capital increase that would be launched to finance this. According to a profitability calculation presented at the meeting, the project would break even with a return on equity of 3 %. However, this calculation had to be revised to account for the increased cost of adapting the buildings to the tenant's needs. Thus, a revised calculation was established on 10 January 2006 to serve as a basis for the capital increase decided at the general assembly on 12 June 2006 (although the capital increase was only paid on 15 February 2007 for technical reasons — this is capital increase C-XI). In this calculation, the assumed annual return on own equity for phase 2 of iTiden was set at 1 %.
- (50) Finland has provided this evidence and states that this accurately accounts for the contemporaneous yield expectations based on which the LG decided to make the capital increases for the iTiden project, i.e. C-IV, C-V, C-VI, C-VII and C-X for phase 1 and C-XI for phase 2. These profitability assessments are based on anticipated revenue (i.e. rents) from iTiden. Finland has argued that the return on the LG's investment should also take into account the prospect of capital gains consisting in an increase in value of the property over time. However, Finland has provided no concrete evidence of this. Such considerations are not integrated in the profitability calculations, which indicate that they were not taken into account when the investment decisions were made. On the basis of the above evidence, the Commission finds that a private investor would not have made similar investments against this expected return.
- (51) Any investor putting money into a project that involves some element of risk (such as commercial real estate development) will demand a return that adequately reflects the risk inherent in the investment. Thus, he will expect a 'risk premium' that exceeds the known return that he can receive from an alternative, risk-free asset ('the risk-free rate'). A common benchmark for the risk-free rate are AAA-rated government bonds for shorter maturities. For the purpose of this assessment, the yield on two-year Finnish government bonds is used, as Finland did not issue bonds with shorter maturities. Accordingly, this gives a risk-free rate of between 2,7 and 4,2 % in 2002, between 2,2 and 2,7 % in 2003 and between 2,8 and 3,8 % in 2006.
- (52) Compared to the return on equity expected by the LG when it decided to make the iTiden-related capital increases, the Commission observes that the LG could have achieved the same or even higher returns without any of the risk associated with the property projects. Indeed, even under the most optimistic reading, the 'risk premium' (i.e. the return exceeding the risk-free premium) would have been at most 0,3 % for capital increases C-IV and C-V (i.e. the capital increases of 2001 and 2002). For the capital increases made as a result of the 2003 decision to launch the construction of phase 1 of iTiden (and thus on the basis of the expected returns presented at the informal meeting of 4 March 2003, see recital 48 above), i.e. C-VI, C-VII and C-X, the expected return was zero, meaning that an infinitely better return could have been achieved by taking no risk at all. Similarly, for the capital increase for phase 2, C-XI, the expected return of 1 % was largely inferior to the risk-free rate available at the time.
- (53) It is obvious that no private investor would have been satisfied with the negative, or marginal, risk premium that the LG was ready to accept for the capital increases mentioned in recitals 47 to 49 above. If need be, this can be corroborated by empirical data on expected returns in the Åland property market.
- (54) According to a report⁽¹⁶⁾ from KPMG dated 10 July 2007, commissioned by the Finnish authorities and submitted to the Commission on 17 July 2007, the return demanded by private investors on office property investments in Åland is 7 % (and 8 % for industrial property). Although this report was drawn up later than the investment decisions of the LG at issue in this decision, it is nevertheless relevant, as the report is based on observations of past investments and there is no obvious reason to believe that the required return would have been significantly lower in the preceding

⁽¹⁶⁾ KPMG 'Projekt Tower', 10.7.2007.

years. At any rate, it provides convincing indications that the returns expected by ÅI would not have been sufficient for a private investor.

- (55) Finland has argued that, despite the low or zero expected return, the investments would be consistent with the MEIP because (i) prior to starting construction, ÅI had approached potential tenants and was confident that it would achieve an occupancy rate of at least 80 % and (ii) in view of the actual financial performance of ÅI (and thus principally of the iTiden project) in the years from 2004 onwards, and the potential capital gains thus accrued, the investments turned out to be profitable.
- (56) In this respect, and without it being necessary to go into the merits of ÅI's financial performance in later years, it suffices to reiterate that the question is not whether the firm's results today are adequate but whether, based on what was known and could be assumed at the time when the LG decided to make the State resources available to ÅI (having regard to the expected 80 % occupancy rate), a private investor acting on market terms would have provided the same capital to the firm. For the reasons explained above, the Commission finds that a private investor would not have done so.
- (57) Consequently, the Commission finds that capital increases C-IV, C-V, C-VI, C-VII, C-X and C-XI have provided ÅI with an advantage that it would not have been able to get on market terms⁽¹⁷⁾.

The remaining capital increases

- (58) The Commission will now look at the remaining capital increases covered by the opening decision which, according to Finland, were not motivated by the iTiden project.

C-I capital increase of 18 June 1997

- (59) Under the *de minimis* rules applicable at the time of this capital injection, subsidies of less than ECU 100 000 granted to an undertaking over a period of three years did not constitute State aid⁽¹⁸⁾. This capital increase

amounts to EUR 84 094,39, i.e. well below the ECU 100 000 *de minimis* ceiling. ÅI did not benefit from any other measure during a period of three years⁽¹⁹⁾. Based on this, the 1997 capital injection would in any event — irrespective of the circumstances in which it was performed — not constitute State aid.

C-II and C-III capital increases of 22 June 2000 and 10 October 2000

- (60) Finland has indicated that these measures were intended for the construction of an industrial property in Norrböle, the renovation of a property in Mariehamn (C-II) and the purchase of an industrial property in the eastern part of Åland (C-III). There is thus no clear link to the iTiden project, which at that time had not yet clearly taken shape (this would happen in 2001 when the land was purchased).

- (61) Although it is true that ÅI's overall profits were modest or negative in the period 1998-2007, the fact is that it turned a modest profit in 2000 and the two preceding years and that losses started in 2001. It has been shown in the investigation that the company was covering its costs and that the liquidity position was adequate. The investments motivating these two capital increases seem proportionate to the size and 'traditional' business model of ÅI prior to the expansion linked to the iTiden project. There is therefore no compelling reason to consider that a private investor would not have undertaken the same capital increases, and there is thus no clear evidence of an advantage to ÅI.

- (62) Up until 2000 ÅI's business operations were showing modest but positive results (in the range of EUR 9 000 to EUR 38 000 in 1997-2000). ÅI's business operations were in accordance with the company's plan in place then. Accordingly ÅI owned and let warehouses and offices around the Åland Islands. The stock of real estate owned by ÅI had remained very stable until 2000, which also explains the company's stable financial performance. ÅI's turnover was in the range of EUR 95 000 to EUR 101 000 in 1997-2000. Accordingly, although with a relatively small turnover, ÅI was able to make its businesses profitable.

C-VIII and C-IX capital increases of 30 September 2004 and 16 June 2005

- (63) According to Finland, these capital increases were used to purchase an industrial property (C-VIII) and to construct a hangar at Jomala airport outside Mariehamn (C-IX).

⁽¹⁷⁾ It is true that capital increase C-IV was made in 2001, i.e. prior to the profitability analysis presented in 2002. No separate account has been given as to the financial assumptions that underpinned C-IV. However, as this capital increase was used to purchase the land on which iTiden was to be built (and this was the intention from the start), the Commission takes the view that the LG, to the extent that it considered the return prospects at all, had no reason to expect a better return than the 3 % that was expected in 2002.

⁽¹⁸⁾ OJ C 68, 6.3.1996, p. 9.

⁽¹⁹⁾ Although the formal procedure was only opened in 2008, the Commission questioned Finland on these measures by letter already on 25 October 2006, which is why the 1997 capital injection is not covered by the 10-year statute of limitations on recovery.

- (64) Although not immediately justified by the iTiden project, these measures were implemented in circumstances that were completely different from those affecting previously discussed measures C-II and C-III. Capital increases C-VIII and C-IX were undertaken in 2004 and 2005, respectively. At that time, ÅI had been operating at a loss since 2001. Crucially, too, these investments were made at a time when the LG had already invested more than EUR 2,25 million in ÅI since 2001 on the understanding that this investment would not provide a return that would be acceptable to a market investor.
- (65) The inadequate return on the iTiden project would inevitably impact negatively on ÅI's result as a whole. Indeed, the equity of an undertaking is not earmarked but fungible and has to be remunerated from the overall performance of the firm. It must therefore have been clear to the LG, at the time when they undertook measures C-VIII and C-IX, that any additional increases in the capital of ÅI was unlikely to produce an adequate return in the foreseeable future. A market investor would have been ready to make those capital injections if those investments had allowed a market return on the overall performance of the firm (i.e. a return that would have compensated for the low returns of the other capital increases), but there is nothing suggesting that this was expected to be the case. Finland has not provided any specific information regarding those measures that would change this view. The Commission consequently considers that no private investor would have provided additional capital to ÅI in these circumstances. Capital increases C-VIII and C-IX have thus provided ÅI with an advantage that it would not have been able to obtain on the market.

5.1.2.2. *The loan guarantees*

- (66) When assessing the possible State aid involved in guarantees, the Commission applies the principles laid down in its Guarantee Notice. Point 3.2 of the Notice sets out the conditions that would normally be sufficient to rule out the presence of State aid in a guarantee granted by public authorities. However, these conditions are not met concerning guarantees G-I, G-II and G-III (it is sufficient to record that these guarantees covered 100 % of the underlying loans, see point 3.2(c) of the Guarantee Notice).
- (67) The Commission first notes that ÅI's financial position in the period in which the guarantees were granted was strong enough not to exclude the firm's ability to obtain loans on the market without guarantees. The

firm was not a firm in difficulty within the meaning of the Commission's Guidelines on Rescue and Restructuring Aid⁽²⁰⁾. It cannot be concluded on the basis of the available evidence that ÅI was a firm that would not have survived at all without state support. In the years preceding the capital injections, i.e. before the launch of the iTiden project, ÅI's financial performance was stable and its business operations showed moderate positive results. The reason why the public authorities started massively injecting capital in 2001 was not to rescue the firm but to finance its growth. In the absence of the aid in the form of capital increases, ÅI would not have been a bankrupt firm but a smaller firm that still would have had access to the financial markets. The Commission cannot, therefore, conclude that ÅI would not have had access to credit markets without guarantees. The question is then whether the guarantees afforded the firm an advantage in the form of lower loan costs than it would have paid on market terms, in the absence of a guarantee.

- (68) The question that needs to be examined next is whether an adequate premium is charged for the guarantees, comparable to what would have been charged by a private guarantee provider. In the present case, the Commission has found no private guarantees that allow for a ready comparison. In such circumstances, the Commission will compare the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, with the market premium of a similar non-guaranteed loan⁽²¹⁾.
- (69) On 9 October 2003, [...] (*), a commercial bank, granted ÅI a loan amounting to EUR [...] against collateral [...]. The interest rate was set at [...] % per annum until 15 January 2007⁽²²⁾.
- (70) Although this loan was contemporaneous with guarantee G-I, the Commission does not consider it a suitable comparison for the cost of that measure. Indeed, between June 2000 and March 2003, ÅI received five capital injections for a total amount of EUR 2 208 595,01. State support of such magnitude will inevitably have influenced the risk assessment conducted by [...] before granting the loan and thus improved the loan terms, including cost, compared to the terms that the firm would have been able to obtain on the markets in the absence of the State aid element in

⁽²⁰⁾ OJ C 244, 1.10.2004, p. 2.

⁽²¹⁾ The Guarantee Notice, point 3.2(d).

(*) Confidential information.

⁽²²⁾ After 15 January 2007, the interest rate was supposed to change to [...] + [...] basis points.

the capital increases. Therefore, the Commission cannot assume that the interest rate for the 2003 non-guaranteed loan (or any later loans) accurately reflects the credit terms of ÅI in the absence of State aid and cannot use it as a credible and reliable benchmark for the cost of the loans covered by the guarantees granted by the LG.

- (71) The Commission considers that, in the absence of any other reliable evidence as to comparable loans on market terms, the Reference Rate Communication⁽²³⁾ provides an appropriate benchmark external to the beneficiary for assessing whether measures G-I, G-II and G-III were granted on market terms. The Reference Rate Communication provides a proxy for the market rate and for calculating the aid element in aid measures. The methodology for defining the reference rate is based on the following two factors: the base rate (in this case the one-year Euribor) to which a loan margin is added. The loan margin to be added to the base rate depends on two factors: the rating of the undertaking receiving the loan and the level of collateral offered for the loan. The communication distinguishes five rating categories (strong [AAA-A], good [BBB], satisfactory [BB], weak [B] and bad [CCC and below]) and three collateralisation levels (high, normal and low) for each rating category.
- (72) On 18 June 2010, Finland submitted to the Commission a report from the consultancy firm [...] that provides an annual rating for ÅI for December each year. The rating is prepared retrospectively and based on the figures available at the end of the financial year (i.e. the rating given in December 2002 looks retrospectively at the health of the company in 2002). [...] produced the rating report describing the overall financial status and development of the company and covering the following sectors of evaluation: growth, profitability, cash flow, liquidity, solvency and obligations. The applied rating scale has five rating categories: excellent (A + and A), good (A – and B +), satisfactory (B and B –), adequate (C + and C) and poor (C – and D), allowing a direct comparison with the rating scale of the Reference Rate Communication.
- (73) In December 2002, 2003 and 2004, [...] rated ÅI respectively at C +, C + and C, which places the company in the category 'adequate'. This category corresponds to the 'weak' rating category within the meaning of the Reference Rate Communication. For a company rated 'weak', the loan margins to be added to the base rate under the Reference Rate Communication range, depending on the collateral offered, from 220 bps for a high collateralisation to 650 bps for a low collateralisation. In December 2005, [...] rated ÅI at B – (satisfactory), which corresponds to a 'satisfactory' rating within the meaning of the Reference Rate Communication.
- (74) On 27 June 2011 Finland submitted additional information on the rating and collateralisation of the loans. The rating was produced by [...], the bank that gave ÅI the non-guaranteed loans and two of the guaranteed loans. The [...] rating uses a letter system for the years 2000 to 2003, complemented with one-word qualifications. The rating is readily comparable with the rating scale of the Reference Rate Communication. For 2005 onwards, the rating is provided by [...], a consultancy firm similar to [...]. In 2003 and 2004 [...] rated ÅI at B – (satisfactory) and A (satisfactory), which corresponds to a 'satisfactory' rating within the meaning of the Reference Rate Communication. This means that for 2003 and 2004 [...] rated ÅI one category higher than [...] did. For 2005 [...] rated ÅI at A (satisfactory), which translates into a 'satisfactory' rating according to the Reference Rate Communication and thus places ÅI in the same category as [...] does.
- (75) The Commission is of the opinion that the rating of [...] should be applied when assessing whether guarantees G-I, G-II and G-III were granted on market terms. Bearing in mind that before the first guarantee G-I was granted in October 2003, when ÅI had already received five capital injections for a total of EUR 2 208 595,01, any rating of the company in 2003 is likely to have been affected by the considerable amount of State support. Therefore the Commission considers it appropriate to apply the more conservative rating produced by [...]. This has an impact for 2003 and 2004, as for these two years [...] rated ÅI one category lower than [...]. It should also be noted that [...] granted ÅI loans guaranteed by the LG while at the same time producing ÅI's rating, which might have affected the assessment. [...] was not involved in the financial proceedings and their assessment is thus less likely to have been directly influenced by undue considerations linked to the State aid.
- (76) Consequently, the Commission assumes the following ratings for ÅI for the purpose of applying the Reference Rate Communication: weak (B) in 2003 and 2004 and satisfactory (BB) in 2005.
- (77) As regards the collateral, ÅI provided collateral at the nominal value of the guarantees in the form of mortgages on real estate on which the iTiden project was built. Finland has not provided Loss Given Default (LGD) related information under footnote 2 of the Reference Rate Communication. This information helps to define the level of collateralisation and the loan margins to be added on top of the base rate. Therefore the Commission requested information on the priority of the mortgages pledged and the value of the property at the time of granting the guarantees. Finland does not have valuations that show the value of the property at the time of the guarantee measures. The Finnish authorities have, however, argued that the value of the

⁽²³⁾ OJ C 14, 19.1.2008, p. 6.

property has accrued over time, as the project progressed. According to Finland, in 2010 the property was valued at EUR [...].

(78) As regards the seniority of the collateral, the Commission notes that for guarantees G-I and G-II, the LG collateral had the highest seniority of all mortgages granted on the property. The Commission notes that commercial banks have granted non-guaranteed loans to ÅI and accepted as collateral mortgages on the same property that rank lower in seniority (and are thus less good collateral) than the collateral received by the LG. In view of this, and in the absence of better evidence, the Commission assumes that the level of collateralisation of the guarantees was 'normal' for the purpose of applying the Guarantee Notice.

(79) On the basis of the above, the reference rate will be assessed separately for each guarantee that ÅI received from the LG.

(80) The Commission notes that, for all guarantees granted to ÅI, the premiums were made up of two parts: (i) a recurrent premium, paid annually and expressed as a percentage of the outstanding principal of the loan and (ii) a 'one-off' fee, also expressed as a percentage of the loan amount, but paid only once, at the emission of the guarantee. In the assessment below, the total financial cost of the guaranteed loans includes only the recurrent premium paid annually. In accordance with point 4.2 of the Guarantee Notice, the aid element of a guarantee should be calculated as the difference between the market price (in this case the reference rate) and the price actually paid. The price actually paid by ÅI includes the recurrent premium paid annually and a one-off premium paid only once. For practical reasons the one-off premium will be addressed below in Section 8.2 dealing with recovery, since it is easier to deduct the amount of the one-off fee from the amount of aid to be recovered. In any case, even if the one-off premiums were added to the total financial costs of the guaranteed loans, the conclusion as to the presence of aid would not change. The one-off premium affects only the amount of aid granted to ÅI.

Guarantee G-I

(81) Guarantee G-I was granted by the LG on 9 October 2003 to cover a loan of EUR [...] from [...] to ÅI (credit number [...]). As collateral for any claims under the guarantee, ÅI provided a mortgage on real estate. The

interest rate on the loan was set at [...] % until 15 January 2007 ⁽²⁴⁾. The premium for the guarantee was [...] % of the loan amount p.a ⁽²⁵⁾. Thus, the total financial cost of the guaranteed loan at the time of granting the loan amounted to [...] % p.a., which should be compared with a reference rate calculated for the guarantee on the basis of the base rate and a margin that depends on ÅI's rating and the collateralisation level of the loan. The base rate (one-year Euribor) on 9 October 2003 was 2,235 %. At the time ÅI was rated 'weak' within the meaning of the Reference Rate Communication. As established above, the Commission assumes that the collateralisation level of the loan was normal, which means that the loan margin to be added on top of the basis rate is 400 bps. Therefore, the reference rate for this loan amounts to 6,235 %, which is higher than the total financial cost of G-I amounting to [...] % p.a.

(82) In addition, as from 6 September 2004, the LG reduced the guarantee premium for G-I to [...] %. Accordingly, the total financial cost of the guaranteed loan came to [...] %, i.e. [...] basis points below the reference rate, thus generating a corresponding advantage for ÅI.

Guarantee G-II

(83) On 2 November 2004 ÅI took a loan of EUR [...] from [...] (credit number [...]). This loan was secured by a guarantee from the LG, for which ÅI provided security in the form of a lien on real estate. The interest rate was set at [...] + [...] basis points and the guarantee fee at [...] % of the loan amount p.a., meaning that the total financial cost of this guaranteed loan was [...] % p.a. ⁽²⁶⁾.

(84) The reference rate for G-II has to be calculated on the basis of the one-year Euribor on 2 November 2004, which was 2,314 %. At the time ÅI was rated 'weak' within the meaning of the Reference Rate Communication. Assuming a normal level of collateralisation, the reference rate for this loan amounts to 6,314 % p.a., which is higher than the total financial cost of G-II amounting to [...] % p.a. Comparing the costs of this

⁽²⁴⁾ According to the information provided by Finland, this rate was to be applied until 15 January 2007, when it was to be changed to [...] + [...] basis points. However, the terms of this guaranteed loan were renegotiated, and as of 13 December 2005 the interest rate was set at [...] % until 15 January 2007, when it was to be changed to [...] + [...] basis points. On 14 January 2009 the interest rate was changed to [...] + [...] bps, and on 12 February 2011 it was again changed to [...] + [...] bps.

⁽²⁵⁾ This does not include the one-off premium of [...] % of the loan, i.e. EUR 19 500. This will be addressed below, in Section 8.2 dealing with recovery of aid.

⁽²⁶⁾ This does not include the one-off premium of [...] % of the loan, i.e. EUR 2 900. This will be addressed below, in Section 8.2 dealing with recovery of aid.

new guaranteed loan with the reference rate shows that the total financial cost of the loan covered by guarantee G-II was at least [...] basis points below the reference rate, thus providing a financial advantage to ÅI. According to the information available to the Commission, the interest rate on the guaranteed loan has not changed since it was issued.

Guarantee G-III

- (85) On 13 December 2005, the LG issued a new guarantee in favour of ÅI. This guarantee was to cover the 'reference loan', i.e. the originally non-guaranteed loan of 9 October 2003, the terms of which were thus amended. The interest rate of the loan was at this point changed to [...] % p.a. The guarantee fee was set at [...] % of the loan amount, meaning a total financial cost of [...] % p.a. ⁽²⁷⁾ (the terms applied from this date are identical to those, described above, that apply to the loan covered by guarantee G-I, including the changes to the interest rate over time).
- (86) The reference rate for G-III has to be calculated on the basis of the one-year Euribor on 13 December 2005, which was 2,769 %. At the time ÅI was rated 'satisfactory' within the meaning of the Reference Rate Communication. Taking into account a normal level of collateralisation, the reference rate for this loan amounts to 4,969 % p.a. This is higher than the total financial cost of G-III amounting to [...] % p.a. Therefore, the LG has given ÅI a corresponding financial advantage of at least [...] % p.a.

5.2. DISTORTION OF COMPETITION AND EFFECTS ON TRADE

- (87) The Finnish authorities have claimed that the measures in question do not affect trade between Member States and do not therefore constitute State aid within the meaning of Article 107(1) TFEU. In support of this argument Finland has in essence argued that ÅI is only one of several firms active on the real estate market, and not the largest one. There is thus no evidence that the measures, if they are considered to constitute State aid, would have strengthened ÅI's position to the detriment of competitors.
- (88) The Commission cannot accept this argument. The fact that ÅI has been provided with a financial advantage that was not made available to its competitors (and, as Finland has confirmed, there are several other operators on the Åland real estate market) means that ÅI has been able to make large investments and expand its operations

on financial terms that were more advantageous than those made available to its competitors (who, in the absence of the advantage granted to ÅI, might have chosen to make similar investments). It is not necessary to demonstrate that the measures have allowed ÅI to take market shares from any specific competitor.

- (89) Similarly, the advantage granted to ÅI was liable to affect trade between Member States. It is true that Åland is a small market, located on an archipelago that can only be reached by sea or air, and that specific restrictions on the right of establishment apply there by virtue of Finland's EU Accession Treaty. However, the fact remains that there is no absolute obstacle to foreign undertakings operating in Åland, and certainly no obstacle to such undertakings making investments in the local property market. The Commission also notes that Finland has not disputed the statement in the opening decision that real estate in Åland has in the past been acquired by undertakings based in other Member States. Any advantage granted to ÅI through these measures would thus have at least the potential to affect trade between the Member States by unduly strengthening ÅI's position in relation to potential foreign competitors or investors.

5.3. CONCLUSION ON THE QUALIFICATION OF STATE AID

- (90) For the above reasons, the Commission finds that all capital increases (with the exception of C-I, C-II and C-III) and loan guarantees G-I, G-II and G-III constitute State aid within the meaning of Article 107 TFEU.

6. ALLEGED LAWFULNESS OF THE AID

- (91) Finland has argued that both the capital injections and the guarantees, if State aid, were lawful under aid schemes that were put into place prior to Finland's EU membership and duly submitted to the EFTA Surveillance Authority ('ESA') prior to EU accession under references 93-074 (capital increases) and 93-079 (guarantees).
- (92) This argument should be examined in the context of the provisions of Regulation (EC) No 659/1999. Pursuant to Article 1(d), 'aid scheme' means 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'. Furthermore, according to Article 1(b) of Regulation (EC) No 659/1999, 'existing aid' means: '(i) without prejudice to Sections 144 and 172 of the Act of Accession of Austria, Finland and Sweden, all aid which existed prior to the entry into force of the Treaty in the respective

⁽²⁷⁾ This does not include the one-off premium of [...] % of the loan, i.e. EUR 6 500. This will be addressed below, in Section 8.2 dealing with recovery of aid.

Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty’.

- (93) Finland acceded to the European Community on 1 January 1995. Moreover, according to paragraph 5 of Section 172 of the Treaty of Accession of Austria, Finland and Sweden ‘[...] state aids granted by new Member States during 1994 but which, in contravention of the EEA Agreement or arrangements made thereunder, either have not been notified to the ESA or have been notified but granted before the ESA took a decision, shall not as a consequence be considered as existing state aids under Article 93(1) of the EC Treaty [...]’.
- (94) Furthermore, according to Article 1(c) of Regulation (EC) No 659/1999, ‘new aid’ means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid ⁽²⁸⁾.
- (95) Finally, Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁹⁾ defines alteration of existing aid as ‘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. However an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.’
- (96) From the above it follows that a measure that pre-dates accession and constitutes a State aid scheme can be said to be existing aid if two conditions are satisfied. The first is that the scheme was put into effect before the entry into force of the EC Treaty and the second is that its substance has not been substantially altered since.
- (97) The Commission will assess the Finnish argument about the lawfulness of the aid separately for the two alleged schemes.

6.1. THE ALLEGED GUARANTEE SCHEME (93-079)

- (98) The Commission will first assess whether these measures constitute an aid scheme within the meaning of Article 1(b) of Regulation (EC) No 659/1999.

⁽²⁸⁾ In *Gibraltar v Commission* (Joined cases T-195/01 and T-207/01 *Government of Gibraltar v Commission*, judgment of 30.4.2002, [2002] ECR II-2309, paragraphs 109-111), the CFI noted that, under Article 1(c) of Regulation (EC) No 659/99, ‘alterations of existing aid’ are to be regarded as new aid. Consequently, it is only the alteration that is liable to be classified as new aid. However, where the alteration affects the actual substance of the original scheme, because it is not severable from that scheme, then the latter is transformed into a new aid scheme (Joined cases T-254/00, T 270/00 and T 277/00 *Hotel Cipriani v Commission*, judgment of 28.11.2008, paragraphs 358-359).

⁽²⁹⁾ OJ L 140, 30.4.2004, p. 1.

- (99) The national legal basis for the guarantee scheme is the provincial Act on provincial guarantees for industry and certain other enterprise sectors (ÅFS 1966:14) ⁽³⁰⁾, which was passed in 1966, and amended by ÅFS 1979:84, 1982:37, 1988:53, 1992:9, 1994:29, 1996:56 and 2002:23. As regards the budget or ‘envelope’, at the time of Finland’s accession to the EC, the 1966 provincial Act stipulated that ‘the amount of outstanding guarantees or loans ⁽³¹⁾ may not at any given time exceed FIM 20 000 000’. On the other hand, the measure in question does not provide for any temporal limitation to their application.
- (100) In the light of the above and of the provisions of the national act, the measures would prima facie appear to meet the definition of an aid scheme, as it seems that the act allows aid which is not linked to a specific project to be awarded to one or several undertakings for an indefinite period of time. The alleged scheme in question was put in place on 1 September 1982, i.e. well before 1 January 1994, and was communicated to the ESA. Thus the first condition for existing aid seems to be satisfied, because the original scheme was put in place before the entry into force of the Treaty in Finland and even before 1 January 1994, which means that paragraph 5 of Article 172 of the Treaty of Accession of Austria, Finland and Sweden is not applicable in this case.
- (101) However, the Commission must also assess whether the measures have undergone any substantive alterations since 1 January 1994.
- (102) At least three amendments to the guarantee scheme were enacted by the regional authorities after 1 January 1994 (by Provincial Acts 1994:29, 1996:56 and 2002:23) and prior to the granting of the first guarantee on 14 August 2003. These amendments provided for a substantial increase in the budget of the scheme (i.e. an increase in the global amount of guarantees that could be granted at any given time). Since the present case concerns the granting of a loan guarantee, it should be assessed whether the alterations concerning the budget of the scheme, introduced prior to the measures under discussion, should be considered as substantial and severable from the existing scheme.
- (103) As described, according to Article 4 of Regulation (EC) No 794/2004 budget increases of more than 20 % constitute an alteration of an existing aid scheme. Two of the abovementioned amendments ⁽³²⁾ have increased the original budget of the scheme by 50 % and 150 %, respectively. These budget increases constitute substantive alterations to the scheme which were never notified to the Commission.

⁽³⁰⁾ Landskapslag om landskapsgarantier för industrier och andra näringsgrenar, ÅFS 1966:14.

⁽³¹⁾ The law also covers some loans (the Commission’s note).

⁽³²⁾ The amendment of 3 March 1994 increased the budget from FIM 20 million to FIM 30 million, while the amendment of 16 February 1996 increased the budget from FIM 30 million to FIM 50 million.

(104) The effect of these substantive alterations cannot be considered as severable from the alleged scheme, with the result that the scheme in its entirety becomes new aid. Indeed, the original aid scheme was limited only as regards the total amount of guarantees that could be outstanding at any given time. With this particular configuration, a very substantial increase in the budget (even without any other alteration of the scheme) touches upon the very essence of the existing rules.

(105) In addition, the Commission notes that it does not appear from the guarantee documents submitted by Finland that the legal basis of these guarantees was the alleged guarantee scheme.

(106) Consequently, the guarantees covered by this decision must be considered new aid. Given that the aid has been put into effect without prior approval by the Commission as required by Article 108 TFEU, it is unlawful.

6.2. THE ALLEGED SHARE SUBSCRIPTION SCHEME (93-079)

(107) The national rules concerning this alleged scheme were declared to ESA as aid arrangements for share subscriptions. It appears from the documents submitted at the time that the 'Annual budget for Åland' was given as the national legal basis. Under the heading 'maximum possible aid intensity that (...) can be obtained in favour of any one project', Finland has indicated '30 %'. Furthermore, under the heading 'Budget/expenditure' Finland has indicated budgets for the years 1992 to 1994 but left a blank under the heading 'Total budget estimate for the whole planning period of the scheme'.

(108) In the course of the investigation, Finland has explained that the formal legal basis of the alleged scheme is the Act on the Autonomy of Åland (1144/1991), which was passed in 1991. Under Section 18(22) the Åland local authorities have 'general powers' to adopt different sorts of measures focusing on the promotion of Åland's economy. These powers are implemented (e.g. by means of loans, capital injections, guarantees) through provisions in the annual general budget of the LG.

(109) The Commission notes the following:

(110) Irrespective of the fact that Finland may qualify the powers of the local authorities to provide such capital injections (under the general powers they are granted by the Autonomy Act) as a 'scheme', the Commission must verify whether the provisions of the national law laying down those powers meet the definition of a 'scheme' under Article 1(d) of Regulation (EC) No 659/1999. It appears in this respect that the legal basis (Section 18(22) of Act 1144/1991) consists of rules that relate to the allocation of powers between different authorities within the Finnish legal order and that do not meet the

requirements for constituting an aid scheme (which is defined among other things as '... an act on the basis of which, without further implementing measures being required, individual aid awards may be made ...'). Any allocation of capital to an individual beneficiary would thus first require an appropriation in the annual budget of the LG (voted by the Åland regional assembly at its discretion) and then the implementation of decisions taken by the LG. It appears thus that capital injections granted under those powers are to be seen as a succession of individual decisions rather than an aid scheme.

(111) In any event, the Commission also notes that the alleged scheme concerned only the years 1992 to 1994, as no other information was given under the heading 'Budget/expenditure' although the legal basis was the 'annual budget for Åland'.

(112) Finally, the Commission notes that Finland had indicated that the maximum aid intensity that can 'be obtained in favour of any one project' is 30 %. This can, in any event, only be understood as meaning that capital injections under this alleged scheme were intended to be used together with significant private contributions (at least 70 %) towards 'projects' intended to promote the objectives of the alleged scheme, given as being 'Tourism, industry, R&D'. The capital increases at issue in this decision do not meet this formal condition and can consequently not be covered by the national legal provisions that were submitted to the ESA, irrespective of whether these measures constituted a proper aid scheme and if so whether it applied beyond 1994.

(113) Consequently, the State aid given in the form of capital increases to ÅI constitutes new aid. As the aid has been put into effect without prior approval by the Commission as required by Article 108 TFEU, it is unlawful.

6.3. ADDITIONAL COMMENT ON RECENT DECISIONS BY FINLAND'S SUPREME ADMINISTRATIVE COURT

(114) It should also be noted that two measures granted by the LG to ÅI have recently been annulled by a national Finnish court. The measures are (i) capital increase C-XI paid to ÅI in 2007 (see comment at recital 16 above) and (ii) a 2006 loan guarantee that was never implemented. By decision of 6 April 2011 the Supreme Administrative Court ruled on whether the LG's decisions were taken in compliance with national administrative rules. However, in doing so, the Court also assessed whether there were sufficient indications that the measures constituted State aid, meaning that the local authorities should have notified them to the Commission before putting them into effect. The Court finds that all criteria of State aid are met *prima facie*. The Court also analysed Finland's claim that the measures — if they did constitute aid — would be covered by the national rules that applied prior to accession and

consequently qualify as 'existing aid'. In doing so, the Court made an in-depth assessment of the national rules and found that, irrespective of whether these rules amounted to genuine State aid schemes or not, the decisions of the local authorities did not comply with the formal requirement under the national rules, mainly owing to the reasons presented above by the Commission. Therefore the conclusions of the national Supreme Administrative Court are in accord with those of the Commission that the capital injection C-XI under investigation includes new State aid. The Supreme Court came to the same conclusion regarding the 2006 loan guarantee. As the guarantee was never put into effect, it has not been assessed in this decision.

7. COMPATIBILITY

- (115) Finland has argued in general terms that the measures, if found to constitute new State aid, would nevertheless be compatible with the internal market because the purpose of ÅI's activities, as financed by the aid, was to facilitate the development of the region and create new jobs.
- (116) State aid, although in principle prohibited, will nevertheless be considered compatible with the internal market in the circumstances mentioned in Article 107(2) TFEU and may be considered compatible if it is used to achieve the objectives mentioned in Article 107(3). The only ground for compatibility that can be envisaged in this case is 107(3)(a) TFEU, which allows for aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment, or Article 107(3)(c) TFEU, which provides that State aid may be authorised to facilitate the development of certain economic areas.
- (117) Under the regional aid rules applicable to Finland at that time (the Regional Aid Maps 2000-2006 and 2007-2013), the City of Mariehamn where iTiden is located was in any event not eligible for such aid. This means that even if the aid could be said to be assigned to that project, it could not be deemed compatible. In addition, the Commission notes that Finland has not shown that any of the conditions for compatibility under the regional aid rules (regarding e.g. the form of aid, eligible costs or maximum aid intensities) are met.
- (118) Nor can the aid be considered compatible with the internal market under any of the other Guidelines and Communications adopted by the Commission with regard to the application of Article 107(3)(c) TFEU or directly under that Article. The Finnish authorities have not provided any specific argument or evidence enabling the Commission to approve those measures as compatible under any provision of the TFEU.

8. RECOVERY OF THE AID

8.1. FINLAND'S ARGUMENTS

- (119) Article 14(1) of Regulation (EC) No 659/1999 provides that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]. The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.' The natural consequence is therefore that the measures that constitute unlawful State aid to ÅI should be recovered.
- (120) Finland has, however, argued that the Commission should refrain from ordering recovery in this case, because Finland had legitimate expectations that the aid was lawful under the alleged pre-accession schemes and that recovery would be contrary to a principle of Community law. The Commission notes that Finland has formally argued legitimate expectations only as regards the LG. Legitimate expectations on behalf of the beneficiary were not expressly argued.
- (121) In any event, the Commission cannot accept this argument.
- (122) As regards the capital increases, the Commission has shown above that, irrespective of what ÅI or anyone else may have had reason to believe about the legal status of the alleged share subscription scheme in relation to State aid rules, they did not even comply with the formal conditions of the alleged scheme as it had been notified to ESA. It is thus not possible to argue that ÅI could benefit from a legitimate expectation as to the lawfulness of the capital increases, since these could not have been covered by the national rules in relation to which Finland claims to have had legitimate expectations.
- (123) Concerning the loan guarantees, the Commission has shown that the guarantee scheme had been substantively altered even before the granting of the guarantees at issue in this decision. These alterations, made by the Åland authorities, have not been notified to the Commission. The consequence is that any guarantees granted under the national rules that made up the original scheme have to be considered new aid. It is well-established that no beneficiary of aid can legitimately expect that

- aid that should have been notified to the Commission under Article 108 TFEU but has not been so, is lawful⁽³³⁾.
- (124) In summary, both the guarantees and the capital increases constitute new State aid that should have been notified to the Commission before implementation.
- (125) It is established case law⁽³⁴⁾ that a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 108 TFEU may not rely on the legitimate expectations of the aid recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If national authorities were able to rely on their own unlawful conduct, they would completely invalidate Articles 107 and 108 of the TFEU and deprive decisions taken by the Commission under these provisions of their effectiveness.
- (126) The same principle must necessarily apply when the national authorities argue that they themselves had a legitimate expectation about the legality of the measures, but did not notify them to the Commission although the measures constituted new aid⁽³⁵⁾.
- (127) Likewise, insofar as the legitimate expectations of AI are relevant, the Commission notes that according to established jurisprudence, in view of the mandatory nature of the supervision of State aid by the Commission under Article 108 of the TFEU, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article. A diligent businessman should normally be able to determine whether that procedure has been followed⁽³⁶⁾.
- (128) The Commission points out that no firm was in a better position than AI to have insight into the actions of the LG concerning the alleged aid schemes, since the LG is its main shareholder and is represented on the AI board by individuals who are also members of the LG executive. This argument is corroborated by the fact that, as shown above in connection with the capital increases, representatives of AI and the LG regularly exchange information. Therefore, even though the Finnish authorities have not expressly argued legitimate expectation on behalf of the aid beneficiary, the Commission believes that AI cannot claim any legitimate expectation in the present case.
- (129) Finally, the Commission has never given either Finland or the aid beneficiary any precise assurance that the measures at issue would not be State aid or would be compatible aid, which might create expectation to that effect⁽³⁷⁾.
- (130) Finland has further argued that in the event of a recovery of aid granted through the capital increases, the aid element should not necessarily be the whole amount of the capital provided, but rather (by analogy with the calculation of the aid element in guarantees), the cost to AI of finding alternative investment on the markets. In this respect, Finland has suggested that the cost of such alternative funding could be established by reference to the 7 % expected return on investment for office property as established in the KPMG report.
- (131) The Commission cannot accept this view.
- (132) It is certainly correct, as a general proposition, that State aid in a given case is constituted by the difference between the advantage (in the form of funding) that the firm has effectively received from State resources and what it would have been able to obtain on the capital markets. Consequently, 'by repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored'⁽³⁸⁾.
- (133) Anyone making an investment, be it by providing credit or by taking an equity stake in a firm, will seek to have a return on his investment that is commensurate with the risk.
- (134) When the aid is given in the form of a credit at a cost below markets costs (which is the case for a guaranteed loan when the total financial cost is lower than the interest rate of a market loan) to a firm that is not excluded from the loan market and that would thus, as an alternative to the aid, have been able to take out a loan at market rate, it is clear that the reparative purpose of the recovery can be achieved by making the firm pay the difference (with interest), thus putting it back on a par with its competitors.
- (135) The situation is different for equity investments. The return here is not dependent on the firm's willingness to pay (as in the case of a loan) but is entirely a factor of the inherent profitability of the firm's business model. Unless the private investor believes that the business will adequately remunerate the risk it entails, he will not make the investment but put his money elsewhere. In other words the Commission cannot accept that the

⁽³³⁾ See case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, judgment of 20.3.1997, [1997] ECR I-1591, paragraph 49.

⁽³⁴⁾ *Ibidem*, point 17; see also joined cases C-465/09P *Diputación Foral de Vizcaya v Commission* and C-470/09P *Territorio Histórico de Vizcaya et al. v Commission*, judgment of 9.6.2011, paragraph 151, not yet published.

⁽³⁵⁾ See footnote 34.

⁽³⁶⁾ Case C-5/89 *Germany v Commission*, judgment of 20.9.1990, [1990] ECR I-3437, paragraph 14.

⁽³⁷⁾ Joined cases T-427/04 and T-15/05 *France and France Télécom v Commission*, judgment of 30.11.2009, [2009] ECR II-4315, paragraph 261.

⁽³⁸⁾ Case C-348/93 *Commission v Italy*, judgment of 4.4.1995, [1995] ECR I-673, paragraph 27.

company would have been able to get the same money in the capital market to increase its capital by offering a higher remuneration because its expected performance did not allow it to offer this higher remuneration to any equity investor. The counterfactual, i.e. the situation in the absence of aid which the recovery is intended to restore or bring about, is thus that no capital would have been invested at all. The aid to be recovered is therefore the full amount of the capital increases.

- (136) The Commission can consequently not accept Finland's view as regards the aid element in the capital increases.

8.2. AID TO BE RECOVERED

- (137) In consequence, the unlawful and incompatible aid that has been identified by the Commission and that Finland shall recover from ÅI is as follows:

- (138) Capital increases:

- (a) Capital increase C-IV: EUR 353 199,00. This aid was put at the disposal of ÅI on 20 July 2001.
- (b) Capital increase C-V: EUR 599 933,78. This aid was put at the disposal of ÅI on 15 August 2002.
- (c) Capital increase C-VI: EUR 799 911,64. This aid was put at the disposal of ÅI on 13 March 2003.
- (d) Capital increase C-VII: EUR 515 165,97. This aid was put at the disposal of ÅI on 6 May 2004.
- (e) Capital increase C-VIII: EUR 669 896,95. This aid was put at the disposal of ÅI on 30 September 2004.
- (f) Capital increase C-IX: EUR 199 977,91. This aid was put at the disposal of ÅI on 16 June 2005.
- (g) Capital increase C-X: EUR 234 961,43. This aid was put at the disposal of ÅI on 16 June 2005.
- (h) Capital increase C-XI: EUR 1 379 998,95. This aid was put at the disposal of ÅI on 15 February 2007.

- (139) Loan guarantees: the aid element for all guarantees is calculated as the difference between, on the one hand, the reference rate applied as a benchmark for loan costs a company with financial strength comparable to ÅI would have borne without the guarantee and, on the other, the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account, pursuant to point 4.2 of the Guarantee Notice (as explained in detail in recitals 66 to 80).

- (a) As regards guarantee G-I, the aid element is made up of the difference between the reference rate for a loan to a firm in the rating category 'weak (B)' and with a normal collateralisation and the total financial cost of the loan covered by the guarantee (understood as the premiums paid for the guarantee plus the interest on the loan). This aid was put at the disposal of ÅI on 9 October 2003 (as explained in recitals 81 and 82). From this amount shall be deducted the one-off guarantee premium of EUR 19 500 ⁽³⁹⁾.

- (b) As regards guarantee G-II, the aid element is made up of the difference between the reference rate for a loan to a firm in the rating category 'weak (B)' and with a normal collateralisation and the total financial cost of the loan covered by the guarantee (understood as the premiums paid for the guarantee plus the interest on the loan). This aid was put at the disposal of ÅI on 2 November 2004. From this amount shall be deducted the one-off guarantee premium of EUR 2 900 ⁽⁴⁰⁾.

- (c) As regards guarantee G-III, the aid element is made up of the difference between the reference rate for a loan to a firm in the rating category 'satisfactory (BB)' and with a normal collateralisation and the total financial cost of the loan covered by the guarantee (understood as the premiums paid for the guarantee plus the interest on the loan). This aid was put at the disposal of ÅI on 13 December 2005. From this amount shall be deducted the one-off guarantee premium of EUR 6 500 ⁽⁴¹⁾.

- (140) The exact total amount of aid to be recovered will be determined by the Finnish authorities, in collaboration with the Commission, within the framework of the recovery procedure according to the methodology described in recitals 138 to 139 above. To the aid amount to be determined shall be added interest from the date on which the aid was put at the disposal of the recipient until the date of its recovery. The Commission calls on the Finnish authorities, in accordance with their duty of sincere cooperation, to collaborate with it in determining the exact amount of aid to be recovered,

⁽³⁹⁾ See recital 81 and footnote 25.

⁽⁴⁰⁾ See recital 83 and footnote 26.

⁽⁴¹⁾ See recital 85 and footnote 27.

HAS ADOPTED THIS DECISION:

Article 1

The capital increase in the amount of EUR 84 094,39 granted by Finland in favour of Ålands Industrihus AB on 18 June 1997 does not constitute State aid in the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

The State aid measures listed in Section 8.2 of this Decision unlawfully granted by Finland, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Ålands Industrihus AB are incompatible with the internal market.

Article 3

1. Finland shall recover the State aid referred to in Article 2 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

4. Finland shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of adoption of this Decision.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.

2. Finland shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Finland shall submit the following information to the Commission:

(a) the total amount (principal and recovery interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Finland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the Republic of Finland.

Done at Brussels, 13 July 2011.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX

Information about the amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total amount of aid received under the scheme (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already reimbursed (*)	
			Principal	Recovery interest

(*) Million of national currency