III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 521/12/COL

of 19 December 2012

to close the formal State aid investigation procedure initiated by Decision No 363/11/COL with regard to State aid to three Icelandic investment banks through rescheduled loans on preferential terms (Iceland)

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

HAVING REGARD to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 and Protocol 26,

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

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 1(3) of Part I and Article 4(4) and Article 6 of Part II.

HAVING called on interested parties to submit their comments pursuant to those provisions [1] and having regard to their comments,

Whereas:

I. FACTS

1. Procedure

(1) By letter dated 22 June 2010, the Authority received a complaint from the Icelandic securities firm H.F. Verðbréf hf. alleging that the Icelandic Treasury had in March 2009 granted unlawful State aid to the investment banks Saga Capital and VBS through conversion of short-term debt with the Central Bank of Iceland ('the CBI') to long-term loans on favourable terms. The letter was received and registered by the Authority on 7 July 2010 (Event No 563424).

(2) Having received the relevant information from the Icelandic authorities and having discussed the case with them in a meeting on 6 June 2011 [2], the Authority decided by Decision No 363/11/COL of 23 November 2011 to initiate the formal investigation procedure with regard to State aid to three Icelandic investment banks through rescheduled loans on preferential terms [3]. By means of this Decision, the Authority called on interested parties to submit their comments. By letter dated 21 February 2012 (Event No 625875), the Icelandic authorities submitted comments on the Authority's Decision No 363/11/COL.

(3) In June 2012 the Authority received information from the complainant, H.F. Verðbréf hf., regarding the winding-up process of Saga Capital hf. (Event No 641907). The Authority has also received information on this matter from other sources and followed closely the winding-up process of the investment banks that were the subject of the Decision No 363/11/COL.

2. Description of the measures

2.1. *The CBI's collateral loans and securities lending scheme*

(4) The measures that were under preliminary assessment in the Authority's Decision No 363/11/COL are linked to the CBI's collateral and securities lending scheme. The CBI, as part of its role as a central bank and lender of last resort and in line with the monetary policy of other central banks, provided short-term credit facilities to

[1] EFTA Surveillance Authority Decision No 363/11/COL of 23.11.2011 to initiate the formal investigation procedure with regard to State aid granted to three Icelandic investment banks through rescheduled loans on preferential terms was published in the *Official Journal of the European Union* on 26.1.2012 (OJ C 21, 26.1.2012, p. 2) and the EEA Supplement No 4, 26.1.2012, p. 8.

[2] See paragraphs 2-6 of the Authority's Decision No 363/11/COL.

[3] See footnote 1 above for publication references.

financial undertaking in the form of collateral loans ([4]), in accordance with the provisions of CBI rules pertaining thereto. In 2007 and 2008 collateral lending increased steadily and the CBI became the financial undertakings' main source of liquidity. At the time of the financial collapse of the three Icelandic commercial banks in October 2008, the CBI had acquired considerable claims against domestic financial undertakings, which were backed by collateral of various types.

(5) Due to the banks' collapse, the value of the collateral diminished and it became clear that the CBI had sustained losses due to unsound collateral. After the Parliament had given its authorisation, the Treasury and the CBI concluded an agreement in January 2009, according to which the CBI assigned a part of its claims of collateral loans against financial undertakings, along with underlying securities, to the Ministry of Finance. In February 2010 the Ministry and the CBI agreed that the claims previously transferred by the CBI to the Ministry should be transferred back to Eignarhaldsfélag Seðlabanka Íslands (ESÍ), a recently established holding company of the CBI, at a reduced price as of 31 December 2009.

(6) The Government Debt Management (GDM), which is administered by the CBI, offers lending facilities to primary dealers of government securities. The purpose of this securities lending is to improve market functionality and to maintain liquidity in the market for bond series that the GDM is building up. The securities accepted by the GDM as collateral for the Treasury Bonds and Bills are all government bonds and mortgage benchmark bonds traded electronically in the secondary market. Other electronically traded securities may also be accepted depending on the criteria specified in the facility. The interest rate for these loans is based on the CBI repo rate. The maximum contract period is 28 days ([5]).

2.2. *Conversion of short-term credit facilities to long-term loans*

(7) In March 2009 the Ministry of Finance concluded loan conversion agreements with Saga Capital Investment Bank hf., VBS Investment Bank hf. and Askar Capital Investment Bank hf. The loan agreements were all concluded on similar terms. The loan amounts were based on settlement of the respective liabilities in December 2008. The repayment terms of the loans to Saga and VBS were identical. They were repayable over the next seven years with indexation and an interest rate of 2 % per annum. The repayment terms of the loan to Askar Capital were similar, except that the annual interest rate was 3 %. The total nominal amount of debt, attributable to the three investment banks, at the time of issue of the long-term bonds, was ISK 52,4 billion ([6]).

(8) The aforementioned measures were based on the proposals of a Working Group which on 20 January 2009 submitted a memorandum to the Minister of Finance for the restructuring of debt owed by financial undertakings due to collateral loan facilities with the CBI. The memorandum was based on information regarding the financial undertakings and their ability to repay the debt. According to the memorandum, the financial undertakings concerned were, due to the implications of the financial collapse in Iceland, unable to pay their debts to the CBI in full. The memorandum of the Minister's Working Group also states that at the time, the entire apparatus of the Icelandic authorities had been preoccupied with trying to keep the country's financial system operating and protecting the interest of deposit holders. Bearing that in mind, along with other considerations, it was considered necessary to make certain arrangements in order to ensure that the undertakings would be able to pay off their debts.

(9) According to the Icelandic authorities, the decision on the terms and conditions of the interest had not centred on what a fair and normal return on equity should be, since it had been clear in advance that the undertakings in question were unlikely to repay in full the liabilities in question. Instead, the Working Group had focused on finding an interest percentage sufficiently high to matter to the undertaking in question but not so high as to preclude the possibility for repayment, thus removing the incentive for these undertakings to restructure their finances.

(10) The Icelandic authorities did however set certain conditions for the debt conversion. According to the conditions the debtor was inter alia obliged not to pay dividends, unless there was a corresponding down payment on the loans, the debtor could not enter into any major risk commitments that exceeded 20 % of equity (CAD), any bonuses to the debtors employees should be moderate, the debtors were obliged to provide the lender with detailed quarterly reports on their operations and the debtors' CAD-ratios should not fall below 10 %. In case the liquidity position of the debtors turned out to be unacceptable in the view of the CBI or their CAD-ratios fell below 10 %, the lender could require that the outstanding amount of the loans together with interest and other relevant costs be converted to equity. The purpose of those conditions was to increase the likelihood of full recovery of the loans and thereby to safeguard the Treasury's interest.

(11) For a more detailed description of the measures, reference is made to the Authority's Decision No 363/11/COL ([7]).

([4]) Collateral loans are also named repo loans, where repos or repurchase agreements are contracts in which the seller of securities, such as Treasury bills, agrees to buy them back at a specified time and price.

([5]) For further details see Rules on Central Bank of Iceland securities lending facilities on behalf of the Treasury for primary dealers dated 28 November 2008, available at: http://www.lanamal.is/assets/nyrlanasysla/regluren08.pdf

([6]) Further details of the loan agreements are set out in Decision No 363/11/COL, paragraphs 11-27.

([7]) In particular, Part 2.2 of the Decision.

2.3. *The objective of the measure and the national legal basis*

(12) The Icelandic authorities considered that the objective of the measures was twofold; firstly, to try to secure the immense interests of the State by maximising the Treasury's recovery of the claims, and, secondly, to give the financial undertakings a breathing space and a chance to work out their matters and get through the difficulties.

(13) The measures were based on an authorisation from the Icelandic parliament in paragraph 7.20 of the State supplementary budget for the year 2008, where the Minister of Finance, on behalf of the Treasury, was authorised to purchase from the Central Bank of Iceland commercial papers which had been pledged to the bank as collateral for loans as well as to settle these claims in the most viable manner possible.

2.4. *The beneficiaries*

(14) As previously noted the three beneficiaries to the aforementioned measures were Saga Capital Investment Bank hf., VBS Investment Bank hf. and Askar Capital Investment Bank hf. For a more detailed description of the three beneficiaries and subsequent developments regarding their operations, reference is made to Sections 2.5 and 2.6 of the Authority's Decision No 363/11/COL.

3. **Grounds for initiating the formal investigation procedure**

(15) In Decision No 363/11/COL, the Authority assessed preliminarily whether the Treasury's measures to convert short-term claims to long-term loans on favourable terms were compatible with the State aid provisions of the EEA Agreement. However since the State's involvement as a major creditor to the undertakings concerned derived from earlier measures, namely the CBI collateral loans and securities lending, it was necessary to consider whether those measures possibly constituted State aid.

(16) The Authority therefore began its assessment by analysing the CBI short-term collateral loans to financial undertakings. The Icelandic authorities had underlined that the short-term credit facilities concerned belonged to regular monetary policy and financial market measures of the CBI and to the Treasury's regular government debt management. The Authority did not dispute that these measures belonged to monetary and government debt management policy and that they had been based on relevant rules thereon ([8]). The measures had been taken at the initiative of the financial undertakings concerned and the CBI had not, at the time, been backed by any counter-guarantee of the State. Therefore the Authority concluded that the CBI short-term collateral loans to financial undertakings and the Treasury's short-term lending facilities did not involve State aid.

([8]) These rules were replaced on 26 June 2009 by Rules No 553 on the same subject (currently applicable rules).

(17) However, in the preliminary view of the Authority, the Treasury's loan conversion agreements amounted to State aid in the meaning of Article 61(1) of the EEA Agreement. The following aspects were indentified in the decision to initiate a formal investigation procedure:

(i) The Authority concluded that the measures were clearly granted through State resources since the loans had been granted by the Ministry of Finance on the basis of authorisation provided for in the State budget.

(ii) The Authority found that the measures conferred on the three investment banks a commercial advantages since they were relieved of charges, in the form of interest payments and other costs associated with the short-term credit facilities with the CBI, that would normally have been borne by their budgets. The Authority also expressed doubt as to whether the measures were consistent with the conduct of a private creditor in a comparable legal and factual situation, given the favourable repayment terms of the loans and the fact that they did not foresee a step-up of interest rates in case the financial condition of the debtors improved.

(iii) With regard to selectivity, the Authority concluded that the measures could not be considered to be general in nature, since they favoured three undertakings in one particular economic sector and other undertakings and sectors did not benefit from them. The measures would therefore have to be considered as selective ([9]). Furthermore the Icelandic authorities had not presented clear evidence that the favourable loan conversion agreements had been effectively made available to all undertakings in a comparable legal and factual situation as Saga Capital, VBS and Askar Capital.

(iv) Finally, the Authority concluded that the measures were liable to distort competition. Even though the investment banks concerned operated mostly on the Icelandic market and were of modest size, they were nevertheless engaged in provision of financial services which were fully open to competition and trade within the European Economic Area.

(18) Moreover, the Authority doubted that the State aid could be considered compatible with the EEA Agreement. The Icelandic authorities had referred to Article 61(3) EEA and the Authority's rescue and restructuring aid guidelines in support of their argument that the measure was compatible with the Agreement. The Icelandic authorities did however not submit any evidence in favour of assessing the compatibility of the measure under Article 61(3)(b) of the EEA Agreement or the Authority's temporary State aid guidelines regarding the financial crisis. The Authority stressed that the

([9]) See for instance Case C-75/97 *Belgium* v *Commission* (Maribel bis/ter) [1999] ECR I-3671 as well as recent judgment in joined Cases C-106/09 P and C-107/09 P *Commission* v *Government of Gibraltar*, not yet reported, paragraph 75.

temporary rules on aid to financial undertakings provide for the limitation of the aid to the minimum necessary, the restoration of the long-term viability of the bank and safeguards against undue distortion of competition. In particular, the guidelines set out rules to secure appropriate and adequate remuneration for State recapitalisation ([10]). The repayment terms of the loans provided by the State appeared not to take account of those principles. The loans had been granted with a repayment period of seven years, with indexation, and at fixed interest rates of 2 % per annum, which was far below market rates and no step-up of interest rates was foreseen to encourage redemption of State capital. In light of this, the Authority concluded that lending terms of this kind were not compatible with the Authority's State aid guidelines.

4. **Comments by the Icelandic authorities**

(19) The comments of the Icelandic authorities are focused on their view that the measures were compatible with the EEA Agreement. In their view the measures had not been selective since the circumstances of the three investment banks had been unique and other banks, such as Straumur, SPB and SPRON, had not been in a similar situation as the three investment banks. Some of the other banking institutions had already defaulted on their obligations against their creditors by the time the loan conversion agreements were made and their reorganisation efforts were so substantial that conversion of debts with the CBI would not have been a significant factor in their financial restructuring. The Icelandic authorities also maintained that their decisions to convert the loans had been in line with the private creditor principle since any creditor, in the same position as the Icelandic State was in at that time, would have acted in the same manner.

(20) Furthermore, the Icelandic authorities provided information on the current status of the three investment banks and the developments that had occurred since the Authority issued Decision No 363/11/COL ([11]).

(21) In light of the fact that the three beneficiaries had ceased all economic activity since Decision No 363/11/COL was issued, and with reference to established practice by the European Commission and the Authority on the issue of pursuing the classification of measures in corresponding circumstances and assessing their compatibility ([12]), the Icelandic authorities maintained that there was no reason for the Authority to pursue the matter any further.

II. **ASSESSMENT**

(22) 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.*'

(23) This implies that for measures to be classified as State aid within the meaning of Article 61(1) of the EEA Agreement, they must involve a grant by the State or through State resources, confer an advantage on the recipient undertaking, be selective, distort competition and be liable to affect trade between the Contracting Parties.

(24) As previously noted the Authority, in Decision No 363/11/COL, preliminarily concluded that the measures under assessment, i.e. the conversion of short-term credit facilities to long-term loans, fulfilled the criteria set out in Article 61(1) of the EEA Agreement and therefore constituted State aid. Furthermore, there was nothing to suggest that the measures were compatible with either the general State aid provisions of the EEA Agreement or the Authority's temporary State aid guidelines regarding the financial crisis. The Authority has in the course of the investigation received no information which would alter this preliminary view. Moreover, the Icelandic authorities had not notified the aid measures covered by the opening decision to the Authority prior to their implementation. By not doing so they disrespected their notification obligation pursuant to Article 1(3) of Part I of Protocol 3. The implementation of those aid measures was therefore unlawful. Despite of this the Authority must nevertheless assess whether there is a reason for it to pursue the matter further.

(25) As was noted in Decision No 363/11/COL, Askar Capital Investment Bank hf. had already in 2007 sustained significant losses from its investments in structured credit (sub-prime) products with US mortgages as underlying assets. The bank faced even greater difficulties in June 2010 when the Supreme Court of Iceland ruled that foreign currency denominated loans were illegal. The bank eventually filed for bankruptcy on 14 July 2010 and was taken over by the Financial Supervisory Authority ('the FME') on the same day. According

([10]) See for instance the Authority's recapitalisation guidelines available at: http://www.eftasurv.int/?1=1&showLinkID=16015&1=1

([11]) The Authority later received corresponding information from the complainant (Event No 641907).

([12]) Commission Decision of 25 September 2007 on the aid measures implemented by Spain for *IZAR*, Case C 47/2003 (OJ L 44, 20.2.2008, p. 33), Commission Decision of 9 November 2005 on the measure implemented by France for *Mines de potasse d'Alsace*, Case C 53/2000 (OJ L 86, 24.3.2006 p. 20) and EFTA Surveillance Authority Decision of 27 May 2009 concerning *alleged unlawful aid to the undertaking NordBook AS*, Case 245/09/COL (OJ L 282, 29.10.2009, p. 41).

to information later submitted to the Authority the bank is currently in the process of winding-up and has now ceased all economic activity.

(26) As was also noted in Decision 363/11/COL, VBS Investment bank hf. financial situation deteriorated substantially after unsuccessful negotiation between the bank and its creditors and shareholders, and, subsequently, in 2010 the bank's creditors ceased all negotiations. By decision of 3 March 2010, the FME appointed VBS a provisional board of directors, and by a ruling of the Reykjavik District Court on 9 April 2010, a winding-up procedure of VBS was initiated, in accordance with Article 101 of Act No. 161/2002 on financial undertakings. The bank's operating license has now been revoked due to the fact that the bank is undergoing a winding-up procedure.

(27) Saga Capital's operating licence was revoked by a decision of the FME of 28 September 2011. Subsequently, the FME demanded that a winding-up procedure of Saga Capital be initiated and a winding-up board appointed. The North Eastern Iceland District Court, by a ruling of 16 May 2012, complied with the FME's demands and declared that Saga Capital should undergo a winding-up procedure. On 14 June 2012, the Supreme Court of Iceland confirmed this ruling. The FME's decision to revoke Saga Capital's operating licence was upheld by a ruling of the Reykjavik District Court, dated 5 March 2012. The ruling of the Reykjavik District Court has been appealed to the Supreme Court. Nevertheless, the bank has ceased all licensed operations given the fact that its operating licence as a financial institution has been withdrawn.

(28) It is therefore clear that the three investment banks in question have now ceased all economic activity, their operating licences have been revoked, they are currently undergoing a winding-up procedure and the time limit for lodging claims to the banks' estates has elapsed ([13]). If State aid was granted to the investment banks, the aid no longer produces any distortive effects, and if illegal aid were granted, recovery of that aid would be impossible. Under these circumstances, a decision by the Authority on the classification as aid of the measures in question and on their compatibility with the EEA Agreement would have no practical effect ([14]).

(29) Continuing the formal investigation procedure initiated pursuant to Article 1(2) of Part I of Protocol 3 to the Surveillance and Court thus serves no useful purpose,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure concerning State aid granted to three Icelandic investment banks through rescheduled loans on preferential terms is herby closed.

Article 2

This Decision is addressed to Iceland.

Article 3

Only the English language version of this Decision is authentic.

Done at Brussels, 19 December 2012.

For the EFTA Surveillance Authority

Oda Helen SLETNES	Sverrir Haukur GUNNLAUGSSON
President	*College Member*

([13]) It has to be noted that the time limit for stating claims to the winding-up boards of the three banks has expired: according to Article 85 of Act No. 21/1991 on Bankruptcy, the period for lodging claims shall generally be two months, but in exceptional circumstances the trustee may decide on a period of three to six whole months at the most. Irrespective of its duration, the period for stating claims shall start when the notice to creditors is published for the first time, and this shall be clearly stated in the notice. Therefore, a decision by the Authority ordering recovery of incompatible aid would in the present case be futile. However, given the fact that the Icelandic authorities did not comply with their notification obligation under Article 1(3) of Part I of Protocol 3 SCA, the Authority was not in a position to initiate the investigation of the measures earlier than it did by its Decision 363/11/COL, i.e. in November 2011. In any case, the Authority expects that the sale of the three investment banks' assets will be conducted on market terms and in line with the general rules applicable in bankruptcy proceedings.

([14]) Commission Decision of 25 September 2007 on the aid measures implemented by Spain for *IZAR*, Case C 47/2003 (OJ L 44, 20.2.2008, p. 33), and Commission Decision of 9 November 2005 on the measure implemented by France for *Mines de potasse d'Alsace*, Case C 53/2000 (OJ L 86, 24.3.2006, p. 20).