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(Vervolg z.o.z.)

NL

[1] Voor de EER relevante tekst

IV

(Informatie)

INFORMATIE AFKOMSTIG VAN DE INSTELLINGEN EN ORGANEN VAN DE EUROPESE UNIE

COMMISSIE

Wisselkoersen van de euro [1]

16 april 2008

(2008/C 96/01)

1 euro =

	Munteenheid	Koers		Munteenheid	Koers
USD	US-dollar	1,5928	TRY	Turkse lira	2,1189
JPY	Japanse yen	161,41	AUD	Australische dollar	1,7069
DKK	Deense kroon	7,4603	CAD	Canadese dollar	1,6073
GBP	Pond sterling	0,80610	HKD	Hongkongse dollar	12,4135
SEK	Zweedse kroon	9,4038	NZD	Nieuw-Zeelandse dollar	2,0223
CHF	Zwitserse frank	1,5896	SGD	Singaporese dollar	2,1551
ISK	IJslandse kroon	117,81	KRW	Zuid-Koreaanse won	1 576,39
NOK	Noorse kroon	7,8985	ZAR	Zuid-Afrikaanse rand	12,7100
BGN	Bulgaarse lev	1,9558	CNY	Chinese yuan renminbi	11,1365
CZK	Tsjechische koruna	24,848	HRK	Kroatische kuna	7,2570
EEK	Estlandse kroon	15,6466	IDR	Indonesische roepia	14 639,42
HUF	Hongaarse forint	254,26	MYR	Maleisische ringgit	5,0229
LTL	Litouwse litas	3,4528	PHP	Filipijnse peso	66,778
LVL	Letlandse lat	0,6972	RUB	Russische roebel	37,2390
PLN	Poolse zloty	3,4213	THB	Thaise baht	50,149
RON	Roemeense leu	3,6278	BRL	Braziliaanse real	2,6641
SKK	Slowaakse koruna	32,355	MXN	Mexicaanse peso	16,6417

[1] *Bron:* door de Europese Centrale Bank gepubliceerde referentiekoers.

INFORMATIE OVER DE EUROPESE ECONOMISCHE RUIMTE

TOEZICHTHOUDENDE AUTORITEIT VAN DE EVA

Kennisgeving van de Noorse autoriteiten inzake de „*Nyvekst*"-regionale steunregeling voor nieuw opgerichte kleine ondernemingen

De Toezichthoudende Autoriteit van de EVA heeft besloten geen bezwaar te maken tegen de aangemelde maatregel

(2008/C 96/02)

Datum waarop het besluit is genomen: 12 december 2007

EVA-staat: Noorwegen

Nummer van de steunmaatregel: 63186

Benaming: „*Nyvekst*"-regeling inzake staatssteun voor nieuw opgerichte kleine ondernemingen

Doelstelling: regionale steun

Rechtsgrond: staatsbegroting voor 2008

Looptijd: 2008-2013

De tekst van de beschikking in de authentieke ta(a)l(en), waaruit de vertrouwelijke gegevens zijn geschrapt, is beschikbaar op site:

http://www.eftasurv.int/fieldsofwork/fieldstateaid/stateaidregistry/

Uitnodiging om overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie opmerkingen te maken over de IJslandse havenwet

(2008/C 96/03)

De Toezichthoudende Autoriteit van de EVA heeft bij Besluit nr. 658/07/COL van 12 december 2007, dat na deze samenvatting in de authentieke taal is weergegeven, de procedure ingeleid van artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie (Toezichtovereenkomst). De IJslandse autoriteiten zijn hiervan in kennis gesteld door middel van een afschrift van het betrokken besluit.

De Toezichthoudende Autoriteit van de EVA verzoekt hierbij de EVA-staten, de lidstaten van de EU en andere belanghebbenden hun opmerkingen over de betrokken maatregel binnen één maand na publicatie van deze bekendmaking in te dienen bij de:

Toezichthoudende Autoriteit van de EVA
Griffie
Belliardstraat 35
B-1040 Brussel

Deze opmerkingen zullen ter kennis van de IJslandse autoriteiten worden gebracht. Een belanghebbende die opmerkingen maakt, kan, met opgave van redenen, schriftelijk verzoeken om vertrouwelijke behandeling van zijn identiteit.

SAMENVATTING

PROCEDURE

Bij brief van 7 mei 2007 van het IJslandse ministerie van Financiën hebben de IJslandse autoriteiten overeenkomstig artikel 1, lid 3, van deel I van Protocol 3 bij de Toezichtovereenkomst wijzigingen in de IJslandse havenwet aangemeld, die betrekking hebben op de vergoeding van schade aan schepenliften. Zij meldden tevens een geplande toepassing van die nieuwe bepaling aan, namelijk ter ondersteuning van de reparatie van de schepenlift van de haven van de Westman-eilanden. Dit laatste deel van de aanmelding werd ingetrokken bij brief van de IJslandse autoriteiten van 11 december 2007.

De IJslandse Werkgeversorganisatie (*Samtök atvinnulífsins*) diende bij brief van 31 augustus 2007 bij de Autoriteit een klacht in, omdat de extra financiering voor het Haveninfrastructuurfonds staatssteun zou vormen. De klacht werd aan de IJslandse autoriteiten doorgezonden met het verzoek hun opmerkingen in te dienen.

Na briefwisseling met de IJslandse autoriteiten besloot de Autoriteit een formele onderzoeksprocedure in te leiden in verband met de wijzigingen in de IJslandse havenwet van 2007 en bepaalde aspecten van de havenwet van 2003, die niet bij de Autoriteit waren aangemeld.

BEOORDELING VAN DE MAATREGEL

De wijzigingen in de havenwet van 2007

De IJslandse havenwet is een algemene kaderwet waarin onder meer bepalingen zijn opgenomen over de coördinatie van havenaangelegenheden door centrale autoriteiten, de definitie van een haven, het beheer en de exploitatie van havens, de bijdragen van de overheid aan de bouw van havens en het zogenaamde Haveninfrastructuurfonds.

Bij de onderhavige aanmelding stellen de IJslandse autoriteiten de Autoriteit in kennis van Wet nr. 28/2007 tot wijziging van de havenwet van 2003. Uit de wijzigingen volgt dat schepenliften thans op grond van artikel 26, lid 3, punt 3, van de havenwet in aanmerking komen voor schadevergoeding uit het Haveninfrastructuurfonds, dat vroeger alleen tussenkwam voor andere bouwwerkzaamheden in havens. De bepaling betreft alleen schade in havens die eigendom zijn van gemeenten. Particuliere havens of scheepsbouwwerven komen niet in aanmerking voor schadevergoeding op grond van de havenwet van 2007.

De Autoriteit is van oordeel dat de te verlenen steun wordt bekostigd met staatsmiddelen via het Haveninfrastructuurfonds. Het Haveninfrastructuurfonds is een publiekrechtelijke instelling, die deels rechtstreeks uit de overheidsbegroting wordt gefinancierd en overheidstaken verricht. De Autoriteit is van oordeel dat de exploitatie van een schepenlift voor scheepsherstellingen een economische bedrijvigheid vormt. De gemeenten die

eigenaar zijn, treden bijgevolg op als ondernemingen in de zin van artikel 61, lid 1, van de EER-Overeenkomst. De maatregel is selectief, aangezien zij alleen ondernemingen in een bepaalde sector (havens) bevoordeelt en binnen die sector alleen bepaalde havens. De Autoriteit is van oordeel dat schepenliften, hijsinstallaties voor schepen en droogdokken internationaal concurreren en bijgevolg vervalst de steun de mededinging of dreigt hij die ter vervalsen en wordt de handel tussen de overeenkomstsluitende partijen in de EER beïnvloed.

Aangezien de havenwet in maart 2007 in werking is getreden, dat wil zeggen voordat zij bij de Autoriteit was aangemeld, is de opschortingsverplichting van artikel 1, lid 2, van deel I van Protocol 3 bij de Toezichtovereenkomst niet nageleefd en wordt de maatregel als onrechtmatige steun beschouwd in de zin van artikel 1, onder f), van deel II van Protocol 3 bij die overeenkomst. Indien de bepaling op grond waarvan de steun is betaald, na onderzoek niet verenigbaar blijkt te zijn met de staatssteunbepalingen van de EER, zal de Autoriteit voor alle steun een bevel tot terugvordering uitvaardigen.

De Autoriteit stelt zich voorlopig op het standpunt dat de steun niet verenigbaar is met de werking van de EER-Overeenkomst, aangezien hij niet in aanmerking komt voor een afwijking op grond van artikel 61, lid 2, onder b), van de EER-Overeenkomst. De schadevergoedingsclausule is niet beperkt tot situaties waarin de schade het gevolg is van natuurrampen of buitengewone gebeurtenissen en kan derhalve niet worden gerechtvaardigd op grond van artikel 61, lid 2, onder b), van de EER-Overeenkomst. Artikel 61, lid 3, onder c), in samenhang met de richtsnoeren scheepsbouw laat de toekenning van exploitatiesteun niet toe. Wel kan steun worden verleend ten behoeve van investeringen in de verhoging van het niveau of de modernisatie van bestaande scheepswerven met als doel de productiviteit te verbeteren. Dit is niet het geval in de onderhavige zaak, aangezien de IJslandse autoriteiten uitdrukkelijk verklaren dat de verleende steun niet voor modernisering bedoeld is. Schadevergoeding moet in elk geval als exploitatiesteun worden beschouwd.

De Autoriteit stelt tevens vast dat schadevergoeding slechts kan worden toegekend aan havens die eigendom zijn van de overheid. De Autoriteit ziet momenteel geen enkele rechtvaardiging voor de kennelijke discriminatie van havens die in particuliere handen zijn.

De Autoriteit betwijfelt bijgevolg of de wijzigingen in de havenwet van 2007 verenigbaar kunnen worden geacht met de werking van de EER-Overeenkomst.

De havenwet van 2003

In 2003 heeft een nieuwe havenwet de regels voor overheidsfinanciering voor haveninfrastructuur gewijzigd. Deze bepalingen voorzien in de mogelijkheid van betalingen uit de schatkist voor bepaalde haveninfrastructuur (artikel 24) en in de mogelijkheid om uit het Haveninfrastructuurfonds schadevergoeding toe te kennen voor sommige infrastructuur (artikel 26 van de wet).

De Autoriteit is van oordeel dat bepaalde van de in artikel 24, lid 2, bedoelde projecten volgens de mededeling van de Europese Commissie betreffende kwaliteitsdiensten in zeehavens kunnen worden aangemerkt als algemene infrastructuurmaatregelen en derhalve geen staatssteun vormen in de zin van artikel 61, lid 1, van de EER-Overeenkomst. Het gaat om de steun voor golfbrekers, markering van toegangskanalen, diepgang, beschermende infrastructuur en baggerwerken. De Autoriteit zal echter nader onderzoeken of deze kwalificatie ook van toepassing is op het gebruik van loodsschepen in havens met moeilijke natuurlijke omstandigheden en op de steun voor kaai-infrastructuur.

Bij de steun die op grond van de schadevergoedingsclausule van artikel 26, lid 3, punt 3, van de havenwet van 2003 wordt verleend, is er sprake van staatssteun, wanneer deze wordt verleend ten behoeve van projecten die geen algemene infrastructuur vormen.

De Autoriteit beschouwt de havenwet van 2003, die niet bij haar was aangemeld, als onrechtmatige steun in de zin van artikel 1, onder f), van deel II van Protocol 3 bij de Toezichtovereenkomst. Voor alle steun die betaald is op grond van die bepaling, die niet verenigbaar is met de staatssteunbepalingen van de EER, zal de Autoriteit een bevel tot terugvordering uitvaardigen.

De Autoriteit zal nagaan of de steunmaatregelen gerechtvaardigd zijn op grond van artikel 61, lid 3, onder c), van de EER-Overeenkomst, hetzij in samenhang met de richtsnoeren scheepsbouw of regionale steun, hetzij door rechtstreekse toepassing. Alle bovengenoemde maatregelen gelden alleen voor havens die eigendom zijn van de overheid. De Autoriteit ziet geen enkele rechtvaardiging voor een dergelijke differentiatie. Op basis van het voorgaande betwijfelt de Autoriteit of de steun verenigbaar is met de staatssteunbepalingen van de EER.

CONCLUSIE

Gelet op voorgaande overwegingen heeft de Autoriteit besloten de formele onderzoeksprocedure overeenkomstig artikel 1, lid 2, van de EER-Overeenkomst in te leiden in verband met de wijzigingen in de havenwet van 2007 en de wijzigingen van 2003.

EFTA SURVEILLANCE AUTHORITY DECISION

No 658/07/COL

of 12 December 2007

to initiate the procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the Icelandic Harbour Act

(Iceland)

THE EFTA SURVEILLANCE AUTHORITY [1],

Having regard to the Agreement on the European Economic Area [2], in particular Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [3], in particular Article 24 thereof,

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

Having regard to the Authority's Guidelines [4] on the application and interpretation of Articles 61 and 62 of the EEA Agreement, in particular the Chapter on State aid to Shipbuilding and the Chapter on National Regional Aid,

Having regard to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Whereas:

I. FACTS

1. Procedure

By letter dated 7 May 2007 from the Icelandic Ministry of Finance, forwarded by the Icelandic Mission to the EU, received and registered by the Authority on the same date (Event No 420581), the Icelandic authorities notified, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, amendments to the Icelandic Harbour Act, with a view to including damage compensation for ship lifts. They also notified an envisaged application of that new provision in support of the repair of the Westman Islands Port ship lift facility.

By letter dated 14 May 2007 (Event No 421158), the Authority informed the Icelandic authorities that it considered the notification to be incomplete as, in particular, the notification form had not been submitted.

On 19 June 2007, the Icelandic Mission to the EU forwarded a letter from the Icelandic Ministry of Finance, received and registered by the Authority on the same date (Event No 425880), by which the Icelandic authorities submitted the notification form and provided further information on the notified measures.

By letter dated 4 July 2007 (Event No 427442), the Authority requested additional information, which the Icelandic authorities provided on 10 August 2007 (Event No 433162).

The Confederation of Icelandic Employers (*Samtök atvinnulífsins*) filed a complaint with the Authority by way of a letter dated 31 August 2007, claiming that the additional funding for the Harbour Improvement Fund constitutes State aid which cannot be justified under the EEA State aid provisions. The Association refers, in particular, to the fact that aid under the Harbour Act is only available to publicly owned, but not to privately owned, harbours.

By letter dated 19 September 2007 (Event No 441678), the Authority forwarded the above complaint to the Icelandic authorities for comment and requested further information, which was provided by the Icelandic authorities in a letter from the Icelandic Ministry of Finance dated 16 October 2007 (Event No 447362). The case was discussed with the Icelandic authorities during the package meeting between the Icelandic authorities and the Authority of 29 October 2007.

By letter dated 11 December 2007 (Event No 456952), the Icelandic authorities withdrew the notification relating to the proposed application of the Harbour Act in support of the repair of the Westman Islands Port ship lift facility.

2. Description of the proposed measures

In order to deal with the amendments to the Harbour Act as notified in 2007, which provide, for the first time, for damage compensation in favour of ship lifts, the Authority finds it appropriate to set the Harbour Act in its historical context.

2.1. *History of the Icelandic Harbour Act*

The Icelandic Harbour Act is a general framework legislation containing *inter alia* provisions on the coordination of harbour affairs by central authorities, the definition of what constitutes a harbour, the management and operation of harbours, State contributions to harbour constructions and the so-called Harbour Improvement Fund.

The 1984 Harbour Act

The Harbour Act No 69/1984 contained a provision authorising damage compensation for harbour facilities in Article 32(2). That provision stipulated that a so-called Harbour Improvement Fund was authorised to indemnify loss to harbour constructions which had sustained damage caused by '*acts of God or natural catastrophes or force majeure, including loss which is not fully indemnified on account of provisions of Section IX of the Maritime Act on limited liability of operators of vessels*'.

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[1] Hereinafter referred to as 'the Authority'.
[2] Hereinafter referred to as 'the EEA Agreement'.
[3] Hereinafter referred to as 'the Surveillance and Court Agreement'.
[4] Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, EEA Supplement No 32, 3 September 1994. The Guidelines were last amended on 31 May 2007. Hereinafter referred to as 'the State Aid Guidelines'.

According to its Article 8, the Act only covered municipal harbours, so public aid in the form of damage compensation under Article 32(2) was only given to harbours owned by municipalities.

The 1994 Harbour Act

In 1994, a new Harbour Act No 23/1994 was adopted, which was subsequently amended by Act No 7/1996. Article 19 of the 1994 Harbour Act listed seven categories of harbour construction project which could receive State support (e.g. constructions at wharfs, piers, berths, traffic lanes within the limits of harbour constructions, etc.). That support would come directly from the State Treasury. The State would pay up to 100 % for the costs of primary research, up to 90 % of investment costs for the constructions of quays, dredging of harbours and entrance, navigation signals and special outfits for ro-ro vessels and ferries, and up to 60 % in relation to the remaining categories.

In addition, Article 28(2) of the 1994 Harbour Act contained the same damage compensation for harbour constructions, granted by the Harbour Improvement Fund, as had been included in the 1984 Act. As before, the 1994 Harbour Act only covered municipal harbours, cf. Article 3 of the Act, and therefore State support was still limited to harbours owned by municipalities.

Some provisions of the 1994 Harbour Act, namely the provisions on State grants for the financing of harbour constructions for ships ([1]), were the subject of a decision of the EFTA Surveillance Authority dated 19 March 1997 (Decision No 51/97/COL). In line with that Decision, the Icelandic authorities had agreed not to apply the provisions in question without prior notification to and approval by the EFTA Surveillance Authority.

The 2003 Harbour Act

In 2003, a new Harbour Act No 61/2003 was adopted. This Harbour Act, which was not notified to the Authority, contained changes in particular with regard to the permissible operating forms of harbours and, hence, which harbours come within the Act. Article 8 provided that:

'A harbour may be operated as:

1. *A harbour that is owned by a municipality without any special board of directors.*

2. *A harbour owned by a municipality and governed by a special board of directors.*

3. *A public limited liability company, irrespective of whether or not it is owned by a public body, a private limited liability company, a partnership or as a private party operating independently. Harbours operated under this paragraph are not regarded being a public operation.'*

In other words, the Harbour Act now applied to harbours other than those owned by the municipalities and specifically envisaged the existence of privately owned harbours, although a distinction was maintained in that the latter would not be considered as a 'public operation' under the Act.

According to Article 24(1) of the Harbour Act, contributions from the Treasury could be granted to projects relating to harbour constructions carried out by harbours which are operated under subparagraph 1 or 2 of Article 8. In other words, privately owned harbours could not receive any State support under the Harbour Act. Public entities (including municipalities) would also not be entitled to any support if they organised their harbour as a limited liability company or any other form of organisation listed in subparagraph 3 of Article 8.

Article 24(2) now contained only three (instead of the former seven) categories of project for which direct aid can be given:

(a) For the reconstruction, improvement and repair of breakwaters in harbours where difficult natural conditions mean that there is little protection from ocean waves, for dredging in harbour approaches where regular dredging is needed (i.e. at least every five years), and for initial costs for pilot vessels in places where conditions in and near the harbour require such safety equipment. The level of State funding is determined in the National Transport Plan and may not exceed 75 %.

(b) Projects undertaken by small harbour funds within a region defined pursuant to the regional aid map for Iceland ([2]), with an income under ISK 20 million and where the value of the average catch over the past three years is under ISK 600 million. The projects to be supported should be limited to the marking of approach channels, depth, protective installations and quays. The level of State funding is determined in the National Transport Plan and may not exceed 90 %.

(c) Projects undertaken by a harbour fund within a region defined pursuant to the regional aid map for Iceland, with an income under ISK 40 million and where the value of the average catch over the past three years is under ISK 1 500 million and goods transportation through the harbour is less than 50 000 tonnes per year. State contributions pursuant to this subparagraph may never exceed 60 % for dredging and 40 % for quay installations on which work is performed in 2007 or later.

Article 26(3), subparagraph 3, of the Harbour Act contained a damage compensation clause which stipulated that the Harbour Improvement Fund is authorised to indemnify loss to harbour constructions which qualify for support under subparagraphs (a) or (b) of Article 24(2) or loss to dry harbour constructions, including loss which will not be fully indemnified from the Emergency Fund (*Viðlagasjóði*) ([3]) or due to the provisions of Section IX of the Maritime Act on limited liability of operators of vessels.

([1]) The investments concerned in particular docking facilities for ship repair contained in Article 24(6) of the 1994 Act.

([2]) EFTA Surveillance Authority Decision of 8 August 2001 on the map of assisted areas and levels of aid in Iceland (Aid No 00-002).

([3]) A fund different from the Icelandic Harbour Improvement Fund and responsible for covering damage from natural catastrophes.

Compared to the 1994 Harbour Act, the provision limits the number of aid beneficiaries by linking the support to categories (a) and (b) in Article 24(2). On the other hand, while still referring to the Emergency Fund, the text no longer refers to compensation limited to damage caused by natural disasters or acts of God.

According to information provided by the Icelandic authorities, no State support has been paid out under this measure so far. This would appear to be as a result of interim provision II of the 2003 Harbour Act, as amended by Act No 11/2006, under which State aid might still be provided, until the end of 2008, in accordance with the rules in the 1994 Harbour Act.

The 2007 amendment Act

By the present notification, the Icelandic authorities inform the Authority of Act No 28/2007, amending the 2003 Harbour Act, and in particular Article 26(3), subparagraph 3 thereof. According to that Article, as now amended, ship lifts can now also receive damage compensation from the Harbour Improvement Fund. The wording '*eða tjón á upptökumannvirkjum*' is added after the reference to Article 24. As explained by the Icelandic authorities, '*upptökumannvirki*' includes dry docks, ship lifts and ship hoists.

According to information provided by the Icelandic authorities, the ship lifts are to be used mainly for ship repair and conversion works, not for the construction of ships.

There are currently 15 ship lifts spread around the country, 12 of which are owned by municipalities. The ship lift ownership does not imply that the concrete repair works are also carried out by the harbours. Normally, the repair works on the ships are carried out by a company which pays the harbour for the use of the ship lift.

2.2. *The objective of the measures*

The above-mentioned amendment to Article 26 of the Harbour Act was not in the bill as originally submitted to Alþingi but was added by the Transport Committee. In the opinion of the Committee, it was considered logical that damage to ship lifts could be compensated on the same basis as other harbour constructions that had benefited from State contributions by way of damage compensation. As stated in a translation submitted by the Icelandic authorities on the Committee bill, 'the authorisation only applies to damage compensation to shipyard facilities ([1]) which were constructed with State aid'. The Committee further emphasised that the provision only covered damage to facilities owned by public bodies. The amount of the compensation was to be limited to the reconstruction value. Consequently, it would not be permissible to grant compensation to build a lift with more capacity than that of the damaged facility ([2]).

As indicated by the complainant and confirmed by the Icelandic authorities, the clause is no longer limited to compensation for damage caused by natural disasters or other special occurrences.

2.3. *National legal basis for the measure/recipients of the support*

The national legal basis for the measure is Article 26(3), subparagraph 3, of the Harbour Act, as amended by Article 7 of Act No 28/2007, which entered into force on 29 March 2007. That provision covers damage compensation for ship lifts, dry docks and ship hoists in addition to what was already covered. Iceland has not indicated how many ship lifts, etc. could potentially receive support under that provision. But as can be seen from above, currently there are 15 ship lifts in the country, 12 of which are owned by municipalities.

2.4. *Budget and duration*

The Icelandic authorities stated that Parliament decided to increase the funding of the Harbour Improvement Fund for the year 2008 by ISK 200 million.

3. Comments by the Icelandic authorities

The Icelandic authorities only notify the amendment for legal certainty as they consider the measure not to constitute State aid within the meaning of Article 61(1) of the EEA Agreement. According to the notification form, the Icelandic authorities do not consider that the measure confers any advantages on the aid recipient(s) or distorts competition or affects trade between the Contracting Parties.

II. ASSESSMENT

1. The presence of State aid

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

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

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

The criteria will be assessed below, first in relation to the notified amendments to the Harbour Act and second in relation to the 2003 Harbour Act, which was never notified to the Authority.

1.1. *The notified amendments made to the Harbour Act in 2007*

1.1.1. *Presence of State resources*

The aid measure must be granted by the State or through State resources. The damage compensation for ship lifts in Article 26(3) subparagraph 3 of the Harbour Act, as amended by Act No 28/2007, is granted by the Harbour Improvement Fund, which for that purpose received a budgetary allocation of ISK 200 million from the Treasury. The budgetary allocation constitutes State resources.

([1]) To be understood as ship lifts and hoists.
([2]) Item 3 of the opinion of the Committee (*Nefndarálit um frv. til l. um breyt. á hafnalögum, nr. 61/2003, þskj. 997-366. mál*).

This classification as State resources is not altered by the fact that the money is channelled through the Harbour Improvement Fund.

Article 26(1) of the Harbour Act states that the Harbour Improvement Fund is owned by the State and that the Harbour Council (*hafnaráð*) acts as its board of directors on behalf of the Minister of Transport. The Harbour Council is appointed by the Minister of Transport pursuant to Article 4 of Act No 7/1996 on the Maritime Agency (*lög um Siglingastofnun Íslands*). Accordingly, the Harbour Improvement Fund is a public law body. Part of the financing of the Fund comes directly from the State budget as decided by Parliament. According to Article 26(3) the Harbour Council disposes of the income of the Fund, following recommendations from the Maritime Agency and subject to the approval of the Minister of Transport, as further laid down in subparagraphs 1 to 3. The Maritime Agency is responsible for the administration of the Fund according to paragraph 4 of that Article. The Harbour Improvement Fund carries out public tasks as laid down in the Harbour Act. The Authority therefore takes the preliminary view that support granted by the Harbour Improvement Fund is imputable to the State ([1]) and constitutes State resources within the meaning of Article 61(1) of the EEA Agreement.

1.1.2. *Favouring certain undertakings or the production of certain goods*

The Authority considers the ownership of a ship lift which is rented out for ship repairs by a publicly owned harbour to constitute an economic activity and therefore that the municipal owners act as undertakings within the meaning of Article 61(1) of the EEA Agreement.

Further, the aid measure must confer on the recipients advantages that relieve them of charges that are normally borne from their budget. Such advantages exist as the owners of ship lifts, etc. can receive State support for repair of damage to facilities. Normally such costs would have to be borne by the ship lift owners from their own budget. The aid measure must be selective in that it favours '*certain undertakings or the production of certain goods*'. The measure is selective as it applies only to undertakings owning ship lifts, etc. falling within the definition of Article 26(3) subparagraph 3 of the Act. In this regard it cannot be argued that no selectivity exists because the owners of other harbour constructions are likewise entitled to receive State support under Article 26(3) subparagraph 3 of the Act. Even if the circle of beneficiaries is wider than owners of ship lifts, the advantages are only conferred to a certain, limited, group of undertakings, as will be demonstrated below.

Firstly, the damage compensation in Article 26(3) subparagraph 3 is limited to those projects which were constructed with State aid as outlined in the opinion of the Committee as referred to above (Section I-2.2). Hence, the provision on the damage compensation does not apply to all undertakings owning harbour constructions.

Secondly, an advantage also exists with regard to undertakings in other sectors which have to cover damages to their production facilities from their own budget. In this regard it is irrelevant that the support is only granted to compensate for the damage caused, without leading to a modernisation or an increase in capacity. Since owners of harbour facilities not having received State support before or in other sectors would not receive any damage compensation, the recipients of the support measure are in a better position with regard to repair than those undertakings having to finance the repair work from their own budget.

The Authority takes the preliminary view that support for ship lifts does not qualify as general infrastructure, the financing of which would not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. As stated in the Commission's Communication on Reinforcing the Quality in Sea Ports ([2]), shipyards are considered as user-specific infrastructure and not as a general infrastructure measure. In the Authority's view the same applies to ship lifts used by or rented out by shipyards and harbours for repair work, which is normally a commercial activity and therefore benefits specific undertakings.

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

For a measure to qualify as aid it must distort competition and affect trade between the Contracting Parties. Ship lifts, ship hoists and dry docks as ship repair facilities are in international competition. In addition, the market for port services has been gradually opened to competition ([3]). The Commission pointed out in its LeaderSHIP 2015 programme that commercial shipbuilding and ship repair operate in a truly global market with exposure to world-wide competition ([4]). As the measure will strengthen the recipients' position in relation to other competitors within the area of the EEA, the damage compensation distorts or threatens to distort competition and affects trade between the Contracting Parties.

1.2. ***The 2003 Harbour Act***

In 2003, Act No 61/2003 replaced Act No 23/1994. In the new Harbour Act, the provisions on State funding of harbour constructions were changed. As outlined above, the current provisions provide for two distinct measures, namely payments by the Treasury in relation to certain harbour constructions (Article 24) and damage compensation granted by the Harbour Improvement Fund (Article 26 of the Act) for facilities covered by Article 24(2)(a) and (b) of the Act.

([1]) See Case C-482/99, *French Republic* v *Commission of the European Communities*, paragraphs 50 *et seq.*, [2002] ECR I-4397.

([2]) Communication from the Commission to the European Parliament and the Council, Reinforcing Quality Service in Sea Ports; A Key for European Transport, COM(2001) 35 final, Section 3.3. Hereinafter referred to as 'the Port Communication'.

([3]) Port Communication, cited in fn. 12, Section 2.

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

1.2.1. *Presence of State resources*

Support directly from the Treasury, as referred to in Article 24 of the 2003 Harbour Act, constitutes budgetary allocations which qualify as State resources within the meaning of Article 61(1) of the EEA Agreement.

As outlined above, the support by the Harbour Improvement Fund for damage compensation to harbour constructions constitutes State resources (see above, Section II-1.1.1 of this Decision).

1.2.2. *Favouring certain undertakings or the production of certain goods*

While an advantage is conferred on the recipients by relieving them of costs which they would otherwise have to bear, it needs to be examined whether all the support measures under the Act are selective.

This would not be the case, if certain of the support measures can be classified as financing general infrastructure. Investments in such infrastructure are normally general measures, being expenditure incurred by the State in the framework of its responsibilities for planning and developing a transport system in the interest of the general public, provided the infrastructure is *de jure* and *de facto* open to all users. According to the Port Communication, public (general) infrastructure is characterised as being open to all users on a non-discriminatory basis. General infrastructure includes maritime access and maintenance, covering dikes, breakwater, locks and other high water protection measures, navigable channels, dredging and ice breaking navigation aid, lights, buoys, beacons, floating pontoon ramps in tidal areas, etc. Further, it includes public land transport facilities within the port area, short connecting links to the national transport networks or TENs and infrastructure up to the terminal site ([1]).

Article 24(2)(a), (b) and (c) of the 2003 Harbour Act are limited to the support of breakwater constructions, marking of approach channels, depth, protective installations and dredging. In line with the above examples given in the Communication, the Authority considers these measures to be general infrastructure which do not confer an advantage on the harbours, but are open to all users.

The use of pilot vessels in Article 24(2)(a) of the 2003 Harbour Act

The Authority, however, questions whether the use of pilot vessels in places where conditions require safety equipment, see Article 24(2)(a) of the Harbour Act, can be considered as infrastructure and will investigate that further during the formal investigation procedure. As the Port Communication cited above states '*public support to investments in mobile assets and operational services, e.g. those of individual port service providers, generally favour certain undertakings and it is difficult to foresee a situation where this is not the case*' ([2]). On the basis of the information available to it, the Authority cannot exclude that pilot vessels do not qualify as general infrastructure.

Support for quay installations in Article 24(2)(b) and (c) of the 2003 Harbour Act

On the basis of the information available to it, the Authority cannot judge whether support to quay installations qualifies as State aid or concerns a general infrastructure measure. In this regard, reference is made to Section 3.3 of the Port Communication which states that no general conclusions can be drawn for quay walls. The Icelandic authorities are requested to provide more information in this regard.

The damage compensation clause in Article 26(3) subparagraph 3 of the 2003 Harbour Act

The Authority considers that the damage compensation provided for in Article 26(3) subparagraph 3 of the Harbour Act is a measure conferring an advantage on the recipient, as normally such damage would have to be made good using funds from the undertaking's own budget.

However, as far as the damage compensation clause, which refers to Article 24(2)(a) and (b) of the Act, concerns infrastructure projects, it does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. Where projects mentioned in Article 24(2)(a) and (b) might be considered as selective measures, the damage compensation clause would also be judged as selective in this regard. Based on the above considerations, it would appear that only damage compensation in respect of pilot vessels and quay installations may be caught.

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

The support strengthens the position of the recipients in relation to other EEA competitors, who compete with them on an international market. The support under the 2003 Harbour Act therefore distorts or threatens to distort competition and affects trade between the Contracting Parties.

1.3. ***Conclusion***

The Authority takes the preliminary view that the notified amendments made to the Harbour Act in 2007 to include ship lifts in the damage compensation clause in Article 26(3) subparagraph 3 of the Act constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

Under the 2003 Harbour Act, the support for breakwater constructions, dredging, the marking of approach channels, depth, and protective installations do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

On the basis of the information available to it, support for the use of pilot vessels referred to in Article 24(2)(a) and support for quay installations provided for in Article 24(2)(b) and (c) would appear not to fall clearly into the category of general infrastructure and must therefore be regarded as State aid within the meaning of Article 61(1) of the EEA Agreement.

The damage compensation clause in Article 26(3) subparagraph 3 constitute State aid within the meaning of Article 61(1) of the EEA Agreement, in so far as it applies to projects which do not qualify as general infrastructure.

([1]) See Communication.
([2]) See Communication, Section 3.3 at the end.

2. **Procedural requirements**

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

Where the final decision of the Authority is negative, i.e. the aid is found to be incompatible with the functioning of the EEA Agreement, any aid paid out in breach of the standstill obligation in Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement will be subject to a recovery order by the Authority.

2.1. ***Act No 28/2007 amending the Harbour Act***

The amendment to the Harbour Act is already law as Act No 28/2007 entered into force on 29 March 2007, thereby enabling the Harbour Improvement Fund to use State funds for damage compensation in favour of ship lifts. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision could be subject to recovery.

2.2. ***The 2003 Harbour Act***

The 2003 Harbour Act has not been notified to the Authority. The 1994 Harbour Act, which that Act replaced, was the subject of an appropriate measures proposal by the Authority in its Decision No 51/97/COL and was authorised on the condition that individual projects would be notified. It will now have to be assessed whether the amendments in the 2003 Harbour Act, in so far as they constitute State aid within the meaning of Article 61(1) of the EEA Agreement, must be treated as new aid within the meaning of Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement.

In this respect, the support for the use of pilot vessels and for quay installations, together with the damage compensation for those facilities, must be examined.

According to Article 4 of the Authority's Decision No 195/04/COL, a purely formal or administrative change does not affect the status of existing aid. However, a tightening of the criteria for the application of an authorised aid scheme, a reduction in aid intensity or a reduction of eligible expenses, qualify as new aid (Article 4(2)(c)). In its ruling in *Namur-Les Assurances*, the Court of Justice held that '[…] *the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it*' ([1]).

([1]) Case C-44/93, *Namur-Les Assurances du Crédit SA*, [1994] ECR I-3829, paragraph 28.

The use of pilot vessels referred to in Article 24(2)(a) of the 2003 Harbour Act

Article 24(2)(a) of the 2003 Harbour Act introduces a new support category, namely support for pilot vessels in places where conditions in and near the harbour require such safety equipment. The introduction of a new aid category constitutes new aid within the meaning of Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision would be subject to recovery.

Quay installations referred to in Article 24(2)(b) and (c) of the 2003 Harbour Act

The support for quay installations was already contained in the 1994 Harbour Act (Article 19(1), number 2, provided for the support of wharfs, piers and berths. The support for quays and quay installations in Article 24(2)(b) and (c) of the 2003 Harbour Act is now limited to projects of a certain dimension and within certain defined regions. This indicates that the possibilities for granting aid have been reduced. However, as can be seen from Article 4 of the Authority's Decision No 195/04/COL, a tightening of aid criteria is to be considered as new aid. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision would be subject to recovery.

Damage compensation under Article 26(3), subparagraph 3, of the 2003 Harbour Act

The Authority notes that the damage compensation in the 2003 Harbour Act differs from the damage clauses in the 1984 and 1994 Acts in so far as it is no longer limited to support for damages caused by acts of God or natural catastrophes. With respect to this change, the Icelandic authorities have confirmed that, indeed, it was not the intention of the legislator to limit damage compensation to natural disasters or exceptional occurrences. The Authority finds that the extension of the damage compensation clause to cover a broader range of circumstances constitutes new aid within the meaning of Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement. The Authority therefore concludes that in relation to this measure the standstill obligation has not been respected. The measure is consequently to be regarded as unlawful aid within the meaning of Article 1(f) of Part I of Protocol 3 to the Surveillance and Court Agreement and any aid paid out under that provision would be subject to recovery.

3. **Compatibility of the aid**

3.1. ***Act No 28/2007 amending the Harbour Act***

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) of the EEA Agreement.

The derogation in Article 61(2) of the EEA Agreement is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. The Authority notes, in particular, that the damage compensation to ship lifts provided for in Article 26(3), subparagraph 3, of the 2007 Harbour Act is no longer limited to natural disaster or exceptional occurrence. It therefore cannot be based on Article 61(2)(b) of the EEA Agreement.

The aid is not given to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Iceland, therefore Article 61(3)(b) of the EEA Agreement does not apply.

The aid in question is not linked to any investment, but compensates recipients for a given damage. It reduces the costs which companies would normally have to bear in the course of pursuing their day-to-day business activities and is consequently to be classified as operating aid. Operating aid is normally not considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement, unless it is specifically envisaged by the Authority's Guidelines, which is not the case here.

An application of the Regional Aid Guidelines in this regard does not appear possible. It would appear that the notified measure falls to be assessed under the Authority's Guidelines on Shipbuilding which, as a *lex specialis*, preclude the application of the regional aid chapter of the Guidelines ([1]). The Shipbuilding Guidelines cover aid to '*any shipyard, related entity, ship owner and third party, which is granted, whether directly or indirectly, for building, repair or conversion of ships*'. As can be seen from the Commission's case practice, aid for the construction or extension of ship lifts is considered to be a measure falling under the Shipbuilding Guidelines ([2]). According to point 26 of the Guidelines investment aid — not operating aid — can only be granted if it is linked to upgrading or modernising existing yards with a view to improving productivity and is limited to 22,5 % or 12,5 % aid intensity thresholds. The Icelandic authorities explicitly state, in any event, that no modernisation is allowed. They also aim for higher aid intensities than the specified thresholds.

Only if the Shipbuilding Guidelines do not apply, can the possibility of support under the Authority's Regional Aid Guidelines be assessed. The aid qualifies as operating aid ([3]), which would have to be assessed under Section 5 of the Guidelines. Such aid must normally be temporary and reduced over time (Section 5(68) of the Regional Aid Guidelines), or granted for least populated regions (Section 5(69) of the Regional Aid Guidelines) or granted for offsetting additional transport costs (Section 5(70) of the Regional Aid Guidelines). On the basis of the information available, the Authority cannot see that envisaged support for damage compensation for ship lifts is limited in that respect.

Given that on the basis of the available information, one or the other of these chapters applies to the measures under examination, a direct application of Article 61(3)(c) of the EEA Agreement is precluded.

The Icelandic authorities do not argue that the harbour services constitute a public service under Article 59(2) of the EEA Agreement.

Even if the aid could be authorised under the EEA State aid provisions, the Authority still is in doubt of the compatibility of the measures with the functioning of the EEA Agreement. The damage compensation is only granted to publicly owned harbours. The Icelandic authorities state that the Harbour Act allows for different operating forms of harbours and therefore different rules apply to the different harbour types. This was one of the primary purposes of the 2003 Harbour Act and the Icelandic authorities do not consider this distinction to be incompatible with the State aid provisions. The Authority has doubts as to how such a difference in treatment between publicly and privately owned harbours can be justified.

On the basis of the foregoing considerations, the Authority has doubts as to whether the amendments to the Harbour Act made in 2007 can be regarded as compatible with the functioning of the EEA Agreement.

3.2. ***The 2003 Harbour Act***

During the formal investigation procedure, the Authority will investigate whether the newly introduced support for pilot vessels and for quay installations can, to the extent that it is found to constitute aid, be justified under Article 61(3)(c) of the EEA Agreement.

Pilot vessels

The support for pilot vessels would qualify as operating aid, falls to be assessed under Section 5 of the Authority's Regional Aid Guidelines. As noted above, such aid would normally be temporary and reduced over time (Section 5(68) of the Regional Aid Guidelines), or granted for least populated regions (Section 5(69) of the Regional Aid Guidelines) or granted for offsetting additional transport costs (Section 5(70) of the Regional Aid Guidelines). On the basis of the information available, the support for pilot vessels provided for Article 26(3), subparagraph 3, of the Harbour Act would not appear to be limited in this way.

([1]) See the Authority's State Aid Guidelines on national regional aid 2007-2013, point 2(8), fn. 8.

([2]) State aid N 554/06 — Germany, Rolandswerft which concerned the adaptation of a ship lift to lift heavier ships and State aid C-6/06 — Germany, Volkswerft Stralsund (OJ L 151, 13.6.2007, p. 33) also for the extension of a ship lift.

([3]) See the definition of investment aid in Section 4.1.1 of the Regional Aid Guidelines which limit investment aid to initial investment projects, i.e. the setting up or extension of a new establishment, diversification of output of the establishment into new, additional products and a fundamental change in the overall production process. Replacement investment is excluded from that concept, but might qualify as operating aid, see Section 4.1.1(26), last paragraph of the Regional Aid Guidelines.

The Authority will also examine any possibilities to justify this aid granted for safety purposes by virtue of a direct application of Article 61(3)(c) of the EEA Agreement. In this respect, the Icelandic authorities are invited to provide information as to the incentive effect, necessity and proportionality of the support.

Quay installations

The Authority does not exclude that these support measures are not related to ship building, repair and conversion and therefore might not fall under the Shipbuilding Guidelines. However, more information is required in this respect. Again, the aid intensity thresholds laid down in those Guidelines would have to be observed and aid would only be allowed if it can be qualified as investment upgrading or modernisation of existing yards with a view of improving the productivity of existing facilities.

In the event that the Shipbuilding Guidelines do not apply, the measures will be examined under other Guidelines, in particular the Authority's Regional Aid Guidelines in the version applicable at each point in time ([1]).

The Authority doubts whether the support for quay installations can be justified under the Regional Aid Guidelines 1999 or 2007-2013 which in both cases provide for lower aid intensities than those foreseen in the Harbour Act.

Damage compensation

The damage compensation provided for in Article 26(3) subparagraph 3 of the 2003 Harbour Act would not be able to be justified under Article 61(2) as it is no longer limited to natural disaster compensation.

It would therefore have to be assessed under Article 61(3)(c) of the EEA Agreement, in conjunction with the Shipbuilding Guidelines, as far as it concerns measures which fall under the scope of these Guidelines. Again, only if the Shipbuilding Guidelines do not apply, can the support be assessed under the Regional Aid Guidelines. As stated before, the criteria for granting operating aid, as set out in Section 5 thereof (see argumentation above), need to be fulfilled.

Finally, it should be noted that all of the above measures are only granted to publicly owned harbours. The Authority does not see any justification for such a differentiation (see above, Section II-3.1 of this Decision).

With reference to the above assessment, the Authority consequently has doubts as to whether the 2003 Harbour Act can be regarded as compatible with the functioning of the EEA Agreement.

The Authority is therefore in doubt as to whether these measures are compatible with the functioning of the EEA Agreement.

([1]) Section 8(90) of the National Regional Aid Guidelines 2007-2013, published on the Authority's webpage, state that regional aid awarded or to be granted before 2007 will be assessed in accordance with the 1999 Guidelines on national regional aid. The 1999 Guidelines on Regional Aid can be found in OJ L 111, 29.4.1999, p. 46.

4. **Conclusion**

Based on the information submitted by the Icelandic authorities, the Authority cannot exclude the possibility that the 2007 amendments to the Harbour Act and certain aspects of the 2003 Harbour Act constitute aid within the meaning of Article 61(1) of the EEA Agreement.

Furthermore, the Authority has doubts that these measures can be regarded as complying with Article 61(2)(b) or 61(3)(c) of the EEA Agreement, possibly in combination with the requirements laid down in the Shipbuilding Guidelines or the Regional Aid Guidelines or by way of direct application. The Authority thus doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question do not constitute aid or are compatible with the functioning of the EEA Agreement.

The Authority notes that were the measures to be identified as new aid within the meaning of Article 1(c) in Part II to Protocol 3 of the Surveillance and Court Agreement, any breach of the standstill operation leads to the classification of the aid as unlawful within the meaning of Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement. Unlawful aid which is not compatible with the EEA State aid provisions is subject to recovery.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, invites the Icelandic authorities to submit their comments on this Decision within **one month** of the date of receipt thereof.

In light of the foregoing considerations, the Authority invites the Icelandic authorities within **one month** of receipt of this decision, to provide all documents, information and data needed for assessment of the compatibility of the above measures,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority finds that as far as breakwater constructions, marking of approach channels, depth, protective installations and dredging are concerned, no State aid is involved as regards support for these projects under Article 24(2)(a), (b) and (c) of the 2003 Harbour Act. The damage compensation clause in 26(3), subparagraph 3, of the 2003 Harbour Act therefore does not involve any State aid within the meaning of Article 61(1) of the EEA Agreement, in so far as it relates to these projects.

Article 2

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Iceland regarding the 2007 amendments to the Harbour Act and certain aspects of the 2003 Harbour Act, namely in relation to support for pilot vessels and quay installations.

Article 3

The Icelandic authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 4

The Icelandic authorities are invited to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 5

This Decision is addressed to the Republic of Iceland.

Article 6

Only the English version is authentic.

Done at Brussels, 12 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján Andri STEFÁNSSON
President	*College Member*

Uitnodiging om overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie opmerkingen te maken over de Noorse steunregeling voor alternatieve hernieuwbare verwarming en voor elektriciteitsbesparende maatregelen in particuliere huishoudens

(2008/C 96/04)

De Toezichthoudende Autoriteit van de EVA heeft bij Besluit nr. 716/07/COL van 19 december 2007, dat na deze samenvatting in de authentieke taal is weergegeven, de procedure ingeleid van artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie (hierna „de Toezichtovereenkomst" genoemd). De Noorse autoriteiten zijn hiervan in kennis gesteld door middel van een afschrift van het betrokken besluit.

De Toezichthoudende Autoriteit van de EVA verzoekt hierbij de EVA-staten, de lidstaten van de EU en andere belanghebbenden hun opmerkingen over de betrokken maatregel binnen één maand na publicatie van deze bekendmaking in te dienen bij de:

Toezichthoudende Autoriteit van de EVA
Griffie
Belliardstraat 35
B-1040 Brussel

Deze opmerkingen zullen ter kennis van de Noorse autoriteiten worden gebracht. Een belanghebbende die opmerkingen maakt, kan, met opgave van redenen, schriftelijk verzoeken om vertrouwelijke behandeling van zijn identiteit.

SAMENVATTING

PROCEDURE

Bij brief van 13 oktober 2006 diende Varmeprodusentenes Forening (Vereniging van warmteproducenten) een klacht in tegen het Koninkrijk Noorwegen (ministerie van Olie en Energie) betreffende de Noorse steunregeling voor alternatieve hernieuwbare verwarming en voor elektriciteitsbesparende maatregelen in particuliere huishoudens.

Bij brief van 19 oktober 2006 verstrekte Varmeprodusentenes Forening aanvullende informatie.

Bij brief van 9 november 2006 zond de Autoriteit de klacht aan de Noorse autoriteiten toe met het verzoek hun opmerkingen in te dienen. De Noorse autoriteiten antwoordden bij brief van 15 januari 2007.

Bij brief van 21 februari 2007 deelde Varmeprodusentenes Forening haar opmerkingen mede over de brief van de Noorse autoriteiten. Op 2 mei 2007 verstrekte Varmeprodusentenes Forening in een brief aanvullende informatie, waaronder een verslag van een consultant, ECON.

Bij e-mailbericht van 14 november 2007 werd de aanvullende informatie van de klager aan de Noorse autoriteiten toegezonden. De Noorse autoriteiten dienden geen opmerkingen in over de aanvullende informatie van de klager.

BEOORDELING VAN DE MAATREGELEN

De steunregeling voor alternatieve hernieuwbare verwarming en voor elektriciteitsbesparende maatregelen in particuliere huishoudens werd in 2006 door de Noorse autoriteiten ingevoerd en wordt uit de overheidsbegroting gefinancierd (46 mln NOK in 2006). Daarna werd bij de laatste herziening van de overheidsbegroting 2006 de toewijzing voor de steunregeling met 25 mln NOK verhoogd. De regeling wordt beheerd door het overheidsbedrijf Enova SF en is nog steeds van toepassing.

De regeling heeft betrekking op de volgende technologieën: pelletkachels, pelletketels, warmtepompen in verwarmingssystemen met watercircuit en elektronische controlesystemen voor systemen voor elektrische verwarming. De steunregeling geldt voor particuliere huishoudens (eindverbruikers), die een terugbetaling kunnen krijgen van ten hoogste 20 % van hun door bewijsstukken gestaafde subsidiabele kosten, met een plafond van 4 000 NOK voor pelletkachels en elektronische controlesystemen en 10 000 NOK voor warmtepompen en pelletketels. De regeling wil huishoudens aanmoedigen om te investeren in nieuwe milieuvriendelijke verwarmingstechnologieën die bestaande systemen voor rechtstreekse elektrische verwarming omvormen of vervangen, wat bijdraagt aan de beperking van het verbruik van elektriciteit in particuliere huishoudens. Andere verwarmingstechnologieën of -methoden, zoals milieuvriendelijke houtkachels, komen niet in aanmerking voor de regeling.

Door particuliere huishoudens die specifieke verwarmingstechnologieën aankopen, een compensatie of een subsidie toe te kennen, kan het zijn dat de Noorse autoriteiten de verkoop van deze producten stimuleren: de consumenten worden immers aangemoedigd om deze producten aan te kopen. Hierdoor kan de verkoop van de producenten en importeurs van de technologieën die voor de regeling in aanmerking komen, stijgen zonder dat zij de prijs waartegen zij de producten verkopen, hoeven te verlagen. De producenten en importeurs van de technologieën verkrijgen derhalve een indirect economisch voordeel door de subsidie die aan de eindverbruiker wordt toegekend.

De Autoriteit stelt zich bijgevolg voorlopig op het standpunt dat de steunregeling staatssteun kan vormen in de zin van artikel 61, lid 1, van de EER-Overeenkomst.

De Autoriteit betwijfelt voorts of de betrokken maatregel onder de toepassing valt van het hoofdstuk betreffende onderzoek en ontwikkeling en innovatie of het hoofdstuk betreffende milieubescherming van de richtsnoeren staatssteun van de Autoriteit (artikel 61, lid 3, van de EER-Overeenkomst).

De begunstigden zouden de producenten en importeurs van bepaalde milieuvriendelijke technologieën zijn, wat buiten de werkingssfeer lijkt te vallen van het hoofdstuk betreffende steun voor milieubescherming van de richtsnoeren (deel B, punt 7).

Ten slotte kan worden betwijfeld of de technologieën die voor de regeling in aanmerking komen, binnen de onderzoekscategorieën vallen die zijn opgenomen in het hoofdstuk betreffende onderzoek en ontwikkeling en innovatie van de richtsnoeren (deel 5.1.1, punt 71), namelijk fundamenteel onderzoek, industriële innovatie of experimentele ontwikkeling.

CONCLUSIE

Gelet op voorgaande overwegingen heeft de Autoriteit besloten de formele onderzoeksprocedure overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Toezichtovereenkomst in te leiden. Belanghebbenden wordt verzocht binnen één maand na bekendmaking van dit besluit in het *Publicatieblad van de Europese Unie* hun opmerkingen te maken.

EFTA SURVEILLANCE AUTHORITY DECISION

No 716/07/COL

of 19 December 2007

to initiate the procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the Norwegian scheme on support for alternative, renewable heating and electricity savings in private households

(Norway)

THE EFTA SURVEILLANCE AUTHORITY ([1]),

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

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

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

Having regard to the Authority's Guidelines ([4]) on the application and interpretation of Articles 61 and 62 of the EEA Agreement, in particular the chapters on aid for environmental protection and aid for research and development and innovation,

Whereas:

I. FACTS

1. Procedure

By letter dated 13 October 2006, Varmeprodusentenes Forening ([5]) (the Association of heat producers) filed a complaint against The Kingdom of Norway (Ministry of Petroleum and Energy). The letter was received and registered by the Authority on 16 October 2006 (Event No 393383). Supplementary information was submitted by letter from the Complainant dated 19 October 2006. The letter was received and registered by the Authority on 26 October 2006 (Event No 395451).

By letter dated 9 November 2006, the Authority forwarded the complaint to the Norwegian authorities for comments. The Norwegian authorities responded by letter, dated 15 January 2007, enclosed in a letter from the Norwegian Mission to the European Union, dated 17 January 2007, both received and registered by the Authority on 17 January 2007 (Event No 406849).

By a letter dated 21 February 2007, the Complainant commented on the letter supplied by the Norwegian authorities. The letter was received and registered by the Authority on 23 February 2007 (Event No 411186). Supplementary information which included a report from ECON and a letter was submitted by the Complainant dated 2 May 2007. The letter and the report were received and registered by the Authority on 3 May 2007 (Event No 419979 and Event No 419977).

By email dated 14 November 2007, the supplementary information submitted by the Complainant was forwarded to the Norwegian authorities. The Norwegian authorities have not presented any comments as regards the Complainant's supplementary information.

2. Description of the contested measures

2.1. *Aid for alternative and renewable heating systems in private households*

The alleged State aid concerns the implementation of an aid scheme for alternative, renewable heating and electricity saving measures in private households.

The scheme covers the following technologies: pellets stoves, pellets boilers, heat pumps in waterborne heating systems and electronic control systems for electric heating systems.

Wood-burning stoves are not covered by the aid scheme. According to the Norwegian authorities, wood-burning stoves are environmentally friendly heating systems. They are, however, not covered by the scheme because they do not have the ability to run continuously and thus reduce the consumption of electricity for heating to the same extent as the technologies entitled to support ([6]).

A further specification of the criteria under which the products in question will be eligible for aid is given on Enova SF's website ([7]). Enova SF is a public company owned by the Ministry of Petroleum and Energy.

([1]) Hereinafter referred to as 'the Authority'.
([2]) Hereinafter referred to as 'the EEA Agreement'.
([3]) Hereinafter referred to as 'the Surveillance and Court Agreement'.
([4]) Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, EEA Supplement No 32, 3 September 1994. The Guidelines were last amended on 3 May 2007, by College Decision No 154/07/COL. Hereinafter referred to as 'the State Aid Guidelines'.
([5]) Hereinafter referred to as 'the Complainant'.
([6]) Letter from the Norwegian Ministry of Petroleum and Energy dated 15 January 2007 (Event No 406849).
([7]) http://minenergi.enova.no/sitepageview.aspx?sitePageID=1062

2.2. *The objective of the scheme*

The scheme is aimed at giving households an incentive to invest in new environmentally friendly heating technologies which will convert or replace existing direct electric heating systems, and thus to contribute to the reduction of the use of electricity in private households ([1]).

2.3. *National legal basis for the scheme*

The legal basis for the scheme is the State budget ([2]). The scheme was proposed to the Parliament on 15 September 2006 with a budget of NOK 46 million. The scheme's budget was later increased by NOK 25 million in the last revision of the State budget for 2006. The aid scheme will be administered by Enova SF.

2.4. *Recipients*

The scheme is targeted at private households (final consumers), which can apply for refunding of maximum 20 % of documented and eligible costs, limited to NOK 4 000 for pellets stoves and electronic control systems, and NOK 10 000 for heat pumps and pellets boilers.

2.5. *Possible effects of the aid scheme*

The complainant alleges that the support to private households may be regarded as constituting an indirect advantage for the producers and/or the importers of the heating technologies covered by the scheme. According to the complainant the support scheme will lead to an increase in demand for these products. Thus, the support scheme gives the producers and/or importers the opportunity to increase sales and profits. The complainant also alleges that the price for these products, due to the indirect advantage, may be increased.

The scheme will, according to the complainant, due to the reasons mentioned above, distort competition and affect trade between the EEA States.

3. **Comments by the Norwegian authorities**

The Norwegian authorities, in their comments on the complaint, have argued that the recipients of the support scheme are private households and not undertakings within the meaning of Article 61(1) EEA. Thus, for this reason the measure cannot be considered to constitute State aid. To support their view, the authorities refer to the Authority's decision of 3 May 2006, regarding the Norwegian Energy Fund, Commission Decision No 158/02 and Commission Decision No 369/05.

Furthermore, the Norwegian authorities argue that the scheme does not distort or threaten to distort competition since wood-burning stoves and the technologies entitled to support cannot be regarded as substitutable products and thus not within the same relevant product market. The Norwegian authorities define the market as *'those technologies which can replace electric heating and provide the same level of heating comfort as electric heating during day and night, or in a more technical language, base load heating systems'* ([3]). Wood-burning stoves are by the Government classified as a supplementary heat source used in addition to the base load source. According to the Government, wood-burning stoves can therefore be characterised as peak-load heating systems.

On these grounds, the Norwegian authorities argue that the aid in question will not distort or threaten to distort competition, since there is no direct competition between the technologies covered by the scheme and wood-burning stoves.

II. **APPRECIATION**

1. **The presence of State aid**

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

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

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

To be termed State aid within the meaning of Article 61(1) of the EEA Agreement, the following four cumulative conditions must be meet: The measure must (i) be granted by the State or through State resources; (ii) confer a selective economic advantage on the recipients; (iii) distort or threaten to distort competition; and (iv) be liable to affect trade between the Contracting Parties to the EEA Agreement.

1.2. *Presence of State resources*

The support scheme is financed by the Norwegian State over the State budget. The measures in question are therefore granted by the State through State resources.

1.3. *Selective economic advantage*

For State support to constitute State aid within the meaning of Article 61(1) it must first grant an economic advantage on the recipients. Second, the aid measure must be selective in that it favours *'certain undertakings or the production of certain goods'*.

([1]) St. prp. No 82 (2005-2006), press release from the Ministry of Petroleum and Energy of 25 August 2006 and of 14 September 2006.

([2]) It is not clear from the information available to the Authority whether the scheme is of limited duration.

([3]) Letter from the Norwegian Ministry of Petroleum and Energy dated 15 January 2007 (Event No 406849) on page 5.

The first question to be analysed is therefore whether the scheme in question confers an economic advantage on undertakings ([1]).

The direct beneficiaries of the aid scheme in question are final consumers (Norwegian households), and not undertakings falling within the scope of Article 61(1). However, the scheme is aimed at promoting the sale of specific heating technologies ([2]). It can therefore be asked whether the producers and/or importers of the technologies covered by the scheme benefit from an indirect economic advantage which may fall within the scope of Article 61(1).

It has been established through case-law and practice of the European Commission that State aid may be granted *indirectly* through a third party, even where the direct beneficiary does not constitute an undertaking for the purposes of Article 61(1) EEA ([3]). In Case C-156/98, *Germany v Commission*, the European Court of Justice held that a tax relief granted to individuals for profit made by sale of shares, provided that the profit was then used to acquire new shares in companies seated in Berlin or the new German Länder, constituted State aid within the meaning of Article 87(1) EC ([4]). The Court of Justice found that the tax renunciation enabled the investors to take holdings in those undertakings on conditions that in tax terms were more advantageous. Similarly, in a recent decision the Commission held that aid granted to final consumers amounted to State aid within the meaning of Article 87(1) EC ([5]). According to Article 4(1) of the 2004 Italian Finance Act, purchasers of TV decoders capable of receiving signals transmitted using terrestrial technology were entitled to a public grant of EUR 150. The Commission found that the measure indirectly conferred an economic advantage upon television broadcasters operating on digital terrestrial and cable platforms and operators of the networks that carry the signal.

In accordance with the case law cited above, the question is whether the producers and/or importers of the heating technologies covered by the scheme are given an indirect economic advantage, i.e. whether the scheme has lead to an increase in their sales and profit margins which they would not have had if the measure had not been put into effect.

By granting private households which purchase specific heating technologies a compensation/subsidy, the Norwegian Government may stimulate the sale of these products by giving the consumers an economic incentive to do so. As expressed in St. prp. No 82 (2005-2006) Section 2 ('Tiltak rettet mot husholdninger') the scheme is *inter alia* aimed at contributing to the spread of mature technologies that have limited spread in the market. The same is also expressed on the Enova website ([6]). This may allow the producers and/or importers to increase their sales without lowering the price at which they sell their products. According to the complainant, it can also be observed that the demand for the products in question has risen after the scheme was put into effect.

The Authority therefore takes the preliminary view that the producers and/or importers of the heating technologies covered by the scheme may have obtained an economic advantage within the meaning of Article 61(1) EEA.

The next question to be analysed is whether the measure is selective, i.e. favours '*certain*' undertakings or the production of certain goods.

The scheme in question does not apply generally to all undertakings in Norway. It is targeted at undertakings operating in the market for heating methods/technologies, and thus limited to one specific economic sector. The measure is therefore selective within the meaning of Article 61(1) EEA.

1.4. *Distortion of competition and effect on trade between contracting parties*

To constitute State aid a measure must also distort or threaten to distort competition and effect trade between the Contracting Parties to the EEA Agreement.

The producers of the heating technologies covered by the scheme seem to operate in an European market.

Regarding one of the products covered by the scheme, pellets stoves, all but one producer is non-Norwegian and hence operates in more than one EEA State. The Norwegian producer, Bionordic, states on its homepage that '*Bionordic AS is developing high-efficient bioenergy products for the European market*' ([7]). When State aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid ([8]).

In addition to intra-EEA competition between pellets stove producers and/or importers, there may be intra-EEA competition between pellets stove producers and/or importers and producers of other products. The aid scheme in question excludes from support, for example, other environmentally friendly heating technologies, such as traditional wood-burning stoves, even though the latter seem to fulfil similar needs for the consumers as the technologies covered by the scheme. Wood-burning stoves are for instance comparable to pellets stoves when it comes to size and design.

([1]) Undertakings are for the purpose of Community competition law defined as entities engaged in economic activity, regardless of their legal status, see for instance the Court of Justice judgment in Case C-41/90, *Höfner*, [1991] ECR I-01979 at paragraph 21.
([2]) St. prp. No 82 (2005-2006) page 1.
([3]) Case C-382/99, *Netherlands v Commission*, [2002] ECR I-5163.
([4]) Case C-156/98, *Germany v Commission*, [2000] ECR I-6857.
([5]) Commission Decision of 24 January 2007 — Only the Italian version is authentic.
([6]) http://minenergi.enova.no/sitepageview.aspx?sitePageID=1013&overrideArticleID=149 — '*Støtten er en bonus til dem som går foran og viser ansvar for egen energibruk ved å ta i bruk teknologier som er tilgjengelige, men så langt ikke spesielt vanlige i allmenn bruk.*'.
([7]) See: http://www.bionordic.no/index.php?NyheitNr=47&cat1=0&cat2=0&artrangering=Rangering&artrantype=ASC&la=EN
([8]) Case 730/79, *Philip Morris v Commission*, [1980] ECR 2671, paragraph 11.

According to the complainant the cost savings due to less use of electricity is almost identical for wood-burning stoves and pellets stoves. The complainant also argues that the two technologies produce comparable heating effect, that the sale of pellets-stoves has increased significantly and that the sale of wood-burning stoves has declined after the scheme was put into effect. To support its view, the complainant *inter alia* refers to an evaluation report made by Nord Trøndelagforskning regarding a similar aid scheme put into effect by the Norwegian authorities in 2003 ([1]). Furthermore, the complainant has engaged the consultancy, ECON ([2]) to assess the economic effects of the scheme. ECON concludes that there is a degree of substitution between pellets stoves and wood-burning stoves. It also finds that the payments to consumers may have the same effects as payments made directly to the producers. This information indicates that the measure in question sets the producers covered by the scheme in a more favourable position to the detriment of other producers of environmentally friendly heating systems such as wood-burning stoves.

The Norwegian authorities dispute this analysis by the complainant. In their opinion, wood-burning stoves do not compete with the products covered by the scheme since they do not have the ability to run continuously and thus to reduce consumption of electricity for heating to the same extent. According to the Norwegian authorities, wood-burning stoves can be regarded as a supplementary heating source, while the technologies covered by the scheme can be classified as base load heating systems which give the same heating comfort as electric heating.

Regardless of the competition between these two products, the producers of pellets stoves seem, as mentioned above, to compete in an European market and it may therefore distort competition and affect trade between contracting parties.

Furthermore, the other products covered by the scheme also seem to be produced by undertakings operating in the EEA market. Leading producers of for instance heat pumps are international companies like Panasonic, Mitsubishi Electric, Toshiba, Sanyo and Daikin.

The Authority therefore takes the preliminary view that the scheme distorts or threatens to distort competition and effect trade between the Contracting Parties to the EEA Agreement.

2. **Procedural requirements**

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

The Norwegian authorities have not notified the Authority of any measures taken in relation to the support granted to households' purchase of pellets stoves, heat pumps in water-born heating systems and control systems for electricity saving. Therefore, in the event that the Authority comes to the conclusion that the contributions given to households constitutes State aid within the meaning of Article 61(1) of the EEA Agreement, the Norwegian Authorities will be considered not to have respected the notification and stand still obligation pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

The grant of State aid within the meaning of Article 61(1) of the EEA Agreement, which has not been notified, constitutes unlawful State aid within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement. It follows from Article 14 in Part II of Protocol 3 the Surveillance and Court Agreement that the Authority shall decide that unlawful aid which is incompatible with the State aid rules under the EEA Agreement must be recovered from the beneficiaries unless it would be contrary to a general principle of law.

3. **Compatibility of the aid**

Supposing that the contested funding constitutes State aid within the meaning of Article 61(1) EEA, it must be assessed whether it can be declared compatible with the functioning of the EEA Agreement.

In the Authority's view, the support scheme does not seem to comply with any of the exemptions provided for in Article 61(2) or (3)(a) or (b) of the EEA Agreement. The question is therefore whether the aid can be justified under Article 61(3)(c). According to this provision aid may be declared compatible with the common market if it '*… facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*'.

The Authority will assess the support scheme according to Article 61(3)(c) of the EEA Agreement in conjunction with the Authority's State Aid Guidelines, in particular the chapters on aid for environmental protection and aid for research and development and innovation ([3]).

It is to be noted that the Norwegian authorities have not specifically invoked this provision, nor have they provided any explanation of how the contested aid measure '*does not adversely affect trading conditions to an extent contrary to the common interest*'.

However, in their comments on the complaint the Norwegian authorities refer to Commission Decision No 369/05, where the Commission, *inter alia* held that aid granted to owners of dwelling houses for the conversion from direct-acting electro heat into district heating or heat pumps, could be authorised on the basis of point 30 of the Commission's Environmental Aid Guidelines ([4]).

([1]) NTF-report 2005:2.
([2]) ECON report 2007-040.

([3]) An element in the assessment of the compatibility of the scheme would also be whether the scheme is of a limited duration. The Authority would normally not approve schemes with a duration exceeding 10 years. As mentioned in footnote 9 above, it is not clear from the information available to the Authority whether the scheme is of limited or unlimited duration.
([4]) See point 30 of Commission Decision No 369/05.

According to the Authority's State Aid Guidelines on environmental protection, investments in energy savings may qualify for an exemption from the general prohibition laid down in Article 61(1) ([1]). What is meant by 'energy savings' is further explained in the Guidelines Section B (Definitions and scope). It follows from Section B point 7 that energy-saving measures should be understood as meaning, among other things, action which enables companies to reduce the amount of energy used in their production cycle. The design and manufacture of machines which can be operated with fewer natural resources as such are not covered by the Authority's guidelines.

The indirect aid to producers and/or importers of certain heating methods/technologies are not directly covered by the above mentioned Section of the Authority's State Aid Guidelines on environmental protection, since the aid will not contribute to the reduction of the amount of energy used in the producers and/or importers production cycle. In cases where the direct beneficiary is an undertaking, the Commission and the Authority have not normally assessed the indirect benefit to producers of environmentally friendly products or technologies, but assessed the aid under the Environmental Guidelines due to the application of the criteria therein on the direct beneficiary of the aid ([2]). The Authority has doubts with regard to an application of the Guidelines to a scheme such as the present.

Against this background the Authority has doubts as to whether the Environmental Guidelines are applicable to the scheme.

For the same reasons, the Authority has doubts as to whether the scheme may be exempted directly under Article 61(3)(c).

Finally, the Authority takes the preliminary view that the support scheme in question is not covered by the State Aid Guidelines' chapter on aid for research and development and innovation. The possible indirect aid to the producers of the heating technologies covered by the scheme do not fall within the research categories listed in the Guidelines Section 5.1.1 point 71 (fundamental research, industrial research or experimental development), as the products covered by the aid scheme are ready-developed technologies.

4. **Conclusion**

Based on the information submitted by the Norwegian authorities, the Authority has doubts whether the aid measure(s) constitute aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts whether these measures can be regarded as complying with Article 61(3)(c) of the EEA Agreement, in combination with the requirements laid down in the Authority's State Aid Guidelines on environmental protection and on aid for research and development. The Authority thus doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Norwegian authorities to submit their comments within **one month** of the date of receipt of this Decision.

In light of the foregoing consideration, the Authority requires that, within **one month** of receipt of this decision, the Norwegian authorities provide all documents, information and data needed for assessment of the compatibility of the support scheme. It requests the Norwegian authorities to forward a copy of this letter to the potential aid recipients of the aid immediately,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Norway regarding the support scheme for alterative, renewable heating and electricity savings in private households.

Article 2

The Norwegian authorities are requested, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

The Norwegian authorities are required to provide within one month from notification of this decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version is authentic.

Done at Brussels, 19 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján Andri STEFÁNSSON
President	*College Member*

([1]) Section C point 25 of the Environmental guidelines.
([2]) See for example Commission Decision No 369/05.

Uitnodiging overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie opmerkingen te maken ten aanzien van staatssteun in verband met de verkoop van stroom door de gemeente Notodden (Noorwegen) aan Becromal Norway AS

(2008/C 96/05)

De Toezichthoudende Autoriteit van de EVA heeft bij Besluit nr. 718/07/COL van 19 december 2007, dat na deze samenvatting in de authentieke taal is weergegeven, de procedure ingeleid van artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie (hierna „de Toezichtovereenkomst" genoemd). De Noorse autoriteiten zijn hiervan in kennis gesteld door middel van een afschrift van het betrokken besluit.

De Toezichthoudende Autoriteit van de EVA verzoekt bij dezen de EVA-staten, de EU-lidstaten en andere belanghebbenden hun opmerkingen over de betrokken maatregel maken door deze binnen één maand vanaf de datum van deze bekendmaking te zenden aan:

Toezichthoudende Autoriteit van de EVA
Griffie
Belliardstraat 35
B-1040 Brussel

Deze opmerkingen zullen ter kennis van de Noorse autoriteiten worden gebracht. Een belanghebbende die opmerkingen maakt, kan, met opgave van redenen, schriftelijk verzoeken om vertrouwelijke behandeling van zijn identiteit.

SAMENVATTING

PROCEDURE

Op basis van berichten in de pers deed de Toezichthoudende Autoriteit van de EVA (hierna „de Autoriteit" genoemd) op 30 mei 2007 Noorwegen een schrijven toekomen met het verzoek om aanvullende informatie over de verkoop door de gemeente Notodden van stroom aan Becromal Norway AS (hierna „Becromal" genoemd), een producent van aluminiumfolie met vestiging te Notodden.

Na de antwoorden van de Noorse autoriteiten op dit verzoek en na verdere correspondentie met de Noorse autoriteiten heeft de Autoriteit besloten de formele onderzoekprocedure in te leiden ten aanzien van het contract tussen de gemeente Notodden (verkoper) en Becromal (afnemer) voor de verkoop van stroom; dit contract liep van 14 mei 2001 tot 31 maart 2006 en werd verlengd tot 31 maart 2007.

BEOORDELING VAN HET CONTRACT

Het betrokken contract werd op 10 mei 2002 gesloten tussen de partijen, met terugwerkende kracht tot 14 mei 2001. De contractvolumes werden als volgt vastgesteld: 14,4794 GWh van 14 mei 2001 tot 31 december 2001; 30 GWh per jaar in de periode 2002-2005, en 7,397 GWh van 1 januari 2006 tot 31 maart 2006. Ten slotte bevatte het contract ook een optie voor Becromal om in de periode van 1 april 2006 tot 31 maart 2007 bepaalde volumes stroom te kopen waarop de gemeente volgens de Noorse wetgeving recht heeft (zgn. concessiestroom). Becromal blijkt deze optie te hebben uitgeoefend.

De betrokken stroomvolumes stemmen overeen met die waarop de gemeente in het kader van haar contract met Tinfos, een lokale stroomcentrale, recht had. De achtergrond voor het contract met de Tinfos-centrale was ten dele het recht van de gemeente in het kader van de Noorse wetgeving op zogenaamde concessiestroom en ten dele een vergoeding aan de gemeente voor haar rechten op de Sagafoss-waterval die door Tinfos werden geëxploiteerd. Onder die omstandigheden werd het tarief vastgesteld op 0,135 NOK/kWh.

De tarieven in het contract tussen de gemeente Notodden en Becromal waren gekoppeld aan die in het contract tussen Tinfos en de gemeente Notodden. Zodoende werd het tarief voor de periode van 14 mei 2001 tot 31 maart 2006 bepaald op 0,135 NOK/kWh. Nadien zou het tarief overeenstemmen met het tarief van de concessiestroom.

De Autoriteit is van oordeel dat, indien de tarieven waartegen Becromal stroom van de gemeente kocht, lager lagen dan het markttarief, die transactie geacht moet worden staatsmiddelen in de zin van artikel 61, lid 1, van de EER-Overeenkomst te behelzen en dat zulks als een selectief voordeel voor Becromal dient te gelden. Er zijn meerdere aanwijzingen dat dit het geval was.

Ten eerste geeft de omstandigheid dat het door Becromal betaalde tarief identiek was aan het door de gemeente betaalde tarief, aan dat er sprake is van steun, aangezien dit tarief de weerspiegeling is van de bijzondere rechten van de gemeente op de waterval uit hoofde van wetgeving en contractuele betrekkingen.

Ten tweede lijkt het tarief laag te zijn in vergelijking met het algemene tariefpeil op het tijdstip dat het contract werd gesloten.

Ten derde lijkt de gemeente in een brief aan Becromal van april 2007 toe te geven dat het vroegere contract Becromal 17,5 mln NOK uitgaven had bespaard — ten opzichte van de marktprijs.

Indien zou komen vast te staan dat het contracttarief onder het toenmalige markttarief lag, zou Becromal een voordeel zijn verleend dat haar positie ten opzichte van die van haar concurrenten had versterkt. Becromal concurreert ook internationaal. Daarom dreigt eventuele steun de mededinging te verstoren en beïnvloedt deze het handelsverkeer tussen de Overeenkomstsluitende Partijen ongunstig.

Wanneer er sprake zou zijn van staatssteun, dan lijkt deze exploitatiesteun te vormen. Aangezien dit soort steun bijzonder verstorend is, is de voorlopige beoordeling van de Autoriteit dat de steun onverenigbaar is met de werking van de EER-Overeenkomst.

Artikel 1, lid 3, van deel I van Protocol 3 bij de Toezichtovereenkomst houdt een standstill-verplichting in en artikel 14 van deel II van datzelfde Protocol bepaalt dat bij een negatieve beschikking alle onrechtmatige steun van de begunstigde kan worden teruggevorderd.

CONCLUSIE

In het licht van bovenstaande overwegingen heeft de Autoriteit besloten, overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Toezichtovereenkomst, de formele onderzoekprocedure in te leiden ten aanzien van het contract voor de verkoop van stroom dat tussen de gemeente Notodden en Becromal Norway AS bestond van 14 mei 2001 tot 31 maart 2006, en nadien werd verlengd tot 31 maart 2007.

EFTA SURVEILLANCE AUTHORITY DECISION

No 718/07/COL

of 19 December 2007

on the sale of power from Tinfos power plant by the municipality of Notodden to Becromal Norway AS

(Norway)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area ([1]), in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ([2]), in particular to Article 24 thereof and Article 1(2) and (3) in Part I and Articles 4(4) and 6(1) in Part II of Protocol 3 thereof,

Whereas:

I. FACTS

1. Procedure

According to an Article published in the regional Norwegian newspaper named Telen on 26 March 2007, the municipality of Notodden in Southern Norway had a power sales agreement, which was about to expire, with Becromal, an aluminium manufacturing company having a plant at Notodden. According to the Article, in order to safeguard Becromal's establishment at Notodden, the prices under the expiring agreement were set equal to the municipality's own costs in purchasing certain amounts of power, see further below. However, the municipality was considering selling the power volumes on the open market. On the basis of that Article, the EFTA Surveillance Authority (hereinafter 'the Authority'), on 30 May this year, sent a letter to Norway requesting additional information on the municipality's sale of power to Becromal, (Event No 422613).

By letter dated 19 July 2007, received and registered by the Authority on 10 July 2007 (Event No 428860), the Norwegian authorities replied to the request.

By letter dated 21 September 2007 (Event No 442519), the Authority requested additional information.

By letter dated 30 October 2007 from the Norwegian Ministry of Government Administration and Reform, received and registered by the Authority on the same day (Event No 449660), Norway replied to the information request.

2. Description of the measures

Notodden is a municipality in the County of Telemark in South-Eastern Norway. Located where two rivers flow into the lake Heddalsvatnet, the municipality has significant hydropower resources within its borders.

In that capacity, the municipality is entitled to receive a certain amount of so-called 'concession power' from concessionaires for waterfall exploitation every year. The system of concession power is laid down in Section 2(12) of the Industrial Licensing Act and Section 12(15) of the Waterfalls Regulation Act ([3]). According to these provisions, which are identical in wording, counties and municipalities in which a power plant is located are entitled to receive up to 10 per cent of a plant's yearly production at a price determined by the State. With respect to concessions granted prior to 1959, such as the concession in the case at hand, the price is based on the so-called 'individual costs' of the plant, unless a lower price is agreed on ([4]). Thus, the price of concession power will normally be lower than the market price.

Each municipality's entitlement to concession power is decided on the basis of its 'general electric power supply needs'. According to the Norwegian Water Resources and Energy Directorate, this includes electric power for industry, agriculture and households, but not power for power intensive industries and wood conversion ([5]). From 1988 Notodden municipality had been entitled to approximately 3,9 GWh from the Tinfos power plant located in Notodden, which appears to have been raised to 7,114 GWh in 2002 ([6]).

In addition to the concession power volumes that the municipality was entitled to under the regulations on concession power, Notodden municipality appears to have had rights of use of the waterfall Sagafoss in Notodden. This right of use was, however, exploited by Tinfos AS and not by the municipality itself. In return, the municipality was entitled to additional volumes of electric power from the plant. The commercial relationship between Notodden and Tinfos is currently governed by a contract entered into on 15 August 2001 ([7]). This contract stipulates that, until 31 March 2006, the

([1]) Hereinafter referred to as the EEA Agreement.

([2]) Hereinafter referred to as the Surveillance and Court Agreement.

([3]) These provisions read: *'The licence shall stipulate that the licensee shall surrender to the counties and municipalities in which the power plant is located up to ten per cent of the increase in water power obtained for each waterfall, calculated according to the rules in Section 11, subsection 1, cf. Section 2, third paragraph. The amount surrendered and its distribution shall be decided by the Ministry concerned on the basis of the county's or municipality's general electric power supply needs. The county or municipality may use the power provided as it sees fit. […]. The price of power [for the municipality] shall be set on the basis of the average cost for a representative sample of hydroelectric power stations throughout the country. Taxes calculated on the profit from power generation in excess of a normal rate of return are not included in the calculation of this cost. Each year the Ministry shall set the price of power supplied at the power station's transmission substation. The provisions of the first and third sentences do not apply to licences valid prior to the entry into force of Act No 2 of 10 April 1959'*. (Translation by the Norwegian Ministry of Petroleum and Energy).

([4]) The 'individual costs' of the plant are calculated in accordance with the legal provisions applicable until 1959. Under these provisions, the individual cost price would be calculated as the plant's production costs including 6 per cent interest on the initial costs, plus a mark-up of 20 per cent, divided by average yearly production in the period 1970-1999. See the so-called KTV-Notat No 53/2001 of 24 August 2001, Event No 455241.

([5]) KTV-Notat No 53/2001, cited above.

([6]) See Norway's reply to question 4 in the second request for information, Event No 449660.

([7]) Annex to Event No 449660.

municipality was entitled to buy 30 GWh per year, including 3,9 GWh concession power, from Tinfos AS. The price was set at NOK 0,135/kWh for concession power and the additional volume alike. After 31 March 2006, the municipality has only be entitled to buy the volume constituting the concession power, and the prices established for the municipalities' purchase of such power has been applicable since then.

The relevant legal basis for the municipalities' right to concession power, referred to above, expressly states that municipalities may dispose of the concession power as they see fit, irrespective of the fact that the amount to which they are entitled is calculated on the basis of their 'general electric power supply needs'. Thus, there is nothing to prevent municipalities from selling this power to power intensive industries, or any other industry, established within the municipality.

Against this background, the municipality, on 10 May 2002, entered into an agreement ([1]) with the aluminium foil producer Becromal concerning the resale of the power volumes to which it was entitled under the agreement with Tinfos. The agreement takes retroactive effect and, therefore, also governs the power volumes sold to Becromal from 14 May 2001 until the date of signature of the contract. The volumes covered appear to correspond to the volumes under the municipality's contract with Tinfos until 31 March 2007: i.e., 14,4794 GWh from 14 May 2001 to 31 December 2001, 30 GWh per year from 2002 to 2005, 7,397 GWh from 1 January 2006 to 31 March 2006, and, finally, an option for Becromal to buy the municipality's concession power from 1 April 2006 to 31 March 2007. The prices also mirror those laid down in the municipality's contract with Tinfos, i.e. NOK 0,135 per kWh until 31 March 2006, and, from 1 April 2006 to 31 March 2007, *'the conditions at which Notodden municipality may, at that time, buy the power in question*'. It appears that Becromal did choose to buy the concession power on these conditions in the period from 1 April 2006 to 31 March 2007 ([2]).

By letter dated 4 March 2007 ([1]), Becromal requested a prolongation of the power purchase agreement. It also asked whether higher volumes could be included in the contract. On 30 April, the municipality replied to the request, offering Becromal to buy the municipality's concession power at NOK 0,2 per kWh (which is said to correspond to the spot price at NordPool, the Nordic power exchange, for May 2007) for the period from 1 April to 31 December 2007, and thereafter a three-year agreement at the price of NOK 0,264 per kWh from 1 January 2008 to 31 December 2010. It is also stated that the concession power volume, from 1 April 2007, is 7,113 GWh.

The municipality also explained the background for the significantly higher prices offered by the municipality in 2007 compared to the previous agreement. In this respect, it pointed to the Municipal Executive Committee's requirement that *'the agreement to be entered into between Becromal AS and the municipality must not infringe competition legislation or other legislation pertaining to competition or State aid*'. The letter then goes on to state:

> *'During the years of application of the previous agreement, Becromal AS has obtained power at prices which have saved the company for, in total, NOK 17,5 million compared to the market price. The power price laid down in the previous agreement cannot be upheld as it would as it involves a subsidy in breach of EEA rules.'*

On 30 June this year, Becromal replied that it accepted the prices offered for the last nine months of 2007. By contrast, it declined the offer for the period 2008-2010, as it was considered to be too high. The municipality replied, by letter dated 4 July, that in light of Becromal's letter, it considered that an agreement had been reached concerning power volumes for 2007. Hence, it would come back soon with a draft agreement. In respect of the period from 2008 to 2010, it upheld its previous position that the contract must be on market terms ([3]). The municipality has later confirmed that no formal agreement has yet been entered into. Nor have negotiations been held with respect to the period after 1 January 2008 ([4]).

II. **ASSESSMENT**

1. **The presence of State aid**

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

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.'*

It follows from this provision that, for State aid within the meaning of the EEA to be present, the following conditions must be met:

— the aid must be granted through *State resources*,

— the aid must favour certain undertakings or the production of certain goods, i.e. the measure must confer an *economic advantage* upon the recipient(s), which must be *selective*,

— the beneficiary must be an *undertaking* within the meaning of the EEA Agreement,

— the aid must be capable of *distorting competition* and *affect trade* between contracting parties.

The fulfilment of these conditions will be considered further below.

1.1. *Presence of State resources*

The measure must be granted by the State or through State resources. Municipal resources are State resources for the purposes of Article 61(1).

([1]) Annex to Norway's reply of 9 July 2007, Event No 428860.

([2]) The Authority is not in possession of a copy of any such prolongation agreement. However, by letter dated 4 March 2007 (Annex to Event No 428860), Becromal requested the prolongation of the agreement and referred in that respect to *'the agreement which Becromal has with Notodden municipality concerning the purchase of the municipality's concession power expires on 31 March 2007*'. Thus, it appears that the option to buy concession power for the period 1 April 2006-31 March 2007 was exercised.

([3]) See Annexes to Norway's reply of 9 July 2007, Event No 428860.

([4]) See Norway's reply to the Authority's second request for information, Event No 449660.

In the case at hand, there is no transfer of money from the municipality to Becromal. However, it is settled case law that when a public entity does not fix an energy tariff in the manner of an ordinary economic agent but uses it to confer a pecuniary advantage on energy consumers, it thereby forgoes the profit which it could normally realise ([1]). Thus, if the price fixed in the contract is lower than the market price, State resources within the meaning of Article 61(1) EEA will be deemed to be involved. The Authority will assess this question below under point 2.2.

1.2. *Favouring certain undertakings or the production of certain goods*

In order for this condition to be fulfilled, the measures must confer on Becromal advantages that relieve it of charges that are normally borne from its budget. Secondly, the measure must be selective in that it favours '*certain undertakings or the production of certain goods*'. In the case at hand, an advantage would be present if the power price in the contract between Becromal and Notodden municipality is lower than the market price. In that case, the measure would also be selective since it exclusively benefits Becromal.

There are several indications that the price laid down in the contract between Becromal and the municipality was below the market price for equivalent contracts at the time of conclusion of the agreement.

Firstly, the very method applied to arrive at the price of NOK 0,135, applicable from 14 May 2001 until 31 March 2006, indicates that aid is involved. As stated above, the price calculation methods for concession power entail that such power prices are generally considerably lower than the market price. Judging by the introduction to the agreement between Notodden and Tinfos, the remaining power volumes covered seem to be delivered in compensation for Tinfos' exploitation of the municipality's rights to Sagafoss. The prices in the contract between Notodden and Tinfos must, therefore, be presumed to be below the market price. Since the price charged from Becromal corresponds to the price payable by Notodden to Tinfos, the same presumption applies to the price laid down in the Becromal contract.

Secondly, the price seems low in comparison to the general price level at the time of conclusion of the contract. For example, the Authority's Decision No 142/00/COL of 26 July 2000, concluding that the contracts under which certain energy intensive undertakings leased power plants from Statkraft did not involve State aid, refers to 20-year contracts being obtainable in the open market at the time at a price of around NOK 0,19 per kWh. Furthermore, an article published in the regional newspaper Telen on 7 November 2001 seems to indicate that the municipality had estimated the price of an equivalent five-year contract in the open market to be around NOK 0,1739 per kWh ([2]).

Thirdly and finally, the municipality seems to acknowledge that the price charged was lower than the market price. As referred to above, the municipality, by letter dated 30 April 2007, informed Becromal that a prolongation of the price in the 2002 agreement would be in breach of the State aid rules, and that the former agreement had already saved Becromal costs of NOK 17,5 million compared to the market price. In a presentation to the board of the administration of 28 November 2005, the head of administration refers to a legal opinion commissioned from Hjort Law Firm in 2001, i.e. prior to the conclusion of the agreement, concluding that the price agreed would constitute aid.

Against this background, the Authority has serious doubts that the prices applicable under the agreement of 10 May 2002 reflected the market price of equivalent contracts at the time.

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

The measures must distort competition and affect trade between the Contracting Parties. Under settled case law, the mere fact that an aid strengthens a firm's position compared with that of other firms competing in intra-EEA trade, is enough to conclude that the measure is likely to affect trade between the contracting parties and distort competition between undertakings established in other EEA States ([3]).

Provided that it is established that the price paid by Becromal under the contract of May 2002 was below the market price for similar contracts at the time, Becromal has received an advantage which has strengthened its position compared with that of its competitors. Thus the measure threatens to distort competition. Neither does the amount of aid referred to (NOK 17,5 million) seem to be below the *de minimis* threshold applicable at the material time ([4]).

According to Becromal's homepage, it is part of a group of companies based in Italy and exports 100 per cent of its production. The plant at Notodden therefore competes with undertakings established in other EEA States. Insofar as the measure is deemed to distort competition, it will, therefore, also be capable of affecting trade between the Contracting Parties.

Procedural requirements

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

The Norwegian authorities neither notified the power contract of 10 May 2002, nor its prolongation in 2006, to the EFTA Surveillance Authority. The Authority therefore concludes that, should State aid be involved, the Norwegian Government has not respected its obligations pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

([1]) See Joined Cases 67, 68 and 70/85, *Kwekerij Gebroeders van der Kooy BV and others* v *Commission*, [1988] ECR 219, paragraph 28.

([2]) http://www.telen.no/article/20011107/NYHET/11106002

([3]) See Case 730/79, *Philip Morris Holland BV* v *Commission*, [1980] ECR 2671, paragraphs 11-12.

([4]) EUR 100 000 over a three-year period, see Article 2(2) of Commission Regulation (EC) No 69/2001, incorporated into the EEA Agreement by Joint Committee Decision No 88/2002 (OJ L 266, 3.10.2002, p. 56 and EEA Supplement No 49, 3 October 2002, p. 42), e.i.f. 1 February 2003, and paragraphs 12.1(2) and (3) of the EFTA Surveillance Authority Decision No 54/96/COL of 15 May 1996 on the ninth amendment of the procedural and substantive rules in the field of State aid (OJ L 245, 26.9.1996, p. 28).

Compatibility of the aid

Exemptions from the general prohibition on State aid as provided for in Article 61(1) may be granted if the conditions of 61(2) or (3) are fulfilled. The exemptions under Article 61(2) and 61(3)(a) and (b) seem to be applicable to the case at hand.

Under Article 61(3)(c) EEA, State aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the EEA Agreement where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

As for the aid in question, it would seem to constitute operating aid. As such aid is particularly distortive, it may only in very limited circumstances be considered compatible with the functioning of the EEA Agreement. The Authority has not been presented with any elements indicating the existence of such circumstances in the case at hand.

Against this background, the Authority takes the preliminary view that the aid is not compatible with the functioning of the EEA Agreement.

Conclusion

Based on the information submitted by the Norwegian Government, the Authority cannot exclude the possibility that the contract between the Municipality of Notodden and Becromal of 10 May 2002, as well as its prolongation until 31 March 2007, involve State aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that these measures may be considered compatible with Article 61(3)(c) of the EEA Agreement. Consequently, the Authority has doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance with Article 4(4) in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

The Authority also draws the attention of the Norwegian authorities to the fact that Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement constitutes a standstill obligation and that Article 14 in Part III of that Protocol provides that, in the event of a negative decision, all unlawful aid may be recovered from the beneficiary, save in exceptional circumstances. At this stage, the Authority has not been presented with any facts indicating the existence of exceptional circumstances on the basis of which the beneficiary may legitimately have assumed the aid to be lawful.

In light of the foregoing considerations, the Authority requires, within one month of receipt of this Decision, the Norwegian Government to provide all documents, information and data needed for assessment of the compatibility of the contract between Notodden municipality and Becromal of 10 May 2002, as well as the extension of the contract until 31 March 2007. It requests the Norwegian authorities to forward a copy of this Decision to the potential recipient of the aid immediately,

HAS ADOPTED THIS DECISION:

Article 1

The Authority has decided to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement against Norway concerning the contract between Becromal AS and the Municipality of Notodden in force from 14 May 2001 to 31 March 2006 and its prolongation until 31 March 2007.

Article 2

The Norwegian Government is requested, pursuant to Article 6(1) in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit its comments on the opening of the formal investigation procedure within one month of the notification of this Decision.

Article 3

The Norwegian Government is required to provide, within one month from notification of this Decision all documents, information and data needed for assessment of the compatibility of the aid measure, in particular:

(a) any documents relating to the prolongation of the agreement until 31 March 2007;

(b) the calculations underlying the assumption that the agreement had saved Becromal for NOK 17,5 million, set out in the municipality's letter to Becromal of 30 April 2007;

(c) any other information that would establish market prices for the type of contract in question at the time of the conclusion of the agreement.

Article 4

The Norwegian Government is requested to forward a copy of this Decision to the potential recipient of aid immediately.

Article 5

This Decision is addressed to the Kingdom of Norway.

Done at Brussels, 19 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján Andri STEFÁNSSON
President	*College Member*

Uitnodiging overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie opmerkingen te maken ten aanzien van staatssteun gemoeid met de belastingvoordelen voor bepaalde coöperatieve ondernemingen in Noorwegen

(2008/C 96/06)

De Toezichthoudende Autoriteit van de EVA heeft bij Besluit nr. 719/07/COL van 19 december 2007, dat na deze samenvatting in de authentieke taal is weergegeven, de procedure ingeleid van artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie (hierna „de Toezichtovereenkomst" genoemd). De Noorse autoriteiten zijn hiervan in kennis gesteld door middel van een afschrift van het betrokken besluit.

De Toezichthoudende Autoriteit van de EVA verzoekt bij dezen de EVA-staten, de EU-lidstaten en andere belanghebbenden hun opmerkingen over de betrokken maatregel maken door deze binnen één maand vanaf de datum van deze bekendmaking te zenden aan:

Toezichthoudende Autoriteit van de EVA
Griffie
Belliardstraat 35
B-1040 Brussel

Deze opmerkingen zullen ter kennis van de Noorse autoriteiten worden gebracht. Een belanghebbende die opmerkingen maakt, kan, met opgave van redenen, schriftelijk verzoeken om vertrouwelijke behandeling van zijn identiteit.

SAMENVATTING

PROCEDURE

Bij schrijven van 28 juni 2007 deden de Noorse autoriteiten, overeenkomstig artikel 1, lid 3, van deel I van Protocol 3 bij de Toezichtovereenkomst, bij de Toezichthoudende Autoriteit van de EVA (hierna „de Autoriteit" genoemd) aanmelding van een voorgenomen wijzing van de Belastingwet. De Noorse autoriteiten zijn voornemens de Belastingwet te wijzigen om voor bepaalde coöperaties een gunstige behandeling wat betreft de inkomstenbelasting te introduceren. Volgens de aanmelding zouden deze coöperaties toevoegingen aan het eigen vermogen van hun inkomsten mogen aftrekken — en zo de belastinggrondslag voor de inkomstenbelasting kunnen versmallen.

Na correspondentie met de Noorse autoriteiten heeft de Autoriteit besloten een formele onderzoekprocedure in te leiden ten aanzien van de belastingaftrek voor coöperaties.

BEOORDELING VAN DE MAATREGEL

De algemene inkomstenbelasting voor ondernemingen bedraagt in Noorwegen 28 % en geldt ook voor de inkomsten die bij het eigen vermogen van de onderneming worden gevoegd. De inbreng van aandelenkapitaal vormt evenwel geen belastbare inkomsten voor de ontvangende onderneming, aangezien degene die deze inbrengt, geacht wordt daarover te zijn belast. Zodoende kunnen ondernemingen met de rechtsvorm van vennootschap met beperkte aansprakelijkheid enz. hun eigen vermogen vergroten door een niet-belastbare inbreng van aandelen van hun aandeelhouders of van het brede publiek. Coöperaties hebben deze mogelijkheid echter niet omdat zij, volgens de Noorse wet inzake coöperaties, geen aandelen aan het publiek kunnen uitgeven noch andere aandelencertifcaten of -bewijzen. Voorts wordt het beginsel van het open lidmaatschap gezien als een beperking op de omvang van de kapitaalinbreng die de coöperaties van hun leden kunnen eisen.

In de Rijksbegroting 2007 stelden de Noorse autoriteiten voor om een bijzondere fiscale aftrekregeling voor coöperaties in te voeren. In die regeling krijgen coöperaties in de landbouw, de bosbouw, de visserijsector, alsmede consumentencoöperaties en coöperatieve woningbouwverenigingen het recht op aftrekken van hun vennootschapsbelasting op basis van toevoegingen aan het eigen vermogen. Deze aftrek is beperkt tot maximaal 15 % van het nettojaarinkomen en mag alleen gebeuren op het deel van de inkomsten dat afkomstig is van het zakelijke verkeer met de leden van de coöperatie. Doel van de regeling is de coöperaties een belastingvoordeel toe te kennen, omdat het de opvatting is dat de coöperaties moeilijker toegang krijgen tot aandelenkapitaal dan andere ondernemingen.

In de voorlopige beoordeling van de Autoriteit, die op de door Noorse autoriteiten verschafte inlichtingen is gebaseerd, kan de Autoriteit niet uitsluiten dat de aftrek wat inkomstenbelasting betreft, staatssteun in de zin van artikel 61, lid 1, van de EER-Overeenkomst vormt.

Volgens de Noorse autoriteiten wordt met de voorgenomen regeling de coöperaties geen voordeel verleend, aangezien daarmee uitsluitend de hun door de wetgeving opgelegde nadelen worden gecompenseerd. Volgens de Noorse autoriteiten is het belastingvoordeel voor de coöperaties bedoeld ter dekking van de extrakosten veroorzaakt door het verbod voor coöperaties om aandelen of andere aandelencertificaten of -bewijzen uit te geven. Voorts bedraagt de voorgenomen steun ten behoeve van de coöperaties, volgens de Noorse autoriteiten, niet meer dan het immateriële voordeel voor de betrokken Staat. In dit verband verwijzen de Noorse autoriteiten naar de mededeling van de Commissie aan de Raad, het Europees Parlement, het Europees Economisch en Sociaal Comité en het Comité van de Regio's over de bevordering van coöperatieve vennootschappen in Europa (COM(2004) 18 van 23 februari 2004). De Autoriteit tekent aan dat de Noorse autoriteiten — in deze fase van de procedure — niet hebben kunnen rechtvaardigen dat de steun gewoon een compensatie is voor de door de coöperaties geleden nadelen. Daarom betwijfelt de Autoriteit dat met de voorgenomen regeling geen voordeel wordt verleend aan de ondernemingen waarop deze van toepassing is.

Voorts betogen de Noorse autoriteiten dat de regeling niet selectief is, aangezien de belastingvoordelen voor bepaalde coöperaties zijn gerechtvaardigd door de aard of de opzet van het Noorse belastingstelsel. Volgens de Noorse autoriteiten houdt de voorgestelde regeling in, dat het algemene stelsel van financiering van het eigen vermogen van vennootschapen waarbij niet-belastbaar kapitaal wordt ingebracht, voor coöperaties wordt opengesteld. Volgens de aanmelding krijgen de coöperaties die onder de voorgenomen regeling zullen vallen, toegang tot een bijzondere belastingaftrek die niet beschikbaar zal zijn voor ondernemingen met de rechtsvorm van vennootschap met beperkte aansprakelijkheid enz. Deze aftrek wordt gerechtvaardigd door de moeilijke toegang tot aandelenkapitaal. Toch is er geen verband tussen deze beide bestanddelen. Inkomstenbelasting wordt geheven over de inkomsten van een onderneming uit het normale zakelijke verkeer, terwijl de inbreng van aandelenkapitaal en ander eigen vermogen volgens de Noorse wetgeving niet als inkomsten wordt aangemerkt. Alleen al op basis hiervan betwijfelt de Autoriteit dat de maatregel is gerechtvaardigd door de aard of de opzet van het Noorse belastingstelsel. Bovendien zou de voorgenomen belastingaftrek volgens het voorstel alleen gelden voor bepaalde coöperaties, terwijl de Autoriteit, op basis van de informatie waarover zij beschikt, aanneemt dat ook andere coöperaties dezelfde moeilijkheden ondervinden om toegang tot aandelenkapitaal te krijgen.

Voorts betogen de Noorse autoriteiten dat de steun de mededinging niet verstoort of dreigt te verstoren omdat hij alleen bestaande concurrentienadelen voor de coöperaties aanpakt. Aangezien de regeling de door de in aanmerking komende coöperaties verschuldigde inkomstenbelasting zal verminderen, betwijfelt de Autoriteit dat de regeling de mededinging niet verstoort of dreigt te verstoren.

De Autoriteit betwijfelt dat de maatregel verenigbaar kan worden verklaard op grond van een van de afwijkingen van artikel 61 van de EER-Overeenkomst.

CONCLUSIE

Gelet op het voorgaande heeft de Autoriteit, overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Toezichtovereenkomst, besloten de formele onderzoekprocedure in te leiden. Belanghebbenden wordt verzocht binnen één maand na bekendmaking van dit besluit in het *Publicatieblad van de Europese Unie* hun opmerkingen te maken.

EFTA SURVEILLANCE AUTHORITY DECISION

No 719/07/COL

of 19 December 2007

to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the proposed scheme concerning tax benefits for cooperative societies

(Norway)

THE EFTA SURVEILLANCE AUTHORITY ([1]),

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

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

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

Having regard to the Authority's Guidelines ([4]) on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular the Guidelines on business taxation,

Whereas:

I. FACTS

1. Procedure

By letter dated 28 June 2007 from the Norwegian Ministry of Government Administration and Reform, received and registered by the Authority on 29 June 2007 (Event No 427327) and letter from the Ministry of Finance dated 22 June 2007, received and registered by the Authority on 4 July 2007 (Event No 428135), the Norwegian authorities notified the proposed amendments to the rules on taxation of cooperative companies contained in Section 10-50 of the Tax Act, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement. As it was only the cover letter from the Ministry of Government Administration and Reform that was received by the Authority on 29 June 2007, the Authority considers the notification to have been submitted on 4 July 2007. This was communicated to and agreed upon by the Norwegian authorities by an e-mail dated 10 August 2007 (Event No 433019). According to the notification, the scheme is notified for reasons of legal certainty.

By letter dated 4 September 2007 (Event No 433067), the Authority requested additional information from the Norwegian authorities.

By letter dated 28 September 2007 from the Norwegian Ministry of Government Administration and Reform, forwarding a letter from the Ministry of Finance of 28 September 2007, received and registered by the Authority on the same day (Event No 444538), the Norwegian authorities requested an extension of the deadline to reply. By letter dated 1 October 2007 (Event No 444790), the Authority met this request.

By letter dated 16 October 2007 from the Norwegian Ministry of Government Administration and Reform, forwarding a letter from the Ministry of Finance of 16 October 2007, received and registered by the Authority on the same day (Event No 447272), the Norwegian authorities replied to the Authority's information request.

By letter dated 10 December 2007 (Event No 456448), the Authority according to Article 4(5) in Part II of Protocol 3 to the Surveillance and Court Agreement asked the Norwegian authorities for an extension of 2 days of the deadline to take a decision according to paragraphs 2-4 of the same Article. By letter dated 12 December 2007 from the Norwegian Ministry of Government Administration and Reform, received and registered by the Authority on the same date (Event No 457226) the Norwegian authorities met this request.

2. Description of the proposed measure

2.1. *Background*

In 1992, the Norwegian authorities introduced a scheme concerning special tax deductions for cooperatives. According to the scheme, cooperatives within the agricultural and fisheries sectors as well as consumer cooperatives were entitled to incorporate tax deductions on the basis of allocations to equity capital. Other forms of cooperatives were not covered by the scheme.

The deduction was limited to maximum 15 % of the annual net income, and taken solely from the part of the income deriving from trade with the members of the cooperative. A deduction corresponding to the maximum allowed would imply a reduction from the normal corporate tax rate of 28 % to 23,8 % ([5]). According to the Proposal by the Norwegian Government of 29 September 2006 ([6]), the aim of the scheme was to grant a fiscal advantage to the cooperatives on the basis that the cooperatives were considered to have a more difficult access to equity capital than other undertakings.

([1]) Hereinafter referred to as 'the Authority'.
([2]) Hereinafter referred to as 'the EEA Agreement'.
([3]) Hereinafter referred to as 'the Surveillance and Court Agreement'.
([4]) Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, EEA Supplement No 32, 3 September 1994. The Guidelines were last amended on 3 May 2007. Hereinafter referred to as 'the State Aid Guidelines'.

([5]) Cf. Section 12.2 of the Proposal by the Norwegian Government of 29 September 2006 (*Ot. prp. nr. 1 (2006-2007) Skatte- og avgiftsopplegget 2007 — lovendringer*).
([6]) *Ot. prp. nr. 1 (2006-2007) Skatte- og avgiftsopplegget 2007 — lovendringer.*

The scheme was abolished as of the fiscal year 2005. However, in relation to the State Budget for 2007, the Norwegian authorities proposed to reintroduce the scheme in a slightly amended form.

2.2. *The cooperative movement in Norway*

According to the notification, the cooperatives in Norway are described in the Article '*Cooperative Law in Norway — Time for Codification?*' ([1]). According to the Article, there are four big cooperative sectors in Norway, namely agriculture, fisheries, consumer and housing. The cooperatives in the agricultural sector are undertakings involved in activities such as processing, sale, purchasing of agricultural products and goods used for agricultural production (fertilisers, machines etc.), breeding, credit and insurance. In the fisheries sector cooperatives have the exclusive right to first-hand sale of all kinds of fish and shellfish, except farmed fish. Furthermore, the consumer cooperatives in Norway operate 1 300 stores (supermarkets, building materials dealers etc.), and have more than 900 000 members. Finally, housing is an important cooperative sector in Norway with more than 652 000 cooperative members and 256 000 dwellings owned by cooperatives. In addition to these traditional cooperatives, there are cooperatives in many other parts of the economy, such as transport and energy supply, but also health care, schools, media etc.

In the notification, the Norwegian authorities describe a cooperative as a company which is owned by its members, cf. Section 1 of the Act on cooperative societies ([2]). The members' liabilities are limited to any membership fee or deposit that may have to be paid according to the memorandum of association. The surplus of the cooperative may only be allocated to the members according to the members' transactions with the company, cf. Sections 26-30 and 135 of the Act on cooperative societies. The membership deposits may only be increased by a return according to an interest rate set with a mandatory maximum, cf. Section 30 of the Act on cooperative societies.

2.3. *Norwegian rules on corporation tax and the cooperatives*

The general income tax for undertakings in Norway is 28 %. The tax also applies when the income is added to the company's equity capital. However, the Norwegian Supreme Court has concluded that share deposits are not taxable income for the receiving company ([3]). The reason is that the contributions are deemed to have been previously taxed as the contributor's income. Hence, whereas an undertaking has to pay 28 % tax on equity financed through the undertaking's own income, no tax is paid with regard to deposits from the shareholders or the public. It follows from the above that undertakings which are organised as limited companies etc. may increase their equity capital by receiving non-taxable share deposits from their shareholders or from the public.

Cooperatives, however, do not have this possibility as they, according to the Norwegian law on cooperatives, cannot issue shares to the public or issue other capital certificates or securities. Furthermore, it is considered that the principle of open membership limits the size of capital contributions that the cooperatives can claim from their members.

According to the notification, the obligations and limitations imposed on the cooperatives by law are seen by the Norwegian authorities as essential and inherent in the cooperative principles. Hence, the Norwegian authorities consider that the lifting of these restrictions would violate fundamental cooperative principles. The Norwegian authorities point out that the Norwegian act on cooperative companies may be stricter at this point than the legislation on cooperatives in other European States. As an example, the Norwegian authorities refer to Article 64 of the Council Regulation on the Statute for a European Cooperative Society ([4]), according to which the cooperative may provide for the issuing of securities other than shares which may be subscribed both by members and non-members.

2.4. *Objective of the scheme*

According to the notification, the cooperative societies must be upheld due to the public interest of maintaining undertakings based on principles such as democracy, self-help, responsibility, equality, equity and solidarity as an alternative to limited companies. Thus, in order to ensure the public, intangible interest of maintaining the cooperative societies as an alternative to the limited companies, there is a need to compensate the cooperatives for the disadvantage they otherwise suffer compared with other companies. The objective of the proposed scheme is to offset some of these disadvantages related to capital supply.

2.5. *The proposed measure*

The notified measure is laid down in a new Section 10-50 of the Tax Act.

The first paragraph of the Tax Act reads as follows:

> '*Cooperative societies may claim deduction in their income for additional payments to the members according to Section 27 of the Act on cooperative societies* [([5])]. *In addition, deduction may be granted for allocations to equity capital up to 15 % of the income. Deduction is only granted with regard to income deriving from trade with the members. Trade with members and equivalent trade must appear in the accounts and must be substantiated*' ([6]).

'*Equivalent trade*' is defined in paragraph 3 of Section 10-50 of the Tax Act as fishermen's sales organisations purchase from members of another fishermen's sales organisation provided that certain conditions are fulfilled, purchase by an agricultural cooperative from a corresponding cooperative in the aim to regulate the market and purchase imposed by a State authority.

([1]) '*Cooperative Law in Norway — Time for Codification?*' by Tore Fjørtoft and Ole Gjems-Onstad, published in '*Scandinativan Studies in Law*', Volume 45 — Company Law, 2003, pages 119-138.
([2]) Act of 29 June 2007 No 81 *Lov om samvirkeforetak (samvirkelova)*.
([3]) Rt. 1917 page 627 and Rt. 1927 page 869.
([4]) Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (OJ L 207, 18.8.2003, p. 1).
([5]) The first sentence of the provision is not relevant for the notified scheme.
([6]) Unofficial translation by the Authority. The original Norwegian text is as follows: *'(1) Samvirkeforetak kan kreve fradrag i inntekten for etterbetalinger til medlemmene etter samvirkeloven § 27. I tillegg kan det gis fradrag for avsetning til felleseid andelskapital med inntil 15 prosent av inntekten. Fradrag gis bare i inntekt av omsetning med medlemmene. Omsetning med medlemmene og likestilt omsetning må fremgå av regnskapet og kunne legitimeres.'*.

It follows from the provision that deduction is only granted with regard to income deriving from trade with members and equivalent trade. Hence, no deduction is granted in income from trade with others.

The Norwegian authorities estimate that the loss in tax revenue resulting from the scheme will amount to between NOK 35 million and NOK 40 million (approximately EUR 4-5 million) for the fiscal year 2007.

2.6. *Beneficiaries*

The scheme is proposed to apply to the cooperative societies indicated in paragraphs 2 and 4-6 of the proposed Section 10-50 of the Tax Act.

It follows from the provisions referred to above that the notified scheme mainly includes certain consumer cooperatives ([1]) and cooperatives active within the agriculture, fisheries and forestry industries. Furthermore, cooperative building societies which are covered by the Act on cooperative building societies ([2]) may also benefit from the tax deduction ([3]). Other forms of cooperatives are not covered by the scheme.

3. **Comments by the Norwegian authorities**

The Norwegian authorities have stated that the scheme has been notified to the Authority for reasons of legal certainty. The Norwegian authorities claim that the scheme cannot be supposed to constitute State aid within the meaning of Article 61(1) of the EEA Agreement. This seems to be based on three different lines of argumentation.

Firstly, the Norwegian authorities argue that the scheme does not confer any advantage on the cooperatives. In this regard, the Norwegian authorities argue that the general principle laid down in the *Altmark* doctrine ([4]), referred to by the Norwegian authorities as the market investor principle, '*must apply where the measure consists of advantages given to the recipient to cover the extra costs for the undertaking to fulfil obligations imposed on it and by which the State in return is given an intangible benefit of public interest*' ([5]). According to the Norwegian authorities, this should in any case apply where the obligation imposed is external to the interests of the undertakings concerned. The Norwegian authorities claim that the principle laid down in the *Altmark* judgement should apply in this case even though '*the Norwegian authorities are not of the opinion that the notified scheme is in line with the Altmark judgement or compatible with the Authority's Guidelines on State Aid in the Form of Public Service Compensation*' ([5]).

The obligation imposed on the cooperatives is in this case the prohibition for cooperatives to issue shares or other capital certificates or securities in order to strengthen their equity capital, restrictions which the Norwegian authorities consider as essential. The intangible benefit is the public interest of keeping up and safeguarding the cooperative companies as alternatives to limited companies and other organisational forms.

The Norwegian authorities argue that the case law on which the Authority's Public Service Compensation Guidelines is based '*does not rule out that the market principle is applicable to payments to compensate obligations imposed in order to ensure intangible benefits for the public*' ([5]). The Norwegian authorities in this regard refer to the Opinion of Advocate General Fennelly in Case C-251/97 ([6]).

The Norwegian authorities go on to say that the obligation imposed on the cooperatives is wholly external to the interest of the cooperatives as it does not bring them any advantage as regards their competitive or market position. The obligation implies a loss in profit for the cooperatives as their equity may not be optimal. The Norwegian authorities claim that the advantage granted to the cooperatives by the scheme does not exceed this loss, or at any rate does not exceed the intangible benefit received by the State.

Secondly, the Norwegian authorities argue that the scheme is not selective. The Norwegian authorities observe that all companies with limited liability may increase their equity by receiving deposits and issue shares or other securities to the investors. Although share deposits constitute an economic advantage for the companies, the deposits are not subject to taxation for the receiving company.

The cooperatives are not permitted to receive equity from external investors or members by issuing shares or other kinds of capital certificates or securities. According to the Norwegian authorities, '*the notified scheme is based on the same logic as the general rule of regarding equity or share deposits as non-taxable income. By the allocation as equity of an amount eligible under the scheme, the amount is deemed as already taxed and not as taxable income for the company*' ([7]). The Norwegian authorities furthermore point out that the tax deduction can only be made on income deriving from trade with members and some other associates.

In essence, the Norwegian authorities argue that the tax benefit for the cooperatives is justified by the nature or general scheme of the Norwegian tax system. In particular, the Norwegian authorities claim that the proposed scheme implies that '*the general system of equity financing for corporations by receiving non-taxable deposits is made applicable also to the cooperative societies*' ([8]).

([1]) According to paragraph 2a of Section 10-50, the provision only applies to cooperatives where more than 50 % of the regular turnover is related to trade with the members.
([2]) Act of 6 June 2003 No 38 *Lov om bustadbyggjelag (bustadbyggjelagslova)*.
([3]) This is an expansion of the scheme compared to the scheme in force until 2005, cf. Section I.2.1 above.
([4]) Case C-280/00, *Altmark Trans GmbH*, [2003] ECR I-7747.
([5]) Section 1 of the letter from the Ministry of Finance dated 16 October 2007 (Event No 447272).
([6]) Opinion of Advocate General Fennelly in Case C-251/97, *French Republic v Commission*, [1999] ECR I-6639.
([7]) Section 4 of the letter from the Ministry of Finance dated 16 October 2007 (Event No 447272).
([8]) Section VI of the letter from the Ministry of Finance dated 22 June 2007 (Event No 428135).

Thirdly, the Norwegian authorities argue that the measure does not distort or threaten to distort competition in a way contrary to Article 61(1) of the EEA Agreement, as the scheme is aimed at compensating the disadvantage for the cooperatives when it comes to access to equity capital. The difficulty for cooperatives with regard to capital supply, itself, according to the Norwegian authorities, implies a distortion of competition at the expense of the cooperatives. The objective of the scheme is to counter this distortion and thereby presumably improve the efficiency of the markets in question.

As an additional point, the Norwegian authorities refer to the Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe ([1]). The Norwegian authorities in particular refer to Section 3.2.6 of the Communication where the Commission i.a. states:

> *'Some Member States (such as Belgium, Italy and Portugal) consider that the restrictions inherent in the specific nature of cooperative capital merit specific tax treatment: for example, the fact that cooperatives' shares are not listed, and therefore not widely available for purchase, results almost in the impossibility to realise a capital gain; the fact that shares are repaid at their par value (they have no speculative value) and any yield (dividend) is normally limited may dissuade new memberships. In addition it is to be mentioned that cooperatives are often subject to strict requirements in respect of allocations to reserves. Specific tax treatment may be welcomed, but in all aspects of the regulation of cooperatives, the principle should be observed that any protection or benefits afforded to a particular type of entity should be proportionate to any legal constraints, social added value or limitations inherent in that form and should not lead to unfair competition.'*

The Norwegian authorities claim that the notified scheme is in accordance with the EEA State aid rules and the principles expressed by the Commission in the Communication.

II. ASSESSMENT

1. Scope of the Decision

As set out in Section I.2.6 above, the potential beneficiaries under the scheme are mainly certain consumer cooperatives, cooperatives active within the agriculture, fisheries and forestry industries and cooperative building societies.

Article 8 of the EEA Agreement defines the scope of the Agreement. It follows from paragraph 3 of Article 8 that:

> *'Unless otherwise specified, the provisions of this Agreement shall apply only to:*
>
> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
>
> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.'*

([1]) COM(2004) 18 of 23 February 2004.

On this basis, the agriculture and fisheries sectors to a large extent fall outside the scope of the State aid rules of the EEA Agreement.

Hence, this Decision applies to the proposed tax concession for cooperative societies, but it does not deal with cooperatives active in the agriculture and fisheries sectors to the extent that the activities of these cooperatives fall outside the scope of the State aid rules of the EEA Agreement.

2. The presence of State aid

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

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

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

The Authority will in the following examine whether the conditions laid down in Article 61(1) of the EEA Agreement are fulfilled in the present case and whether, consequently, the notified measure constitutes State aid.

2.1. *Presence of State resources*

The aid measure must be granted by the State or through State resources. According to the notified scheme, the cooperatives mentioned in Section 10-50 of the Tax Act will be entitled to a special form of tax deduction. Hence, these cooperatives may deduct allocations to equity capital from their income. The tax deduction implies that the tax payable by the cooperatives covered by the scheme is reduced. Hence, the measure constitutes a loss of tax revenues for the Norwegian State, estimated by the Norwegian authorities to amount to between approximately NOK 35 and 40 million (approximately EUR 4-5 million) for the fiscal year 2007. Consequently, State resources are involved.

2.2. *Favouring certain undertakings or the production of certain goods*

2.2.1. Advantage

The aid measure must confer on the cooperatives advantages that relieve them of charges that are normally borne from their budgets.

As referred to above, the proposed tax deduction implies that the tax payable by the cooperatives covered by the scheme is reduced. Thereby, the measure relieves them of charges that are normally borne from their budgets.

However, the Norwegian authorities argue that the proposed tax deduction does not confer an advantage on the cooperatives because the tax deduction must be regarded as compensation for the obligations imposed on the cooperatives by law, and in particular the prohibition for cooperatives to issue shares or other capital certificates or securities in order to strengthen their equity capital. The Norwegian authorities go on to argue that the said prohibition is inherent in the legal form of cooperatives. Furthermore, the issue of safeguarding the cooperatives, with the legal restrictions and obligations imposed on them, as an alternative to companies organised as limited companies, etc., is of public interest.

It is the Authority's understanding that the Norwegian authorities consider that the proposed aid is a part of a bargain whereby the State, on the one hand, achieves that the cooperatives in their current form are safeguarded. The cooperatives, on the other hand, obtain compensation for the disadvantages with regard to equity capital imposed on them by law in the form of a tax concession.

The Norwegian authorities refer to the Opinion of Advocate General Fennelly in Case 251/97 ([1]) to justify their argumentation, and in particular argue that the obligations imposed on the cooperatives are wholly external to the interests of the cooperatives themselves. The obligations are only advantageous for the State, and the cooperatives should therefore be compensated for their services.

The Norwegian authorities have referred to the market investor principle as a justification for the scheme in the notification. It is the opinion of the Authority that in this case the market investor principle cannot be applied, simply because the notified measure is a fiscal measure which, as the Authority sees it, has nothing to do with the State's possible behaviour as a market investor.

The question remains whether the State may grant compensation for disadvantage of the cooperatives with regard to equity capital without this amounting to State aid within the meaning of Article 61(1) of the EEA Agreement ([2]).

First, the Authority will examine whether the prohibition for cooperative societies to issue shares or other capital certificates or securities is a service of general economic interest and therefore whether the *Altmark* doctrine ([3]) may apply.

In the *Altmark* judgement, the European Court of Justice ([4]) concluded that '*where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty*' ([5]).

In the *Altmark* judgement the Court of Justice set up four conditions which have to be complied with in order for such compensation to escape classification as State aid in a particular case ([6]). First, the recipient undertakings must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, if the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost for the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

Based on the information available to it, the Authority is uncertain whether the Norwegian authorities argue that the service of general economic interest involved is the interest of safeguarding the cooperatives with their present obligations and restrictions or more specifically the prohibition for cooperative societies to issue shares or other capital certificates or securities. At this stage of the proceedings, the Authority has not been presented with any argument that would permit it to conclude that any of these alternative definitions can be classified as a service of general economic interest. In this regard, the Authority notes that for Article 59(2) of the EEA Agreement to apply, what needs to constitute a public service is the actual activities performed by the undertakings concerned. In other words, that a given company structure is seen as beneficial does not in itself constitute a public service within the meaning of that provision.

In any event, even if the obligation for the cooperatives had been considered to be a service of general economic interest, the criteria for compensation set out in the judgment of the Court of Justice in the *Altmark* case must apply if the measures at hand were not to be covered by Article 61(1) of the EEA Agreement.

However, the Norwegian authorities expressly state that they do not consider the notified aid scheme to be in line with the *Altmark* judgement. The Authority in this regard also refers to the information submitted by the Norwegian authorities whereby they have i.a. calculated neither the costs incurred on the cooperatives by offering the alleged public service nor the advantage for the cooperatives resulting from the tax concession.

On this basis, the Authority has reached the preliminary conclusion that the *Altmark* doctrine does not apply to the present case.

([1]) Opinion of Advocate General Fennelly in Case C-251/97, *French Republic v Commission*, cited above.
([2]) Cf. paragraph 20 of the quoted Opinion.
([3]) Cf. Case C-280/00, *Altmark Trans GmbH*, cited above.
([4]) Hereinafter referred to as 'the Court of Justice'.
([5]) Cf. paragraph 87 of the Judgement.
([6]) Cf. paragraphs 89-93 of the Judgement.

Second, the Authority will examine whether it can be concluded that the proposed scheme does not involve an advantage for the cooperatives covered by it on the basis that the aid is granted in order to compensate the cooperative for structural disadvantages ([1]).

The Norwegian authorities claim that the cooperatives are disadvantaged in comparison to other undertakings, i.a. limited companies, when it comes to access to equity capital. However, the Norwegian authorities have not provided detailed information describing the situation of cooperatives in relation to other companies which demonstrates that the possible disadvantage with regard to equity capital is not offset by other elements in the regime on cooperatives in Norway. The Norwegian authorities confine their argumentation to the situation of the cooperatives with regard to equity capital.

Furthermore, it has not been accepted, either in the case-law of the European Courts or in the practise of the Commission, that a measure does not confer an advantage on the undertaking in question merely because it compensates a 'disadvantage' suffered by the undertaking ([2]).

Against this background, and on the basis of the lack of justification provided by the Norwegian authorities, the Authority doubts that the aid proposed to be granted to the cooperatives can be regarded not to constitute an advantage for them on the basis that they suffer from a structural disadvantage.

Third, the Norwegian authorities claim that the notified scheme is in accordance with the EEA State aid rules and the principles expressed in Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe ([3]). The Norwegian authorities in particular refer to Section 3.2.6 of the Communication, where the Commission i.a. states that specific tax treatment of cooperatives may be welcomed.

At this stage of the proceedings, the Authority is in doubt as to what extent the Communication can provide the legal basis for concluding that the notified scheme does not confer an advantage on the cooperatives covered by it. In this regard, the Authority in particular refers to Section 3.2.7 of the Communication, which reads as follows:

> *'Cooperatives that carry out economic activities are considered as "undertakings" in the sense of Articles 81, 82 and 86 to 88 of the European Community Treaty (EC). They are therefore subject in full to European competition and State aid rules, and also to the various exemptions, thresholds and de minimis rules. There are no grounds for special treatment of cooperatives in the general competition rules; however certain aspects of their legal form and structure should be taken into account on a case-by-case basis, as previous decisions and rulings have demonstrated.'*

Against this background, the preliminary conclusion of the Authority is that the proposed tax concession implies an advantage for the cooperatives covered by the scheme.

2.2.2. Selectivity

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

The proposed scheme only covers certain cooperatives as specified in the draft Section 10-50 of the Tax Act. These cooperative societies are entitled to a deduction of up to 15 % in the part of their income deriving from trade with their members. Thus, the tax base of these undertakings is reduced, and thereby also their income tax. This tax rule deviates from the normal rules on income tax payable by undertakings in Norway. On this basis, the proposed scheme appears to be selective in that it favours certain undertakings.

However, the Norwegian authorities argue, in essence, that the tax benefit for the cooperatives is justified by the nature or general scheme of the Norwegian tax system ([4]). In particular, the Norwegian authorities claim that the proposed scheme implies that '*the general system of equity financing for corporations by receiving non-taxable deposits is made applicable also to the cooperative societies*' ([5]).

According to Section 3.4 of the Authority's Guidelines on business taxation ([6]), certain differential measures whose economic rationale makes them necessary to the smooth functioning and effectiveness of the tax system might not constitute State aid. In such cases, the measure would no longer be considered selective ([7]).

Against this background, the Authority has to examine whether the logic underlying the tax exemption could justify a differentiation between the cooperatives covered by the proposed scheme and other undertakings. As the exemption constitutes a derogation from the income tax, this tax will be the general system against which the logic of the derogation must be measured. In other words, the Authority will examine whether the logic of the tax exemption for cooperatives is in line with the objectives of the income tax itself.

According to the proposed scheme, certain cooperatives will be entitled to a deduction in their income whereas companies which are organised as limited companies etc. will not be entitled to the same tax deduction. Thus, if a cooperative and a limited company use their own income to add to their equity capital, the cooperative covered by he proposed scheme will benefit from a tax deduction which is not open to the limited company.

([1]) It has been recognized that structural disadvantages may, in certain specific situations, be offset by aid measures. Cf. Case T-157/01, *Danske Busvognmænd v Commission*, [2004] ECR II-917, where the aid was granted in order to compensate a company for the costs of replacing the status of the officials employed by it with the status of employees on a contract basis, comparable to the employees of its competitors.

([2]) Cf. i.a. the Commission's Decisions in Case C-2/2006, *OTE* paragraph 92.

([3]) COM(2004) 18 of 23 February 2004, cf. Section I.3 above.

([4]) Case 173/73, *Italy v. Commission*, [1974] ECR 709.

([5]) Section VI of the letter from the Ministry of Finance dated 22 June 2007 (Event No 428135).

([6]) The Authority's Guidelines on the application of State aid rules to measures relating to direct business taxation.

([7]) EFTA Court's judgment in Joined Cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnfiord, the Kingdom of Norway, PIL and others v the EFTA Surveillance Authority*, [2005] EFTA Court Reports, p. 117 and Case C-143/99, *Adria-Wien Pipeline GmbH*, [2001] ECR I-8365.

The Norwegian authorities claim that the deduction on the part of the cooperatives is justified on the basis of their difficult access to equity capital. However, the there is no link between the two components in the argumentation of the Norwegian authorities. Income tax is a tax levied on a company's income from normal trade whereas share deposits and other equity deposits are not qualified as income according to Norwegian tax law ([1]). Hence, at this stage of the procedure, the Authority is in doubt as to whether the different rules applicable to cooperative societies and other undertakings in relation to equity deposits can justify discrimination with regard to the rules on income tax.

Already on this basis, the Authority is in doubt as to whether the measure can be regarded as justified by the nature or general scheme of the Norwegian tax system. However, as an additional point, the Authority notes that the notified tax deduction for cooperatives is not proposed to cover all cooperatives in Norway. On the contrary, the scheme is only proposed to cover certain cooperative societies as defined in the draft Section 10-50 of the Tax Act. On the basis of the information submitted by the Norwegian authorities, the Authority assumes that the difficulties concerning access to equity capital explained above are valid also for other cooperatives than he ones proposed to be covered by the scheme.

Against this background, the preliminary conclusion of the Authority is that the tax deduction for cooperatives does not seem to be justified by the nature or general scheme of the Norwegian tax system. It is therefore the preliminary conclusion of the Authority on the basis of the information available to it that the measure notified by the Norwegian authorities is selective.

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

The aid measure must distort competition and affect trade between the Contracting Parties. The tax deduction strengthens the position of the cooperatives in relation to their competitors which are organised differently. The tax deduction applies to all main forms of cooperatives, and at least some of them are also active on markets within the EEA. In this regard, the Authority mentions that the consumer cooperative Coop NKL BA is part of the Coop Nordic Group, which is the largest market participant in the retail food industry in Scandinavia ([2]).

The Norwegian authorities argue that the aim of the scheme is to counter the existing competitive disadvantage for the cooperatives when it comes to access to equity capital. On this basis they maintain that the scheme does not distort or threaten to distort competition.

The Authority notes that the effect of the scheme is to reduce the income tax of the cooperatives covered by the scheme compared to other companies. Thereby, the competitive position of the cooperatives is strengthened. The fact that the cooperatives have certain obligations according to Norwegian law which are not imposed on i.a. limited companies is not decisive in this regard.

Against this background, the preliminary conclusion of the Authority is that the tax deduction is likely to distort competition and affect trade between the Contracting Parties.

2.4. *Conclusion on the presence of State aid*

On the basis on the information set out above, the Authority has reached the preliminary conclusion that the notified scheme concerning tax concessions for cooperative societies in Norway constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

3. **Procedural requirements**

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

The Norwegian authorities have complied with the notification requirement by submitting notification of the new Section 10-50 of the Tax Act by letters dated 28 June 2007 and 16 October 2007 and by not implementing the scheme until it possibly would be approved by the Authority.

The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

4. **Compatibility of the aid**

Support measures caught by Article 6l(l) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement.

The derogation laid down in Article 6l(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision.

The aid can furthermore not be justified under Article 61(3)(b) of the EEA Agreement, as the aid is not given to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Norway.

The aid in question is not linked to any investment. It simply reduces the costs which companies would normally have to bear in the course of pursuing their day-to-day business activities and is consequently to be classified as operating aid. Operating aid is normally not considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement.

On the basis of the information available to it, the Authority is of the opinion that none of the Authority's Guidelines apply to the scheme.

([1]) Cf. Section I.2.3 above.
([2]) '*Cooperative Law in Norway — Time for Codification?*' by Tore Fjørtoft and Ole Gjems-Onstad, cf. footnote 7 above.

In the notification, the Norwegian authorities claim that the notified scheme is in accordance with the EEA State aid rules and the principles expressed in Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe ([1]).

At this stage of the proceedings, the Authority doubts that the Communication can be understood as arguing that State aid measures such as the notified scheme should be considered to be compatible with the State aid rules of the EEA Agreement ([2]).

Against this background, the Authority is of the preliminary opinion that the Communication does not provide a basis for concluding that the scheme is compatible with the State aid provisions laid down in the EEA Agreement.

On this basis, the preliminary conclusion of the Authority is that the notified scheme does not qualify for derogation under Article 61(2) or (3) of the EEA Agreement and is therefore not compatible with the Agreement.

5. **Conclusion**

Based on the information submitted by the Norwegian authorities, the Authority cannot exclude the possibility that the aid measure constitutes aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that the measure can be regarded as complying with Article 61(3)(c) of the EEA Agreement. The Authority thus doubts that the notified measure is compatible with the functioning of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measure in question is compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Norwegian authorities to submit their comments within **one month** of the date of receipt of this Decision.

In light of the foregoing consideration, the Authority requires that, within **one month** of receipt of this Decision, the Norwegian authorities provide all documents, information and data needed for assessment of the compatibility of the notified scheme concerning tax benefits for cooperative companies,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Norway regarding the proposed scheme concerning tax benefits for cooperative companies.

Article 2

The Norwegian authorities are requested, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

The Norwegian authorities are invited to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version is authentic.

Done at Brussels, 19 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján Andri STEFÁNSSON
President	*College Member*

([1]) COM(2004) 18 of 23 February 2004.
([2]) Cf. citation in Section II.2.2.1 above.

Uitnodiging overeenkomstig artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie opmerkingen te maken ten aanzien van staatssteun ten behoeve van het zeevervoer in de vorm van een tonnagebelasting en een terugbetalingsregeling voor zeelieden

(2008/C 96/07)

De Toezichthoudende Autoriteit van de EVA heeft bij Besluit nr. 721/07/COL van 19 december 2007, dat na deze samenvatting in de authentieke taal is weergegeven, de procedure ingeleid van artikel 1, lid 2, van deel I van Protocol 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie (hierna „de Toezichtovereenkomst" genoemd). De IJslandse autoriteiten zijn hiervan door middel van een afschrift van het betrokken besluit in kennis gesteld.

De Toezichthoudende Autoriteit van de EVA verzoekt bij dezen de EVA-staten, de EU-lidstaten en andere belanghebbenden hun opmerkingen over de betrokken maatregel maken door deze binnen één maand vanaf de datum van deze bekendmaking te zenden aan:

Toezichthoudende Autoriteit van de EVA
Griffie
Belliardstraat 35
B-1040 Brussel

Deze opmerkingen zullen ter kennis van de IJslandse autoriteiten worden gebracht. Een belanghebbende die opmerkingen maakt, kan, met opgave van redenen, schriftelijk verzoeken om vertrouwelijke behandeling van zijn identiteit.

SAMENVATTING

1. PROCEDURE

Bij schrijven van 23 maart 2007 hebben de IJslandse autoriteiten bij de Toezichthoudende Autoriteit van de EVA (hierna „de Autoriteit" genoemd) aanmelding gedaan van een steunvoornemen ten behoeve van het zeevervoer, in de vorm van een belastingregeling en een terugbetalingsregeling voor zeelieden. Na correspondentie met de IJslandse autoriteiten besloot de Autoriteit de formele onderzoekprocedure in te leiden ten aanzien van de aangemelde maatregelen.

2. DE FEITEN

2.1. De tonnagebelasting

In IJsland bedraagt de normale vennootschapsbelasting 18 %. Bij Wet nr. 86/2007 betreffende de belasting op koopvaardijactiviteiten *Lög um skattlagningu kaupskipaútgerðar* (hierna „de wet tonnagebelasting" genoemd) voeren de IJslandse autoriteiten een gunstigere tonnagebelastingregeling in. De wet tonnagebelasting bepaalt dat scheepvaartmaatschappijen, in plaats van de 18 % gewone vennootschapsbelasting over winsten, een voordeligere tonnagebelasting kunnen krijgen waardoor de scheepvaartmaatschappijen hun winst kunnen berekenen op basis van een notionele winst per dag, afhankelijk van de tonnage van het betrokken schip. Het gewone tarief van de vennootschapsbelasting wordt vervolgens toegepast op het bedrag van de aldus bepaalde winst.

Deze regeling geldt voor in het *Íslensk alþjóðleg skipaskrá* (het IJslandse Internationaal Scheepsregister — hierna „IIS" genoemd) opgenomen schepen van ten minste 100 brutoton (bt) die worden gebruikt voor buitenlands passagiers- of vrachtvervoer of voor binnenlands vrachtvervoer. De regeling geldt voor koopvaardijschepen die eigendom zijn van de scheepsexploitant, gehuurd zonder bemanning (rompbevrachter) en gehuurd met bemanning (tijdbevrachter).

De tonnagebelasting geldt ook voor bepaalde aanverwante activiteiten, zoals het gebruik van containers bij vrachtvervoer, het in- en uitladen of het onderhoud.

Om voor de wet tonnagebelasting in aanmerking te komen, moeten de schepen in het IIS zijn geregistreerd en moeten de scheepvaartmaatschappijen onbeperkt belastingplichtig zijn. Onbeperkt belastingplichtig betekent dat de in IJsland gevestigde ondernemingen daar belastingplichtig zijn voor hun volledige inkomsten. Bronbelasting in de zin van artikel 3 van de wet op de inkomstenbelasting geeft geen recht op de tonnagebelastingregeling.

De belastinggrondslag (notionele winst) wordt als volgt bepaald:

Tot en met 25 000 nettoton (NT) — 30 ISK per 100 NT (0,36 EUR)

Vanaf 25 001 NT — 10 ISK per 100 NT (0,12 EUR).

Diverse bepalingen in de wet tonnagebelasting zouden garanderen dat er geen spill-over is van de voordelige tonnagebelasting naar andere activiteiten van de rederij. Een rederij die voor de tonnagebelastingregeling kiest, moet gedurende drie jaar binnen die regeling blijven.

2.2. **De terugbetalingsregeling voor het in dienst hebben van zeelieden**

De IJslandse autoriteiten hebben ook een subsidieregeling voor het brutoloon van zeelieden aangemeld. Daarmee krijgen de rederijen subsidies ten belope van 90 % van de inkomstenbelasting berekend op het brutoloon van de zeelieden die zij in dienst hebben. Om op de subsidies aanspraak te kunnen maken, moet de rederij aan dezelfde voorwaarden voldoen als voor de tonnagebelasting (registratie en onbeperkte belastingplicht) en moet zij zeelieden in dienst hebben die in IJsland belastingplichtig zijn.

Zowel de tonnagebelastingregeling en de terugbetalingsregeling voor zeelieden hebben een onbeperkte looptijd.

3. **BEOORDELING**

De Autoriteit is van oordeel dat alle voorwaarden van artikel 61, lid 1, van de EER-Overeenkomst zijn vervuld, hetgeen impliceert dat er sprake is van staatssteun.

Wat de verenigbaarheid van de steunregeling met de EER-staatssteunregels betreft, heeft de Autoriteit de zaak getoetst aan artikel 61, lid 3, onder c), van de EER-Overeenkomst, gelezen in samenhang met de richtsnoeren inzake overheidssteun voor het zeevervoer (hierna „de richtsnoeren" genoemd).

3.1. **De tonnagebelasting**

De Autoriteit betwijfelt of de tonnagebelasting verenigbaar is, en wel om de volgende redenen.

De regeling omvat ook scheepsmanagement

De Autoriteit is niet zeker dat voor tijdscharter afgestane schepen of scheepsmanagement voor *shipping pools* in de tonnagebelastingregeling kunnen worden opgenomen. Volgens deel 3.1, punt 11, van de richtsnoeren kunnen scheepsmanagementbedrijven alleen steun ontvangen ten behoeve van schepen, waarvan zij het volledige bemannings- en technische beheer onder hun hoede hebben. Voorts mag de tonnage van die schepen niet meer bedragen dan viermaal de tonnage van het schip waarvoor de tonnagebelastingplichtige onderneming met het volledige management is belast, daaronder begrepen het commerciële beheer.

Verplichte registratie in het IIS en onbeperkte belastingplicht

Het vereiste dat schepen in het IIS moeten zijn geregistreerd om aanspraak te kunnen maken op de tonnagebelastingregeling, resulteert in de uitsluiting van niet in IJsland geregistreerde schepen. Het is een vast beginsel dat de EER-staten, ondanks dat directe belastingen tot hun bevoegdheid behoren, deze bevoegdheid niettemin moeten uitoefenen in overeenstemming met het EER-recht. Deze verschillende behandeling betekent een beperking van het recht op vestiging, in de vorm van registratie van schepen in andere EER-staten. Uit de EER-Overeenkomst volgt dat staatssteun die in strijd is met andere bepalingen van de EER-Overeenkomst niet met de werking van de EER-Overeenkomst verenigbaar kan worden verklaard. De Autoriteit heeft tot dusver geen redenen gezien waarom een dergelijke beperking op de vrijheid van vestiging noodzakelijk is voor het behalen van de doelstellingen achter de tonnagebelastingregeling.

Voorts is het genot van de gunstigere tonnagebelastingregeling beperkt tot de ondernemingen die onbeperkt belastingplichtig zijn in IJsland. Toch kunnen — ten minste in beginsel — ook belastingverplichtingen ontstaan uit de zogenaamde bronbelasting. Dit betekent dat een in een andere EER-staat gevestigde onderneming voor bepaalde activiteiten in IJsland misschien toch belasting verschuldigd is, zonder dat deze toegang krijgt tot de gunstigere tonnagebelastingregeling.

De IJslandse autoriteiten benadrukken dat, ingeval er overeenkomsten ter voorkoming van dubbele belastingheffing bestaan, de rederijen de belastingen zullen betalen in het land waar zij hun vaste inrichting hebben — en niet in IJsland. IJsland heeft echter niet met alle EER-staten overeenkomsten ter voorkoming van dubbele belastingheffing heeft gesloten. Bijgevolg lijkt het vereiste dat een onderneming onbeperkt belastingplichtig moet zijn om voor de gunstige fiscale behandeling in aanmerking te kunnen komen, een verschillende behandeling te zijn die een beperking vormt van de vrijheid van in andere EER-staten gevestigde dienstenaanbieders om in IJsland zeevervoersdiensten aan te bieden.

Belastinggrondslag

De Autoriteit heeft twijfel bij de vaststelling van de belastinggrondslag die, vergeleken met andere reeds goedgekeurde tonnagebelastingregelingen, laag lijkt te zijn. Deel 3.1, punt 18, van de richtsnoeren beschrijft dat de Europese Commissie uitsluitend haar goedkeuring zal hechten aan regelingen die leiden tot een belastingdruk voor dezelfde tonnage *„die in redelijke mate overeenkomt met de reeds goedgekeurde regelingen. De Autoriteit zal eveneens een billijk evenwicht proberen te bewaren, in de lijn van reeds goedgekeurde systemen*". Daarom dient de Autoriteit te beoordelen of de aangemelde belastinggrondslag in redelijke mate overeenkomt met de belastinggrondslag van andere aangemelde en reeds goedgekeurde regelingen. De Autoriteit vindt dat dit niet het geval is, aangezien de belastinggrondslag tussen 25 en 60 % lager kan uitkomen dan de in andere landen gehanteerde belastinggrondslag.

Duur van de aansluiting bij de tonnagebelastingregeling

De Autoriteit heeft twijfel ten aanzien van de periode die de rederij in de tonnagebelastingregeling moet blijven. In IJsland bedraagt deze periode drie jaar. Uit de beschikkingspraktijk van de Europese Commissie blijkt dat de minimumduur van die periode in andere tot dusver goedgekeurde tonnagebelastingregeling tien jaar bedraagt. De Autoriteit maakt zich zorgen dat deze kortere aansluitingsperiode de IJslandse tonnagebelastingregeling attractiever kan maken en tot omvlagging binnen de EER kan leiden.

3.2. **De terugbetalingsregeling voor het in dienst hebben van zeelieden**

De IJslandse autoriteiten hebben geen schriftelijke definitie van het begrip „zeelieden" in een wetgevend of administratief besluit meegedeeld. Wel bevestigden zij dat nationaliteit geen vereiste is, noch de verblijfplaats van de zeelieden. Bijgevolg lijken ook onderdanen van derde landen onder de regeling te kunnen vallen. De Autoriteit wil er op wijzen dat voor passagiersdiensten tussen EER-havens enkel steun mag worden verleend voor het in dienst hebben van EER-zeelieden (zie ook deel 3.2, punt 3, van de richtsnoeren). De Autoriteit betwijfelt, op grond van de informatie waarover zij beschikt, dat de definitie van EER-zeelieden op dit punt correct wordt toegepast.

Voorts blijken rederijen die van de tonnagebelastingregeling worden uitgesloten, ook van de terugbetalingsregeling te worden uitgesloten. Ondernemingen die onbeperkt belastingplichtig zijn in IJsland, komen niet voor de subsidie in aanmerking wanneer hun schepen in andere EER-staten zijn geregistreerd. Dit lijkt te gelden voor zowel situaties waarin de bemanning in IJsland inkomstenbelastingplichtig is (omdat IJsland hun verblijfplaats is) als situaties waarin de bemanning geen enkele belastingplicht in IJsland heeft. De Autoriteit maakt in dit opzicht dezelfde bezwaren als bij de tonnagebelasting.

4. **CONCLUSIE**

Op basis van het voorgaande heeft de Autoriteit besloten de formele onderzoekprocedure in te leiden ten aanzien van de aangemelde tonnagebelastingregeling en de terugbetalingsregeling voor het in dienst hebben van zeelieden.

EFTA SURVEILLANCE AUTHORITY DECISION

No 721/07/COL

of 19 December 2007

to initiate the procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement with regard to State aid to maritime transport in Iceland in the form of a tonnage tax scheme and a refund scheme for the employment of seafarers

(Iceland)

THE EFTA SURVEILLANCE AUTHORITY [1],

Having regard to the Agreement on the European Economic Area [2], in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [3], in particular to Article 24 thereof,

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

Having regard to the Authority's Guidelines [4] on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular the Chapter on Aid to Maritime Transport,

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

Whereas:

I. FACTS

1. Procedure

By letter of 23 March 2007 from the Icelandic Mission to the European Union forwarding a letter from the Ministry of Finance of the same date, both received and registered by the Authority on 27 March 2007 (Event No 415003), the Icelandic authorities notified the Authority of planned aid to the maritime transport sector, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

By letter dated 20 April 2007 (Event No 417798), the Authority requested additional information to which the Icelandic authorities replied on 20 June 2007 (Event No 426146).

A second request for information was sent by the Authority on 10 August 2007 (Event No 428891), to which the Icelandic authorities replied on 12 September 2007 (Event No 440936).

By letter dated 2 October 2007, the Authority informed the Icelandic authorities that the questions raised by the Authority's Internal Market Directorate at the package meeting on 24 and 25 May 2007 were also relevant for the assessment of the State aid notification and were therefore considered to form part of the current investigation. Thus, the Authority considered that its two months deadline to adopt a decision would not start before answers to these questions had been provided by the Icelandic authorities. The Icelandic authorities replied to those questions by a letter dated 16 October 2007 (Event No 447358).

The notification was discussed between the Authority and the Icelandic authorities in a State aid package meeting on 29 October 2007.

2. Description of the proposed measures

The notification concerns State aid to the maritime sector, firstly by means of the introduction of a tonnage tax scheme, and secondly by the introduction of a special refund scheme for ship-owners, who will be entitled to claim a refund for income tax paid on seafarers' wages. The two measures will be described below.

2.1. *Title and objective of the notified schemes*

The title of the scheme *'Ríkisstyrkur vegna kaupskipaútgerðar á Íslandi'*, i.e. State aid to maritime transport in Iceland comprises both notified measures. The objective is to support the maritime transport sector in Iceland by giving advantages to ship-owners with a view to encouraging them to register in Iceland, rather than sailing under a convenience flag.

2.2. *National legal basis for the notified measures*

The legal basis for the above mentioned measures is Act No 86/2007 on the Taxation of merchant vessel operations, *'Lög um skattlagningu kaupskipaútgerðar'* (hereinafter 'the Tonnage Tax Act'). This Act was adopted by Parliament on 17 March 2007 and published in the Official Law Gazette on 30 March 2007. According to Article 17 of the Tonnage Tax Act, it will enter into force on 1 January 2008.

The Tonnage Tax Act needs to be seen in connection with Act No 38/2007 on the Icelandic International Shipregister (hereinafter IIS). This Act should also enter into force on 1 January 2008. However, the Icelandic Government has submitted to the Authority a Government draft bill which would postpone the entry into force of Act No 38/2007 until 1 January 2009. This would according to the Icelandic authorities not affect the entry into force of the Tonnage Tax Act. It would, however, render the Tonnage Tax Act temporarily ineffective since registration in the IIS is a pre-condition for access to the tonnage tax scheme and the refund scheme for seafarers.

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[1] Hereinafter referred to as 'the Authority'.
[2] Hereinafter referred to as 'the EEA Agreement'.
[3] Hereinafter referred to as 'the Surveillance and Court Agreement'.
[4] Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, EEA Supplement No 32, 3 September 1994. The Guidelines were last amended on 19 December 2007. Hereinafter referred to as 'the State Aid Guidelines'.

2.3. ***Details of the Tonnage Tax***

In Iceland the normal corporation tax rate is 18 %. The Tonnage Tax Act provides that, instead of the ordinary corporation tax on profits at 18 %, shipping companies can be subject to a more favourable tonnage tax calculated on the basis of a notional profit per day depending on the tonnage of the ship concerned. The standard corporation tax rate is then applied to the amount of profit so established.

The scheme has the following eligibility requirements:

2.3.1. *Eligible activities*

The scheme covers ships on the IIS ([1]) of at least 100 GT used for transportation of people or cargo abroad and transportation of cargo domestically. Article 4 of the Tonnage Tax Act defines more precisely that the transport of cargo or passengers is to be done by means of:

1. merchant vessels owned by the vessel operator;
2. merchant vessels leased without crew (bareboat charter);
3. merchant vessels leased with crew (time charter).

Merchant vessel operations do not include the leasing of bareboat charter for longer periods than three years.

Article 4 of the Tonnage Tax Act also lists a number of activities, which are not eligible for any support under the Act, such as fishing, harbour constructions, diving, piloting and salvage, educational and schooling activities or other social activities, sports, entertainment and leisure activities, including whale watching and passenger transport between ports within Iceland that are not ports of calls between countries.

As confirmed by the Icelandic authorities, towing and dredging activities are not eligible under the Act.

2.3.2. *Ancillary activities*

The following activities are considered operational elements in merchant vessel operations pursuant to the Tonnage Tax Act. These activities qualify for the tonnage tax as well:

1. the use of containers in cargo transportations;
2. the operation of loading, unloading and maintenance facilities;
3. operation of ticket sales and passenger terminals;
4. the operation of offices and management facilities;
5. sales of consumer products on board merchant vessels.

2.3.3. *Registration in the IIS and full tax liability*

According to Article 1 of Act No 86/2007 (Tonnage Tax Act),

'[l]imited liability companies and private limited companies, subject to taxation pursuant to item 1 of paragraph 1 of Article 2 of Act No 90/2003 on Income Tax, and operating merchant vessels registered in the Icelandic International Shipregister (IIS), may decide to pay taxes on their merchant vessel operations in accordance with this Act instead of Act No 90/2003.'

Hence, in addition to the limitation with regard to eligible transport activities described above, the Tonnage Tax Act stipulates two requirements to be fulfilled for the ship-owner to qualify for the favourable tonnage tax rates.

Firstly, the vessels to which tonnage tax applies must be registered in the Icelandic International Shipregister (hereinafter IIS). Secondly, the limited liability companies and private limited companies must be subject to taxation pursuant to Article 2(1) subparagraph 1 of Act No 90/2003 on Income Tax (hereinafter 'the Income Tax Act'). That provision states that companies domiciled in Iceland are liable there to tax on their global income (**full tax liability**). A legal person is considered to be domiciled in Iceland if it is registered in Iceland, if it considers Iceland as its residence according to its bylaw, or if it has the real seat of its administration in Iceland. Article 3 of the Income Tax Act provides that non-domiciled companies are liable in Iceland to tax on income originating in Iceland (**source taxation**).

The Authority assumes that the reference to *'limited liability companies and private limited companies'* does not entail that the companies have to be incorporated under Icelandic company law as Icelandic companies in order to qualify for the tonnage tax scheme. Thus, it assumes that such companies incorporated under the company law of another EEA State would qualify for the tonnage tax scheme provided the additional requirements are met. The Icelandic authorities are requested to clarify this issue.

2.3.4. *Requirement of a flag link*

The Icelandic authorities argue that registration in the IIS is not considered to be a so-called flag link. No explicit flag link with Iceland *strictu sensu* is required. Indeed, according to Section 6 of Act No 38/2007 on the IIS *'a merchant vessel that is registered in the Icelandic International Shipregister is considered to be an Icelandic vessel and has the right to sail under the national flag of Iceland'*. The Icelandic authorities therefore describe the flag link as a right and not a condition for eligibility under the scheme.

A ship not flying the Icelandic flag could still have access to the tonnage tax as long as it is registered in the IIS. In that regard, Article 4 of the same Act prescribes that registration is open to where the *'owner of the merchant vessel is an Icelandic citizen, a citizen of another State in the European Economic Area or of the founding States of the European Free Trade Area, a citizen of the Faeroe Islands or a legal entity registered in Iceland'*.

2.3.5. *Establishment of the tax rate*

According to Article 6 of the Tonnage Tax Act, the tax base (notional profit) will be established as follows:

Up to and including 25 000 NT — ISK 30 per 100 NT

From 25 001 NT — ISK 10 per 100 NT.

No deductions are permitted from the tax base.

([1]) There is already an Icelandic Ship Register, which covers fishing ships, sailboats, ferries, etc. which will not be replaced by the newly introduced IIS. The registers will be run separately.

2.3.6. *Taxation under the Income Tax Act and Separate Accounting*

Article 4 of the Tonnage Tax Act specifies that if a vessel operator is also engaged in other activities than the ones qualifying for tonnage tax, he should be taxed for those activities in accordance with the Act on Income Tax.

Article 7 of the Tonnage Tax Act stipulates that income and costs of merchant vessel operations should be kept separate from the income and costs of other activities. Article 8 of the Tonnage Tax Act provides that interest, depreciation and exchange rate gains shall be divided between the merchant vessel operation and other activities in proportion to the book value of assets used in merchant vessel operation, on one hand, and for other uses, on the other hand.

Article 9 of the Tonnage Tax Act stipulates that merchant vessel operation costs cannot be deducted from the income of the vessel operator subject to taxation under the Income Tax Act. Costs, other than financial costs, which relate at the same time to the acquisition of income in merchant vessel operations and the acquisition of other income, should be divided in proportion to the income. In the event that interest expenses, depreciation and exchange rate losses pursuant to Article 49 of the Income Tax Act relate at the same time to the acquisition of income in merchant vessel operation and the acquisition of other income, such financial costs shall be divided in proportion to the book value of assets used in merchant vessel operations, on one hand, and for other uses, on the other hand. Costs which are considered to relate to the generation of other income than that from merchant vessel operation shall be governed by the Income Tax Act.

Losses from merchant vessel operations should not be deductible with regard to taxation of other activities according to the Income Tax Act, cf. Article 11 of the Tonnage Tax Act.

2.3.7. *Duration of the tonnage taxation*

According to Article 2 of the Tonnage Tax Act, the taxation will apply for a period of three years. This means that a ship-owner opting for the tonnage tax has to stay within that scheme for three years.

2.4. ***Details of the special refund for seafarers' income tax***

The Icelandic authorities have also notified a gross wage support system for seafarers, by which ship-owners may be paid grants amounting to 90 % of the income tax calculated on the gross wages of the employed seafarers ([1]). In order to qualify for the grants the ship-owner must be a limited liability company or private limited company with full tax liability in Iceland, the vessels must be registered in the IIS and the ship-owner must employ seafarers who are eligible for taxation in Iceland.

The relevant provision, Article 16 of the Act, reads as follows:

> *'Limited liability companies and private limited companies subject to taxation pursuant to Item 1 of Paragraph 1 of Article 2 of Act No 90/2003 on Income Tax, and which operate merchant vessels, cf. Article 3, registered in the Icelandic International Shipregister (IIS), shall receive a subsidy which corresponds to 90 % of the correctly determined amount of income tax and municipal income tax in withholding taxes on the wages of the crew of the merchant vessels in question, having taken into account personal tax allowances and seamen's allowances. The withholding tax shall, in other respects, be so disposed of that 5 % shall be paid to the Treasury and 5 % shall be paid to the municipality of the crewmember in question. This disposal shall replace the disposal of withholding tax and division according to the Act on Withholding Tax, the Act on Income Tax and the Act on Municipal Revenue Base.*
>
> *The Minister of Finance shall, by means of a regulation, specify the implementation of payments pursuant to Paragraph 1, including the form of subsidy applications, payment times and balancing against unpaid public levies.'*

The Icelandic authorities have confirmed that there are no eligibility criteria on the level of the seafarer other than being employed with a merchant shipping company and having tax liability in Iceland. The refund is only given for the income tax, calculated on the seafarers' wages. It does not cover any social security contributions. The Icelandic authorities have also confirmed that the seafarer's nationality is not relevant in this respect. Nor does the seafarer need to have a residence in Iceland in order for the ship-owner to be able to qualify for the grant.

2.5. ***Aid recipients, budget, duration and entry into force of the notified measures***

The Icelandic authorities have not submitted any exact figures regarding the reduction of State revenue that will follow from the application of the tonnage tax scheme as compared with the tax revenue that would have followed from the application of the ordinary corporation tax rules.

The Icelandic authorities state that the cost of the notified measures will depend on the number of vessels registering in the IIS. A preliminary estimate points to a registration of 12 vessels for which the tonnage tax is assumed to be on average ISK 120 000. Hence, the tonnage tax revenue would amount to some ISK 1 440 000. However, the preliminary estimate does not indicate the amount of ordinary corporate tax these 12 vessels otherwise would have been liable to.

For the seafarers' gross wage support scheme, the Icelandic authorities estimate a budget of ISK 140-150 million per year (based on 12 estimated vessels which might register and 200 seafarers employed on those ships).

The Icelandic authorities have not limited the duration of the schemes. They have, however, confirmed to the Authority that they would be willing to re-notify the scheme after a given number of years.

The Tonnage Tax Act will enter into force on 1 January 2008. Still, according to the Icelandic authorities, the Act will not be effective before the entry into force of the Act on the IIS which is supposed to enter into force on 1 January 2009 ([2]).

2.6. ***Overlap with other schemes***

Cumulation of the scheme with other schemes will be monitored by the Icelandic tax authorities.

([1]) Letter of the Icelandic authorities dated 23 March 2007 (Event No 415003).

([2]) Cf. point 2.2 above.

2.7. ***Information on the expected macro-economic return on the maritime cluster***

Pursuant to Section A12(2) of the Authority's State Aid Guidelines for Aid to the Maritime Transport Sector, the Icelandic authorities carried out a cost effect analysis to establish the macro-economic return of the notified tax schemes. The analysis states that it is difficult to foresee the economic effects of the Tonnage Tax Act as it will depend on the number of ships registered on the IIS. On the estimate of jobs created or saved, the Icelandic authorities estimate that the effect of both support measures is that in the next six years 200 seafarers will be employed as new crew on qualifying merchant vessels.

II. ASSESSMENT

1. The presence of State aid

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

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

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

The individual criteria of that provision will be examined below.

1.1. ***Presence of State resources***

The aid measure must be granted by the State or through State resources. The application of the lower tonnage tax rather than the ordinary corporate tax leads to a loss of State revenues. Likewise are the subsidies from the national budget given to shipowners for the income tax of the seafarers State resources.

1.2. ***Favouring certain undertakings or the production of certain goods***

The two measures give ship owners advantages by way of subsidies and tax concessions. The two measures are limited to the maritime sector and therefore favour only certain undertakings. Hence, they must be viewed as selective within the meaning of Article 61(1) of the Agreement.

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

The aid measure must distort competition and affect trade between the Contracting Parties. The tax relief and the subsidy for the seafarers' income tax strengthens the ship-owners position towards their competitors within the EEA. The maritime transport activities in question are carried out within the EEA and internationally. Hence, the measures affect trade between the Contracting Parties.

1.4. ***Conclusion***

The Authority therefore takes the preliminary view that the notified support measures constitute State aid within the meaning of Article 61(1) of the EEA Agreement ([1]).

2. Procedural requirements

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

By submitting notification of the two support measures, forwarded with a letter from the Icelandic Mission to the European Union dated 23 March 2007 (Event No 415003), the Icelandic authorities have complied with the notification requirement. The Tonnage Tax Act has not yet entered into force. The Authority can therefore conclude that the Icelandic authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

That being said, according to the notification, the entry into force of the new Tonnage Tax Act does not seem to be dependent upon a final positive decision from the Authority. An entry into effect before a final decision would be a breach of the standstill obligation. Any aid paid out in breach of the standstill obligation would be unlawful within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement. If such aid is not found compatible with the functioning of the EEA Agreement, it would be subject to a recovery order from the Authority, see Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement.

3. Compatibility of the aid

Under Article 61(3)(c) of the EEA Agreement, aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the functioning of the EEA Agreement where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Authority considers Article 61(3)(c) of the EEA Agreement together with the Authority's State Aid Guidelines on State aid to maritime transport (hereinafter 'the Guidelines') to form the correct legal basis for assessing the compatibility of the notified measures.

These Guidelines allow the EEA EFTA States to support the maritime transport industry in pursuit of general objectives such as to encourage a flagging or re-flagging to the registers of the Contracting parties, the contribution to the consolidation of the maritime cluster established in the Contracting Parties while maintaining a competitive fleet on world markets, etc.

([1]) For the tonnage tax, the Maritime Guidelines specify that *'the system of replacing the normal corporate tax system by a tonnage tax is a State aid'*, see Section 3.1(4) of the Guidelines.

The Authority has already approved, on the aforementioned legal basis, tonnage tax and seafarers' tax refund schemes in Norway ([1]). Likewise the European Commission has a long standing case practice in this area ([2]).

In the following, the Authority will assess the compatibility of the notified schemes with the criteria laid down in the Guidelines. The Authority will below make first an analysis of the notified tonnage tax (Section 3.1) and subsequently of the notified gross wage scheme (Section 3.2). The Authority will then analyse topics relevant to both schemes (3.3).

It should be noted that the current notification concerns operating aid, i.e. aid which is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities. Operating aid should normally not be allowed, unless it is explicitly authorized by the Authority's State Aid Guidelines. The Authority's Guidelines in the maritime transport sector provide for operating aid in Section 3.1 — tonnage tax and Section 3.2 — labour related costs.

3.1. ***Tonnage tax scheme***

The tonnage tax criteria are laid down in Section 3.1 of the Guidelines. In the following, the Authority will assess the eligibility criteria (3.1.1), the requirements of registration in the IIS and full tax liability in Iceland (3.1.2), the ring fencing measures applied by Iceland (3.1.3), the establishment of the tax base (3.1.4) and the length of period for which the ship-owner has to stay within the tonnage tax scheme (3.1.5).

3.1.1. *Eligible activities*

International transport and cabotage

The Authority has no objections regarding the coverage by tonnage tax of the international maritime transport of freight and/or passengers and cabotage (maritime transport within a Contracting Party).

Ancillary activities

As to the ancillary activities notified by the Icelandic authorities, the Authority considers that these activities are closely linked with the provision of maritime transport services. The services of:

1. the use of containers in cargo transportations;
2. the operation of loading, unloading and maintenance facilities;
3. operation of ticket sales and passenger terminals;
4. the operation of offices and management facilities;
5. sales of consumer products on board merchant vessels

are all integral to maritime transport and covered by the tonnage tax if they are provided by the tonnage tax company itself ([3]).

Ship management

Maritime transport management is normally divided into the following three functions:

— commercial management of vessels,

— technical management of vessels,

— crew management.

Ship management companies, which do not have the legal title to the ship and are not ship-owners, but assume certain management responsibilities for a vessel, may also qualify for aid. According to Section 3.1(11) of the Guidelines this aid can be given only in respect of vessels for which the management companies have been assigned the entire crew and technical management. In particular, as stipulated in Section 3.1(11) of the Guidelines, ship managers have to assume from the owner the full responsibility for the vessel's operations. They moreover have to take over from the owner all duties and responsibilities imposed by the International Management Code for the Safe Operation of Ships and for Pollution Prevention, the so-called ISM code. The Commission describes these conditions to mean that where in practice the ship management company does not ensure the commercial management of the vessel it must simultaneously ensure at least the two last functions ([4]).

When a vessel is chartered without crew (bare-boat charter), this is generally considered as being close to operating an own vessel and therefore can profit from the tonnage tax ([5]).

However, if chartered with a crew (time charter), the management is less close to operating an own vessel and for that reason, additional restrictions as described above must be fulfilled. The Commission has in its case practice also dealt with cases, in which the company takes over the commercial management of the vessels, e.g. for a shipping pool ([6]).

According to Commission's case practice in all cases ([7]) revenues derived from the management of vessels, on its own account or on the account of third parties, may be eligible for tonnage tax where the tonnage tax company ensures:

— either both the crew and technical management of the said vessels,

— or their commercial management,

([1]) Decision No 412/06/COL and No 280/06/COL, which replaces the three schemes authorised in Decisions No 164/98/COL, No 117/02/COL and No 187/03/COL as far as the tax refund to ship-owners for the employment of seafarers is concerned. Decisions No 143/03/COL and No 164/98/COL dealt with the Norwegian tonnage tax scheme.

([2]) References for tonnage tax schemes approved by the European Commission can be found in Decision No 93/06 — Poland, Introduction of a tonnage tax scheme in favour of international maritime transport, which in paragraph 62 lists all the adopted decisions in this field.

([3]) State aid N 563/01 — Denmark and State aid N 93/06 — Poland approve almost identical activities.

([4]) State aid N 93/06 — Poland, paragraph 78.

([5]) This means that the person chartering the boat can count the tonnage for taxations purposes in the same manner as he would do for his own ships. See also State aid N 93/06 — Poland, paragraph 77.

([6]) Shipping pools are defined as *'joint ventures between ship-owners to pool vessels of similar types, with central administration, which are marketed as a single entity, negotiating voyage/time charterparties and contracts of affreightment, where the revenues are pooled and distributed to owners …'*, see Murray, R. (1994). Shipping Pools and EC Competition Law; A Guide for the Shipping Industry. London, 2-4 March.

([7]) Except for bare boat charter for which it is normally assumed that the charter is close to the operation of an own vessel.

and provided that the tonnage of such vessels does not exceed four times the tonnage of vessels for which the tonnage tax company ensures together the crew, technical and commercial management ([1]). This should ensure that aid is only given to maritime transport activities. Tonnage tax companies should not lose the characteristics of a maritime transport company ([2]).

The Icelandic authorities refer in this regard to Section 4 of the Tonnage Tax Act. This Section stipulates that maritime transport eligible for support should be carried out by merchant vessels owned by the vessel operator, merchant vessels leased without crew (bareboat charter) and merchant vessels leased with crew (time charter).

The Icelandic authorities have not clarified whether the above conditions will be met under the Tonnage Tax Act, but limited themselves to repeat the conditions set out in Article 3 of the Tonnage Tax Act. Article 3 of the Tonnage Tax Act however does neither stipulate which kind of management must be carried out by the ship manager, nor does it have any stipulations on the amount of tonnage for a managed vessel in relation to the tonnage for which the tonnage tax company ensures all management functions.

Consequently, the Authority has doubts whether application of the tonnage tax to ship management activities is in line with the Guidelines.

3.1.2. *The requirements of registration in the IIS and full tax liability*

It follows from the EEA Agreement that State aid that contravenes other provisions of the EEA Agreement cannot be declared compatible with the functioning of the EEA Agreement ([3]). The Authority will therefore assess below whether certain requirements of the Tonnage Tax Act, in particular the requirement of registration in the IIS and the requirement of full tax liability are in conformity with other provisions of the EEA Agreement.

The registration requirement

The requirement in Article 1 of the Act to have the vessels registered in the IIS in order to have access to the tonnage tax scheme leads to the exclusion of vessels not registered in Iceland. This also applies in cases where the revenues generated by the operation of such vessels can be subject to Icelandic taxation. To give an example, a ship-owner with two ships, one registered in the IIS, the other registered in another EEA State can be subject to taxation in Iceland on profits from the operations of both ships ([4]).

It is a well established principle that although direct taxation falls within the EEA States competence, they must, nonetheless, exercise that competence consistently with EEA law ([5]). The right of establishment includes the right for nationals (natural and legal persons) of one EEA State to set up and manage undertakings in another EEA State under the conditions laid down by the law of the host State for its own nationals. The abolition of restrictions on the right of establishment applies to restrictions on the setting up of agencies, branches or subsidiaries ([6]). Moreover, the prohibition on restrictions to the right of establishment also applies to tax provisions ([7]). Consequently, this includes the right of a company established in one EEA State, and having its seat, registered office, central administration or principal place of business within the EEA to pursue its activities in another EEA State through a branch or an agency, and be subject to the same tax treatment as companies established in that State. A difference in tax treatment can only be compatible with the provisions of the EEA Agreement if it concerns situations which are not objectively comparable or if it is justified by overriding reasons in the public interest ([8]).

Registration of a ship can constitute establishment where the ship constitutes an instrument for pursuing economic activity which involves a fixed establishment. Restrictions on registering ships in other EEA States can therefore be contrary to the right of establishment in Article 31 EEA ([9]).

As illustrated above, a ship-owner with full tax liability in Iceland and merchant vessels registered in another EEA State will be subject to less favourable tax treatment than a ship-owner with full tax liability in Iceland and its merchant vessels registered in the IIS. This difference in treatment constitutes a restriction on establishment by way of registration of ships in other EEA States.

The Authority has so far not identified reasons as to why such a restriction on the freedom of establishment is necessary in order to pursue the objective behind the tonnage tax scheme, namely to improve the competitive conditions of ship-owners in Iceland vis-à-vis the conditions in non-EEA jurisdictions. The national authorities have neither presented any convincing overriding reasons in the public interest capable of justifying such a restriction on ship-owners establishment in other EEA States. In the absence of such convincing justification grounds the Authority has doubts as to the compatibility of the registration requirement with Article 31 EEA and thereby whether the State aid scheme at issue can be declared compatible with the functioning of the EEA Agreement.

The Authority furthermore has doubts whether the Icelandic registration requirement is compatible with Section 3.1(7) of the Guidelines, which stipulates that a tax relief scheme should require a link with an 'EEA flag'. The Guidelines explain that this is so since the purpose of State aid within the context of the maritime transport is to *'promote the competitiveness of the*

([1]) State aid N 93/06 — Poland, paragraph 84.
([2]) State aid N 93/06 — Poland, paragraph 83.
([3]) Case C-204/97, *Portugal* v *Commission*, [2001] ECR I-3175, paragraph 41. See also Case E-9/04, *The Banker's and Securities' Dealers Association of Iceland v the EFTA Surveillance Authority*, [2006] EFTA Court Report, paragraph 82.
([4]) Where double taxation agreements are in place, full tax jurisdiction will be given to the State where the place of effective management of the company is, including for operations which take place in other EEA States through a branch, etc. Hence, in the above given example, the taxation of a 'permanently established company in Iceland would be in Iceland, also for income generated outside the Icelandic territory'. It would, nevertheless, only be the profits from the ship registered in the Icelandic International Shipregister that would be subject to the tonnage tax regime. The profits from the operations of the other ship would be taxed according to the normal company tax scheme. The Icelandic authorities confirmed this finding to the Authority.
([5]) Case E-6/98, *The Government of Norway* v *EFTA Surveillance Authority*, [1999] EFTA Court Report, p. 74, paragraph 34; Case E-1/04, *Fokus Bank*, [2004] EFTA Court Report, p. 11, paragraph 20.
([6]) See for example Case C-270/83, *Commission* v *France*, [1986] ECR 273, paragraph 13, and Case C-311/97, *Royal Bank of Scotland*, [1999] ECR I-2651, paragraph 22.
([7]) C-471/04, *Keller Holding*, [2006] ECR I-2107, paragraph 49.
([8]) Case 270/83, *Commission* v *France*, [1986] ECR 273, paragraph 13; Case C-311/97, *Royal Bank of Scotland* cited above, paragraphs 23-31; and Case C-253/03, *CLT-UFA SA*, [2006] ECR I-1831, paragraphs 14-17.
([9]) Case C-221/89, *Factortame Ltd and others*, [1991] ECR I-3905, paragraph 22, and Case C-438/05, *Viking Line ABP*, judgment of 11 December 2007, not yet reported, paragraph 23.

EEA fleets in the global shipping market'. The wording 'an EEA State' read in the light of this objective does not support the introduction of a requirement of registration in the specific EFTA State granting the aid. Rather, it supports the view that registration in any EEA State should be the criterion ([1]).

The Icelandic authorities underline that they do not require what they call a 'flag link' as each ship registered in the IIS still remains free to fly another flag. As explained above in point Section I point 2.3.4 of this Decision, Article 6 of the Act on the IIS states that a merchant vessel that is registered in the IIS is considered to be an Icelandic vessels regardless of whether it sails Icelandic flag. Moreover, according to Article 4 of the Act on the IIS the registration is open to all EEA citizens. As mentioned above under point 2.3.4, that Article states that the condition of registration is that the '*owner of the merchant vessel is an Icelandic citizen, a citizen of another State in the European Economic Area or of the founding States of the European Free Trade Area, a citizen of the Faeroe Islands or a legal entity registered in Iceland*'.

It is the Authority's understanding that the reference to 'citizen' means natural persons and not legal entities. Moreover, it is the Authority's understanding that '*legal entity registered in Iceland*' covers only the entities that have full tax liability in Iceland under Article 2(1), paragraph 1 of the Income Tax Act, cf. point 2.3.3 above. Hence, it appears that vessels owned by legal entities established in other EEA States with limited tax liability in Iceland are not eligible for registration in the IIS. The Authority has doubts whether this limitation is compatible with the EEA Agreement, in particular the freedom of establishment in Article 31 EEA, as it appears to discriminate against companies established in other EEA States. Indeed, even if the condition in the Tonnage Tax Act regarding full tax liability was amended to also cover companies with limited tax liability, the limitation with regard to registration would disqualify such companies from the tonnage tax scheme.

Finally, the Authority is not convinced that the argument concerning the voluntary use of the Icelandic flag is relevant, as the possible discrimination mentioned above stems from the registration requirement ([2]). I.e. even if the ship-owner is allowed to fly a flag other than the Icelandic one, he is still obliged to register in the IIS in order to profit from the more favourable tonnage tax. The Authority has despite questions to this end, not received the necessary information and explanations from the Icelandic Government, and has, therefore, not been able to establish what (legal) consequences result from the fact that there might be a separation between the registration and the flying of the flag under Icelandic law. The Icelandic authorities are hereby invited to explain this point further and in particular to state whether (and in case of a positive answer), which obligations and rights are associated with the flag, and which obligations and rights are associated with the registration in the IIS (e. g. manning and security requirements, taxation, etc.).

The requirement of full tax liability

As demonstrated above in Section, point 2.3.3 of this Decision, the eligibility for the beneficial tonnage tax regime is, furthermore, limited to those companies who have full tax liability in Iceland. Hence, as confirmed by the Icelandic authorities, the effect of the Tonnage Tax Act is that ship-owners established in other EEA States who perform transport services in the Icelandic territory are not eligible for the beneficial regime of the tonnage tax. Still, tax liability in Iceland can, at least in principle, also arise from the so-called source taxation, which is laid down in Article 3 of the Income Tax Act. This means that a company established in another EEA State might be tax liable for certain of its operations in Iceland, without having access to the more favourable tonnage tax scheme.

The Icelandic authorities underline that where double taxation agreements are in place, the ship-owners will pay the tax in the country of permanent establishment ([3]) and not in Iceland. And indeed, where double taxation agreements do exist, no taxation would normally arise on the operations in Iceland of companies established in other EEA States because the tax jurisdiction would normally be in the place of effective management of the company, i.e. outside Iceland. However, as regards EEA States, Iceland has not concluded double taxation agreements with Bulgaria, Cyprus and Liechtenstein. Agreements with Greece and Italy are ratified, but not in force yet. Agreements with Austria, Romania and Slovenia are likewise not in force.

As explained above, the right of establishment in Article 31 EEA includes the right of a company established in one EEA State and having its seat, registered office, central administration or principal place of business within the EEA to pursue its activities in another EEA State through a branch or an agency and be subject to the same tax treatment as companies established in that State, insofar as different treatment is not based on objective differences or can be justified by overriding reasons in the general interest. The companies, accordingly, have the right to choose the appropriate legal form in which to pursue their activities in another EEA State, and that freedom of choice must not be limited by discriminatory tax provisions ([4]).

Moreover, the freedom to provide and receive services requires, according to Article 36 EEA, in the same way the elimination of all discrimination on grounds of nationality against service providers who are established in another EEA State. It moreover requires the abolition of all restrictions which are liable to prohibit, impede or render less advantageous the activities of service providers from other EEA States, who lawfully provide services in their EEA State of origin ([5]) and wish to provide those services in another EEA State.

As is explained above, only domiciled companies subject to full tax liability in Iceland are eligible for the tonnage tax scheme. The Icelandic authorities have not at this point provided information allowing the Authority to conclude whether shipping companies established in other EEA States and providing services in Iceland would be subject to income taxation in Iceland on those activities. Accordingly, the requirement of full tax liability in order to qualify for the

([1]) The Authority is aware that the European Commission has accepted a requirement of a flag link with the State granting the aid in a Finish and a Polish case State aid N 93/06 — Poland, Section 3.4.1.2(88) *et seq.* and State aid N 195/02 — Finland. However, the Authority has not full knowledge about all the factual circumstances and conditions of the national schemes for which this requirement has been accepted.

([2]) Normally, in the Authority's and the Commission case practice, the notifion of 'flag link' is understood as a registration requirement.

([3]) Wording used by the Icelandic authorities in their letter dated 16 October 2007 (Event No 447358).

([4]) Case C-270/83, *Commission* v *France* cited above, paragraph 13; Case C-311/97, *Royal Bank of Scotland* cited above, paragraphs 23-31; and Case C-253/03, *CLT-UFA SA* cited above, paragraphs 14-17.

([5]) Case C-76/90, *Säger*, [1991] ECR I-4221, paragraph 12; Case C-279/00, *Commission* v *Italy*, [2002] ECR I-1425, paragraph 31; Case C-131/01, *Commission* v *Italy*, [2003] ECR I-1659, paragraph 26; Case C-244/04, *Commission* v *Germany*, [2006] ECR I-885, paragraph 30; Case C-255/04, *Commission* v *France*, [2006] ECR I-5251, paragraph 37; and Case C-433/04, *Commission* v *Belgium*, [2006] ECR I-10653, paragraph 28.

favourable tax treatment appears to constitute a difference of treatment restricting the freedom of service providers established in other EEA States to provide maritime transport services in Iceland.

Conclusion

To limit the tonnage tax regime to companies with their seat, registered office or the place of residence according to their bylaw in Iceland (requirement of full tax liability), and, furthermore, to extend the benefits of that tax regime only to the part of those companies' income which derives from the operation of ships registered in Iceland (requirement of registration in the IIS), appears liable to place comparable companies established in other EEA States, and/or operating ships registered in other EEA States, at a disadvantage. In the same manner, the tax regime appears liable to place providers of maritime transport services established in other EEA States, and providing services in Iceland, at a disadvantage, as compared to service providers established in Iceland.

Based on the above, the Authority has doubts whether the registration requirement and the requirement of full tax liability in Iceland, are compatible with the functioning of the EEA Agreement, in particular the right of establishment in Article 31 EEA and the freedom to provide services in Article 36 EEA, and can be allowed under the EEA State aid rules.

3.1.3. *Ring-fencing measures, separate accounting*

The Authority finds that there are sufficient rules which should ensure that no spill over between tonnage tax activities and other activities occurs. Article 4 and 7 of the Tonnage Tax Act establish that the eligible activities should be separately accounted for. The requirement of separate accounts also applies to companies within a group. There are several provisions in the Tonnage Tax Act which establish that operating costs and losses of merchant vessel operations cannot be deducted from the income tax to which the operator is submitted for other activities.

However, in its formal investigation regarding the Polish tonnage tax scheme the Commission took note of the commitment of Poland that when opting for a tonnage tax, the company agrees to putting all its eligible vessels and related activities under the tonnage tax. This rule is also applied by Poland to groups of companies that are tax liable in Poland (the so-called 'all or nothing rule'). The Authority is not aware how the Icelandic tonnage tax deals with this situation and will investigate this point further during the formal investigation procedure. The Icelandic authorities are invited to provide further information to that end.

3.1.4. *Tax rates*

Section 3.1(18) of the Maritime Guidelines describes that the EC Commission will only approve schemes giving rise to a tax load for the same tonnage '*fairly in line with the schemes already approved. The Authority will likewise seek to keep an equitable balance in line with already approved schemes.*'

For that reason, the Authority needs to assess whether the notified tax base are fairly in line with the rates applied in other notified and authorised schemes. The Authority has doubts that this is the case and points to the comparative table, based on adopted decisions after the 2004 Guidelines came into force, below:

Iceland	Denmark No 171/04	Lithuania No 330/05	Italy (**) No 114/04
Every amount until 25 000 NT ISK 30 (**EUR 0,36**) per 100 NT (*)	**Until 1 000 NT** EUR 0,90 per 100 NT	**Until 1 000 NT** EUR 0,93 per 100 NT	**Until 1 000 NT** EUR 0,90 per 100 NT
	From 1 001 NT until 10 000 NT EUR 0,70 per 100 NT	**From 1 001 NT until 10 000 NT** EUR 0,67 per 100 NT	**From 1 001 NT until 10 000 NT** EUR 0,70 per 100 NT
	From 10 001 until 25 000 NT EUR 0,40 per 100 NT	**From 10 001 until 25 000 NT** EUR 0,43 per 100 NT	**From 10 001 until 25 000 NT** EUR 0,40 per 100 NT
More than 25 000 NT ISK 10 (**EUR 0,12**) per 100 NT	**More than 25 000 NT** EUR 0,30 per 100 NT	**More than 25 000 NT** EUR 0,27 per 100 NT	**More than 25 000 NT** EUR 0,20 per 100 NT

(*) All the value are given per day.
(**) The Italian decision has an even larger comparative table of tax bases applied in the EU Member States.

As can be seen from the table, the Icelandic scheme operates with tax base considerably lower than in the three EU Member States.

In the case practice of the Commissions lower tax base for larger ships which were going to be re-flagged were only allowed in very special circumstances ([1]), which do not seem to be fulfilled in the present case. The Commission's concern against this tax base divergence was that a low tax base might lead to a distortion of competition if it encourages non-Belgian ship-owners to transfer their ship from a Community register to the Belgian register. These concerns are also valid in the current case in relation to a distortion of competition towards the Icelandic ship register.

The Authority therefore must at the current stage of the procedure express doubts whether these tax base can be declared compatible with the EEA State aid provisions.

3.1.5. *Period, for which the ship-owner has to stay within the tonnage tax regime*

The period, for which the ship-owner has to stay within the Icelandic tonnage tax scheme, is three years. From Commission's

([1]) Commission Decision 2005/417/EC of 30 June 2004 concerning a series of tax measures which Belgium is planning to implement for maritime transport (OJ L 150, 10.6.2005, p. 1). There was a reduced rate for the tranche above 40 000 tons in the Belgium case, which was accepted provided that the ship is new or have been registered under the flag of a third country during the five years preceding their entry into the Belgian system.

case practice it appears that the minimal duration of that period in other tonnage tax schemes approved so far is ten years. The Commission stresses that by allowing diverging criteria for different tonnage tax schemes, a risk exists that unfair advantages are created and that there might be a competition between Member States on the level of tonnage tax schemes. Consequently, the Commission expressed doubts towards a Polish tax scheme, which allowed for a minimal duration of five years, pointing out that this might lead to a harmful divergence between tonnage tax systems as it might make the Polish tonnage tax system more desirable and lead to a re-flagging within the Community ([1]).

The period of staying within the tonnage tax system is even shorter in the current notification, namely three years. Hence, the Authority has doubts as to whether the Icelandic scheme might lead to harmful divergence between tonnage tax systems in the EEA.

3.2. ***Special refund scheme for seafarers***

According to Section 3.2(2) of the Guidelines support can be granted in the form of reduced rates of contributions for the social protection of EEA seafarers employed on board ships registered in an EEA State as well as reduced rates of income tax for EEA seafarers on board ships registered in a EEA State. The Icelandic authorities do not envisage a support for social security contribution, but only for the seafarer's income tax, of which 90 % can be refunded to the ship-owner.

According to Section 3.2(2) of the Guidelines an EEA seafarer is defined as the citizen of the EEA State, in the case of seafarers working on board vessels (including ro-ro ferries) providing scheduled passenger services between ports of the EEA. It moreover covers all seafarers liable to taxation and/or social security contribution in an EEA State, in all other cases. The Icelandic authorities have not submitted a written definition of the notion of seafarer in a legislative or administrative Act, but confirmed that nationality is not a requirement, neither is the residence of the seafarer. Hence, also third country nationals seem to be able to fall under the scheme. The Authority wishes to point out that for passenger services between ports of the EEA, aid should only be given for the employment of EEA seafarers (see also Section 3.2(3) of the Guidelines)). The Icelandic authorities are invited to clarify that the Icelandic law will be applied in compliance with the Guidelines as described above. The Authority has, on the basis of the information available to it, doubts whether the definition of EEA seafarers is applied correctly in this regard.

The Guidelines accept, in Section 3.2(3), that instead of a reduction, a refund of the taxes can be granted by the State, which is the model chosen by the Icelandic authorities.

According to Article 16 paragraph 1 of the Tonnage Tax Act limited liability companies and private limited companies with full tax liability in Iceland, pursuant to Article 2 paragraph 1 point 1 of the Income Tax Act, shall receive a subsidy corresponding to 90 % of the correctly assessed income tax and municipality income tax paid by the crews on the ships they operate that are registered in the IIS. Paragraph 2 of that Article provides that the Minister of Finance shall issue a regulation on *inter alia* how the payments shall be conducted and the application forms to be used. Such a regulation has not yet been issued.

Thus, it appears that ship-owners who are excluded from the tonnage tax scheme are also excluded from the refund scheme. Companies with full tax liability in Iceland will not be eligible for the subsidy insofar as their ships are registered in other EEA States. This appears to apply both for situations where the crew members would be liable to Iceland for income tax (based on residence in Iceland) and situations where the crew members do not have any tax liability in Iceland.

Also, since companies established in other EEA States cannot register ships in the IIS those companies would not be eligible for the subsidy. This is, in the Authority's understanding, so even if the crew of those ships were paying income tax and municipal income tax in Iceland, and the companies were taxed in Iceland on their income originating in Iceland.

These measures, therefore, appear to lead to difference in tax treatment based on where the companies are established to the detriment of companies with establishments in other EEA States. So far the Icelandic Government has not demonstrated that companies established in other EEA States, or Icelandic companies with secondary establishments in other EEA States based on the registration of their ships, are not in comparable situation to companies established solely in Iceland. The Authority, therefore, has doubts as to the compatibility of the refund scheme with the EEA fundamental freedoms, in particular the right of establishment in Article 31 EEA.

3.3. ***Cumulation***

According to Section 11 of the Guidelines, a reduction to zero of taxation and social charges for seafarers and a reduction of corporate taxation of shipping activities is the maximum level of aid which might be permitted. To avoid distortions of competition, other systems of aid may not provide any greater benefit than this. The aid should not exceed the total amount of taxes and social contributions collected from shipping activities and seafarers.

According to the Authority's knowledge no existing aid scheme in Iceland would be capable of adding to the benefits of the present regime. In particular, not the full income tax of the seafarer, but only an amount of 90 % is granted a subsidy. The Authority however reminds the Icelandic authorities of the need to verify that the ceiling of the Guidelines is respected in any case of an individual ship-owner who is eligible both for aid under the present schemes and for any other aid. The Icelandic authorities are hereby invited to confirm that the aid thresholds of the Guidelines will be respected.

3.4. ***Duration of the aid scheme***

As stated above, the two notified measures concern operating aid. Operating aid should normally not be allowed for an unlimited period of time. The Icelandic authorities have stated that they are willing to re-notify the schemes to the Authority after a given period of time. They have, however, not given indication of any limitation to the notified scheme. The Commission has accepted a re-notification after ten years in the Polish tonnage tax case ([1]), thereby effectively limiting the duration of the Polish scheme which was originally not limited in time.

([1]) State aid N 93/06 — Poland.

The Authority would normally not accept aid schemes with an unlimited scheme. A scheme *with* limitation might however be re-notified and prolonged if the Authority should take a positive decision on the re-notified scheme. As long as the duration is not limited, the Authority must however raise doubts as to the compatibility of the Icelandic aid measures.

4. **Conclusion**

Based on the information submitted by the Icelandic authorities, the Authority preliminary concludes that the tonnage tax scheme and the refund for the seafarers' income tax constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

Furthermore, the Authority has doubts that the tonnage tax can be regarded as complying with Article 61(3)(c) of the EEA Agreement, in combination with the requirements in the Authority's Guidelines on State aid to maritime transport. The Authority thus doubts that the tonnage tax is compatible with the functioning of the EEA Agreement. This concerns in particular the following aspects:

1. requirement of registration of the vessel in the IIS, thereby excluding from the tax scheme operations of ships registered in other EEA States;
2. requirement of full tax liability according to Article 2 of the Income Tax Act, thereby excluding activities subject to source taxation according to Article 3 of the Income Tax from access to the tonnage tax;
3. requirement that only legal entities registered in Iceland can register in the IIS, see Article 4 of the Act on the IIS;
4. treatment of ship-management companies;
5. establishment of the tax base;
6. duration of the period for which the ship-owner has to stay within the tonnage tax scheme; and the
7. unlimited duration of the aid scheme.

Further, the Authority would like to clarify the divergence between the flag link and the registration requirement and in particular which obligations and rights are associated with them respectively. The Authority would also like to receive more information regarding the notion of '*limited liability companies and private limited companies*' as set out in point I.2.3.3 of this Decision. The Authority would also like to receive more information on the so-called all or nothing rule.

As to the refund scheme for seafarers, the Authority has the same doubts as expressed above under (1), requirement of registration in the IIS and (2), requirement of full tax liability. Further, the Authority doubts whether for scheduled passenger services between ports of the EEA ensures that aid would only be given to the employment of EEA seafarers.

For both schemes, the Authority would appreciate a confirmation that the cumulation rules of Chapter 11 of the Guidelines and the respective upper thresholds will be respected.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1 (2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Icelandic authorities to submit their comments within **one month** of the date of receipt of this Decision.

In light of the foregoing consideration, the Authority requests the Icelandic authorities, within **one month** of receipt of this Decision, to provide all documents, information and data needed for assessment of the compatibility of the tonnage tax measure,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Iceland regarding the notified tonnage tax scheme and the refund scheme for seafarers.

Article 2

The Icelandic authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

The Icelandic authorities are requested to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Republic of Iceland.

Article 5

Only the English version is authentic.

Done at Brussels, 19 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján STEFÁNSSON
President	*College Member*

Mededeling van de Toezichthoudende Autoriteit van de EVA betreffende de verlenging van de geldigheidstermijn van de richtsnoeren inzake staatssteun ten behoeve van het milieu

(2008/C 96/08)

De Toezichthoudende Autoriteit van de EVA heeft besloten de geldigheidstermijn van de huidige richtsnoeren inzake staatssteun ten behoeve van het milieu (gepubliceerd in het *Publicatieblad van de Europese Gemeenschappen* L 21 van 24.1.2002, EER-supplement nr. 6) te verlengen totdat de nieuwe richtsnoeren goedgekeurd worden.

V

(Bekendmakingen)

BESTUURLIJKE PROCEDURES

RAAD

OPEN UITNODIGING

Europese samenwerking op het gebied van wetenschappelijk en technisch onderzoek (COST)

(2008/C 96/09)

COST brengt onderzoekers en deskundigen uit verschillende landen, die op specifieke gebieden werkzaam zijn, met elkaar in contact. COST financiert NIET de onderzoeksactiviteiten zelf, maar geeft steun aan netwerkactiviteiten zoals vergaderingen, conferenties, korte wetenschappelijke uitwisselingen en stimuleringsactiviteiten. Op dit moment worden meer dan 200 wetenschappelijke netwerken (acties) ondersteund.

COST vraagt om voorstellen voor acties die bijdragen tot de wetenschappelijke, technologische, economische, culturele of maatschappelijke ontwikkeling van Europa. Vooral voorstellen die als voorloper dienen voor andere Europese programma's en/of die gestart zijn door beginnende onderzoekers, zijn welkom.

Het ontwikkelen van nauwere banden tussen Europese onderzoekers is van cruciaal belang voor het tot stand brengen van de Europese onderzoeksruimte (EOR). COST stimuleert nieuwe, innovatieve, interdisciplinaire en brede onderzoeksnetwerken in Europa. COST-activiteiten worden uitgevoerd door onderzoeksteams ter versterking van de fundamenten voor de ontwikkeling van wetenschappelijke topkwaliteit in Europa.

De activiteiten van COST zijn onderverdeeld in negen brede gebieden (biogeneeskunde en moleculaire biowetenschappen; chemie en moleculaire wetenschappen en technologieën; aardsysteemkunde en milieubeheer; voeding en landbouw; bosbouw, en de daarmee samenhangende producten en diensten; individu, maatschappij, cultuur en gezondheid; informatie- en communicatietechnologie; materialen, natuurkunde en nanowetenschappen; vervoer en stadsontwikkeling). Op www.cost.esf.org wordt toegelicht wat de beoogde reikwijdte van de verschillende gebieden is.

De indieners wordt verzocht hun onderwerp in een gebied onder te brengen. Interdisciplinaire voorstellen die niet zomaar in één gebied te plaatsen zijn, zijn echter bijzonder welkom en zullen afzonderlijk worden beoordeeld.

Een voorstel moet deelname van onderzoekers uit minimaal vijf COST-landen behelzen. Er kan een financiële steun van ongeveer 100 000 EUR per jaar, voor normaliter vier jaar tegemoet worden gezien.

De voorstellen zullen in twee fasen worden beoordeeld. In de **voorlopige voorstellen** (maximaal 1 500 woorden/3 bladzijden), die moeten worden ingediend via het onlineformulier op www.cost.esf.org/opencall, wordt een kort overzicht van het voorstel en de bedoelde effecten ervan gegeven. De voorstellen die niet aan de subsidiabiliteitscriteria van COST voldoen (bijvoorbeeld omdat financiering van onderzoek wordt gevraagd), zullen worden uitgesloten. De in aanmerking komende voorstellen zullen worden beoordeeld door de desbetreffende Domain Committees, conform de op: www.cost.esf.org gepubliceerde criteria. De indieners van de geselecteerde voorlopige voorstellen zullen worden uitgenodigd een volledig voorstel in te dienen. **Volledige voorstellen** worden middels collegiale toetsing beoordeeld volgens de beoordelingscriteria op: www.cost.esf.org/opencall. Normaal gesproken wordt binnen zes maanden na het verstrijken van de uiterste datum van indiening een besluit genomen. Naar verwachting kunnen de acties dan binnen drie maanden van start gaan.

De uiterste datum van indiening voor **voorlopige voorstellen** is **26 september 2008**. Voor circa 75 volledige voorstellen zal er een uitnodiging volgen voor een definitieve selectie van ongeveer 25 nieuwe acties.

Op 14 november 2008 zal er een uitnodiging volgen om de **volledige voorstellen** uiterlijk op 16 januari 2009 in te dienen. Naar verwachting worden in mei 2009 besluiten genomen. De volgende uiterste datum van indiening is gepland op 27 maart 2009.

De indieners kunnen voor nadere inlichtingen en hulp contact opnemen met hun nationale COST-coördinator (zie: www.cost.esf.org/cnc).

De voorstellen moeten on line via de website van het COST-bureau worden ingediend.

De coördinatieactiviteiten van COST worden financieel gesteund via het OTO-kaderprogramma van de EU. Het COST-bureau, dat bestuurd wordt door de Europese Stichting voor Wetenschappen (ESW) en dat als het uitvoerend orgaan voor COST fungeert, verzorgt het wetenschappelijk secretariaat voor de COST-gebieden en COST-acties.

EUROPEES BUREAU VOOR PERSONEELSSELECTIE (EPSO)

AANKONDIGING VAN ALGEMENE VERGELIJKENDE ONDERZOEKEN EPSO/AST/46-55/08

Assistenten (AST3)

(2008/C 96/10)

Het Bureau voor personeelsselectie van de Europese Gemeenschappen (EPSO) organiseert voor de burgers van de 12 lidstaten die de afgelopen jaren zijn toegetreden de volgende algemene vergelijkende onderzoeken:

— EPSO/AST/46/08 — Juridische aangelegenheden;

— EPSO/AST/47/08 — Financieel beheer;

— EPSO/AST/48/08 — Beheer van programma's/projecten/contracten;

— EPSO/AST/49/08 — Audit;

— EPSO/AST/50/08 — Statistiek/economie;

alsmede

tegelijkertijd, op dezelfde gebieden, maar voor de burgers van de 27 lidstaten, de volgende algemene vergelijkende onderzoeken:

— EPSO/AST/51/08 — Juridische aangelegenheden;

— EPSO/AST/52/08 — Financieel beheer;

— EPSO/AST/53/08 — Beheer van programma's/projecten/contracten;

— EPSO/AST/54/08 — Audit;

— EPSO/AST/55/08 — Statistiek/economie.

waarbij afhankelijk van het diploma een beroepservaring van 5 of 8 jaar wordt vereist.

De aankondigingen van de vergelijkende onderzoeken worden alleen in het Duits, het Engels en het Frans bekendgemaakt, in Publicatieblad C 96 A van 17 april 2008.

Aanvullende informatie is beschikbaar op de website van EPSO: http://europa.eu/epso

PROCEDURES IN VERBAND MET DE UITVOERING VAN HET GEMEENSCHAPPELIJK MEDEDINGINGSBELEID

COMMISSIE

Voorafgaande aanmelding van een concentratie

(Zaak COMP/M.4900 — Solvay/Sibur/JV)

Voor een vereenvoudigde procedure in aanmerking komende zaak

(Voor de EER relevante tekst)

(2008/C 96/11)

1. Op 9 april 2008 heeft de Commissie een aanmelding ontvangen van een voorgenomen concentratie in de zin van artikel 4 van Verordening (EG) nr. 139/2004 van de Raad ([1]). Hierin is meegedeeld dat SolVin GmbH & Co. KG, dat deel uitmaakt van het Solvay-concern („SolVin", Duitsland), en OJSC Sibur Holding, dat deel uitmaakt van het Gazfond-concern („Sibur", Rusland), in de zin van artikel 3, lid 1, onder b), van genoemde verordening gezamenlijke zeggenschap verkrijgen over de OOO RusVinyl („de JV", Rusland) door de verwerving van aandelen in een nieuw opgerichte onderneming die een gemeenschappelijke onderneming is.

2. De bedrijfswerkzaamheden van de betrokken ondernemingen zijn:

— voor SolVin: productie van vinyl;

— voor Sibur: productie van petrochemische producten;

— voor JV: productie en marketing van caustische soda en polyvinylchloride.

3. Op grond van een voorlopig onderzoek is de Commissie van oordeel dat de aangemelde concentratie binnen het toepassingsgebied van Verordening (EG) nr. 139/2004 kan vallen. Ten aanzien van dit punt wordt de definitieve beslissing echter aangehouden. Hierbij dient te worden aangetekend dat, overeenkomstig de mededeling van de Commissie betreffende een vereenvoudigde procedure voor de behandeling van bepaalde concentraties krachtens Verordening (EG) nr. 139/2004 van de Raad ([2]), deze zaak in aanmerking komt voor de in voormelde mededeling beschreven procedure.

4. De Commissie verzoekt belanghebbenden haar hun eventuele opmerkingen ten aanzien van de voorgenomen concentratie kenbaar te maken.

Deze opmerkingen moeten de Commissie uiterlijk tien dagen na dagtekening van deze bekendmaking hebben bereikt. Zij kunnen de Commissie per fax ((32-2) 296 43 01 of 296 72 44) of per post, onder vermelding van zaaknummer COMP/M.4900 — Solvay/Sibur/JV, aan onderstaand adres worden gezonden:

Europese Commissie
Directoraat-Generaal Concurrentie
Griffie Concentratiezaken
J-70
B-1049 Brussel

([1]) PB L 24 van 29.1.2004, blz. 1.
([2]) PB C 56 van 5.3.2005, blz. 32.

RECTIFICATIES

Rectificatie van het geannoteerd overzicht van de gereglementeerde markten en van de nationale bepalingen tot omzetting van de terzake geldende voorschriften van de RBD (Richtlijn 93/22/EEG van de Raad)

(Publicatieblad van de Europese Unie C 57 van 1 maart 2008)

(2008/C 96/12)

Op de omslag en op bladzijde 21, in de titel:

in plaats van: „Richtlijn 93/22/EEG van de Raad";

te lezen: „Richtlijn 2004/39/EG van het Europees Parlement en de Raad".