EUROPEISKA EKONOMISKA SAMARBETSRÅDET

EFTA:s ÖVERVAKNINGSMYNDIGHET

Uppmaning i enlighet med artikel 1.2 i del I av protokoll 3 till övervakningsavtalet att inkomma med synpunkter på försäljningen av statens aktier i Sementsverksmiðjan (ärende nr 56694 – f.d. ärende nr 47824)

(2005/C 117/07)

Eftas övervakningsmyndighet har genom beslut 421/04/KOL av den 20 december 2004, som återges på det giltiga språket på de sidor som följer på denna sammanfattning, inlett ett förfarande enligt artikel 1.2 i del I av protokoll 3 till avtalet mellan Eftastaterna om upprättande av en övervakningsmyndighet och en domstol (övervakningsavtalet). Islands regering har underrättats genom en kopia av beslutet.

Eftas övervakningsmyndighet uppmanar härmed de avtalsslutande parterna i EES-avtalet och berörda parter att inkomma med sina synpunkter på den aktuella åtgärden inom en månad från offentliggörandet av detta tillkännagivande. Synpunkterna skall sändas till:

Eftas övervakningsmyndighet
Rue Belliard 35
B-1040 Bryssel

Synpunkterna kommer att meddelas Islands regering. Den tredje part som inkommer med synpunkter kan skriftligen begära konfidentiell behandling av sin identitet, med angivande av skälen för begäran.

SAMMANFATTNING

Förfarande

Genom en skrivelse från Islands delegation vid Europeiska unionen av den 19 augusti 2003 mottog övervakningsmyndigheten en anmälan från de isländska myndigheterna i enlighet med artikel 1.3 i del I av protokoll 3 till övervakningsavtalet om landets avsikt att försälja statens aktier i Sementsverksmiðjan (engelskspråkigt namn: Iceland Cement Ltd.). De isländska myndigheterna undertecknade försäljningsavtalen den 2 oktober 2003 innan övervakningsmyndighet hade fattat beslut om anmälan.

Beskrivning av stödåtgärden

Fram till dess att en cementimportör från Danmark år 2000 trädde in på den isländska marknaden hade Sementsverksmiðjan innehaft ett de facto-monopol på cementmarknaden. Till följd av den nya konkurrenssituationen hamnade Sementsverksmiðjan i ekonomiska svårigheter och började ackumulera förluster. Försäljningen av företaget, som till fullo ägs av staten, skall ses mot denna bakgrund.

Den 12 mars 2003 utlyste regeringen i tidningen Morgunblaðið ett anbudsförfarande gällande 100 % av statens aktier i Sementsverksmiðjan. Fem anbud lämnades innan tidsfristen löpte ut den 28 mars 2003. Anbuden utvärderades av en oberoende expert under beaktande av fem kriterier: inköpspris, effekter för konkurrensen på Islands byggmarknad, anbudsgivarens ekonomiska bärkraft, framtidsplaner för företaget och ledningserfarenheter samt kunskaper om marknaden. Regeringen inledde förhandlingar om försäljning av de statsägda aktierna i Sementsverksmiðjan med de anbudsgivare som ansågs ha lämnat det bästa anbudet, en grupp investerare som bildade Íslenskt Sement ehf., på villkor att cementtillverkningen skulle fortsätta.

Samme oberoende expert ombads också bedöma värdet på Sementsverksmiðjan. I bedömningen angavs att för ett företag i samma ekonomiska situation som Sementsverksmiðjan, skulle likvidationsvärdet vara den i allmänhet mest godtagbara värderingsmetoden. Resultatet utgjorde ett negativt eget kapital på […] isländska kronor (jämfört med ett bokfört värde för Sementsverksmiðjans egna kapital på […] isländska kronor per den 31.3.2003). Vidare beräknades kostnaderna för nedrivning och sanering av fabriksanläggningen i Akranes till omkring […] isländska kronor. I form av en post på skuldsidan ingick detta belopp i totalsumma negativt eget kapital på […] isländska kronor.

På basis av denna bedömning såldes företaget med utgångspunkt i följande överenskommelser:

Sementsverksmiðjan och Akranes kommun slöt ett avtal den 31 juli 2003 enligt vilket äganderätten till alla marklotter tillhöriga Sementsverksmiðjan i Akranes per den 1 augusti 2003 överfördes till Akranes kommun. Efter privatiseringen av företaget den 2 oktober 2003 undertecknade Akranes kommun och Sementsverksmiðjan fem 25-åriga hyresavtal för olika marklotter på vilka företagets cementproduktion äger rum. Ett av dem innehöll en klausul som föreskrev att om cementproduktionen skulle upphöra under en sammanhängande period av 24 månader skulle Sementsverksmiðjan vara tvungen att på egen bekostnad riva materiallagerutrymmena.

Den 2 oktober 2003 undertecknade industriministeriet på den isländska regeringens vägnar ett aktieköpavtal med Íslenskt Sement ehf. På basis av detta avtal sålde staten, som var ägare till 100 % av aktierna i Sementsverksmiðjan med ett nominellt värde på […] isländska kronor, dem till Íslenskt Sement ehf. till ett pris av […] isländska kronor.

Samma dag, den 2 oktober 2003, undertecknade Sementsverksmiðjan och företrädare för den isländska statskassan ett köpeavtal varigenom statskassan köpte företagets egendom och tillgångar i Reykjavik, företagets kontorsbyggnad i Akranes (med undantag för ett och ett halvt våningsplan) samt Sementsverksmiðjans aktier och företagsobligationer i andra företag till ett pris av […] isländska kronor. I enlighet med kontraktet får Sementsverksmiðjan behålla en del av den försålda egendomen, använda den i den egna industridriften och återställa den till statskassan senast den 31 december 2011. Företaget betalar ingenting för denna utnyttjanderätt. Fram till den 31 december 2009 har Sementsverksmiðjan rätt att återköpa de ovan nämnda försålda egendomen till ett sammanlagt pris av […] isländska kronor med en fast årlig ränta på […] % räknat från den 1 augusti 2003.

De isländska myndigheterna anmälde transaktionen till övervakningsmyndigheten trots att de ansåg att det inte förelåg något inslag av statligt stöd eftersom försäljningen fullföljdes i enlighet med bestämmelserna i kapitel 18B i riktlinjerna om statligt stöd.

Bedömning

Övervakningsmyndigheten betvivlar att de anmälda åtgärderna inte är statligt stöd såsom påstås av de isländska myndigheterna. Övervakningsmyndigheten ifrågasätter om kapitel 18B är tillämplig i det aktuella ärendet eftersom staten inte bara säljer statligt ägd mark och byggnader utan också sina aktier i ett 100-procentigt statsägt företag med tilläggsvillkoret att driften av företaget skall fortsättas. Vidare kan det i detta skede inte fastställas huruvida de isländska myndigheterna följde den marknadsekonomiska investerarprincipen vid denna privatisering.

Oavsett vad som anges ovan kan de två förfarandena i kapitel 18B i riktlinjerna, som gör det möjligt att påvisa frånvaron av statligt stöd vid en försäljning, på samma sätt hjälpa till att avgöra huruvida stöd har beviljats eller ej.

I enlighet med kapitel 18B.2.1 i riktlinjerna sker en överlåtelse av mark och byggnader per definition till marknadsvärdet och utan inslag av statligt stöd om den äger rum efter ett vederbörligen offentliggjort, öppet och villkorslöst anbudsförfarande (av auktionstyp), där det bästa eller det enda anbudet antas. I det aktuella ärendet kan det inte hävdas att ovan nämnda villkor är uppfyllda och att överlåtelsen genomfördes till marknadsvärdet.

Använder man inte det öppna och ovillkorliga anbudsförfarandet finns i kapitel 18B.2.2 i riktlinjerna också ett alternativt förfarande som gör det möjligt att påvisa frånvaron av statligt stöd. Det värde som fastställts av en oberoende värderingsman på grundval av allmänt accepterade marknadsindikatorer utgör det lägsta anskaffningspris som får avtalas utan att statligt stöd beviljas.

I det aktuella ärendet värderade en oberoende värderingsman Sementsverksmiðjans tillgångar efter det att en förhandlingspartner utvalts genom anbudsförfarandet, men innan företaget försålts. Trots att företaget försåldes som ett i gång varande företag, dvs. på villkor att driften skulle fortsätta, uppskattade värderingsmannen dess likvidationsvärde. I princip kan värdet på ett företag som är i drift, även om det för tillfället går med förlust, inte förmodas motsvara dess likvidationsvärde, som bygger på antagandet att driften kommer att upphöra. Dessutom är värderingen av vissa av Sementsverksmiðjans tillgångar för fastställandet av likvidationsvärdet tvivelaktig. Av dessa skäl kan det inte i detta skede avgöras huruvida företagets likvidationsvärde motsvarar dess marknadsvärde.

Om marknadsvärdet på 100 % av statens aktier i Sementsverksmiðjan var högre än det pris som Íslenskt Sement ehf. betalade skulle staten ha sålt företaget under marknadspris. Inslag av statliga medel i den mening som avses i artikel 61.1 i EES-avtalet skulle då ha varit för handen eftersom staten hade fått lägre intäkter än en privat aktör som agerar enligt marknadens villkor skulle ha fått för samma tillgångar. Om den isländska statskassan skulle ha betalat ett högre pris än marknadsvärdet för de tillgångar som återköptes från Sementsverksmiðjan skulle statliga medel också ha kommit till användning. Även om staten samma dag, om än i olika avtal, var både säljare och köpare av dessa konkreta tillgångar förelåg dock inget inslag av statligt stöd om priset för tillgångarna var detsamma vid båda transaktionerna.

Vidare förlorar staten inkomster när den avstår från att gottgöras av Sementsverksmiðjan för användningen av sina tillgångar i Reykjavik. Detta utgör statliga medel i den mening som avses i artikel 61.1 i EES-avtalet.

Staten kommer även att avstå från inkomster genom förlorade intäkter om Sementsverksmiðjan gör bruk av sin rätt att återköpa tillgångarna i Reykjavik till ett pris som ligger under marknadspriset.

Om det fastställs att transaktionerna i fråga inte genomförts till marknadsvillkor och att det följaktligen funnits inslag av statliga medel har Sementsverksmiðjan och/eller Íslenskt Sement ehf. erhållit en fördel i den mening som avses i artikel 61.1 i EES-avtalet. Detta skulle vara fallet antingen därför att företagens kostnader minskades eller därför att det pris som de erhöll för tillgångarna översteg marknadsvärdet.

Alla fördelar som beviljas Sementsverksmiðjan och som minskar de omkostnader som företaget normalt sett skulle behöva bära, förbättrar detta företags konkurrensposition i jämförelse med övriga marknadsaktörer på den isländska cementmarknaden, som inte erhåller denna fördel, och följaktligen snedvrids konkurrensen. Fördelar som beviljas investeringskonsortiet Íslenskt Sement ehf., åtminstone i förhållande till andra investeringsgrupper som deltog i det anbudsförfarande som den isländska regeringen utlyste för försäljningen av aktierna, innebär även de en snedvridning av konkurrensen.

Med tanke på att Sementsverksmiðjans direkta konkurrent på den isländska marknaden är ett företag, lokaliserat i en annan EES-stat, som importerar cement från andra EEA-länder till Island samt att det fanns investerare i andra EES-länder som var intresserade av att förvärva statens aktier i Sementsverksmiðjan, påverkade åtgärden handeln mellan avtalsparterna i EES-avtalet i den mening som avses i artikel 61.1 i EES-avtalet.

Slutsats

Övervakningsmyndigheten befarar eventuella inslag av statligt stöd, i den mening som avses i artikel 61.1 i EES-avtalet, i den anmälda försäljningen av statens aktier i Sementsverksmiðjan. Om åtgärderna vid privatiseringen skulle utgöra statligt stöd måste övervakningsmyndigheten bedöma huruvida de är förenliga med EES-avtalets funktion. Övervakningsmyndigheten måste därför inleda det formella undersökningsförfarande som anges i artikel 1.2 i del I av protokoll 3 till övervakningsavtalet.

EFTA SURVEILLANCE AUTHORITY DECISION

No 421/04/COL

of 20 December 2004

on the sale of the Icelandic State's shares in Sementsverksmiðjan (Iceland)

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 as well as Article 1(2) in Part I and Article 4(4) in Part II of Protocol 3 thereof,

Having regard to the Authority's Guidelines [3] on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

Whereas:

I. FACTS

1. Procedure

Pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement (hereinafter: Protocol 3), the Icelandic authorities notified the sale of the State's shares in Sementsverksmiðjan hf. (hereinafter referred to as Iceland Cement) by letter dated 19 August 2003 from the Icelandic Mission to the European Union, forwarding a letter from the Ministry of Finance dated 19 August 2003, received and registered by the EFTA Surveillance Authority (hereinafter: the Authority) on 19 August 2003.

By letter dated 29 August 2003, the Authority acknowledged receipt of the notification and reminded the Icelandic authorities of their obligation under Article 1(3) in Part I of Protocol 3 not to put the proposed measures into effect until the Authority's examination of the notification had resulted in a final decision.

The Icelandic authorities provided further documentation on the notification with letters from the Icelandic Mission to the European Union of 22 September 2003 and 9 October 2003, forwarding letters from the Ministry of Finance dated 17 September 2003 and 3 October 2003, respectively.

On 10 October 2003, the Authority sent a request for additional information to the Icelandic authorities, which was answered by a letter from the Icelandic Mission to the European Union of 12 November 2003 forwarding a letter from the Ministry of Finance dated 7 November 2003.

In its letter of 27 November 2003, the Authority informed the Icelandic authorities that, since the Icelandic authorities signed the sale agreements in October 2003, the notified measure was put into effect and constituted a breach of the standstill obligation. Accordingly, the procedure regarding unlawful aid, as laid down in Section III of Part II of Protocol 3, was applicable.

The Authority sent new information-requests with letters dated 27 February 2004 and 4 June 2004. The Icelandic authorities replied by letters from the Icelandic Mission to the European Union of 4 May 2004 and of 7 September 2004, respectively, forwarding two letters of the Ministry of Finance of the same dates.

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[1] Hereinafter referred to as "the EEA Agreement".

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

[3] Procedural and Substantive Rules in the Field of State Aid — Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.1994 No 32, last amended by the Authority's Decision No 371/04/COL of 15 December 2004, not yet published, hereinafter referred to as "the Guidelines".

Two meetings between representatives of the Authority and the Icelandic authorities to discuss the notification were held in the framework of a package meeting which took place in Reykjavik on 26 May 2004 and at an ad hoc meeting in Brussels on 7 July 2004.

On 4 November 2004, the Authority sent a letter to the Icelandic authorities explaining its doubts concerning the non-State aid character of the notified measures. It also requested further information which was missing in the case. The Icelandic authorities commented on this letter and responded by letter from the Ministry of Finance dated 30 November 2004.

2. **Description of the notified measure: the sales process of Iceland Cement**

Until the entry in 2000 of an importer of cement from Denmark into the Icelandic market, Iceland Cement had enjoyed a de facto monopoly in the market for cement. As a result of the new competitive situation, Iceland Cement experienced economic difficulties and started cumulating losses. The sale of the undertaking, wholly owned by the State, has to be seen against this background.

On 12 March 2003, the Government published an announcement in the newspaper Morgunblaðið calling for a tender to purchase 100 % of its shares in Iceland Cement. Offers had to be submitted by 28 March 2003. Additionally, the Government announced the tender on the website of MP Verðbréf, a privately held authorized securities firm which had been appointed to monitor the selection procedure for a purchaser of the shares. A press release was submitted to the Icelandic main media, television and radio. No announcement was made at international level.

Five criteria were to be taken into account in the selection procedure: (1) the suggested purchase price, (2) the description and evaluation on the effect of sale on the competition in the Icelandic construction market, (3) the financial strength and description of financing provided by the bidder, (4) the future vision of the operation of the factory as well as (5) the managerial experience and knowledge of the market which the factory operates in. The offers received were to be ranked and allocated points according to how well MP Verðbréf thought they scored on each criterion. For each offer, the scored points were to be given different weights for each criterion (30 % for suggested purchase price, 25 % for effect on competition, 20 % for financial strength, 15 % for future vision of the operation of the factory and 10 % for managerial experience).

Five offers were made and evaluated by MP Verðbréf who ranked them in accordance with the total score obtained. Following meetings between the Executive Committee on Privatisation, MP Verðbréf and the different bidders, the scores of each group were amended. MP Verðbréf considered that the offer that originally got the third score was the best purchase offer ([1]) taking into account the explanations given. The Government initiated negotiations for the sale of the State's shares in Iceland Cement with this group of investors ([2]), which created Íslenskt Sement ehf for the purpose of acquiring the State's shares. Following the tender, negotiations for the sale of the State's shares were initiated with the bidder selected. A condition for the sale was that cement production should continue.

MP Verðbréf was also requested to assess the value of Iceland Cement. MP Verðbréf stated that for a company in a financial situation like Iceland Cement, establishment of the liquidation value would be the most generally accepted valuation method. Consequently, MP Verðbréf revalued Iceland Cement Ltd's equity taking into consideration the possible price for its assets and how much of the receivables could possibly be collected. The outcome was a negative equity estimated at ISK […] million (compared to the book value of Iceland Cement's equity of ISK […] million as of 31 March 2003). The monetary value of the liquidated assets was consequently not expected to be sufficient to cover all of Iceland Cement's debt. In addition, another independent expert, Almenna Verkfæðistofan hf., had estimated that all the costs associated with the demolition and cleaning of the factory plant at the site in Akranes would amount to approx. ISK […] million. With this sum included as a liability, the negative equity amounted to ISK […] million. MP Verðbréf accordingly estimated on 30 April 2003 that the costs would amount to the negative sum of ISK […] million, including the demolition and cleaning of the plant area, should the company be closed down and liquidated.

([1]) It should be mentioned that this bidder obtained the best mark for the criteria "managerial experience and knowledge of the market which the factory operates in" and "financial strength".

([2]) The investment group was made out of Framtak fjárfestingarbanki hf, Björgun ehf., BM Vallá ehf and originally Steypustöðin, which was later replaced by the Norwegian company Norcem AS.

Against this background, the company was sold based on the following agreements:

Iceland Cement and the Township of Akranes concluded an agreement on 31 July 2003 based on which title to all lots of Iceland Cement in Akranes were transferred to the Township of Akranes as of 1 August 2003. This was necessary in view of the imminent privatisation since the ownership of the land used by the company in the municipality of Akranes had not been clarified ([1]).

Following the privatisation of the company, on 2 October 2003, the Township of Akranes and Iceland Cement Ltd signed five 25-year rental agreements for different lots of land on which the cement production of the company is located. One of the agreements had a clause stating that, if cement production were to cease for a continuous period of 24 months, Iceland Cement would have to demolish the materials storage at its own expense.

On 2 October 2003, the Ministry of Industry, on behalf of the Government of Iceland, signed a Share Purchase Agreement with Íslenskt Sement ehf. On the basis of this Agreement, the State, owner of 100 % of the shares in Iceland Cement for a nominal value of ISK […], sold them to Íslenskt Sement ehf for a price of ISK […].

According to Article 5 of the Share Purchase Agreement, the Government of Iceland shall purchase some assets from Iceland Cement in a separate agreement. As indicated in Section 3 of Article 5, the purchase price for these assets shall be ISK […]. The payment shall, if necessary, be in the form of paying the debts which are secured with the said assets to free them from any lien and encumbrances. Pursuant to Section 5 of Article 5, *"the purchaser* [i.e. the Government of Iceland] *shall use the purchase price to pay the outstanding debts of the company*".

On the same date, 2 October 2003, Iceland Cement and the National Treasury of Iceland signed a Purchase Contract on the basis of which the Treasury purchased the properties and assets of the company in Reykjavík, the office building of the company in Akranes with the exception of one and half floors, and the shares and bonds owned by Iceland Cement in other companies, for the price of ISK […] million. As stated in Article 5 of the Purchase Contract, Iceland Cement may keep a part of the sold properties in Reykjavik ([2]), use them for purposes of its own industrial operations and return them to the National Treasury no later than 31 December 2011. Iceland Cement pays for all maintenance and improvements to these properties but does not pay any compensation for this right of use. According to Article 6 of the Purchase Contract, until 31 December 2009, Iceland Cement has the right to re-purchase the abovementioned sold properties in Reykjavik for a total price of ISK […] million with a fixed annual interest of […] % as of 1 August 2003.

It follows from the above that there are two undertakings involved in these transactions: Iceland Cement, the company sold by the State, and Íslenskt Sement ehf, the consortium of shareholders which acquired the State's shares in Iceland Cement.

Although the Icelandic authorities held the view that no State aid would be involved in the transaction because the sale, in their opinion, had taken place in accordance with Chapter 18 of the State Aid Guidelines (hereinafter: the Guidelines) on the sales of land and buildings, they notified it to the Authority. The Icelandic authorities have stated during the preliminary phase that the overall sales price corresponds to the market value of the company without regard to the economic disadvantage of the special obligations of the buyer. In their opinion, special obligations (clearing obligation of the site in Akranes) further offset the purchase price ([3]).

II. **APPRECIATION**

1. **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*."

([1]) According to the information provided by the Icelandic authorities, the land where the company was situated in Akranes belonged to the township which had put it at the disposal of the State following the establishment of the company. There was however no documentary record of this property right.

([2]) Two cement storage tanks, cement delivery/packaging building, stairs and hallway, cement pipe casing, fence and gate, steel silo with accompanying equipment, air compressors, dryer and electric equipment in a storage shed by the dock, quayside crane, piping in cement pipe casing, vehicle scale and accompanying computer equipment.

([3]) The Icelandic authorities' letter to the Authority of 26 November 2004.

Although the Icelandic authorities submitted a notification by letter dated 29 August 2003 on the planned sale of the State's shares at Iceland Cement, the signature of the abovementioned agreements by the Icelandic authorities put any possible State aid measure granted on the basis of these agreements into effect before the Authority had taken a final decision on the notification.

For this reason, any State aid granted in the framework of this transaction constitutes unlawful State aid within the meaning of Article 1(f) in Part II of Protocol 3, that is, new aid put into effect in contravention of Article 1(3) in Part I of the same Protocol.

2. **State aid assessment**

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."

Thus, in order for a measure to be considered State aid within the meaning of Article 61(1) of the EEA Agreement, the following cumulative conditions must be fulfilled: it must constitute a selective advantage in favour of certain undertakings, be granted through State resources and affect competition and trade between the Contracting Parties to the EEA Agreement.

Chapter 18B of the Authority's State Aid Guidelines lays down certain procedures related to public authorities' sales of land and buildings. If these procedures are followed, there is a presumption that no State aid is involved in the sale. The Authority questions the applicability of Chapter 18B to this case since the State is not merely selling land and buildings which it owns, but its shares in a 100 % owned undertaking with the supplementary condition of continuing the operations of the company.

Furthermore, at this stage, it cannot be determined whether the market investor principle laid down in Chapter 20 of the Guidelines has been followed, since it is uncertain as to what extent the State has taken into account other considerations beyond the mere economic return of the transaction during the negotiation process (i.e. the consequences of a closure for the local economy of Akranes, its the effects on competition, etc.) and whether the price obtained in the sale corresponded to the market value of the company.

Notwithstanding the above, the principles laid down in Chapter 18B of the Guidelines concerning sales procedures, could, by analogy, give an indication to determine whether it can be presumed that no State aid has been involved in the sale.

(a) *State resources*

In accordance with the provisions of Chapter 18B.2.1 of the Guidelines, a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, where the best or only bid is accepted, is by definition a sale at market value and consequently does not contain any State aid.

In the case in question, it cannot be maintained that the abovementioned conditions for the sale to be completed at market value, were fulfilled. The offer was not sufficiently well publicised, since it was only announced in the Icelandic newspaper Morgunblaðið (as well as on the website of MP Verðbréf) and gave bidders 14 calendar days to present their offers. The Guidelines require that the offer is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real-estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers. The sale did not follow an unconditional bidding procedure since the buyers were not free to acquire the land and buildings and to use them for their own purposes. Furthermore, the bidding procedure was not designed to find the economically best offer for acquiring the State's shares, but only to select a future buyer with whom the price and other conditions of the sale could be negotiated afterwards.

Against this background, it cannot be concluded that the provisions of Chapter 18B.2.1 of the Guidelines have been complied with.

To the extent an open and unconditional bidding procedure is not applied, Chapter 18B.2.2 of the Guidelines establishes an alternative procedure that presumes that no State aid is involved. According to these provisions, the value established by an independent asset valuer on the basis of generally accepted market indicators prior to the sale, constitutes the minimum purchase price that can be agreed upon without granting State aid.

In the case in question, an independent asset valuer, MP Verðbréf, estimated the value of Iceland Cement after a negotiation partner was selected by means of the tender procedure, but before the company was sold. Although the company was sold as a going concern, *i.e.* on the condition of continuation of the operations, MP Verðbréf estimated its liquidation value. In principle, the value of a company in operation, even if it currently is making a loss, cannot be assumed to be equivalent to its liquidation value, which is based on the supposition that operations will cease. The estimation of some of the assets of Iceland Cement, for the purpose of establishing the liquidation value of the company, is questionable. In particular, the factory buildings and machinery in Akranes were valued at zero since it was considered that assets specialised for cement production could not be sold to third parties if operations were to be terminated. Nevertheless, these assets certainly have a value for an acquirer who is willing to continue operation of cement production, a condition imposed by the Icelandic State for the sale of its shares. In the view of the Authority, it is not clear to what extent the valuation of the real estate repurchased by the National Treasury of Iceland, reflects their market value.

The Icelandic authorities decided to base the sales negotiations on the liquidation value of the company, which originally corresponded to the negative amount of ISK […] million, without taking into account the costs of clearing the plant in Akranes. During the preliminary phase, the Icelandic authorities have corrected this figure, stating that some assets had been partly or incorrectly considered. The liquidation value has been accordingly amended to ISK […] million ([1]). Taking into account that the company was sold for a price of ISK […], the sales price was very close to the corrected liquidation value.

Nonetheless, at this stage, it cannot be determined whether this liquidation value of the company corresponded to its market value. This is so in particular, because a liquidation value is the estimated value in the event that operations cease. However, as already stated, the transaction took place on the condition that production should continue.

Should the market value of 100 % of the State's shares in Iceland Cement have been higher than the price of ISK […] paid by Íslenskt Sement ehf, the State would have sold the company below its market price. State resources within the meaning of Article 61(1) of the EEA Agreement would have been involved because the State would have obtained a lower revenue than a private operator, acting on market terms, would have got for the same assets.

If the National Treasury of Iceland had paid a higher price than their market value for the assets repurchased from Iceland Cement, State resources would also be consumed.

On the same day but in different agreements, the State was both the seller and the purchaser of these concrete assets. Therefore, no State aid would be involved if the price of the assets remained the same in both transactions.

Furthermore, Iceland Cement retains the right to use some of the assets located in Reykjavik sold to the National Treasury, but does not pay anything for this right. The State is thus foregoing remuneration for the use of its assets, which the company should pay under normal business circumstances. As already mentioned above, there is a consumption of State resources within the meaning of Article 61(1) of the EEA Agreement whenever the State foregoes income normally due.

At any time until 31 December 2009, the company has the right to reacquire certain properties and ground rights in Reykjavik for a total of ISK […] million, assuming full payment in cash. The replacement value of these properties ([2]) had been estimated by an independent expert at approximately ISK […] million. Should Iceland Cement make use of this re-purchase price, the State might lose revenue if it sells the assets for a price below their market value.

([1]) The assets repurchased by the State in Reykjavik and Akranes had been estimated at a lower value in the original assessment of the liquidation value: ISK […] million and ISK […] million respectively. According to the information submitted by the Icelandic authorities lately their value was ISK […] million and ISK […] million respectively.

([2]) This estimation did not include the steel silo with accompanying equipment, air compressors, dryer and electric equipment in a storage shed by the dock, quayside crane, piping in cement pipe casing, vehicle scale and accompanying computer equipment. This estimation did not include the value of the land itself, of which 2 050 m² can apparently also be acquired for this price.

(b) *Selective advantage*

In order for Article 61(1) of the EEA Agreement to be applicable, the measure must be selective in that it favours *"certain undertakings or the production of certain goods"*. Moreover, it must confer on certain undertakings an advantage that reduces the costs they normally bear in the course of business and relieves them of charges that are normally borne from their budgets.

The different measures identified in the various legal instruments mentioned above, in particular, the Share Purchase Agreement between the Government of Iceland and Íslenskt Sement ehf, and the Purchase Contract between Iceland Cement and the National Treasury of Iceland, have been granted selectively to either the privatised company Iceland Cement or to the buyer of the company, Íslenskt Sement ehf.

Should it be determined that the transaction was not carried out on market conditions and that, accordingly, State resources have been involved, Iceland Cement and/or Íslenskt Sement ehf. would have received an advantage within the meaning of Article 61(1) of the EEA Agreement. This would be so because either their costs were reduced or they were paid a price for assets higher than their market value.

(c) *Distortion of competition*

In order for Article 61(1) of the EEA Agreement to be applicable, the measure must distort competition. Undertakings benefiting from an economic advantage granted by the State which reduces their normal burden of costs, are placed in a better competitive position than those who cannot enjoy this advantage.

Any advantage granted to Iceland Cement which reduces the costs it should normally incur, places this undertaking in a better competitive position vis à vis the other market player in the Icelandic cement market which does not receive this advantage. By definition, competition is distorted.

Furthermore, any advantage granted to the consortium of investors, Íslenskt Sement ehf, at least in competition with the other investment groups which participated in the tender procedure employed by the Icelandic Government for the acquisition of shares, also has the effect of distorting competition.

(d) *Effect on trade*

Finally, for Article 61(1) of the EEA Agreement to be applicable, the notified measure must have an effect on trade between the Contracting Parties to the EEA Agreement.

The direct competitor of Iceland Cement in the Icelandic market is an undertaking located in another State party to the EEA Agreement which does not produce cement in Iceland, but imports it from other EEA countries into Iceland.

One of the companies participating in the consortium of investors who acquired Iceland Cement, is a cement producer established in another country of the EEA. Other European companies were part of the investors groups who participated in the tender to purchase the shares of Iceland Cement.

Accordingly, the measure affects trade between the Contracting Parties to the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

3. **Conclusion**

At this stage, based on the information submitted by the Icelandic authorities and for the abovementioned reasons, the Authority has doubts about the classification of the notified sale and accompanying measures as non-aid falling outside the scope of Article 61(1) 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 formal investigation 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.

Should the Authority during this formal investigation procedure come to the conclusion that State aid has been granted in the framework of the privatisation of Iceland Cement, it would like to note that the Icelandic authorities have not provided any arguments and respective documentary evidence so far to assess compatibility with the rules of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement, requests Iceland to submit its comments and to provide all such information as may help to assess the aid measure notified, within two months of the date of receipt of this Decision,

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure pursuant to Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement regarding the agreements related to the sale of 100 % of the shares of the Icelandic State in Iceland Cement.

2. The Icelandic Government is invited, 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 two months from the notification of this Decision.

3. Other Contracting Parties to the EEA Agreement and interested parties shall be informed by the publishing of this Decision in the EEA Section of the *Official Journal of the European Union* and the EEA Supplement thereto, inviting them to submit comments within one month from the date of publication of this Decision.

4. This Decision is authentic in the English language.

Done at Brussels, 20 December 2004.

For the EFTA Surveillance Authority

Hannes HAFSTEIN
President

Einar M. BULL
College Member