



E-9/04-90

**REPORT FOR THE HEARING**  
in Case E-9/04

APPLICATION to the Court pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

**The Bankers' and Securities Dealers' Association of Iceland**

and

**EFTA Surveillance Authority**

seeking the annulment of the EFTA Surveillance Authority's Decision No 213/04/COL of 11 August 2004.

**I Introduction**

1. The case concerns the Decision by the EFTA Surveillance Authority of 11 August 2004, in which the Authority declared the house financing mechanisms provided for by the Icelandic authorities in favour of the Housing Financing Fund to be compatible with the State aid rules according to Article 59(2) of the EEA Agreement.

2. The Application from the Bankers' and Securities Dealers' Association of Iceland ("the SBV") is based on three pleas in law: that the EFTA Surveillance Authority violated its obligation to open formal investigation proceedings; infringed essential procedural requirements by not providing adequate reasons as required by Article 16 in the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"); and wrongfully interpreted and applied Article 59(2) of the Agreement on the European Economic Area ("EEA").

## II Legal background

### *EEA law*

3. Article 59(2) EEA reads as follows:

*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.*

4. Article 4(4) of Part II of Protocol 3 SCA reads as follows:

*Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a 'decision to initiate the formal investigation procedure').*

5. Article 16 SCA reads as follows:

*Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

6. Article 36(2) SCA reads as follows:

*Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.*

7. The first paragraph of Article 1(2) in Part I of Protocol 3 SCA reads as follows:

*If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.*

### *The Housing Financing Fund*

8. The Icelandic Housing Financing Fund (the “HFF”) is an independent State-owned institution accountable to the Minister of Social Affairs, which is governed by the Act on Housing Affairs 1998 No. 44 (the “Housing Act”).<sup>1</sup> Its Board of Directors is appointed by the Minister of Social Affairs.<sup>2</sup> The main tasks of the HFF are specified in Article 9 of the Housing Act.

9. The purpose of the HFF is described in Article 1 of the Housing Act as follows:

*“The purpose of this act is to promote, through the granting of loans and organisation of matters relating to housing, that Icelanders will enjoy security and equal rights as regards housing, and that funds are provided in the specific purpose of increasing people’s chances of acquiring or renting housing on manageable terms.”*

10. After 1 July 2004, The HFF system underwent some changes on the basis of Act No. 57/2004 (amending the Housing Act No. 44/1998), Regulation No. 544/2004 on “the Financing and Risk Management of the Housing Financing Fund”, Regulation No. 522/2004 on “Borrowers’ Mortgages and HFF Bonds” and Regulation No. 521/2004 on “Loan Proportions and Maximum Amounts of Borrowers’ Mortgages”.

11. In pursuance of its goal as stated in Article 1 of the Housing Act, the HFF provides different categories of loans. First, it provides “general loans” to individuals for the purchase, construction or renovation of residential housing against the delivery of a borrower’s mortgage.<sup>3</sup> Second, the HFF provides “supplementary loans” confined to individuals with low income. Finally, the HFF provides “loans for rental housing” to municipalities, associations and companies for the construction or purchase of residential housing to be rented.

12. The conditions of lending differ between the three categories of loans. The general loans’ conditions are established in Chapter VI of the Housing Act. Before a general loan is paid out, the borrower must issue a borrower’s mortgage as a security.<sup>4</sup> The Housing Act and Regulation No. 521/2004 on “Loan Proportions and Maximum Amounts of Borrowers’ Mortgages” set out maximum amounts for general loans in percentage of the value of the housing

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<sup>1</sup> Citations and references to the Housing Act in this Report for the Hearing are based on the current English translation by the Icelandic Ministry of Social Affairs posted on its website: [www.felagsmalaraduneyti.is](http://www.felagsmalaraduneyti.is).

<sup>2</sup> Article 7 of the Housing Act.

<sup>3</sup> Article 2 of the Housing Act.

<sup>4</sup> Article 19 of the Housing Act.

and in absolute figures.<sup>5</sup> It is stated in Decision No 213/04/COL that the Icelandic Government foresees an increase of the lending cap up to 90 per cent of the purchase price, up to a maximum amount obtainable which corresponds to 90 per cent of the price for an average apartment. According to the Housing Act (prior to its amendment by Act No 120/2004) Chapter VII established the conditions of supplementary loans.<sup>6</sup>

13. The HFF's means of financing the tasks with which it is charged are as follows: by return on the Fund's own capital, i.e. instalments, interest and price indexation payments on extended loans; by issue and sale of HFF bonds and by borrowing as may be provided for in the Budget Act at any particular time; and finally, by service charges as provided for in Article 49 of the Housing Act.<sup>7</sup>

14. The HFF's management of its assets and liabilities is described in Article 11 of the Housing Act. The HFF must always have adequate liquid funds to honour its obligations. Furthermore, it has to keep its revenues and expenses in balance and must establish a risk management system. Further requirements concerning risk management are set out in Regulation No. 544/2004 on "the Financing and Risk Management of the Housing Financing Fund", according to which the HFF must, inter alia, keep its equity ratio over 5 per cent<sup>8</sup> and provide quarterly reports on the progress of its risk management policy and key figures in its operation to the Minister of Social Affairs and the Financial Supervisory Authority.<sup>9</sup>

### **III Pre-litigation procedure**

15. By letter of 20 November 2003 the Government of Iceland notified the EFTA Surveillance Authority, pursuant to Article 1(3) in Part I of Protocol 3 SCA, of an increase in the limit of lending by the Icelandic Housing Financing Fund up to 90% of the purchase price of each housing unit.

16. According to Article 5(1) in Part II of Protocol 3 SCA, the EFTA Surveillance Authority sent a letter dated 23 January 2004, requesting additional information from the Government of Iceland. By letter dated 11 March 2004, the Government of Iceland replied to the request for additional information.

17. By letter of 29 January 2004, the SBV informed the EFTA Surveillance Authority of the situation on the Icelandic market for home loans and expressed

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<sup>5</sup> Article 19(2) of the Housing act and Articles 2 and 3 of the Regulation.

<sup>6</sup> Chapter VII has been abolished by Act No 120/2004 Article 6, which entered into force after the decision was adopted.

<sup>7</sup> Article 10 of the Housing Act.

<sup>8</sup> Article 7 of the Regulation.

<sup>9</sup> Article 6 of the Regulation.

its view that the HFF system constituted an infringement of the EEA Agreement. It subsequently lodged a complaint by letter of 20 April 2004, alleging that the Icelandic legislation on the operation of the HFF was incompatible with the EEA Agreement, in particular the competition rules, the rules on State aid, free movement of services, capital and the freedom of establishment of the EEA Agreement.

18. Based on Article 5(1) in Part II of Protocol 3 SCA, the EFTA Surveillance Authority sent a letter dated 14 May 2004 to the Government of Iceland requesting, for a second time, information and clarification, and in which they forwarded a copy of the complaint.

19. The notification was discussed between representatives of the Icelandic Government, the HFF and the EFTA Surveillance Authority during the State aid package meeting in Reykjavik on 26 May 2004. The Government of Iceland subsequently replied to the second request for information in a letter that was received by the EFTA Surveillance Authority on 11 June 2004. The complaint was discussed in a meeting in Brussels on 14 June 2004 between representatives of the SBV and the EFTA Surveillance Authority.

20. In a written statement of 23 June 2004, the EFTA Surveillance Authority informed the SBV that in its view, the arguments set out in the complaint did not appear to warrant the initiation of formal proceedings under the EEA competition rules, namely Article 54 EEA. The EFTA Surveillance Authority stated that it saw no reason to take further action on the complaint of the SBV with regard to the alleged abuse of the dominant position of the HFF.

21. By letter received by the EFTA Surveillance Authority on 1 July 2004, the Government of Iceland provided additional information in response to the EFTA Surveillance Authority's second information request.

22. On 1 July 2004, the EFTA Surveillance Authority informed the SBV that it had not been able to detect any features of the legislation or the structure behind the HFF which would render it incompatible with the four freedoms. It noted that possible restrictions on the basic freedoms were all "inherent" in the State-supportive elements of the HFF system and therefore were so indissolubly linked to the object of the aid that it was impossible to evaluate them separately.

23. The Government of Iceland sent an electronic mail message on 7 July 2004 to the EFTA Surveillance Authority, by which it forwarded the national legislation in question, and a document on the Funding and Risk Policy of the HFF prepared by a financial consultant, as well as supplementary information and explanations. By letter of 27 July 2004 and 23 August 2004, the EFTA Surveillance Authority informed the SBV that it had closed the case with regard to the competition issues and the alleged violation of the four freedoms, respectively.

24. On 11 August 2004, the EFTA Surveillance Authority adopted the final Decision 213/04/COL addressed to the Republic of Iceland. The EFTA Surveillance Authority concluded that the HFF system involves State aid within the meaning of Article 61(1) of the EEA Agreement, and furthermore, that it is justified under Article 59(2) EEA. The operative part of the Decision reads as follows:

*The EFTA Surveillance Authority has decided to declare the house financing mechanisms provided for by the Icelandic authorities in favour of the Housing Financing Fund to be compatible with the State aid rules according to Article 59(2) of the EEA Agreement.*

25. The Applicant was notified of the Decision by letter received on 23 September 2004.

26. The Application from the SBV was registered at the EFTA Court on 23 November 2004, requesting the EFTA Court to annul the contested Decision.

#### **IV Forms of order sought**

27. The Bankers' and Securities Dealers' Association of Iceland claims that the Court should:

*(i) Annul the decision of the EFTA Surveillance Authority of 11 August 2004, Decision 213/04/COL (Icelandic Housing Financing Fund); and*

*(ii) Order the EFTA Surveillance Authority to pay the costs of the proceedings.*

28. The EFTA Surveillance Authority claims that the Court should:

*(i) Dismiss the Application as unfounded;*

*(ii) Order the Applicant to pay the costs.*

29. The Government of Iceland has intervened in support of the EFTA Surveillance Authority and the European Banking Federation in support of the Banker's and Security Dealers' Association of Iceland. In their written observations, the Commission of the European Communities has submitted that the Court should annul the Decision and the Government of Norway has submitted that the Court should dismiss the Application as unfounded.

#### **V Written procedure**

30. Pleadings have been received from the parties:

- the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski, Deputy Director and Bjørnar Alterskjær, Officer, Department of Legal & Executive Affairs, acting as Agents,
- the Bankers' and Dealers' Association of Iceland, represented by Dr. Hans-Jörg Niemeyer.

31. Pursuant to Article 36 of the Statute of the EFTA Court, applications for intervention have been received from:

- the Government of Iceland, represented by Finnur Þór Birgisson, First Secretary and Legal Officer, Ministry of Foreign Affairs acting as Agent, assisted by Árni Páll Árnason, Attorney of Law, Ingvi Már Pálsson, Legal Officer, Ministry of Finance and Guðjón Bragason, Director of Department for Local Government affairs, Ministry of Social Affairs,
- the European Banking Federation, represented by Marc Pittie, member of the Brussels Bar, and Mathilde Damon, member of the Paris Bar, with the law firm of Bredin Prat.

32. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Commission of the European Communities, represented by Nicholas Khan, acting as Agent,
- the Government of Norway, represented by Eyvin Sivertsen and Gry Karen Waage, acting as Agents.

## **VI Admissibility**

33. In its application the Bankers' and Securities Dealers' Association of Iceland stated that it fulfils the requirements for *locus standi* under Article 36(2) SCA, in that the contested Decision is of "direct and individual concern" to the Applicant. In its statement of defence, the EFTA Surveillance Authority did not address the question of admissibility. However, the Commission of the European Communities discussed the issue in its written observations and stated that the Application is admissible only with respect to the plea that the EFTA Surveillance Authority failed to open the formal investigation procedure. Conversely, the two other pleas by the Applicant (inadequate reasoning and incorrect application of Article 59(2) EEA), are, in the Commission's view, inadmissible. In its rejoinder, the EFTA Surveillance Authority stated that it concurs with the Commission's opinion with regard to the admissibility of the Application.

34. The Commission of the European Communities argues that the mere fact that the Applicant may be considered to be a party concerned within the meaning of Article 88(2) EC, (corresponding to Article 1(2) of Protocol 3 SCA) does not render it individually concerned for the purposes of Article 230(4) EC (Article 36(2) SCA).<sup>10</sup> According to the Commission, the Applicant would have to satisfy the *Plaumann* test<sup>11</sup> in order for all its pleas to be entertained. However, nothing in the Application attempts to show that the Applicant satisfies the *Plaumann* test.<sup>12</sup> According to the case law of the Court of Justice of the European Communities, the mere fact of being concerned as an undertaking operating in the sector affected by a measure does not suffice.<sup>13</sup> The Commission notes that the EFTA Court has dealt with some aspects of the recent developments in *locus standi*,<sup>14</sup> but not with the very situation raised in the present case.

35. In its reply, the Applicant commented on the arguments submitted by the Commission. The Applicant disagrees with the Commission that different standards of admissibility apply with regard to the first plea (failure to initiate the formal investigation procedure) and the other two pleas (failure to provide adequate reasons under Article 16 SCA and wrongful interpretation and application of Article 59(2) EEA). The Applicant asserts, in essence, that by seeking annulment of the Decision also on the ground that the EFTA Surveillance Authority was in breach of its obligation under Article 1(2) in Part I of protocol 3 SCA to initiate the formal investigation procedure, its status as a “party concerned” under that provision suffices for it to have *locus standi* under Article 36(2) SCA in respect of all pleas. In the Applicant’s view, it can be inferred from the case law that the Applicant gains general access to the Court, for all three pleas, if the Applicant has standing to seek annulment on procedural grounds (first plea). Unless an applicant seeks an annulment exclusively on grounds of substance (errors in law), the lower standard applies with regard to all pleas. Unlike the applicants in the cases referred to by the Commission,<sup>15</sup> the Applicant in the present case does seek annulment of the Decision (also) on the ground that the EFTA Surveillance Authority was in breach of its obligation to

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<sup>10</sup> T-188/95 *Waterleiding Maatschappij "Noord-West Brabant" NV v Commission* [1998] ECR II-3713 para 54; and Case T-266/94 *Skibsværftsforeningen v Commission* [1996] ECR II-1399, para 45.

<sup>11</sup> Case 25/62 *Plaumann v Commission*, [1963] ECR 199; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-03425; and Case T-266/94 *Skibsværftsforeningen* [1996] ECR II-1399, para 45.

<sup>12</sup> The Commission notes that Case T-36/99 *Lenzing v Commission*, on which the Applicant relies is under appeal in Case C-525/04 P *Spain v Lenzing*.

<sup>13</sup> Case T-213/02 *SNF SA v Commission* [2004] judgment of 6 September 2004, not yet reported, para 60; Case 11/82 *Piraiiki-Patraiki and Others v Commission* [1985] ECR 00207, para 14; and the orders in Case C-276/93 *Chiquita Banana and Others v Council* [1993] ECR I-3345, para 12; and in Case C-10/95 P *Asocarne v Council* [1995] ECR I-4149, para 42.

<sup>14</sup> Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v the EFTA Surveillance Authority* [2003] EFTA Court Report 52.

<sup>15</sup> Case T-188/95 *Waterleiding Maatschappij "Noord-West Brabant" NV v Commission* [1998] ECR II-3713; and Case T-266/94 *Skibsværftsforeningen v Commission* [1996] ECR II-1399.

initiate the formal investigation procedure, The Applicant refers to further case law in support of its view.<sup>16</sup>

36. With regard to its assertion that it is a “party concerned” under Article 1(2) in Part I of protocol 3 SCA, the Applicant relies on the fact that it filed a complaint against the State aid provided to the HFF participated actively in the preliminary examination by the EFTA Surveillance Authority in the matter now before the Court, and that the position of the members of the Bankers’ and Securities Dealers’ Association as competitors on the market for house financing is strongly affected by the backing of the HFF through state guarantees.

37. The Applicant claims, in the alternative, that even if the Court were to follow the Commission’s view regarding the application of the *Plaumann* test<sup>17</sup> in respect of the second and third plea, the Applicant would have *locus standi*. In the view of the Applicant, it fulfils the requirement set out by the Court of Justice of the European Communities according to which undertakings are recognised as being individually concerned by a Commission decision where those undertakings have played a significant role in that procedure, provided that their position on the market is significantly affected by the aid which is the subject of the decision at issue.<sup>18</sup> The latter condition is fulfilled since the Applicant is an association whose members are themselves individually concerned by the Decision because of their competitive relationship with HFF, and who therefore would be entitled to bring an action for annulment individually.

38. In its intervention, the Government of Iceland asserts that the Applicant does not fulfil the requirements for *locus standi* under Article 36(2) SCA as set out in *Plaumann*, and the application is therefore inadmissible. The Government of Iceland argues in the alternative that only the first plea (the alleged failure to open the formal investigation procedure) is admissible. The Government of Iceland acknowledges that submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties,<sup>19</sup> and that the intervener must accept the case as he finds it at the time of his intervention.<sup>20</sup>

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<sup>16</sup> Case T-157/01 *Danske Busvognmænd v Commission*, judgment of 16 March 2004, not yet reported, para 41; Case T-27/02 *Kronofrance SA v Commission*, judgment of 1 December 2004, not yet reported, paras 34-46; Case T-358/02 *Deutsche Post and DHL v Commission* [2004] ECR II-0000; Opinion of Advocate General Jacobs in Case C-78/03 P, *Commission v Aktionsgemeinschaft Recht und Eigentum*, judgment of 24 February 2005, not yet reported, paras 113, 114 and 108; Case 225/91 *Matra v Commission* [1993] ECR 3203, para 18; Case 198/91 *Cook v Commission* [1993] ECR 2487, para 24; and Case 323/82 *Intermills v Commission* [1984] ECR 3809, para 16.

<sup>17</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 199.

<sup>18</sup> Case 169/84 *Cofaz v Commission* [1986] ECR 391, paras 24 and 25; Case 106/98 P *Comité d’entreprise v Commission* [2000] ECR 3659, paras 40 and 41; Joined cases T-447/93, 448/93 and 449/93 [1995] ECR II-1971, paras 35 and 37; Case T-36/99 *Lenzing v Commission*, judgment of 21 October 2004, not yet reported, para 85-88; and Case E-4/97 *Norwegian Bankers’ Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1, para 32.

<sup>19</sup> Article 36(3) of the Statute of the EFTA Court.

<sup>20</sup> Article 89(4) of the Rules of Procedure of the EFTA Court.

However, the Government of Iceland recalls that the EFTA Court may examine objections to the admissibility of the Application of its own motion.<sup>21</sup>

39. The European Banking Federation supports the arguments submitted by the Applicant. In its view, the arguments raised by the Commission concerning admissibility are themselves inadmissible, since such points were not contested by the Defendant in its Defence.

## VII Substance

### *The Bankers' and Security Dealers' Association of Iceland*

The alleged violation of the obligation to open formal investigation proceedings

40. The Applicant submits that the EFTA Surveillance Authority violated its obligation pursuant to Article 4(4) of Part II of the Protocol 3 SCA by not initiating a formal investigation procedure, because the difficulties involved in assessing the compatibility of the HFF system according to Article 59 (2) EEA required the initiation of that procedure.

41. In this regard, the Applicant refers to the case law of the Court of Justice of the European Communities, according to which the formal procedure under Article 88(2) EC (mirroring Article 1(2) in Part I of Protocol 3 SCA) is obligatory if the Commission experiences serious difficulties in establishing whether or not aid is compatible with the Common market. It also follows from that case law that the notion of serious difficulties is an objective one.<sup>22</sup> Moreover, the preliminary stage provided for in Article 4 in Part II of Protocol 3 SCA is intended merely to enable the EFTA Surveillance Authority to form a “prima facie opinion” of the measure. If the preliminary examination raises doubts as to the compatibility of the measure with the Treaty, the EFTA Surveillance Authority must initiate a formal investigation procedure.<sup>23</sup>

42. The Applicant contends that the EFTA Surveillance Authority did encounter serious difficulties according to the standards established in

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<sup>21</sup> The Government of Iceland refers to Article 88(2) of the Rules of Procedure and case law; Joined cases C-305/86 and C-160/87 *Neotype Techmasexport v Commission and Council* [1990] ECR I-2945, para 18; Case C-313/90 *CIRFS v Commission* [1993] ECR I-1125, para 23; and Case T-398/94 *Kahn Scheppvaart BV v Commission* [1996] ECR II-477, para 13.

<sup>22</sup> Case T-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867, paras 42-47; and Case C-204/97 *Portuguese Republic v Commission* [2001] ECR I-3175, para 33.

<sup>23</sup> Case T-27/02 *Kronofrance SA v Commission*, judgment of 1 December 2004 not yet reported, paras 32, 49 and 52; and Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, para 51.

Community case law. In support of this view, the Applicant asserts, *inter alia*, that the delay of nine months in this case, exceeds the time required to complete preliminary examinations. In this regard, the Applicant relies on *Prayon-Rupel v Commission*.<sup>24</sup> The Applicant disagrees with the Commission that *Gibraltar v Commission* and *Thermenhotel Stoiser Franz Gesellschaft v Commission* cited by the Commission would be relevant on this point.<sup>25</sup>

43. In the view of the Applicant, the chronology of events, i.e. the incomplete notification from the Icelandic Government, the two separate official requests for information sent to the Government of Iceland, as well as the nature of the information submitted by the Government of Iceland in July 2004, shows that the assessment of the HFF scheme was fraught with difficulty.

44. The Applicant further refers to the fact that the evaluation of the HFF system under Article 59(2) EEA required a substantial amount of information, which in its view also supports the argument that serious difficulties were present. The Applicant contends in this regard that it is quite clear from the Decision that the EFTA Surveillance Authority lacked sufficient information on whether the HFF system affected cross-border banking services contrary to the interests of the Contracting Parties. On this point, the EFTA Surveillance Authority should, under its duty of good administration,<sup>26</sup> have requested supplementary information from the Commission.

45. Finally, the Applicant claims that the question of compatibility of the HFF scheme with the freedom to provide services, the right of establishment and the free movement of capital supports the assertion that the assessment of the HFF was fraught with serious difficulties. This was not properly addressed in the Decision even if a State aid measure may never be declared compatible with the common market if it violates other provisions of the EEA Agreement.<sup>27</sup>

The alleged lack of adequate reasons as an infringement of essential procedural requirements

46. The Applicant claims that the EFTA Surveillance Authority infringed the essential procedural requirement in Article 16 SCA by not providing adequate reasons with regard to first, the assessment of the HFF as a service of general economic interest; second, to why the application of the EEA rules would

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<sup>24</sup> Case T-73/98 *Preyon-Rupel v Commission* [2001] ECR II-867, para 97.

<sup>25</sup> Cases T-195/01 R and T-207/01 R *Government of Gibraltar v Commission* [2001] ECR II-3915; and T-158/99 *Thermenhotel Stoiser Franz Gesellschaft v Commission*, judgment of 13 January 2004, not yet reported.

<sup>26</sup> Case T-73/98 *Preyon-Rupel v Commission* [2001] ECR II-867, para 98.

<sup>27</sup> Case C-204/97 *Portuguese Republic v Commission* [2001] ECR I-3175, para 41.

obstruct the performance of the particular tasks of the HFF; and finally, to the proportionality test.

47. In this regard, the Applicant recalls that a decision by the EFTA Surveillance Authority must properly explain the considerations which led the EFTA Surveillance Authority to adopt the decision. The decision must set out in a concise but clear manner the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the EFTA Surveillance Authority to its decision may be understood.<sup>28</sup> A decision that does not satisfy this requirement must be annulled.<sup>29</sup> Furthermore, with regard to State aid cases, the the EFTA Surveillance Authority is required to examine all the facts and points of law brought to its notice by persons, undertakings and associations whose interests may be affected by the granting of aid, and respond to their main arguments.<sup>30</sup> The Applicant believes that a general reference to documents and views put forward from opposing standpoints can not be regarded as an appropriate means of explanation of the decision.<sup>31</sup> The Applicant deems that it is particularly important where the EFTA Surveillance Authority is granted discretion.

48. First, with regard to the assessment of the HFF as a service of general economic interest, the Applicant claims that the Decision lacks any in-depth discussion of whether the loans provided by the HFF could also be provided by the market. Likewise, the reasons given for the alleged “social dimension” of the lending cap are very superficial and thus highly insufficient. The EFTA Surveillance Authority also failed to address adequately the fact that the *Husbanken*<sup>32</sup> loans were, unlike those of HFF, exclusively geared towards “social housing.”

49. Concerning the second point (why the application of EEA rules would obstruct the performance of the particular tasks of HFF), the Applicant contends that the EFTA Surveillance Authority focused solely on the question of whether

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<sup>28</sup> Cases 36-38/59 and 40/59 *Präsident Ruhrkohlen Verkaufsgesellschaft v High Authority* [1960] ECR 423, 444; Opinion of Advocate General Darmon, Case 248/84 *Germany v Commission* [1987] ECR 4025, 4027; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435, para 403; Case T-95/96 *Gestevisión Telecinco SA v Commission* [1998] ECR II-3407, para 53; Case T-16/96 *Cityflyer Express Ltd. v Commission* [1998] ECR II-757, para 69; and Case 367/95 P, *Sytraval and Brink's France SARL v Commission* [1998] ECR 1719.

<sup>29</sup> Case E-2/94 *Scottish Salmon Growers Association v EFTA Surveillance Authority* [1994-1995] EFTA Court Report 59, para 26 et seq.; and Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] EFTA Court Report 74, para 68.

<sup>30</sup> Case C-364/90 *Italy v Commission* [1993] ECR I-2097, para 44-45.

<sup>31</sup> Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, para 76; Case 203/85 *Nicolet Instrument v Hauptzollamt Frankfurt am Main* [1986] ECR 2049, para 10; Case T-323/99 *INMA and Itainvest v Commission* [2002] ECR II-545, para 55; and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435, para 396.

<sup>32</sup> E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1.

the HFF's costs to render the service of general economic interest were overcompensated and whether the State support was limited to what was necessary for the HFF to perform the specific service in question. Consequently, a discussion of whether the market could provide similar services is completely absent from the Decision. Relevant information submitted by the Applicant and suggestions for alternative models of home financing not involving restrictions on free competition was not taken into account by the EFTA Surveillance Authority.

50. Concerning the third point, the proportionality test calls for a balancing by the EFTA Surveillance Authority between the performances of the service of general economic interest on the one hand and the requirement to protect the interest of the Contracting Parties in open markets on the other hand. The EFTA Court stated in *Husbanken* that these questions call for complex analyses and assessments.<sup>33</sup> In the present case it failed to do so. In particular, the EFTA Surveillance Authority did not provide sufficient reasons for its assertion that distortion of competition arising from financial advantages accorded to the HFF is “likely to have only limited direct trade effects”. Moreover, by merely asserting that the effect of “possible hindrances” to the basic freedoms “is indissolubly linked to the objective of the State aid”, the EFTA Surveillance Authority did not enter into any discussion with regard to potential restrictions thereof.

51. Finally, the Applicant states that it is too late to provide reasons for the contested decision in the Court proceedings following an application for annulment.

#### The alleged wrongful interpretation and application of Article 59(2) EEA

52. The Applicant claims that the EFTA Surveillance Authority has wrongfully interpreted and applied Article 59(2) EEA, as the HFF is neither entrusted with a service of general economic interest, nor could the disruptive effect of its intervention in the market be justified as it is disproportionate given the stated objectives of the fund and the interests of the Contracting Parties to maintain and develop an open market for financial services, including mortgage credits.

#### *Service of general economic interest*

53. In the view of the Applicant, Article 59(2) EEA must be interpreted strictly. While the EFTA States have some freedom to define what constitutes a service of general economic interest, that definition is subject to review by the

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<sup>33</sup> E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1, para 70.

EFTA Surveillance Authority for manifest error.<sup>34</sup> Ultimately it is for the EFTA Court to decide whether the conditions of a service of general economic interest are fulfilled in the case at hand. The EFTA States are required to clearly define the public service mission in an act of public authority.<sup>35</sup> The Applicant contends that there is no single comprehensive European definition of the content of such services. However, existing Community legislation contains a number of common elements that can be used in the assessment, inter alia, the concept of a universal service.<sup>36</sup> The Applicant believes that the Government of Iceland has violated its obligation to accurately define the service of general economic interest of the HFF. The regional and the social dimension put forward by the Government of Iceland as HFF's public service mission is neither clearly defined nor reflected in Article 1 of the Act on Housing Affairs, nor in the "Explanatory Notes accompanying the Bill amending the Housing Act." No explicit reference is made to potential beneficiaries of the loans, and the legal acts regulating the operations of the HFF do not establish the interest rate level the HFF is to offer its clients.

54. The Applicant claims that the Act on Housing Affairs must comply with the principles set out by the Commission of the European Communities to the effect that social housing loans as a service of public interest must have a "purely social character" and this social character must be "precisely defined".<sup>37</sup> In its assessment of whether the HFF system could have been characterized as a service of general economic interest, the EFTA Surveillance Authority was obliged to take into account (1) the nature of the service, (2) the extent to which the same service is provided by the market on the same conditions, and, (3) in the case of a universal service, particularly the legitimate objective to ensure continuity of service on acceptable conditions throughout the territory.<sup>38</sup>

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<sup>34</sup> C-159/94 *Commission v France* [1997] ECR I-5815, para 53; and C-41/83 *Italy v Commission* [1985] ECR 873, para 30; E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1997] EFTA Court Report 1, para 47.

<sup>35</sup> E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1, para 47; EC Commission (DG D (2004)), Community Framework for State Aid in the Form of Public Service Compensation (Draft) point 9; and, Commission Decision of 16 January 2004 on the Application of Article 86 of the Treaty to State aid in the form of public service compensation granted to certain undertakings and trusted with the operation of services of general economic interest point 10.

<sup>36</sup> Green Paper on Services of General Interest of 21 May 2003 (COM(2003)270 final); and, the Report of the European Commission to the Council of Ministers "Services of General Economic Interest in the Banking Sector", adopted on 17 June 1998.

<sup>37</sup> Understanding of 1 March 2002 between the Commission and Germany about the Orientation of Legally Independent Special Credit Institutions in Germany (Annex 14 to the Application). Point I. (4); and Case T-27/02 *Kronofrance SA v Commission*, judgment of 1 December 2004, not yet reported, para 104.

<sup>38</sup> Report by the Commission of the European Communities to the Council of Ministers, *Services of General Economic Interest in the Banking Sector*, 17 June 1998, point 2; Decision of the EC Commission, 13 February 2002, State aid No N514/2001; Commission Decision of 15 January

55. The HFF does not, in the view of the Applicant, provide a service of a nature which cannot be provided unless the undertaking enjoys certain special rights in the meaning of Article 59(2) EEA.<sup>39</sup> The Applicant makes a distinction between the supplementary loans on the one hand, in respect of which the social criteria is present, and the general mortgage loans of the HFF on the other hand. The latter do not exhibit any special characteristics as compared with the housing loans offered by the commercial banks and saving banks in Iceland. The Applicant provides extensive information on factual and policy issues in support of this view. Furthermore, on this point, the case at hand must be distinguished from the *Husbanken* case.<sup>40</sup>

56. With regard to the second question (the extent to which the same service can be provided by the market on the same conditions), the Applicant holds that there has been no (general) market failure for the provision of housing loans on “manageable terms”. In particular, the EFTA Surveillance Authority’s contention is incorrect in stating that private credit institutions restrict lending for housing almost exclusively to property in the Reykjavik area (point 2.3 of the Decision), and that they would not be in a position to offer housing loans on equal conditions throughout the entire territory of Iceland. In contrast to what the EFTA Surveillance Authority has contended, private and saving banks are able to offer housing loans at affordable tariffs. The Applicant adduces extensive information concerning, inter alia, individual banks in order to substantiate its view.

57. As to the third question, the Applicant’s view is that the Decision is wrong in stating that asset evaluation, prices and securities of the private banks would differ between Reykjavik and sparsely populated areas (Decision point 3.2.1, paragraph 6). The EFTA Surveillance Authority committed a manifest error in stating that the HFF provides a universal service and that no private credit institution would be able to offer housing loans on equal conditions and at affordable prices throughout Iceland.

58. In its assessment under Article 59(2) EEA, the EFTA Surveillance Authority should have analysed the opening up of the financial markets in Iceland in the last years and taken into account that the Icelandic banks have considerably expanded their housing loan activities throughout the entire territory of Iceland in recent years. By failing to do so, the EFTA Surveillance Authority committed a manifest error.

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2002, OJ L 88/39, paragraph 188 et seq; and Pesaresi/Pilley, *Retail banking, social inclusion and public service*, Competition Policy Newsletter, spring 2003.

<sup>39</sup> Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889, para 26,27; and Report by the Commission of the European Communities to the Council of Ministers, *Services of General Economic Interest in the Banking Sector*, 17 June 1998, point 2.

<sup>40</sup> E-4/97 *Norwegian Bankers’ Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1.

### *Proportionality*

59. The Applicant contends that, even if the provision of general loans could be regarded as a service of general economic interest, the HFF would in principle still be subject to the rules on State aid as well as other provisions in the EEA Agreement protecting competition and the internal market. Any derogation under Article 59(2) EEA must be considered an exception to be justified by the Member State.<sup>41</sup> Furthermore, Article 59(2) EEA requires a balancing of a Member State's special interest with the interest of the Contracting Parties in establishing an internal market operating on the principle of open competition, i.e. a proportionality test.

60. The proportionality test implies, first, that interventions in the market for long-term funding must not go beyond what is necessary<sup>42</sup> to guarantee achievements of the goals pursued by the HFF. In the view of the Applicant, this requirement is not fulfilled. In considering whether a derogation is necessary, the EFTA Surveillance Authority may not limit its inquiry to the question of overcompensation.<sup>43</sup> The correct test for necessity is whether there are alternative ways to achieve the stated objective.<sup>44</sup> Moreover, the HFF system is not proportionate because it is not suitable to increase people's chances of acquiring housing on manageable terms. This is because the means employed drives both inflation and house prices, and thus makes it increasingly difficult for low-income families to purchase their own home.<sup>45</sup> The Applicant claims that no valid argument has been provided in support of the view that the application of the State aid rules to the HFF would obstruct the performance of the alleged service of general economic interest. Instead the Applicant holds that there are strong arguments in support of the opposite view, that the private banks would provide similar services, and on equal terms, once the competitive advantage of the HFF on the market would be removed. At least there would be alternative, less distortive ways of ensuring such services.

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<sup>41</sup> Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para 37; Case C-159/94 *Commission v France* [1997] ECR I-5815, para 53; Case T-260/94 *Air Inter SA v Commission* [1997] ECR II-997, para 135 et seq.; and Case 155/73 *Sacchi* [1985] ECR 873, para 15.

<sup>42</sup> Case C-280/00 *Altmark Trans BmbH v Commission* [2003] ECR-I 9067; and Joined cases C-34-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] judgment of 27 November 2004, not yet reported, para 105-106.

<sup>43</sup> Case 41/83 *Italy v Commission* [1985] ECR 873, para 30; Case 203/96 *Dusseldorp and others v Minister van Volkshuisvesting* [1998] ECR 4075, para 67; Case 260/94 *Air Inter v Commission* [1997] ECR II-1997, para 140-141; Opinion of Advocate General Léger, Case 438/02 *Åklagaren v Hanner*, 25 May 2005, not yet reported, para 157; and Case 159/94 *Commission v France* [1997] ECR 5815, para 101.

<sup>44</sup> Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Reports 1, paras 64 and 69.

<sup>45</sup> Mercer Oliver Wyman, *Study on the Financial Integration of European Mortgage Markets*, October 2003 (Annex 20 to the Application), at page 4 ("Cost levels are the key determinant of the long-term sustainable level of prices and as such will be the main driver of prices in the medium to long-term").

61. The proportionality test further implies that the derogation from the State aid rules of the EEA Agreement must not lead to “disproportionate effects” on the development of trade contrary to the interests of the Contracting Parties.<sup>46</sup> According to the Applicant, this requirement is not fulfilled, either. This limitation has to be interpreted broadly.<sup>47</sup> What counts is whether the Member State chose the right balance between two competing aims: the performance of the service of general economic interest on the one hand and the requirement to protect the interest of the Contracting Parties in an open market on the other.<sup>48</sup> In the view of the Applicant, the yardstick for measuring the (negative) effects on the development of trade is the Community interest. The creation and maintenance of the internal market as well as the protection of open competition are of paramount importance in this regard. This is not a static concept but takes into account the dynamics of liberalisation, and thus the likely perspectives of the further development of markets. Against the background of a high degree of liberalisation in the financial services sector, the Commission of the European Communities has noted that “any interference by the Member States in this sector threatens to cause substantial distortive effects which may only be compensated by a particularly important Community interest”.<sup>49</sup> The Applicant disagrees with the Defendant’s view that the *Albany* case restricts the EFTA Surveillance Authority’s competence of scrutiny.<sup>50</sup> Furthermore, the Applicant believes that the Court of Justice of the European Communities assumes full competence to scrutinize the definition of the Community interest and the potential infringement of the development of trade.<sup>51</sup>

62. The Applicant does not agree with the contested Decision that the HFF aid scheme is only likely to have limited direct trade effects. In the view of the Applicant, Article 59(2) EEA explicitly refers to the “development of trade” meaning that, not only actual development trends but also developments that could be expected, if the distortions of the internal market were removed must be considered.<sup>52</sup> The Applicant asserts that the Icelandic financial market is linked to

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<sup>46</sup> In this regard the Applicant refers, inter alia, to the opinion of Advocate General Jacobs in Case 203/96 *Dusseldorp and others v Minister van Volkshuisvesting* [1998] ECR 4075, 4107, para 102.

<sup>47</sup> In this regard the Applicant refers to Alexander Schaub/Rüdiger Dohms, *Der wettbewerbliche Binnenmarkt für Strom und Gas*. Zur Rolle von Art. 90 Abs. 2 EGV, Die Aktiengesellschaft 12/1993, p. 566 and 571.

<sup>48</sup> Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 27 April 2004, OJ C 101/81, para 12-13.

<sup>49</sup> The applicant refers to the Commission proposal for appropriate measures pursuant to Article 88(1) EC, *Abolition of State Guarantees* (Anstaltslast und Gewährträgerhaftung), May 2001, at p. 8. (Annex 13 to the Application).

<sup>50</sup> Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

<sup>51</sup> Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para 69; Case C-158/94 *Commission v Italy* [1997] ECR I-5789; Case C-159/94 *Commission v France* [1997] ECR I-5815; and Case C-19/93 *Rendo NV v Commission* [1995] ECR I-3319, para 18-19.

<sup>52</sup> Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 27 April 2004, OJ C 101/81, paras 32, 41-42.

the other EEA markets, and refers to several cases where it is believed that banks could have an interest in entering the Icelandic market. The Applicant also claims that the chances of Icelandic banks to further expand into other EEA/EU countries are hampered by their lack of opportunity to acquire larger market shares in one of the most important home markets. The applicant further relies on the on-going efforts to liberalise the financial markets in Europe and makes references to a number of initiatives that aim at further liberalisation of the mortgage markets and general development of the financial services sector. Lastly, the Applicant claims that the operation of the HFF also infringes on the free movement of services and capital. By providing a competitive advantage to the HFF, entry by foreign banks in the market for home loans will be prevented, or at least made more difficult.

### *The EFTA Surveillance Authority*

63. The EFTA Surveillance Authority raises the question of whether the new evidence submitted in the Applicant's reply is admissible, since the Applicant has not provided reasons for the delay in offering it.<sup>53</sup>

The alleged violation of the obligation to open formal investigation proceedings

64. The EFTA Surveillance Authority contends that it did not experience serious difficulties during the assessment of the HFF system, and hence the alleged violation of the obligation to open formal investigation proceedings is unfounded.

65. The Defendant holds that, contrary to what the European Banking Federation submits, the notion of doubt under Article 4(4) of Part II of Protocol 3 SCA, means that the formal investigation procedure has to be opened where the EFTA Surveillance Authority experiences "serious difficulties" in establishing whether or not aid is compatible with the common market.<sup>54</sup>

66. The EFTA Surveillance Authority disagrees with the Applicant that the time which elapsed before the adoption of the contested Decision amounts to evidence of serious difficulties. In this regard, the Defendant holds that according to Article 13(2) in Part II of Protocol 3 SCA, in cases of possible unlawful aid (as in the case at hand), the EFTA Surveillance Authority is not bound by the time-limit set out in, inter alia, Article 4(5) in Part II of Protocol 3 SCA. Hence the

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<sup>53</sup> Article 37(1) of the Rules of Procedure of the EFTA Court; and, Opinion of Advocate General Stix-Hackl in Case C-454/99 *Commission v United Kingdom* [2002] ECR I-10323.

<sup>54</sup> Joined cases E-5/04, 6/04, 7/04 *Fesil and Finnford, Pil and others, The Kingdom of Norway v EFTA Surveillance Authority* [2004] EFTA Court Report (not yet reported).

EFTA Surveillance Authority was not bound by the two months time-limit after receipt of the complete notification, since the aid was classified as unlawful aid.<sup>55</sup> The Defendant considers that the cases relied on by the Applicant (*Portugal v Commission* and *Prayon-Rupel v Commission*<sup>56</sup>), must be distinguished from the case at hand. In the view of the Defendant, in cases concerning unlawful aid, the relevant test is whether the time spent on an initial examination considerably exceeds the time usually spent in cases where no formal investigation is opened. Naturally, where, as in the present case, interested third parties submit complaints, the EFTA Surveillance Authority cannot prolong its investigation indefinitely but should come to a decision as rapidly as possible without thereby disregarding that, in the context of the preliminary stage, it has an obligation to conduct a diligent and impartial examination of the complaints in the interest of sound administration of the fundamental rules relating to State aid.<sup>57</sup> Due to the incomplete notification, the late submitted complaint and information on the amendments to the legal framework conditions of the HFF, the total timeframe involved in the case at hand very much reflects the average case-handling time of State aid cases, regarding unlawful aid, in which the competent body decides not to open formal investigations. In the view of the Defendant, the requests for additional information are, therefore, no proof of the existence of serious difficulties.<sup>58</sup>

67. The EFTA Surveillance Authority does not agree that under the “duty of good administration” it should have contacted the Commission of the European Communities to request supplementary information. Information requests are aimed at the notifying State, and the EFTA Surveillance Authority did indeed request supplementary information from the Government of Iceland. The EFTA Surveillance Authority believes that the Applicant has misinterpreted *Prayon-Rupel v Commission* on this point.<sup>59</sup> Furthermore, the Defendant notes that it has the possibility to consult the Commission at any time,<sup>60</sup> so the opening of the formal investigation procedure is no prerequisite for such consultations. In the present case it saw no reason to consult with the Commission, which was in no better position than the Government of Iceland to provide the EFTA Surveillance Authority with information.

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<sup>55</sup> Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para 103; and, Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, para 79.

<sup>56</sup> Case C-204/97 *Portugal v Commission* [2001] ECR I-3175; and C-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867.

<sup>57</sup> Case T-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867, paras 100 to 104.

<sup>58</sup> Case T-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867, para 89; Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para 89; and Case C-225/91 *Matra* [1993] ECR I-3203, para 38.

<sup>59</sup> Case T-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867.

<sup>60</sup> Protocol 27 to the EEA Agreement.

68. Finally, the Defendant holds that its explanations on whether the HFF system infringed the four freedoms and the competition rules show that it had no difficulties concluding that these allegations were unfounded.

The alleged lack of adequate reasons as an infringement of essential procedural requirements

69. In the view of the Defendant, it has provided a thorough and well reasoned evaluation of the HFF system against the conditions in Article 59(2) EEA, and therefore the alleged infringement of essential procedural requirements by not providing adequate reasons must be rejected.

70. The Defendant emphasizes that the EFTA Surveillance Authority is not required to enter into a dialogue with the Applicant in the sense that it should be obliged to adopt a position on all the arguments relied upon by third parties. It is sufficient if the EFTA Surveillance Authority sets out the facts and legal considerations having decisive importance in the context of the decision.<sup>61</sup> The EFTA Surveillance Authority states that the procedure for reviewing State aid is a procedure initiated in respect of the State responsible for granting the aid, and that third parties, within the meaning of Article 1(3) in Part I of Protocol 3 SCA, cannot themselves seek to debate the issues with the EFTA Surveillance Authority in the same way as may the State concerned<sup>62</sup>. In the view of the Defendant, it is precisely this thorough reasoning that enables the Applicant to presently challenge the reasoning of the Decision concerning Article 59(2) EEA.

71. As regards the incompatibility with the four freedoms the Defendant considers that in a case like the one at hand, the provisions on the four freedoms are simply not applicable besides the State aid rules.<sup>63</sup> The assessment of whether a given reasoning is sufficient should not be made by looking exclusively at the decision itself but rather be evaluated in the context of the correspondence that the EFTA Surveillance Authority had with the State or economic operator concerned.<sup>64</sup> The requirements concerning the statement of reasons of a decision are less strict where a third party is involved in the process by which the final decision came about, and is therefore aware of the reasons for which the

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<sup>61</sup> Case T-198/01 *Technische Glaswerke Ilmenau v Commission*, judgement of 8 July 2004, not yet reported, paras 60-61; Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, para 31; Joined Cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267, para 35; Case T-55/99 *CETM* [2000] ECR II-3207, paras 58 and 104; and Case T-16/96 *Cityflyer Express* [1998] ECR II-757, paras 65-69.

<sup>62</sup> Case T-198/01 *Technische Glaswerke Ilmenau v Commission*, judgment of 8 July 2004, not yet reported, paras 59 to 61, which make reference to Case 234/84 *Belgium v Commission* [1986] ECR 2263, para 29; and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paras 81-82.

<sup>63</sup> Case 74/76 *Ianelli & Volpi v Meroni* [1977] ECR 557, Case C-225/91 *Matra* [1993] ECR I-3203, para 41; and, Case C-234/99 *Nygaard* [2002] ECR I-3657, para 57.

<sup>64</sup> Case C-301/96 *Germany v Commission* [2003] ECR I-9919, paras 89-90.

administration considered that the request should not be upheld.<sup>65</sup> Both with regard to the four freedoms and the competition rules the Defendant informed the Applicant that it would take no further actions. The Applicant was invited to submit comments in this regard, but failed to do so. In the view of the Defendant, it can then hardly be required to provide a more exhaustive reasoning in the contested decision.

#### The alleged wrongful interpretation and application of Article 59(2) EEA

72. Before addressing the third plea in detail, the EFTA Surveillance Authority states that it agrees with the Applicant that in reviewing the substantive issues of the case, the EFTA Court cannot substitute its own assessment for that of the EFTA Surveillance Authority. The EFTA Court must confine itself to verifying whether the facts on which the Contested Decision was based have been accurately stated by the EFTA Surveillance Authority and whether there has been any manifest error of assessment or a misuse of powers.<sup>66</sup>

73. Contrary to the view of the Applicant, the Defendant claims that it did not err in its assessment that the HFF scheme is a service of general economic interest and proportional to achieve its aim.

#### *Service of general economic interest*

74. The Defendant holds that it is for the State concerned to define the service of general economic interest, only subject to the scrutiny by the EFTA Surveillance Authority.<sup>67</sup> Under these circumstances, the EFTA Surveillance Authority's task is therefore to ensure that Article 59(2) of the EEA Agreement is applied with no manifest error.<sup>68</sup>

75. The EFTA Surveillance Authority holds that the regional and social dimension of the HFF has been clearly defined in the relevant legal framework and refers to the specific documents at issue. In this regard, the EFTA

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<sup>65</sup> Case T-504/93 *Tiercé Ladbroke SA v Commission* [1997] ECR II-923; and Case T-188/98 *Aldo Kuijer v Council* [2000] ECR II-1959.

<sup>66</sup> Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1, para 40.

<sup>67</sup> Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229, para 192.

<sup>68</sup> Opinion of the Advocate General Léger in Case C-438/02 *Åklagaren v Krister Hanner* [2005] judgment of 31 May 2005, not yet reported, para 139; Opinion of Advocate General Tizzano in Case C-53/00 *Ferring v Commission* [2001] ECR I-9067, para 51; and Advocate General Jacobs' opinion in Case C-126/01 *GEMO* [2003] ECR I-13769, para 116 and footnote 75. In the Defendants view a broadly similar expression can be found in paragraph 162 of the Advocate General's opinion in Case C-309/99 *Wouters* [2002] ECR I-1157.

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Surveillance Authority claims that the Applicant overstates the relevance of the principles set out by the Commission of the European Communities in the Understanding of 1 March 2002, a case concerning the German public banks.<sup>69</sup>

76. With regards to the allegation that the general loans of the HFF do not have any special characteristics as compared to the housing loans offered by the commercial banks in Iceland, the Defendant claims that the reasoning of the Court in *Husbanken* is equally applicable to the case at hand. The concept of affordability requires a service of general economic interest to be offered at an affordable price in order to be accessible for everybody. The Defendant asserts that the Icelandic State has used its more favourable credit rating to raise money at lower cost than the banks could have done and has transferred this benefit to the Icelandic population through the more favourable conditions offered by the HFF, thereby fulfilling the obligation to provide Icelanders with affordable house financing on, i.e. “manageable terms”.

77. As to the argument by the Applicant that the general loans do not contain any social element, the Defendant refers to the contested Decision which makes reference to “average apartments” and not simple “low-cost houses”. In this regard the Defendant disagrees with the view of the Applicant that the *Husbanken* case was de facto limited to individuals or families with low income who can only afford small houses, and therefore must be distinguished from the case at hand.

78. According to the Defendant, Article 16 EC, although not reflected in the EEA Agreement, stipulates that the role of a service of general economic interest is to promote social and territorial cohesion, and these are therefore important features to define a service of general economic interest. In the view of the Defendant, certain characteristics of the loans operated by the HFF, in particular the obligation to keep the loans available on affordable and equal terms throughout the entire territory of Iceland, were sufficient to distinguish them from loans generally offered on the market by commercial banks. Furthermore, States cannot be precluded from taking account of objectives pertaining to their national policy when defining the service of general economic interest which they entrust to certain undertakings.<sup>70</sup> The mortgage secured housing loan market was not functioning outside the Reykjavik area and therefore, the Icelandic State decided to intervene in this market. The HFF system was made available to the entire territory of Iceland, including sparsely populated areas, where asset evaluations differ compared to more densely populated areas.<sup>71</sup> In the view of the

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<sup>69</sup> Annex 14 to the Application.

<sup>70</sup> Case C-202/88 *France v Commission* [1991] ECR I-1223, para 12; Case C-159/94 *Commission v France* [1997] ECR I-5815, para 56; Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Reports 1, para 47; Case C-202/88 *France v Commission* [1991] ECR I-1223; and Communication from the Commission - *Services of General Interest in Europe*, OJ C 17, 19.1.2001, p. 4, para 24.

<sup>71</sup> Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1, para 49.

Defendant, the correction of regional imbalances must be considered a task of general economic interest in the sense of Article 59(2) of the EEA Agreement.

79. The EFTA Surveillance Authority is of the opinion that the HFF system is a universal service (characterized by the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of individual operations<sup>72</sup>), which is one of the classical instances of a service of general economic interest.<sup>73</sup> Therefore, it is essential to ascertain whether the same service is provided by the market on the same conditions. This must be examined solely on the basis of the information available to it at the time when those assessments were made.<sup>74</sup> The Defendant essentially holds that in the summer of 2004, both information from the Government of Iceland and indications from the Applicant itself showed unequivocally that private banks did not provide the same service on the Icelandic market on the same conditions.

### *Proportionality*

80. In the view of the Defendant, the alleged disproportionality is unfounded. The EFTA Surveillance Authority claims that the State aid measure at hand satisfies the proportionality test laid down in case-law,<sup>75</sup> in that it is suitable, necessary and not overcompensated. The Defendant is of the view that the proportionality test to be applied in the context of Article 59(2) EEA does not go so far as interfering with the level of the service. It merely enables the EFTA Surveillance Authority to verify whether the level of service chosen by the State can be fulfilled in another way that distorts competition to a lesser extent, notably with less State aid. However, there is no requirement that the measure adopted is the least restrictive possible.<sup>76</sup> The standard has been described by three

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<sup>72</sup> Communication from the Commission – *Services of General Interest in Europe* (OJ C 17, 19.1.2001, p. 4), para 14; and, Communication from the Commission – *White Paper on services of general interest*, COM (2004) 374 final, 12.5.2004, p. 8.

<sup>73</sup> Case C-320/91 *Corbeau* [1993] ECR I-2533; and Case C-393/92 *Almelo* [1994] ECR I-1477.

<sup>74</sup> Case 234/84 *Belgium v Commission* [1986] ECR 2263, para 16; Case C-241/94 *France v Commission* [1996] ECR I-4551, paras 33, 36-37; Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paras 34-35; Case C-114/00 *Spain v Commission* [2002] ECR I-7657, para 108; Case C-394/01 *France v Commission* [2002] ECR I-8245, paras 30-34; Case T-109/01 *Fleuren Compost* [2004] ECR (not yet reported), paras 50-52; Case T-296/97 *Alitalia* [2000] ECR II-3871, paras 86 and 93; Case C-241/01 *National Farmers Union* [2002] ECR I-9079, paras 37-38; and Joined Cases T-371/94 and T-394/94 *Air France* [1998] ECR II-2405, paras 80-81.

<sup>75</sup> Joined Cases 279, 280, 285 and 286/84 *Rau* [1987] ECR-1068, paras 34-38; Case 59/83 *Biovilac* [1984] ECR-4057, para 17; and Case C-331/89 *Fedesa* [1990] ECR I-4023, para 15.

<sup>76</sup> Case C-159/94 *Commission v France* [1997] ECR I-5815; Case C-158/94 *Commission v Italy* [1997] ECR I-5789; Case C-157/94 *Commission v The Netherlands* [1997] ECR-5699; Case E-4/97, *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Reports 1, para 62; and Communication from the Commission – *White Paper on services of general interest*, COM (2004) 374 final, 12.5.2004, point 4.2 (on page 13).

Advocates Generals as that of a “minimal” or “marginal” control” that should only strike down “abuse” or “manifest errors of assessment”.<sup>77</sup>

81. In the view of the EFTA Surveillance Authority, the assertion by the Applicant that the aid is not suitable for achieving the aim that lies behind the service of general economic interest is manifestly untenable. Moreover, the Defendant contends that, contrary to the allegation of the Applicant, it did sufficiently consider whether there were alternative models for achieving the aim, in particular whether private banks could provide the same service.

82. The Defendant argues that in the absence of plausible alternatives, the Decision naturally focused on the question of whether the HFF was overcompensated. As stated in the contested Decision, once having found that the service qualifies as a service of general economic interest, it is sufficient for the conditions for the application of Article 59(2) EEA to be fulfilled, that it would not be possible for the HFF to perform the particular tasks entrusted to it without the State aid involved.<sup>78</sup> The compensation granted to the HFF did not exceed the cost of the service provided, including a reasonable return.

83. With respect to the condition contained in the last sentence of Article 59(2) EEA concerning effect on the development of trade, the Defendant holds that it did assess existing and possible future trade patterns in both the relevant market for housing loans, as well as in the neighbouring markets. The Defendant also claims that the State intervention in this case is that the State compensates for the costs of a service of general economic interest. To allege, in such circumstances, that the compensation will lead, in general, to disproportionate effects on competition in relation to the last sentence in Article 59(2) EEA, is unfounded and has no basis in case-law on public service compensation.<sup>79</sup> Furthermore, the assertion by the Applicant that the relevant standard can be found in the Antitrust-Guidelines<sup>80</sup> is unfounded. These guidelines state themselves that they do not give guidance on the term “affects trade” in Article 87(1) EC. According to the Defendant, there is no absolute upper limit for how much a measure can restrict competition and still be compatible with Article 59(2) EEA.<sup>81</sup> Finally on this point, the Defendant states that, the dynamic element contained in Article 59(2) EEA does not mean that its decision should have been based on abstract speculations concerning possible future legislative

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<sup>77</sup> Case C-438/02 *Åklagaren v Krister Hanner*; Case C-53/00 *Ferring v Commission*; and Case C-126/01 *GEMO*, referred to in footnote 60 above.

<sup>78</sup> Case C-340/99 *TNT Traco v Poste Italiane* [2001] ECR I-4109, para 54; and Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para 107.

<sup>79</sup> Case C-172/00 *Ferring v Commission* [2002] ECR I-6891; and Case C-280/00 *Altmark Trans GmbH v Commission* [2003] ECR I-7747.

<sup>80</sup> Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 27 April 2004, OJ C 101/81.

<sup>81</sup> Advocat General Léger in Case C-309/99 *Wouters* [2002] ECR I-1577, para 164.

developments and the likely consequent effect on the Icelandic market, if such legislation were to be enacted.

84. In the view of the Defendant, a possible effect on trade does not mean that the development of trade is affected to an extent contrary to the interests of the Contracting Parties. The Defendant essentially holds that, contrary to the assertions by the Applicant, the circumstances of the case show that the HFF has not prevented foreign banks from entering the Icelandic market. However, the information also shows that current and prospective cross-border services in the mortgage market are very limited.

### *The Government of Iceland*

85. The Government of Iceland intervenes in support of the Defendant and submits that the EFTA Court should dismiss the Application as unfounded. The Government of Iceland claims that the Application contains numerous factual inaccuracies, and provides a detailed account of the facts of the case.

86. With regard to the first plea, (the alleged infringement of the procedural requirement to open the formal investigation procedure), the Government of Iceland agrees with the Defendant that there are no grounds for concluding that the Defendant had, or should have had, serious doubts as to the compatibility of the HFF with the State aid rules of the EEA Agreement.<sup>82</sup>

87. The second plea (the alleged infringement of essential procedural requirements by not providing adequate reasons) is also, in the view of the Government of Iceland unfounded. The Government of Iceland refers to specific parts of the contested Decision to show that it contained proper discussion on whether the loans provided by the HFF could also be provided by the market. The referral to the social dimension of the lending cap is neither “superficial” nor “highly insufficient”, since the HFF lending cap in fact makes financing from the HFF more attractive to those purchasing lower and medium priced housing than those in the market for higher-priced housing. Furthermore, the Government of Iceland points out that it is not correct that the Husbanken loans were exclusively geared to “social housing”, as access to the Husbanken system was granted irrespective of income or cost of property. Concerning the discussion on possible alternatives, any such discussion would, in the view of the Government of Iceland, be outside the competence of the Defendant. Furthermore, the balancing between the performance of the service of general economic interest and the requirement to protect the interest of the Contracting Parties in open markets, was properly carried out by the EFTA Surveillance Authority. Finally, in the view of the Government of Iceland, the contested decision does not lack discussion on the issue of compatibility of the HFF system to the four freedoms.

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<sup>82</sup> The Government of Iceland refers to Case C-99/98 *Republic of Austria v Commission* ECR-I 1101 as regards the duration of the preliminary examination.

88. Finally, with regard to the third plea, the Government of Iceland states that it fully supports the conclusion of the Defendant as regards the compatibility of the HFF system with Article 59(2) EEA.<sup>83</sup>

*The European Banking Federation*

89. The European Banking Federation (“FBE”) intervenes in support of the Application for annulment lodged by the Applicant, and submits that all three pleas raised by the Applicant are well-founded.

90. Concerning the alleged infringement of procedural requirements to open the formal investigation procedure, the FBE claims that the EFTA Surveillance Authority applied a “serious doubts” standard which is stricter than the one provided for by the EEA Agreement. The FBE contends that the correct standard is whether the compatibility of the measure falling under scrutiny by the EFTA Surveillance Authority raises mere doubts, and if so, this should be sufficient to prompt the obligation of the EFTA Surveillance Authority to open a formal investigation procedure. The FBE questions whether a preliminary examination of the HFF scheme by the EFTA Surveillance Authority sufficed to consider that its compatibility with the functioning of the EEA Agreement did not raise any doubt. In this regard, the FBE recalls in particular that the compatibility assessment under Article 59(2) EEA entails several complex legal issues which have led to a significant body of case law.<sup>84</sup>

91. With regard to the alleged lack of adequate reasoning, the FBE refers to the arguments by the Applicant.

92. Concerning the alleged wrongful interpretation and application of Article 59(2) EEA, the FBE asserts that the HFF cannot be characterised as a service of general economic interest. The EFTA Surveillance Authority attached too great importance to the universality of the HFF system, and misrepresented its social nature as well as the alleged general market failure.

93. In the alternative, should the HFF be qualified as a service of general economic interest, the FBE claims that the EFTA Surveillance Authority wrongfully interpreted and applied the proportionality test laid down in Article 59(2) EEA. The proportionality test is two-fold: first, the HFF must constitute a necessary and proportionate way to achieve the policy goals lying behind the measure, and second, it must not affect the development of trade to an extent contrary to the interests of the Contracting Parties. With regard to the necessity

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<sup>83</sup> The Government of Iceland refers to Case C-266/96 *Corsica Ferries* [1998] ECR-I 3949; and Case C-10/71 *Ministere public Luxembourgeois v Madeline Muller* [1971] ECR-I 723.

<sup>84</sup> Case C-T-106/95 *FFSA v Commission*, [1997] ECR II-229; Case 174/97P [1998] ECR I-1303; Case T-46/97 *SIC v Commission*, [2000] ECR II- 2125; Case C-53/00 *Ferring v Commission*, [2001] ECR I-9067; Case C-280/00 *Altmark Trans GmbH v Commission*, [2003] ECR I-7747; and Case C-126/01 *GEMO v Commission* [2003] ECR I-13769.

test, the FBE limits itself to supporting the arguments put forward by the Applicant. Concerning the distortive effects on trade the FBE essentially holds that the EFTA Surveillance Authority erred in its finding that there is no cross-border trade in Iceland.<sup>85</sup> In the view of the FBE, the HFF system affects the development of trade contrary to the interests of the Contracting Parties.

### *The Commission of the European Communities*

94. In the view of the Commission, the Decision by the EFTA Surveillance Authority should be annulled on the grounds that the EFTA Surveillance Authority should have initiated the formal investigation procedure under Article 4(4) in Part II of Protocol 3 SCA. The reason is that the HFF scheme raises serious difficulties with regard to the assessment under Article 59(2) EEA. The Commission questions whether the universality of the present arrangements, which confer such a dominant market position on the HFF, can be justified as proportionate.

95. The Commission holds that the Member states enjoy a wide margin of discretion in determining the services that might potentially benefit from a derogation under Article 59(2) EEA,<sup>86</sup> but that the jurisdiction of the Member states is not unlimited<sup>87</sup>. In the view of the Commission, the social aspect of the HFF is not very clearly articulated by the terms of the HFF scheme. As mortgage finance for property outside Reykjavik is not readily obtainable from commercial banks, the HFF scheme could also be potentially justifiable as a service of general economic interest on grounds of territorial cohesion. In this regard the Commission does not read *Husbanken*<sup>88</sup> as an endorsement of the service of general economic interest status of intervention on the housing finance market through State aid. The *Husbanken* case shows that the EFTA Surveillance Authority must strike a balance between the right of Norway to invoke the exemption and the interest of the Contracting Parties in avoiding distortions of competition.

96. In the view of the Commission the HFF scheme does raise difficulties as regards its proportionality, both from the perspective of its social and territorial

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<sup>85</sup> Judgment of the Court of Justice, 16 December 1975, *Suiker Unie v Commission*, 1975 [ECR] 1663; and Opinion of Advocate General Warner of 23 May 1978 in Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV v Commission* [1978] ECR 1513.

<sup>86</sup> Advocate General Jacobs in Case C-126/01 *GEMO*; Advocate General Lever's opinion in case C-309/99 *Wouters* [2002] ECR I-1577, para 162; and Case C-67/96 *Albany International* [1999] ECR I-5751, paras 103-104.

<sup>87</sup> Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889 para 27; Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021; Case C-41/90 *Hofner v Macrotron* [1991] ECR 1979; and Commission Decision N 209/2001.

<sup>88</sup> Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Reports 1.

cohesion objectives. With respect to the social aspect, the Commission mainly observes that it is far from clear that the universality of the scheme ensures that it benefits those with a poor credit rating. With regards to the role the HFF scheme plays in contributing to territorial cohesion, notably in the light of topographic and demographic circumstances of Iceland, the Commission asserts that it is not clear from the Decision why universality is necessary for the HFF to provide loans at affordable rates of interest in rural areas. The Commission recalls that the Court of Justice of the European Communities has accepted that the scope of a service of general economic interest may be enlarged if this is necessary to enable the service to operate on an economically acceptable basis.<sup>89</sup> The Commission does not submit that there are no grounds on which the universality of the HFF scheme could be justified, but it is not clear to the Commission why the economic equilibrium of the HFF would be rendered unacceptable were its activities restricted to a more tightly defined class of beneficiaries in terms of their social composition and geographic location. The Commission contends that the need to consider this point is emphasised in the case law, where the Court of First Instance has taken a notably strict approach to the requirement of proportionality and the burden of proof thereto in relying on Article 86(2) EC.<sup>90</sup>

97. The Commission recognises that, notwithstanding the legislative action taken to liberalise banking services,<sup>91</sup> there are considerable barriers to the provision of financial services in Iceland by reason of its very particular circumstances, which inhibit the provision of such services by banks established in other EEA States or the establishment of branches of such banks in Iceland. However, the Commission submits that the dominance which flows from the terms on which the HFF operates is a matter which raises serious doubts about the extent to which the HFF scheme is compatible with Article 59(2) EC.

98. Concerning the delay in adopting the Decision, the Commission is of the opinion that the *Prayon-Rupel* case,<sup>92</sup> relied on by the Applicant, does not establish any rule of law to the effect that a delay of nine months is ipso facto evidence of serious difficulties.<sup>93</sup> Furthermore, concerning the submission that the EFTA Surveillance Authority did not properly address the question of the

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<sup>89</sup> Case C-320/91 *Corbeau* [1993] ECR I-2533, para 17-19; and Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089.

<sup>90</sup> The Commission refers to Case C-320/91 *Corbeau* [1993] ECR I-2533 read in the light of the subsequent judgment of the Court of First Instance in Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, para 138.

<sup>91</sup> Directive 2000/12, OJ L 126 of 26. 5. 2000 p. 1.

<sup>92</sup> Case T-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867.

<sup>93</sup> Cases C-301/87 *Commission v France* [1990] ECR I-307; T-195/01 R and T-207/01 R *Government of Gibraltar v Commission* [2001] ECR II-3915; and Case T-158/99 *Thermenhotel Stoiser Franz Gesellschaft v Commission*, judgment of 13 January 2004, not yet reported.

fundamental freedoms, the Commission holds that the EFTA Surveillance Authority properly entertained no doubts in this respect.<sup>94</sup>

### *The Government of Norway*

99. The Government of Norway is of the opinion that the alleged wrongful interpretation and application of Article 59(2) EEA (the Applicant's third plea) is unfounded.

100. The Government of Norway claims that the differences between *Husbanken* and the HFF are not sufficient to support the conclusion that although *Husbanken* qualifies for exemption from the State aid rules under Article 59(2) EEA, the HFF does not. The Government of Norway asserts that there is no doubt that the HFF carries out activities of general economic interest<sup>95</sup> since the purpose of the HFF system is to contribute to the realisation of social, geographical and structural goals of national housing policy.<sup>96</sup> The Court of Justice of the European Communities has held that an undertaking is entrusted with the operation of a service under Article 86(2) EC, provided that the task in question is conferred by an act of the public authorities, including administrative acts, or a grant of a concession governed by public law.<sup>97</sup>

101. With regard to the proportionality test under Article 59(2) EEA, the Government of Norway claims that in order to fulfil the necessity requirement inherent in the proportionality test, it is sufficient that the undertaking will be unable to perform the tasks it is entrusted with unless state aid is granted.<sup>98</sup> Article 86(2) EC (corresponding to Article 59(2) EEA) is thus applicable if a derogation is necessary for the undertaking to be able to perform its tasks on acceptable financial terms. The selected means need not to be optimally efficient to qualify for derogation under Article 59(2) EEA, and the EFTA Surveillance Authority has no power to interfere if there is a reasonable relationship between the aim and the means employed.<sup>99</sup> The Government of Norway asserts that the

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<sup>94</sup> Case T-158/99 *Thermenhotel Stoiser Franz Gesellschaft v Commission*, judgment of 13 January 2004, not yet reported.

<sup>95</sup> Case 155/73 *Guiseppe Sacchi* [1974] ECR 409; Case 18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECR I-05941; Case 96/82 *NV IAZ International Belgium and others v Commission* [1983] ECR 03369; and Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Werrbewerbs e.V.* [1989] ECR 00803.

<sup>96</sup> In this regard the Government of Norway refers to in particular point 2.3-2.4 of the decision.

<sup>97</sup> Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-01477, para. 47.

<sup>98</sup> The Government of Norway refers to Case 157/94 *Commission v France*, paras 53-59 and 95-96, but the correct reference appears to be Case C-159/94 [1997] I-05815.

<sup>99</sup> Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Reports 1, para 62.

restriction on competition by granting State aid to the HFF is needed to ensure the performance of the particular tasks assigned to the institution.

102. Secondly, the Government of Norway states that the EEA institutions must limit themselves to assessing whether the same standard of service can be offered on equally advantageous terms but using less distortive means, i.e. without State aid or with a lesser amount. The Applicant fails to establish a credible factual basis for its assertion that there are less restrictive means for achieving the same objectives at the same cost, and it is not required that the Contracting Party or the EFTA Surveillance Authority points out alternative measures.<sup>100</sup> The Government of Norway states that it has no reason to believe that the EFTA Surveillance Authority has misinterpreted the facts, or that the assessment is erroneous in other ways. If the general lending scheme of the HFF were abolished or amended as proposed by the Applicant, the particular tasks assigned to the HFF at present would be obstructed.

103. Lastly, the Government of Norway claims that the last sentence of Article 59(2) EEA is not a separate condition, but a clarification of the proportionality test.<sup>101</sup> The measure can only be regarded as disproportionate when it has a considerable negative effect on the development of trade between the States. Furthermore, the Government of Norway notes that the mere fact that a third party has challenged the decision cannot mean that the burden of proof is transferred to the State. It is for the Applicant to provide documentation that the EFTA Surveillance Authority has erred in concluding that the Republic of Iceland is not in breach of its EEA obligations.

104. With regard to the alleged procedural errors (the Applicant's first and second plea), the Government of Norway asserts that the EFTA Surveillance Authority committed no such error. According to the Government of Norway, the application to annul the contested Decision is therefore unfounded. The Government of Norway notes that the opening of a formal investigation procedure often creates uncertainty among the public and market operators in the field involved. The dynamics of formal investigations may also generate national initiatives that can lead to unsound and hasty amendments before the procedure is concluded, thereby, adversely affecting the interests involved. One important objective of the legal distinction in law between preliminary and formal investigations must be to avoid such effects.

Henrik Bull  
Judge-Rapporteur

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<sup>100</sup> The Government of Norway refers to Case 179/94 *Commission v France*, para 101, but the correct reference appears to be Case C-159/94 [1997] I-05815.

<sup>101</sup> Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Reports 1; Case 78/82 *Commission v Italy* [1983] ECR 01955; and Case C-159/95 *Commission v France* [1997] ECR staff cases IA-00385; II-01035.