ZAWIADOMIENIA DOTYCZĄCE EUROPEJSKIEGO OBSZARU GOSPODARCZEGO

URZĄD NADZORU EFTA

Zaproszenie do zgłaszania uwag w sprawie domniemanej pomocy przyznanej przez państwo islandzkie na rzecz funduszy inwestycyjnych i powiązanych przedsiębiorstw zarządzających funduszami, związanych z trzema upadłymi bankami: Glitnir, Kaupthing i Landsbankinn

(2010/C 292/05)

Decyzją nr 338/10/COL z dnia 8 września 2010 r., zamieszczoną w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA wszczął postępowanie na mocy art. 1 ust. 2 w części I protokołu 3 do Porozumienia pomiędzy państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości. Władze Islandii otrzymały stosowną informację wraz z kopią wyżej wymienionej decyzji.

Urząd Nadzoru EFTA wzywa niniejszym państwa EFTA, państwa członkowskie UE oraz inne zainteresowane strony do zgłaszania uwag w sprawie omawianego środka w terminie jednego miesiąca od daty publikacji niniejszego zawiadomienia na poniższy adres kancelarii w Urzędzie Nadzoru EFTA:

EFTA Surveillance Authority
Registry
Rue Belliard/Belliardstraat 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

Uwagi zostaną przekazane władzom islandzkim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

STRESZCZENIE

Procedura

Pismem z dnia 8 kwietnia 2009 r. Byr sparisjóður, Rekstrarfélag Byrs, Íslensk verðbréf, Rekstrarfélag íslenskra verðbréfa, MP banki, Mp sjóðir, Sparisjóður Reykjavíkur og nágrennis oraz Rekstrarfélag Spron (zwane dalej łącznie „skarżącymi") złożyły skargę w sprawie domniemanej pomocy państwa udzielonej przy likwidacji funduszy inwestycyjnych powiązanych z trzema upadłymi bankami islandzkimi: Glitnir, Kaupthing i Landsbankinn. Skarżący są przedsiębiorstwami zarządzającymi funduszami zbiorowego inwestowania oraz powiązanymi przedsiębiorstwami finansowymi, które pełnią funkcję depozytariuszy w stosunku do tych funduszy.

Skarżący utrzymują, że jesienią 2008 r., w szczytowym momencie islandzkiego kryzysu finansowego, przedsiębiorstwa zarządzające funduszami, które były ich konkurentami, otrzymały niezgodną z prawem pomoc państwa od władz islandzkich. Miało to rzekomo nastąpić w drodze zakupu aktywów tych funduszy na korzystnych warunkach, co umożliwiło tym przedsiębiorstwom likwidację funduszy i spłacenie inwestorów w czasie, gdy skarżący nie mogli tego dokonać, ponieważ nie było na rynku podmiotów zainteresowanych aktywami znajdującymi się w posiadaniu funduszy.

Fundusze, których dotyczy skarga, były w posiadaniu spółek zależnych trzech upadłych islandzkich banków będących spółkami akcyjnymi (isl. *hf*). Skarżący utrzymują, że władze islandzkie interweniowały na rynku poprzez wywarcie wpływu na decyzje nowo utworzonych po załamaniu finansowym banków (New Glitnir – obecnie Islandsbanki, New Kaupthing – obecnie Arion, oraz (New) Landsbankinn) o zakupie aktywów od tych funduszy po cenie wyższej od ceny rynkowej, co przyniosło korzyści inwestorom funduszy oraz przedsiębiorstwom zarządzającym.

Ocena środka

Władze islandzkie argumentują, że decyzje o zakupie wspomnianych aktywów podjęte w październiku 2008 r. przez trzy nowo powstałe banki były uzasadnione względami handlowymi. Zgromadzone dowody wskazują jednak, że aktywa te zakupiono po cenach wyższych od ich ówczesnej wartości rynkowej. W skład zakupionych aktywów wchodziły obligacje wydane przez upadłe lub upadające przedsiębiorstwa, w związku z czym ich wartość była ograniczona, a ich zakup był obciążony ryzykiem.

Wydaje się, że transakcje można przypisać państwu islandzkiemu, zważywszy na ówczesne okoliczności – każdy z tych banków stanowił własność państwa, a decyzje o zakupie aktywów podejmowały tymczasowe zarządy, powołane przez państwo, zaledwie kilka dni po utworzeniu nowych banków.

Głównymi beneficjentami domniemanej pomocy są islandzkie przedsiębiorstwa i instytucje finansowe, które dokonały inwestycji w te fundusze, oraz przedsiębiorstwa zarządzające funduszami, które mogły uzyskać przewagę konkurencyjną, będąc w stanie zlikwidować fundusze i zminimalizować straty swoich klientów po wydaniu przez Islandzki Urząd Nadzoru Finansowego takiego właśnie zalecenia.

Wniosek

W świetle powyższych rozważań Urząd ma wątpliwości, czy zakup aktywów przez nowo utworzone banki nie wiązał się z pomocą państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG i w związku z tym podjął decyzję o wszczęciu formalnego postępowania wyjaśniającego zgodnie z art. 1 ust. 2 w części I protokołu 3 do porozumienia o nadzorze i Trybunale. Zainteresowane strony zaprasza się do nadsyłania uwag w terminie jednego miesiąca od publikacji niniejszego zawiadomienia w *Dzienniku Urzędowym Unii Europejskiej*.

EFTA SURVEILLANCE AUTHORITY DECISION

No 338/10/COL

of 8 September 2010

to initiate the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement into alleged state aid granted by the Icelandic State to investment funds and associated fund management companies connected to the three failed Icelandic banks Glitnir, Kaupthing and Landsbankinn

(Iceland)

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

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

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

Whereas:

I. FACTS

1. Procedure

By letter dated 8 April 2009, Byr sparisjóður, Rekstrarfélag Byrs, Íslensk verðbréf, Rekstrarfélag íslenskra verðbréfa, MP banki, Mp sjóðir, Sparisjóður Reykjavíkur og nágrennis, and Rekstrarfélag Spron (referred to collectively throughout as 'the Complainants') made a complaint against alleged state aid granted in the winding up of investment funds connected to the three failed Icelandic banks Glitnir, Kaupthing and Landsbankinn. The letter was received and registered by the Authority on 17 April 2009 (Event No 515439).

By letter dated 12 May 2009 (Event No 518286), the Authority acknowledged the receipt of the complaint and by letter dated 15 May 2009 (Event No 518114) sent a request for information to the Icelandic authorities. The Icelandic authorities replied by letter dated 26 August 2009, after being granted an extended deadline to reply on two occasions. The letter was received and registered by the Authority on 28 August 2009 (Event No 528492).

By letter dated 29 October 2009 (Event No 534335), the Authority requested additional information from the Icelandic authorities. The Icelandic authorities initially replied to this request by asking for a further extension to the deadline, which was refused by the Authority. The Icelandic authorities subsequently provided additional information by letter dated 7 January 2010 (Event No 542323), on 3 March 2010 (Event No 548874) and on 16 April 2010 (Event No 553782). Further comments were also received from the complainants on 5 March 2010 (Event No 550236), 16 March 2010 (Event No 555011) and 31 March 2010 (Event No 552160).

The case was also subject to discussion between the Icelandic authorities and the Authority in a package meeting held in Reykjavík during the first week of November 2009.

2. **Description of the case**

2.1. *The complaint*

It is alleged that in the autumn of 2008, the Icelandic authorities intervened in the market for investment funds that operated in accordance with Act No 30/2003 on Undertakings for Collective Investment in Transferable Securities ('the UCITS Act'). The complainants are collective investment fund management companies and related financial undertakings that act as depositories for these funds (in total 8 companies). The complainants contend that other, competing, fund management companies and depositories received unlawful state aid from the Icelandic authorities at the height of the Icelandic financial crisis. This is said to have been done through the purchase of those funds' assets on favourable terms, enabling them to wind the funds up and repay investors at a time when the complainants could not as there was no effective market for the assets held by the funds.

The funds subject to the complaint were held by subsidiaries of the three failed Icelandic banks; Glitnir Bank hf, Kaupthing Bank hf and Landsbankinn hf. It is alleged that the Icelandic authorities intervened in the market by influencing decisions of the banks newly created after the financial collapse (Islandsbanki, Arion, and (New) Landsbankinn) to purchase assets from these funds above the market price.

2.2. *Legal and factual background*

2.2.1. The Icelandic UCITS legislation (Act No 30/2003)

The UCITS Act provides that investment funds must be established and operated by independent management companies, which are financial undertakings as defined by the Icelandic Act on Financial Undertakings (Act No 161/2002). Supervision of the funds and deposits of their assets must be undertaken by a separate financial undertaking approved by the Icelandic Financial Supervisory Authority (the 'FME'). Investments subject to the UCITS Act are undertaken through the following structure:

— Depositaries, which administer and ensure safekeeping of financial instruments belonging to the investment funds;

— Management companies, which establish, operate and take decisions on behalf of the investment funds (i.e. on how the funds will invest); and

— the Investment funds themselves, which receive finance from members of the public to be used for collective investments in exchange for unit share certificates that are redeemable at the owner's demand from the fund's assets.

Icelandic legislation on investment funds originated in 1993 and the UCITS Act is based on European Council Directive 85/611/EC on undertakings for collective investment in transferable securities (UCITS) as amended [1]. This Directive forms part of the EEA Agreement [2].

The UCITS Act differentiates between 'UCITS' funds on the one hand, and 'non-UCITS' funds on the other. UCITS funds fulfil all of the criteria set out in the UCITS Directive and can therefore be marketed across the European Economic Area without need for further regulatory consent in individual states. Non-UCITS funds do not fulfil all the conditions of the Directive and must therefore obtain express authority to operate outside Iceland. UCITS funds are required to allow investors to redeem their unit shares at any time while non-UCITS are not under the same obligation. The funds subject to the complaint were in each case non-UCITS funds.

2.2.2. Factual background

In the case of each of the funds subject to the complaint, the depositaries were the three failed Icelandic banks, and the management companies were subsidiaries of the banks (each subsidiary using their parent as the depositary). Large numbers of Icelanders invested their savings in these investment funds. At the end of 2007 the Icelandic pension funds jointly held a quarter of their ISK 1 697 billion worth asset portfolio as unit shares in UCITS and non-UCITS funds [3]; and the value of the UCITS and non-UCITS funds was ISK 682 billion, of which the non-UCITS investment funds accounted for ISK 538 billion. At this time funds affiliated to the three banks held approximately 90 % of the total value invested in Icelandic UCITS and non-UCITS funds [4]. By mid 2009, after the October 2008 financial crisis, the total value of Icelandic UCITS and non-UCITS funds had decreased to approximately ISK 191 billion [5].

The funds subject to the complaint invested mainly in bonds issued by domestic (Icelandic) undertakings (mainly corporations and financial undertakings), and also held a considerable proportion of their assets as deposits in financial institutions.

On 29 September 2008, the Icelandic Government announced plans to rescue Glitnir Bank. This led (among other things) to a run on the investment funds which lasted until the FME decided on Friday 3 October 2008 to suspend redemption of unit shares to protect the interests of the remaining unit shareholders.

On Monday 6 October 2008, the Icelandic Parliament (*Althingi*) passed an Emergency Act (Act No 125/2008 — the 'Emergency Act') giving the FME the power (among other things) to take over Icelandic banks if this proved necessary. Over the following week the three major banks in Iceland collapsed and were brought under state control and ownership. In three decisions taken on the 9th, 14th and 17th of October 2008, the FME restored the banking system by forming new banks and transferring (most) of the domestic assets of each failed bank to corresponding 'New' Glitnir, Kaupthing and Landsbanki [6] banks. The new banks were each also provided with working capital to ensure continued domestic banking operations. Upon their creation the FME appointed temporary boards of directors for each new bank, mostly consisting of civil servants, who were later replaced by permanent appointments made by the Government on 7 November 2008.

On 17 October 2008, the FME issued a recommendation that investment funds should discontinue their operations and liquidate their assets. It advised that all available cash should be paid to the unit shareholders and that assets invested in should be sold gradually and the value paid to unit shareholders until no assets remained in the funds. The liquidation was to be executed in accordance with the principle of equality of unit shareholders.

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[1] Council Directive 85/611/EEC of 20.12.1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 375, 31.12.1985, p. 3.
[2] Paragraph 30 of Annex IX to the EEA Agreement.
[3] FME's annual report 2009, published on 26.11.2009, p. 14.
[4] FME's report; 'Heildarniðurstöður ársreikninga fjármálafyrirtækja og verðbréfaö og fjárfestingasjóða fyrir árið 2007', published on 9.9.2008, p. 7.
[5] FME's annual report 2009, published on 26.11.2009, p. 19.
[6] Now called Arion, Islandsbanki and Landsbankinn respectively.

By the end of October 2008, the three management companies subject to the complaint, now owned by the main Icelandic banks in their 'new' form [1], had all wound up their funds and the unit shareholders had received (in the form of deposits in the new banks) between 60 and 85 % (depending on the fund) of the last recorded value of their unit shares. This was achieved by the new banks buying the assets (securities) held by the funds, and as a result of the FME transferring the deposits held by the funds in the collapsed banks to the new banks. Unit shareholders therefore received (in the form of deposits created in the new banks) the full amount of their share of the money held by the investment funds as deposits in the old banks, together with between 61 % and 70 % (depending on the fund) of the book value as at 3 October 2008 of their share of the assets invested in by the funds. The price paid for the assets is claimed to be based on valuations of the assets prepared for the new banks by KPMG and PWC.

The complainants allege that they also approached the government and the new banks asking them to purchase the assets held in their funds. Valuations were prepared by the same independent experts that had estimated the value of the funds connected to the banks, and the assets were offered to the banks on those terms. According to the complainants only one of the banks was willing to discuss a possible purchase, but at a price that was substantially less than the valuation they had obtained and the amount paid for the assets in the fund connected to that bank.

2.3. *The potential state aid measures*

The measures under review are the decisions taken by the boards of directors of the restored main Icelandic banks to acquire the assets held by investment funds subject to the FME's wind up recommendation that were owned by their subsidiary management companies.

2.4. *The recipients of the potential aid*

The first potential recipients of the alleged aid are the fund management companies formerly owned by the three failed Icelandic banks, but now owned by their successor banks. These companies owned the securities that were acquired by the restored banks, and were paid fees for managing them on behalf of investors. However, the fund management companies held these assets on behalf of investors who held unit share certificates, and would ultimately therefore benefit the most. Those who benefit the most, therefore, from the potential aid are undertakings who invested in the funds. Individuals who invested in the funds would also have benefitted, but to the extent that they were not investing as undertakings (i.e. businesses) this would not amount to state aid within the meaning of Article 61(1) of the EEA Agreement.

2.5. *Possible effects of the aid*

The alleged aid has the potential to distort the market for asset management and other investment services to institutional and non-institutional investors. The main effect, however, is that it is likely to have also substantially reduced losses faced by undertakings that had invested in the funds.

3. **Comments of the Icelandic authorities**

The Icelandic authorities deny that the liquidation of the investment funds in question involved state aid. The Icelandic authorities claim that the transactions in question were neither influenced by the state nor funded by state resources, but involved commercial banks acting independently. They also contend that the new deposit accounts created to finance the transactions did not burden the banks themselves because they received assets of the same value as the liabilities created by deposits.

The Icelandic authorities claim that the decisions taken by the boards of directors of the new banks were not imputable to the State. Although it is accepted that the State had some influence over the activities of the banks at the time, the Icelandic authorities deny that they intervened in order to facilitate the liquidation of the investment funds. The Icelandic authorities believe that the measures taken by the banks were taken on the basis of commercial motives only, contending that it was 'unsurprising … that the respective firms took actions to calm the distress of their customers'. The Icelandic authorities are of the opinion that the process of valuing assets transferred from the investment funds seemed to be independent and professional, but acknowledged that this was undertaken 'at a critical point of time in which it must have been difficult to predict the accurate value given the uncertainty of what [the] future might hold for the financial markets'.

[1] The Authority believes that these subsidiary companies were transferred from the old to the new banks as 'domestic assets' under the Emergency Act.

II. **ASSESSMENT**

1. **The presence of state aid**

In order to fall within the scope of the state aid rules of the EEA Agreement, the described measures must constitute state aid as defined by Article 61(1) of the EEA Agreement.

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

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

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

1.2. *Presence of state resources*

The aid measure must be granted by the State or through state resources.

In order to amount to state aid within the meaning of Article 61(1) of the EEA Agreement, the acquisition of the securities held by the investment funds by the new banks must firstly involve the use of state resources, and secondly the use of the resources must be imputable to the State. These are conditions that must both be fulfilled ([1]).

(i) Use of state resources

At the time of acquisition and redemption of the assets, the three banks were all fully owned by the Icelandic State and were under its complete control. According to the Court of Justice of the European Union, the fact that the State is capable of exercising its dominant influence over publicly owned undertakings is normally sufficient to consider their resources as state resources ([2]). It has also been established by the Court that use of state resources in this context covers all of the financial means by which the public authorities may support undertakings ([3]). The Authority believes that this criterion is fulfilled, therefore, given that the new banks were created by and (at the time in question) were fully owned by the Icelandic State.

(ii) Imputable to the State

In order to amount to state aid the use of the state resources must in some way be imputable to the State, meaning that the three new Icelandic banks must have acted on instructions from the State when deciding to acquire the securities. The Icelandic authorities deny any involvement in the decisions taken by the boards of the new banks to acquire assets from the management companies. This is so despite the fact that the acquisitions coincided with, and contributed to, other measures and policies taken by the Government to stabilise the financial system.

Although, the three banks were formed as independent limited liability companies and were not part of the Icelandic State, the Court of Justice held in Stardust Marine ([4]) that:

> '… the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot, having regard to the autonomy which that legal form is capable of conferring upon it, be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State (Case C-305/89 *Italy* v *Commission* … paragraph 13). The existence of a situation of control and the real possibilities of exercising a dominant influence which that situation involves in practice makes it impossible to exclude from the outset any imputability to the State of a measure taken by such a company'

([1]) Case C-482/99 *France* v *Commission* (Stardust Marine) [2002] ECR I-4397, paragraph 24.
([2]) Case C-482/99 *France* v *Commission* (Stardust Marine), cited above, paragraph 38.
([3]) Case C-83/98 P *France* v *Ladbroke Racing* and *Commission* [2000] ECR I-3271, paragraph 50.
([4]) Case 482/99 *France* v *Commission* (Stardust Marine), cited above, paragraph 57.

While as a general rule imputability cannot be presumed (even if the State is in a position to influence and control the operations of a public undertaking), specific, compelling evidence is not always essential and indeed the Court of Justice will assume in certain circumstances that it will not be available [1]. As the Court stated in Stardust Marine [2]:

> 'it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities incited the public undertaking to take the aid measure in question'.

Imputability can, therefore, be inferred from a set of indicators arising from the circumstances of the case, and the context in which the measure was taken. Among the relevant indicators set out by the Court (and by Advocate General Jacobs in his opinion in the Stardust Marine case) were:

— the fact that the body in question could not take the contested decision without taking into account the requirements of the public authorities;

— the nature of the undertaking's activities and the extent to which the activities were exercised on the market in normal conditions of competition with private operators [3];

— the intensity of the supervision exercised by the public authorities over the management of the undertaking, and the degree of control which the state has over the public undertaking; and

— any other indicator showing an involvement by the public authorities in the adoption of the measure, or the unlikelihood of their not being involved, having regard to the compass of the measure, its content or the conditions which it contains [4].

From the information available to the Authority, the circumstances suggest that indicators of imputability were present when the decisions were taken. The table below set out a timeline of the major events, which helps illustrate these indicators.

Date	Event
29 September 2008	The Government announces plans to rescue Glitnir Bank (which were never realised)
3 October 2008	The last effective trading day of the investment funds in question
6 October 2008	The Icelandic Parliament passes the Emergency Act
7-9 October 2008	The three main Icelandic banks are taken over by the FME and the Icelandic financial system collapses
9 October 2008	(New) Landsbanki is restored by decision of the FME with a temporary board of directors appointed by the State
14 October 2008	(New) Glitnir is restored by decision of the FME with a temporary board of directors appointed by the State
17 October 2008	(New) Kaupthing is restored by decision of the FME with a temporary board of directors appointed by the State
17 October 2008	The FME issues the recommendation to wind up investment funds

[1] Case 482/99 *France* v *Commission* (Stardust Marine), cited above, paragraph 54. The difficulties of proving collusive behaviour between public authorities and public undertakings would render the state aid rules of the EEA Agreement ineffective by such condition. For this reason the case law of the Court of Justice holds that in the presence of certain indicators, aid measures taken by public undertakings may be inferred as being imputable to the State.

[2] Case C-482/99 *France* v *Commission* (Stardust Marine), cited above, paragraph 53.

[3] AG Jacobs also referred in this context to the scale and nature of the measure.

[4] Case C-482/99 *France* v *Commission* (Stardust Marine), cited above, paragraphs 55-56. See also the opinion of AG Jacobs paragraphs 66-67, where he, inter alia, stated: 'The involvement of the State does not therefore have to go so far as to constitute an explicit instruction. Instead it will in my view be sufficient to establish on the basis of an analysis of the facts and circumstances of the case that the undertaking in question could not take the decision in question "without taking account of the requirements of the public authorities".'.

Date	Event
17-30 October 2008	The new banks (through their temporary boards) decide to acquire assets from the investment funds, paying in total over ISK 80 billion (c. EUR 460 million [1]) for the assets
7 November 2008	The Government appoints permanent boards of directors for the three banks replacing the temporary boards appointed by FME

[1] Based on an exchange rate of ISK 180 to EUR 1.

The first indicator is that at the time of acquisition of the assets, the FME had only very recently seized all managerial and ownership powers over the three main Icelandic banks from their previous shareholders. This gave the FME discretion to appoint caretaker boards that had the power to handle the affairs of the banks in accordance with decisions taken by the FME. The FME also had the power to limit or prohibit the disposal of financial undertakings' capital or assets. When the transactions in question took place in late October 2008 the banks were still under the control of the FME and were run in accordance with Article 5 of the Emergency Act by a temporary board, subject to the FME's managerial supervision as described. The caretaker boards consisted mainly of civil servants from government ministries and other public authorities. It was not until 7 November 2008, that permanent boards of directors were appointed.

As is referred to under section 4.3 below, the Authority also has doubts concerning the extent to which the transactions were exercised on the basis of commercial motives. The first reason for the Authority's doubts is (again) the timing of the transactions — only days after temporary boards were formed. The Authority also questions the scale of the transactions, given the circumstances. Íslandsbanki, Arion and Landsbankinn purchased assets at a price of approximately ISK 12,9 billion (c. EUR 71,6 million), ISK 7,7 billion (c. EUR 42,7 million), and ISK 63 billion (c. EUR 350 million) respectively. While these figures would not be considered to be particularly large under normal circumstances, these were unprecedented times of crisis, and the Authority understands that the new banks had been formed as an emergency measure in order to safeguard basic domestic banking services. The Authority considers it surprising, therefore, that the banks entered into such large and (by the Icelandic authorities' admission) unpredictable and risky transactions days after they were formed. Finally, as referred to in more detail below, the Authority doubts that any reasonable market operator, motivated only by profit, would have purchased the assets; and even if such a market investor could have existed the Authority doubts that such an investor would have been willing to pay the price paid. This suggests, therefore, that the banks would not have been willing to enter into the transactions were it not for the influence of the state.

The Authority also considers it significant that the Icelandic authorities contend that the temporary boards of the banks each, separately, took decisions to invest a total of ISK 80 billion on impaired assets held by the investment funds without consulting the FME. The FME is the (public) body responsible for restoring the banking sector, and as referred to above had (and still has) wide ranging powers in respect of the banks. Considering the size of the investments, their potential impact on the viability of the new banks and the extent of the FME's powers over the banks at the time, the Authority doubts that these decisions could have been taken without the consent of the FME, which would in turn have consulted with the Icelandic Government. Similarly, the Authority considers that the fact that each of the banks took the same decision to purchase the assets of the funds linked to the subsidiaries of their predecessor banks suggests state involvement. This is particularly the case given that this was a highly contentious and prominent issue in Iceland which, by the Icelandic authorities' own admission, was the subject of heated public debate.

The Authority also notes that the Report of the Special Investigation Commission formed to investigate and analyse the processes leading to the collapse of the three main banks in Iceland [1] refers to plans of the Government and the FME to remedy the problems faced by investors in the investment funds. The report also records however that the Minister of Business Affairs at the time states that his Ministry took no measures other than to encourage a resolution of the funds on commercial terms. The former Minister of Finance gave evidence stating that he believed that deciding whether to purchase the funds' assets was a matter for the banks based on their commercial interests [2].

Given the above circumstances, however, the Authority has doubts concerning the position of the Icelandic authorities that the transactions did not involve state resources.

[1] See http://sic.althingi.is/ See Chapter 14.12 of the Report.
[2] Chapter 14.12.2, page 232-233.

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

Firstly, for the measure to involve state aid it must confer on the management companies advantages that relieve them of charges that normally should be borne from their budget — such advantages not being obtainable on the open market.

Secondly, for the measure to be state aid it must be selective in that it favours 'certain undertakings or the production of certain goods'.

The existence of an advantage within the meaning of Article 61(1) of the EEA Agreement depends on whether the terms and conditions of the sale of the assets were more favourable than those which would have been acceptable to a market investor at the time of the transaction.

The Icelandic authorities contend that each of the new banks was investing on reasonable commercial terms, and that in consequence, no advantage was gained by the management companies or investors. Further, they claim that the banks did not incur any additional burdens as a result of the transactions on the basis that the value of the deposits issued to the investors should correspond to the real value of the assets acquired by the banks at the time of acquisition.

When the state uses its resources in ways that are compatible with the behaviour of a normal market operator, this does not amount to state aid. The assets acquired were listed bonds issued by Icelandic corporations and financial undertakings. Under normal market conditions these assets could be sold to numerous institutional investors. Under market conditions at the time of the acquisition, however, it would appear that trading had ceased. The Authority understands that there were severe concerns about the viability of the Icelandic economy and companies at this point, which is illustrated by the fact that a significant part of the assets sold were actually bonds issued by companies that were or were about to go into liquidation. The Authority is of the preliminary view, therefore, that valuing such assets at this point would have been a near impossible task. It is perhaps not surprising therefore that independent valuations that the new banks apparently relied upon are, in the Authority's opinion, far from robust. The reports were prepared in haste, are very short and contain a number of disclaimers, most notably stating that they are not intended to be a 'formal due diligence' ([1]) assessment of the value of the funds. The valuations were in the Authority's opinion vague and did not provide specific figures for the value of assets but rather wide-ranging estimates based on worst case and best case scenarios ([2]). The valuations for specific assets in some cases ranged between 0 % of pre-crisis value as a worst case scenario and 100 % as a best case.

The case of Islandsbanki provides an example of why the Authority doubts that the transactions were commercial in nature. The fund bought by Islandsbanki (new Glitnir) from the former subsidiary of its predecessor bank Glitnir, included a large proportion of bonds issued by companies such as the Baugur Group (which in turn held a large proportion of the shares in the Glitnir bank itself), Exista and Milestone which were in serious financial difficulties. The Authority estimates that over 60 % of the fund's book value derived from bonds issued by companies that either were or were shortly to go into liquidation. In the Authority's opinion, therefore, it would not be a case of applying the benefit of hindsight to doubt the commercial accuracy of the value of an investment fund that contained so many assets linked to failed companies.

The Glitnir fund was purchased by Islandsbanki (in October 2008) for ISK 12,9 billion (c. EUR 71,6 million), or 70 % of its former book value. This sum was apparently based on a report prepared for Islandsbanki by KPMG which set out a range of estimated values of between approximately 56 % and 82 % (these figures were later changed, downwards to between 48 % and 78 %, by KPMG but Islandsbanki proceeded regardless on the same terms) ([3]). The latest accounts of Islandsbanki have, however, now made provision for a loss of ISK 11 billion on this transaction, suggesting that the true value of the fund was actually 10 % of the book value (and was potentially less — the final loss is apparently yet to be established). This equates to a loss (so far) of over EUR 60 million.

([1]) Words translated by the Authority, the full Icelandic wording is as follows: 'áreiðanleika könnun'.

([2]) The method used was to estimate the recovery rates of the underlying assets of the funds on a best case-worst case basis on a scale of 0 %, 25 %, 50 %, 75 % and 100 %.

([3]) The Authority has been provided with an email sent by the newly appointed CEO of Islandbanki informing the board of directors that KPMG had amended its value assessment downwards. The CEO nevertheless recommended that the new bank should proceed with the original price despite it being based on a higher valuation.

While smaller in percentage terms, the other banks also made significant losses, most notably (new) Landsbankinn, which purchased the largest of the funds and has so far made accounting provisions for ISK 23 billion of losses (approx EUR 222 million). 47 % (ISK 48 billion) of the nominal value of the fund linked to Landsbankinn was made up of bonds issued by (old) Landsbankinn and Kaupthing, which had both gone into liquidation. KPMG's valuation estimated a 0 % recovery for these bonds but nevertheless the Authority understands that (new) Landsbankinn bought the assets at a price corresponding to 87 % of their book value in the case of the (old) Landsbankinn bonds, and 45 % in the case of Kaupthing ([1]). Similarly Arion (New Kaupthing) appears to have purchased bonds issued by its predecessor bank for 30 % of book value despite KPMG valuing them as being worthless.

Tables setting out the percentage valuations used and price paid in the case of each of the banks are set out in the Annex to this decision. The table below reflects the Authority's understanding of the losses made by new banks when purchasing assets of the investment funds.

Bank	Book value at closure 3 October 2008	Acquisition price in late October 2008	Acquisition price as a % of 3 October 2008 book value	Book value at the end of 2008	Value end 2008 as a % of book value 3 October 2008
Kaupthing/Arion	ISK 11 Billion	ISK 7,7 Billion	70 %	ISK 2,3 Billion	21 %
Glitnir/Íslandsbanki	ISK 18 Billion	ISK 12,9 Billion	71,5 %	ISK 1,9 Billion ([1])	10 %
(New) Landsbankinn	ISK 103 Billion	ISK 63 Billion	61 %	ISK 23 Billion	22 %
Total:	ISK 132 Billion	ISK 83,6 Billion	63,5 %	ISK 27,6 Billion	21 %

([1]) This includes a further loss provision of ISK 416 million made in the financial statement for the first six months of 2009.

As referred to above, the Icelandic authorities have also contended that the actions taken by the banks were not surprising given the public debate about the investment funds' status, and that the rationale of the decisions was economic — a desire to calm their own customers. Again, the Authority doubts that this can be a realistic contention. In circumstances where the financial services sector (and to an extent the wider economy) had effectively ceased to function and where capital controls had been imposed, it is difficult to understand why a newly formed bank would, within days of its formation, enter into a transaction of (in the case of Landsbanki) approximately EUR 350 million on the premise that it feared the reaction of customers if it didn't.

The Authority is also of the preliminary view that the measures taken by the state owned banks were selective because they only allowed specific management companies to sell their assets to a state-backed buyer while their competitors, who also were subject to the windup recommendation by the FME, were unable to do so.

Given the uncertainty caused by the unprecedented circumstances in Iceland, and the experience of the complainants, the Authority doubts that any market investor would have been willing to acquire the assets in question at this time. In the event that a market investor was willing to purchase the assets, the Authority also doubts that it would have been willing to pay the price paid by the Icelandic authorities. On that basis, the actions of the state appear to have favoured certain undertakings.

1.4. *Distortion of competition and affect on trade between Contracting Parties*

The aid measure must distort competition and affect trade between the Contracting Parties to the EEA Agreement. At the level of the fund management companies, the provision of financial services is a highly competitive market across the EEA. Competition is likely to have been severely distorted in this case, given that future investors are likely to favour fund management companies that have previously been supported by the state as opposed to those who were not. The Authority is of the view, therefore, that there is likely to have been both an affect on trade between the Contracting Parties and a distortion of competition. Similarly at the level of the investors, undertakings that received an advantage through these measures are in a better position in comparison to their competitors than would have been the case had the state not intervened. It is also likely that these undertakings are engaged in activities which are tradable across the EEA meaning that these criteria are again likely to have been fulfilled.

([1]) See page 237, Chapter 14 of the Report of the Special Investigation Commission formed to investigate and analyse the processes leading to the collapse of the three main banks in Iceland.

2. **Procedural requirements**

The Icelandic authorities did not notify the alleged intervention to the Authority. The Authority, therefore, takes the preliminary view that the Icelandic authorities did not respect their obligations pursuant to Article 1(3) of Part I of Protocol 3.

3. **Compatibility of the aid**

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

It is possible that the measures may qualify as compatible aid to remedy a serious disturbance in the economy of an EFTA State under Article 61(3)(b) given the apparent connection with the financial crisis in Iceland. This is particularly possible in the case of the investors in the fund, especially to the extent that they are institutional investors such as pension funds.

The Icelandic authorities have, however, not argued that the measures should be allowed on that basis nor have they provided information to justify the intervention. In consequence the Authority has been unable to assess whether potential aid could be regarded as compatible with the state aid provisions of the EEA Agreement.

4. **Conclusion**

Based on the information submitted by the Icelandic authorities, the Authority cannot exclude the possibility that the aid measures constitute aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that the measure can be regarded as complying with Article 61(3) (b) or (c) of the EEA Agreement. The Authority has doubts, therefore, that the above measures are compatible with the functioning of the EEA Agreement.

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

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

Within one month of receipt of this decision, the Authority also requests that the Icelandic authorities provide all documents, information and data needed for assessment of the compatibility of the rescue aid.

The Authority also requests that the Icelandic authorities forward a copy of this decision to the potential aid recipients of the aid immediately.

Finally, the Authority reminds the Icelandic authorities that, according to the provisions of Protocol 3 to the Surveillance and Court Agreement, any incompatible aid unlawfully put at the disposal of the beneficiaries will have to be recovered with interest, unless this recovery would be contrary to the general principle of law,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the alleged state aid granted by the Icelandic State to investment funds and associated fund management companies connected to the three failed Icelandic banks Glitnir, Kaupthing and Landsbanki Íslands.

Article 2

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

Article 3

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

Article 4

This Decision is addressed to the Republic of Iceland.

Article 5

Only the English language version of this decision is authentic.

Done at Brussels, on 8 September 2010.

For the EFTA Surveillance Authority

Per SANDERUD
President

Sverrir Haukur GUNNLAUGSSON
College Member

ANNEX

Assessment and acquisition of bonds in funds affiliated to Landsbankinn [1]

	KPMG's assessment of likely recovery [2]		
Name of issuing company	Negative scenario (%)	Positive scenario (%)	Assets sold to NBI [3] (%)
Atorka	50	100	100
Avion	25	75	0
Baugur (unsecured)	0	50	0
Baugur (secured) [4]	50	100	80
Egla	0	25	0
Eimskip	25	50	70
Erlend bankabréf	0	0	100
Exista	0	50	50
FL/Stoðir [5]	50	100	100
Glitnir	0	0	30
Kaupthing bonds	0	0	45

Assessment and acquisition of bonds in funds affiliated to Landsbankinn [1]			
	KPMG's assessment of likely recovery [2]		
Name of issuing company	Negative scenario (%)	Positive scenario (%)	Assets sold to NBI [3] (%)
Landsbankinn bonds	0	0	87
Marel	75	100	100
Mosaic	50	100	100
Nýsir	0	0	0
Samson [6]	0	25	0
Sparisjóður Bolungavíkur	0	0	100

[1] Source: Landsvaki (Fund management company of Landsbankinn) — Table 26, Page 237, Chapter 14 of the Special Investigation Committee's report.
[2] KPMG's report to Landsbankinn, dated 22.10.2008.
[3] Presentation given by the asset management division of Landsbankinn to its Board, dated 22.10.2008.
[4] Prioritised collateral in BG Holding.
[5] Collateral in subordinated bonds issued by Landic Property (190 % collateral coverage).
[6] Collateral in shares in Landsbankinn.

KPMG's assessment of Glitnir's Fund 9 recovery value [1]		
Name of issuing company	Negative scenario (%)	Positive scenario (%)
Fjárfestingafélagið Atorka hf	50	100
Atorka	50	100
Bakkavör hf	75	100
Baugur Group hf (secured) [2]	50	75
BG Capital ehf	0	0
Clearwater Fine Foods Inc	75	100
Eignarhaldsfélagið Fasteign hf (secured) [3]	75	100
Eik Fasteignafélag	75	100
Exista hf	0	50
Eyrir Fjárfestingarfélag ehf	75	100
Hf Eimskipafélag Íslands	50	75
Icelandair Group hf	75	100
Invik og Co AB	75	100
Eignarhaldsfélagið Kirkjuhvoll ehf	50	75
Marel Food Systems hf	75	100
Milestone ehf	50	100
N1 hf	75	100

KPMG's assessment of Glitnir's Fund 9 recovery value (1)		
Name of issuing company	Negative scenario (%)	Positive scenario (%)
Norðurturninn ehf	50	100
Nýsir hf	25	75
Samson eignarhaldsfélag ehf	0	25
Sparisjóður Hafnarfjarðar	75	100
Straumborg ehf	75	100
Fasteignafél.Stoðir hf	50	75
Straumur Fjárfestingabanki hf	75	100
Kaupþing Bank hf	0	25

(1) Source: Glitnir Funds — Table 25, Page 235, Chapter 14 of the Special Investigation Committee's report. The Authority does not have information on how the value of individual bonds were assessed when the board of Islandsbanki decided to acquire them. The Authority assumes that the price was based on the average of the negative and positive scenarios assessed by KPMG. The price paid was 70 % of the book value which is close to the median of 69 % in KPMG's original estimate of a value of between 56 % and 82 % of book value. KPMG however subsequently revised the assessment due to concerns (among other things) over the value of Kaupthing bonds, and lowered the valuation to a range between 48 % and 78 %, of which 63 % is the median. The new bank nevertheless proceeded with the transaction at a price of 70 % of book value.
(2) Collateral in BG Holding.
(3) Collateral in ISK 750 million of cash according to Glitnir.

Assessments of investment funds affiliated to Kaupthing (1)				
	KPMG's assessment of likely recovery (2)		PWC's assessment of likely recovery (3)	
Name of issuing company	Negative scenario (%)	Positive scenario (%)	Negative scenario (%)	Positive scenario (%)
Atorka	0	0	100	100
Alfesca	75	100	100	100
Bakkavör	75	100	80	90
Baugur (unsecured)	0	0	60	80
Egla	0	0	0	0
Eik fasteignafélag	0	0	100	100
Eimskip	0	0	0	0
Exista	0	50	40	60
Exista (subordinated)	0	0	30	50
Glitnir	0	0	0	10
Hagar	75	100	90	100
HB Grandi	0	0	100	100
Hekla	0	0	100	100

Assessments of investment funds affiliated to Kaupthing [1]				
	KPMG's assessment of likely recovery [2]		PWC's assessment of likely recovery [3]	
Name of issuing company	Negative scenario (%)	Positive scenario (%)	Negative scenario (%)	Positive scenario (%)
Hótel Saga	0	0	100	100
Icebank	0	0	0	5
Kaupthing bonds	0	0	10	20
Kaupthing (subordinated)	0	0	0	0
Kögun	0	0	65	85
Landic Property	50	75	65	75
Landsbankinn bonds	0	0	0	10
Marel	75	100	90	100
Mosaic	50	100	0	0
Samson (unsecured)	0	0	0	0
Síminn	0	0	100	100
Sorpa	0	0	100	100
Sparisjóður Hafnarfjarðar	100	100	75	95
Sparisjóður Hafnarfjarðar (subordinated)	0	0	65	85
Sparisjóður Keflavíkur (subordinated)	0	0	25	45
SPRON (subordinated)	0	25	30	50
Straumur	0	0	70	90
Vinnslustöðin	75	100	100	100

[1] Source: Rekstrarfélag Kaupþings banka (Fund management company of Kaupthing) — Table 27, Page 239, Chapter 14 of the Special Investigation Committee's report. It again seems that the weighted median of KPMG's negative and positive scenario valuations was the basis for the acquisition price of the bonds. However, bonds issued by Kaupthing were bought for 30 % of book value despite being assessed as being worthless by KPMG.

[2] KPMG's assessment for Kaupthing funds assessing likely recovery of assets as percentage of the last recorded value on 3.10.2008.

[3] PWC's assessment for Kaupthing funds assessing likely recovery of assets as percentage of the last recorded value on 3.10.2008, presented on 7.11.2008.