EUROPEJSKI OBSZAR GOSPODARCZY

URZĄD NADZORU EFTA

Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 część I protokołu 3 do Porozumienia o Nadzorze i Trybunale w sprawie sprzedaży akcji Sementsverksmiðjan należących do państwa (sprawa nr 56694 — dawna sprawa nr 47824)

(2005/C 117/07)

Na mocy decyzji 421/04/COL z dnia 20 grudnia 2004 r., zamieszczonej w języku oryginału na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA rozpoczął postępowanie zgodnie z art. 1 ust. 2 część I protokołu 3 do Porozumienia pomiędzy Państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości (Porozumienia o Nadzorze i Trybunale). Rząd Islandii został poinformowany w drodze kopii wymienionej decyzji.

Urząd Nadzoru EFTA niniejszym wzywa umawiające się strony Porozumienia EOG i zainteresowane strony do przesłania uwag w sprawie środka, o którym mowa, w ciągu jednego miesiąca od publikacji niniejszego zawiadomienia na adres:

Urząd Nadzoru EFTA
35, rue Belliard/Belliardstraat 35
B-1040 Brussels

Wymienione uwagi zostaną przekazane rządowi Islandii. Zainteresowane strony przekazujące uwagi mogą wystąpić z odpowiednio umotywowanym pisemnym wnioskiem o objęcie ich tożsamości poufnością.

STRESZCZENIE

Procedura

Pismem od Misji Islandii przy Unii Europejskiej z dnia 19 sierpnia 2003 r. władze Islandii powiadomiły Urząd zgodnie z art. 1 ust. 2 część I protokołu 3 do Porozumienia o Nadzorze i Trybunale o zamiarze sprzedania należących do państwa akcji Sementsverksmiðjan (zwane dalej Iceland Cement). Władze Islandii podpisały porozumienia w sprawie sprzedaży dnia 2 października 2003 r., przed podjęciem przez Urząd decyzji w sprawie notyfikacji.

Opis środka pomocowego

Przed wejściem na islandzki rynek importera cementu z Danii w 2000 r., Iceland Cement miał w rzeczywistości monopol na rynku cementu. W wyniku pojawienia się nowej konkurencji Iceland Cement doświadczył trudności gospodarczych i zaczął odnosić straty. W tym świetle należy postrzegać sprzedaż przedsięwzięcia, będącego w całkowitym posiadaniu państwa.

Dnia 12 marca 2003 r. rząd opublikował w gazecie Morgunblaðið zawiadomienie o przetargu na zakup 100 % swojego udziału w Iceland Cement. Przed upływem terminu dnia 28 marca 2003 r. przedłożonych zostało pięć ofert. Oferty zostały ocenione przez niezależnego eksperta wziąwszy pod uwagę pięć kryteriów: cenę zakupu, wpływ na konkurencję na islandzkim rynku budowlanym, kondycję finansową oferenta, wizję spółki w przyszłości, doświadczenie w zarządzaniu oraz znajomość rynku. Rząd rozpoczął negocjacje w sprawie sprzedaży akcji Iceland Cement należących do państwa z oferentami, którzy zostali uznani za przedstawiających najlepsze oferty, grupą inwestorów, która stworzyła Íslenskt Sement ehf, pod warunkiem, że produkcja cementu będzie kontynuowana.

Ten sam niezależny ekspert został poproszony o ocenę wartości Iceland Cement. W ocenie zostało stwierdzone, że w przypadku spółki będącej w sytuacji finansowej, w jakiej jest Iceland Cement, najbardziej akceptowaną metodą oceny byłoby ustalenie wartości likwidacyjnej. Wynikiem był ujemny kapitał własny oceniony na ISK […] (w porównaniu do wartości księgowej kapitału własnego Iceland Cement w wysokości ISK […] dnia 31 marca 2003 r.). Ponadto koszty związane z rozbiórką i oczyszczeniem zakładu przemysłowego znajdującego się w Akranes zostały ocenione na ok. ISK […]. Zaliczając tę sumę do zobowiązań, ujemny kapitał własny wynosił ISK […].

Na podstawie powyższej oceny spółka została sprzedana w oparciu o następujące porozumienia:

Iceland Cement i miasto Arkanes zawarły dnia 31 lipca 2003 r. porozumienie., zgodnie z którym prawa własności do wszystkich parceli w Akranes należących do Iceland Cement zostały od dnia 1 sierpnia 2003 r. przeniesione na miasto Akranes. Po prywatyzacji spółki dnia 2 października 2003 r. miasto Akranes i Iceland Cement podpisały pięć porozumień na 25 lat w odniesieniu do różnych parceli, na których odbywała się produkcja cementu przez spółkę. Jedno z nich zawierało klauzulę mówiącą, że jeśli produkcja cementu miałaby zostać wstrzymana na ciągły okres wynoszący 24 miesiące, Iceland Cement musiałby na własny koszt przeprowadzić rozbiór magazynu na materiały.

Dnia 2 października 2003 r. Ministerstwo Przemysłu podpisało w imieniu Rządu Islandii porozumienie o zakupie akcji z Íslenskt Sement ehf. Na podstawie tego porozumienia rząd, posiadacz 100 % akcji Iceland Cement Ltd. o wartości nominalnej wynoszącej ISK […], sprzedał je Íslenskt Sement ehf. w cenie ISK […].

Tego samego dnia, tj. 2 października 2003 r., Iceland Cement i Ministerstwo Finansów Islandii podpisali umowę kupna, na podstawie której Ministerstwo nabyło mienie i aktywa spółki w Reykjavík, biurowiec spółki w Akranes (z wyjątkiem jednego i pół piętra) oraz akcje i obligacje innych spółek należące do Iceland Cement, w cenie ISK […]. Zgodnie z umową Iceland Cement może zatrzymać część sprzedanego mienia, używać go do własnych działań przemysłowych i zwrócić go Ministerstwu Finansów nie później niż dnia 31 grudnia 2011 r. Spółka nie płaci za to prawo użytkowania. Do dnia 31 grudnia 2009 r. Iceland Cement ma prawo do ponownego kupna powyżej wspomnianego mienia, które zostało sprzedane, za całkowitą cenę wynoszącą ISK […] ze stałą roczną stopą procentową wynoszącą […] % od dnia 1 sierpnia 2003 r.

Chociaż władze Islandii były zdania, że transakcja nie będzie się wiązała z pomocą państwa, gdyż sprzedaż została dopełniona zgodnie z przepisami rozdziału 18B Wytycznych na temat pomocy państwa, poinformowały o niej Urząd.

Ocena

Urząd wyraża wątpliwości, czy zgłoszone środki nie stanowią pomocy państwa, jak twierdzą władze Islandii. Urząd poddaje w wątpliwość stosowalność rozdziału 18B w omawianym przypadku, ponieważ państwo nie sprzedawało jedynie gruntu i budynków, które do niego należą, ale swoje akcje w przedsięwzięciu, które posiada w 100 %, z dodatkowym warunkiem kontynuowania działań spółki. Ponadto na tym etapie nie można stwierdzić, czy władze Islandii kierowały się zasadą inwestora w warunkach gospodarki rynkowej w celu przeprowadzenia omawianej prywatyzacji.

Pomimo tego dwie procedury ustanowione w rozdziale 18B Wytycznych, na podstawie których można przypuszczać, że nie doszło do pomocy państwa podczas sprzedaży, mogą analogicznie pomóc w określeniu, czy pomoc została przyznana, czy nie.

Zgodnie z przepisami rozdziału 18B.2.1 Wytycznych sprzedaż gruntu i budynków jest z definicji przeprowadzana zgodnie z wartością rynkową, i w związku z tym nie stanowi pomocy państwa, jeśli jest przeprowadzana według wystarczająco dobrze nagłośnionej, otwartej i bezwarunkowej procedury licytacyjnej. W omawianym przypadku nie można utrzymywać, że spełnione zostały powyżej wspomniane warunki sprzedaży przeprowadzanej zgodnie z wartością rynkową.

W zakresie, w jakim nie jest stosowana otwarta i bezwarunkowa procedura licytacyjna, rozdział 18B.2.2 Wytycznych ustanawia alternatywną procedurę, która zakłada, że nie doszło do pomocy państwa: wartość ustalona przez niezależnego rzeczoznawcę majątkowego na podstawie ogólnie akceptowanych wskaźników rynku przed sprzedażą stanowi minimalną cenę kupna, która może być uzgodniona bez przyznawania pomocy państwa.

W omawianym przypadku niezależny rzeczoznawca majątkowy ocenił wartość Iceland Cement po wyłonieniu partnera negocjacyjnego za pomocą procedury przetargowej, ale przed sprzedażą spółki. Chociaż spółka została sprzedana na zasadzie kontynuacji prowadzenia działalności, rzeczoznawca oszacował jej wartość likwidacyjną. Z zasady nie można przypuszczać, że wartość działającej spółki, nawet jeśli w danej chwili przynosi straty, jest równa jej wartości likwidacyjnej, która jest oparta na założeniu, że działalność zostanie zaprzestana. Ponadto wątpliwości budzi wycena niektórych aktywów Iceland Cement w celu ustalenia wartości likwidacyjnej spółki. Z tych powodów na obecnym etapie nie można ocenić, czy wartość likwidacyjna spółki odpowiadała jej wartości rynkowej.

Jeśli wartość rynkowa 100 % akcji Iceland Cement należących do państwa byłaby wyższa niż cena, którą zapłacił za nie Íslenskt Sement ehf., państwo sprzedałoby spółkę poniżej jej ceny rynkowej. Doszłoby do zaangażowania zasobów państwowych w rozumieniu art. 61 ust. 1 Porozumienia EOG, ponieważ państwo uzyskałoby niższy przychód, niż ten, który uzyskałby prywatny podmiot gospodarczy działający na zasadach rynkowych. Jeśli Ministerstwo Finansów Islandii zapłaciłoby wyższą cenę, niż wartość rynkowa aktywów ponownie zakupionych od Iceland Cement, również zużyte zostałyby zasoby państwowe. Jednakże pomimo tego, że państwo tego samego dnia lecz w różnych porozumieniach było zarówno sprzedawcą, jak i nabywcą tych konkretnych aktywów, nie doszłoby do pomocy państwa, jeśli cena aktywów pozostała taka sama w przypadku obu transakcji.

Ponadto państwo rezygnuje z dochodu w przypadku powstrzymania się od otrzymania wynagrodzenia od Iceland Cement za korzystanie ze swoich aktywów w Reykjaviku?. Stanowi to zasoby państwowe w rozumieniu art. 61 ust. 1 Porozumienia EOG.

Państwo rezygnuje również z dochodu w wyniku straty przychodów, w przypadku gdy Iceland Cement skorzysta z ceny ponownego zakupu aktywów w Reykjaviku za cenę poniżej ich wartości rynkowej.

Jeśli zostanie ustalone, że omawiane transakcje nie zostały przeprowadzone na warunkach zgodnych z rynkiem, a zatem że zaangażowane zostały zasoby państwowe, Iceland Cement i/lub Íslenskt Sement ehf. odniosłyby korzyść w rozumieniu art. 61 ust. 1 Porozumienia EOG. Stałoby się tak ponieważ albo ich koszty zostałyby zmniejszone, albo otrzymaliby za aktywa cenę, która byłaby wyższa niż ich wartość rynkowa.

Każda korzyść przyznana Iceland Cement, której wynikiem jest zmniejszenie kosztów, które spółka musiałaby normalnie ponieść, stawia ją w lepszej pozycji konkurencyjnej w stosunku do innych uczestników rynku działających na islandzkim rynku cementu, którzy nie odnoszą takiej korzyści, i zgodnie z tym prowadzi do zakłócenia konkurencji. Każda korzyść przyznana konsorcjum inwestorów Íslenskt Sement ehf, przynajmniej w odniesieniu do konkurencji z innymi grupami inwestorów, którzy uczestniczyli w procedurze przetargowej ogłoszonej przez rząd Islandii w celu nabycia akcji, prowadzi również do zakłócenia konkurencji.

Biorąc pod uwagę, że bezpośredni konkurent Iceland Cement na islandzkim rynku to przedsięwzięcie mające siedzibę w innym państwie będącym stroną Porozumienia EOG, które przywozi cement z innych państw EOG do Islandii, oraz że nabyciem akcji Iceland Cement Ltd. należących do państwa zainteresowani byli inwestorzy mający siedzibę w innych państwach EOG, środek ma wpływ na wymianę handlową między umawiającymi się stronami Porozumienia EOG w rozumieniu art. 61 ust. 1 Porozumienia EOG.

Wnioski

Urząd wyraża wątpliwości, czy zgłoszona sprzedaż akcji Iceland Cement Ltd. należących do państwa nie stanowi pomocy państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG. Jeśli środki zaangażowane w proces prywatyzacji stanowią pomoc państwa, Urząd musiałby ocenić ich zgodność z funkcjonowaniem Porozumienia EOG. W konsekwencji Urząd jest zobowiązany do wszczęcia oficjalnej procedury dochodzeniowej przewidzianej w art. 1 ust. 2 część I protokołu 3 do Porozumienia o Nadzorze i Trybunale.

EFTA SURVEILLANCE AUTHORITY DECISION

No 421/04/COL

of 20 December 2004

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

THE EFTA SURVEILLANCE AUTHORITY,

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

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

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

Whereas:

I. FACTS

1. Procedure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. **APPRECIATION**

1. **Procedural requirements**

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

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

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

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

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

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

2. **State aid assessment**

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

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

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

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

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

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

(a) *State resources*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Selective advantage*

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

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

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

(c) *Distortion of competition*

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

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

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

(d) *Effect on trade*

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

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

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

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

3. **Conclusion**

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

Consequently, and in accordance with Article 4(4) in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority.

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

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

HAS ADOPTED THIS DECISION:

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

2. The Icelandic Government is invited, pursuant to Article 6(1) in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit its comments on the opening of the formal investigation procedure within two months from the notification of this Decision.

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

4. This Decision is authentic in the English language.

Done at Brussels, 20 December 2004.

For the EFTA Surveillance Authority

Hannes HAFSTEIN
President

Einar M. BULL
College Member