Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 części I protokołu 3 do porozumienia o nadzorze i trybunale w sprawie pomocy państwa w odniesieniu do pomocy państwa na rzecz transportu morskiego w postaci podatku tonażowego i systemu refundacji dla marynarzy

(2008/C 96/07)

Decyzją nr 721/07/COL z dnia 19 grudnia 2007 r. zamieszczoną w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA wszczął postępowanie zgodnie z art. 1 ust. 2 części I protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości (porozumienie o nadzorze i trybunale). Władze Islandii otrzymały stosowną informację wraz z kopią wyżej wymienionej decyzji.

Urząd Nadzoru EFTA niniejszym wzywa państwa EFTA, państwa członkowskie UE i zainteresowane strony do zgłaszania uwag w sprawie omawianego środka w ciągu jednego miesiąca od publikacji niniejszego zawiadomienia na poniższy adres Urzędu Nadzoru EFTA w Brukseli:

EFTA Surveillance Authority
Registry
Rue Belliard 35
B-1040 Brussels

Otrzymane uwagi zostaną przekazane władzom Islandii. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio umotywowanym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

STRESZCZENIE

1. **PROCEDURA**

Pismem z dnia 23 marca 2007 r. władze Islandii poinformowały Urząd o planowanej pomocy dla sektora transportu morskiego w postaci podatku tonażowego i systemu refundacji dla marynarzy. Po wymianie korespondencji z władzami Islandii Urząd podjął decyzję o wszczęciu formalnego postępowania wyjaśniającego w odniesieniu do zgłoszonych środków.

2. **FAKTY**

2.1. **Podatek tonażowy**

Podstawowa stawka podatku od przedsiębiorstw w Islandii wynosi 18 %. Na mocy ustawy nr 86/2007 w sprawie opodatkowania działalności statków handlowych „*Lög um skattlagningu kaupskipaútgerðar*" (zwanej dalej „*ustawą o podatku tonażowym*") władze Islandii wprowadziły korzystniejszy system podatku tonażowego. Zgodnie z ustawą o podatku tonażowym w miejsce zwykłej stawki podatku od przedsiębiorstw wynoszącej 18 %, przedsiębiorstwa żeglugowe mogą podlegać korzystniejszemu podatkowi tonażowemu umożliwiającemu im obliczanie zysku na podstawie hipotetycznego zysku na dzień, zależnego od tonażu danego statku. Obliczony w ten sposób zysk jest obciążony podstawową stawką podatku od przedsiębiorstw.

System ten obejmuje statki z Międzynarodowego Islandzkiego Rejestru Statków o tonażu brutto co najmniej 100 GT, wykorzystywane do międzynarodowego transportu pasażerskiego lub towarowego i krajowego transportu towarowego. Obejmuje on statki handlowe, należące do operatora statku, wypożyczane bez załogi (czarter statku bez załogi) lub wypożyczane z załogą (czarter na czas).

Podatek tonażowy obejmuje także pewne rodzaje działalności pomocniczej, na przykład wykorzystanie kontenerów w transporcie towarów, operacje załadunku i wyładunku, konserwację itd.

Aby statek kwalifikował się do objęcia przepisami ustawy o podatku tonażowym, musi być zarejestrowany w Międzynarodowym Islandzkim Rejestrze Statków, zaś przedsiębiorstwo żeglugowe musi podlegać nieograniczonemu obowiązkowi podatkowemu. Pojęcie nieograniczonego obowiązku podatkowego oznacza, że przedsiębiorstwa zarejestrowane w Islandii płacą tam podatki od dochodów uzyskiwanych na całym świecie. Podatek potrącany u źródła zgodnie z art. 3 ustawy o podatku dochodowym nie kwalifikuje się do objęcia podatkiem tonażowym.

Podstawa opodatkowania (hipotetyczny zysk) jest ustalana w sposób następujący:

Do 25 000 NT włącznie — 30 ISK za 100 NT (0,36 EUR)

Od 25 001 NT — 10 ISK za 100 NT (0,12 EUR).

Przepisy ustawy o podatku tonażowym mają gwarantować nierozciąganie korzystnego podatku tonażowego na inne rodzaje działalności armatora. Armator, który decyduje się na podatek tonażowy, musi mu podlegać przez trzy lata.

2.2. **System refundacji za zatrudnianie marynarzy**

Ponadto władze Islandii poinformowały o systemie dotacji do wynagrodzeń brutto dla marynarzy, zgodnie z którym armatorzy mogą otrzymywać dotacje w wysokości 90 % podatku dochodowego obliczonego na podstawie wynagrodzeń brutto zatrudnionych marynarzy. Aby kwalifikować się do objęcia dotacją armator musi spełnić te same warunki, co w przypadku podatku tonażowego (tzn. rejestracja i nieograniczony obowiązek podatkowy) oraz zatrudniać marynarzy kwalifikujących się do opodatkowania w Islandii.

Zarówno system podatku tonażowego, jak i system refundacji dla marynarzy obowiązują przez czas nieokreślony.

3. **OCENA**

Urząd stwierdza, że wszystkie warunki wymienione w art. 61 ust. 1 Porozumienia EOG zostały spełnione, co oznacza, że udzielana jest pomoc państwa.

Co się tyczy zgodności systemu pomocy z przepisami EOG dotyczącymi pomocy państwa, Urząd rozpatrzył sprawę zgodnie z art. 61 ust. 3 lit. c) Porozumienia EOG łącznie z wytycznymi Urzędu w sprawie pomocy dla transportu morskiego (zwanymi dalej „wytycznymi").

3.1. **Podatek tonażowy**

Urząd wyraża wątpliwości co do zgodności podatku tonażowego z następujących względów.

Uwzględnienie działalności związanej z zarządzaniem statkami

Urząd nie ma pewności, czy działalność statków wyczarterowanych na czas lub działalność związana z zarządzaniem statkami w konsorcjach przewoźników może zostać objęta systemem podatku tonażowego. Zgodnie z sekcją 3.1 pkt 11 wytycznych pomoc może zostać udzielona jedynie w odniesieniu do statków, w przypadku których firmom zarządzającym przydzielono całą załogę i zarządzanie techniczne. Ponadto tonaż takich statków nie powinien przekraczać czterokrotnego tonażu statku, w przypadku którego przedsiębiorstwo objęte podatkiem tonażowym pełni wszystkie obowiązki związane z zarządzaniem, w tym z zarządzaniem komercyjnym.

Wymóg rejestracji statków w Międzynarodowym Islandzkim Rejestrze Statków oraz wymóg nieograniczonego obowiązku podatkowego

Wymóg, zgodnie z którym statek musi być zarejestrowany w Międzynarodowym Islandzkim Rejestrze Statków, aby kwalifikować się do systemu podatku tonażowego, prowadzi do wykluczenia statków niezarejestrowanych w Islandii. Ponadto powszechnie przyjęto zasadę, że mimo iż podatki bezpośrednie należą do kompetencji państw EOG, państwa te muszą jednak z tych kompetencji korzystać zgodnie z przepisami EOG. Różnica w traktowaniu stanowi ograniczenie dla przedsiębiorstw w przypadku rejestracji statków w innych państwach EOG. Z Porozumienia EOG wynika, że pomoc państwa sprzeczna z innymi przepisami Porozumienia EOG nie może zostać uznana za zgodną z funkcjonowaniem Porozumienia EOG. Urząd nie widzi przyczyn, dla których takie ograniczenie swobody przedsiębiorczości byłoby konieczne do realizacji celów systemu podatku tonażowego.

Ponadto do korzystnego systemu podatku tonażowego kwalifikują się jedynie przedsiębiorstwa o nieograniczonym obowiązku podatkowym w Islandii. Jednak obowiązek podatkowy w Islandii może, przynajmniej co do zasady, powstać w związku z tak zwanym podatkiem potrącanym u źródła. Oznacza to, że przedsiębiorstwo zarejestrowane w innym państwie EOG może podlegać obowiązkowi podatkowemu w związku z pewnymi operacjami prowadzonymi w Islandii bez dostępu do bardziej korzystnego systemu podatku tonażowego.

Władze Islandii podkreślają, że w przypadku obowiązywania umów dotyczących podwójnego opodatkowania armatorzy płacą podatki w kraju, w którym mają stałą siedzibę, a nie w Islandii. Islandia nie podpisała jednak umów dotyczących podwójnego opodatkowania ze wszystkimi państwami EOG. Dlatego też wydaje się, że wymóg nieograniczonego obowiązku podatkowego w celu objęcia korzystnymi zasadami opodatkowania stanowi różnicę traktowania ograniczającą swobodę dostarczania usług transportu morskiego w Islandii przez usługodawców mających siedzibę w innych państwach EOG.

Podstawa opodatkowania

Urząd wyraża wątpliwości co do ustanowienia podstawy opodatkowania, która w porównaniu do innych wcześniej zatwierdzonych systemów podatku tonażowego wydaje się niska. Sekcja 3.1 pkt 18 wytycznych żeglugowych stwierdza, że Komisja WE b będzie zatwierdzać jedynie programy prowadzące do obciążenia podatkowego na taką samą objętość tonażu, „*które są zgodne z zasadami określonymi w już zaaprobowanych programach. Urząd będzie się również starał o utrzymanie sprawiedliwej równowagi zgodnie z już zaaprobowanymi systemami*". Z tego względu Urząd musi ocenić, czy zgłoszona podstawa opodatkowania jest zasadniczo zgodna z podstawą opodatkowania stosowaną w innych zgłoszonych i zatwierdzonych systemach. Urząd stwierdza, że tak nie jest, ponieważ wartości podstawy opodatkowania mogą być od 25 do 60 % niższe od podstawy opodatkowania obowiązującej w innych państwach.

Czas podlegania systemowi podatku tonażowego

Urząd wyraża wątpliwości co do okresu, w ciągu którego armator musi podlegać islandzkiemu systemowi podatku tonażowego. Okres ten w Islandii wynosi trzy lata. Zgodnie z praktyką Komisji wydaje się, że minimalny analogiczny okres w innych zatwierdzonych dotychczas systemach podatku tonażowego wynosi dziesięć lat. Urząd wyraża obawę, że krótszy okres podlegania systemowi powoduje, iż islandzki system podatku tonażowego jest korzystniejszy i prowadzi do zmiany bandery wewnątrz EOG.

3.2. **System refundacji za zatrudnianie marynarzy**

Władze Islandii nie przedstawiły pisemnej definicji pojęcia marynarza znajdującej się w akcie prawnym lub administracyjnym, potwierdziły jednak, że narodowość ani miejsce zamieszkania marynarza nie wchodzi w skład definicji. Dlatego też wydaje się, że system obejmuje także mieszkańców krajów trzecich. Urząd zwraca uwagę, że w przypadku usług transportu pasażerskiego między portami EOG, pomocy należy udzielać jedynie na zatrudnianie marynarzy z EOG (patrz też sekcja 3.2 pkt 3 wytycznych). Urząd, na podstawie dostępnych mu informacji, wyraża wątpliwości co do tego, czy definicja marynarzy z EOG została w tym przypadku zastosowana prawidłowo.

Wydaje się ponadto, że armatorzy, których nie obejmuje system podatku tonażowego, wykluczeni są także z systemu refundacji. Przedsiębiorstwa podlegające nieograniczonemu obowiązkowi podatkowemu w Islandii nie kwalifikują się do dotacji, jeśli należące do nich statki są zarejestrowane w innych państwach EOG. Wydaje się, że dochodzi do tego zarówno w przypadku, gdy członkowie załogi podlegają podatkowi dochodowemu w Islandii (w związku z zamieszkiwaniem w Islandii), jak i w sytuacji, gdy członkowie załogi nie podlegają obowiązkowi podatkowemu w Islandii. W tym względzie Urząd wyraża te same obawy, co w przypadku podatku tonażowego.

4. **WNIOSEK**

W świetle powyższych uwag Urząd podjął decyzję o wszczęciu formalnego postępowania wyjaśniającego w odniesieniu do zgłoszonego systemu podatku tonażowego oraz systemu refundacji w przypadku zatrudniania marynarzy.

EFTA SURVEILLANCE AUTHORITY DECISION

No 721/07/COL

of 19 December 2007

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

(Iceland)

THE EFTA SURVEILLANCE AUTHORITY [1],

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

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

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

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

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

Whereas:

I. FACTS

1. Procedure

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

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

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

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

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

2. Description of the proposed measures

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

2.1. *Title and objective of the notified schemes*

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

2.2. *National legal basis for the notified measures*

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

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

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

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

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

The scheme has the following eligibility requirements:

2.3.1. *Eligible activities*

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

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

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

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

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

2.3.2. *Ancillary activities*

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

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

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

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

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

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

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

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

2.3.4. *Requirement of a flag link*

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

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

2.3.5. *Establishment of the tax rate*

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

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

From 25 001 NT — ISK 10 per 100 NT.

No deductions are permitted from the tax base.

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

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

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

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

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

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

2.3.7. *Duration of the tonnage taxation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

([2]) Cf. point 2.2 above.

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

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

II. ASSESSMENT

1. The presence of State aid

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

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

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

The individual criteria of that provision will be examined below.

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

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

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

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

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

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

1.4. ***Conclusion***

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

2. Procedural requirements

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

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

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

3. Compatibility of the aid

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

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

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

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

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

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

3.1. ***Tonnage tax scheme***

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

3.1.1. *Eligible activities*

International transport and cabotage

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

Ancillary activities

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

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

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

Ship management

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

— commercial management of vessels,

— technical management of vessels,

— crew management.

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

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

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

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

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

— or their commercial management,

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

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

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

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

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

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

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

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

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

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

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

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

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

The registration requirement

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

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

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

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

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

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

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

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

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

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

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

The requirement of full tax liability

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

3.1.3. *Ring-fencing measures, separate accounting*

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

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

3.1.4. *Tax rates*

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

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

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

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

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

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

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

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

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

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

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

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

3.2. *Special refund scheme for seafarers*

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

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

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

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

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

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

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

3.3. *Cumulation*

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

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

3.4. *Duration of the aid scheme*

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

([1]) State aid N 93/06 — Poland.

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

4. **Conclusion**

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

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

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

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

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

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

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

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

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

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

Article 4

This Decision is addressed to the Republic of Iceland.

Article 5

Only the English version is authentic.

Done at Brussels, 19 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján STEFÁNSSON
President	*College Member*