JUDGMENT OF THE COURT
29 July 2016

(Failure by an EFTA State to fulfil its obligations – State aid – Article 14(3) of Part II of Protocol 3 SCA – Failure to recover unlawfully granted aid)

In Case E-25/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Markus Schneider and Clémence Perrin, Members of its Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, acting as Agent, Haraldur Steinþórsson, Legal Officer, Ministry of Finance and Economic Affairs, and Þórður Reynisson, Legal Officer, Ministry of Industries and Innovation, acting as Co-Agents,

defendant,

APPLICATION for a declaration that by failing to take within the prescribed time all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area by Articles 2, 3, 4 and 5 of EFTA Surveillance Authority Decision No 404/14/COL of 8 October 2014 *on the Investment Incentive Scheme in Iceland*; by failing to cancel, within the prescribed time any outstanding payments referred to in Article 7 third sentence of that decision; and by failing to provide the EFTA Surveillance Authority, within the prescribed time, with the information outlined in Article 8 of that decision, Iceland has failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and under Articles 6, 7 and 8 of EFTA Surveillance Authority Decision No 404/14/COL,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

Judgment

I Introduction

1 By an application lodged at the Court Registry on 23 October 2015, the EFTA Surveillance Authority ("ESA") brought an action under the second subparagraph of Article 1(2) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). ESA seeks a declaration that Iceland has failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 SCA and Articles 6, 7 and 8 of ESA Decision No 404/14/COL of 8 October 2014 on the Investment Incentive Scheme in Iceland (OJ 2016 L 63, p. 9 and EEA Supplement 2016 No. 14, p. 1), by failing, within the time limits prescribed, (i) to take all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area (the "EEA Agreement" or "EEA") by Articles 2, 3, 4 and 5 of ESA's decision, (ii) to cancel any outstanding payments referred to in Article 7 third sentence of that decision, and (iii) to provide ESA with the information outlined in Article 8 of that decision.

II Relevant law

EEA law

2 The first and second paragraphs of Article 3 EEA read:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

3 Article 61(3) EEA reads:

The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

4 The first paragraph of Article 24 SCA reads:

The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

5 Protocol 3 SCA contains rules on the functions and powers of ESA in the field of State aid. The first and second paragraphs of Article 1(2) of Part I of Protocol 3 SCA read:

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

If the EFTA State concerned does not comply with this decision within the prescribed time, the EFTA Surveillance Authority or any other interested EFTA State may, in derogation from Articles 31 and 32 of this Agreement, refer the matter to the EFTA Court directly.

6 Article 14 of Part II of Protocol 3 SCA reads:

> *1. Where negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The EFTA Surveillance*

Authority shall not require recovery of the aid if this would be contrary to a general principle of EEA law.

2. *The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the EFTA Surveillance Authority. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.*

3. *Without prejudice to any order of the EFTA Court pursuant to Article 40 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the EFTA Surveillance Authority's decision. To this effect and in the event of a procedure before national courts, the EFTA States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to EEA law.*

7 Article 23(1) of Part II of Protocol 3 SCA reads:

Where the EFTA State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the EFTA Surveillance Authority may refer the matter to the EFTA Court direct in accordance with Article 1(2) in Part I.

III Factual background and pre-litigation procedure

8 In June 2010, the Icelandic authorities notified to ESA pursuant to Article 1(3) of Part I of Protocol 3 SCA a scheme on investment incentives ("the Scheme"). The aim was to create jobs in disadvantaged regions in Iceland. The Scheme allowed for granting new aid to companies in all sectors except the financial sector. Aid could take the form of direct grants, tax exemptions or sale and lease of land below market value. By Decision No 390/10/COL of 13 October 2010, ESA approved the Scheme. The Scheme expired on 31 December 2013.

9 The legal basis for the Scheme was Act No 99/2010 of 29 June 2010 on Incentives for Initial Investments in Iceland (*Lög um ívilnanir vegna nýfjárfestinga á Íslandi*) and Regulation No 985/2010 of 25 November 2010 on Incentives for Initial Investments in Iceland (*Reglugerð um ívilnanir vegna nýfjárfestinga á Íslandi*). That regulation was amended by Regulation No 1150/2010 of 30 December 2010 ("the Supplementary Regulation"). ESA was not notified of that amendment.

10 Between December 2010 and January 2013 Iceland entered into six separate investment agreements under the Scheme, one of which is not relevant to the present proceedings. The remaining five agreements were concluded with companies referred to as Becromal, Verne, Kísilfélagið, Thorsil and GMR Endurvinnslan, respectively.

11 In December 2012, Iceland notified ESA of certain proposed amendments to the Scheme. During the preliminary examination of the proposals, ESA also became aware of the Supplementary Regulation. ESA took the preliminary view that the amendments altered the Scheme to such an extent that the Scheme became new aid. It would therefore be subject to an approval procedure. In particular, the Supplementary Regulation appeared to allow for State aid to projects which had started before the Scheme entered into force. Another concern was whether aid under the investment agreements had been kept within the scope of the Scheme. On 30 April 2013, ESA initiated a formal investigation procedure with regard to the Scheme and the investment agreements, by way of Decision No 177/13/COL.

12 On 8 October 2014, ESA adopted Decision No 404/14/COL ("the Recovery Decision") and notified it to Iceland. Articles 1 to 9 of the Recovery Decision read:

Article 1

The formal investigation procedure concerning the Icelandic Investment Incentives Scheme, with amendments notified by the Icelandic authorities is hereby closed.

...

Article 2

The Supplementary Regulation entails State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.

Article 3

The Becromal Investment Agreement entails State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.

Article 4

The Verne Investment Agreement entails ad hoc *State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.*

Article 5

The Kísilfélagið, Thorsil and GMR Endurvinnslan Investment Agreements do not comply with the conditions set out in the Scheme as approved by Decision No 390/10/COL, since the agreements neither contain references to eligible investment costs, nor to the aid intensities and aid ceiling.

The Kísilfélagið, Thorsil and GMR Endurvinnslan Investment Agreements entail ad hoc *State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.*

Article 6

The Icelandic authorities shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 3, 4 and 5 which was unlawfully made available to them.

The aid to be recovered shall bear compound interest from the date on which it was at the disposal of the beneficiaries, until the date of its actual recovery.

Article 7

Recovery of aid shall be immediate and effective in accordance with the procedures of national law.

The Icelandic authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

The Icelandic authorities shall cancel any outstanding payments of the aid referred to in Articles 3 to 5, with effect from the date of notification of this Decision.

Article 8

The Icelandic authorities shall, within two months from the notification of this Decision, submit the following information to the Authority:

a) the total amount (principal and recovery interests) to be recovered by the beneficiaries;

b) the dates on which the sums to be recovered were put at the disposal of the beneficiaries;

c) a detailed report on the progress made and the measures already taken to comply with this Decision,

d) documents proving that recovery of the unlawful and incompatible aid from the recipients is under way (e.g. circulars, recovery orders issued etc.).

Article 9

This Decision is addressed to Iceland.

13 By letter of 23 March 2015, Iceland informed ESA of the steps adopted to comply with the Recovery Decision. The letter contained preliminary information on the amounts of aid granted to each beneficiary during the years 2011 to 2013. The aid had been granted in the form of tax derogations and discounted excise duties, social security charges and stamp duties. However, as noted in Iceland's letter to ESA dated 30 April 2013, Iceland submitted that in the cases of Thorsil and Kísilfélagið neither had in fact received State aid under the investment agreements made, since the underlying projects had not been initiated.

14 By emails of 10 and 15 July 2015, Iceland provided ESA with information concerning the precise aid amounts granted to Verne. A draft termination agreement between Iceland and Verne was also provided. However, ESA received no further information concerning the recovery amounts or the recovery procedure relating to the other beneficiaries.

15 On 16 September 2015, ESA took the view that Iceland had failed to comply with the Recovery Decision and decided to bring the matter before the Court pursuant to Article 1(2) of Part I and Article 23(1) of Part II of Protocol 3 SCA.

IV Procedure and forms of order sought

16 ESA lodged its application at the Court Registry on 23 October 2015. Iceland's statement of defence was registered at the Court on 5 January 2016. On 8 February 2016, ESA submitted its reply and Iceland submitted its rejoinder on 24 February 2016.

17 The applicant, ESA, requests the Court to:

1. *declare that by failing to take within the prescribed time all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area by Articles 2, 3, 4 and 5 of EFTA Surveillance Authority Decision No 404/14/COL of 8 October 2014 on the Investment Incentive Scheme in Iceland; by failing to cancel, within the prescribed time any outstanding payment referred to in Article 7 third sentence of that decision; and by failing to provide the EFTA Surveillance Authority, within the prescribed time, with all the information outlined in Article 8 of that Decision, Iceland has failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and Articles 6, 7 and 8 of Decision No 404/14/COL.*

2. *order Iceland to bear the costs.*

18 The defendant, Iceland, submits that no State aid was in fact conferred under the Thorsil and Kísilfélagið investment agreements, as the underlying projects were not initiated. The Court takes this submission to mean that Iceland is of the opinion that it is not obliged therefore to take measures to recover any State aid in those two cases. Apart from that, Iceland does not dispute that it was obliged to take steps to fulfil the Recovery Decision or that the time limit for the implementation of those steps had expired. However, Iceland remarks that the prolonged procedure was not unreasonable given the circumstances of the case, the legislative framework and national procedures. Iceland also notes that the amounts at stake do not have any, or at most minimal, effects on trade between the Contracting Parties of the EEA Agreement.

19 After having received the express consent of the parties by emails of 18 and 30 March 2016, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure pursuant to Article 41(2) of the Rules of Procedure ("RoP").

V Pleas and arguments submitted to the Court

20 ESA contends that Iceland has breached its obligations under Article 14(3) of Part II of Protocol 3 SCA and Articles 6, 7 and 8 of the Recovery Decision. ESA's application is based on the pleas that, within the time limits prescribed, (i) Iceland has breached Articles 6 and 7 of the Recovery Decision by failing to recover aid declared incompatible with the functioning of the EEA Agreement by Articles 2, 3, 4 and 5 of the Recovery Decision; (ii) Iceland has breached Article 7 of the Recovery Decision by failing to immediately cancel outstanding payments of the aid; and (iii) Iceland has breached Article 8 of the Recovery Decision by failing to inform ESA of the total amount to be recovered and of the measures planned or taken to recover the aid.

First plea – failure to recover unlawful aid within the prescribed time

21 ESA points out that, under Articles 6 and 7 of the Recovery Decision, Iceland was required to take all necessary measures to recover the unlawful State aid referred to in Articles 2, 3, 4 and 5 of the Recovery Decision. This recovery was to be immediate and effective in accordance with the procedures of national law. The deadline set for implementing the recovery of aid elapsed on 9 February 2015.

22 Iceland has not challenged ESA's assessment, as set out in the Recovery Decision, by an action for annulment. Thus, according to ESA, the Recovery Decision has become binding on Iceland. ESA submits that, after a decision on recovery of unlawful aid has become binding on an EEA State, the only defence left in opposing an application would be to plead that it was absolutely impossible to implement the decision properly. In ESA's view, Iceland has neither raised the argument that it was absolutely impossible for it to recover the aid nor did it appear that Iceland was in the position where it was impossible to recover the aid.

23 ESA submits that although Iceland had provided an estimation of the aid granted thus far to Verne, Becromal and GMR Endurvinnslan, no recovery had been completed by the deadline of 9 February 2015. Thus, Iceland had not taken all the steps necessary to recover the amounts granted under the aid. Consequently, Iceland has breached Articles 6 and 7 of the Recovery Decision and Article 14(3) of Part II of Protocol 3 SCA.

24 In its reply, ESA rejects Iceland's argument that no State aid was granted to Kísilfélagið and Thorsil. It points out that the grant of aid to the beneficiary under EEA State aid law lies in the fact that the State makes available an advantage to an undertaking, irrespective of whether it is actually paid out (reference is made to the judgment in *ThyssenKrupp Acciai Speciali Terni* v *Commission*, T-62/08,

EU:T:2010:268, paragraph 234). In any event, ESA's decision has become final and is no longer open to challenge.

25 Moreover, ESA claims that Iceland neither submitted any termination agreements with regard to the Kísilfélagið and Thorsil projects, nor did it inform ESA within the prescribed time that no recovery was necessary. The letters from Iceland dated 30 April 2013 and 23 March 2015 do not contain any statements to this effect.

26 ESA observes that Iceland does not argue that the *de minimis* rules apply in this case, but states that the amounts recovered are below the relevant threshold. ESA nevertheless notes that for the *de minimis* rules to apply, specific conditions must be fulfilled and procedures followed in addition to the amounts being below the relevant thresholds. In ESA's view, Iceland has failed to prove that the relevant conditions have been fulfilled in the present case.

27 ESA stresses the importance of recovering unlawful aid within fixed deadlines. Any delay of such recovery perpetuates the distortion of competition created by the unlawful aid. This is contrary to the purpose of EEA State aid rules (reference is made to the judgment in *Commission* v *Italy*, C-454/09, EU:C:2011:650, paragraph 37). In ESA's view, there are currently systemic deficiencies in Iceland's State aid management. No adequate procedures appear to be in place to ensure timely recovery of unlawful aid. This leads to delays in the recovery procedure. A case has previously been brought before the Court due to a failure to implement a recovery decision (reference is made to Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 202). According to ESA, there seems to be no improvement over time. While the present case concerns a "blatant failure" on the part of Iceland to comply with its obligations under a particular recovery decision, ESA urges the Court to take "this alarming wider factual context into account", in particular in light of the obligations imposed on Iceland under Article 3 EEA.

Second plea – failure to cancel outstanding payments of the aid within the prescribed time

28 Under the third sentence of Article 7 of the Recovery Decision, Iceland was obliged to cancel all outstanding payments of the aid with effect from 8 October 2014. In the present case, ESA submits that the effective elimination of potential State aid could adequately take the form of a termination agreement of the investment agreements. However, Iceland has not informed ESA whether the draft termination agreement with Verne, forwarded to ESA in July 2015, has been finalised. No termination agreement has been presented with regard to the other investment agreements.

29 In ESA's view, Iceland has therefore not presented any evidence of actions taken to effectively eliminate State aid. This suggests that the beneficiaries have continued to receive aid under the investment agreements, and thus perpetuating the distortion of competition created by the unlawful aid.

30 Consequently, ESA submits that Iceland has failed to fulfil its obligation under the third sentence of Article 7 of the Recovery Decision, namely to cancel any outstanding payments of the illegal aid referred to in Articles 3 to 5.

31 ESA notes that Iceland's claim that any outstanding payments were immediately cancelled, could be interpreted as Iceland disputing ESA's plea that Iceland failed to immediately cancel outstanding payments. However, the statement made by Iceland is unsubstantiated and lacks the necessary clarity to draw any conclusion on this point. ESA submits that, should the Court consider the statement in issue as a formal plea, it does not meet the requirements in Article 35 RoP and should be dismissed as inadmissible.

Third plea – failure to inform ESA within the prescribed time of the total amount to be recovered and of the measures planned or taken to recover the aid

32 According to Article 8 of the Recovery Decision, Iceland was obliged by 9 December 2014 to provide ESA with information on the total amount to be recovered, the dates on which the sums to be recovered were put at the disposal of the beneficiaries, a detailed report on the progress made and the measures taken to comply with the Recovery Decision, and documents proving that recovery of the unlawful aid from the recipients was under way.

33 ESA submits that it has only received preliminary information concerning the amount of aid granted in three instances, and that Iceland confirmed that Kísilfélagið and Thorsil did in fact not receive any aid. Furthermore, this information was provided in March 2015, that is more than three months after the fixed deadline. Moreover, Iceland failed to provide a detailed report on the progress made to comply with the Recovery Decision or documents evidencing the recovery of the aid.

34 ESA therefore submits that Iceland has failed to provide ESA with the information listed under Article 8 of the Recovery Decision within the prescribed time.

35 Iceland claims that it cooperated with ESA after the adoption of the Recovery Decision. However, ESA submits that it was not regularly informed about the recovery process. This is evidenced by the limited exchange of letters and updates after the adoption of the Recovery Decision. A satisfactory cooperation would in any event have involved a request for an extension of the prescribed period or suggestions of appropriate amendments to the Recovery Decision. However, ESA was never contacted to discuss such issues. Moreover, Iceland failed to describe and evidence the various measures it had allegedly taken to immediately stop the payment of the aid. Finally, the figures provided in Iceland's defence with regard to the aid amounts are different from those provided by Iceland in the letter of 23 March 2015. No explanation or supporting evidence was provided for the differences.

36 Iceland submits that the facts of the case, as brought forward in the application, are correct and undisputed. The only exception is that the investment agreements made

with Kísilfélagið and Thorsil did not confer any State aid to the undertakings, as the underlying projects were not initiated. Iceland informed ESA of this by letters of 30 April 2013 and 23 March 2015. This point is not meant to challenge the substance of the Recovery Decision. Rather, Iceland considers that the information given to ESA on the non-implementation of the aid in both cases were sufficient. Furthermore, new agreements had been concluded with regard to those two projects and thus according to Iceland, there was no need for a separate termination. This fact had been brought to ESA's attention by letters of 27 and 29 August 2014.

37 With regard to the three remaining investment agreements, namely with Becromal, Verne and GMR Endurvinnslan, where aid was granted, Iceland submits that the aid amounts were minimal and thus entailed limited distortion of competition and effects on intra-EEA trade. The aid granted to Verne, GMR Endurvinnslan and Becromal amounted to EUR 15 819, EUR 36 903 and EUR 214 143, respectively. According to Iceland, these amounts are "extremely low" when compared to the *de minimis* threshold in Article 3(2) of Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ 2013 L 352, p. 1). The reference to the *de minimis* rules is not intended to demonstrate the applicability of those rules, but merely to show that the amounts at hand are minimal.

38 Iceland observes that studies done on the recovery of unlawful aid demonstrate that recovery faces a number of challenges, which generally result in an excessive length of recovery proceedings. Iceland argues that even though it faced obstacles, it did take immediate and effective action to fulfil the Recovery Decision by cancelling outstanding payments, terminating or amending investment agreements and calculating the amount of aid to be recovered from each beneficiary.

39 Iceland notes that, despite the small amounts of aid to be recovered, administrative procedures and a dialogue with the aid beneficiaries on efficient recovery and termination of the agreements resulted in a more prolonged recovery process than anticipated. For these reasons and due to the Government's heavy workload, a full recovery of the aid was unfortunately not completed within the prescribed time. As a result, the Recovery Decision is still in the process of being implemented. Iceland submits that the full recovery will be completed within a reasonable timeframe, taking into consideration the facts of the case and difficulties routinely faced in similar proceedings. It is expected that full recovery of the aid will be completed by the first quarter of the year 2016.

40 Iceland argues that it endeavoured to fulfil its duty of cooperation under Article 3 EEA and case law on recovery procedures by regularly informing ESA of the progress made in implementing the Recovery Decision. The difference in opinion between the parties with regard to the adequacy of the information supplied during the recovery process is a matter for Iceland and ESA to work out and improve in the future.

41 Iceland objects to the allegations made by ESA with regard to the current situation of State aid recovery in Iceland. The swiftness of the recovery procedure varies from case to case. Cases where the exact amounts have to be determined by calculating whether and how much fiscal aid has been granted, may be more time consuming than those where the exact amounts to be recovered are clear from the date when a recovery decision is adopted. Moreover, the one-year delay experienced in the present case, while unfortunate and in breach of the Recovery Decision, is not out of the ordinary in the wider EEA context. Furthermore, there have only been four recovery decisions from ESA addressed to Iceland since the EEA Agreement entered into force. Nothing in those cases suggests a systematic delay in the recovery. Consequently, ESA's description of the present case as a "blatant failure" and the wider factual context as "alarming" is an unnecessary exaggeration, which in Iceland's view must be rejected.

VI Findings of the Court

First plea – failure to recover unlawful aid within the prescribed time

42 By Articles 3, 4 and 5 of the Recovery Decision, ESA found the five investment agreements to entail unlawful State aid. Pursuant to Article 6 of the Recovery Decision, and in accordance with Article 14(1) of Part II of Protocol 3 SCA, Iceland was ordered to take all necessary measures to recover from the beneficiaries the State aid unlawfully made available to them. Pursuant to Article 7 of the Recovery Decision, and in accordance with Article 14(3) of Part II of Protocol 3 SCA, the recovery of aid was to be immediate and effective in accordance with the procedures of national law, but at the latest within four months from notification.

43 An EFTA State is free to choose the means by which to fulfil an obligation to recover unlawful aid, provided that the measures chosen do not adversely affect the scope and effectiveness of EEA law. Furthermore, the obligation to recover is fulfilled only if the measures adopted by the EFTA State are suitable to re-establish the normal conditions of competition which were distorted by the grant of the unlawful aid (compare the judgment in *Commission* v *Germany*, C-209/00, EU:C:2002:747, paragraphs 34 and 35).

44 ESA's first plea is undisputed by Iceland, with the exception that no aid was granted under the Kísilfélagið and Thorsil investment agreements since the underlying projects were not initiated. However, since Iceland did not challenge the Recovery Decision within the mandatory period of two months prescribed in the third paragraph of Article 36 SCA, Iceland cannot any longer dispute ESA's finding that the two investment agreements entailed unlawful State aid.

45 Nevertheless, the Court finds it appropriate to add the following: An allegation that there is nothing to be recovered, because the projects to which the investment agreements relate were not implemented, is flawed. The grant of aid lies in the fact that the State makes available an advantage to an undertaking, irrespective of

whether money is actually paid out (compare *ThyssenKrupp Acciai Speciali Terni* v *Commission*, cited above, paragraph 234).

46 Where an EFTA State decides to recover aid by other means than a cash payment, it is obliged to provide, in a transparent manner, ESA with evidence enabling it to establish that the measures are suitable for achieving, in full compliance with EEA law, the result required by the decision. This entails close cooperation between the EFTA States and ESA. The Court points to the obligation in Article 3 EEA to facilitate the achievement of ESA's tasks, in particular by ensuring that decisions adopted by ESA are applied and complied with (compare the judgment in *Commission* v *Germany*, cited above, paragraphs 39 and 42).

47 Iceland was therefore obliged to demonstrate that the advantages made available to the recipients under the two agreements have been effectively recovered. A mere assertion that the two projects were not initiated does not demonstrate effective recovery of advantages. Effective recovery would have required Iceland to demonstrate that the agreements conferring unlawful State aid were no longer in force, for example by terminating the investment agreements or, if applicable, declaring the investment agreements void.

48 As regards the three other investment agreements, it is undisputed that unlawful aid had been granted and that Iceland has failed to recover that aid within the time prescribed. Iceland's mention of the *de minimis* rules cannot alter this finding as these rules are not applicable in the present case.

49 Since the Recovery Decision is final and binding on Iceland, the only defence in opposing an application for failure to implement the decision would have been to plead that it was absolutely impossible to implement the decision properly (see *ESA* v *Iceland*, cited above, paragraph 38 and case law cited). Justifications put forward by Iceland to explain the delay, namely the heavy workload of the Government and the lack of relevant information from the beneficiaries, are manifestly unsuitable to establish an absolute impossibility in light of the relevant case law. Provisions, practices or situations prevailing in the domestic legal order cannot justify a failure to observe obligations under EEA law (see Case E-19/14 *ESA* v *Norway* [2015] EFTA Ct. Rep. 300, paragraph 48). Such circumstances are fully in the hands of the national authorities.

50 On this background, ESA's first plea is well-founded.

Second plea – failure to cancel outstanding payments of the aid within the prescribed time

51 Pursuant to Article 7 third sentence of the Recovery Decision, Iceland was obliged to cancel any outstanding payments of unlawful aid, with effect from the date of notification of that decision.

52 ESA claims that no termination agreements have been presented for the five investment agreements. This suggests that the beneficiaries have continued to

receive aid under the investment agreements. Iceland claims, for its part, that all outstanding payments were immediately cancelled following the Recovery Decision.

53 The Court has not seen clear proof that the investment agreements are no longer in force. Therefore, it cannot be ruled out that the favourable treatment constituting unlawful State aid, according to ESA's assessment, continued to apply to the beneficiaries after the notification of the Recovery Decision. Consequently, Iceland has not demonstrated that it complied with the obligation to cancel any outstanding payments. In light of this finding, it is not necessary to address ESA's alternative inadmissibility plea.

54 ESA's second plea is therefore well-founded.

Third plea – failure to inform ESA within the prescribed time of the total amount to be recovered and of the measures planned or taken to recover the aid

55 Article 8 of the Recovery Decision obliged Iceland within two months from notification to inform ESA of the total amount to be recovered and the measures planned or taken to recover the aid.

56 An estimation of the total amount of aid that had been provided under the investment agreements was submitted on 23 March 2015. That was more than three months after the deadline for submitting such information had expired. In any event, the information submitted did not fully comply with the obligations laid down in Article 8 of the Recovery Decision. Exact amounts were not indicated, and no detailed report or documents, as required under Article 8(c) and (d), was submitted.

57 If an EFTA State encounters difficulties in implementing a recovery decision, it must submit those difficulties for consideration by ESA. The EFTA State may, for example, request an extension of the recovery period and suggest appropriate amendments to that decision, so that ESA may take an informed decision (compare the judgment in *Commission* v *Germany*, C-527/12, EU:C:2014:2193, paragraph 51 and case law cited). Iceland did not resort to any of these possibilities.

58 Thus, ESA's third plea is also well-founded.

59 Finally, ESA's application claims failure to recover unlawful aid described in Articles 2 to 5 of the Recovery Decision. However, it follows from the Recovery Decision itself that only aid described in Articles 3 to 5 must be recovered. Failure to recover unlawful aid described in Article 2 of the Recovery Decision is therefore not in breach of EEA law.

Conclusion

60 It must be held that Iceland has failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 SCA and Articles 6, 7 and 8 of the Recovery Decision, by failing, within the time limits prescribed, (i) to take all the necessary measures to

recover from the recipients the State aid declared incompatible with the functioning of the EEA Agreement by Articles 3, 4 and 5 of that decision, (ii) to cancel any outstanding payments referred to in Article 7 third sentence of that decision, and (iii) to provide ESA with the information outlined in Article 8 of that decision.

VII Costs

61 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Iceland be ordered to pay the costs, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that Iceland has failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and Articles 6, 7 and 8 of EFTA Surveillance Authority Decision No 404/14/COL of 8 October 2014 on the Investment Incentive Scheme in Iceland, by failing, within the time limits prescribed, to take all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area by Articles 3, 4 and 5 of that decision, to cancel any outstanding payments referred to in Article 7 third sentence of that decision, and to provide the EFTA Surveillance

Authority with the information outlined in Article 8 of that decision.

2. Orders Iceland to bear the costs of the proceedings.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 29 July 2016.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President