ORDER OF THE COURT

31 March 2016

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Admissibility – Locus standi – Status of an association)

In Case E-4/15,

Icelandic Financial Services Association, represented by Dr Hans-Jörg Niemeyer, Rechtsanwalt, Brussels, Belgium, and Dr Christian Kovács, Rechtsanwalt, Brussels, Belgium, acting as Counsel,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Maria Moustakali and Clémence Perrin, Officers, subsequently by Markus Schneider, Deputy Director, Maria Moustakali and Clémence Perrin, Officers, Department of Legal & Executive Affairs, acting as Agents, and subsequently by Carsten Zatschler, Director, Markus Schneider, Deputy Director, Maria Moustakali and Clémence Perrin, Senior Officers, Department of Legal & Executive Affairs, acting as Agents,

defendant,

supported by **the Government of Iceland**, represented by Ambassador Kristján Andri Stefánsson, Director General at the Ministry for Foreign Affairs, acting as Agent, Supreme Court Attorney Jóhannes Karl Sveinsson, acting as Counsel, and District Court Attorney Bjarnveig Eiríksdóttir, acting as Co-Counsel,

intervener,

APPLICATION for the annulment of EFTA Surveillance Authority Decision No 298/14/COL of 16 July 2014, notified in OJ 2014 C 400, p. 13, ("the contested decision"), to close the case concerning existing aid to the Icelandic Housing Financing Fund (*Íbúðalánasjóður*).

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the applicant, the defendant and the intervener, and the written observations of the European Commission ("the Commission"), represented by Leo Flynn, Legal Adviser, and Lorna Armati and Paul-John Loewenthal, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Hans-Jörg Niemeyer, Christian Kovács and Thore Neumann, the defendant, represented by Clémence Perrin and Maria Moustakali, the intervener, represented by Jóhannes Karl Sveinsson, and the Commission, represented by Leo Flynn, Lorna Armati and Paul-John Loewenthal, at the hearing on 12 November 2015,

makes the following

Order

I Introduction

1 The applicant, Icelandic Financial Services Association ("IFSA"), is an association governed by Icelandic law, which represents all registered financial undertakings in Iceland. These include universal, investment and savings banks as well as insurance, leasing, securities and card companies.

2 For the past 60 years, public intervention in the Icelandic housing market has aimed at encouraging private home ownership. In 1955, a basis for a systematic State involvement, both as regards policy making in the field of housing affairs and the provision of loans for private housing, was created. The State Housing Agency (*Húsnæðisstofnun ríkisins*) was established by Act No 51/1980 and provided, *inter alia*, loans to the general public of Iceland, thereby fostering private home ownership.

3 The Act on Housing Affairs No 44/1998 ("the Housing Act") entered into force on 1 January 1999 and established the Housing Financing Fund ("HFF") (*Íbúðalánasjóður*). It took over all assets and obligations of the State Housing Agency, including the tasks of issuing housing bonds and providing housing loans through a bond-swap system. The HFF is an independent State-owned institution.

4 The Housing Act was amended by Act No 57/2004, which entered into force on 1 July 2004. A number of changes were made to the housing loan system but the general purpose and structure of the system remained the same.

5 The HFF's activities have been scrutinised by ESA on six separate occasions in the years 2004 to 2012.

6 On 11 August 2004, by Decision No 213/04/COL (notified: OJ 2005 C 112, p. 8; EEA Supplement 2005 No 23, p. 3) ("the 2004 Decision"), ESA declared the HFF's house financing mechanisms compatible with the EEA Agreement. At the time of the 2004 Decision the HFF provided three categories of loans. First, it provided *general loans* to individuals for the purchase, renovation or construction of residential housing. Second, the HFF provided *supplementary loans* awarded to individuals with low income and limited assets upon referral from the housing committee of a municipality. Finally, the HFF provided *loans for rental housing* to municipalities, associations and companies for the construction or purchase of residential housing for rent. The supplementary loans were later abolished by Act No 120/2004, which entered into force on 3 December 2004 (see Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* [2006] EFTA Ct. Rep. 42, paragraph 8).

7 On 7 April 2006, following an application by the Bankers' and Securities' Dealers Association, the predecessor of IFSA, the 2004 Decision was annulled by the Court in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above.

8 On 21 June 2006, in response to the Court's judgment, by Decision No 185/06/COL (OJ 2006 C 314, p. 90; EEA Supplement 2006 No 63, p. 3), ESA decided to initiate a formal investigation into the HFF, considering the aid scheme to be new aid.

9 On 28 February 2007, the HFF submitted comments on ESA Decision No 185/06/COL.

10 On 27 June 2008, by Decision No 405/08/COL (OJ 2010 L 79, p. 40; EEA Supplement 2010 No 14, p. 20), ESA decided to close the formal investigation procedure applicable to new aid. On the same day, ESA opened new proceedings under Article 1(1) of Part I and Articles 17 to 19 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 ("SCA") regarding existing aid. Following this reconsideration, also on 27 June 2008, ESA sent a letter to the Icelandic Government pursuant to Article 17(2) of Part II of Protocol 3 SCA.

11 On 1 September 2008, IFSA submitted comments on ESA's letter of 27 June 2008.

12 On 8 September 2008, the Icelandic Government replied to ESA's letter of 27 June 2008.

13 On 18 July 2011, by Decision No 247/11/COL ("the 2011 Decision"), ESA decided that the HFF scheme in the form of state guarantee, income tax exemption, interest support and lack of adequate rate of return/lack of dividend payments constituted existing aid incompatible with the EEA Agreement, and proposed appropriate measures for the financing of the HFF.

14 On 6 October 2011, the Icelandic Government replied, stating that it was willing to accept ESA's proposal for appropriate measures.

15 On 11 November 2011, IFSA submitted comments on the 2011 Decision, maintaining the position that the response of the Icelandic Government did not constitute proper acceptance of that Decision.

16 On 10 February 2012, ESA requested further information from IFSA regarding its previous submissions.

17 On 1 June 2012, IFSA replied and supplied further information.

18 On 5 June 2012 and 27 April 2013, IFSA participated in two meetings with ESA.

19 On 27 May 2013, IFSA submitted further updated information regarding the Icelandic banking sector and the problems faced by HFF.

20 On 16 July 2014, by Decision No 298/14/COL, ESA recorded Iceland's acceptance of the appropriate measures proposed in the 2011 Decision and noted further commitments entered into by Iceland. ESA then closed the case concerning the review of existing aid to the HFF. The contested decision was notified in the Official Journal of the European Union on 13 November 2014.

21 By an application lodged at the Court on 28 January 2015, IFSA brought an action under the second paragraph of Article 36 SCA seeking the annulment of the contested decision.

II Legal background

22 Article 59 EEA reads:

> *(1) In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.*
>
> *(2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned*

to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

…

23 Article 61(1) EEA reads:

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.

24 Article 62(1) EEA reads:

All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. …

25 Article 16 SCA reads:

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

26 Article 36 SCA reads:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

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

…

27 Article 1(1) of Part I of Protocol 3 SCA reads:

The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

28 Article 18 of Part II of Protocol 3 SCA reads:

> *Where the EFTA Surveillance Authority, in the light of the information submitted by the EFTA State pursuant to Article 17 of this Chapter, concludes that the existing aid scheme is not, or is not longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendations may propose, in particular*
>
> *(a) substantive amendments of the aid scheme, or*
> *(b) introduction of procedural requirements, or*
> *(c) abolition of the aid scheme.*

29 Article 19(1) of Part II of Protocol 3 SCA reads:

> *Where the EFTA State concerned accepts the proposed measures and informs the EFTA Surveillance Authority thereof, the EFTA Surveillance Authority shall record that finding and inform the EFTA State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.*

The contested decision

30 On 16 July 2014, ESA adopted Decision No 298/14/COL. Pursuant to Article 19(1) of Part II of Protocol 3 SCA, Iceland's acceptance of the appropriate measures proposed in the 2011 Decision on the financing of the HFF was recorded. Further commitments entered into by Iceland were noted and the case concerning the review of existing aid to the HFF was closed. The contested decision was notified in the Official Journal of the European Union on 13 November 2014.

III Procedure and forms of order sought

31 On 28 January 2015, IFSA lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of the contested decision.

32 The Applicant requests the Court to:

> *(i) annul the EFTA Surveillance Authority's decision 298/14/COL of 16 July 2014 (OJ 2014 of 13 November 2014, No C 400, p. 13) to close the case concerning existing aid to the Icelandic Housing Financing Fund (Íbúðalánasjóður), and*
>
> *(ii) order the EFTA Surveillance Authority to bear the costs of the proceedings.*

33 On 26 February 2015, ESA requested an extension of the deadline to lodge a defence. On 27 February 2015, the President, pursuant to Article 35(2) of the Rules of Procedure ("RoP"), granted ESA's request and set the deadline for the defence to 27 April 2015.

34 On 27 April 2015, ESA submitted its defence. The defendant, the EFTA Surveillance Authority, requests the Court to:

> *(i) dismiss the application, or, in the alternative, declare the application inadmissible in whole or in part;*
>
> *(ii) order the applicant to bear the costs.*

35 On 8 May 2015, IFSA requested an extension of the deadline to lodge a reply to the defence. On 11 May 2015, the President, pursuant to Article 78 RoP, granted IFSA's request and set the deadline for the reply to 19 June 2015.

36 On 10 June 2015, the Government of Iceland sought leave to intervene in support of the form of order sought by ESA, pursuant to Article 36(1) of the Statute and Article 89 RoP. On 19 June 2015, IFSA submitted its reply. On 25 and 26 June 2015, ESA and IFSA, respectively, lodged their written observations on the application to intervene.

37 On 3 July 2015, the European Commission submitted written observations. On 8 July 2015, ESA requested an extension of the deadline to submit its rejoinder. On 9 July 2015, the President, pursuant to Article 78 RoP, granted an extension until 17 August 2015. On 13 July 2015, the President by order granted the Government of Iceland leave to intervene pursuant to Article 89(3) RoP.

38 On 4 August 2015, the Government of Iceland requested an extension of the deadline to submit its statement in intervention. On 5 August 2015, the President, pursuant to Article 78 RoP, granted an extension until 1 September 2015. On 17 August 2015, ESA submitted its rejoinder.

39 On 1 September 2015, the Government of Iceland lodged its statement in intervention at the Court's Registry.

40 The intervener, the Government of Iceland, requests the Court to:

> *(i) dismiss the application, or, in the alternative, declare the application inadmissible in whole or in part,*
>
> *(ii) order the applicant to bear the costs of the intervener.*

41 On 8 September 2015, IFSA requested an extension of the deadline to submit its comments on the statement in intervention. On 9 September 2015, the President, pursuant to Article 78 RoP, granted an extension until 25 September 2015. On 9

September 2015, ESA requested an extension of the deadline to submit comments on Iceland's statement in intervention. On 10 September 2015, the President, pursuant to Article 78 RoP, granted an extension until 25 September 2015. On 25 September 2015, both IFSA and ESA submitted comments on the statement in intervention.

42 The parties presented oral argument and answered questions put to them by the Court at the hearing on 12 November 2015.

43 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

IV Law

Admissibility

Arguments of the parties

IFSA

44 IFSA submits that it has standing to challenge the contested decision pursuant to the second paragraph of Article 36 SCA, as the contested decision entails a legally binding effect by terminating a "decision making procedure" under Article 19(1) of Part II of Protocol 3 SCA capable of affecting the interests of IFSA. Further, IFSA claims to have *locus standi* as it is directly and individually concerned by the contested decision. The standing of IFSA's predecessor, the Bankers' and Securities Dealers' Association of Iceland, was recognised by the Court in Case E-9/04 *Bankers' and Securities Dealers' Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Ct. Rep. 42, which, in substance, assessed the same aid scheme addressed by the contested decision.

45 In the alternative, IFSA maintains that it has standing in its own right as an association representing the interests of undertakings, which themselves have *locus standi*. According to Article 2 of its Articles of Association, IFSA is entitled to "promote the interests of companies providing financial services" which includes the representation of the Icelandic financial institutions' interests in legal proceedings. Moreover, IFSA has played not only a decisive role, at ESA's express invitation, throughout the administrative proceedings; IFSA and its predecessor have assisted ESA for over ten years. It has also played a significant role in the legislative processes relating to the reform of the HFF.

46 According to IFSA, the commercial banks would be entitled to bring an action for annulment individually, as they are directly and individually concerned by the contested decision. Individual concern may arise from the beneficiary's important and substantial position on the relevant market. The commercial banks and the HFF are competitors on the housing loan market in Iceland, on which the HFF has

a dominant market position that is expressly recognised by ESA. Due to benefits from manifold aid measures, in particular the state guarantee ruling out the bankruptcy of the HFF, the company's income tax exemption, the lack of a requirement for the HFF to pay dividends, and the interest support mechanism, the HFF's refinancing costs are significantly reduced, enabling it to offer housing loans at a lower price than commercial banks. In its reply, IFSA submits that direct and individual concern must be inferred not only from factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. It can also be established by other factors, such as the loss of an opportunity to make a profit or the less favourable development of a company's market share than would have been the case without such aid.

47 In its reply, IFSA submits that the *locus standi* of an association has to be assumed if the association's membership accounts for a significant share in a tight market, which is significantly disturbed by the state measure in question. Consequently, this principle is applicable *a fortiori* where IFSA's members account for the overwhelming majority of the market share held by commercial banks in the market for mortgage loans for residential housing in Iceland.

48 Moreover, IFSA emphasises the relevance of its role as an originator of the complaint leading to the opening of the formal examination procedure and its subsequent active role throughout the proceedings.

49 In IFSA's view, commercial banks offer mortgage loans on the basis of regular market conditions, whereas the conditions offered by the HFF are distorted by State aid and the HFF has used its State funding to deliberately undercut the interest rates at market conditions between 2006 and 2011 by approximately 1%, even as far as operating at a loss. This led to a loss of business opportunities. The increase in the market share held by commercial banks since 2010 does not contradict these adverse effects. Rather, it demonstrates their ability to regain market shares lost during the financial crisis. Moreover, the requirement of a first priority collateral for maximum HFF funding automatically leaves commercial banks' mortgage loans secured with second priority with higher borrowing costs and puts them at a further competitive disadvantage.

50 IFSA submits further that the commercial banks are a limited class of traders identifiable prior to the adoption of the contested decision. While the three major banks, Íslandsbanki, Landsbankinn, and Arion Bank, were restructured in the aftermath of the financial crisis, they remain identical to their predecessors as regards the provision of mortgage loans. In IFSA's view, the question whether a group's members can be identified at a given moment in time is in no way linked to the fact that the composition of a specific group of individual companies may have not remained stable for more than a decade.

ESA

51 According to ESA, IFSA has not established that it has sufficient standing to challenge the contested decision, which is addressed to Iceland, is legally binding and constitutes a final decision. To the extent that the provisions governing *locus standi* are substantively the same in the EU and the EEA, the principle of homogeneity applies. In State aid law, the *Plaumann* test has been applied with regard to *locus standi* and applicants who challenge the merits of a decision appraising aid are considered to be individually concerned by that decision if their market position is substantially affected by the aid to which the contested decision relates.

52 A professional association that is responsible for protecting the collective interests of its members is entitled to bring an action for the annulment of a final decision on State aid only in two sets of circumstances. First, it may bring an action where the undertakings that it represents or some of those undertakings themselves are sufficiently affected (and are themselves in a position to bring an admissible action). Second, the association may bring an action if it can prove an interest of its own, in particular because its position as a negotiator has been affected by the measure, the annulment of which is sought.

53 In relation to the first limb of the test, ESA contends that IFSA's reference to the fact that it was found to have *locus standi* in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* and that the judgment and the contested decision concern the same aid scheme is insufficient to meet the test.

54 According to ESA, in the context of actions brought by associations, an applicant can be individually concerned as a result of it having played a significant role in the procedure leading to the adoption of the challenged decision if it occupied a clearly circumscribed position as negotiator that was intimately linked to the actual subject matter of the decision, thus placing it in a factual situation which distinguishes it from all other persons. IFSA cannot be considered to have played such a role considering that it had no procedural right to submit comments in the context of a procedure pursuant to Article 19(1) of Part II of Protocol 3 SCA. It only did so at ESA's invitation and its role did not go further than providing comments on behalf of its members, while the actual negotiations were bilateral between Iceland and ESA. Further, the procedure for review of existing aid is not challengeable in the same way as an assessment by ESA of a new aid scheme.

55 In relation to the second limb of the test, ESA contends that IFSA's statements are insufficient to demonstrate the substantial adverse effect the aid scheme allegedly has on the market position of the commercial banks. IFSA has not demonstrated the extent of the impact of the aid scheme on the economic situation of its members. It has also failed to demonstrate that the market position of any of its members was affected more than that of any competitor in the market and its arguments do not distinguish the situation of one or more of its members.

56 Moreover, the allegation concerning the dominance of the HFF should be rejected as completely unfounded. IFSA's assertion that the commercial banks have regained market share since 2010 contradicts the existence of substantial adverse effects of the aid scheme.

57 IFSA's members cannot be individually concerned because they belong to a group of persons that were identified or identifiable by reason of criteria specific to the members of the group. The number and identity of the commercial banks on the housing loan market were not precisely determined at any point in time whether through a system of approval by decree or by the fact that those banks were granted any sort of exclusive rights before the aid scheme was adopted. Rather, housing loans were also offered by other financial undertakings such as savings banks, pension funds and mortgage companies. Moreover, the membership of IFSA changed in the aftermath of the financial crisis due to the winding up of some of its members.

58 With regard to the applicant's claim to have *locus standi* in its own right as an association, ESA emphasises that the mere fact that the applicant represents all the commercial and savings banks present on the mortgage market in Iceland does not create a "special or exceptional situation". It is further questionable whether IFSA could at all be intimately linked to negotiations in the housing loan sector considering that it represents all registered financial undertakings in Iceland some of which are active in sectors in which the HFF does not operate.

59 ESA submits that banks are not competitors of the HFF, whose role is to promote security and equal rights as regards housing in Iceland by providing loans on manageable terms to the general public. Thus, the aid cannot be considered to benefit one competitor over others active on the same market.

60 In relation to the alleged standing of the applicant as a representative of its member banks which themselves have *locus standi*, ESA notes that the graph relied on as evidence of the HFF's alleged market dominance shows outstanding mortgage credits, which cannot establish a meaningful picture of the market as it currently stands.

61 ESA further contests IFSA's reasoning that commercial banks lost opportunities to make profits and increase their activities in the mortgage loan market due to the HFF's alleged undercutting of interest rates, its operational structure and its regulatory competitive advantages. The lending rates of the HFF are calculated on the basis of its funding costs, with an added margin set by the Ministry of Social Affairs, and are thus not aligned with those of the commercial banks. The other measures may not be considered advantages, but, instead, measures aimed at compensating the HFF for the provision of a service of general economic interest. The commercial banks' loss of opportunities may also be due to the financial crisis.

Government of Iceland

62 The Government of Iceland submits that nothing in IFSA's submissions indicates that the applicant's situation falls within any of the three grounds required by case law for instituting proceedings. It is for IFSA to establish both the extent to which the aid has been detrimental to its market position and a link between the measure, which is the subject of the contested decision, and the alleged substantial effect on its position on the relevant market. IFSA needs to demonstrate a loss of opportunity to make a profit or less favourable development than would have been the case without such aid. The evidence submitted by IFSA concerning the market relates primarily to the period before changes based on the appropriate measures proposed by ESA were made and is, thus, not relevant.

63 The Government of Iceland contends that, according to data from the Central Bank of Iceland, commercial banks secure most of the market. The Icelandic Competition Authority considers the three major banks to be collectively dominant on the financial market in Iceland and that the HFF's operations have not limited competition in the market. In contrast to banks, the HFF is under the universal obligation to promote security and equal rights and has to offer the same interest rates throughout the country even though loan impairments have been considerably higher in the rural areas. Therefore, it has not competed and does not compete on price.

64 The Government of Iceland adds that the HFF's status as the only mortgage provider in Iceland that is required to finance mortgages for their full term together with its universal service obligation puts it at a considerable disadvantage. Interest rates for indexed housing loans offered by the HFF have been higher than those offered by commercial banks since 2012.

European Commission

65 The Commission submits that, in the context of annulment actions directed against State aid decisions, to be considered individually concerned it suffices for an applicant to show that it is an "interested party" pursuant to Article 1(h) of Part II of Protocol 3 SCA if that applicant is seeking to vindicate its procedural rights arising when interested parties are invited to participate in a formal investigation procedure. However, unlike the situation in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, there is no possibility under Protocol 3 SCA for ESA to open a formal investigation procedure once the EFTA State concerned accepts the appropriate measures proposed by ESA to modify the existing aid scheme.

66 It is for the applicant to demonstrate individual concern by showing that the decision it challenges affects them by reason of certain attributes which are peculiar to them or by reason of a circumstance in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed. There must be a real

competitive relationship between the applicant and the beneficiary, and the market position of the applicant must be substantially affected by the measures. It is for the applicant to show a causal link between the factual elements it invokes and the prejudice to its market position by reference to a number of concrete factors and not simply speculation. Moreover, participation in the administrative proceedings leading to the adoption of a decision after a formal investigation procedure is neither necessary nor sufficient to be individually concerned, as only a significant effect on its market position will suffice.

67 According to the Commission, associations of undertakings can be individually concerned, for *Plaumann* purposes, by State aid decisions on two main grounds: either because the decision affects directly and individually the association in its own rights or because its members are directly and individually concerned. Whereas the latter situation does not apply here, had the association shown that it had a role as a negotiator with the Commission or ESA that is affected by the contested decision, this could have demonstrated individual concern.

Findings of the Court

68 IFSA seeks the annulment of the contested decision "to close the case concerning existing aid to the Icelandic Housing Financing Fund (*Íbúðalánasjóður*)".

69 Paragraph three of the contested decision lays out ESA's proposals made in its 2011 Decision; a decision taken pursuant to Article 18 of Part II of Protocol 3 SCA. The contested decision then sets out that "[t]he Icelandic authorities informed the Authority of their acceptance of the appropriate measures in a letter dated 6 October 2011 (Event No. 610792), completed by further information submitted in particular on 5 June 2012 (Event No. 637062), 7 October 2012 (Event No. 648980), 7 January 2013 (Event No. 658858) and 22 May 2014 (Event No. 709426)". ESA also noted that it had "consulted with the complainant, the Icelandic Financial Services Association, who provided extensive comments on the proposed Icelandic measures, notably on 11 November 2011 (Event No. 713194), 1 June 2012 (Event No. 639998) and 27 May 2013 (Event No. 673674), as well as in various meetings".

70 In paragraphs 24 and 25 of the contested decision, ESA found that "the Icelandic authorities have accepted the appropriate measures set out in Decision No. 247/11/COL" and recorded that finding. Further, ESA recorded that "pursuant to Article 19(1) of Part II of Protocol 3, Iceland is bound by its acceptance to fully implement the appropriate measures". Finally, ESA reminded the Icelandic authorities of its obligation to keep all systems of existing aid under constant review, in cooperation with the EFTA State concerned and that the Icelandic authorities should therefore provide ESA with detailed information on any changes in the definition of public service entrusted to the HFF, including with regard to the operation of the review mechanism.

71 The present case concerns existing aid. Article 62(1) EEA provides that all existing systems of State aid in the EEA/EFTA States shall be subject to constant review by ESA as to their compatibility with Article 61 EEA in accordance with the rules set out in Protocol 26 to the EEA Agreement on the powers and functions of the EFTA Surveillance Authority in the field of State aid.

72 Article 1 of Part I of Protocol 3 SCA provides that ESA shall, in cooperation with the EFTA States, keep all systems of aid under constant review. As part of that review, ESA is to propose to the EFTA States any appropriate measures required by the progressive development or by the functioning of the EEA Agreement. Paragraph 2 of the same Article provides that if, after giving notice to the parties concerned to submit their comments, ESA finds that aid is not compatible with the EEA Agreement having regard to Article 61 EEA, or that such aid is being misused, it shall decide that the EFTA State concerned must abolish or alter such aid within a period of time to be determined by ESA (compare judgments in *Italy* v *Commission*, C-47/91, EU:C:1994:358, paragraph 23; *Namur-Les assurances du credit*, C-44/93, EU:C:1994:311, paragraph 11; and *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 63 and case law cited).

73 According to Article 17(2) of Part II of Protocol 3 SCA, if ESA considers that an existing aid scheme is not, or is no longer, compatible with the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give it the opportunity to submit its comments within a period of one month. Only in duly justified cases may ESA extend this period.

74 According to Article 18 of Part II of Protocol 3 SCA, if, in the light of the information submitted by the EFTA State under Article 17, ESA concludes that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it is to issue a recommendation proposing appropriate measures to the EFTA State concerned. It is incontestable that such a recommendation, which is no more than a proposal, is not, taken in isolation, a challengeable act (compare *TF1* v *Commission*, cited above, paragraph 65 and case law cited).

75 According to Article 19(2) of Part II of Protocol 3 SCA, where the EFTA State concerned does not accept the proposed measures and ESA, having taken into account the arguments of the EFTA State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4) of Part II of Protocol 3 SCA, with Articles 6, 7 and 9 of that Chapter applying *mutatis mutandis*.

76 According to Article 19(1) of Part II of Protocol 3 SCA, where the EFTA State concerned accepts the proposed measures and informs ESA thereof, ESA shall record that finding and inform the Member State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures (in addition, compare judgment in *Commission* v *Council*, C-118/10, EU:C:2013:787, paragraph 55 and case law cited).

77 The present case concerns Article 19(1) of Part II of Protocol 3 SCA. In such a case, ESA and the EFTA State may discuss the proposed appropriate measures. But it is only where ESA decides, in the exercise of its exclusive power to assess the compatibility of State aid with the functioning of the EEA Agreement, to accept the EFTA State's commitments as answering its concerns that the investigation procedure is brought to an end by the decision of ESA. The procedure under Article 19(1) of Part II of Protocol 3 SCA is not a quasi-contractual procedure (compare *TF1* v *Commission*, cited above, paragraphs 68 to 70).

78 In the context of the constant review of existing aid, and where the EFTA State continues to fulfil its commitments, ESA no longer has to adopt a further decision after its Article 19(1) decision is published in accordance with Article 26(1) of Part II of Protocol 3 SCA. The only measure then available to interested third parties – in this case the applicant – to challenge is the Article 19(1) decision, a decision which has binding legal effect (compare *TF1* v *Commission*, cited above, paragraphs 73 and 76). Thus, the contested decision is challengeable.

79 The applicant is the trade association of registered financial undertakings in Iceland including universal, investment and savings banks as well as insurance, leasing, securities and card companies.

80 Pursuant to the second paragraph of Article 36 SCA, a natural or legal person may institute proceedings against a decision addressed to another person only if the decision is of direct and individual concern to them. Since the contested decision was addressed to Iceland, it must be considered whether it is of individual and direct concern to the applicant (see, *inter alia*, order of the Court of 20 March 2015 in Case E-19/13 *Konkurrenten* v *ESA*, not yet reported, paragraph 93 and case law cited).

81 Persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the second paragraph of Article 36 SCA only if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision (see, *inter alia*, *Konkurrenten* v *ESA*, cited above, paragraph 94 and case law cited).

82 IFSA contends that it has *locus standi* on the basis of three alternatives. First, that its predecessor, the Bankers' and Securities Dealers' Association of Iceland, had *locus standi* in the Case *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above. Second, that IFSA has *locus standi* as a trade association as some of the undertakings that it represents have *locus standi*. Third, IFSA contends that that it has *locus standi* having played not only a decisive role, at ESA's express invitation, throughout the administrative proceedings but also a significant role in the legislative processes relating to the reform of the HFF. IFSA maintains that its role as an originator of the complaint leading to the opening of

the formal examination procedure as well as its subsequent active role throughout the proceedings is relevant.

83 That IFSA's predecessor, the Bankers' and Securities Dealers' Association of Iceland, had *locus standi* in Case E-9/04 is immaterial to the determination of standing in the present case.

84 The Court recalls that actions brought by an association of undertakings may be admissible in three situations where that association is not the addressee of the contested measure at issue: first, where the association acts in place of one or more of its members who could themselves have brought an admissible action (see Case E-8/13 *Abelia* v *ESA* [2014] EFTA Ct. Rep. 638, paragraph 86; compare also the judgment in *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 39); second, if the association can prove an interest of its own, in altogether special or indeed exceptional circumstances because its position as a negotiator has been affected by the measure of which annulment is sought (compare the judgment in *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraphs 87 to 95 and case law cited); and, third, where a legal provision expressly confers on professional associations a number of procedural rights (compare the order in *Sdružení nájemníků BytyOKD.cz* v *Commission*, T-559/11, EU:T:2013:255, paragraph 29 and case law cited).

85 With regard to the first of the possibilities detailed in the previous paragraph, Article 2 of IFSA's Articles of Association provides that the association is empowered to represent its members' interests in proceedings before the Court. It must thus be ascertained whether one or more of IFSA's members could have brought an admissible action themselves.

86 The Court notes that IFSA's member financial institutions, "comprising the commercial banks and savings banks", are described as "commercial banks" in the application.

87 IFSA contends that the commercial banks that form part of its membership are directly and individually concerned by the contested decision because those banks' market position is significantly adversely affected by the contested decision. IFSA states that "[t]his widespread availability of subsidized HFF loans continues to constrain the commercial banks' mortgage loan business in Iceland. It deprives the commercial banks' chances to earn risk-adequate margins." IFSA summarises its position in the application stating that "[i]t follows from these observations that the benefits enjoyed by the HFF significantly reduce its refinancing costs, and, at least in the past, enabled the HFF to offer housing loans at a lower price than the commercial banks".

88 IFSA seeks to evidence harm suffered by way of figures 4 and 5 included in the application. Figure 4 is a graph showing "interest rate on indexed mortgage loans 'Banks and HFF'" from 1 January 2004 to 1 July 2014. The graph shows that the interest rate of "banks" was higher than the "mortgage rate of HFF" between spring

2006 and spring 2011. Figure 5, which is also a graph, shows the "interest rate margin on mortgages loans based on HFF44 bond yield, %" from 1 January 2004 to 1 July 2014. This graph shows that between late spring 2006 and late spring 2011 the "banks margin" was higher than the HFF's margin although the two margins were virtually identical at two points in late spring and early summer 2010. No evidence has been submitted indicating the bank or banks referred to in the graphs.

89 Annex 23 to the Application which is an "Overview of Financial Accounts of Financial Institutions for 2013" published by the Icelandic Financial Supervisory Authority notes that, as of 31 December 2013, there were four commercial banks and eight savings banks operating in Iceland: (commercial banks) Arion banki hf., Íslandsbanki hf., Landsbankinn hf., MP banki hf.; (savings banks) AFL sparisjóður ses., Sparisjóður Bolungarvíkur, Sparisjóður Höfðhverfinga, Sparisjóður Norðfjarðar, Sparisjóður Norðurlands, Sparisjóður Strandamanna, Sparisjóður Suður-Þingeyinga and Sparisjóður Vestmannaeyja.

90 IFSA has provided the Court also with a list of its Members as of 18 June 2015, printed from its website, as Annex 2 to its Reply, and with a detailed list from the Icelandic Financial Supervisory Authority of "supervised entities" dated 28 May 2015, as Annex 3 to its Reply. Annex 3 lists the commercial banks supervised by the Icelandic Financial Supervisory Authority as Landsbankinn hf., Íslandsbanki hf., Arion banki hf., and MP banki hf. The savings banks listed are: AFL – sparisjóður ses., Sparisjóður Austurlands hf., Sparisjóður Höfðhverfinga ses., Sparisjóður Norðurlands ses., Sparisjóður Strandamanna ses., and Sparisjóður Suður-Þingeyinga ses.

91 However, IFSA has failed to provide the Court with evidence of which of its members were allegedly deprived of the chance "to earn risk-adequate margins" at the material times alleged between spring 2006 and spring 2011.

92 Moreover, during the 2008 financial crisis, Kaupþing, Glitnir and Landsbanki, the three largest banks in Iceland, collapsed with their assets being transferred to newly established banks: Arion banki hf., Íslandsbanki hf., and Landsbankinn hf. respectively (see Cases E-16/11 *ESA* v *Iceland* ("*Icesave*") [2013] EFTA Ct. Rep. 4, paragraphs 38 and 211; and E-18/11 *Irish Bank Resolution Corporation Ltd* v *Kaupþing hf* [2012] EFTA Ct. Rep. 592). As confirmed by IFSA's attorney at the hearing, Kaupþing, Glitnir and Landsbanki could therefore no longer be members of IFSA. Nevertheless, in its Reply, IFSA submitted that Arion banki hf., Íslandsbanki hf., and Landsbankinn hf. "provid[e] jointly approx. 99% of all mortgage loans within the commercial banks [and] have been active on the market for mortgage loans for many years". This renders IFSA's submissions concerning admissibility inconsistent and unclear.

93 The main body of evidence to which IFSA refers, relating to the period between spring 2006 and spring 2011, pre-dates ESA's 2011 Decision. The 2011 Decision laid down a deadline of 1 January 2012 for the Icelandic authorities to take the

recommended legislative, administrative and other relevant actions. An annulment of the contested decision would require ESA to reconsider whether Iceland's substantive amendments of the aid scheme, or the introduction of procedural requirements, or the abolition of the aid scheme satisfy the requirements of the appropriate measures proposed by ESA in its Article 18 decision – here the 2011 Decision, taking into account any additional relevant facts that may have occurred and impacted upon the relevant market following the deadline in the Article 18 decision, including whether it is appropriate to propose other appropriate measures for the future or to initiate the formal investigation procedure under Article 19(2) of Part II of Protocol 3 SCA (see paragraph 75 above, and compare, to that effect, *TF1* v *Commission*, cited above, paragraphs 72 and 91).

94 Therefore, irrespective of the source of the data displayed in figures 4 and 5, as well as its reliability, and the insufficient clarity of the applicant's submissions and evidence as to which of its members it seeks to represent, which are alternatively described as "banks", "commercial banks", defined in the application as comprising both "commercial banks and savings banks", and "commercial and savings banks", as well as the manifestly inadequate information provided as to the applicant's membership, the present action is devoid of purpose in so far as it relates to the situation prior to the deadline in the 2011 Decision.

95 As regards the circumstances subsequent to the deadline in the 2011 Decision, IFSA may claim to be individually concerned, on behalf of its members, within the meaning of the second paragraph of Article 36 SCA only if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision (see paragraph 80 above).

96 In State aid law, an applicant who challenges the merits of a decision appraising aid taken on the basis of Article 1(3) of Part I of Protocol 3 SCA or at the end of the formal investigation procedure is considered to be individually concerned by that decision if its market position is substantially affected by the aid, or, as in the present circumstances, in the context of a challenge to an Article 19(1) decision, by the existing aid following implementation of the appropriate measures, to which the contested decision relates (compare *Konkurrenten* v *ESA*, cited above, paragraph 95 and case law cited).

97 Accordingly, IFSA must demonstrate that its members' positions on the market are substantially affected. That the decision at issue may have some influence on competitive relationships on the relevant market and that the undertaking concerned is in some sort of competitive relationship with the beneficiary of the decision cannot suffice for that undertaking to be regarded as individually concerned by that measure. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in

receipt of the aid (see *Konkurrenten* v *ESA*, cited above, paragraph 96 and case law cited).

98 However, the mere fact that the contested decision may have some impact on the competitive relationships existing on the relevant market and that IFSA's members were in a competitive relationship with the HFF does not mean that the applicant's members' competitive position is substantially affected. IFSA must also demonstrate the extent of the detriment to its members' market position (see *Konkurrenten* v *ESA*, cited above, paragraph 99 and case law cited). However, demonstrating a substantial adverse effect on its members' position on the market cannot simply be a matter of the existence of certain factors indicating a decline in its members' commercial or financial performance, but may be made by demonstrating the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid, or, in the context of Article 19(1) of Part II of Protocol 3 SCA, such existing aid following implementation of the appropriate measures, to which the contested decision relates (compare *Konkurrenten* v *ESA*, cited above, paragraph 100 and case law cited).

99 In that regard, IFSA submits in its Application that housing loans "create a long standing relationship with the customer and may be used as a tool to combine them with additional banking services to that respective customer including savings accounts, consumer loans, asset management, etc. Furthermore, mortgage loans constitute the most secure loans in a financial institution's loan portfolio. The HFF securing a major part of this business leads the commercial banks into engaging in more risky commercial loans, resulting in a lower rating and higher cost for re-financing" (see also paragraph 87 above). In its Reply, IFSA elaborates substantially as to why the "commercial banks lost and are still losing opportunities to make profits and increase their activities in the market for mortgage loans in Iceland".

100 On the basis of the findings in paragraph 93 above, it is only necessary to consider the evidence relating to the period following the expiry of the deadline in the 2011 Decision. On that basis, it can be seen from the table provided at paragraph 15 of the Reply that the "banks and sav. Banks" have increased their percentage shares of "outstanding mortgage credit by issuers" annually, from approximately 24% in 2011 to approximately 38% in 2014, while the HFF's percentage share has declined annually from its peak in 2011 of approximately 60% to approximately 49% in 2014. Moreover, the graphs discussed at paragraph 88 above illustrate that, from spring 2011 to 1 July 2014, the "commercial banks'" mortgage rates were lower, i.e. cheaper for the consumer, than those of the HFF. Similarly, figure 5 illustrates that from late spring 2011 onwards until 1 July 2014 the "banks'" interest rate margins "on mortgages loans based on HFF44 bond yield" were lower than the HFF's margin.

101 Without it being necessary to make any further assessment on this point, it follows from all of the foregoing, in particular the inconsistent and unclear information provided by IFSA, that IFSA has not established that its members' market position was substantially affected by the existing aid following the implementation of the appropriate measures, which is the subject of the contested decision. Consequently, IFSA, on behalf of its members, lacks standing to challenge the contested decision pursuant to the second paragraph of Article 36 SCA.

102 In relation to the second possibility in which an association may be granted standing detailed in paragraph 84 above, IFSA submits that it played a proactive role throughout the entire administrative proceedings before ESA and notes that the contested decision states that it provided "extensive comments on the proposed Icelandic measures, notably on 11 November 2011, 1 June 2012 and 27 May 2013".

103 In its Reply, IFSA adds that it has also played a significant role in the ongoing legislative processes in Iceland relating to the reform of the HFF and that its role as an originator of the complaint leading to the opening of the formal examination procedure as well as its subsequent active role throughout the proceedings are relevant for the determination of its *locus standi*.

104 In assessing an applicant's *locus standi* it is, of course, relevant to take into account the role it has played before ESA during the existing aid scheme procedure (compare *Konkurrenten* v *ESA*, cited above, paragraphs 97 and 98 and case law cited). In the present case, IFSA submitted comments on the 2011 Decision on 11 November 2011, supplying further information at ESA's request on 10 February 2012, participating in two meetings with ESA on 5 June 2012 and 27 April 2013, and submitting further updated information on 27 May 2013. It is clear that IFSA played a significant, active role in the administrative proceedings in this case.

105 However, its role in the administrative proceedings was that of a concerned third party that sought to further the commercial interests of constituent members on the Icelandic mortgage loans market. Thus, IFSA's position was not comparable to that of one of the applicants, the Landbouwschap, in *Van der Kooy and Others* v *Commission*, 67/85, 68/85 and 70/85, EU:C:1988:38, which had negotiated with the supplier of gas the preferential tariff challenged by the Commission and was also one of the signatories to the agreement establishing that tariff which had been obliged also to engage in new tariff negotiations with the supplier and to sign a new agreement in order to put into effect the Commission's decision (compare *3F* v *Commission*, cited above, paragraph 85).

106 Nor did IFSA occupy a clearly circumscribed position as negotiator which was intimately linked to the actual subject-matter of the decision, thus placing it in a factual situation which distinguished it from all other persons (compare the judgment in *Comité d'entreprise de la Société française de production and Others*, C-106/98 P, EU:C:2000:277, paragraph 45).

107 Consequently, IFSA cannot prove an interest of its own, namely, that its position as a negotiator has been affected by the contested decision in altogether special or indeed exceptional circumstances (see paragraph 83 above).

108 Finally, as regards the third possibility in which an association may be granted standing detailed in paragraph 84 above, there is, in the present case, no legal provision that expressly confers on professional associations a series of procedural powers.

109 Consequently, it must be held that the action brought against the contested decision is inadmissible.

V Costs

110 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 the defendant has requested that the applicant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay its costs and those of the defendant. The intervener shall bear its own costs. The costs incurred by the Commission are not recoverable.

On those grounds,

THE COURT

Hereby orders:

1. **The application is dismissed as inadmissible;**

2. **Icelandic Financial Services Association is to bear its own costs and the costs incurred by the EFTA Surveillance Authority;**

3. **The Government of Iceland is to bear its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 31 March 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President