



EUROPEAN COMMISSION

Brussels, 30.06.2004

C (2004) 2205 fin

**Subject: State Aid N 89/2004 – Ireland
Guarantee in favour of the Housing Finance Agency (HFA)
Social housing schemes funded by the HFA**

Sir,

1. Procedure

- (1) By letter dated 2 February 2004 your authorities notified a legislative measure (Section 17 of the Housing (Miscellaneous Provisions) Act 2002 (hereinafter 2002 Act) pursuant to which the Minister for Finance may guarantee the borrowings of the Housing Finance Agency (hereinafter HFA). The Irish authorities asked for an authorisation by the Commission for a time-period of 10 years. By letter dated 2 April 2004 the Commission asked for additional information, which was provided by letter dated 22 April 2004.

2. History

- (2) On 9 March 2001 Ireland submitted a notification concerning the provisions of the Housing Finance Act 1981 relating to guarantees granted by the Minister for Finance to the Housing Finance Agency. By a decision dated 3 July 2001, SG (2001) D/289528, the Commission found that the notified measure under which the Minister for Finance guaranteed the Agency's borrowings was State aid according to Article 87(1) EC being compatible with the EC-Treaty pursuant to Article 86(2) EC.

2.1 The HFA

- (3) The HFA is a company limited by shares promoted by the Minister for the Environment and Local Government. It is regulated by public law. All of the issued share capital of the Agency is beneficially owned by the Minister for Finance. Directors are appointed by the Minister for the Environment, Heritage and Local Government with the consent of the Minister for Finance. The legislation governing the Agency's activities is the Housing Finance Agency Act 1981 with its amendments 1982, 1985, 1988 and 1992 as well as the Planning and Development (Amendment)

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Act 2002, section 20, and the 2002 Act. According to the applicable legislation the Agency operates exclusively on behalf of the State.

- (4) Historically, the only objective of the HFA has been to advance funds to local authorities in Ireland for social housing and related purposes, because the Irish State has always provided significant support for housing for the most socially disadvantaged households. Pursuant to Section 10 of the 1981 Act the HFA raises funds on the capital markets. Those funds are then advanced to local authorities to finance the performance by them of their obligations under the Housing Acts 1966 – 2002. These Acts provide the statutory basis for the provision of social housing by local authorities in Ireland. The nature and scope of the Agency’s fundraising activities are restricted by applicable legislation and its own internal statutes.
- (5) Section 11 of the 1981 Act provides that this borrowing by the HFA may be subject to a State guarantee by the Minister for Finance. Your government states that the purpose of the State guarantee is to facilitate borrowing by the Agency at the best available rates. The guarantee assists the HFA in accomplishing its principal statutory objective, which is to support local authorities in Ireland in carrying out their statutory functions within the framework of the social housing policy of the State. The Agency does not benefit from any other statutory guarantees or equivalent support. It is in close connection to the public authorities and acts in its fundraising activities as an instrument of the State.

3. Description of the notified measure

- (6) Since the Commission decision in July 2000, in which the Commission considered the aid granted to HFA being compatible with the EC-Treaty, the 2002 Act has been enacted. That Act will include among its provisions, Section 17, the subject of the notification, which will increase the range and scope of HFA’s activities and responsibilities.

It provides that HFA will:

a) be given increased borrowing powers;

- (7) The limit of the Agency’s borrowing power was set out in Section 10 of the 1981 Act. The most recently implemented amendment of the Agency’s borrowing power was Section 29 of the Housing (Miscellaneous Provisions) Act, 1992, which fixed the limit at €1.905 billion. Pursuant to Section 17(c) of the 2002 Act the limit is now increased to €6 billion.

b) be able to lend directly to approved voluntary housing bodies engaged in the provision of social housing;

- (8) Currently, voluntary housing bodies are dependent on local authorities for their funding, because the Agency does not fund voluntary housing bodies directly. The local authorities, in turn, obtain the funding they provide to the voluntary housing bodies either directly from the State or from the Agency. To qualify for funding from the State funded schemes for housing administered by the local authorities, a voluntary body must be approved by the Minister for the Environment and Local Government under Section 6 of the 2002 Act.

- (9) Pursuant to Section 17(a) of the 2002 Act the HFA may now lend **directly** to approved voluntary housing bodies engaged in the provision of social housing, where currently the HFA provides indirect lending to these bodies through local authorities. Part 2 of the Voluntary Housing Memorandum sets out the criteria for voluntary housing bodies seeking approved status from the Minister. It also sets out conditions in relation to their operations, which ensure that their activities are strictly confined to the performance of their statutory functions. The provision of cheap funding by the Agency is strictly limited to the statutory functions of the voluntary housing bodies and requires the approval of the Department of Environment and Local Government.
- (10) The voluntary housing bodies supplement the social housing activities of the local authorities in Ireland and operate on a not-for-profit basis. The conditions for eligibility for housing in a scheme administered by a voluntary housing body are the same as those applied for social housing provided by a local authority.
- (11) The principle eligible category for housing provided is *“persons whose need for accommodation has been included in a local authority’s most recent assessment of housing needs under Section 9 of the Housing Act, 1988, or have been accepted for inclusion in the next such assessment”*. Additional categories of eligible persons are *“homeless persons as defined in Section 2 of the Housing Act, 1988”* and returning indigent emigrants. Tenancies within the housing developments built by the voluntary housing bodies are allocated in consultation with the local authority concerned.
- (12) According to your government this direct access to funding should enable the voluntary housing bodies to play a more significant role in the management and procurement of social housing provision in Ireland.
- c) *be empowered to finance, in addition to social housing projects, local authorities’ capital expenditure relating to water services projects;*
- d) *be empowered to finance local authorities’ capital expenditure relating to waste management.*
- (13) This notification covers Section 17 in so far as it relates to its paragraphs (a) and (b). According to your authorities it does not cover the element of Section 17 that relates to the HFA’s ability to finance local authorities’ water services and waste management projects. Your government also confirms that the HFA will not provide financing guaranteed on the basis of Section 17 to local authorities for water services and waste management projects until these arrangements are duly authorised by the Commission.
- (14) Your authorities take the view that the changes introduced by the notified measure are not relevant to the legal analysis under the State aid rules of the guarantee power provided for in Section 11 of the 1981 Act and do not affect the continued application of the legal analysis contained in the Commission Decision of 3 July 2001.
- (15) Your government is concerned that lenders may raise queries concerning the application of the State aid rules to the increase in the Agency’s borrowing limit and to the new statutory provision permitting the Agency to provide finance directly to voluntary housing bodies. Your government is also concerned that any element of uncertainty resulting from those queries could risk undermining the Agency’s ability to perform its task. Accordingly, your authorities request the Commission to adopt a decision confirming that the provision by the Agency of finance directly to voluntary housing bodies pursuant to Section 17(a) of the 2002 Act is not aid for the purposes of Article 87(1) of the EC-Treaty.

4. Assessment of the notified measure

4.1 HFA activities:

- (16) The HFA uses State guarantees in order to raise funds on the capital market at preferential terms, which are then advanced to (a) municipalities as well as (b) voluntary housing bodies, to be used by both of them for the provision of social housing.

4.2 Two different levels of assessment:

- (17) On a first level, the effect of the State guarantee in favour of HFA has to be assessed (see 4.2.2).
- (18) On a second level, the Commission must also assess the effects of the provision of cheap financing by HFA to (a) municipalities as well as (b) voluntary housing bodies for social housing activities (see 4.2.3).

4.2.1 Application of the principles on special credit institutions¹:

- (19) HFA is a special public credit institution benefiting from State guarantees that provides dedicated financing for social housing purposes.
- (20) The activities of special credit institutions aim at supporting the structural, economic and social policies and the public tasks of their public owners in accordance with their public mission. It must be taken care that special credit institutions are only entrusted with promotional tasks in compliance with the State aid rules of the Community. The fulfilment of promotional tasks shall be governed by the respect of the prohibition of discrimination under Community law.
- (21) The application of the principles on special credit institutions is without prejudice to the examination of these activities under the Community State aid rules *vis-à-vis* the beneficiaries. It is also without prejudice to the application of other provisions of the Treaty and to the international obligations of the Community concerning State aid and other subsidies.
- (22) The advantages for special credit institutions immanent to the State guarantees may, among others, be used in the following areas:
- 1) Fulfilment of public promotional activities:
- (23) The public promotional tasks of the special credit institutions, e.g. the raising and/or channelling of State financial support, consist in the implementation and administration of promotional measures at the request of the State in precisely described promotional areas, in particular environment-friendly investment, infrastructure, housing and services of general interest. The public promotional tasks must be described in concrete terms in the relevant legal provisions.

¹ See Amendments of the Commission's proposal for appropriate measures on State guarantees for the public credit institutions in Germany, OJ C-150 of 22 June 2002 (pages 7 to 8).

- (24) For the implementation of their public promotional tasks special credit institutions may use all instruments at their disposal, in particular the principle of channelling through funds to beneficiaries via commercial banks and financing in consortia. Addressees of their promotional measures can be all persons and entities of private and public legal form.
- (25) For the fulfilment of their public promotional tasks special credit institutions may only engage in services and other activities (e.g. treasury management, risk management and consultancy on their promotional activities), which are directly in connection with the fulfilment of their tasks; trade in securities, deposited funds business and giro account business are allowed to special credit institutions only for their own account and only to the extent that they are directly in connection with their public promotional tasks.
- 2) Granting of loans and other forms of financing to the State, municipalities and special purpose associations of public legal form.
- (26) In summary, special credit institutions may use State guarantees for public (service) tasks, for instance, firstly, to finance entities of the State sphere (e.g. municipalities) without restrictions (closed-cycle approach) or, secondly, to generate and distribute subsidies at the request of the public authorities but only if this is in line with the State aid rules vis-à-vis the final beneficiaries.

4.2.2 Effect of the guarantee vis à vis HFA:

- (27) HFA is a legal entity closely connected to the public authorities, which is restricted by the applicable legislation and by its own internal statutes to the performance of the activity of fundraising for the social housing activities of the local authorities and voluntary housing bodies.
- (28) The limits on the lending powers of HFA mean that the advantage accruing to HFA as a credit institution by virtue of the State guarantees cannot be exploited by HFA to allow it to compete with commercial banks in lending money to third parties. The Commission is therefore of the opinion that the guarantees granted by the State remain within the sphere of financing of the State.
- (29) HFA is therefore not an undertaking within the meaning of Article 87 (1) of the EC-Treaty but an intra-governmental funding agency/special credit institution. The State guarantees granted to HFA for the purpose of enhancing HFA's ability to raise finance thus do not constitute State Aid within the meaning of Article 87 (1) of the EC Treaty.

4.2.3 Social housing schemes financed by the HFA:

1. Municipalities:

- (30) Currently the funds raised by HFA are advanced to the municipalities in order to be used by them for their statutory social housing obligation. Municipalities on the other hand provide the funding obtained by HFA to the voluntary housing bodies.

2. Voluntary Housing Bodies:

- (31) According to the notification HFA will in the future be able to lend **directly** to voluntary housing bodies at preferential terms.
- (32) Voluntary housing bodies are not State bodies. To operate as an approved voluntary housing body and qualify for funding for the provision of social housing, the body must first obtain approved status from the Minister for the Environment, Heritage and Local Government. Such bodies must be either limited companies registered under the Companies Acts, societies registered under the Industrial and Provident Societies Act or trusts incorporated under the Charities Acts.
- (33) In addition, such a body must be a not-for-profit organisation and have as primary objects the relief of housing needs or poverty or hardship or the welfare of Travellers and the provision and management of housing. The body must have in its memorandum of association or registered rules provisions prohibiting the distribution of any surplus, profit etc. to members and requiring the assets of the body be applied solely towards its objectives.
- (34) Approved voluntary housing bodies may not engage in any other commercial activity which may adversely affect the financial solvency of their housing activities.
- (35) By permitting the Agency to lend directly to voluntary housing bodies, Section 17(a) of the 2002 Act removes an administrative level in the allocation of funding since the HFA's funding had previously been provided to the voluntary housing bodies through the intermediary of the local authorities.

4.2.4 Distortion of competition in the housing market:

- (36) The municipalities and the voluntary housing bodies on the other hand are active in the housing market. They get preferential financing from the HFA and, in turn, they offer cheaper housing conditions through rents and construction loans, to certain customers and are doing so in competition with other operators in the housing market. They are therefore performing an economic activity. As this activity is supported by the State through the cheap guaranteed funding from the HFA, State resources are involved. Furthermore, since only the municipalities and the voluntary housing bodies receive the advantage of funding at preferential terms with respect to the other operators in the market they are favoured in the sense of Article 87(1) EC Treaty and competition is distorted. Building firms or other entrepreneurs operating with the housing sector are not entitled to the advantage of cheap funding at all. Insofar the Commission cannot exclude that competition with the building sector will be distorted. Since the real estate market is today characterised by significant foreign investment activities the measures may also have an effect on trade between Member States. Thus, the Commission considers the notified measure as State aid within the meaning of Article 87(1) EC Treaty.

4.2.5 Compatibility

- (37) However, according to the jurisprudence of the Court, a State measure is not caught by Article 87(1) EC Treaty where it must be regarded as compensation for the services provided by the recipient undertaking in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus

does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them.

- (38) Ireland claims that the local authorities as well as the voluntary housing bodies provide a service of general economic interest, namely the provision of social housing for allocation to disadvantaged households. Ireland states that the Agency's cheap funding to local authorities (in relation to social housing) and to voluntary housing bodies is strictly limited to the amounts necessary for the funding of the performance of the services of general economic interest. An upper limit to the HFA's borrowing power has been set by statute in the Housing Acts. The budgetary provision for lending to local authorities and approved housing bodies for the provision of social housing in 2004 is €442 million and €135 million, respectively.
- (39) For such compensation to escape classification as State aid in a particular case, however, four conditions must be satisfied. (see Case C-280/00, Altmark Trans GmbH paragraph 87, 88).
- (40) First, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined.
- (41) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- (42) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public services obligation, taking into account the relevant receipts and a reasonable profit.
- (43) Fourth, where the undertaking is not chosen in a public procurement procedure, which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs, which a typical undertaking, well run and adequately provided within the same sector would incur, taking into account the receipts and a reasonable profit from discharging the obligations.
- (44) Only if those four conditions are satisfied may it be considered that an undertaking has not enjoyed a real financial advantage, which would have the effect of putting it in a more favourable competitive position than the undertakings competing with it, so that it is not therefore State aid within the meaning of the EC Treaty.
- (45) In the case at hand the municipalities and the voluntary housing bodies which are responsible for carrying out certain social housing activities under Irish law are not chosen in a public procurement procedure. Such a procedure does not apply since municipalities and voluntary housing bodies exercise a competence on social housing, apply for subsidies with the HFA within the framework of their competence and are therefore not awarded with public contracts. Furthermore the Irish authorities have not provided information substantiating that they are being compensated according to the costs of a typical undertaking.
- (46) In the absence of indications that the municipalities and the voluntary housing bodies are acting as cost-efficient undertakings it cannot be excluded, that the fourth condition is not fulfilled. Therefore it could in principle be possible that the municipalities and the voluntary housing bodies do enjoy a real financial advantage, which would have the effect of putting them in a more favourable competitive position

than the undertakings competing with them, so that it is therefore State aid within the meaning of Article 87(1) EC Treaty.

4.3 Article 86(2) EC Treaty

(47) However, an aid measure can be authorised under Article 86(2) EC-Treaty if the conditions for applying this provision are fulfilled.

(48) First (a), the recipient undertaking must actually have a public service obligation to discharge, and the obligation must be clearly defined. Secondly (b), the undertaking must have been entrusted with the public service task. Third (c), the compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligation. Fourth (d), the development of trade must not be affected contrary to the interests of the Community.

(a) Operation and definition of a service of general economic interest: Social housing

(49) The objective of the Irish Government's housing policy, as set out in the Housing Acts, is to ensure that the most socially disadvantaged households can have a good dwelling in a good housing environment. These programmes consist of the provision of general mortgage finance, the operation of a shared ownership scheme, an affordable housing scheme aimed at providing low-cost housing, a rental subsidy scheme and miscellaneous grant schemes for elderly and disabled persons. Beneficiaries of these measures are socially disadvantaged households whose economic circumstances do not permit them to purchase or rent houses on the open market. Due to their poor creditworthiness, these households are generally unable to obtain a housing loan in the commercial, competitive sector at affordable rates, which has also to be proved by submitting letters of rejection from two private sector mortgage lenders. They can through this housing-funding-system turn to the municipalities for housing at cheaper rents.

(50) Because of these considerations the provision of social housing, as defined in the notification, can be regarded as an activity falling under Article 86(2) EC Treaty. Since, in addition, the content of the service and the task of the housing-funding-system and the municipalities as well as the voluntary housing bodies are accurately defined in the Housing Act 1991, the Commission considers the promotion of social housing as a legitimate public task of the State² and the first condition of Article 86(2) EC-Treaty to be fulfilled.

(b) Entrustment

(51) The HFA was established in 1981 by an Act of the Oireachtas (the Irish Parliament). The tasks of the Agency are clearly set out under Section 5 of the 1981 Act, as amended by Section 29 of the Housing (Miscellaneous Provisions) Act 1992, which states that the Agency may advance moneys to a housing authority to enable loans to be made by the authority for the acquisition and construction of houses. Under the same law the municipalities are obliged to grant loans or to hire and construct houses. The voluntary housing bodies are entrusted with the provision of social housing supplementary to that provided by the local authorities for allocation to disadvantaged households by Section 6 of the Housing (Miscellaneous Provisions) Act 1992 and Section 15 of the Housing Act 1998.

(52) Ireland has therefore taken specific steps to entrust the municipalities as well as the voluntary housing bodies with the tasks of social housing policy.

(c) Proportionality of the compensation

(53) According to the information provided by your authorities, local authorities are obliged to publish accounts in a format which separately shows income and expenditure under a range of functional headings. In this way, the accounts of social housing and other activities are kept, audited and published separately by the local authorities.

(54) Since approved voluntary housing bodies are not engaged in commercial activities but their housing projects fall within the social housing category the issue of separate accounting does not arise.

(55) The preferential financing granted by HFA to the municipalities and the voluntary housing bodies can only be used to perform the public social housing obligations imposed by legislation and to cover the costs of the social public housing service insofar, as these costs could not be otherwise recovered. Consequently the benefit of the cheap guaranteed financing from the Agency to the voluntary bodies may accrue directly and exclusively to the disadvantaged households for which those bodies provide housing.

(56) Furthermore in the event of a surplus arising from the provision of social housing (e.g. rents from tenants), local authorities have to apply this surplus to housing purposes. Also the approved voluntary housing bodies as not-for-profit organisations must have in its memorandum of association or registered rules provisions prohibiting the distribution of any surplus or profit to members and requiring the assets of the body be applied solely towards its objectives.

(57) Accordingly this part of the scheme fulfils the condition that no overcompensation should exist for the public service costs.

(d) Development of trade within the Union

(58) The ultimate objective of the notified scheme is social housing, which has been recognized as a legitimate element of public policy by the Commission in its decision from 3.7.2001 in the case at hand as well as in other recent Commission decisions³. The characteristics of the aid under assessment is proportionate to the costs incurred by the operators. Accordingly the aid in question is not liable to produce distortion to an extent contrary to the Community interest.

² See Amendments of the Commission's proposal for appropriate measures on State guarantees for the public credit institutions in Germany, OJ C-150 of 22 June 2002 (see II/4 measures with a purely social character).

³ See Amendments of the Commission's proposal for appropriate measures on State guarantees for the public credit institutions in Germany, OJ C-150 of 22 June 2002 (see II/4 measures with a purely social character). See furthermore Commission decision N 40/2003 from 24.6.2003 on "Measures to promote certain house buildings".

5. **Conclusion**

The Commission has accordingly decided:

- i. That the guarantees in favour of HFA do not constitute State aid within the meaning of Article 87(1) EC Treaty.
- ii. The social housing activities constitute compatible State aid pursuant to Article 86(2) EC Treaty.

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Yours faithfully,

For the Commission

Mario Monti

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