Decyzja nr 86/19/COL z dnia 5 grudnia 2019 r. o wszczęciu formalnego postępowania wyjaśniającego dotyczącego domniemanej pomocy państwa przyznanej na rzecz Gagnaveita Reykjavíkur

Zaproszenie do zgłaszania uwag zgodnie z częścią I art. 1 ust. 2 protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości dotyczących pomocy państwa

(2020/C 40/03)

Poprzez wyżej wspomnianą decyzję, zamieszczoną w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA („Urząd") poinformował władze islandzkie o swojej decyzji o wszczęciu formalnego postępowania wyjaśniającego zgodnie z częścią I art. 1 ust. 2 protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości w odniesieniu do przedmiotowego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat przedmiotowego środka pomocy w terminie jednego miesiąca od daty publikacji na adres:

Urząd Nadzoru EFTA
Rejestr
Rue Belliard 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË
registry@eftasurv.int

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

Streszczenie

Procedura

W dniu 26 października 2016 r. Urząd otrzymał skargę od islandzkiego przedsiębiorstwa telekomunikacyjnego Síminn hf. dotyczącą domniemanej pomocy państwa przyznanej przez spółkę Orkuveita Reykjavíkur („OR") na rzecz jej spółki zależnej, Gagnaveita Reykjavíkur („GR"). Urząd otrzymał od skarżącego dodatkowe informacje i uwagi w drodze pism i wiadomości e-mail z dnia 23 listopada 2016 r., 16 stycznia 2017 r., 28 marca 2017 r., 1 stycznia 2018 r., 20 kwietnia 2018 r., 21 września 2018 r., 26 marca 2019 r. i 13 września 2019 r.

W odpowiedzi na swoje wnioski Urząd otrzymał od władz islandzkich informacje w pismach z dnia 7 lutego 2017 r., 22 czerwca 2017 r., 25 maja 2018 r. i 4 czerwca 2019 r.

Opis środków pomocy

Skarga dotyczy inwestycji w sieci szerokopasmowe dokonywanych przez spółkę OR od roku 1999 (rok założenia spółki Lina.Net, poprzedniczki spółki GR) do chwili obecnej. Zasadniczo jednak skarga obejmuje okres następujący po założeniu spółki GR dnia 1 stycznia 2007 r. W szczególności dotyczy domniemanej pomocy państwa przyznanej przez spółkę OR na rzecz spółki GR za pośrednictwem różnych środków, w tym zastrzyków kapitałowych i pożyczek udzielanych na warunkach innych niż rynkowe.

Spółka OR powstała dnia 1 stycznia 1999 r. jako przedsiębiorstwo publiczne na mocy decyzji rady miasta Reykjavík dotyczącej połączenia działalności prowadzonej w ramach systemów elektroenergetycznych i ciepłowniczych należących do miasta. Spółka OR należy do trzech islandzkich gmin: (i) miasta Reykjavík (93,5 %), (ii) gminy Akranes (5,5 %) oraz (iii) gminy Borgarbyggð (1 %). Pięciu członków zarządu spółki OR wyznacza rada miasta Reykjavík, a jednego – rada gminy Akranes.

Przedsiębiorstwo telekomunikacyjne GR powstało w 2007 r. Spółka GR została utworzona jako niezależny podmiot prawny w celu spełnienia wymogów Islandzkiego Urzędu Poczty i Telekomunikacji („PTA") w zakresie rozdzielenia konkurencyjnej i niekonkurencyjnej działalności spółki OR. Spółka GR należy w całości do spółki OR. Zgodnie z umową spółki jej celem jest obsługa sieci telekomunikacyjnej oraz służącej do transmisji danych.

Spółka GR jest zarejestrowanym operatorem prowadzącym działalność w zakresie transmisji i obsługi danych na podstawie ustawy nr 81/2003 o łączności elektronicznej. Celem art. 36 wspomnianej ustawy jest zapewnienie, aby konkurencyjna działalność telekomunikacyjna nie była subwencjonowana przy wykorzystaniu dochodów z działalności chronionej prawami wyłącznymi ani za pośrednictwem innych środków.

Zgodnie z art. 36 ustawy PTA zapewnia, aby dochody uzyskane z sektorów niekonkurencyjnych nie były wykorzystywane do subwencjonowania działalności w konkurencyjnym sektorze telekomunikacji. PTA powierza się zatem zadanie kontroli inwestycji dokonywanych przez spółkę OR na rynku telekomunikacyjnym oraz stosunków handlowych pomiędzy spółkami GR i OR. PTA może wszcząć takie postępowanie wyjaśniające z inicjatywy własnej lub w wyniku skarg złożonych przez zainteresowane strony. Spółka GR ma również obowiązek powiadomienia PTA o uzyskaniu szczególnych środków pomocy.

W latach 2006–2019 PTA przyjął dziewięć formalnych decyzji dotyczących odrębności finansowej spółek OR i GR. Postępowania wyjaśniające przeprowadzone przez PTA obejmowały przegląd biznesplanu spółki GR, który podlega corocznym przeglądom, w zestawieniu z rzeczywistymi danymi finansowymi. W ramach przeglądu PTA sprawdza na przykład, czy stopa zwrotu dla inwestora (spółki OR) odpowiada ogólnym warunkom rynku telekomunikacyjnego, oraz analizuje strukturę kapitałową i zgodność cen stosowanych pomiędzy spółkami OR i GR z warunkami panującymi na rynku.

W trzech przypadkach PTA ustalił konkretne naruszenia art. 36 ustawy o łączności elektronicznej. W dwóch z nich PTA nakazał zwrot środków pomocy, natomiast w trzecim przypadku PTA nie polecił żadnego wycofania przyznanych korzyści.

Władze islandzkie utrzymują, że we wszystkich stosunkach ze spółką GR działania spółki OR spełniały wymogi testu prywatnego inwestora oraz że nie przyznano żadnej pomocy na rzecz spółki GR. W tym kontekście władze islandzkie podkreślają, że wszystkie środki będące przedmiotem skargi jako dotyczące relacji finansowych spółek OR i GR zostały poddane ocenie PTA zgodnie z art. 36 ustawy o łączności elektronicznej. Według władz islandzkich test zastosowany przez PTA jest porównywalny z kryterium zastosowanym przez Urząd podczas oceny zgodności danego środka z warunkami panującymi na rynku (tzw. test prywatnego inwestora). Władze islandzkie zwróciły również uwagę, że Urząd odrzucił już zarzuty skarżącego dotyczące inwestycji spółki OR w przedsiębiorstwo Lina.net w swojej decyzji nr 300/11/COL z dnia 5 października 2011 r.

Ocena środków pomocy

Mając na uwadze między innymi status prawny spółki OR, zawartą przez nią umowę o partnerstwie oraz skład jej zarządu, Urząd nie może wykluczyć możliwości przypisania środków pomocy państwu ani też faktu, że wiążą się one z przeniesieniem zasobów państwowych, jeżeli – oraz w zakresie, w jakim – prowadzą one do przyznania korzyści spółce GR.

Ponadto, chociaż spółka GR nie prowadzi sprzedaży usług własnych świadczonych w zakresie swojej sieci światłowodowej, oferuje ona wszystkim zainteresowanym dostawcom usług telekomunikacyjnych neutralny i swobodny dostęp do sieci. Urząd uważa, że dostarczanie zewnętrznym usługodawcom dostępu do sieci po stałej cenie stanowi działalność gospodarczą i że w związku z tym wydaje się, że spółka GR prowadzi działalność jako przedsiębiorstwo w rozumieniu art. 61 ust. 1 Porozumienia EOG.

Mając na uwadze praktykę decyzyjną PTA zgodnie z art. 36 ustawy o łączności elektronicznej w odniesieniu do finansowania spółki GR i poziomu kontroli podczas oceny różnych środków pomocy, Urząd wstępnie przyjmuje, że test zastosowany przez PTA zgodnie z art. 36 zasadniczo zapewnia zgodność wszystkich transakcji pomiędzy spółkami GR i OR lub innymi powiązanymi firmami z warunkami panującymi na rynku. Podejście zastosowane przez PTA być może nie odzwierciedla oceny przeprowadzanej w ramach testu prywatnego inwestora przez Urząd zgodnie z zasadami EOG w zakresie pomocy państwa, jednak przynosi ten sam rezultat, jakim jest zapobieganie transakcjom niezgodnym z warunkami rynku. W związku z tym na obecnym etapie Urząd wstępnie przyjmuje, że PTA zapewnia ocenę równoważną testowi prywatnego inwestora przeprowadzanemu przez Urząd.

W przypadku gdy PTA stwierdzi naruszenia art. 36 ustawy o łączności elektronicznej ex post, a zatem w razie ustalenia niezgodności danej transakcji z warunkami rynku, PTA może nakazać stronom wyeliminowanie wszelkich potencjalnych korzyści poprzez przyjęcie odpowiednich środków. Aby jednak PTA nakazał wycofanie korzyści, niezgodny środek musi być wyraźnie zdefiniowany i niepodważalny, np. musi to być konkretna suma pieniężna, warunek umowy pożyczki itp. Ponadto w przypadkach gdy PTA nakazał wycofanie korzyści przyznanych na rzecz spółki GR, nie polecił zwrotu tych korzyści z odsetkami.

PTA ustalił trzy konkretne przypadki naruszenia art. 36 ustawy o łączności elektronicznej. W dwóch z nich nakazał zwrot środków pomocy, natomiast w trzecim przypadku nie polecił żadnego wycofania przyznanych korzyści. Urząd ustalił, że środki poddane ocenie PTA w tych przypadkach przysporzyły spółce GR korzyści, których spółka ta nie otrzymałaby w normalnych warunkach rynkowych. Ponadto korzyści te nie zostały w pełni odzyskane od GR.

W związku z tym Urząd wstępnie przyjmuje, że spółka GR uzyskała korzyści w rozumieniu art. 61 ust. 1 Porozumienia EOG w taki sposób, że: (i) nie zapłaciła odsetek rynkowych od korzyści uzyskanej dzięki tymczasowemu zawieszeniu płatności odsetek, (ii) otrzymała środki pieniężne pośrednio od spółki OR w zamian za ułożenie sieci światłowodowej w gminie Ölfus, (iii) otrzymała krótkoterminową pożyczkę od spółki OR oraz (iv) w umowach pożyczki spółki GR z prywatnymi pożyczkodawcami zawarto warunek dotyczący dalszego pakietu większościowego spółki OR w spółce GR.

Urząd wstępnie przyjmuje, że są to środki selektywne, ponieważ stanowią indywidualne środki skierowane wyłącznie do spółki GR. Ponadto wydaje się, że środki te mogą zakłócić konkurencję i wywrzeć wpływ na handel w ramach EOG.

Jeżeli środki stanowią pomoc państwa, obowiązek, o którym mowa w części I art. 1 ust. 3 protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości, dotyczący zgłoszenia pomocy Urzędowi przed wprowadzeniem jej w życie, nie został dopełniony. Taka pomoc państwa byłaby niezgodna z prawem.

Władze islandzkie nie przedstawiły argumentów, które by potwierdzały, że w zakresie, w jakim środki te stanowią pomoc państwa, można uznać je za zgodne z funkcjonowaniem Porozumienia EOG. W związku z tym Urząd ma wątpliwości co do zgodności wszystkich czterech środków z funkcjonowaniem Porozumienia EOG.

Decision No 86/19/COL of 5 December 2019 to open a formal investigation into alleged state aid granted to Gagnaveita Reykjavíkur

1 Summary

(1) The EFTA Surveillance Authority („the Authority") wishes to inform the Icelandic authorities that some measures covered by the complaint related to Gagnaveita Reykjavíkur („GR") might entail state aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts concerning the compatibility of these measures with the functioning of the EEA Agreement. Therefore, the Authority is required to open a formal investigation procedure into these measures (*) ([1]).

(2) The Authority has based its decision on the following considerations.

2 Procedure

(3) By a letter dated 26 October 2016 ([2]), Síminn hf. („the complainant") made a complaint regarding alleged state aid granted by Orkuveita Reykjavíkur („OR") to its subsidiary GR. By letter dated 7 November 2016, the Authority acknowledged receipt of the complaint ([3]). By email of 23 November 2016, the complainant submitted further information ([4]).

(4) By letter dated 28 November 2016 ([5]), the Authority forwarded the complaint and the additional information received to the Icelandic authorities, and invited them to submit information and observations. By email dated 16 January 2017, the Authority received additional information from the complainant ([6]). By letter dated 7 February 2017, the Icelandic authorities submitted their comments to the Authority ([7]).The complainant submitted further information by email of 28 March 2017 ([8]).

(5) On 7 June 2017, the Authority discussed the complaint with the Icelandic authorities at the annual package meeting in Reykjavík. On 22 June 2017, the Icelandic authorities provided the Authority with copies of various decisions of the Post and Telecom Administration in Iceland („PTA"), concerning the financing of GR ([9]).

(6) On 25 September 2017, the Authority met with the complainant, at its request, in Reykjavík. On 1 January 2018, the complainant submitted further comments ([10]).

(*) The information in square brackets is covered by the obligation of professional secrecy.

([1]) Reference is made to Article 4(4) 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.

([2]) Document No 825150, and Annexes 1–43 (Document Nos 825151, 825152, 825152, 825153 and 825156).

([3]) Document No 825249.

([4]) Document No 827877.

([5]) Document No 828509.

([6]) Document No 835622 and three attachments (Document Nos 835623, 835624 and 835625).

([7]) Document Nos 840228 and 840229, and Annex 1 (Document No 840230).

([8]) Document No 850420.

([9]) Document No 862626 and eight attachments (Document Nos 862628, 862635, 862639, 862641, 862645, 862648, 862651 and 862655).

([10]) Document No 892188.

(7) By letter dated 13 March 2018 ([11]), the Authority informed the complainant about its preliminary assessment that the financing of GR did not raise concerns concerning potential state aid within the meaning of Article 61(1) of the EEA Agreement. By letter dated 20 April 2018 ([12]), the complainant submitted its response to the Authority's preliminary assessment.

(8) By letter dated 27 April 2018 ([13]), the Authority forwarded the complainant's response and additional information received to the Icelandic authorities, and invited them to submit their observations. By letter dated 25 May 2018 ([14]), the Icelandic authorities submitted their comments.

(9) On 6 June 2018, the Authority discussed the complaint with the Icelandic authorities and received a presentation from the PTA at the annual package meeting in Reykjavík ([15]). By letter dated 21 September 2018 ([16]), the complainant submitted further information.

(10) By letter dated 26 March 2019 ([17]), the Authority received additional information concerning new developments from the complainant. On 29 April 2019, the Authority requested additional information and clarifications from the Icelandic authorities ([18]). By letter dated 4 June 2019 ([19]), the Icelandic authorities replied to the information request and provided the requested information and clarifications. Finally, the complainant submitted additional comments and information by letter dated 13 September 2019 ([20]).The complaint

2.1 ***The complainant - Síminn hf.***

(11) The complainant is a telecommunications company which provides communication solutions to private and corporate clients in Iceland. It offers a range of services, such as: (i) mobile services on its 2G/3G/4G network, (ii) fixed line telephony, (iii) fixed broadband, and (iv) television. The complainant also offers communications and IT solutions for companies of all sizes. The complainant's subsidiary, Míla ehf.**,** owns and operates a telecommunications network covering the entire country, which builds mostly on fibre optic cables, but also on copper lines and microwave connections. Míla sells its services at a wholesale level to companies with a telecommunications licence in Iceland.

2.2 ***Scope of the complaint***

(12) The complaint concerns OR's investments in fixed broadband from 1999, when GR's predecessor Lina.Net was established, until today. However, the complaint predominantly concerns the period from 1 January 2007 onwards, following the establishment of GR. In particular, the complaint concerns alleged state aid granted by OR to GR through various means, such as capital injections and lending that was not on market terms.

(13) Moreover, the complaint concerns the terms of loans GR has obtained from […]. According to the complainant, the interest rates on GR's loans are not on market terms that reflect the credit risk inherent in an undertaking such as GR, with a very high debt to EBITDA ratio ([21]). The complainant maintains that the interest rates offered to GR are directly connected to its ownership, as no market lender would have offered GR such rates without a direct link to its public ownership.

2.3 ***Arguments brought forward by the complainant***

(14) The complainant maintains, in general terms, that GR's activities represent a political rather than a commercial project. It alleges that the company has been operated with a view to enhance competition on the telecommunications market, and that a private investor would not have acted in the same way as OR, when providing loans and capital injections to GR. The complainant moreover alleges that OR has provided GR with several capital injections and loans to finance their operations, which have not been on market terms, as well as more favourable access to OR infrastructure than other market players could receive.

([11]) Document No 882024.
([12]) Document No 910552 and Annexes 1 and 2 (Document No 910554).
([13]) Document No 911001.
([14]) Document No 915072.
([15]) Document No 919903.
([16]) Document Nos 931137, 931138 and 931139.
([17]) Document No 1060941.
([18]) Document No 1066345.
([19]) Document No 1073306 and Annexes 1–5 (Document Nos 1073308, 1073310, 1073312, 1073314 and 1073316).
([20]) Document No 1087462 and Annexes 1–5 (Document Nos 1087456–1087460).
([21]) Earnings before interest, tax, depreciation and amortization (EBITDA) is a measure of a company's operating performance.

(15) According to the complainant, a major part of the alleged unlawful state aid has been in the form of interest rates for loans granted by OR to GR, which have not corresponded to market terms. Furthermore, after the majority of GR's loans were gradually replaced by loans financed by private lenders (with full replacement at the end of 2017), the interest rates have continued to not correspond to normal market conditions, as OR has provided lenders with a guarantee that it would maintain its majority ownership of GR. The complainant considers that this must be considered as state aid that is incompatible with the functioning of the EEA Agreement.

(16) The complainant puts forward that the assessment performed by the PTA under Article 36 of the Electronic Communications Act is substantially different from the assessment conducted by the Authority under the state aid rules. According to the complainant, the application of the said rule by the PTA has consisted in assessing the return on equity. It seems that PTA has not made a detailed comparison with other market investors. The focus has rather been on assessing the financing generally, concentrating on whether the measures provide a direct loss for OR, as opposed to assessing whether the financing would have been provided by an investor operating on the market.

3 Description of the measures

3.1 *Background*

3.1.1 *OR – Orkuveita Reykjavíkur*

(17) OR was established on 1 January 1999 as a public undertaking with the decision of the City Council of Reykjavík to merge the operations of the electricity and heat utilities owned by the city. A year later, the water utility was also incorporated into the new company. The company was operated on the basis of Regulation No 793/1998, issued by the Ministry of Industry and the City Council of Reykjavik, with reference to legislative Act No 38/1940 on the Reykjavik Heating Utility, and the Power Act No 58/1967. OR currently provides the following services through its three subsidiaries: electricity (Orka Náttúrunar), geothermal water for heating, cold water, sewage services (Veitur) and fibre-optic data connections (GR).

(18) On 1 December 2001, OR merged with a utility company owned by several small municipalities in the western part of Iceland. After the merger, the City of Reykjavík owns 93,5 % of the company, the municipality of Akranes owns 5,5 % and the municipality of Borgarbyggð 1 %. Five members of the board of directors are appointed by the City Council of Reykjavík and one is appointed by the Municipality Council of Akranes ([22]). OR currently operates as a public partnership company, *sameignarfélag* ([23]), on the basis of Act No 136/2013 on OR ([24]) and Regulation No 297/2006 ([25]).

3.1.2 *GR – Gagnaveita Reykjavíkur*

(19) GR is a telecommunications company established in 2007 as an independent legal entity, in order to comply with the requirements of the PTA on separation between the competitive and non-competitive operations of OR. GR is fully owned by OR. The purpose of GR, according to its articles of association, is the operation of a telecommunication and data transmission network. It provides wholesale access to its fibre optic network, for a number of retail service providers that operate in the residential and businesses markets with different fixed broadband and data transmission services. GR also offers services on the household market, where it charges end-users directly for the use of the access network.

(20) OR began investing in the telecommunications market in 1999, when it established the subsidiary Lina.Net, with the purpose of providing general telecommunication services with emphasis on data transmission and internet connections in urban areas in Iceland. Its operations were later expanded into the setting up of an electronic telecommunications network using fibre optic cables. The Authority investigated several capital injections into Lina.Net during the years 1999–2001 in its Decision No 300/11/COL and found that they were in line with the actions of a private investor such that no state aid was granted ([26]).

(21) Lina.Net invested considerable sums in its fibre optic networks and, since 2007, GR has continued to expand the network. In total, the investments between 2002 and 2010 amounted to around ISK 8 billion.

([22]) https://www.or.is/um-or/skipulag-og-stjornhaettir/stjorn/.
([23]) https://www.rsk.is/fyrirtaekjaskra/leit/kennitala/5512983029.
([24]) https://www.althingi.is/lagas/nuna/2013136.html.
([25]) https://www.reglugerd.is/reglugerdir/allar/nr/297-2006.
([26]) OJ C 10, 12.1.2012, p. 6 and EEA Supplement No 2, 12 stycznia 2012, p. 4.

3.2 **National legal basis**

(22) GR is a registered operator (data transmission and service) ([27]) under the Electronic Communications Act No 81/2003. Article 36 of the Electronic Communications Act, on separation of concession activities from electronic communications activities, provides:

„Electronic communications undertakings or consolidations operating public communications networks or publicly available electronic communications services, which enjoy special or exclusive rights in sectors other than electronic communications, must keep their electronic communications activities financially separate from other activities as if they were two separate undertakings. Care shall be taken to ensure that competitive operations are not subsidised by activities enjoying exclusive rights or protected activities". (emphasis added)

(23) According to the legislative proposal (*frumvarp*) of the Electronic Communications Act, Article 36 is meant to ensure that competitive telecommunication operations are not subsidised through income from operations that are protected by exclusive rights or by other means ([28]).The proposal also makes it clear that the provision is applicable regardless of the undertaking's market share and regardless of whether the telecommunications operations are carried out within the same undertaking or by a separate legal entity which it controls ([29]).

3.3 **The PTA's monitoring role**

3.3.1 *General*

(24) The PTA operates according to the Act on Post and Telecom Administration No 69/2003, which implements the provisions of the EU's regulatory framework for electronic communications ([30]). As a supervisory authority, the PTA, *inter alia,* ensures, in accordance with Article 36 of the Electronic Communications Act, that revenues stemming from non-competitive sectors do not subsidise operations in the competitive telecommunications sector. Therefore, the PTA is entrusted with scrutinising OR's investments in the telecommunications market and the business relations between GR and OR. Such investigations can start at the PTA's own initiative or through complaints from interested parties. GR is also obligated to notify specific measures, such as increase in share capital ([31]), to the PTA to obtain prior approval and interested parties can be parties to such cases, if they demonstrate that they have a legitimate interest in the result of the case ([32]).

(25) An interested party can challenge decisions of the PTA before the Rulings Committee for Electronic Communications and Postal Affairs ([33]). This includes decisions taken on the basis of Article 36 of the Electronic Communications Act ([34]).

(26) The following is a brief summary of the PTA's main decisional practice concerning OR's investments in the telecommunications market and the business relations between GR and OR to which the complainant has referred.

3.3.2 *OR's purchase of the fibre-optic network from Lina.Net*

(27) In October 2002, OR purchased the fibre-optic network from Lina.Net for ISK 1 758 811 899. In early 2003, after the enactment of the Electronic Communications Act, the PTA sent OR an inquiry regarding how the company intended to fulfil the conditions for separation of activities stipulated by Article 36 of the Electronic Communications Act ([35]).

([27]) Based on a general authorisation to operate telecommunication networks and services in accordance with Art. 4 of The Electronic Communications Act No 81/2003, see https://www.pfs.is/english/telecom-affairs/registration-and-licences/.

([28]) Submitted to Parliament in the 128 parliamentary session 2002–2003; http://www.althingi.is/altext/128/s/0960.html.

([29]) Ibid.

([30]) The framework is made up of a package of primarily five Directives and two Regulations: Framework Directive 2002/21/EC (OJ L 108, 24.4.2002, p. 33); Access Directive 2002/19/EC (OJ L 108, 24.4.2002, p. 7); Better Regulation Directive 2009/140/EC (OJ L 337, 18.12.2009, p. 37); Authorisation Directive 2002/20/EC (OJ L 108, 24.4.2002, p. 21); the Universal Service Directive 2002/22/EC (OJ L 108, 24.4.2002, p. 51); the Regulation on Body of European Regulators for Electronic Communications (BEREC) (OJ L 337, 18.12.2009, p. 1); and the Regulation on roaming on public mobile communications networks (OJ L 172, 30.6.2012, p. 10).

([31]) PTA Decision No 14/2010 of 21 maja 2010.

([32]) PTA Decision No 20/2013 of 10 października 2013.

([33]) Article 13 of the Act on The Post and Telecom Administration No 69/2003.

([34]) See for example Ruling of the Ruling Committee of 17 July 2006 in Case No 8/2006.

([35]) PTA Decision of 13 listopada 2006, p. 1.

(28) In the ensuing PTA procedure, the PTA requested two expert reports , from the two consultancies KPMG and Rafhönnun ([36]), on the fair market value of the Lina.Net fibre-optic network ([37]). Both reports concluded that there was no indication that the purchase price was below market value. Moreover, the audit firm KPMG analysed certain parts of the operational and financial separation ([38]). The PTA accepted the results of the expert reports.

3.3.3 *The establishment and financing of GR as a separate legal entity*

(29) As part of the aforementioned procedure, the PTA required OR to submit a business plan for the operations of the fibre-network and telecommunication services, demonstrating an adequate rate of return on the investment. KPMG performed a due diligence review of the business plan and determined that the rate of return on the investment was appropriate. Moreover, the PTA instructed OR to fulfil the following conditions ([39]):

(i) Separation of accounts. The PTA instructed OR to establish a separate entity, entrusted with the telecommunications operations, which should keep separate accounts in line with established corporate practices.

(ii) Prepare a foundation balance sheet (*stofnefnahagsreikningur*), comprising the telecommunication assets (valued at an appropriate market price) as well as the liabilities that stemmed from the financing of the telecom operations of OR (with the reservation that if the terms were more favourable than market terms, the new entity would have to compensate OR for any difference).

(iii) Arm's-length terms should apply to all dealings between the new entity and OR.

(30) On 1 January 2007, in accordance with instructions of the PTA described above, OR established the private limited liability company GR as a new legal entity.

(31) On 8 March 2007, a framework agreement was concluded between OR and GR, setting out the terms of the investment and the opening balance sheet of GR. OR transferred assets to GR. GR provided payment in the form of a loan and issuing share capital to OR. The interest rate to be paid by GR to OR on its loan principal over a payback period of […] years was based on the […] plus a margin of […] basis points, and was linked to the exchange rates of several foreign currencies. According to the consulting firm Deloitte, the loan agreement contained normal market practice terms, comparable to agreements concluded between private undertakings, as regards the event of default, the provision of information to the lender, and other covenants. Deloitte submitted a declaration in accordance with Article 5 of the Act on Private Limited Companies No 138/1994 ([40]), dated 7 March 2007, on the value of the assets, and concluded that they had been valued at a fair price. The terms of the loans were also reviewed and approved by the PTA ([41]).

(32) On 21 May 2010, the PTA issued Decision No 14/2010, concerning the financial separation between OR and GR. In its Decision, the PTA confirmed that GR had to obtain prior approval from the PTA for any increase in share capital on behalf of OR or related companies. The PTA also noted that it would only approve such measures if they were on arm's-length terms and if they did not entail the subsidisation of competitive operations ([42]).

(33) Following the financial crisis in Iceland in 2008, the ISK devalued considerably, and GR became unable to fulfil its commitments under the loan agreement. An agreement was made with OR on temporary suspension of interest payments. The PTA was informed and subsequently intervened. The PTA required that the suspension of payments be revoked on the grounds that it did not comply with the required arm's-length terms ([43]). GR complied and paid instalments and accrued interests in full.

3.3.4 *GR's rate of return and the share capital increase of December 2008*

(34) In December 2008, OR increased its share of GR's capital. On 22 December 2010, the PTA adopted Decision No 39/2010, concerning the share capital increase and GR's rate of return on capital.

([36]) Attachments contained in Document No 862628.
([37]) PTA Decision of 13 listopada 2006, p. 5.
([38]) PTA Decision of 13 listopada 2006, p. 16.
([39]) PTA Decision of 13 listopada 2006, p. 15–23.
([40]) Article 5 of the Act (available in English here) concerns the special provisions that a Memorandum of Association should contain. According to section 5 in paragraph 2 there should be attached to the Memorandum of Association a report containing „a declaration to the effect that the specific valuables correspond at least to the agreed remuneration, including the nominal value of the shares to be issued plus a conceivable surcharge on account of overprice; the remuneration must not exceed the amount at which these valuables may be credited in the Company's accounts".
([41]) PTA Decision No 32/2008 of 30 grudnia 2008.
([42]) PTA Decision No 14/2010 of 21 maja 2010, p. 15.
([43]) PTA Decision No 25/2010 of 7 września 2010.

(35) With this Decision, the PTA noted that the operations of GR went according to the initial business plan in the year 2007. GR's equity ratio was approximately 52 % at the end of 2007 and the company made a profit of ISK 120 million that year. The financial crisis of 2008 hit the company hard and in spite of increasing operating revenues, the losses of 2008 were close to ISK 3 billion, almost solely attributable to the devaluation of the ISK, which caused the debt of the company to increase.

(36) To urgently restore the viability of GR, OR decided to increase the share capital before the end of 2008. The capital was increased by ISK 1,2 billion, setting an equity ratio of 23 %. The PTA Decision states that in absence of the share capital increase, „practically all equity would have been wiped out", due to the financial collapse and sharp devaluation of the operating currency whilst the liabilities were all linked to foreign currency rates ([44]).

(37) Furthermore, the PTA observed that in 2008 OR and GR had contacted private lenders with the intention to finance further investment in ongoing projects ([45]). The financial markets, however, were completely frozen by the end of the year. The Icelandic authorities maintain that, as an investor, OR inevitably had to invest further, in order to protect its significant initial investment ([46]).

(38) The PTA highlighted that OR's decision to increase the share capital had to be considered not only from its perspective as GR's owner, but also as GR's largest creditor. The PTA noted that creditors of several telecommunication companies had acquired them following the financial crisis, and either converted debts to equity or restructured loans. Moreover, the PTA found that GR's updated business plans convincingly demonstrated a satisfactory level of profitability for a telecommunication company in a competitive market, within a reasonable timeframe, and that there was a normal correlation between the profitability and the owner's contribution ([47]).

3.3.5 *The conversion of debt into equity in 2014*

(39) Like many companies in Iceland, GR needed to reorganize its financial affairs after the financial crisis of 2008. OR's application for permission to increase the share capital of GR in July and August 2013 was the subject of PTA's Decision No 2/2014 of 24 March 2014. The reorganisation involved: (i) a conversion of ISK 3,5 billion of debt into equity, and (ii) that GR would enter the financial markets to refinance all remaining debt owed to OR. Finally, OR intended to dispose of a large portion of its shares post-refinancing.

(40) The PTA accepted that the debt conversion would not increase the total financing of GR by OR, since it only changed the composition of the financing. The PTA also recognised that the conversion would change the equity ratio of GR from 22 % to 52 %, thereby leaving the ratio at the same level as GR's main competitor, Míla ([48]). The PTA also assessed the initial business plan of GR, and determined that it was credible. The cash flow analysis demonstrated that if the devaluation of the operating currency had not hit the company in 2008, there would not have been a need for refinancing. Moreover, the PTA's financial analysis confirmed that the rate of return for the investor and the weighted average cost of capital (WACC) of GR were in conformity with the general benchmark set by the PTA ([49]).

(41) Míla intervened in the procedure before the PTA. The PTA rejected all the objections from Míla. The PTA adopted its Decision No 2/2014 on 24 March 2014, and the debt conversion was finalized in early April 2014. In June 2014, Míla initiated a court case against the PTA, GR and OR, requesting the courts to annul the PTA's decision ([50]). The District Court of Reykjavík dismissed the case on 26 February 2015, and the Supreme Court confirmed the ruling of the District Court by judgment of 27 March 2015 ([51]).

3.3.6 *The implementation of GR's financial separation for 2016–2017*

(42) On 20 March 2019, the PTA adopted Decision No 3/2019, concerning the implementation of GR's financial separation for 2016–2017, and whether it was in compliance with Article 36 of the Electronic Communications Act ([52]).

([44]) PTA Decision No 39/2010 of 22 grudnia 2010, p. 21.
([45]) PTA Decision No 39/2010 of 22 grudnia 2010, p. 21.
([46]) Document No 840229, p. 8.
([47]) PTA Decision No 39/2010 of 22 grudnia 2010, p. 24 and 26.
([48]) PTA Decision No 2/2014 of 24 marca 2014, p. 35.
([49]) PTA Decision No 2/2014 of 24 marca 2014, p. 40–42.
([50]) According to Article 13, paragraph 4, of the Act on the Post and Telecom Administration No 69/2003, a party can decide to avoid the Ruling Committee and appeal a decision of the PTA directly to the District Court within 3 months from the time they are aware of the decision.
([51]) Supreme Court of Iceland judgment of 27 marca 2015 in Case No 219/2015.
([52]) PTA Decision No 3/2019 of 20 marca 2019.

(43) The PTA concluded that the financial separation between OR and GR had been in accordance with Article 36 of the Electronic Communications Act in the years 2016 and 2017, except for short-term lending to GR from a shared cash pool by OR and GR. The PTA found that these loan arrangements between OR and GR infringed an earlier PTA decision from 13 November 2006, as well as PTA Decision No 14/2010, since there was no loan agreement concluded between OR and GR reflecting the conditions that prevailed on the market for such loans ([53]).

(44) The PTA also commented on conditions in GR's loan agreements with private lenders, relating to OR's continuing majority ownership of GR. The loan agreements in question had included special conditions that if the ownership of OR in GR went below 50% then the lender was authorised to demand repayment, terminate the loan agreement, or declare the loan immediately due. Such a provision has been included in GR's loan agreements with private lenders since OR's loan financing of GR was replaced by private lenders, starting in 2014 and eventually being completely replaced by the end of 2017 ([54]).

(45) The PTA noted that by including these provisions, private lenders connected the ownership of OR to the loan agreements, in order to minimise the probability of default ([55]). The PTA considered that such arrangements could lead to more advantageous loan terms and more access to loan capital than other comparable telecommunication undertakings and, therefore, distort competition ([56]). Moreover, the PTA considered that this provision in the loan agreements constituted a connection between OR and GR that was not in accordance with the financial separation imposed in order to ensure that the two acted as unrelated parties ([57]).

(46) The PTA concluded that measures were required to ensure an efficient financial separation between OR and GR, in accordance with Article 36 of the Electronic Communications Act. The PTA decided that:

a) OR's lending to GR from a shared cash pool, without a loan agreement reflecting market conditions, infringed the PTA Decision of 13 November 2006 and, therefore, also Article 36 of the Electronic Communications Act.

b) GR's debt from the shared cash pool was not to, at any given time, exceed ISK […].

c) GR was to obtain prior authorisation from the PTA for any loans from OR, or any other undertaking within the company group. GR shall submit an application to the PTA along with the necessary documents, e.g. a draft loan agreement, an appropriate business plan, a calculation of the profitability requirements, as well key social security numbers and the acceptance of other landers. Such a credit increase was to be in line with standard separation of accounts, and was to entail that competitive operations are not subsidised by activities enjoying exclusive rights.

d) New loan agreements with private lenders could not contain a provision stipulating that if the ownership of OR in GR goes below 50 % then the lender is authorised to declare the loan immediately due.

(47) On 4 October 2019, following an appeal from GR, the Rulings Committee for Electronic Communications issued Ruling No 2/2019, confirming the decision of the PTA.

3.3.7 *Other cases*

(48) In addition to the decisions referred to above, the PTA adopted a decision in 2013, under Article 36 of the Electronic Communications Act, to temporarily allow GR to extend its loan agreement with OR ([58]).

(49) Moreover, in 2014, Míla complained to the PTA about certain measures relating to an agreement GR had concluded with Ölfus Municipality, which included funds indirectly deriving from OR. The funds had initially been paid by OR into the Ölfus Revegetation Fund („ÖRF") in connection with OR's geothermal power plant project in the municipality. OR had joint control of the ÖRF together with representatives from the municipality. In 2014, the ÖRF decided to use its funds to finance GR's rollout of a fiber optic network in Ölfus Municipality. After assessing the measures, the PTA found that they were contrary to Article 36 of the Electronic Communications Act, and instructed GR to undertake certain measures to ensure that it did not obtain an advantage from the funds deriving from OR ([59]).

([53]) PTA Decision No 3/2019 of 20 marca 2019, paragraphs 372–373.
([54]) PTA Decision No 3/2019 of 20 marca 2019, paragraph 375.
([55]) PTA Decision No 3/2019 of 20 marca 2019, paragraph 353.
([56]) PTA Decision No 3/2019 of 20 marca 2019, paragraph 353.
([57]) PTA Decision No 3/2019 of 20 marca 2019, paragraph 354.
([58]) PTA Decision No 26/2013 of 1 listopada 2013.
([59]) PTA Decision No 11/2015 of 2 czerwca 2015.

4 Comments by the Icelandic authorities

(50) The Icelandic authorities point out that the Authority has already dismissed allegations by the complainant as regards OR's investments in Lina.Net in its Decision No 300/11/COL of 5 October 2011 ([60]).

(51) The Icelandic authorities maintain that in all its relations with GR, OR has acted in accordance with the market economy operator („MEO") test, and that no aid has been granted to GR. In that regard, the Icelandic authorities highlight that all of the measures complained of concerning the financial relations between OR and GR, have been assessed by the PTA on the basis of Article 36 of the Electronic Communications Act. According to the Icelandic authorities, the test applied by the PTA is comparable to the criterion applied by the Authority when determining whether a measure is on market terms (i.e. the MEO test).

(52) The Icelandic authorities have confirmed that GR's current investments are financed with cash provided by its operating activities and loans from […]. According to the Icelandic authorities, these loans do not constitute state aid in any way, and nor do they indicate that state aid has been extended to GR by its owner, as it is clear that the loans from […] to GR were solely based on commercial motives. They state that the loans are fully in line with normal market terms.

5 Presence of state aid

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

„[…] 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."

(54) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be granted by the state or through state resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) be liable to distort competition and affect trade.

5.1 *Presence of state resources*

(55) The measure must be granted by the state or through state resources. The transfer of state resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A positive transfer of funds does not have to occur; foregoing state revenue is sufficient. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of state resources.

(56) The state, for the purpose of Article 61(1) of the EEA Agreement, covers all bodies of the public administration, from the central government to the city or the lowest administrative level. Resources of public undertakings may also constitute state resources within the meaning of Article 61(1) of the EEA Agreement because the state is capable of directing the use of these resources ([61]). For the purposes of state aid law, transfers within a public group may also constitute state aid if, for example, resources are transferred from the parent company to its subsidiary ([62]). However, the measure must be imputable to the state.

(57) The mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it imputable to the state. However, it does not need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question ([63]). Therefore, the imputability to the state of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken ([64]). Among the relevant indicators set out by the Court of Justice are:

— the fact that the body in question could not take the contested decision without taking into account the requirements of the public authorities;

([60]) Reply from the Icelandic authorities, dated 7 lutego 2017, pages 2 and 3. Document No 840228.
([61]) The Authority's Guidelines on the notion of state aid („NoA") (OJ L 342, 21.12.2017, p. 35), and EEA Supplement No 82, 21 grudnia 2017, p. 1, paragraph 49.
([62]) Judgment in *SFEI and others*, C-39/94, EU:C:1996:285, paragraph 62.
([63]) NoA, paragraph 41.
([64]) Judgment in *France* v *Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraph 55.

— the nature of the undertaking's activities and the extent to which the activities were exercised on the market in normal conditions of competition with private operators;

— the intensity of the supervision exercised by the public authorities over the management of the undertaking, and the degree of control which the state has over the public undertaking; and

— any other indicator showing an involvement by the public authorities in the adoption of the measure, or the unlikelihood of their not being involved, having regard to the compass of the measure, its content or the conditions which it contains.

(58) The Authority will therefore need to assess, in light of the aforementioned indicators, whether OR, in its dealings with GR, was acting as an autonomous entity, free of any influence from its owners, or whether its actions are imputable to the Icelandic authorities, i.e. the City of Reykjavík and the municipalities of Akranes and Borgarbyggð.

(59) As noted in paragraph (18) above, OR operates as a public partnership company on the basis of Act No 136/2013 on OR ([65]) and Regulation No 297/2006 ([66]). OR is therefore distinct from private companies which are subject to ordinary company law. OR's annual accounts are also reflected in the City of Reykjavík's consolidated financial statements ([67]).

(60) The Board of OR consists of six members, five appointed by the Reykjavík City Council and one by the Municipality Council of Akranes. Currently, three board members are politicians who also serve as either City Council or Municipal Council representatives. According to OR's partnership agreement, the Board is responsible for the company's affairs between owner's meetings and should monitor the company's direction, organisation and that its operations are in good shape and in accordance with the ownership policy. The Board sets an overall policy and future vision for OR and adopts decisions concerning major matters within the limit of the ownership policy. Before adopting unusual or important decisions or policy decisions, the Board must consult with the owners of OR. The same applies to similar decisions regarding subsidiaries (such as GR). The Board is also responsible for recruiting OR's Director, drafting his/her job description and his/her eventual employment termination ([68]).

(61) OR produces and sells electricity in a liberalised market open to competition. The company also has legal obligations to provide utility services (heating and water) and carries out other projects in the municipalities of its owners as well as other municipalities ([69]). Those utility services have since 2014 been carried out by OR's subsidiary, Veitur, in order to comply with the Electricity Act, which prohibits cross subsidisation between utility activities, as well as between activities enjoying exclusive rights and competitive operations ([70]). According to OR's ownership policy, the company's administrative practices shall reflect professionalism, efficiency, prudence, transparency and responsibility. The Board is responsible for adopting the company's policies concerning dividends, risk management, purchasing, etc. ([71]).

(62) Although it appears that OR's owners have taken steps to separate its public utility services and its competitive operations, in order to ensure that the latter are operated in line with commercial practices on the market, with OR's management being somewhat autonomous in its decision making process, there are nevertheless elements to indicate that the public authorities may influence the company's strategy and decisions. As noted above, the Board sets OR's policies in various fields and must approve the company's major decisions, which in some instances requires consulting with OR's owners. It appears that many of the measures complained of concern major investments, loan guarantees and loan transactions between OR and GR, which may have been subject to the Board's scrutiny and approval. The Board, as noted above, is politically appointed, and currently half of the board members also serve as City or Municipal Council representatives. This arrangement has been evaluated by the Enquiry Committee on Orkuveita Reykjavíkur, which in its 2012 report noted that this arrangement could lead to a lack of professional knowledge and experience on the Board, and that its work could be characterised by political conflict and disunity ([72]).

(63) In light of the legal status of OR, the composition of its Board and the general circumstances described above, the Authority is unable to exclude that the measures are imputable to the State and that they entail the transfer of state resources, if and to the extent they confer advantages on GR.

([65]) https://www.althingi.is/lagas/nuna/2013136.html.
([66]) https://www.reglugerd.is/reglugerdir/allar/nr/297-2006.
([67]) See for example: https://reykjavik.is/sites/default/files/ymis_skjol/skjol_utgefid_efni/city_of_ reykjavik_-_financial_statements_2018.pdf.
([68]) https://www.or.is/um-or/skipulag-og-stjornhaettir/stjorn/. .
([69]) See Article 2 of OR's ownership policy: https://www.or.is/um-or/skipulag-og-stjornhaettir/eigendastefna/,
([70]) Article 16 of the Electricity Act No 65/2003.
([71]) See Article 6 of OR's ownership policy: https://www.or.is/um-or/skipulag-og-stjornhaettir/eigendastefna/. .
([72]) See Report of the Enquiry Committee on Orkuveita Reykjavíkur, page 73, https://rafhladan.is/handle/10802/5777.

(64) Against this background, the Icelandic authorities are invited to comment on the issue of imputability.

5.2 ***Conferral of an advantage on an undertaking***

5.2.1 *General*

(65) The qualification of a measure as state aid requires that it confers an advantage on the recipient. An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit, which an undertaking could not have obtained under normal market conditions.

5.2.2 *Does GR constitute an undertaking?*

(66) The EU Courts have consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ([73]). Consequently, the public or private status of an entity or the fact that an entity is partly or wholly publicly owned has no bearing as to whether or not that entity is an „undertaking" within the meaning of state aid law ([74]).

(67) Economic activities are activities consisting of offering goods or services on a market ([75]). Conversely, entities that are not commercially active in the sense that they are not offering goods or services on a given market do not constitute undertakings. A single entity may carry out a number of activities, both economic and non-economic, provided that it keeps separate accounts for the different funds that it receives, so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities ([76]).

(68) As described in paragraph (19) above, GR was established on 1 January 2007, and its role is to provide Icelandic households and businesses access to high quality services on an open access network ([77]). GR operates a telecommunications and data transmission network and it provides wholesale access to its fibre optic network for a number of retail service providers that operate in supplying homes and businesses with different fixed broadband and data transmission services. GR also offers services on the household market, where it charges end-users directly for the use of the access network.

(69) Although GR does not sell its own services in the retail market, it offers neutral and open network access to all interested telecommunications providers. The Authority considers that the provision of network access for a fixed price to third-party service providers and households constitutes an economic activity. Consequently, GR appears to operate as an undertaking within the meaning of Article 61(1) of the EEA Agreement ([78]).

(70) Any advantage involved in the transactions between OR and GR will therefore have been conferred upon an undertaking.

5.2.3 *PTA's monitoring and decisional practice*

(71) The measures complained of, concerning the financial relations between OR and GR, have, as described in Section 3.3 above, all been assessed by the PTA on the basis of Article 36 of the Electronic Communications Act.

(72) The Icelandic authorities maintain that the test applied by the PTA is comparable to the test applied by the Authority when determining whether a measure is on market terms (i.e. the MEO test).

(73) It is the Authority's preliminary view, considering the decisional practice of the PTA under Article 36 of the Electronic Communications Act on the financing of GR and the level of scrutiny involved in the assessment of the various measures, that the test applied by the PTA under Article 36 generally ensures that all transactions between GR and OR, or other related companies, are on market terms.

([73]) Judgments in *Pavlov and others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 74, and *Cassa di Risparmio di Firenze and others*, C-222/04, EU:C:2006:8, paragraph 107; Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 78.

([74]) Judgment in *Congregación de Escuelas Pías Provincia Betania* v *Ayuntamiento de Getafe*, C-74/16, EU:C:2017:496, paragraph 42.

([75]) Judgment in *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 108; and Case E-29/15 *Sorpa* [2016] EFTA Ct. Rep. 825, paragraph 72.

([76]) Judgment in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 51.

([77]) See https://www.ljosleidarinn.is/gagnaveita-reykjavikur.

([78]) See the Authority's Decision No 444/13/COL, *The Deployment of a Next Generation Access network in the municipality of Skeiða- and Gnúpverjahreppur* (OJ C 66, 6.3.2014, p. 6) and EEA Supplement No 82, 21 grudnia 2017, p. 1, paragraph 56.

(74) The PTA's approach may not be identical to the MEO assessment that would be carried out by the Authority under the EEA state aid rules, but it nonetheless ensures the same outcome, i.e. it prevents transactions that are not on market terms. Therefore, at this stage the Authority is of the preliminary view that the PTA provides an assessment similar to the Authority's MEO assessment. The enforcement of Article 36 of the Electronic Communications Act by the PTA thus appears to effectively prevent GR from obtaining an advantage from its dealings with OR and when infringements are found the PTA has the competence to order the clawback of any advantages. However, there are instances where the PTA has either not ordered the full clawback of advantages with interest, or not ordered clawback at all.

(75) An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of state intervention, thereby placing it in a more favourable position than its competitors ([79]).

(76) Generally, when examining this question, the Authority applies the MEO test ([80]), whereby the conduct of states or public authorities, when selling or leasing assets, is compared to that of private economic operators ([81]).

(77) The purpose of the MEO test is to assess whether the state has granted an advantage to an undertaking by not acting like a private market economy operator with regard to a certain transaction, e.g. loan agreements or the sale of asset ([82]). In order to fulfil the test, the public authority must disregard public policy objectives and instead focus on the single objective of obtaining a market rate of return or profit on its investments and a market price for the sale or lease of assets ([83]). This assessment must take into account any special rights or obligations attached to the asset concerned, in particular those that could affect the market value.

(78) It follows from this test that an advantage is present whenever a state makes funds available to an undertaking, which, in the normal course of events, would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social, political or philanthropic nature ([84]).

(79) The PTA, as described above, has examined the strategy and financial prospect of the relevant measures, in order to determine whether the financing of the operations of GR has been carried out in line with normal market conditions. In its assessment, the PTA has considered independent expert reports and drawn comparisons with other, private operators in the same market. The PTA's assessment is normally carried out on an *ex ante* basis. However, there are also examples of the PTA having carried out an *ex post* assessment of the financial separation between OR and GR, as well as individual measures.

(80) More precisely, from 2006 until 2019, the PTA adopted nine formal decisions regarding the financial separation of OR and GR. The PTA did not make formal comments for the years 2013–2015. The PTA's investigations included a review of GR's business plan, which must be renewed annually, in accordance with actual financial data. In its review, the PTA e.g. checks whether the rate of return for the investor (OR) is in conformity with the telecom market in general, and looks at the capital structure and whether transactions between OR and GR are on market terms.

(81) GR has been obliged to submit to the PTA, on an annual basis, detailed operational and economic information, together with its revised business plans and profitability requirements. Whenever necessary, the PTA has requested additional data and has assessed whether the operations were in line with market terms and, if not, whether there was a reason for taking action.

(82) In a letter from the PTA to the complainant, dated 6 September 2018, the PTA confirmed that it does not have legal powers to perform a cost analysis of the prices OR sets for renting out its facilities. The complainant has argued that because of this, the PTA's assessment of the financial separation cannot replace that of the Authority, when assessing possible state aid.

([79]) Judgments in *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 60, and *Spain* v *Commission*, C-342/96, EU:C:1999:210, paragraph 41.

([80]) NoA, chapter 4.2.

([81]) For the application of the MEO test, see Case E-12/11 *Asker Brygge* [2008] EFTA Ct. Rep. 536, and judgment in *Land Burgenland*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682.

([82]) NoA, paragraph 133.

([83]) Judgment in *Land Burgenland*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682.

([84]) See for example, the Opinion of Advocate-General Jacobs in *Spain* v *Commission*, C-278/92, C-279/92 and C-280/92, EU:C:1994:112, paragraph 28. See also judgments in *Belgium* v *Commission*, 40/85, EU:C:1986:305, paragraph 13, *France* v *Commission*, 301/87, EU:C:1990:67, paragraphs 39–40, and *Italy* v *Commission*, 303/88, EU:C:1991:136, paragraph 24.

(83) It is the preliminary view of the Authority that even though the PTA does not have the legal basis to perform a cost analysis of OR's prices, the PTA has other ways to ensure that OR's pricing practices for renting out facilities are on market terms. Article 36 of the Electronic Communications Act obliges OR to ensure equality in pricing when renting out facilities to related and unrelated companies. Furthermore, OR is obliged to ensure that competitive operations are not subsidised by activities enjoying exclusive rights or protected activities. The PTA then enforces these obligations. As the PTA explains in its letter to the complainant, it did in fact open an investigation into OR pricing practices for renting out facilities, and concluded that OR's pricing was in full conformity with Article 36 of the Electronic Communications Act ([85]).

(84) The PTA has found that in order to ensure that the effectiveness of Article 36 of the Electronic Communications Act is guaranteed, the concept of „subsidy" should be understood in a broad sense, so as to include any measures from OR, both direct and indirect, which potentially provide GR with an advantage that its competitors on the market do not enjoy. The PTA has also noted that its monitoring role, pursuant to Article 36, is comparable to the Authority's, when it comes to assessing whether an advantage within the meaning of Article 61(1) of the EEA Agreement is present ([86]).

(85) It is the Authority's preliminary view that there is an efficient system in place in Iceland that entails an assessment similar to the MEO test. Consequently, Article 36 of the Electronic Communications Act sets up a system under which the PTA can ensure that GR's operations are not subsidised through income from OR's operations.

(86) It follows from the test that an advantage is present whenever OR makes funds available to GR, which, in the normal course of events, would not be provided by a private investor applying ordinary commercial criteria. The PTA can conduct a formal investigation on its own initiative or based on a complaint. If a transaction is not in conformity with Article 36 of the Electronic Communications Act, the PTA can instruct the parties to eliminate any advantage through the adoption of relevant measures set forth in an administrative decision by the PTA. The decisions are challengeable before the Rulings Committee for Electronic Communications and Postal Affairs and the Courts.

(87) The Icelandic authorities have explained that the PTA's monitoring role is primarily focused on an *ex ante* assessment of GR's business plans, financing, profitability requirements, loan arrangements, etc., with the PTA imposing conditions and obligations when necessary in order to ensure financial separation between OR and GR, and that the latter's competitive operations are not subsidised by the mother company ([87]).

(88) Where the PTA *ex post* finds an infringement of Article 36 of the Electronic Communications Act, i.e. where it finds that a particular transaction was not on market terms, it can instruct the parties to eliminate any potential advantage through the adoption of relevant measures. The advantage is then recovered from the beneficiary in accordance with national law ([88]).

(89) However, for the PTA to order an advantage clawed back, the incompatible measure must be clearly defined and be incontestable, e.g. a particular monetary sum, a condition in a loan agreement, etc. ([89]). Moreover, when the PTA has ordered advantages granted to GR to be clawed back, it has not required those advantages to be recovered with interest.

(90) As described in Section 4.3 above, there are three examples of the PTA having established concrete infringements of Article 36 of the Electronic Communications Act. In two of those cases, the PTA ordered that the measures be clawed back. In the third case, the PTA did not order any clawback.

(91) The first case, described in paragraph (33) above, concerned a temporary suspension of interest payments on loans provided by OR to GR ([90]). The PTA concluded that this temporary suspension had been in breach of the requirement imposed by the PTA concerning arm's-length terms in transactions between OR and GR. Moreover, the PTA found that the suspension of interest payments had provided GR with an advantageous subsidy. Considering the facts of this case, the nature of transactions, as well as the PTA's assessment, the Authority is also of the preliminary view that the measure provided GR with an advantage that it would not have obtained under normal market conditions.

([85]) Document No 931139.
([86]) PTA Decision No 3/2019 of 20 marca 2019, paragraphs 338–340.
([87]) Document No 1073308.
([88]) Judgment in *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 89.
([89]) Document No 1073308.
([90]) PTA Decision No 25/2010 of 7 września 2010.

(92) The PTA ordered GR to pay back the suspended interest payments, however, it did not order the company to pay back interest on those suspended payments ([91]). In order to effectively recover an unlawful advantage at national level, the beneficiary must be ordered to pay interest for the whole of the period in which it benefitted from that aid. The interest must at least be equivalent to that which would have been applied if the beneficiary had had to borrow the amount on the market at the time ([92]). Although GR has paid back the market interest it was obliged to pay in the first place, it has not been required to pay back market interest on the advantage it obtained through the temporary suspension of interest payments. Therefore, the full advantage has not been adequately clawed back.

(93) The second case, briefly described in paragraph (49) above, concerned funds deriving from OR and used to finance GR's fiber optic cable project in Ölfus Municipality ([93]). The PTA concluded that the transfer of funds from ÖRF (but deriving from OR) to GR had amounted to a cross-subsidy between OR's protected geothermal activities and GR's competitive operations. Having considered the facts of the case and the PTA's assessment, the Authority takes the preliminary view that ÖRF's financing of the fibre optic cable network was not on market terms and therefore provided GR with an advantage.

(94) The PTA ordered GR to undertake appropriate measures to repay the funds it received from ÖRF, although it did not stipulate how GR should go about this. Nevertheless, the PTA suggested that GR could either repay the funds to Ölfus Municipality or that the municipality could obtain an appropriate share in the project proportional to its investment. The Authority does not have information concerning how GR reacted to the PTA's proposals and which measures it adopted following the decision. At this stage, it is therefore not clear to the Authority whether the advantage has been fully clawed back from GR.

(95) Finally, in its latest decision concerning the implementation of GR's financial separation for 2016–2017 (see Section 4.3.6 above), the PTA found two infringements of Article 36 of the Electronic Communications Act ([94]):

(i) The first infringement concerned OR's lending to GR from a shared cash pool, without a loan agreement reflecting market conditions.

(ii) The second infringement concerned conditions in GR's loan agreements with private lenders relating to OR's continuing majority ownership of GR. Such provisions had been included in GR's loan agreements with private lenders, since OR's loan financing of GR was replaced by private lenders, starting in 2014 and eventually being completely replaced at the end of 2017. The PTA found that by including these provisions, private lenders connected the ownership of OR to the loan agreements, in order to minimise the probability of default ([95]). The PTA considered that such arrangements could lead to more advantageous loan terms and more access to loan capital than other comparable telecommunications undertakings and, therefore, distort competition ([96]).

(96) The Authority, considering the benchmarks applied by the PTA and its detailed assessment of these measures, takes the preliminary view that these two measures provided GR with an advantage that it would not have obtained under normal market conditions. Due to proportionality considerations, the PTA did not order the clawback of the aforementioned advantages.

5.2.4 *Preliminary conclusions*

(97) Based on the above considerations, it is the Authority's preliminary view that GR has obtained an advantage within the meaning of Article 61(1) of the EEA Agreement, which it could not have obtained under normal market conditions, by: (i) not paying market interest on the advantage it obtained through a temporary suspension of interest payments, (ii) receiving funds indirectly from OR for the layout of a fibre optic cable network in Ölfus Municipality, (iii) receiving short-term lending from OR, and (iv) through the inclusion of a condition in GR's loan agreements with private lenders on OR's continued majority ownership in GR.

5.3 ***Selectivity***

(98) To be characterised as state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must also be selective in that it favours „certain undertakings or the production of certain goods". Not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings, categories of undertakings or to certain economic sectors.

([91]) PTA Decision No 25/2010 of 7 września 2010.
([92]) Judgment in *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 142.
([93]) PTA Decision No 11/2015 of 2 czerwca 2015.
([94]) PTA Decision No 3/2019 of 20 marca 2019.
([95]) PTA Decision No 3/2019 of 20 marca 2019, paragraph 353.
([96]) PTA Decision No 3/2019 of 20 marca 2019, paragraph 353.

(99) The potential aid measures at issue, i.e. (i) not paying market interest on the advantage GR obtained through a temporary suspension of interest payments, (ii) receipt of funds indirectly from OR for the layout of a fibre optic cable network in Ölfus Municipality, (iii) short-term lending from OR to GR, and (iv) the inclusion of a condition in GR's loan agreements with private lenders on OR's continued majority ownership in GR, are individual measures addressed only to GR. The measures therefore appear to be selective within the meaning of Article 61(1) of the EEA Agreement.

5.4 *Effect on trade and distortion of competition*

(100) The measures must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.

(101) According to CJEU case law, it is not necessary to establish that the aid has a real effect on trade between the Contracting Parties to the EEA Agreement and that competition is actually being distorted, but only to examine whether the aid is liable to affect such trade and distort competition ([97]). Furthermore, it is not necessary that the aid beneficiary itself is involved in intra-EEA trade. Even a public subsidy granted to an undertaking, which provides only local or regional services and does not provide any services outside its state of origin, may nonetheless have an effect on trade if such internal activity can be increased or maintained as a result of the aid, with the consequence that the opportunities for undertakings established in other Contracting Parties are reduced ([98]).

(102) GR is active in deploying a fibre network infrastructure in a market which can be entered directly or through financial involvement by participants from other EEA States. In general, the markets for electronic communications services (including the wholesale and the retail broadband markets) are open to trade and competition between operators and service providers across the EEA.

(103) Therefore, it is the Authority's preliminary view that the measures are liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.

5.5 *Conclusion*

(104) Based on the information provided by the Icelandic authorities and the complainant, the Authority has formed the preliminary view that the measures, i.e. (i) not paying market interest on the advantage GR obtained through a temporary suspension of interest payments, (ii) receipt of funds indirectly from OR for the layout of a fibre optic cable network in Ölfus Municipality, (iii) short-term lending from OR to GR, and (iv) the inclusion of a condition in GR's loan agreements with private lenders on OR's, fulfil all criteria in Article 61(1) of the EEA Agreement and therefore constitute state aid.

6 **Procedural requirements**

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

(106) The Icelandic authorities did not notify the potential aid measures to the Authority. It is therefore the Authority's preliminary view that the Icelandic authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3. The granting of the potential aid therefore appears to be unlawful.

7 **Compatibility**

(107) Having reached a preliminary conclusion that the measures might constitute unlawful aid, the Authority must assess whether they would be compatible with the functioning of the EEA Agreement.

(108) The Authority can declare state aid compatible with the functioning of the EEA Agreement under its Articles 59(2) and 61(3)(c) provided that certain compatibility conditions are fulfilled.

([97]) Case E-6/98 *Norway* v *ESA* [1999] EFTA Ct. Rep. 76.

([98]) See for example judgments in *Eventech*, C-518/13, EU:C:2015:9, paragraph 66, *Libert and others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 77, *Friulia Venezia Giulia*, T-288/97, EU:T:2001:115, paragraph 41.

(109) It is for the Icelandic authorities to invoke possible grounds for compatibility and to demonstrate that the conditions for compatibility are met ([99]). However, the Icelandic authorities have not provided any arguments substantiating why the measures should be considered compatible with the functioning of the EEA Agreement. In particular, no arguments supporting the conclusion that the aid is targeted at a well-defined objective of common interest have been presented. Furthermore, the Icelandic authorities have not presented evidence suggesting that GR has been entrusted with a public service obligation. The Authority has also not identified any clear grounds for compatibility.

(110) To the extent that the measures constitute state aid, the Authority therefore has doubts as to their compatibility with the functioning of the EEA Agreement

8 **Conclusion**

(111) As set out above, the Authority has formed the preliminary view that the measures fulfil all criteria in Article 61(1) of the EEA Agreement and therefore appear to constitute state aid. The Authority furthermore has doubts as to whether the measures are compatible with the functioning of the EEA Agreement.

(112) Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority hereby opens the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measures do not constitute state aid or are compatible with the functioning of the EEA Agreement.

(113) The Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Icelandic authorities to submit, by **6 January 2020** their comments and to provide all documents, information and data needed for the assessment of the measures in light of the state aid rules.

(114) The Icelandic authorities are requested to immediately forward a copy of this decision to OR.

(115) If this letter contains confidential information which should not be disclosed to third parties, please inform the Authority by **13 December 2019**, identifying the confidential elements and the reasons why the information is considered to be confidential. In doing so, please consult the Authority's Guidelines on Professional Secrecy in State Aid Decisions ([100]). If the Authority does not receive a reasoned request by that deadline, the Icelandic authorities will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter on the Authority's website: http://www.eftasurv.int/state-aid/state-aid-register/ and in the Official Journal of the European Union and the EEA Supplement thereto.

(116) Finally, the Authority will inform interested parties by publishing a meaningful summary of it in the Official Journal of the European Union and the EEA Supplement thereto. All interested parties will be invited to submit their comments within one month of the date of such publication. The comments will be communicated to the Icelandic authorities.

For the EFTA Surveillance Authority

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([99]) Judgment in *Italy* v *Commission*, C-364/90, EU:C:1993:157, paragraph 20.
([100]) OJ L 154, 8.6.2006, p. 27 and EEA Supplement No 29, 8 czerwca 2006, p. 1.