

Case No: 70520
Event No: 655195
Dec. No: 128/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 20 March 2013

to initiate the formal investigation procedure into potential state aid involved in the financing of the Harpa Concert Hall and Conference Centre

(ICELAND)

The EFTA Surveillance Authority (“the Authority”)

HAVING REGARD to:

The Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61 and Protocol 26,

The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1 of Part I and Articles 4 (4), 6 and 13 of Part II,

WHEREAS:

I. FACTS

1. Procedure

- (1) On 19 September 2011, the Authority received a complaint, dated 13 September 2011 (Event No. 608967), concerning the alleged subsidising by the Icelandic State and the City of Reykjavík (“the City”) of conference services and restaurant/catering services in the Harpa Concert Hall and Conference Centre (“Harpa”).¹
- (2) By letter dated 14 October 2011, the Authority requested additional information from the Icelandic authorities (Event No 609736). By a letter dated 30 November 2011 (Event No 617042), the Icelandic authorities replied to the request and provided the Authority with the relevant information.
- (3) The case was the subject of discussions between the Authority and the Icelandic authorities as well as the lawyer representing the holding company responsible for Harpa’s operations, at the package meeting in Reykjavík on 5 June 2012. Shortly after the meeting

¹ For the purposes of this decision ‘Harpa’ will refer to the building itself and its facilities.

the Authority sent a follow up letter, dated 9 July 2012 (Event No 637627), to the Icelandic authorities inviting them to provide information on certain outstanding issues.

- (4) By letter dated 21 August 2012 (Event No 644771), the Icelandic authorities submitted additional information. By letter dated 27 September 2012 (Event No 648320), the Icelandic authorities submitted a memorandum concerning the separation of accounts as well as a statement from the accounting firm PWC.
- (5) Finally, the Icelandic authorities submitted information by email dated 11 February 2013 (Event No 662444) and by letter dated 7 March 2013 (Event No 665434).

2. The complaint

- (6) The complainant has alleged that unlawful state aid is being provided by the Icelandic State and the City to the companies involved in the operation of Harpa. The complainant referred to the State budget for the year 2011 where the Ministry of Finance allocated ISK 419.400.000 to the operation of Harpa and additional ISK 44.200.000 for building costs and maintenance. The Municipality's budget foresaw a substantial allocation of funds to the Harpa project for the year 2011 amounting to a total of ISK 391.526.000. Furthermore, the Municipality contributed a substantial amount to the project in the years 2009-2010.
- (7) The complainant claims that the contribution from both the Icelandic government and the City is partly being used to subsidize the conference service and the restaurant/catering services in the music hall and conference centre. The contributions in question are fairly high and according to the complainant there is no transparency in how they are being used. The complainant maintains that this state aid affects the market for the conference business in the European Economic Area ("EEA") as a whole and is not limited to competitors on the Icelandic market. It therefore constitutes an infringement of Article 61 of the EEA Agreement.
- (8) The complainant provided the Authority with extracts from the Icelandic State budget for the year 2011 as well as an extract from the City's budget for the same year. Furthermore the complainant provided a purchase agreement for Harpa and general information on the conference market in Iceland. However the complainant noted that due to the lack of transparency it was difficult to gather detailed information on the obligations of the Icelandic State and the City to contribute funds to the companies involved in the operation of Harpa as well as information on Harpa's business model and on the separation of accounts.

3. Harpa concert hall and conference centre

3.1 Background

- (9) In 1999 the Mayor of Reykjavík along with representatives of the Icelandic government announced that a concert and conference centre would be constructed in the centre of Reykjavík. In late 2002 the Icelandic State and the City signed an agreement regarding the project and the following year the company Austurhöfn-TR ehf. was founded with the purpose of overseeing the project.
- (10) In 2004 the Icelandic State and the City initiated a Public Private Partnership ("PPP") bid concerning the construction, design and operation of the concert hall and conference centre. There were four companies that bid for the contract. In 2005 the evaluation committee of Austurhöfn-TR ehf. concluded that the offer from Portus ehf. was the most favourable one and subsequently the Icelandic State and the City entered into a contract

with Portus ehf. for the construction and operation of a concert and conference centre.² The construction of Harpa began on 12 January 2007.

- (11) Due to the financial collapse in Iceland in October 2008, the construction of Harpa was put on hold. However, shortly after the collapse, the Mayor of Reykjavík and the Minister of Education reached an agreement which entailed that the State and the City would continue with the construction of Harpa without the private partner. After an amended and restated project agreement was concluded the construction project continued (hereinafter referred to as “the Project agreement”).³ On 20 August 2011 Harpa was formally opened. The building is 28.000 square meters and is located at Austurbakki 2, 101 Reykjavík.
- (12) Harpa is meant to accommodate various services and operations. Both the Icelandic Symphony Orchestra and the Icelandic Opera have entered into long term contracts for the use of certain facilities within Harpa. Moreover, Harpa accommodates conferences and there are four conference halls of different sizes. Harpa also houses various other events such as pop and rock concerts with both Icelandic and foreign artists.
- (13) Other activities in Harpa such as catering, restaurants, a music shop and a furniture shop are operated by private companies who rent the facilities. According to the Icelandic authorities these facilities are leased on market terms and were subject to public tenders, where the most favourable offers were accepted.

3.2 The ownership and corporate structure of Harpa

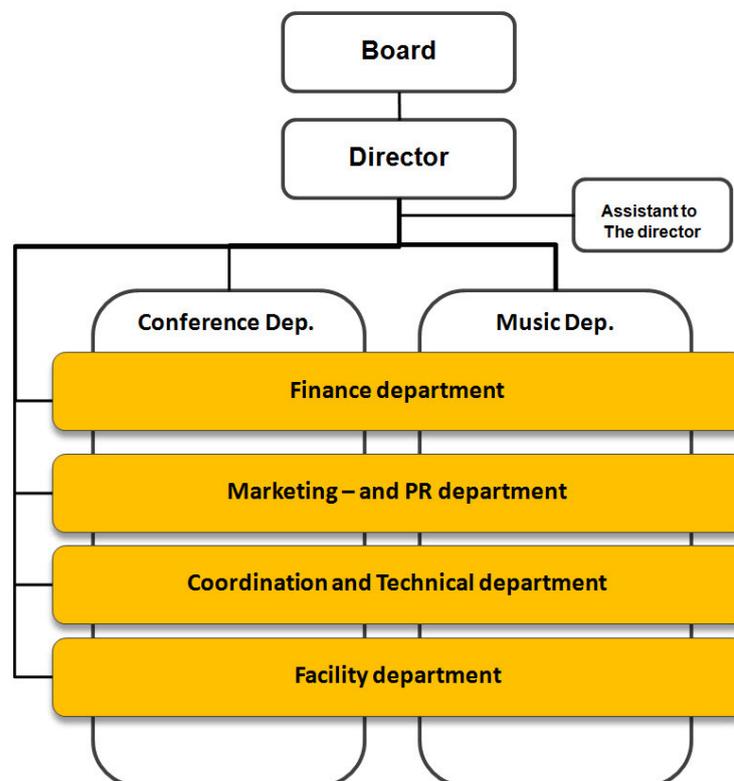
- (14) Harpa Concert Hall and Conference Centre is owned by the Icelandic State (54%) and Reykjavík City (46%) and therefore constitutes a public undertaking. The entire Harpa project has been overseen by Austurhöfn-TR ehf. which is a limited liability company, established by the Ministry of Finance on behalf of the Icelandic State and the City in order to take over the construction and running of the Harpa project.⁴
- (15) Until recently there were several limited liability companies involved in Harpa’s operations, namely: Portus ehf., which was responsible for Harpa real estate and operations, and Situs ehf., which was responsible for other buildings planned in the same area. Portus had two subsidiaries: Totus ehf., which owned the real estate itself, and Ago ehf., which was responsible for all operations in Harpa and leased the property from Totus. Situs also had two subsidies: Hospes ehf., which would have owned and operated a hotel which is to be constructed in the area, and Custos ehf., which was to own and operate any other buildings in the area.
- (16) However, in order to minimize operational costs and increase efficiency, the board of Austurhöfn-TR ehf. decided in December 2012 to simplify the operational structure of Harpa by merging most of the limited liability companies involved in its operations into one company. The State and the City therefore founded the company Harpa - tónlistar- og ráðstefnuhús ehf. which is to oversee all of Harpa’s operations. Simplifying the infrastructure of Harpa is a part of a long term plan to make Harpa’s operations sustainable.

² Project agreement between Austurhofn-TR ehf. and Eignarhaldsfelagid Portus ehf, signed on 9 March 2006.

³ Amended and restated project agreement between Austurhofn-TR ehf. and Eignarhaldsfelagid Portus ehf, signed on 19.1.2010.

⁴ Further information on Austurhöfn-TR ehf. can be found on their website: <http://www.austurhofn.is/>.

- (17) The following chart explains in broad terms the organizational structure of Harpa after the changes to its corporate structure entered into effect:⁵



3.3 The financing of Harpa’s operations

- (18) As previously noted, Harpa is fully owned by the Icelandic State and the City through Austurhöfn-TR ehf. The obligation of the State and the City are regulated by Article 13 of the Project agreement from 2006.⁶ The annual payments of the State and the City are covered by their respective budgets. According to the State budget for 2011 the annual state contribution was expected to amount to ISK 424.4 million. For the year 2012 the expected amount to be contributed by the State was ISK 553.6 million. In the year 2013 there is expected to be an increase in the public funding of Harpa as the City and the State have approved an additional ISK 160 million contribution. All public contributions to Harpa are borne in accordance with the participation in the project, i.e. the State pays 54% and the City 46%. The contributions are also indexed with the consumer price index.
- (19) In addition to the contribution provided for in the State and the City’s budgets the government and the City have undertaken an obligation to grant a short term loan for the operation of Harpa until long term financing necessary to fully cover the cost of the project is completed,. As from 2013 the total amount of the loan was ISK 794 million with an interest rate of 5% and a 200 bp premium. The Icelandic authorities have however announced their intention to convert the loan into share capital in the companies operating Harpa.⁷

⁵ Information available online at: <http://en.harpa.is/media/english/skipur-1.jpg>.

⁶ As amended and restated in 2010.

⁷ The Icelandic authorities have not yet outlined the particulars of this arrangement.

- (20) The State and the City allocate funds on a monthly basis in order pay off loan obligations in connection with Harpa. Since the project is meant to be self sustainable the profits must cover all operational costs. The funds from the owners are therefore, according to the Icelandic authorities, only meant to cover outstanding loans.⁸
- (21) According to the Project agreement, there is to be a financial separation between the different companies involved in the operation of Harpa and between the different operations and activities:
- (22) *13.11.1 The Private Partner will at all times ensure that there is financial separation between the Real Estate Company, the Operation Company, Hringur and the Private Partner. Each entity shall be managed and operated separately with regards to finances.*
- (23) *13.11.2 The Private Partner will at all times ensure that there is sufficient financial separation, i.e. separation in book-keeping, between the Paid for Work and other operations and activities within the CC. The Private Partner shall at all times during the Term be able to demonstrate, upon request from the Client, that such financial separation exists.*
- (24) The operations of Harpa are divided into several categories: 1) The Icelandic Symphony Orchestra, 2) The Icelandic Opera, 3) Other art events, 4) Conference department, 5) Operations, 6) Ticket sales, 7) Operating of facilities, 8) Management cost. All these cost categories now fall under Harpa - tónlistar- og ráðstefnuhús ehf. and the revenue and costs attributed to each of these categories are included in the budget under the relevant category. Common operational costs such as salary, housing (heating and electricity) and administrative costs are divided among the categories according to a cost allocation model.⁹
- (25) According to the projected annual account of Austurhöfn-TR ehf. for the year 2012, the company was expected to sustain a significant operating loss corresponding to a total negative EBITDA of ISK 406.5 million. The conference part of Harpa's operation was run at a negative EBITDA of ISK 120 million in 2012 and the same goes for "other art events" (negative EBITDA of ISK 131 million). The projected annual accounts and earning analysis for the year 2013 also foresee a considerable operating loss, a total negative EBITDA of around ISK 348 million, with both the conference activities and "other art events" operating at a loss.¹⁰
- (26) As previously noted, the operation in Harpa is now overseen by a single company, Harpa - tónlistar- og ráðstefnuhús ehf., which is devoted to making the Harpa project as profitable as possible. According to the Icelandic authorities the overall aim is to make the operations gradually sustainable. Nevertheless, Harpa has since its opening been operated with an annual deficit that has been covered over the budgets of the Icelandic State and Reykjavík City.¹¹ According to projections submitted by the Icelandic authorities the conference activities in Harpa are expected to become gradually sustainable and by the year 2016 the authorities project that Harpa's conference operations will run at a positive EBITDA of ISK 3.5 million.¹² However, by the year 2016 the "other art events" are still expected to run at a negative EBITDA of around ISK 93 million.

⁸ See memorandum issued by the Director of Harpa, dated 24 September 2012 (Event No 648320).

⁹ See report by KPMG, dated 7.2.2013 (Event No 662444).

¹⁰ Ibid.

¹¹ According to the Icelandic authorities Harpa's losses mostly stem from high real estate taxes.

¹² The key factor in this revenue growth is the expected increase in the conference business.

4. Comments by the Icelandic authorities

- (27) The Icelandic authorities argue that the financing of the companies involved in the operation of Harpa does not involve state aid since they have properly ensured that the companies keep separate accounts for the different activities within the concert hall and the conference centre.
- (28) The Icelandic authorities have claimed that revenues from conference and concert activities have been accounted for separately from other activities, while costs had not been accounted for separately up until now. The Icelandic authorities have acknowledged the need for accounting for conference activities separately from concert activities, as well as costs associated with these activities, and they aimed at having such a separation functional in January 2012.
- (29) Furthermore, the Icelandic authorities claim that there is now a sufficient separation of accounts. In order to validate this claim they have put forward statements from two accounting firms, PWC and KPMG. According to PWC the separation of accounts for the companies involved in the operation of Harpa is sufficient. The profits are attributed to the relevant operational category and the common operational costs are divided between all operational categories. According to the report from KPMG, the property management team of Harpa have divided the building's square meters based on function and usage and the related costs are allocated accordingly.
- (30) With regard to the conference operations, according to the Icelandic authorities, Harpa - tónlistar- og ráðstefnuhús ehf. is not itself active on the conference market. The company however leases conference rooms either to one-off conference organizers or to specialized conference businesses. Furthermore, the Icelandic authorities have noted that there are no competing conference centres in Iceland capable of hosting large scale conferences like Harpa. According to the Icelandic authorities the conference business positively contributes to other activities in Harpa. If Harpa - tónlistar- og ráðstefnuhús ehf. would not operate the conference business, the costs other activities would have to carry would be considerably higher. In order to show that the conference aspect of Harpa is not being subsidized the Icelandic authorities submitted a pricing analysis from KPMG where they compared the prices of comparable conference facilities, based on size and capacity. According to KPMG's analysis the price for a full day, the price per guest and the price per square meter is on average much higher for the facilities in Harpa than for comparable facilities offered in competing conference facilities.
- (31) Lastly, the Icelandic authorities maintain that the financial contributions from the State and the City are fully allocated for payment of outstanding loans and are not used in order to subsidize the conference hosting aspect.

II. ASSESSMENT

1. The presence of state aid within the meaning of Article 61(1) EEA

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

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

(34) In the following chapters the financing of the companies involved in the operation of Harpa Concert Hall and Conference Centre will be assessed with respect to these criteria.

1.1 State resources

(35) According to Article 61(1) of the EEA Agreement, a measure must be granted by the State or through state resources in order to constitute state aid.

(36) At the outset, the Authority notes that both local and regional authorities are considered to be equivalent to the State.¹³ Consequently, the state for the purpose of Article 61(1) covers all bodies of the state administration, from the central government to the City level or the lowest administrative level as well as public undertakings and bodies. Furthermore, municipal resources are considered to be state resources within the meaning of Article 61 of the EEA Agreement.¹⁴

(37) Since the Icelandic State and the City of Reykjavík cover jointly the annual deficit of the companies involved in the operation of Harpa by annually contributing a certain amount from their budgets, state resources are involved. Furthermore, the converting of loans into share capital also entails a transfer of state resources since the State and the City would forgo their entitlement to receive a full repayment of the outstanding loans. Therefore, the first criterion of Article 61(1) of the EEA Agreement is fulfilled.

1.2 Undertaking

(38) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement the measure must confer an advantage upon an undertaking. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.¹⁵ Economic activities are activities consisting of offering goods or services on a market.¹⁶ Conversely, entities that are not commercially active in the sense that they are not offering goods and services on a given market do not constitute undertakings.

(39) The Authority is of the opinion that both the construction and operation of an infrastructure constitute an economic activity in itself (and are thus subject to state aid

¹³ See Article 2 of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings (OJ L 318 17.11.2006 p. 17), incorporated at point 1a of Annex XV to the EEA Agreement.

¹⁴ See the Authority's Decision No 55/05/COL section II.3. p. 19 with further references, published in OJ L 324, 23.11.2006, p. 11 and EEA Supplement No 56, 23.11.2006, p. 1.

¹⁵ Case C-41/90 *Höfner and Elser v. Macroton* [1991] ECR I-1979 paragraphs 21-23 and Case E-5/07 *Private Barnehagers Landsforbund v. EFTA Surveillance Authority* [2008] Ct. Rep. 61 paragraph 78.

¹⁶ Case C-222/04 *Ministero dell'Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, paragraph 108.

rules) if that infrastructure is, or will be used, to provide goods or services on the market.¹⁷ In this case, the conference hall and concert centre is intended for e.g. hosting conferences as well as music, culture and “other art events” on a commercial basis, i.e. for the provision of services on the market. This view has been confirmed by the Court of Justice of the European Union in the *Leipzig/Halle* case.¹⁸ Consequently, in infrastructure cases, aid may be granted at several levels: construction, operation and use of the facilities.¹⁹

- (40) As previously noted, Harpa Concert Hall and Conference Centre hosts concerts by the Icelandic Symphony Orchestra, the Icelandic Opera, various other art events as well as conferences. In the view of the Icelandic authorities only the conference aspect of Harpa’s operation constitutes an economic activity. All other activities should therefore be classified as non-economic. However, the Authority has certain doubts in this regard.
- (41) Some of the activities taking place in Harpa, notably conferences, theatre performances, popular music concerts etc., can attract significant numbers of customers while they are in competition with private conference centres, theatres or other music venues. Therefore, the Authority takes the view that the Harpa Concert Hall and Conference Centre and the companies involved in its operation, in so far as they engage in commercial activities, qualify as an undertaking.²⁰ The companies involved in the operation of Harpa must be regarded as vehicles for pursuing the common interest of its owners, that is to support cultural activities in Iceland.

1.3 Advantage

- (42) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement the measure must confer an economic advantage on the recipient.
- (43) Regarding the financing of the construction of Harpa, state aid can only be excluded if it is in conformity with the market economy investor principle (“MEIP”).²¹ According to the Icelandic authorities, the State and the City had initially hoped that a private investor would finance the realization of the project. However, due to the financial crisis, it became impossible to carry out the project without public funding. The direct grant by the State and the City is thus claimed to be necessary, as without it there were not enough funds to finance the project. The Authority therefore considers, at this stage, that the public financing of the construction of Harpa would constitute an economic advantage and thus aid, since the project would admittedly not have been realised in the absence of public funding and the participation by the State and the City was essential to the Harpa project as a whole.
- (44) It follows from the Authority’s decisional practice that when an entity carries out both commercial and non-commercial activities, a cost-accounting system that ensures that the commercial activities are not financed through State resources allocated to the non-profit

¹⁷ See the Commission Decision in Case SA. 33618 (Sweden) *Financing of the Uppsala arena* (OJ C 152 of 30.5.2012, p. 18) paragraph 19.

¹⁸ Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v. The European Commission*, 19/12/2012, paragraphs 40-43, not yet published.

¹⁹ See the Commission Decision in Case SA. 33728 (Denmark) *Financing of a new multiarena in Copenhagen* (OJ C 152 of 30.5.2012, p. 6) paragraph 24.

²⁰ See the Commission Decision in Case N 293/2008 (Hungary) *Cultural aid for multifunctional community cultural centres, museums, public libraries* (OJ C 66 of 20.3.2009, p. 22) paragraph 19.

²¹ See the Commission Decision in Case SA. 33728 (Denmark) *Financing of a new multiarena in Copenhagen* (OJ C 152 of 30.5.2012, p. 6) paragraph 25.

making activities must be in place.²² This principle is also laid down in the Transparency Directive.²³ The Directive does not apply directly to the case at hand. However, the Authority is of the opinion that the principles of operating economic activities on commercial terms with separate accounts, and a clear establishment of the cost accounting principles according to which separate accounts are maintained, still apply.

- (45) As described in Section I.3 above, the operations of Harpa are divided into several categories, e.g. hosting the Icelandic Symphony Orchestra and the Icelandic Opera as well as other art events and conferences, which can be divided into economic and non-economic activities (i.e. cultural activities). The Icelandic authorities have however not properly ensured, through either amending the organizational structure of Harpa or by other administrative action, that there is a clear and consistent separation of the accounts for the different activities of the concert hall and conference centre. Simply dividing the losses associated with the operation of the building and common administrative costs between the different activities of Harpa, both the economic and non-economic, based on estimated usage and other criteria cannot be seen as a clear separation of accounts under EEA law. This situation therefore may lead to cross-subsidisation between non-economic and economic activities.
- (46) Additionally, an advantage is conferred on the companies involved in the operation of Harpa in the form of foregone profits when the State and the City do not require a return on their investment in the concert hall and conference centre, in so far as those companies engage in commercial activities, such as the hosting of conferences or “other art events”. Any business owner or investor will normally require a return on its investment in a commercial undertaking. Such a requirement effectively represents an expense for the undertaking. If a state and municipally owned undertaking is not required to generate a normal rate of return for its owner this effectively means that the undertaking benefits from an advantage whenever the owner foregoes that profit.²⁴
- (47) The Authority considers that the announced conversion of loans, in the amount of ISK 904 million could also constitute an advantage, should the conversion not be concluded on market terms. However, since the Authority has not received a detailed description of the loan conversion agreement it is not in the position to assess whether an advantage is present or not.
- (48) The preliminary assessment of the Authority thus shows that an economic advantage cannot be excluded at any level (construction, operation and use).

1.4 Selectivity

- (49) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement the measure must be selective.
- (50) The Icelandic authorities provide funding to the companies involved in the operation of Harpa. The funding is used to cover the losses stemming from the different activities within Harpa, including economic activities such as the hosting of conferences. This

²² ESA Decision 142/03/COL Regarding Reorganisation and Transfer of Public Funds to the Work Research Institute (OJ C 248, 16.10.2003, p. 6), ESA Decision 343/09/COL on the property transactions engaged in by the Municipality of Tím concerning property numbers 1/152, 1/301, 1/630, 4/165, 2/70, 2/32 (OJ L123, 12.5.2011, p.72).

²³ Commission Directive 2006/111/EC of 16.11.2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318 17.11.2006 p. 17), incorporated at point 1a of Annex XV to the EEA Agreement.

²⁴ Case C-234/84 *Belgium v Commission* [1986] ECR I-2263, paragraph 14.

system of compensation, under which cross-subsidisation may occur, is not available to other companies that are active on the conference market in Iceland or elsewhere.

- (51) In light of the above, it is the Authority's preliminary view that the companies involved in the operation of Harpa receive a selective economic advantage compared to their competitors on the market.

1.5 Distortion of competition and effect on trade between Contracting Parties

- (52) The measure must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement to be considered state aid within the meaning of Article 61(1) of the EEA Agreement.
- (53) According to settled case law, the mere fact that a measure strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, is considered to be sufficient in order to conclude that the measure is likely to affect trade between Contracting Parties and distort competition between undertakings established in other EEA States.²⁵ The state resources allocated to the companies involved in the operation of Harpa, in order to cover their losses, constitute an advantage that strengthens Harpa's position compared to that of other undertakings competing in the same market.
- (54) As the market for organising international events is open to competition between venue providers and event organisers, which generally engage in activities which are subject to trade between EEA States, the effect on trade can be assumed. In this case, the effect on trade between certain neighbouring EEA States is even more likely due to the nature of the conference industry. Moreover, the General Court has recently, in its Order concerning the Ahoy complex in the Netherlands, held that there was no reason to limit the market to the territory of that Member State.²⁶
- (55) Therefore, in the preliminary view of the Authority, the measure threatens to distort competition and affect trade within the EEA.

1.6 Conclusion with regard to the presence of state aid

- (56) With reference to the above considerations the Authority cannot, at this stage and based on its preliminary assessment, exclude that the measure under assessment includes elements of state aid within the meaning of Article 61(1) of the EEA Agreement. Under the conditions referred to above, it is thus necessary to consider whether the measure can be found to be compatible with the internal market.

2. Compatibility assessment

- (57) The Icelandic authorities have not put forward any arguments demonstrating that the state aid involved in the financing of the companies involved in the operation of Harpa could be considered as compatible state aid.
- (58) Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) or Article 59(2) of the EEA Agreement and are necessary, proportional and do not cause undue distortion of competition.

²⁵ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court page 76, paragraph 59; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11.

²⁶ Case T-90/09 *Mojo Concerts BV and Amsterdam Music Dome Exploitatie BV v. The European Commission*, Order of the General Court of 26/01/2012, paragraph 45, published in OJ C 89, 24.3.2012, p. 36.

- (59) The derogation in Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Further, the aid under assessment in this case cannot be considered to qualify as public service compensation within the meaning of Article 59(2) of the EEA Agreement.
- (60) The EEA Agreement does not include a provision corresponding to Article 107(3)(d) of the Treaty on the Functioning of the European Union. The Authority nevertheless acknowledges that state aid measures may be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement.²⁷
- (61) On the basis of Article 61(3)(c) of the EEA Agreement, aid to promote culture and heritage conservation may be considered compatible with the functioning of the EEA Agreement, where such aid does not affect trading conditions and competition in the EEA to the extent that is considered to be contrary to the common interest. The Authority must therefore assess whether granting aid to the various activities in Harpa can be justified as aid to promote culture on the grounds of Article 61(3)(c) of the EEA Agreement.
- (62) It should be noted that the principles laid down in Article 61(3)(c) of the EEA Agreement have been applied to cases somewhat similar to the case at stake.²⁸ The Icelandic authorities have stated that the primary objective of the measure in question was to promote culture through the construction of a concert hall that could house both the Icelandic Symphony Orchestra and the Icelandic Opera. Similar multipurpose cultural centres already exist in most other European cities. Harpa is to be Iceland's national concert hall, providing a necessary cultural infrastructure that was missing in Iceland and it will act as the focal point for the development and advancement of those performance arts in Iceland. The concert centre will therefore contribute to the development of cultural knowledge and bring access to cultural educational and recreational values to the public.²⁹
- (63) In view of the above, the Authority considers that, given its cultural purpose, the construction and operation of a Symphony and Opera facility, would qualify as aid to promote culture within the meaning of Article 61(3)(c) of the EEA Agreement. However, the Authority has doubts as to whether aid granted to subsidize conference and other art events, on a commercial basis, can be justified under Article 61(3)(c) and this aid must therefore be assessed separately.
- (64) Concerning necessity, proportionality and whether the measure is likely to distort competition, the Authority has the following observations. As previously noted the main reason for constructing Harpa was the apparent need for a suitable concert hall to accommodate both the Icelandic Symphony Orchestra and the Icelandic Opera. Given the scale of the project it is understandable that an infrastructure such as Harpa would also be used to house various commercial activities such as restaurants, coffee shops, stores, conferences and popular concerts. However, in order not to distort competition, safeguards must be put in place to ensure that there is no cross subsidisation between the commercial activities and the heavily subsidised cultural activities. This can be achieved by either tendering out facilities for the commercial activities, thereby ensuring that the economic

²⁷ See for example paragraph 7 (with further references) of the Authority's Guidelines on state aid to cinematographic and other audiovisual work, available at the Authority's webpage at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

²⁸ See Commission Decision in Case N 122/2010 (Hungary) *State aid to Danube Cultural Palace* (OJ C 147 of 18.05.2011, p. 3) and Commission Decision in Case N 293/2008 (Hungary) *Cultural aid for multifunctional community cultural centres, museums, public libraries* (OJ C 66 of 20.03.2009, p. 22).

²⁹ See Commission Decision in Case SA 33241 (Cyprus) *State support to the Cyprus Cultural Centre* (OJ C 377 of 23.12.2011, p. 11), paragraphs 36-39.

operator pays market price for the facilities and does not benefit from cross subsidisation, or by sufficiently separating the economic activities from the non-commercial activities by establishing a separate legal entity or a sufficient system of cost allocation and separate accounts that ensures a reasonable return on investment. The Icelandic authorities have already taken the former approach with regard to the restaurants, catering services and shops within Harpa. The same approach has however not been taken with regard to the hosting of conference and “other art events” which are currently overseen by a company owned by the State and the City, Harpa - tónlistar- og ráðstefnuhús ehf., and run at a considerable negative EBITDA. The Authority therefore cannot see that the Icelandic authorities have put the necessary safeguards in place to ensure that cross subsidisation does not occur between the cultural and the purely commercial activities within Harpa.

- (65) Consequently, following its preliminary assessment, the Authority has doubts whether the proposed project could be deemed compatible under Article 61(3)(c) of the EEA Agreement, at this stage at all three levels of possible aid (construction, operation and use) in accordance with the above.
- (66) At this stage, the Authority has not carried out an assessment with respect to other possible derogations, under which the measure could be found compatible with the functioning of the EEA Agreement. In this respect, the Icelandic authorities have not brought forward any further specific arguments.

3. Procedural requirements

- (67) Pursuant to Article 1(3) of Part I of Protocol 3, “[t]he 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 th[e] procedure has resulted in a final decision”.
- (68) The Icelandic authorities did not notify the aid measures to the Authority. Moreover, the Icelandic authorities have, by constructing and operating Harpa, put those measures into effect before the Authority has adopted a final decision. The Authority therefore concludes that the Icelandic authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3. The granting of any aid involved is therefore unlawful.

4. Opening of the formal investigation procedure

- (69) Based on the information submitted by the complainant and the Icelandic authorities, the Authority, after carrying out the preliminary assessment, is of the opinion that the financing of the companies involved in the operation of the Harpa Concert Hall and Conference Centre - within the context of the project as outlined above - might constitute state aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, as outlined above, the Authority has doubts as regards the compatibility of the potential state aid with the functioning of the EEA Agreement.
- (70) Given these doubts and the impact of potential state aid on the investments of private operators it appears necessary that the Authority opens the formal investigation procedure.
- (71) Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority is obliged to initiate 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 in question are compatible with the functioning of the EEA Agreement or that they do not constitute aid.

- (72) The opening of the procedure will also enable interested third parties to comment on the questions raised and on the impact of the Harpa project on relevant markets.
- (73) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, hereby invites the Icelandic authorities to submit their comments and to provide *all documents, information and data* needed for the assessment of the compatibility of the measures within one month from the date of receipt of this Decision.
- (74) The Authority must remind the Icelandic authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted already to the beneficiaries will have to be recovered, unless (exceptionally) this recovery would be contrary to a general principle of EEA law.
- (75) Attention is drawn to the fact that the Authority will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties, by publication of a notice in the EEA Supplement to the Official Journal of the European. All interested parties will be invited to submit their comments within one month of the date of such publication.

HAS ADOPTED THIS DECISION:

Article 1

The financing and operation of the Harpa Concert Hall and Conference Centre constitutes state aid within the meaning of Article 61(1) of the EEA Agreement. The Authority has doubts as regards the compatibility of the state aid with the functioning of the EEA Agreement.

Article 2

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is initiated regarding the aid referred to in Article 1.

Article 3

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

Article 4

The Icelandic authorities are requested to provide, within one month from notification of this Decision, all documents, information and data needed for assessment of the measures under the state aid rules of the EEA Agreement.

Article 5

This Decision is addressed to Iceland.

Article 6

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 20 March 2013.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sabine Monauni-Tömördy
College Member