

Case No: 68531  
Event No: 622381  
Decision No: 213/12/COL

EFTA SURVEILLANCE AUTHORITY DECISION  
of 30 May 2012  
on the repair of the Ship Lift in the Westman Islands  
(Iceland)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD to the Agreement on the European Economic Area<sup>1</sup>, in particular to Article 61,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice<sup>2</sup>, in particular to Article 24 thereof,

HAVING REGARD to Article 13(1) and Article 4(2) of Part II of Protocol 3 to the Surveillance and Court Agreement<sup>3</sup>,

Whereas:

## I. FACTS

### 1 Procedure

- 1 By letter dated 19 June 2010 (Event No. 562463), Landslog Law Offices filed a complaint with the EFTA Surveillance Authority (*the Authority*) on behalf of Skipasmíðastöð Njarðvíkur hf. (*the complainant*), which operates and owns ship repairs infrastructure in the south-west of Iceland. The complaint alleged the grant of unlawful state aid in connection to an intended investment by the Municipality of the Westman Islands (*the Municipality*) in a ship lift in the Municipality's harbour. The letter was received and registered by the Authority on 30 June 2010. By letter dated 22 July 2010 (Event No. 564644), the Authority acknowledged the receipt of the complaint and offered the complainant to provide further information on the market allegedly being distorted. The complainant forwarded further information by emails dated 19 and 24 May 2011 (Event No. 599077).

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<sup>1</sup> Hereinafter referred to as the EEA Agreement.

<sup>2</sup> Hereinafter referred to as the Surveillance and Court Agreement.

<sup>3</sup> Hereinafter referred to as Protocol 3.

- 2 By letter dated 22 July 2010 (Event No. 564461), the Authority sent the Icelandic authorities a request for information on the alleged investment in the ship lift in the Westman Islands, in particular on the intended financing and use. The Icelandic authorities responded by a letter dated 27 September 2010 (Event No. 571155). The Authority sent a second request for information to the Icelandic authorities by a letter dated 16 November 2011 (Event No. 615247) which was responded to by a letter dated 18 January 2012 (Event No. 621790).

## 2 Background

- 3 The Westman Islands are situated just off the south coast of Iceland and have the benefit of a natural harbour which is used by a relatively large fleet of fishing vessels due to the proximity to the fishing stocks in the seas off the southern coast of Iceland. The Municipality fully owns a public undertaking called the Westman Islands Harbour (*the Harbour*). The Harbour is operated on the basis of the Icelandic Harbour Act No. 61/2003 and Regulation No. 671/2005 for the Westman Islands Harbour<sup>4</sup> (*the Harbour regulation*); and is designated with the task of owning and operating the harbour infrastructure in the Westman Islands.
- 4 According to the Harbour regulation, the Municipal Council of the Westman Islands oversees the management of the Harbour. The management of normal operations is delegated to a Harbour Committee and a Harbour Manager. The Municipal Council elects the Harbour Committee in accordance with rules regarding the Municipality's various municipal committees and the duration of the term is the same as for the Municipal Council. The Harbour Committee oversees the finances of the Harbour, but it shall seek approval of the Municipal Council for each year's budget and for debt obligations lasting longer than a year. The Harbour Manager oversees the daily operations of the Harbour on behalf of the Harbour Committee.
- 5 According to information provided by the Municipality<sup>5</sup>, the current ship lift owned by the Harbour has been operating since 1982 and infrastructure for similar purposes has been in the Westman Islands since 1925. The ship lift was originally purchased in 1972, but due to the volcanic eruption in 1973 it was not set up until 1980 and started operating in 1982. The infrastructure was designed to lift vessels weighing up to 1000 ton and the commercial operation of the lift was carried out by the company Skipaliftan hf. in return for a fee payable to the Harbour.
- 6 In October 2006 the lift broke down when hoisting a vessel weighing 450 ton. The same vessel had been hoisted numerous times before without any incident. The exact reasons for the malfunction are unclear, but the Icelandic authorities suspect a combination of different factors, including wrong usage of the equipment, unusually fast corrosion of cables, and an earthquake which occurred six years earlier.
- 7 In May 2007 the Icelandic authorities notified to the Authority amendments to the Icelandic Harbour Act No. 61/2003 which among other things were supposed to extend a State funded damage compensation scheme to include damages to ship lift

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<sup>4</sup> Hafnarreglugerð fyrir Vestmannaeyjahöfn Nr. 671/2005.

<sup>5</sup> See letter dated 26 August 2010 attached to a letter from the Icelandic authorities dated 27 September 2010 (Event No. 571155).

facilities. On 12 December 2007 the Authority opened the formal investigation with Decision No. 658/07/COL,<sup>6</sup> doubting the compatibility of the amendments with the EEA Agreement. With its Decision of 15 July 2009 No. 328/09/COL<sup>7</sup> the Authority found the amendments to the Harbour Act with regards to state aid for ship lift facilities incompatible with the functioning of the EEA Agreement. This included the proposed State funded compensations for damages to ship lift facilities.

- 8 In October and November 2009 minutes from the meetings of the Westman Islands' Harbour Committee and Municipal Council show that the Decision of the Authority cancelled plans for the State to partly finance the repairs of the damaged ship lift. In response to that the Municipal Council decided that 50% of the cost of the repairs would be paid directly from the municipal budget, amounting to a maximum of ISK 150 million. In December 2009 the budget for the project was revised and the estimated total cost rose from ISK 300 million to ISK 370 million.<sup>8</sup>
- 9 On 19 November 2009 a complaint was filed by the Federation of Icelandic Industries<sup>9</sup> to the Icelandic Competition Authority alleging a breach of the Icelandic Competition Act No. 44/2005 and of Article 61 of the EEA Agreement with reference to the decision of the Municipal Council of the Westman Islands. By a letter dated 27 April 2010 the Competition Authority informed the Federation of Icelandic Industries that no formal investigation would be initiated. The Competition Authority noted that many of the arguments presented were based on state aid considerations which are outside the scope of their competence. Shortly thereafter the complainant lodged its complaint with the Authority.

### 3 The complaint

- 10 The complaint alleged that the ISK 370 million investment by the Municipality of the Westman Islands in the ship lift facilities would constitute a selective advantage to the Harbour, the owner of the ship lift. The advantage was claimed to be liable to distort competition on a market where the complainant is active, by lowering investment costs which otherwise would have been borne from the budget of the operator of the ship lift.
- 11 The complainant also alleged that the Municipality's investment would not return profits since the services provided through the ship lift will not generate sufficient revenues to cover operational costs and adequate returns on the capital invested. The complainant sent additional information by emails on 19 and 24 May 2011<sup>10</sup> informing of a tender procedure advertised by the Municipality of the Westman Islands. This tender allegedly would enable undertakings to set up businesses using the ship lift infrastructure provided by the Harbour for a remuneration which would not be sufficient to cover the costs associated with the operation and investment in such infrastructure. This, argued the complainant, would enable selected undertakings to compete with his own business on the basis of operational aid in the form of cheap

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<sup>6</sup> Published in the OJ C 96 of 17.04.2008, p. 3 and EEA Supplement No. 20 of 17.04.2008, p. 2.

<sup>7</sup> Published in the OJ L 219 of 25.8.2011, p. 7 and EEA Supplement No. 47 of 25.08.2011, p. 1.

<sup>8</sup> See minutes from the meeting of the municipal council on 22 October 2009 and from the 73<sup>rd</sup>, 74<sup>th</sup> and 77<sup>th</sup> meeting of the Harbour committee on 21 October, 2 November, and 14 December 2009.

<sup>9</sup> In Icelandic; Samtök iðnaðarins.

<sup>10</sup> See Event No. 633058

access to infrastructure while at the same time he had established his own infrastructure for which he had to bear the full operational and investment costs.

#### **4 The view of the Icelandic authorities**

- 12 The Icelandic authorities explained in their submissions that plans to finance part of the investment in the ship lift facilities directly through the budget of the Municipality have been abandoned. Instead the entire cost will be borne by the public undertaking operating the harbour. The Icelandic authorities also explained that the lease agreement with the company operating the ship lift has been cancelled and that in the future the facility will be available for other companies wishing to offer services using the ship lift infrastructure owned by the Harbour. In light of the changed financing of the project the Icelandic authorities did not find it necessary to comment further on the alleged state aid to the public undertaking operating the harbour.<sup>11</sup>
- 13 Upon a request from the Authority, the Icelandic authorities explained the business case for the investment which they claimed to be based on normal commercial considerations and that would in the long term be viable in business terms. Based on historical data it was estimated that annually 23 ships would use the lift for 220 days. The estimated income from this usage was based on a pricelist from the Port of Akureyri. Given those parameters the basic annual income was estimated at ISK 30.55 million, while the basic annual operational costs were estimated at ISK 6.52 million. Given a 2,5% annual inflation and 2% annual amortization of the ship lift, the internal interest rate of the investment of ISK 370 million was estimated at 8,27%. Given the same premises the present value of payment flow based on imputed rate of interest of 8% was estimated at approximately ISK 13 million.<sup>12</sup>
- 14 The Icelandic authorities also explained that operation of the Harbour is an important source of income for the Municipality and an estimated 80% of the Municipality's income tax is directly or indirectly derived from the Harbour's operations.
- 15 Furthermore it was emphasised that that the Harbour is a profitable public undertaking which returned ISK 153 million in profits on a balance sheet of ISK 1,1 billion in 2010. It is also explained that it is of importance from a business point of view for the Harbour to be able to provide businesses with a full range of services. If the ship lift facilities are not present the risk would be that ships and businesses might relocate and thus other revenues would be lost as well.

#### **5 Description of the potential aid measure**

- 16 The changed financing of the repairs of the ship lift alters the nature of the state aid concerns brought to the attention of the Authority by the complainant. There can no longer be a question of aid to the public undertaking operating the harbour after it was decided that it would take full responsibility for financing the project from its own funds.

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<sup>11</sup> See event No. 571155.

<sup>12</sup> See event No. 621790.

- 17 However, the complainant also raised the issue of the viability of the investment and concerns that competitors may be at a disadvantage if the Harbour would not require an adequate remuneration for the use of the ship lift facility.
- 18 The potential beneficiaries of the measure would be companies granted access to the ship lift and enabled to provide services to individuals and undertakings operating maritime vessels within the EEA. Cheap access to the infrastructure, that is the ship lift, could constitute operational aid to such companies.

## II. ASSESSMENT

### 1 The presence of state aid

- 20 Article 61(1) of the EEA Agreement reads as follows: “Save as otherwise provided in the 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.”

### 2 State resources

#### 2.1 Use of state resources

- 21 According to Article 2 of Regulation No. 671/2005 for the Westman Islands Harbour the Municipality of the Westman Islands is the owner of the public undertaking operating the Harbour.
- 22 The Court of Justice of the European Union (*CJEU*) has made clear that all resources of public-sector companies can constitute State resources:
- 23 “Art. 87(1) EC [corresponds to Article 61(1)EEA] covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources. [...] The State is perfectly capable, by exercising its dominant influence over such undertakings of directing the use of their resources in order, as occasion arise, to finance specific advantages in favour of other undertakings.”<sup>13</sup>
- 24 It is evident from the Harbour regulation that the Municipality is capable of controlling the public undertaking. The Municipality appoints the undertaking’s board of directors and approves its annual budget proposals. The Authority thus finds that the criterion regarding use of state resources is fulfilled. The resources used to finance the repairs of the ship lift were under the control of the public authorities.

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<sup>13</sup> See Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, paras 37-39.

## 2.2 Imputable to the State

- 25 When a measure is taken through an intermediary body, such as a public undertaking, the CJEU has stated that it is necessary to ‘*examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures*’.<sup>14</sup> In other words, the decision to implement a given measures must be imputable to public authorities in order to qualify as a measure granted through state resources within the meaning of Article 61(1) of the EEA Agreement.
- 26 The Municipality is governed by a Municipal Council, which is elected for a term of four years. The Municipal Council delegates its executive functions to a Municipal Executive Committee and four subject specific executive committees. One of those four committees serves as a Harbour Committee within the meaning of the Harbour Act and the Harbour Regulation.<sup>15</sup> This is however just one of the Committee’s many functions. It also oversees all public works decided by the Municipal Council and is responsible for various other public service functions. There is no separation between the Harbour Committee and other delegated executive functions of the public authorities in question.
- 27 According to the mandate of the Harbour Committee its decisions are in fact proposals to the Municipal Council subject to the latter’s approval. Only minor decisions that do not infer large expenses on the Municipality or its undertakings can be taken without consent of the Municipal Council.<sup>16</sup>
- 28 In line with the governance structure described, the Municipal Council approved the proposal of the Harbour Committee on its 1425<sup>th</sup> meeting on 22 October 2009 to rebuild the ship lift. Later the financing of the project was altered and approved by the Municipal Council through the budget proposal of the Harbour.<sup>17</sup>
- 29 The circumstances described above show that the relevant public authorities were indeed involved in taking the decision to rebuild the ship lift. The measure is therefore imputable to the State.

## 2.3 Conclusion on the presence of state resources

- 30 The resources used to rebuild the ship lift came from the budget of the public undertaking operating the Harbour. This undertaking and its resources are under the control of the Municipality of the Westman Islands, and the decision to undertake the measure under assessment was taken by the Municipal Council and the Harbour Committee. The Authority thus concludes that there was an intervention by the State through state resources within the meaning of Article 61(1) of the EEA Agreement, to the extent that an advantage was granted.

## 3 The presence of an advantage

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<sup>14</sup> See Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, para 52.

<sup>15</sup> See Samþykkt um stjórn Vestmannaeyjabæjar og fundarsköp bæjarstjórnar.

<sup>16</sup> See Article 64 of Samþykkt um stjórn Vestmannaeyjabæjar og fundarsköp bæjarstjórnar.

<sup>17</sup> See Minutes of 89<sup>th</sup> meeting of the Harbour Committee on 25 August 2010.

- 31 The EEA Agreement is neutral with regards to public and private ownership of undertakings (i.e. Article 125 EEA) which makes it necessary to distinguish between the behaviour of the State when acting in its capacity as a public authority and when acting as a market operator. When the State uses its resources in ways that are compatible with the behaviour of a normal market operator state aid is by definition ruled out. No advantage within the meaning of Article 61(1) is being granted by the State if another company in similar circumstances can expect a private investor or a shareholder to act in the same way. On the other hand, a company receives an advantage when it obtains through state resources funds which it could not obtain under normal market conditions.<sup>18</sup>
- 32 In the Authority's Guidelines on the application of state aid provisions to public enterprises in the manufacturing sector<sup>19</sup> the Market Economy Investor Principle (MEIP)<sup>20</sup> is articulated as the benchmark against which investments of the State should be assessed. It is not the aim of the Authority to replace the investor's judgment when state resources are being invested and any investment decision requires risk analysis which by their very nature implies a wide margin of judgement on behalf of the investor. Only where there are no objective grounds to reasonably expect that an investment gives an adequate rate of return that would be acceptable to a private investor in a comparable position under normal market conditions is state aid involved.
- 33 The CJEU has on numerous occasions found that the supply of goods or services on preferential terms, such as the provision of logistical and commercial assistance by public undertakings, is capable of constituting state aid.<sup>21</sup> In the *SFEI* case the CJEU established that the determination of what constitutes a normal remuneration '*presupposes an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided.*'<sup>22</sup>
- 34 In cases where comparable market references are absent, such as in the *Chronopost* case, the CJEU has found it sufficient to exclude the possibility of state aid that the received remuneration covered at least variable costs, fixed costs, and an adequate return on the capital invested. The finding presupposes that the cited costs elements are not underestimated or fixed in an arbitrary fashion.<sup>23</sup>

<sup>18</sup> Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-0435, Paragraph 207.

<sup>19</sup> See Part VI of the Authority's State Aid Guidelines: Rules on public service compensation, state ownership of enterprises and aid to public enterprises: Application of State aid provisions to public enterprises in the manufacturing sector - This corresponds to the Commission's Communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector.

<sup>20</sup> The market economy investor test was adopted by the CJEU in cases such as C-303/88 *Italy v Commission* [1991] ECR I-1433 and C-328/99 and C-399/00 *Italy and SIM 2* [2003] ECR I-4035.

<sup>21</sup> See Joined Cases 67/85, 68/85 and 70/85 *Kwekerij Gebroeders van der Kooy BV and others v Commission* [1988] ECR I-219, para 28; Case 56/93 *Belgium v Commission* [1996] ECR I-723, para 10; Case C-39/94 *Syndicat français de l'Express international and others v La poste and others* [1996] ECR I-3547, paras 57-60.

<sup>22</sup> See Case C-39/94 *Syndicat français de l'Express international and others v La poste and others* [1996] ECR I-3547, para 61.

<sup>23</sup> See Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost SA, La Poste and French Republic v Union française de l'Express* [2003] ECR I-6993, para 40.

- 35 This does however not necessarily mean that an advantage is present every time the State foregoes some revenues by undercutting market prices or, as alleged in this case, provides subsidised access to infrastructure. In such cases, however, there needs to be a special economic justification that refutes the natural assumption that preferential prices involve an advantage. In the *Van der Kooy* case the CJEU established that preferential prices could be ‘*objectively justified by economic reasons such as the need to resist competition on the same market*’.<sup>24</sup>
- 36 In order for the criteria of an advantage to be fulfilled some form of an advantage must have been granted to an undertaking from state resources. Based on the facts in the present case this could potentially occur if the Harbour would provide access to its ship lift at a price below the normal market price for such access, or alternatively if the remuneration would be compatible with comparable market prices but still below the actual total cost of operating the specific infrastructure. In the former case the Harbour would be losing potential revenues and thus granting an advantage to the users of the ship lift. In the latter case the Harbour would not be gaining sufficient returns on its investment and the users would be granted the advantage of having their access to the infrastructure subsidised. In both cases the intervention of the Municipality would mitigate charges which are normally included in the budget of comparable undertakings offering competing services.
- 37 With reference to the case law of the CJEU cited above it can be established that if the remuneration charged for the use of the ship lift by the Harbour of the Westman Islands is; (i) in line with the market prices for such services and (ii) covers the total costs associated with the operation and establishment of the facility, there is no advantage granted and thus no state aid is involved. If however either, or both, of those indicators are not met the assumption would be that the remuneration is preferential unless specially justified by objective verifiable economic reasons. This essentially means that remuneration for the use of infrastructure only involves an advantage if it cannot be commercially justified.<sup>25</sup>
- 38 The Icelandic authorities have informed that the ship lift will be operated on a commercially viable basis and that the prices charged for its use will be comparable to those charged by the Port of Akureyri, which operates similar infrastructure. The Icelandic authorities have also provided a business case for the operation of the ship lift based on the premises that the remuneration for its use will be comparable with normal market prices. This business case forecasts revenues that will in the long term cover all variable and fixed costs, in addition to adequate returns on the capital invested. The Icelandic authorities thus forecast that the investment in the ship lift as a standalone project will generate sufficient revenues to make it a sensible investment from a business point of view.
- 39 The Icelandic authorities have forwarded information explaining the wider economic context within which the decision to provide the customers of the Harbour with access to a ship lift was taken. The Icelandic authorities essentially argue that the presence of

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<sup>24</sup> See See Joined Cases 67/85, 68/85 and 70/85 *Kwekerij Gebroeders van der Kooy BV and others v Commission* [1988] ECR I-219, paras 29-30. See also Case 56/93 *Belgium v Commission* [1996] ECR I-723, para 10.

<sup>25</sup> See Opinion of Advocate General Slynn in Joined Cases 67/85, 68/85 and 70/85 *Kwekerij Gebroeders van der Kooy BV and others v Commission* [1988] ECR I-219 (at page 250) – “A lower tariff is only an aid if it is not commercially justifiable.”

a functional ship lift is necessary for the Harbour to remain competitive as a hub for maritime vessels and related businesses, which can relatively easily relocate to other competing harbours.

40 For the purposes of this assessment the Authority recognises that the investment in the repairs of the ship lift should not be examined in isolation from other activities of the public undertaking operating the harbour. If a functional ship lift supports other revenue producing activities and increases the overall competitiveness of the public undertaking such factors, to the extent they can be objectively verified, must be accounted for when assessing the rationality of the decision. It is only when this kind of an investment decision does not make economic sense, both in itself and in a larger context, that an advantage is likely to be present. In this regard the Icelandic authorities have confirmed that the Harbour is operated as a profitable business regularly returning sizable profits from its normal operations as explained above in paragraph 16.

41 In addition the Icelandic authorities have provided information that show that the Harbour of Westman Islands intends to offer access to its ship lift for a remuneration corresponding to market prices, and that such remuneration will be sufficient to cover the total cost associated with the operation and investment in the facility. This is sufficient to exclude that users of the ship lift will gain an advantage through preferential prices as compared with market prices, and also as compared with the costs associated with the infrastructure. On this basis the Authority concludes that no advantage will be granted through the decisions of the Municipality to grant access to a ship lift infrastructure.

#### 4 Conclusion of the state aid assessment

42 On the basis of the foregoing assessment, the Authority concludes that the investment of ISK 370 million by the Harbour of the Westman Islands in repairs of its ship lift does not involve state aid within the meaning of Article 61 of the EEA Agreement.

HAS ADOPTED THIS DECISION:

*Article 1*

The investment of ISK 370 million by the Harbour of the Westman Islands in the repairs of its ship lift does not involve state aid within the meaning of Article 61 of the EEA Agreement.

*Article 2*

This Decision is addressed to Iceland.

*Article 3*

Only the English language version is authentic.

Done at Brussels, 30 May 2012.

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
*President*

Sverrir Haukur Gunnlaugsson  
*College Member*