

Case No: 68955  
Event No: 646700  
Decision No: 261/12/COL

**EFTA SURVEILLANCE AUTHORITY DECISION**  
of 4 July 2012  
concerning municipal tax measures; the sale of real estate; and  
the sale of electricity to Verne

(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(3)(c),

HAVING REGARD to 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,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1(2) of Part I and Articles 4(4), 6, 7(5) and 8 of Part II,

HAVING called on interested parties to submit their comments pursuant to those provisions<sup>1</sup>,

Whereas:

## I. FACTS

### 1. Procedure

- (1) On 1 September 2010, subsequent to pre-notification discussions, the Icelandic authorities notified the Authority of state aid concerning the construction of a data centre in the municipality of Reykjanesbær (“the Municipality” or “Reykjanesbær”), pursuant to Article 1(3) of Part I of Protocol 3, by a letter received and registered by the Authority on the same day (Event No 568140). The notification concerned derogations from taxes and charges provided for the construction of a data centre (“the Data Centre”) by the company Verne Holdings ehf. (“Verne”), under Act No 57/2010 and an agreement initialled 23 October 2009 (“the Investment Agreement”).
- (2) After various exchanges of correspondence<sup>2</sup>, by letter dated 3 November 2010 (Event No 573997) the Authority informed the Icelandic authorities that it had decided to initiate the

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<sup>1</sup> Published in OJ C 25, 27.1.2011, p. 6 and EEA Supplement No 4.

formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 in respect of aid concerning the Verne Data Centre.

- (3) The Authority's Decision No 418/10/COL to initiate the procedure was published in the Official Journal of the European Union and the EEA Supplement to it ("the opening decision")<sup>3</sup>. The Authority called on interested parties to submit their comments on the Decision. No comments were received from interested parties.
- (4) By letters dated 23 November 2010, 4 January, 18 January and 2 February 2011 (Events Nos. 578499, 582634, 583705 and 585546), the Authority agreed to requests from the Icelandic authorities to extend the deadline for submitting comments on the Decision.
- (5) The Icelandic authorities submitted their comments by letter dated 28 February 2011 (Event No 589033). The Authority received additional information from the Icelandic authorities on 12 April 2011 (Event No 594276).
- (6) The case was discussed during a meeting held 27 May 2011 in Brussels between the Authority and the Icelandic authorities, followed up by the Authority by way of email on 1 June 2011 (Event No 599862). Subsequently, the Icelandic authorities submitted information by way of two letters; on 21 June (Event No 601641) and 27 June 2011 (Event No 602133).
- (7) Furthermore, the National Power Company (*Landsvirkjun*) submitted separate additional information by way of letter dated 20 June 2011 received by the Authority on 23 June 2011 (Event No 601937) and by way of letter received by the Authority 16 January 2012 (Event No 621366).
- (8) By letter dated 28 September 2011 (Event No 609826) the Icelandic authorities withdrew their notification of the aid measures for the construction of the Data Centre. Subsequently, the Authority submitted a letter dated 4 October 2011 (Event No 609991) acknowledging the withdrawal of the notification and informing the Icelandic authorities that it would, according to Article 8(2) of Part II of Protocol 3, close the formal investigation for the measures concerned, however clarifying that it would continue its investigation into the measures provided for under certain agreements entered into with Verne in connection with the envisaged data centre and still in force.
- (9) The Icelandic authorities provided information by way of letter dated 25 October 2011 (Event No 613209) in response to the Authority's letter of 4 October 2011 mentioned above. The Icelandic authorities then submitted further information by way of email on 30 April 2012 (Event No 633398).
- (10) Lastly, the Icelandic authorities provided further clarifications regarding the case by emails on 14 and 24 May 2012 respectively (Events Nos 634340 and 635757), following a brief discussion on the case during a meeting between the Icelandic authorities and the Authority in Brussels on 2 May 2012, and submitted further documents by email on 1 June 2012 (Event No 636529).

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<sup>2</sup> For more detailed information on the various correspondences between the Authority and the Icelandic authorities, reference is made to the Authority's Decision to open the formal investigation procedure, Decision No 418/11/COL. See footnote 1 for the publication references.

<sup>3</sup> See footnote 1 for the publication references.

## 2. Background

### 2.1 The beneficiary

- (11) Verne Holdings ehf. is a privately held company registered in Iceland in June 2007. Verne Holdings ehf. has three wholly owned subsidiaries, Verne Global, Inc. registered in the United States of America, Verne Global Ltd., registered in the United Kingdom and Verne Real Estate ehf., registered in Iceland in March 2008.<sup>4</sup>
- (12) According to the information provided by the Icelandic authorities, Verne Holdings ehf. is owned by a number of minority shareholders, the two largest being Novator, which is a global investor, and Teha Investments S.a.r.l. Further, according to the information provided by the Icelandic authorities, the management holds a substantial share of Verne Holdings ehf.

### 2.2 Agreements entered into

- (13) According to the later withdrawn notification, the Icelandic authorities planned to provide, under the Authority's Guidelines on Aid to Regional Development ("the Regional Aid Guidelines"), aid to Verne for the construction of the Data Centre in a region eligible for regional aid pursuant to Article 61(3)(c) of the EEA Agreement in order to promote regional development in the form of a range of government and municipal tax derogations under the Investment Agreement.
- (14) Discussions between the Icelandic authorities and Verne starting late in 2008<sup>5</sup> (after the onset of the financial crisis in Iceland in October 2008) delivered an agreement providing Verne with various tax derogations; the Investment Agreement. According to the Icelandic authorities the final draft version of a Memorandum of Understanding for the Investment Agreement was reached in April 2009, however the Memorandum was not signed. The Investment Agreement was later concluded on 23 October 2009 when initialled by the managing director of Verne and an official of the Ministry of Industry<sup>6</sup>. The entry into force of the Investment Agreement was conditional upon the authorization by the Parliament, the approval of the boards of Directors of Verne and the approval of the Authority. On 12 December 2009, a Bill authorising the Icelandic authorities to enter into the Investment Agreement with Verne was submitted before the Icelandic Parliament. On 7 June 2010 the Icelandic Parliament adopted Act No 57/2010 ("the Verne Act") authorising the Ministry of Industry to enter into an Investment Agreement on behalf of the Icelandic authorities with Verne for the purposes, amongst other, of awarding various tax and fee concessions in relation to the construction of the Data Centre.<sup>7</sup>

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<sup>4</sup> For the purpose of this Decision, Verne Holding ehf. and Verne Real Estate ehf. will be referred to collectively as Verne.

<sup>5</sup> According to an internal memorandum dated 23.10.2008 prepared by the Ministry of Industry in Iceland, proved by the Icelandic authorities under the administrative procedure, Verne had approached the Ministry shortly before, requesting various measures to reduce the risk and initial cost of the company's data centre investment; infrastructure, direct grants, tax concessions, incl. VAT remission, and interventions as state guarantee and subsidized electricity prices at the start of operation.

<sup>6</sup> The initialled draft agreement, which was submitted as part of the later withdrawn notification, will be referred to as "the Investment Agreement" in this Decision. The contraction parties are the Government of Iceland on the one hand and Verne Holdings ehf., Verne Real Estate ehf., Novator and Teha Investments S.a.r.l. on the other hand. Description of the company structure is in Section 2.1 of this Decision. Throughout this decision the companies will be referred to collectively as Verne.

<sup>7</sup> This agreement, initialled 23.10.2009 ("the Investment Agreement"), is the one which was notified to the Authority on 1.9.2010

- (15) On 28 September 2011 the Icelandic authorities informed the Authority that the Investment Agreement had been repealed.
- (16) However, as explained in a letter from the Icelandic authorities dated 25 October 2011<sup>8</sup> “[t]he only benefit which has already taken effect is the waiving of municipal taxes by the municipality of Reykjanesbær, under the terms of the Agreement on Licensing and Charges.”<sup>9</sup> The agreement is signed 4 November 2009. However the measures became effective in early 2009, as explained by the Icelandic authorities.<sup>10</sup> The municipal tax and fee concessions contained in this agreement are therefore subject to state aid assessment in the case at hand:
- municipal property tax; and
  - municipal street construction tax.
- (17) Moreover, measures under the following agreements, which Verne signed in 2008 and 2009 became effective and were not repealed, are subject to state aid assessment in this Decision:
- “the Real Estate Purchase Agreement” (with the Treasury)
  - “the Ground Lease Agreement” and “the Supplementary Lease Agreement” (with the Treasury)
  - “the Power Contract” (with Landsvirkjun).
- (18) The agreements and the measures under assessment are further described in Section 3 below.
- (19) Verne further entered into an agreement on bandwidth service with Farice on 26 February 2008. The Icelandic authorities have explained that this agreement was cancelled.

### 2.3 Short description of the project, the site and the former military area

- (20) Initially, Verne planned to construct, in three phases over a seven year period, a campus of high-reliability, high power density wholesale data centre in Reykjanesbær, which is in the south-western part of Iceland; the Data Centre<sup>11</sup>.
- (21) The total investment cost for the whole project, as initially planned by Verne, was in 2010 estimated at USD 726 million.<sup>12</sup>
- (22) These plans were later, due to the change in economic circumstances in Iceland, disbanded and the Investment Agreement from 23 October 2009 was cancelled on 23 September 2011

<sup>8</sup> This letter is a respond to the Authority’s letter to the Icelandic authorities dated 4.10.2011 in which the Authority stated that it understood that theses derogation had at least partly taken effect and had not been abolished and that the Authority would assess the measures in its final decision.

<sup>9</sup> See the Icelandic Authorities’ comments to the opening decision, dated 28.2.2011 (Event No 589033) at page 14.

<sup>10</sup> *Ibid*

<sup>11</sup> A more detailed description of the initial project plans is in the opening decision. According to the initial plans, the first phase would encompass making the first building operational, costing approximately [...] according to the notification. The building, with 4 800 m<sup>2</sup> of technical space, was expected to be ready for use in 2011. It was to use 20 MW of utility power. The second phase was to encompass bringing the first building to full occupancy by the end of 2012. This would require an additional [...] of capital, according to information submitted by the Icelandic authorities. The third and final phase entailed, according to the initial plans, making all four buildings operational by the end of 2016.

<sup>12</sup> According to the notification received 1.9.2010. In the preamble to the later cancelled Investment Agreement this commitment read as follows: “...over the first five years of its investment, Verne and the Investors estimate that the potential level of investment for the project envisaged above could exceed USD 700 million, and that the power consumption of the Data Center could exceed 140MW”.

and Verne entered, according to information provided by the Icelandic authorities on 25 October 2011, into “a modified investment plan with the Icelandic authorities under the auspices of the General Aids Investment Scheme”.<sup>13</sup> The modified investment plan envisages an investment that could exceed USD 675 million over and above prior preparatory investment, according to the information provided by the Icelandic authorities. According to media, the first phase already became operational and formally opened in February 2012<sup>14</sup>, announcing the first customers.

- (23) As a part of the initial investment plan, Verne purchased on 26 February 2008 five buildings on the site in question, at Valhallarbraut in Reykjanesbær, 31 000 m<sup>2</sup> in total, thereof two large warehouses, 11 064 and 16 606 m<sup>2</sup>, further described in Section 3.2 below.<sup>15</sup> Initially, Verne planned to demolish<sup>16</sup> the three smaller buildings.
- (24) Verne signed a separate ground lease agreement with the Icelandic Treasury on 9 May 2008 for the 9.6 hectares site<sup>17</sup> for a period of 99 years.
- (25) The site is located at the address Valhallarbraut 868, Reykjanesbær, next to the international airport at Keflavík.<sup>18</sup> It is a part of a former US military base. In 1951, the Icelandic State entered into a defence agreement with the US government, providing the US Navy i.a. with land for the military base, including an international airport area. In 2006, the US Navy left Iceland and handed the area with its constructions over to the Icelandic State. By way of Act 176/2006 adopted by the Icelandic Parliament in December 2006 the area was regulated and the boundaries of the airport area was defined (Zone A)<sup>19</sup>; a security area, intended for defence purposes was defined (Zone B); and, lastly, an area intended for civilian use was defined (Zone C). Zone C is 59.7 km<sup>2</sup> in total.
- (26) A specific body, Keflavík Airport Development Corporation, KADECO (Þróunarfélag Keflavíkur ehf.), fully owned by the Icelandic State, was established on 24 October 2006 to, on behalf of the State, administer real estate in Zone C, and, as soon as possible, take the area into profitable civilian use.<sup>20</sup> KADECO is organized as a limited liability company, however considered a public entity within the meaning of certain laws, i.a. law on public procurement, as established in a service agreement entered into between KADECO and the Treasury 8

<sup>13</sup> Letter from the Icelandic authorities on 25.10.2011 (Event No 613209). Information was also provided by email from the Icelandic authorities dated 14.5.2012 (Event No 634340). The reference is to a scheme approved by the Authority by Decision No 390/10/COL on Investment Incentives. For the sake of clarity, the Authority notes that aid granted under the scheme is not subject to assessment in this Decision.

<sup>14</sup> <http://www.datacenterdynamics.com/focus/archive/2012/02/verne-global-officially-opens-iceland-data-center>

<sup>15</sup> See pictures 2 and 3.

<sup>16</sup> See letter from KADECO dated 19.11.2010 at page 2, annexed to the Icelandic authorities' comments to the opening decision 28.2.2011 (Event No 589033) and Annex 3 to KADECO's letter. A reference to the intended demolition of the smaller buildings (Nos 864, 866 and 872) is also in Section 2.1.4 of the Agreement on Licensing and Charges entered into 4.11.2009.

<sup>17</sup> A document entitled “Exhibit B” attached to the lease agreement reads: “Master Plan. Construction of up to 40 000 m<sup>2</sup> of new data center buildings. Construction of up to 4 additional generator buildings of up to 4 000 m<sup>2</sup> each”.

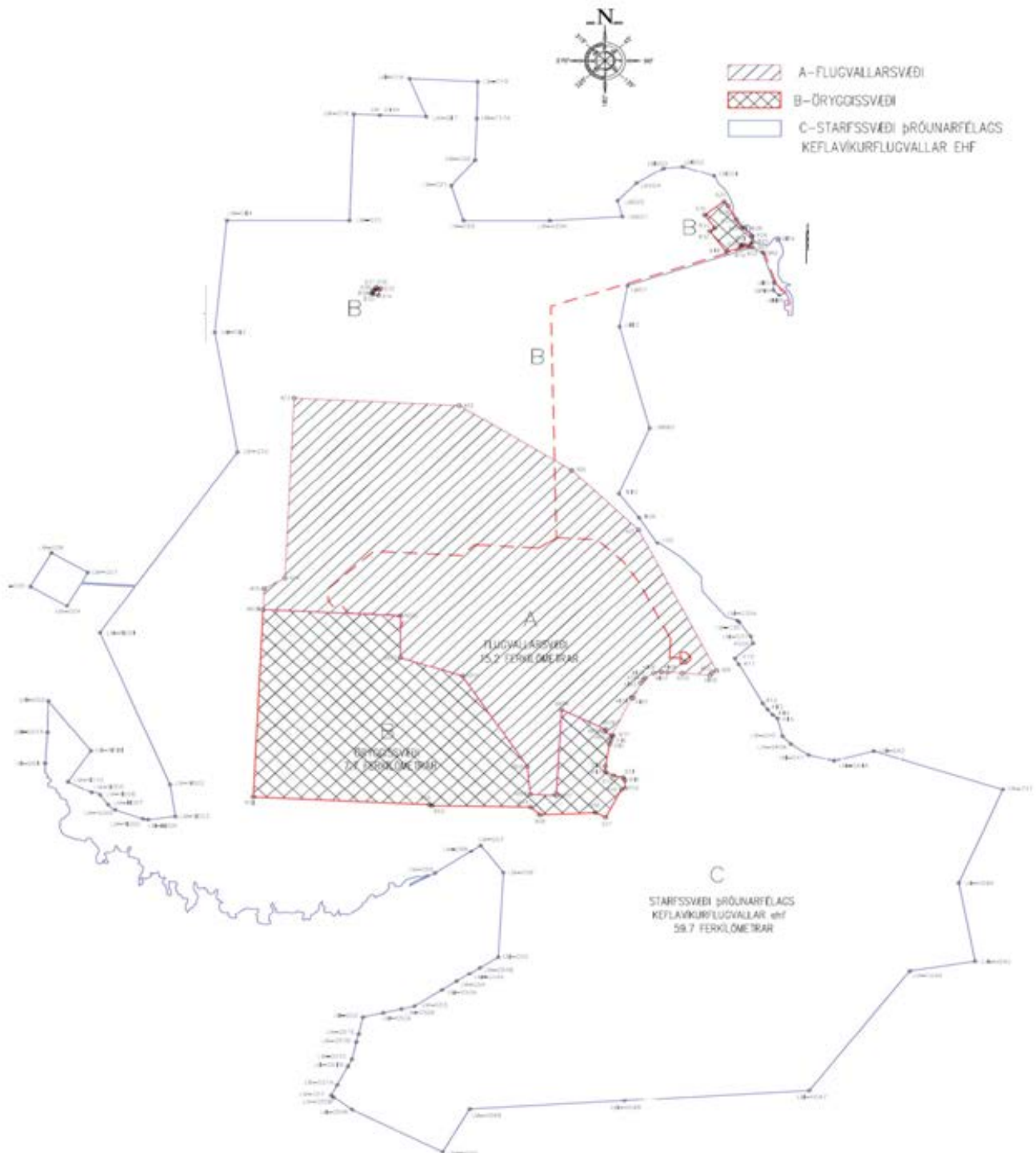
<sup>18</sup> See Picture 4.

<sup>19</sup> See Picture 1.

<sup>20</sup> Pursuant to Act 176/2006. A service agreement dated 8.12.2006 was signed between the Icelandic Treasury and KADECO on the development, administration and disposal of the real estate within the area.

December 2006 (“the Service Agreement”)<sup>21</sup>. The sole function of KADECO is to develop, administer and to sell/rent real estate within the defined area (Zone C).

- (27) According to Art 5 of Act 176/2006 statutory rules apply as regards taxes and charges to all areas within Zones A and C as soon as they have been taken into civilian use on the basis of a sale or lease agreement.



<sup>21</sup> The Service Agreement is available at KADECO's website.

Picture 1. The former military area at Keflavík airport according to Act 176/2006. Zone A: airport area; Zone B: security area, intended for defence purposes; and Zone C: intended for civilian use, administered by KADECO. Source: Annex to Act No 176/2006.

### 3. The measures under assessment

#### 3.1 Introduction

(28) The measures initially notified by the Icelandic authorities, which they considered entailing state aid, were:

- 1) Corporate income tax rate
- 2) Depreciation rules
- 3) Industrial and market charges
- 4) Stamp duties
- 5) Zoning fee
- 6) Import duties
- 7) Deferral from payment of VAT on imports and electricity
- 8) Safety control fee for electricity production
- 9) Net worth tax guarantee
- 10) Municipal property tax

These measures were provided for in the Investment Agreement and the Verne Act. In addition, derogation from one-off municipal tax was referred to in the Investment Agreement and the Verne Act:

- 11) Municipal street construction tax.

(29) Both the municipal property tax and the municipal street construction tax were negotiated between the Municipality and Verne and concluded on 4 November 2009 in:

- the Agreement on Licensing and Charges.

(30) Further, the Icelandic authorities notified, for legal certainty, the following agreements, which they considered not entailing state aid:

- the Real Estate Purchase Agreement
- the Ground Lease Agreement
- the Power Contract

(31) Decision No 418/11/COL to open the formal investigation procedure covered one additional agreement, which was later cancelled:

- Bandwidth Agreement entered into with Farice on 26 February 2008.

#### 3.2 The Real Estate Purchase Agreement

(32) The Real Estate Purchase Agreement, whereby Verne buys five buildings from the Icelandic Treasury, was signed on 26 February 2008. The purchase price was USD 14.5 million, divided into a deposit, USD 25 000, paid on 26 February 2008, and the closing payment, to be paid on 26 March 2008.

(33) The five buildings purchased by Verne and located at Valhallarbraut, built in 1951 to 1958, are:

- |    |                 |                                |                       |
|----|-----------------|--------------------------------|-----------------------|
| 1) | Building No 868 | NATO warehouse/supply building | 11 064 m <sup>2</sup> |
| 2) | Building No 869 | "Navy Exchange" warehouse      | 16 606 m <sup>2</sup> |

3)	Building No 872	warehouse/cold storage	1 009 m <sup>2</sup>
4)	Building No 866	warehouse	782 m <sup>2</sup>
5)	Building No 864	electrical power plant	1 547 m <sup>2</sup>



Picture 2. The site (in 2009). Buildings 869 and 868 are the large buildings, 872 is the smaller building on the right (brown roof), 866 is the building in the centre (blue roof) and 864 the building at the bottom (red roof). Other (new) constructions in the picture are constructed by Verne in 2008-9.  
Source: Socioeconomic impacts of a datacenter in Ásbrú, KPMG Report November 2009 /Verne Holdings ehf.

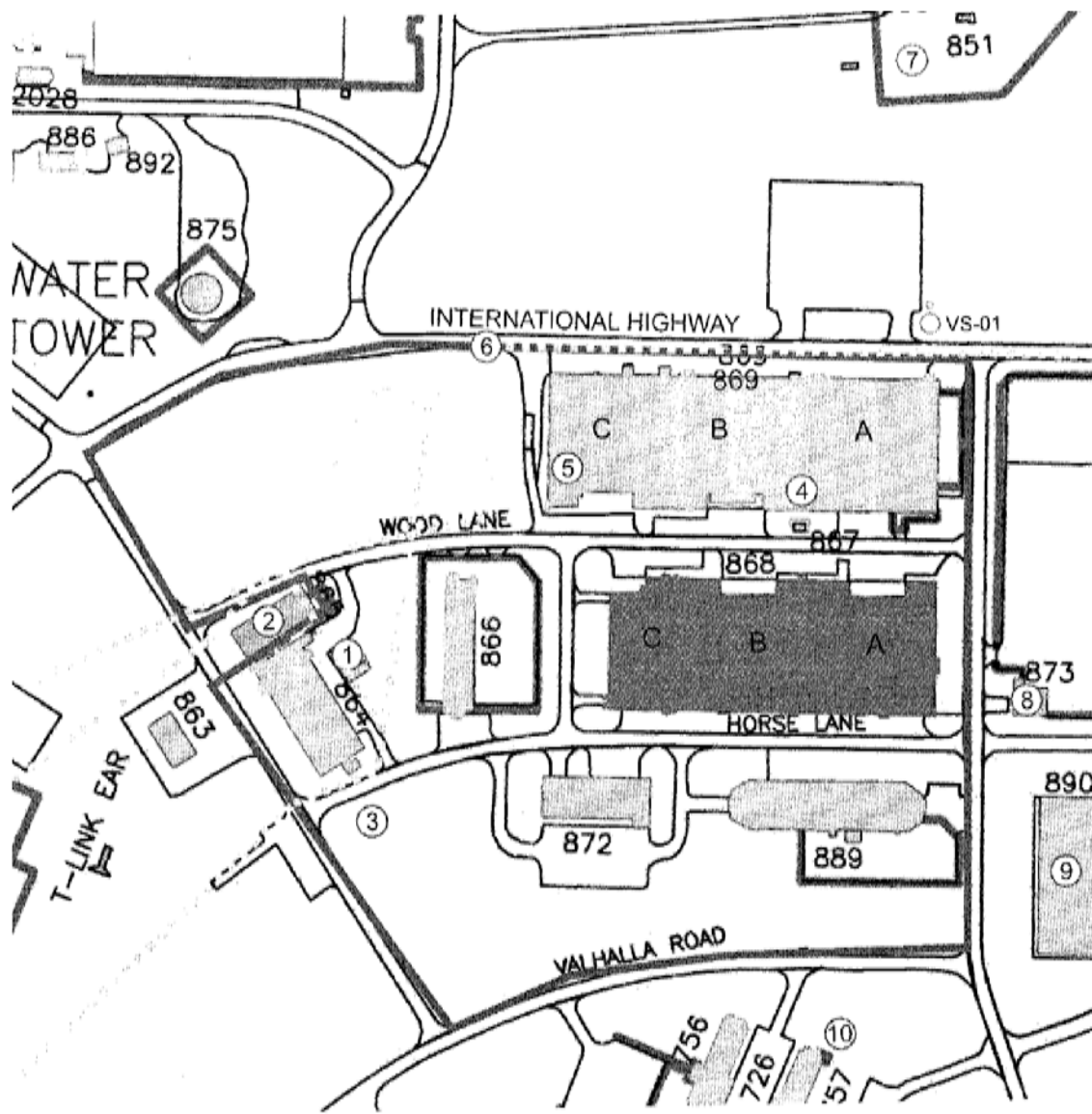
- (34) Transfer of the title was signed on 9 May 2008. According to the information provided by the Icelandic authorities Verne, through 2008 and 2009, refurbished the two large warehouses (buildings 868 and 869) as part of the initially planned multi-building campus (see Picture 2).<sup>22</sup>
- (35) Attachment D to the Real Estate Purchase Agreement is an environmental report, dated 29 November 2007, commissioned by Verne<sup>23</sup>. The report describes two constructions located on the land in addition to the five buildings purchased by Verne 26 February 2008; a small switching substation (building No 867) and a storage tent/supply warehouse (building No

<sup>22</sup> The demolition, engineering, design, project management and other site preparation work carried out over the period through October 2008 totalled [...], according to information submitted to the Authority, and amounted to a further [...] in the period November 2008 through December 2009, including physical construction and purchase of electrical and mechanical gear.

<sup>23</sup> The environmental report prepared by ENVIRON International Corporation is a part of the Real Estate Purchase Agreement and the documents are publicly available at the Land Register at the Commissioner's Office in Keflavík.



889)<sup>24</sup>, constructed in 1979 and 1985 respectively. These constructions are not mentioned in the Real Estate Purchase Agreement and appear to have been demolished/cleared away.



Picture 3. The site and its buildings. Two large warehouses No 868 and 869. Three additional buildings purchased by Verne, initially intended for demolition by the company; No 864, 866 and 872. Building No 867 (small substation) and construction No 889 (tent) were not included in the purchase.

Source: Environmental Assessment, ENVIRON November 2007, annexed to the Real Estate Purchase Agreement.

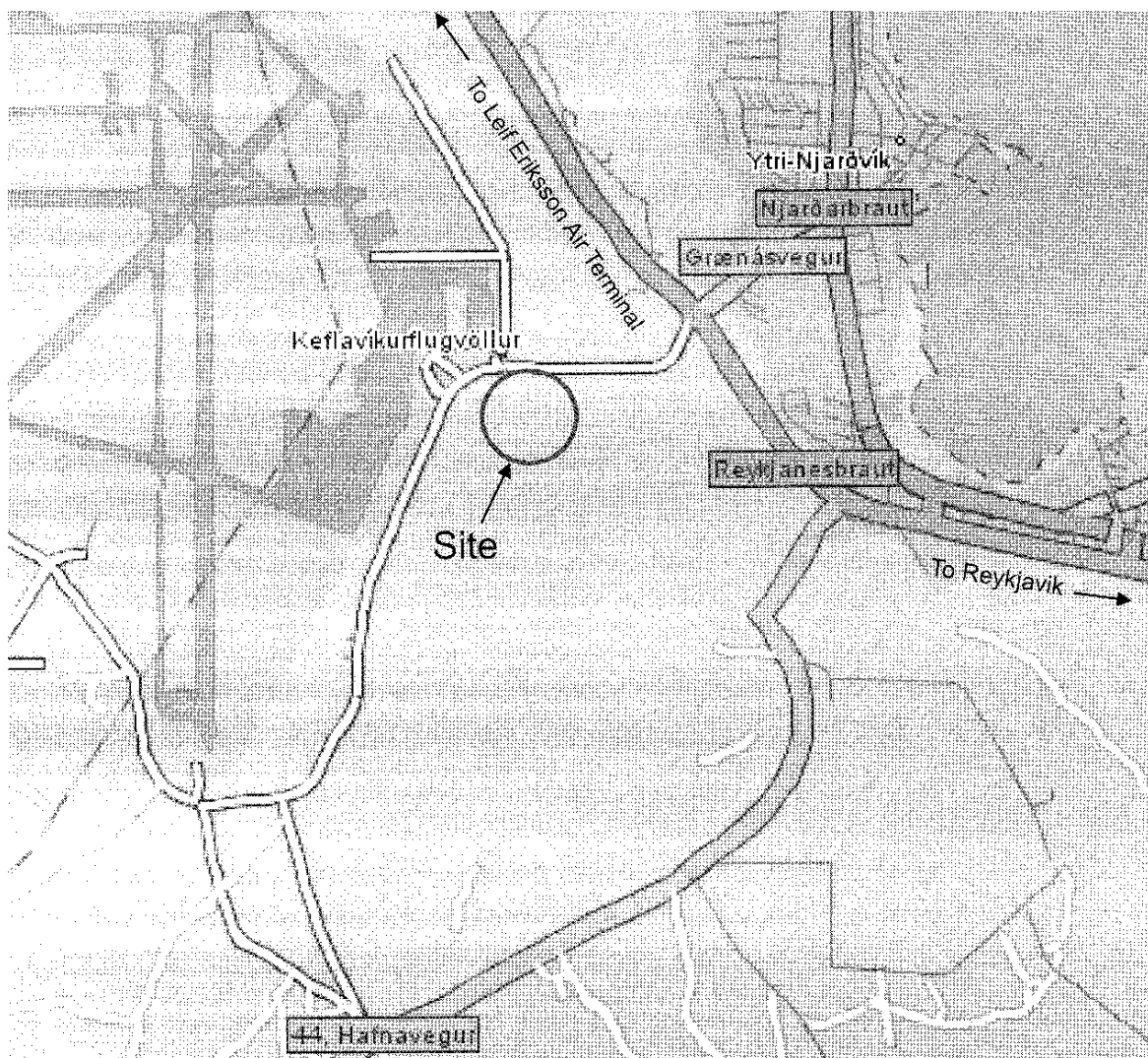
### 3.3 The Ground Lease Agreement and the Supplementary Lease Agreement

- (36) A separate Ground Lease Agreement between Verne and the Treasury of Iceland was signed on 9 May 2008. Pursuant to this agreement, Verne leased 9.6 hectares of land together with all fixtures, fittings and improvements located thereon. The land, registered at Valhallarbraut 868, Reykjanesbær with Icelandic Land Registry number 214 247, is located within the boundaries of the former Keflavík Air Base, next to Keflavík International Airport, as

<sup>24</sup> See Picture 3.

described above (see Picture 4). All five buildings purchased by Verne are located within this site. The site was not fully exploited at the time of the lease (see Pictures 2 and 3).

- (37) The duration of the lease agreement is 99 years. The total rent for the site was USD 0.8 (80 US cents) per m<sup>2</sup> per annum, without adjustment clause. The Icelandic authorities have during the formal investigation procedure informed the Authority that the terms under the Ground Lease Agreement were amended on 30 June 2009 when the Municipality and Verne signed an agreement altering the rental price and deferring the rental payment (“the Supplementary Agreement”). The Ground Lease Agreement as amended by the Supplementary Agreement is therefore subject to the Authority’s assessment in this case.
- (38) The Supplementary Lease Agreement provides for a rent free period until 1 April 2010. The re-negotiated price for the annual lease is ISK 60 per m<sup>2</sup> indexed according to the Icelandic construction costs index.



Picture 4. Location of the site.

Source: Environmental Assessment, ENVIRON November 2007, annexed to the Real Estate Purchase Agreement.

### 3.4 The Agreement on Licensing and Charges

- (39) On 4 November 2009, Verne and the Municipality signed an agreement (“the Agreement on Licensing and Charges”) on, amongst other, exemptions from statutory rules on:
- municipal property tax, and
  - municipal street construction tax.

(40) The Agreement on Licensing and Charges does not provide for any time limits as regards the derogations.

(41) According to information provided by the Icelandic authorities the Agreement on Licensing and Charges entered into effect in early 2009, even if not signed until 4 November 2009.<sup>25</sup>

#### 3.4.1 Icelandic legislation governing municipal taxes subject to this Decision

(42) Under Icelandic law, municipal property tax (*fasteignaskattur*) is levied on an annual basis on all real estate<sup>26</sup> (land and buildings, including industrial real estate) evaluated under Act No 6/2001 on Property Registry and Assessment on 31 December the previous year.

(43) Article 4(2) of No 4/1995 on Sources of Municipal Revenue stipulates that the owner of a property pays the tax, except in the case of leased land, in which case the user (the lessee) pays the tax.

(44) According to Article 3 of Act No 4/1995 the tax base is the value of the property as evaluated by the Statistics Iceland (*Þjóðaskrá Íslands*), the centre for official statistics in Iceland, under Act No 6/2001 on Property Registry and Assessment and the tax rate, fixed each year by the individual municipalities may range from zero to a maximum 1.65% of the official value of the property. According to information provided by the Icelandic authorities the applicable tax rate in Reykjanesbær is 1.65%. Municipal property tax is levied on all existing building (and land). For new buildings and expansions the tax is levied once the property has been valued under Act No 6/2001.

(45) Article 3 of Act 153/2006 on street construction tax (*gatnagerðargjald*), stipulates that street construction tax is a one-off tax municipalities in Iceland shall levy on real estate in all urban areas. Under Act 153/2006 the municipalities have an obligation to levy the tax and can decide the tax rate up to a maximum of 15% of the official building cost pr. m<sup>2</sup> as established by Statistics Iceland. The tax base is the construction permitted on the relevant site according to the urban planning or the construction permit issued.

#### 3.4.2 Derogations from statutory rules in the case of Verne

(46) As regards Verne’s property at Valhallarbraut, the Agreement on Licensing and Charges provides for the following derogations from statutory rules:

- (a) Verne is guaranteed to pay a property tax of maximum 1.65% (as currently generally levied by Reykjanesbær) on all buildings, premises and facilities

<sup>25</sup> Letter from the Icelandic authorities dated 25.10.2011 (Event No 613209) Section B.1 at page 5. The Icelandic authorities previously also explained, on 28.2.2011 in their comments to the opening decision (Event No 589033) at page 14, that the waiving of municipal taxes under the Agreement on Licensing and Charges had taken effect early 2009.

<sup>26</sup> With the exception of churches, non-profit museums and embassy buildings.

owned or leased by Verne, also for the future in the event that the tax rate would be increased<sup>27</sup>,

- (b) the municipal property tax base as regards the real-estate bought by Verne under the Real Estate Purchase Agreement is fixed at ISK 1 030 600 000 which is equivalent to the official value in 2008 of the two large warehouse buildings (No 868 and 869) purchased by Verne and does neither take into account the value of the three additional buildings (No 964, 866 and 872) purchased, nor the 9.6 ha land leased<sup>28</sup>,
- (c) the municipal property tax base adjusted according to the Icelandic Construction Cost Index in the month in which Verne commences customer operations/the building becomes operational and not the date of purchase<sup>29</sup>,
- (d) the tax base for the future buildings constructed on the site will be the lesser of (i) the costs of the build-out of the exterior shells and (ii) 85 500 ISK per square meter, indexed to the Icelandic Construction Cost Index beginning in the month in which Verne commences customer operations/the building becomes operational (pro-rata according to occupancy rate) and not the tax which would be applicable under statutory rules,<sup>30</sup>
- (e) property tax is only levied as of 1 January 2011, and not as of the purchase of the building/lease of the land, and Verne receives credit against future property taxes in the amount of ISK 44 660 298 for taxes already paid or due to the Municipality at the time of entering into the Agreement on Licensing and Charges<sup>31</sup>,
- (f) Verne is exempted from municipal street construction tax on existing buildings and any present and future similar charges to that tax provided that the company will undertake street construction within the site at its own expense,
- (g) Verne is granted a special 75% reduction on street construction tax for all new buildings provided that the company will undertake street construction within the site at its own expense<sup>32</sup>.

### 3.5 The Power Contract

- (47) The Power Contract between Verne and Landsvirkjun (the national power company, wholly state owned) was signed on 22 October 2009. Landsvirkjun is licensed by the minister of Industry to engage in trade in electricity by wholesale distribution of power to suppliers and to power intensive industries in Iceland. Landsvirkjun will supply the energy necessary to meet the power requirements of the data centre. Landsvirkjun commits to provide Verne with the necessary regular power supply of up to approximately [...]. The Power Contract is valid for 20 years, subject to an extension for another 10 years.

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<sup>27</sup> Article 2.1.3 of the Agreement on Licensing and Charges.

<sup>28</sup> Article 2.1.4 of the Agreement on Licensing and Charges.

<sup>29</sup> Article 2.1.4 of the Agreement on Licensing and Charges.

<sup>30</sup> Article 2.1.5 of the Agreement on Licensing and Charges.

<sup>31</sup> Article 2.2.2 of the Agreement on Licensing and Charges.

<sup>32</sup> Article 1.2 of the Agreement on Licensing and Charges.

- (48) The power price negotiated is as follows (transmission costs not included):

For the first [...]:

Price pr. MW	Period
[...] USD <sup>33</sup>	Until 31.12.2013
[...] USD	1.1.2014-31.12.2016
[...] USD	1.1.2017-31.12.2018
[...] USD	1.1.2019 until end of contract

For volume exceeding [...]:

Price pr. MW	Volume
[...] USD	[...] MW
[...] USD	[...] MW
[...] USD	[...] MW
[...] USD	[...] MW
[...] USD	[...] MW
[...] USD	Above [...] MW

The prices are adjusted annually by [...]

- (49) Article 6 of the Power Contract contains a so-called “Take or Pay Obligation” for Verne. This entails that the company must pay for a minimum a fixed amount (equal to 90% of the “Contract Power”) of energy per calendar year regardless of whether the actual annual consumption reaches the annual amount. The Contract Power is established in Annex A to the Power Contract, progressive from [...] in the years [...].

#### 4. Grounds for initiating the procedure

- (50) Apart from the doubts the Authority expressed in the opening decision as regards the later cancelled Investment Agreement and the Agreement on Licensing and Charges as to the classification as investment aid and the necessity and the incentive effect of the aid measures in question, i.e. whether the aid actually contributes to changing the behaviour of the beneficiary so that it undertakes investment in the assisted region concerned, the Authority invited the Icelandic authorities in the opening decision “to provide it with the necessary information and reasoning to allow the Authority to assess whether the [...] agreements [referred to] entail state aid or not”.<sup>34</sup> The agreements referred to are<sup>35</sup>:

- 1) the Ground Lease Agreement,
- 2) the Real Estate Purchase Agreement, and
- 3) the Power Contract.

<sup>33</sup> All prices are excluding transmission costs, which are charged separately by the national grid operator, Landsnet.

<sup>34</sup> Decision 418/10/COL at page 13.

<sup>35</sup> The Icelandic authorities have explained that the Farice Agreement for bandwidth lease services signed on 26.2.2008 was cancelled.

- (51) The Authority had doubts as to whether aid would be granted to Verne under these agreements, which could not be considered compatible with the state aid rules of the EEA Agreement.

## 5. Summary of comments by the Icelandic authorities

- (52) In the following, the Authority will summarize the comments received from the Icelandic authorities in the context of the measures under assessment.<sup>36</sup>

### 5.1 Comments as regards the Ground Lease Agreement, the Supplementary Lease Agreement, the Real Estate Purchase Agreement and Power Contract

- (53) The Icelandic authorities submit that the agreements are negotiated at an arm's length on commercial terms and do not entail any granting of state aid.
- (54) First, with regard to the Ground Lease Agreement, the Icelandic authorities have explained that the exclusivity provision mentioned in the opening decision<sup>37</sup> refers solely to the Keflavík area and not to Iceland as a whole. It is also added that the provision should be interpreted in light of the operative provisions of the general aid scheme developed under Act 99/2010 on Incentives for Initial Investments in Iceland. As regards the lease charged under the Supplementary Agreement, which the Authority was provided with under the formal investigation, the Icelandic authorities submit that the lease for the land reflects market price and have referred to the fact that municipalities generally charge 1-2% of official value of land on an annual basis, however the lease in the case at hand is more than 3% for 2011.
- (55) Second, as regards the Real Estate Purchase Agreement the Icelandic authorities have submitted that the property was publicly advertised and the sales price reflected market price, also considering the condition of the buildings and the additional supply on the property market after the area was abandoned by the US Navy. They have provided an expert valuation for one of the buildings and an offer from a third party, also for that building, both dated 23 April 2007. The expert valuation is almost twice as high as the offer, which was rejected, according to the information provided. Further, the Authority was, towards the end of the formal investigation procedure, provided with copies of all advertisements published for the area in question. The Icelandic authorities submitted a letter from the CEO of KADECO (Keflavík Airport Development Corporation) along with the expert valuation, the offer for one of the buildings later sold to Verne and a picture of the properties, to demonstrate that the agreements regarding the real estate were negotiated at arm's length. The Icelandic authorities submit that accordingly, the award and allocation procedures followed in the case of real property sales (public procurement procedures) are in conformity with the usual regulatory and commercial practices adopted in Iceland in relation to the particular types of agreement in question. As a result, the Icelandic authorities are of the opinion that there is no issue of imputability of aid from State-affiliated resources which needs to be considered in this particular case.
- (56) As regards to the Power Contract between Verne and Landsvirkjun and its relation to a the previous contract between the parties entered into in 2008 (on [...]) replaced by the Power Contract under assessment, the Icelandic authorities have explained that the impetus for renegotiating the original contract lay in Verne's inability to meet its original obligations to

<sup>36</sup> The Authority will not give detailed account of arguments presented which relate exclusively to the cancelled Investment Agreement.

<sup>37</sup> See description of exclusivity clause at page 3 of the Authority's Decision No 418/10/COL.

Landsvirkjun due to the economic crisis and the delays which it created. The second version of the contract allowed Verne to reduce its total commitment to Landsvirkjun if required due to exogenous circumstances, but if it did so Verne would be penalised through the loss of access to additional capacity. The Icelandic authorities submit that the contract was negotiated at an arm's length.

## 5.2 Investment aid vs. operating aid

- (57) The Icelandic authorities submit that the Authority took the view in the Aluminium Smelters Cases<sup>38</sup> that the aid in question could be characterised as an investment aid if it could be linked to the carrying-out of specific projects, based on an amount invested in the region, capable of being quantified and a costing expressed as a percentage of the amount invested in the region.
- (58) Furthermore, the Icelandic authorities note that the Authority has referred to the fact that the transparency requirements set forth in paragraphs 4(3) and 4(4) of the Authority's Business Taxation Guidelines<sup>39</sup> were satisfied; in other words, the benefit conferred can be quantified and is proportional to the limitations that it was designed to offset.
- (59) In addition, the Icelandic authorities submitted that should the total investment cost initially planned eventually be lower than the initially anticipated USD 726 million both the total aid ceiling and the amount of total state aid will be proportionately lower. The mechanism put in place is, according to the Icelandic authorities, designed to guarantee whether and how the applicable aid intensities would be ensured in the event that the investment cost might be lower than estimated.

## 5.3 The standstill provision

- (60) The Icelandic authorities submitted in their comments to the opening decision that the only benefit which has already taken effect is the waiving of municipal taxes by the Municipality, under the terms of the Agreement on Licences and Charges. In this regard, Verne has, according to the Icelandic authorities, committed itself to reimburse the outstanding amounts to the Municipality. The Icelandic authorities commit themselves to monitor that this will be done and report to the Authority in due course that the amounts involved (including interest) have been repaid in full. However, the Icelandic authorities propose that the reimbursement envisaged will be postponed until the Authority has adopted its final decision in this matter.

## 5.4 Necessity of the initially envisaged aid and its incentive effect, as argued by the Icelandic authorities before the withdrawal of the notification

### 5.4.1 Background to Verne's initial investment decision

- (61) The Icelandic authorities submit that a concerted government policy began in 2007, designed to attract foreign investors into the data centre business in Iceland. Key reasons for establishing business in Iceland focussed on its location between Europe and North America, its tax structure, which was limited to 15% on net income, its vast renewable green resources and cool climate.
- (62) The Icelandic authorities submit that the former military base, vacated in September 2006, was heavily promoted in terms of its potential impact on regional development. In its

<sup>38</sup> Authority's Decision No 174/98/COL, 40/03/COL and 344/09/COL.

<sup>39</sup> The Authority's State Aid Guidelines on the application of state aid rules to measures relating to direct business taxation.

discussions with Verne, the Icelandic authorities encouraged the use of the site for the data centre project. In this regard, it was hoped that any natural impediments to the development of the site would be overcome by the fact that there were already some buildings on the site that could be refurbished and the close proximity to the international airport.

- (63) The Icelandic authorities submit that the initially planned Data Centre would have had a very positive effect on employment in the Reykjanes area. The anticipated level of employment, according to Verne's initial plan, was between 180-220 persons by the time it would be fully operational, in an area with a labour force of 12 613 as of 30 October 2009 and an unemployment rate of just below 13%. It was further submitted that a significant percentage of new hiring would be for skilled workers. In addition, the Icelandic authorities submitted, that the initially planned project would add significantly to the industrial diversification of the area and Iceland overall, by attracting IT industries to Iceland.
- (64) The Icelandic authorities further submit that when Verne made its initial decision to invest in Iceland in 2007, aside from the obvious interest in Iceland's renewable energy resources, the general perception was that Iceland was a stable business and political environment. Stability is, according to the Icelandic authorities, a pre-requisite for investors and customers alike which were anticipated to the sorts of long-term commitments required to be made in the wholesale data centre industry. It is submitted that customers of wholesale data centres typically sign 10-20 year leases and data centre investors will look at 15-year investment horizons, at least, in which to realise their business plans. Following the economic crash of 2008, the business environment in Iceland became unstable.

#### *5.4.2 Inevitable pressure on government fiscal policy*

- (65) The Icelandic authorities submit that the economic balance was rudely shattered in late 2008 when the economic crash hit Iceland. In those circumstances, the raising of a broad range of taxes was a necessity for the government. As an example, the corporate income tax rates were raised from 15% to 18% in January 2010.<sup>40</sup> The Icelandic authorities further submitted that the ultimate recovery from the recession which struck Iceland will be patchy and the scale and timeframe for that recovery is unclear. It is therefore impossible to predict with certainty that further changes in taxation would not be implemented.
- (66) The Icelandic authorities further submitted that in light of the unstable business environment following the economic crisis it would not have been realistic to have expected Verne to continue its proposed investment on the understanding that the situation was "business as usual". It would therefore be unreasonable, given that the growth of capacity for a data centre over the course of its lifetime occurs in relation to the upgrading of existing data centre facilities, to anticipate that Verne would continue with its existing investment in Iceland, which it entered into in vastly different economic circumstances.

#### *5.4.3 Effects on investor confidence*

- (67) The Icelandic authorities submitted that the events of the financial crisis in Iceland, constituted a situation of force majeure that radically changed the way that investors and customers thought about Iceland. In short, it rendered Iceland a relatively unattractive place for foreign investment, at least in the short to medium term.

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<sup>40</sup> The Icelandic authorities further refer to a report by Jagjit S. Chadha: "Fiscal Policy in a Major Recession: The Case of Iceland", submitted with their comments to the opening decision.



- (68) The Icelandic authorities submitted that the gravity of the economic crisis, and its impact on data centre customers and investors, has been severe. As an example they mention that CDS spreads, which had been trading in the range of 200 basis points for most of the year 2008, spiked to well over 1000 basis points as the banking crisis approached. The Icelandic authorities note that in those circumstances, Verne and its investors felt they had no choice other than to secure a commitment from the Icelandic government in order to demonstrate that an economic environment of some stability could be maintained for its customers and investors alike. The Icelandic authorities understand that potential large-scale users such as IBM and Morgan Stanley alerted Verne to the fact that, unless the business environment could be stabilised, they would have no choice other than to postpone their decisions to invest in Iceland. Verne therefore recognised that extraordinary measures were required in order to secure customer commitments and future investment capital.
- (69) Regarding the incentive effect, the Icelandic authorities submit that expecting a small private equity investment firm such as Verne to compile detailed documentation about a self-evident, immediate and radical change in circumstances does not sit comfortably with the way small investment firms engage in decision-making in practise. The Icelandic authorities further note that Verne was and is a small entrepreneurial company with a handful of executives and employees and a group of investors who have personal relationships in data centre projects preceding the Verne investment in Iceland. Moreover, the lack of board minutes or other formal documentation concerning the decision to seek aid does not indicate that Verne or its investors took the requirement for aid any less seriously or were less convinced that the aid was necessary.
- (70) The Icelandic authorities submit that nothing in the case law on the incentive effect suggests that the norm of substance over form should not prevail. The Icelandic authorities do not find anything in the *Kronoply Case*<sup>41</sup> or in the *Freistaat Sachsen Case*<sup>42</sup>, referred to by the Authority in the opening decision, which would suggest the contrary.
- (71) The Icelandic authorities submitted in its comments to the opening decisions that the Authority largely ignores the fact that Verne's role as an equity investor in a start-up venture is not conducive to the adoption of a formalistic approach to its business planning. Furthermore, the Icelandic authorities note that there are currently no direct competitors to Verne in the provision of data centre services to international clients.

## 5.5 Selectivity and competitive distortions

- (72) The Icelandic authorities take the view that the position espoused by the Authority in the opening decision regarding the aid being selective, is at odds with its understanding of the situation.
- (73) Firstly, the Icelandic authorities submit that the element of selectivity is not borne out by the facts, insofar as;
- the Market Economy Investor Principle has been satisfied for a number of the state aid measures identified by the Authority;

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<sup>41</sup> Case T-162/05 *Kronoply GmbH&KG v Commission* [2009] ECR II-1.

<sup>42</sup> Case T-396/08 *Freistaat Sachsen v Land Sachsen-Anhalt*, Judgment of the General Court (Eight Chamber) of 8.7.2010, not yet reported.

- under the Incentive Legislation<sup>43</sup> any potential market entrant can benefit from the palette of measures extended to Verne;
- the “exclusivity” conferred upon Verne is very limited in terms of both terms and duration and is wholly consistent with a commercial arm’s length deal in order to preserve the goodwill generated by the purchase of real estate in the Reykjanesbær area.

- (74) Secondly, the Icelandic authorities submit that all existing data centre providers in Iceland are almost exclusively addressing the local needs of private business and government bodies (i.e. an altogether different market or market segment to that being targeted by Verne). The Icelandic authorities submit that it is also evident that, aside from Verne, other more experienced international data centre operators have not shown any tangible interest in investing in Iceland, despite the efforts of the Icelandic state to promote itself as an ideal location for data centres. Only one other data centre operator focussing on a market segment that goes beyond the purely local, Thor Data Centre, has launched commercial operations in Iceland, and its focus is on smaller retail customers. Thor Data Centre required only a small fraction of the up-front investment required by Verne to launch its wholesale data centre business.
- (75) The Icelandic authorities further submit that the impact of the Data Centre on the relevant market is minimal. Iceland has essentially 0% share of the global data centre market today, the Icelandic authorities submit. It is, in the view of the Icelandic authorities, not realistic to conclude that the aid measures contemplated by the Investment Agreement will distort competition.

## II. ASSESSMENT

### 1. Formal investigation closed as regards certain measures

- (76) According to Article 8(1) of Part II of Protocol 3, a notification may be withdrawn in due time before the Authority has taken a decision on the measure. On 28 September 2011 the Icelandic authorities informed the Authority that the Investment Agreement had been repealed and withdrew the notification.
- (77) According to Article 8(2) of Part II of Protocol 3, in cases where the Authority has initiated the formal investigation procedure, the Authority shall close that procedure upon withdrawal of the notification. The formal investigation procedure under Article 1(2) of Part I of Protocol 3 as regards the following tax and fee concessions, contained in the Investment Agreement, is therefore closed without further investigation:
- 1) Corporate income tax rate
  - 2) Depreciation rules
  - 3) Industrial and market charges
  - 4) Stamp duties
  - 5) Zoning fee
  - 6) Import duties
  - 7) Deferral from payment of VAT on imports and electricity
  - 8) Safety control fee for electricity production

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<sup>43</sup> The Investment Incentives scheme in force as of 2010, approved by the Authority.

9) Net worth tax guarantee.

(78) Further, the Icelandic authorities have informed that the Farice Agreement on bandwidth lease service dated 26 February 2008 was cancelled. Therefore, the formal investigation into the Farice Agreement on bandwidth lease service dated 26 February 2008 is closed.

## 2. The presence of state aid

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

“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.”

(80) This implies that a measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement if the following conditions are cumulatively fulfilled: the measure (i) is granted by the State or through State resources; (ii) confers an economic advantage to the beneficiary; (iii) is selective; (iv) has an impact on trade between Contracting Parties and is liable to distort competition.<sup>44</sup>

(81) The Authority will assess the existence of state aid regarding each of the measures subject to this decision separately.

### 2.1 The Agreement on Licensing and Charges

#### 2.1.1 Presence of state resources

(82) To be qualified as state aid, the advantage must be granted by the State or through State resources. For purposes of the state aid rules the term “State” covers also regional and local bodies.<sup>45</sup> A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. Besides, State support may be provided equally by tax provisions of a legislative, regulatory or administrative nature as through the practises of the tax authorities.<sup>46</sup> A reduction in the tax base or a total or partial reduction on the amount of tax, fees or charges, involves a loss of revenue and is therefore equivalent to the consumption of State resources in the form of fiscal expenditure.

(83) In the case at hand the State has intervened by means of an agreement between the Municipality and Verne (the Agreement on Licensing and Charges). This agreement contains the following derogations from municipal taxes, as further described in Section I.3.4 above;

- (a) Guaranteed maximum rate of 1.65% on an annual basis for property tax
- (b) Fixed base of ISK 1 030 600 000 instead of the annual official valuation of land and existing buildings for property tax
- (c) Deferred indexation of the tax base for property tax
- (d) No property tax levied before 1 January 2011
- (e) Fixed base for future buildings instead of official valuation for property tax

<sup>44</sup> According to settled case-law, classification as aid requires that all the conditions set out in the provision should be fulfilled, see Case C-142/87 *Belgium v Commission* (“*Tubemeuse*”) [1990] ECR I-959.

<sup>45</sup> Case C-248/84 *Germany v Commission* [1987] ECR 4013.

<sup>46</sup> See point 3 of the Authority’s Business Taxation Guidelines.

- (f) No street construction tax on existing buildings
- (g) 25% street construction tax on new buildings.

(84) All measures listed above entail foregone revenues by the State. As regards the street construction tax in particular, the Authority notes, that under Icelandic law this is a tax rather than charges for services as further elaborated on below under the assessment of whether an advantage was conferred. The fact that Verne will construct roads within the boundaries of the leased land, does not alter the fact that the exemption from paying street construction tax entails foregone revenues in the form of street construction taxes.

### 2.1.2 Selectivity

(85) In order to be caught by the state aid rules the aid measure must be selective in that it favours “certain undertakings or the production of certain goods”. Verne is an undertaking within the meaning of the state aid rules of the EEA Agreement. According to settled case-law, in the field of competition law, the concept of “undertaking” covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>47</sup> The Municipality signed on 4 November 2009 the Agreement on Licensing and Charges only with Verne. Therefore the measures included in this agreement exclusively apply to Verne and the Agreement on Licensing and Charges favours Verne. The selectivity criterion is thus fulfilled.

### 2.1.3 Economic advantage

- (86) The Authority recalls that the definition of aid is more general than that of subsidy, because it includes not only positive benefits, such as subsidies themselves, but also state measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect.<sup>48</sup> According to settled case law, a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of state resources, places those to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes aid granted by the state or through state resources.<sup>49</sup>
- (87) Such an advantage may be conferred by various reductions in the undertaking’s tax burden, including a reduction in the tax base or total or partial reduction in the amount of tax or a deferment, cancellation or even by special re-scheduling of tax debt.<sup>50</sup>
- (88) A further examination is needed for the individual measures covered by the Agreement on Licensing and Charges in order to determine whether and to which extent they confer an economic advantage on Verne.

<sup>47</sup> Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 107 et seq. and the case law cited there.

<sup>48</sup> See, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain v Commission* [2004] ECR I-6717, paragraph 90; and Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 77.

<sup>49</sup> See to that effect Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14; and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 132.

<sup>50</sup> See point 2 of the Business Taxation Guidelines.

### 2.1.3.1 Fixed tax rate of 1.65% - property tax

- (89) Verne is guaranteed to pay property tax rate of 1.65% annually (as currently generally levied by the Municipality), also for the future in the event that the tax rate would be increased, in lieu of the property tax levied under Act 4/1995<sup>51</sup>. By fixing the currently applicable tax rate as a maximum ceiling for an indefinite period of time, the provision guaranteed Verne a degree of planning security regarding property tax which other economic operators do not enjoy. This guarantee against future legislative or administrative changes in itself constitutes state aid within the meaning of Article 61(1) EEA.

### 2.1.3.2 Fixed tax base ISK 1 030 600 000 – property tax

- (90) The fixed tax base for municipal property tax under the Agreement on Licensing and Charges was ISK 1.030.600 000, adjusted by the Icelandic construction costs index<sup>52</sup>. Under Act No 4/1995 all companies pay property tax calculated on the basis of the official assessment of land and buildings, as established each year. At the time of entering into the Agreement on Licensing and Charges the official valuation of the land leased and buildings owned by Verne had been established as follows (in 2008, which would under statutory rules form the basis for property tax levied in 2009):

Building 868	ISK 452 050 000
Building 869	ISK 578 550 000
Building 872	ISK 52 700 000
Building 866	ISK 23 650 000
Building 864	ISK 70 900 000
Land 9.6 ha	ISK 181 200 000
Total value	ISK 1 359 050 000

- (91) According to this, the tax base for Verne under the Agreement on Licensing and Charges was fixed below what would have been the case under the statutory rules. (ISK 1 030 600 000 instead of ISK 1 359 050 000). The reduced tax base relieves Verne of charges that should normally be borne by the company and confers therefore an advantage on Verne.

### 2.1.3.3 Deferred indexation of the tax base – property tax

- (92) Fixing the base construction cost index at the time of start of operations by Verne relieves the company of charges that it would pay under the normal statutory rules, where owners of real estate and lessees of land under statutory rules pay property tax on the basis of the value as assessed at the time when they buy/lease the real estate and re-established annually. These costs would normally be borne by the company to relive from them confers therefore an advantage on Verne.

### 2.1.3.4 Property tax levied as of 1 January 2011

- (93) Under Act 4/1995 municipal property tax in Iceland is levied on all buildings which have been subject to official valuation the previous year. The buildings purchased by Verne in 2008 had been subject to official valuation at the time of purchase. Thus, the tax free period from the time of purchase until 1 January 2011 provided for under the Agreement on

<sup>51</sup> Article 2.1.3 of the Agreement on Licensing and Charges.

<sup>52</sup> Article 2.1.4 of the Agreement on Licensing and Charges.

Licensing and Charges<sup>53</sup> relieves Verne of charges that should normally be borne by the company and confers therefore an advantage on Verne. The measure constitutes therefore state aid within the meaning of Article 61(1) EEA

#### 2.1.3.5 Fixed tax base for future buildings – property tax

- (94) Instead of applying the official valuation as the tax base as stipulated in Act 4/1995, the tax base for the future buildings constructed on the site is the lesser of (i) the costs of the build-out of the exterior shells and (ii) 85 500 ISK per square meter, indexed to the Icelandic Building Cost Index (beginning in the month in which Verne commences customer operations/the building becomes operational) pro-rata according to occupancy rate.<sup>54</sup> Insofar as Verne will construct buildings (or already has), this will relieve Verne of charges that should normally be borne by the company and confers therefore an advantage on Verne.

#### 2.1.3.6 No street construction tax on existing buildings

- (95) Article 3 of Act 153/2006 on street construction tax (*gatnagerðargjald*), stipulates that street construction tax is a one-off fee municipalities in Iceland shall levy on real estate in all urban areas. Under the Act the municipalities have an obligation to levy the tax and can decide the tax rate up to a maximum of 15% of the official building cost pr. m<sup>2</sup> as established by Statistics Iceland, the centre for official statistics in Iceland. The tax base is the construction permitted on the relevant site according to the urban planning or construction permit issued. Article 5 provides for the possibility of a waiver or discount of the tax, which would have to be stipulated in municipal statutes. Further, Article 6 provides for an *ad hoc* waiver or discount in special circumstances.
- (96) On the basis of Article 1.1 of the Agreement on Licensing and Charges, Verne will not pay any street construction tax on existing buildings.
- (97) The fee under Act 153/2006 is tax by definition rather than fee for services provided, as described by the Authority in the opening decision. This nature of the street construction tax is explicitly stated in Article 1 of the Act.<sup>55</sup>
- (98) Act 153/2006 further stipulates that the municipalities in Iceland are obliged to determine the tax rate of street construction tax by municipal statutes, published in Section B of the State Gazette. According to statutes dated 20 January 2008 on street construction tax in Reykjanesbær<sup>56</sup> the applicable tax rate for industrial sites in Reykjanesbær is 7.5% of the tax base as established under Article 3 of Act 153/2006. Under Act 153/2006 the tax is payable when land is initially leased, building is refurbished or amended, or in the case of amended purpose of a building, and for the expansion of older buildings. Accordingly, Verne would have paid the tax under the statutory rules, also on the existing buildings, which were military buildings before and had not been subject to street construction tax in the past. The Authority recalls that according to Article 5 of Act 176/2006, the normal tax rules shall apply to all real

<sup>53</sup> Article 2.2.2 of the Agreement on Licensing and Charges.

<sup>54</sup> Article 2.1.5 of the Agreement on Licensing and Charges.

<sup>55</sup> This is further clarified in the explanatory note to the legislative bill as presented to the Parliament when Act 153/2006 was adopted, repealing previous Act on street construction fee No 17/1996. Previously there had been legal uncertainty as regards the nature of the fee; whether it was a tax or merely a charge for services provided. Act 153/2006 was adopted following a Supreme Court Ruling in Case No 415/2005, where the Court concluded that street construction fee was tax and not a charge for service provided.

<sup>56</sup> Statue No 120/2008, published in the State Gazette, section B.

estate within the boundaries of the former Navy area once they have been taken into civilian use.<sup>57</sup>

- (99) The exemption provided for under Article 1.1 of the Agreement on Licensing and Charges relieves Verne of charges that should normally be borne by the company and confers therefore an advantage on Verne.

#### 2.1.3.7 25% street construction tax on new buildings

- (100) Under the Agreement on Licensing and Charges<sup>58</sup> Verne will pay only 25% of the tax that would have been payable under Act 153/2006, “due to the size of the properties [...] and the size of the Project and its substantial impact on revenues of Reykjanesbær”. The Agreement stipulates that Verne will in the future undertake street construction within the site boundaries at its own expense “and of such work as is normally provided in return for the street construction fees”. In contrast, the municipality will take care of street connection to the site.

- (101) The street construction tax reduced by 75% for new buildings under the Agreement on Licensing and Charges is below what would have been the case under the statutory rules. The reduced tax relieves Verne of charges that should normally be borne by the company and confers therefore an advantage on Verne.

#### 2.1.4 Impact on trade and distortion of competition

- (102) As regards the criteria in Article 61(1) EEA on aid “*which distorts or threatens to distort competition in so far as it affects trade between Contracting Parties*”, it follows from the case law that it is not necessary to establish that the aid has a real effect on trade between Contracting Parties and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition.<sup>59</sup> Moreover, where aid granted by the state strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid. Conversely, it is not necessary that the recipient undertaking itself be involved in the said trade.<sup>60</sup>

- (103) Verne intends to provide services on the wholesale data centre market, including to other EEA countries. Wholesale data centre service is widely provided within the EEA and in world markets. On this basis, the Authority concludes that the Agreement on Licensing and Charges is liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.

#### 2.1.5 Conclusion as regards the existence of state aid in the Agreement on Licensing and Charges

- (104) The derogations from the municipal taxes (property tax and street construction tax), identified above, *i.e.*:
- a) Guaranteed maximum rate of 1.65% for annual property tax;

<sup>57</sup> See also description under Section I.2.3 above.

<sup>58</sup> Article 1.2 of the Agreement on Licensing and Charges.

<sup>59</sup> Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44; Case C-66/02 *Italy v Commission*, paragraph 111 and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 54.

<sup>60</sup> Case C-66/02 *Italy v Commission*, cited above, paragraphs 115 and 117, and Case C-148/04 *Unicredito Italiano*, cited above, paragraphs 56 and 58.

- b) Fixed tax base of ISK 1 030 600 000 instead of the annual official valuation of land and existing buildings for property tax;
- c) Deferred indexation of the tax base for property tax;
- d) No property tax levied before 1 January 2011;
- e) Fixed tax base for future buildings instead of official valuation for property tax;
- f) No street construction tax on existing buildings; and
- g) 25% street construction tax on new buildings,

entail a selective advantage to Verne, state resources are involved and there is an impact on trade and distortion of competition. Hence, the measures constitute state aid within the meaning of Article 61(1) EEA.

### *2.1.6 Quantification of state aid in the Agreement on Licensing and Charges*

- (105) The amount of the state aid is the difference between the taxes payable under the Agreement on Licensing and Charges on the one hand, and the taxes which Verne would have paid would the statutory rules have been applied.

## **2.2 The Real Estate Purchase Agreement, the Ground Lease Agreement and the Supplementary Lease Agreement**

### *2.2.1 State resources, selectivity and effect on trade*

- (106) First, all three agreements, the Real Estate Purchase Agreement, the Ground Lease Agreement and the Supplementary Lease Agreement, were signed between Verne and the State Treasury.<sup>61</sup>
- (107) Having established that the Real Estate Purchase Agreement, the Ground Lease Agreement and the Supplementary Lease Agreement were entered into directly by the State and thus state resources were involved, the Authority notes, secondly, that Verne, the potential beneficiary of the measures contained in the three agreements, qualifies as an undertaking since it pursues economic activities by offering whole-sale date storage services on the market.
- (108) Third, since the transactions potentially benefitted a specific undertaking (i.e. Verne), it should be considered as a selective measure.
- (109) Fourth, the measures distort or has the potential to distort competition and affect trade between Contracting Parties of the EEA Agreement whereas Verne intends to operate a global wholesale date centre where the service will be available to customers within the EEA and the world market.

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<sup>61</sup> The Real Estate Purchase Agreement and the Ground Lease Agreement are signed by Mr Kjartan Eiríksson<sup>61</sup>, on behalf of the Treasury, “according to proxy dated 8.5.2007”, and the Supplementary Lease Agreement “[o]n behalf of the State Treasury, in accordance with law no. 176/2006 on provisions following the agreement with the U.S.A. regarding returning the defence area at Keflavík Airport, Kjartan Eiríksson with a registered proxy dated 8.5.2007”. Mr Eiríksson is the CEO of KADECO,



### 2.2.2 *The existence of an advantage – the Market Investor Principle*

- (110) In order to assess whether measures contained in the three agreements constitute state aid, the Authority must ascertain whether the sale of the buildings and the lease of the land confer an advantage on Verne
- (111) Should the Real Estate Purchase Agreement, the Ground Lease Agreement and the Supplementary Lease Agreement have been carried out in accordance with the market economy investor principle, *i.e.* if the State sold the buildings for market value and the provisions of the Ground Lease Agreement and the Supplementary Lease Agreement complied with market terms no state aid would be involved.
- (112) In relation to the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity it must be pointed out that the Court has held that such a sale may include elements of state aid, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private market investor, operating in normal competitive conditions, would have been able to fix.<sup>62</sup>

#### 2.2.2.1 *The Real Estate Purchase Agreement*

- (113) The Treasury sold five buildings to Verne on 26 February 2008. To assess the presence of aid in this case the Authority applies the Guidelines on State Aid Elements in Sales of Land and Buildings by Public Authorities (“the Guidelines”). The Guidelines are based on the test of the private operator in a market economy; the private investor test.

#### *Was an unconditional bidding procedure followed - or comparable?*

- (114) According to point 2.1 of the Guidelines the existence of state aid in favour of the buyer is automatically excluded when the sale follows “a sufficiently well-published, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid”. According to the information gathered by the Authority under the formal investigation procedure, it appears that no bidding procedure was organized by the State or KADECO on its behalf. Therefore, the presence of state aid cannot be automatically excluded on that ground. However, the Authority will in the following assess whether a procedure, *comparable* to an unconditional bidding procedures, was applied, even if not entirely in compliance with the Guidelines.
- (115) The Icelandic authorities argued in their comments to the opening decision<sup>63</sup> that the buildings were sold at market value at the time, in February 2008. To support this statement the Icelandic authorities have, even if not referring to the Guidelines, amongst other submitted that “all of the government’s properties, which KADECO was handling at the time, were advertised publicly, several months before the sale to Verne”<sup>64</sup>; that the “property was publicly advertised and there were two offers for Building 869; the [...] offer of Verne Holdings ehf. and an offer from [another bidder]”.<sup>65</sup>

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<sup>62</sup> See in this regard Case C-290/07 P *Commission v Scott* [2010] not yet published, paragraph 68, and Case C-239/09 *Seydaland* [2010] not yet published, paragraph 34.

<sup>63</sup> Letter from KADECO dated 19.11.2010 attached to a letter dated 28.2.2011.

<sup>64</sup> Letter from KADECO dated 16.6.2011 attached to a letter dated 21.6.2011.

<sup>65</sup> Letter from KADECO dated 19.11.2010 attached to a letter dated 28.2.2011.

- (116) In order to verify that a procedure similar to an unconditional bidding procedure took place, the Authority has assessed all available information.
- (117) The Icelandic National Audit Office (*Ríkisendurskoðun*) is an independent body operating under the auspices of the Icelandic Parliament, Alþingi. Its main role is to audit the financial statements of central government bodies and to monitor and promote improvements in the financial management of the State and in the use of public funds.<sup>66</sup>
- (118) In November 2007 to March 2008 the Icelandic National Audit Office carried out a so-called Performance Audit<sup>67</sup> on the operations of KADECO. The reason for the examination was assertions in the public debate to the effect that the full interests of the State had not been protected when assets in the former defence area at Keflavík Airport were sold. The buildings purchased by Verne are located in the area. However these buildings had not yet been sold when the audit was performed. The audit pointed out that the KADECO had, by law, been appointed to manage the facilities in the former defence area at Keflavík Airport and to handle the future development of the area on behalf of the Icelandic State. It had therefore been fully within the company's rights to handle the selling of the State's assets in the area without the involvement of the State Trading Centre (*Ríkiskaup*)<sup>68</sup>, and KADECO was not under any obligation to put them out to tender. Moreover, the audit concludes that interests of the State had been protected when the facilities were disposed of.
- (119) The report on the Performance Audit was issued 26 March 2008 and it is publicly available at the Icelandic National Audit Office's website.<sup>69</sup> The report describes in detail the sales process of the buildings already sold or in the process of being sold at the time of the audit, by when three fourth of all the properties in the area had already been sold. According to the report the first public advertisements for designated buildings in the area were published in March 2007, whereby 24 specific buildings were offered for sale.<sup>70</sup> In April 2007 eight additional buildings were offered for sale in various newspapers in Iceland.<sup>71</sup> The report states that since April 2007 no buildings were specifically advertised in newspapers, however regular advertisements were published where reference is made to KADECO and its homepage, and called for ideas of exploitation in the area.
- (120) The Icelandic National Audit Office pointed out in its report that it would have been more fortunate to advertise more buildings specifically.
- (121) In the case of the five buildings sold to Verne on 26 February 2008, only one building was advertised specifically; namely building No 869.<sup>72</sup> This building is among the eight that were advertised in April 2007. The Icelandic authorities have explained that one offer was received for this particular building, submitted on 23 April 2007 by Atlantic Film Studios. The Authority has been provided with a copy of the offer. Atlantic Film Studios offered ISK 35

<sup>66</sup> See <http://www.rikisend.is/index.php?id=44>

<sup>67</sup> See English version of the Annual Report of the Icelandic National Audit Office 2008 at page 23, available at [http://www.rikisendurskodun.is/fileadmin/media/skyrslur/arsskyrsla\\_2008\\_enska.pdf](http://www.rikisendurskodun.is/fileadmin/media/skyrslur/arsskyrsla_2008_enska.pdf)

<sup>68</sup> The role of the State Trading Centre is to handle procurement on supplies and services in domestic and foreign markets for state institutions and state corporations under the Public Procurement Act No 84/2007, see <http://www.rikiskaup.is/english/nr/324>

<sup>69</sup> Only available in Icelandic, see [http://www.rikisend.is/skyrslur-eftir-utgafutima/2008.html](http://www.rikisend.is/skyrslur-efrir-utgafutima/2008.html)

<sup>70</sup> None of the buildings later purchased by Verne were among them.

<sup>71</sup> Amongst them was building 869.

<sup>72</sup> This has been confirmed by information submitted in an email on 1 June 2012 (Event No 636529) from the Icelandic authorities.

000 pr m<sup>2</sup>, which given the estimated size of building 869 at the time, 13 000 m<sup>2</sup>, was calculated to ISK 455 000 000 in the offer. In addition, Atlantic Film Studios, offered to pay ISK 15 000 000 for asphalt area outside the boundaries of building 869. The Icelandic authorities have explained that this offer was rejected.<sup>73</sup>

- (122) On the basis of the aforementioned, the Authority cannot conclude that a procedure, comparable to an unconditional bidding procedure was followed in this case. Thus, state aid cannot be automatically excluded on this basis.

#### *Independent expert evaluation*

- (123) The Guidelines provide for an alternative procedure to exclude aid, the so-called independent expert valuation method, at Section 2.2. Even if the Icelandic authorities have not argued that aid was excluded on the basis of the method prescribed, the Authority will assess whether this was the case.
- (124) On 23 April 2007 an expert, a local real estate agency named Fateignastofa Suðurnesja, assessed the market value of this particular building (869), on the size assumption 13 382 m<sup>2</sup>, to be ISK 980 000 000, or around ISK 73 000 pr m<sup>2</sup>. While Verne bought this building plus four additional building in February 2008 for the total price of USD 14.5 million, then equivalent to ISK 957 000 000, this raises a legitimate question; whether market value was indeed paid for the buildings.
- (125) As mentioned before the Icelandic authorities argued in their comments to the opening decision that the buildings were sold at market price and to support this statement they amongst other referred to a the independent expert valuation of building 869, mentioned above. The Icelandic authorities have provided the Authority with a copy of the valuation, dated 23 April 2007, signed by the expert. The report is short, less than one page, and refers to building No 869 as being 13 383 m<sup>2</sup> made of steel frame in good condition and with good accessibility.<sup>74</sup> The expert establishes the market price of ISK 980 000 000 based on documentation available, the inspection of the house and survey of comparable properties in the area, considering the market conditions. The expert refers to the possibility of an exploitation of the building in connection with the nearby international airport at Keflavík and refers to multiple exploitation possibilities of the property as high ceiling building.
- (126) The Authority notes that Icelandic authorities submitted in their comments to the opening decision that the expert assessment “was to reflect a new building value of comparable properties”.<sup>75</sup> This is however not reflected in the wording of the expert valuation which clearly refers to the conditions of building 869 and does not contain any reference to new buildings. Moreover, the report of the Icelandic National Audit Office referred to above does not support the understanding that the expert valuation reflected the value of new buildings.

<sup>73</sup> The Authority notes that Icelandic National Audit Office’s Performance Audit in March 2008 reports that Atlantic Film Studios bought in fact 12 buildings in the area for ISK 575 000 000 and that the purchase price was 87% of price assessment made by an expert, a local real estate agency.

<sup>74</sup> The size was later accurately established as being 16 606 m<sup>2</sup>. However at this point in time (April 2007) Iceland Property Registry, now Registers Iceland (*Þjóðskrá Íslands*) had not yet registered the actual size and value of the buildings located at the former US military base, which was being taken into civilian use pursuant to Act 176/2006.

<sup>75</sup> KADECO’s letter of 19 November 2010 attached to a letter dated 28.2.2011.

- (127) Since the expert valuation does only cover one of the five buildings sold to Verne, it was performed 10 months before the buildings were sold to Verne and it appears to be uncertain whether this valuation actually was based on generally accepted market indicators and valuation standards, it cannot be regarded as independent expert valuation for all five buildings sold to Verne, within the meaning of the Guidelines for the purposes of the case at hand.

#### *Market price*

- (128) The question then arises, how the market price for the buildings can be established in the case at hand. In the absence of the procedure to automatically exclude state aid, that was available to the State under the Authority's Guidelines, the Authority will take the systematic and logical approach on which the Guidelines are based, in its assessment of the market value in the case at hand.
- (129) The total size of all five buildings purchased by Verne was 31 008 m<sup>2</sup>.<sup>76</sup> The total price paid, equivalent to ISK 957 000 000 at the time, gives a price of around ISK 31 000 pr. m<sup>2</sup>, which is about ISK 4 000 below the price pr. m<sup>2</sup> offered by Atlantic Film Studios 10 months earlier for building 869; an offer that was rejected according to the Icelandic authorities.<sup>77</sup> In the Authority's view this already gives an indication that the buildings were sold below market price to Verne.
- (130) As indicated above, the Authority cannot rely entirely on the expert valuation performed. However, it indicates in the Authority's view, that the price paid might have been below market price, also viewed in the light of the only other offer that was put forward, according to the Icelandic authorities, which, in addition, was already 10 months before the actual sale to Verne took place.
- (131) The assessment of whether market price was paid, is, in the absence of the automatic assumption provided for under the Authority's Guidelines, by nature retrospective.<sup>78</sup> It is the duty of the Authority to apply the most reliable method to determine the value of a property in such cases, based on all information available.
- (132) The Authority is of the view that reliable information in this regard can be found in the report of the Icelandic National Audit Office referred to above, even if it cannot be excluded that other sales contracts entered into by the State and discussed in the report entail state aid. In the Authority's view, the report provides helpful information on the situation prior to and at the time of the sale to Verne and it can be useful in the process of establishing market value in the area concerned.
- (133) The report explains that the same real estate expert as provided the valuation for building 869, one of the buildings sold to Verne, assessed a considerable part of the buildings in the area that the State offered for sale. However, not all buildings were assessed. The report also provides information on the assumptions made by the expert and clarifies that the assessments were based on market prices in the area, taking into account construction costs. However, as the report clarifies, the buildings were not individually assessed, but rather grouped according to age, conditions and exploitation possibilities. Then, different groups

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<sup>76</sup> See breakdown in Section I.3.2 above.

<sup>77</sup> Atlantic Film Studios offered ISK 35 000 pr m<sup>2</sup> see paragraph 117 above.

<sup>78</sup> See in this respect Case T-274/01 *Valmont v Commission* [2004] ECR II-3145, paragraph 45.

were assessed. The expert assessment took into consideration necessary improvements of electricity (from US to European standards), location and distance from infrastructure. In contrast, it neither took into consideration the vast extra supply of real estate in the area when the US Navy area was taken into civilian use nor the resale and exploitation restriction apparently imposed in some cases. In fact, as explained in the report, before the sale to Verne took place, buildings had been sold to other companies in the area; in the 1st phase (first half of 2007) buildings were sold for 57% of the price the expert valuation had established (22 buildings, all sold to one company). Later, in the autumn of 2007 buildings were sold to different companies/organizations for 72% to 87% of the price established by the expert valuation. These properties were sold in smaller units. Finally, the report describes that one company bought two school buildings for 30% of the price in the expert valuation. Even though the Authority cannot in the case at hand take a position on whether or not state aid was involved in the transactions referred to, this information demonstrates that the expert valuations performed might not be the most or only appropriate method to establish market price in the area and in the case at hand.

- (134) The Authority notes, that it has no reason to believe that the State commissioned any valuations for buildings No 868, 866, 872 or 864, sold to Verne. The Icelandic authorities would have come forward with such information, were they available. The only available expert valuation in the case of the five buildings sold to Verne is thus for building No 869. This is also the only building of the five, which was advertised specifically, according to the report of the Icelandic National Audit Office, referred to above and the information provided by the Icelandic authorities. The Authority further has no reason to believe that the basis for the expert's valuation as regards other buildings in the area was any different from the expert evaluation available in this case.
- (135) In the view of the shortcomings of using the expert valuation for building No 869 performed in 2007 in general as a proxy for market value in the case at hand, considering that it merely concerns one out of the five buildings sold to Verne and it is performed 10 months prior to the contract signed with Verne, the Authority does not consider that this valuation can be directly applied as representative for the price pr. m<sup>2</sup> a private operator would have been willing to accept for the five buildings sold together had he or she been the owner of the buildings. However, it can in the Authority's view indicate that the marked price indeed was higher than the actual price paid by Verne.
- (136) The Authority thus will have to rely on a different proxy for market price than the expert assessment available in the case at hand.
- (137) A central independent authority, Registers Iceland (Þjóðskrá Íslands), assesses the value of all civil real estate in Iceland, land and buildings, on an annual basis<sup>79</sup>. The value shall reflect the market value.
- (138) The legal basis for the valuation performed by Registers Iceland is Act 6/2001 on the Property Registry and Valuation. According to Article 27 of the Act the registered valuation of real estate shall reflect the market value of the property. If the market value is not available, the valuation shall be determined on the basis of best available information on market price of comparable properties taking into consideration the revenues, cost and age of construction, location of property in respect of transport infrastructure, age, exploitation

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<sup>79</sup> Some exemptions apply, irrelevant to the case at hand.

potentials, perquisites, soil type, vegetation, landscape and all other elements that could affect the market price of the property in question.

- (139) The Registers Iceland shall assess all properties each year based on the market price the previous February and this valuation will come into effect on December 31 of the same year. The annual assessment is based on information about the characteristics of each property and on the market price of real estate according to registered sales contracts.
- (140) Sale prices and payment conditions from every sale contract in the country are collected into the Property Registry Database, operated by Registers Iceland. The registered sales contracts form the basis of the valuation. Registers Iceland uses the data collected to assess the housing market as well as the market for industrial and other commercial buildings Iceland. This market information is publicly available.<sup>80</sup>
- (141) As of April 2010 Registers Iceland has published market information about commercial buildings on a monthly basis.<sup>81</sup> This data provides information about the number of sales contracts for commercial buildings entered into each month, dating back to January 2005, the number of transactions for which sales price was available and the total official value of buildings sold compared to the total sales price for all contracts entered into for each month, divided into two geographical categories; the capital city area and the rest of the country. The buildings bought by Verne belong to the latter geographical category.
- (142) The market data demonstrates that the total sales price of commercial buildings, also outside the capital city area, was in general above the total official valuation for all the buildings sold in the months the data concerns; the period from 1 January 2005 to date.<sup>82</sup> This indicates that the official valuation is normally not higher than the actual market price, where data is available.
- (143) The Authority considers, that in the absence of a real market value being established by a comparable offer on an open market, the method for assessing real estate in Iceland provided for under Act 6/2001, as described in detail above, is the most reliable method available to determine the value of the property purchased by Verne. This view of the Authority is based on the clear aim of Act 6/2001 and the wording of Article 27 of the Act; to establish the official assessment on the basis of market indicators.

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<sup>80</sup> See <http://www.skra.is/pages/1183> "Iceland Property Registry [now Registers Iceland] is responsible for collecting, processing, storing and publishing real estate data such as market data, which is used by central and local government institutions, real estate brokers and the financial sector. Iceland Property Registry analyses and publishes data on the real estate market, based on registered property sales data, which have been collected since 1980. Sale prices and methods of payment from every sale contract are collected into the Land Registry Database and used for the calculation of economic indicators, such as the real estate price index. Iceland Property Registry created and maintains the Land Registry Database, which is a centralised data collection system and information source for all land and real estate data."

<sup>81</sup> See <http://www.skra.is/Um-okkur/Frettir/Frett&NewsID=4103>

<sup>82</sup> In eight months of the year 2005, all months of both the year 2006 and 2007, 10 months of 2008, 10 months of 2009, nine months of 2010 and 10 months of 2011 the total sales price for commercial buildings outside the capital city area each month was above the total official valuation. The latest information available at the website of Registers Iceland are on the transactions registered in May 2012. They demonstrate that the sales prices in registered transactions are consistently and in general above the official valuation, also for commercial buildings outside the capital area.

- (144) Moreover, the official valuation under Act 6/2001 was the only contemporaneous assessment of the buildings in question and it was made by an independent authority.<sup>83</sup> This is not contradicted by the fact that in principle a valuation for tax purposes does not necessarily show the “market value” of real estate, as also reflected in the Authority’s Guidelines.
- (145) The Authority takes the view that the method by which the property was assessed under Icelandic law is the best indicator of the market price available in the case at hand and that an ex post valuation by an expert in this case would not be a more reliable method in determining the market value of the property at the time of entering into the agreement 26 February 2008.<sup>84</sup>
- (146) All things considered, the Authority concludes that the valuation performed by the Registers Iceland is the best proxy for market price in this case. The Authority further observes, that the Icelandic authorities verified in their email dated 14 May 2012, referring to the transactions of 2008 under assessment, that “the valuation rate for taxation purposes under Icelandic practice is generally understood to reflect the market rate.”<sup>85</sup> This is common ground.
- (147) The view of the Authority is further reinforced by the fact that official valuation under Article 31 of Act 6/2001 can be challenged by interested parties and the finding of the Registers Iceland can be appealed to a specific body (Yfirfasteignamatnefnd) under Article 34 of the Act. Verne has not challenged the official valuation of the buildings in the case at hand.

#### *Quantification of the aid*

- (148) It follows from established case-law that the Authority is under the obligation, to establish, as far as possible, the true value of the aid in question and to order the recovery of that exact amount in each case.<sup>86</sup>
- (149) At the time of the transaction in this case, the Iceland Property Registry (now Registers Iceland) had valued the buildings in question as follows:

Building 868	ISK 452 050 000
Building 869	ISK 578 550 000
Building 872	ISK 52 700 000
Building 866	ISK 23 650 000
Building 864 <sup>87</sup>	ISK 70 900 000
Total valuation for buildings	ISK 1 177 850 000

<sup>83</sup> The Authority observes that these assessments were referred to in the Real Estate Purchase Agreement.

<sup>84</sup> See in this respect also Case C-124/10 P, *Commission v Électricité de France (EDF)*, judgment of the Court of Justice (Grand Chamber) of 5.6.2012, not yet published, at paragraph 85.

<sup>85</sup> Event No 634340.

<sup>86</sup> See, to that effect, Case C-367/95 P *Commission v Sytraval and Brink’s France* [1998] ECR I-1719, paragraph 62 and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein Westfalen v Commission*, [2003] ECR II-435, paragraph 167.

<sup>87</sup> In the Real Estate Purchase Agreement the valuation for 9.6 ha land is included in the figure for building 864, in total ISK 252 100 000. However, according to information collected under the administrative procedure, the valuation of building 864 was ISK 70 900 000 whereas the valuation for the land, on which all five buildings are located, was ISK 181 200 000. Valuation of land is thus not included in the valuation of the buildings.

For the sake of completeness, it may be added here that this does not include the valuation for the land, which was not sold to Verne, but rather leased for 99 years.

- (150) The price paid for the buildings was USD 14.5 million, equivalent of ISK 957 000 000 when the transaction took place; hence below the market price as established by the Authority above.
- (151) Thus state aid within the meaning of Article 61(1) EEA was granted when the State entered into the Real Estate Purchase Agreement on 26 February 2008.
- (152) The total aid amount as regards the buildings is the difference between the market value as established by the Authority, ISK 1 177 850 000, and the actual price paid for the buildings, USD 14.5 million, equivalent of ISK 957 000 000 at the time: ISK 220 850 000.
- (153) The Authority notes that the aid amount is well above the 5% margin for market price provided for in the Guidelines at Section 2.2 b).
- (154) Furthermore, the Authority notes that the provisions on special obligations prescribed under Section 2.2 c) in the Guidelines do not apply in this case, as the Real Estate Purchase Agreement does not contain any such obligations which would confer an economic burden on Verne within the meaning of the Guidelines.<sup>88</sup> Economic burden related to obligations incumbent on all owners of real estate under the ordinary law a further not to be discounted from the purchase price, as stipulated in the Guidelines. Finally, primary costs as stipulated in Section 2.2 c) of the Guidelines are not relevant in this case<sup>89</sup> and cannot be used to establish minimum benchmark.

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<sup>88</sup> In particular, even if this appears to be more aimed at lease/purchase of land, at paragraph 3.2 of the Real Estate Purchase Agreement, it is clearly stated that in the case of any significant changes or changes of material nature of the borders and plot sizes in the process of planning the former US army base, the purchase price for a plot of land will be reduced. Further, at paragraph 4.4 the Agreement foresees that the State will indemnify and hold Verne harmless of any costs arising out of the presence of Hazardous Substances, except in cases where the State can prove that the presence of such Hazardous Substances are caused by Verne. The only conditions in the Agreement that could possibly have qualified as “special obligations” within the meaning of the Guidelines is related to building 864, which at the time of entering into the Agreement was serving as a backup power plant for the power distribution at the former air base. The State and Verne agreed to maintain its purpose as a backup power plant for the area while the distribution system is being reconstructed. A set off against the purchase price on this basis has neither been argued by the Icelandic authorities during the administrative procedure nor did the authorities apply the procedure provided for under Section 2.2 of the Guidelines, which would in any case have called for a separate evaluation of the alleged disadvantage by an independent valuer. The Icelandic authorities further submitted in their comments to the opening decision that buildings located on the plot had to be demolished and the demolition costs were covered by Verne. No demolition costs are mentioned in the Real Estate Purchase Agreement and this was not elaborated on by the Icelandic authorities. The three buildings (872, 866 and 864) were not demolished. Buildings 867 and 889 (not part of the sales contract) were demolished. However, it is not clear when or whether the seller or the buyer had to bear the costs. Building 867 was a small switching substation located on the southern side of building 869 and building 889 was a storage tent. The Authority concludes that the costs of demolishing these minor constructions were in any case marginal in the context of the sale of over 31 000 m<sup>2</sup> of industrial buildings.

<sup>89</sup> The Icelandic State has been the owner of the land at least since 1951 when it granted the US government use. In 2006 when the Navy left, as described above, the State took over the land and buildings.



### 2.2.2.2 *The Ground Lease Agreement as amended by the Supplementary Lease Agreement*

- (155) It is recalled that should the measures in the Ground Lease Agreement as amended by the Supplementary Lease Agreement have been carried out in accordance with the market economy investor principle, *i.e.* if the State terms in the Ground Lease Agreement and the Supplementary Lease Agreement were on market terms the transaction would not involve state aid.
- (156) The Ground Lease Agreement was entered into between the Treasury of Iceland and Verne on 9 May 2008. By the Supplementary Lease Agreement signed on 30 June 2009 the rental price was altered. Furthermore, the Treasury provided for a rental free period until 1 April 2010.
- (157) The initial rental price, USD 0.8 per m<sup>2</sup> annually, was negotiated in February 2008. The price was not subject to any adjustment under the Ground Lease Agreement. The lease period was 99 years. This would appear to be far from what a market operator could accept. The Authority however does not have to assess whether the price was concluded on market terms, since the price was re-negotiated in June 2009 by the Supplementary Lease Agreement and the initially negotiated rent never entered into effect. Under the latter agreement the rental period is unchanged; however the rental price is amended and fixed in Icelandic currency: ISK 60 pr. m<sup>2</sup>. Further, the lease is now adjusted annually with the construction costs index in Iceland.
- (158) The pricing methodology under the Supplementary Lease Agreement reflects a common practice applied for land owned by municipalities in Iceland, as pointed out by the Icelandic authorities. Under this practice the official valuation of the Registers Iceland under Act 6/2001 on an annual basis, as also described in detail under Section 2.2.2.1 above, the annual assessment forms the base on which in general 1% or 2% lease is paid annually, depending on the decision of each municipality.
- (159) While the lease agreements entered into by different municipalities in Iceland do not reflect market value in the sense that a market operator would be willing to lease his or her land on this basis on an open market, the Icelandic authorities have not put forward any arguments to establish an alternative market price for the land in question. They have merely put forward that the rent reflects what the State generally charges in the area.
- (160) While information on market for industrial land in Iceland are not readily available, contrary to the information gathered by the Registers Iceland on market price of housing and commercial buildings, as described above, it is difficult to set a realistic benchmark as to the market price of the land in this case. The Authority can therefore only come to a rough estimate of the market value of the land. The best available information is, again, the official value as established under Act 6/2001.<sup>90</sup>
- (161) At the time of entering into the Supplementary Lease Agreement in June 2009, the official value of the land leased by Verne had been established as being ISK 188 850 000<sup>91</sup>, according to information gathered from the Registers Iceland. The annual rent was ISK 5 760 000 in 2009 prices, or 3.05% of the official valuation of the land, which is higher than the

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<sup>90</sup> The Authority has, in addition, taken into consideration the rulings of the Committee on Compensation for Expropriation under Act 11/1973, concerning land in the neighborhood of the capital city and in the Reykjanes area.

<sup>91</sup> Equivalent to ISK 1 967 pr. m<sup>2</sup>.

percentage normally applicable. Therefore, the Authority considers that the rent could have been acceptable to a private market operator operating on an open market in the circumstances of this case.

- (162) Finally, regarding the exclusivity clause, to which the Authority referred in its opening decision, the Icelandic authorities have explained that it only concerns the area managed by KADECO. This is also consistent with an amendment to the registered Ground Lease Agreement. The Authority considers that the clause as such does not confer an economic advantage on Verne as it had limited scope, both geographically and in time.
- (163) The Authority concludes that the Ground Lease Agreement as amended by the Supplementary Lease Agreement does not entail an advantage for Verne.

## 2.3 The Power Contract

### 2.3.1 State resources

- (164) As mentioned before, in order to establish that a measure involves the grant of state aid under Article 61(1) of the EEA Agreement the Authority must establish that the measure confers an economic advantage which the undertaking would not have received in the normal course of business. To be qualified as state aid, the advantage must be granted by the State or through state resources. The advantage can also be granted through a public undertaking provided there is imputability to the State<sup>92</sup>. The European Court of Justice held in *Stardust Marine*<sup>93</sup> that:

“...“Art. 87 (1) EC 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. [...] the position of a public undertaking cannot be compared with that of a private undertaking. Through its public undertakings, the State may pursue objectives other than commercial ones, [...].”

- (165) The Authority refers to its recent decisions regarding long term power contracts entered into by Landsvirkjun, Decision No 391/11/COL and No 392/11/COL, and takes the same approach as regards the imputability of the Power Contract in the case at hand.
- (166) In addition to the general argument put forward in above mentioned decisions, the Authority notes that in a memorandum prepared by the Ministry of Industry on 23 October 2008, which the Icelandic authorities made available to the Authority in the pre-notification procedure of the case at hand, reference is made to the discussions between Verne and the Icelandic authorities on possible measures, amongst them subsidised power price at the beginning of Verne’s operations. Landsvirkjun was a party to the first draft Memorandum of

<sup>92</sup> Case C482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, paragraphs 50-59 and Article 1 of the Transparency Directive.

<sup>93</sup> Case 482/99 *France v Commission (Stardust Marine)*, cited above, paragraph 57.

Understanding, dated 15 December 2008, in preparation for the later cancelled Investment Agreement between the Icelandic authorities and Verne, which was also made available to the Authority during the pre-notification procedure. The following clause was included in the draft Memorandum of Understanding as regard a previous power contract between Landsvirkjun and Verne<sup>94</sup>:

“The first [...] of power to Verne for a 20 year term will be sold at whatever rate it takes to land Verne’s initial customer.”

- (167) The above demonstrates in the Authority’s view that the State was involved in the decisions of Landsvirkjun in the case at hand. Not only is Landsvirkjun fully owned and controlled by the Icelandic state, it has evidently been used by the State in its efforts to attract the data centre industry to Iceland.<sup>95</sup>
- (168) Overall, the Authority is therefore, in light of the legal status of Landsvirkjun, the past evident use of Landsvirkjun as a tool to attract foreign investment and the general circumstances of the case concludes that the Power Contract is imputable to the State, and that it entails State resources if and to the extent it confers an advantage on Verne.

### 2.3.2 *Advantage in the Power Contract*

- (169) When governments make financial transactions and investments, the European Court of Justice has stated that in order to confirm whether a state measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage, which it would not have obtained under normal conditions<sup>96</sup>. In doing so, the Authority has to apply the market economy investor test<sup>97</sup>, which in essence provides that state aid is granted 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<sup>98</sup>.
- (170) The measure at hand – a power contract, with a publicly owned company as a seller – could thus entail an element of state aid if its terms are such that they would not have been acceptable to a private market investor and that the sale of electricity could not have been expected to be sufficiently profitable for a private operator. The Authority observes that the issue is to examine whether a private investor operating in a market economy would have chosen to enter into a long term bilateral contract for the same price and on the same terms as in the agreement under assessment.<sup>99</sup> However, in making that assessment the Authority cannot replace the seller’s judgment with its own, which implies that the seller of electricity must enjoy a wide margin of judgment. Whilst the Authority fully recognises the right for public companies such as Landsvirkjun to operate on the market on commercial terms, it

<sup>94</sup> At this point in time Landsvirkjun and Verne had already entered into a power contract, dated 26.2.2008, which was later replaced by the Power Contract under assessment, entered into in October 2009.

<sup>95</sup> See also Invest in Iceland’s website [www.invest.is](http://www.invest.is)

<sup>96</sup> Case C-39/94, *SFEI v La Poste*, 2006 ECR I/3547, at paragraph 60.

<sup>97</sup> This principle is explained in the Authority’s guidelines Part IV 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.

<sup>98</sup> Cf. for example Opinion of Advocate General Jacobs, Joined Cases C-278/92, C-279/92 and C-280/92 *Kingdom of Spain v Commission* [1994] ECR I-4103, at paragraph 28.

<sup>99</sup> See the Authority’s decision No 305/09COL on power sales agreement entered into by Notodden municipality and Becromal Norway AS.

nevertheless must consider carefully whether similar agreements would have been concluded by a private market investor.<sup>100</sup>

- (171) Moreover, the Authority must base its assessment of the price and terms of the contracts between Landsvirkjun and Verne on the information available at the time of the conclusion of the contract.
- (172) The Authority observes that Landsvirkjun decided in 2010 to reduce its dependency of adjusting price of electricity to power intensive uses with the price of aluminium and this seems to decrease the risk for the company as regards agreements entered into with the aluminium industry, which is the main buyer of electricity in the power intensive industry in Iceland. The Authority notes that the contract at hand is entered into before the new pricing policy was introduced by Landsvirkjun.
- (173) As described above, Verne will be buying power from facilities owned by the state controlled Landsvirkjun. The electricity will be provided by the existing facilities of Landsvirkjun.
- (174) Landsvirkjun has explained that there is a certain flexibility built into the power supply committed for by Landsvirkjun. During the first five years of the contract period Verne has the possibility to grow to [...]. If after the first five years the growth has not reached [...] Verne is obligated to pay for [...] during the remainder of the contract period (take-or-pay obligation).
- (175) The Authority must verify whether the price - and other terms - of the part of the power already available and Landsvirkjun will provide Verne with, reflects market price.
- (176) The Icelandic authorities have submitted that the isolation of the Icelandic power market from the rest of the European interconnected power market has characterized the market for electricity to industries in Iceland.
- (177) In the case at hand, however, a market price for electricity to power intensive industry in Iceland is not readily available. In this respect it should be noted that there is no alternative outlet in the general Icelandic market for supply of electricity of the magnitude as in the case at hand. The isolated and limited size of the Icelandic market for general consumption of electricity would not be able to absorb the production generated by Landsvirkjun. The only outlet would be, as in the current case, large industrial consumers located in Iceland. The isolation of the market also means that the benchmark cannot be established as being the price in Europe.
- (178) In the absence of a relevant benchmark the Authority must rely on the information provided by the Icelandic authorities on the average price paid to Landsvirkjun in the past under the contracts with other power intensive businesses.
- (179) The Icelandic authorities have provided the following information on Landsvirkjun's average power price to power intensive industry in Iceland in the past. The Authority understands that transmission costs are included in the figures.

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<sup>100</sup> See the Authority's guidelines, Part IV 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, paragraph 5(1).

Year	USD per MWh
2002	12.8
2003	13.8
2004	17.0
2005	21.6
2007	27.8
2008	30.3
2009	19.0
2010	25.1

(180) Landsvirkjun has further explained the pricing mechanism of the Power Contract. The power is priced in two steps. [...] to start their data center activities in Iceland. This initial power price is in steps during the first half of the contract period ([...]).[...].

(181) The Authority recalls the actual price negotiated in the case at hand (transmission costs not included):

For the first [...]:

Price pr. MW	Period
[...] USD	Until 31.12.2013
[...] USD	1.1.2014-31.12.2016
[...] USD	1.1.2017-31.12.2018
[...] USD	1.1.2019 until end of contract period

For volume exceeding [...]:

Price pr. MW	Volume
[...] USD	[...] MW
[...] USD	[...] MW
[...] USD	[...] MW
[...] USD	[...] 1 MW
[...] USD	[...] MW
[...] USD	Above [...] MW

(182) Thus, the prices set out in the Power Contract are [...] to all power intensive customers of Landsvirkjun (taking into account the transmission costs which are added in the case of Verne) except for the period until [...], when the prices Verne pays [...]. Moreover, the price for the volume between [...] (see Decision 392/11/COL).

(183) Furthermore, the Take or Pay Obligation ensures a constant sale of a considerable share of the electricity provided.

(184) For the above mentioned reasons, the Authority concludes that the terms of the Power Contract must fall within the margin of discretion that public companies enjoy in running their business. On the basis of the information provided by the Icelandic authorities, the Authority concludes that the Power Contract does not entail an advantage for Verne.

### 3. Legality of the measures

- (185) Pursuant to Article 1(3) of Part I of 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”.
- (186) The Icelandic authorities did not notify the aid identified above prior to taking effect thus not allowing the Authority to take its final decision before the aid was granted. Therefore, the aid is unlawful.

### 4. Compatibility of the aid

- (187) 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 derogation under Article 61(2) or (3) of the EEA Agreement.
- (188) Under the Regional Aid Guidelines, measures may qualify as compatible aid under Article 61(3)(c) if aimed to “assist the development of the most disadvantaged regions by supporting investment and job creation”. The Authority notes that the data centre will be located in Reykjanesbær, which is an area eligible for regional investment aid based on the Authority’s Decision No 378/06/COL on the regional aid map of assisted areas for Iceland.

#### 4.1 The Agreement on Licensing and Charges

- (189) In the later withdrawn notification, one of the measures dealt with in this decisions was notified; the municipal property tax. The notification was withdrawn after opening of the formal investigation. However, the Municipality had already put into effect the measures contained in the Agreement on Licensing and Charges and the measures had not been abolished.
- (190) The Icelandic authorities argued, in the later withdrawn notification and in their comments to the opening decision, that the derogations from municipal property tax on an annual basis was compatible with the functioning of the EEA Agreement under the Regional Aid Guidelines, as a part of different tax measures. The Icelandic authorities notified the municipal property tax derogations as a part of the overall tax derogations provided for in the Investment Agreement in 2009 for the construction of the Data Centre initially planned. Later, the Investment Agreement as such has been abandoned, yet the municipality property tax measure as part of the Agreement on Licensing and Charges entered into between Verne and the Municipality is an independent measure.<sup>101</sup> Moreover, it was, according to the Icelandic authorities, put into effect already in early 2009 and is granted on an annual basis.
- (191) The derogations from the municipal property tax in the Agreement on Licensing and Charges are not linked to a specific investment. Moreover, the Icelandic authorities explained in their comments to the opening decision that the measures entailed in the later cancelled Investment Agreement were not made conditional upon completing all phases of the Data Centre, as planned at the time.<sup>102</sup>

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<sup>101</sup> This is the case even if paragraph 11.1 of the Agreement on Licensing and Charges stipulates that the entry into effect of the agreement is contingent upon the conclusion of an Investment Agreement, as the Icelandic authorities have confirmed that the terms of the Agreement on Licensing and Charges entered into effect already in early 2009, irrespective of the Investment Agreement.

<sup>102</sup> Letter dated 28.2. 2011 (Event No 589033) at page 33.

- (192) It follows from the Regional Aid Guidelines that regional investment aid must be made conditional upon a specific and defined investment project, see Chapter 4 of the guidelines. The derogations from the municipal property tax on an annual basis provided for under the Agreement on Licensing and Charges were not made conditional upon a specific or defined investment (for data centre or other operations), as required under the Regional Aid Guidelines. The maintenance of an investment project in the region for five years as stipulated in paragraph 32 of the Regional Aid Guidelines was accordingly not a condition for the municipality tax derogation. Therefore, the aid cannot qualify as an investment aid under the Regional Aid Guidelines.
- (193) The Icelandic authorities have not argued that the aid measures are compatible as operating aid under the Regional Aid Guidelines. The municipal property tax derogations do not comply with the conditions set out in Chapter 5 of the Regional Aid Guidelines; in particular the measures are not granted in respect of a predefined set of eligible expenditures or costs, as stipulated in paragraph 60 of the Regional Aid Guidelines.
- (194) The municipal property tax derogations therefore constitute pure operating aid which is not compatible with the EEA Agreement.
- (195) The Icelandic authorities have not provided specific argumentation as to whether the derogation from the one-off municipality street construction tax entails state aid or not and they have not put forward specific arguments as to the compatibility of this measure. The Authority takes the view that the same applies to the derogation from street construction tax as in the case of property tax in this respect; the measures are not linked to a specific investment and they constitute pure operating aid to Verne, incompatible with the EEA Agreement.
- (196) In addition, in its opening decision, the Authority doubted the incentive effect of the agreements entered into after the construction of the Data Centre started in 2008.<sup>103</sup> The incentive effect is a fundamental prerequisite for aid to be regarded compatible under the Regional Aid Guidelines. Whether the proposed aid is necessary to produce a real incentive effect to undertake investment which would not otherwise be made in the assisted areas is a crucial element in a regional aid assessment. Thus, it has to be verified whether the aid is necessary to provide an incentive effect for the investment, i.e. whether the aid actually contributes to changing the behaviour of the beneficiary so that it undertakes investment in the assisted region concerned and not somewhere else. Therefore, regional aid may be compatible with Article 61(3)(c) of the EEA Agreement only if it has triggered the investment in the given regional aid area.<sup>104</sup>
- (197) The Regional Aid Guidelines define the term “start of work” as “start of construction work or first firm commitment to order equipment, excluding preliminary feasibility studies.”<sup>105</sup> It is an established fact that the work had already started in 2008 in the case at hand. By that time, no agreement with the authorities as regards municipal tax derogations had been initiated, according to the information available.

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<sup>103</sup> *I.e.* the Agreement on Licensing and Charges and the later cancelled Investment Agreement.

<sup>104</sup> Case T-162/06 *Kronoply v Commission* [2009] ECR II-1, paragraph 27. See also Case C-34/2009 *Petrogal* where the Commission stated that in a case of an *ad hoc* aid the competent authority shall issue a letter of intent to award aid before the start of work on the project and Case C-390/06 *Nuova Agricast Srl* paragraph 69. Case T-212/00 *Nuove Industrie molisane Srl v Commission* [2002] ECR II-347 confirms the same principle.

<sup>105</sup> See Regional Aid Guidelines, footnote 32.

- (198) In the case of the Agreement on Licensing and Charges, which was entered into with the Municipality on 9 November 2009, just before the construction of the Data Center came to a halt in December 2009, it is even more evident than in the later cancelled Investment Agreement, that the requirement of demonstrated incentive effect was not met. This is so, since the agreement with the Municipality was entered into even at a later point in time than the Investment Agreement (entered into in October 2009). Even if at date as early as May 2009, when the Icelandic authorities have claimed that the Municipality and Verne initially negotiated the tax derogations, the requirement of incentive effect would not be met. No “document that may be considered as explicitly granting aid to [the company] for the investment”<sup>106</sup> had been issued as regards the derogation from municipal tax when the construction of the Data Centre started in 2008.
- (199) The Authority is of the view that the provisions and aim of the Regional Aid Guidelines form a solid basis for this assessment, and does not share the view of the Icelandic authorities, that this basis would entail taking form over substance.
- (200) The Icelandic authorities have argued that the initial Investment Agreement was necessary for Verne to complete its investment for the Data Centre following the onset of the financial crisis. The argument put forward was that “Verne cannot proceed with the completion of the data centre project as originally planned”, see page 19 of the Authority’s Decision No 418/10/COL. In the opening decision the Authority addressed this argument by taking the view that verifying the necessity of the aid would need a full analysis of the economic circumstances of the beneficiary’s investment decision. The Authority took the view that such an analysis should only be made on the basis of the beneficiary’s original business plans and other documents submitted to the beneficiary’s investment committees in order to obtain approval to commit resources to the investment activity; profitability calculations for the project with and without the aid; project finance analysis; risk assessments; and a detailed account of how circumstances following the onset of the financial crisis in October 2008 influenced on the business plan and required rate of return of the investment. The Icelandic authorities have not during the formal investigation put forward any such business plans or relevant documentation regarding the investment decision or any further evidence in support of this argument. This argument is therefore without merit and the Authority cannot consider the municipal tax measures compatible on this basis.
- (201) Thus, the Authority concludes that the aid granted under the Agreement on Licensing and Charges cannot be found compatible under the Regional Aid Guidelines or Article 61(3)(c) of the EEA Agreement.
- (202) Authority observes that the Icelandic authorities invoked a force majeure argument in their comments to the opening decision. The derogations from the general ban on state aid are set out in Article 61(3) of the EEA Agreement. The Authority fails to see any relevance of the force majeure argument to Article 61(3) or the guidelines adopted on the basis of that provision. In particular the facts of this case do not qualify as aid under Article 61(3)(b) as the tax measures were not aimed at tackling a serious disturbance in the economy as a whole. The Authority thus ejects the relevance of the force majeure argument put forward by the Icelandic authorities.

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<sup>106</sup> Case N-357/2008 *Fri-El Acerra S.r.l.* (Italy) [2010] OJ C 95, p. 20, paragraph 40. See also Commission decision of 15.9.2010, C 8/2009, *Fri-El Acerra* [2010] OJ L 46, p. 28.



- (203) The Icelandic authorities have not invoked the Authority's Guidelines on Rescue and Restructuring. Given that nothing indicates that Verne was a firm in difficulty within the meaning of these guidelines at the time of entering into the Agreement on Licensing and Charges in 2009, the conditions laid down in the guidelines would not seem to be met.
- (204) In any event, it has not been demonstrated that the tax measures contained in the Agreement on Licensing and Charges were necessary and proportionate to attain any objects of common interest. Therefore, the Authority has not identified any grounds to declare the aid granted under the Agreement on Licensing and Charges compatible with the internal market in the light of Article 61(3) EEA.
- (205) For the above reasons, the aid measures identified under the Agreement on Licensing and Charges cannot be considered compatible with the EEA Agreement.
- (206) The Authority therefore concludes that the tax derogations granted to Verne by the Municipality constitute aid that is unlawful and incompatible with the internal market on the basis of Article 61(1) EEA.

#### **4.2 The Real Estate Purchase Agreement**

- (207) The Authority has found that the preferential price of the five buildings sold to Verne entails state aid. The Icelandic authorities have not put forward any arguments as to whether the aid is compatible to the EEA Agreement but rather focused their argumentation on their assertion that no aid was involved. However, the Authority has assessed whether the aid could be regarded compatible under the Regional Aid Guidelines.
- (208) The aid was granted in February 2008. The aid cannot be regarded as regional investment aid since when entering into the Real Estate Purchase Agreement on 26 February 2008 and signing of the transfer of title on 9 May 2008 there was no link made between the aid granted and a defined commitment to invest in the area. To qualify as investment aid under the Regional Aid Guidelines, the aid must be "awarded for an initial investment project" as stipulated in paragraphs 25 of the Regional Aid Guidelines, and the aid is calculated with reference to either the cost related to a specific investment or the cost of jobs directly created by the investment, as stipulated in paragraph 28 of the guidelines. This was not the case when the State sold the buildings to Verne; the sale was not linked to or made conditional upon a specific investment project. The only mentioning of an investment project in the Real Estate Agreement is in Annex C to the agreement, titled "Phase I permits" where the renovation of buildings 868 and 869 into data centre including up to 5 000 m<sup>2</sup> new construction, construction of a new buildings of up to 12 000 m<sup>2</sup> is listed under the title "Phase 1" and a "Master Plan" of construction of up to 40 000 m<sup>2</sup> of new data centre buildings and construction of up to four additional generator buildings of up to 16 000 m<sup>2</sup> is envisaged. However, it appears that the sale of the buildings and the conditions under which they were sold was not made conditional upon these plans or any specific investment plans, as also is demonstrated by the fact that the initially envisaged investment did not fully materialize, as has been clarified by the Icelandic authorities during the formal investigation, yet the price paid for the buildings remained unchanged.
- (209) Further, an important condition is contained in paragraph 32 of the Regional Aid Guidelines; that the aid must be made conditional on the maintenance of an investment project in the region concerned for a minimum period of at least five years after its completion. This condition is not met in the case at hand.

(210) No other grounds for compatibility apply. The Authority therefore concludes that the state aid granted to Verne through preferential real estate prices constitute aid that is unlawful and incompatible with the internal market on the basis of Article 61(1) EEA.

## 5. Conclusion

(211) On the basis of the foregoing assessment, the Authority finds that in breach of the Article 61(1) of the EEA Agreement Iceland has unlawfully granted Verne the following aid:

- (a) municipal tax derogations described under Section I.3.4.2 of this Decision, whose value will have to be determined by the Icelandic authorities in proceedings for the recovery of the aid, and;
- (b) a preferential price of ISK 220 850 000 for buildings No 864, 866, 868, 869 and 872 at Valhallarbraut industrial site in the municipality of Reykjanesbær.

(212) The aid referred to in (a) and (b) should be regarded as incompatible with the common market.

(213) The Authority finds that neither the Ground Lease Agreement, as amended by the Supplementary Lease Agreement, nor the Power Contract does entail the granting of state aid.

## 6. Recovery of unlawful and incompatible state aid

(214) It follows from Article 14 of Part II of Protocol 3 that the Authority shall decide that unlawful aid which is incompatible with the state aid rules under the EEA Agreement must be recovered from the beneficiaries.

(215) To abolish the aid, by means of recovery of state aid that has been unlawfully granted is the logical consequence of a finding that aid is unlawful. By repaying the aid, the beneficiary forfeits the advantage which it enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.<sup>107</sup>

(216) Given that the measures identified in the case at hand constitute unlawful and incompatible aid, the amount of aid must be recovered from Verne in order to re-establish the economic conditions with which the company would have had to contend if it had not been granted incompatible aid, the Icelandic authorities must take all necessary steps to eliminate the advantages deriving from the aid and recover it from the beneficiary.

(217) Recovery shall be affected from the time when the advantage occurred to the beneficiary, i.e. when the aid was put at the disposal of the beneficiary, and shall bear recovery interests until effective recovery. The amount to be recovered shall be calculated on the basis on the provisions of the Authority's Guidelines on recovery of unlawful and incompatible aid and in accordance with the Authority's Decision No 195/04/COL.

(218) The incompatible aid element in the case of the real estate price is ISK 220 850 000. As regards the aid element of the municipal property tax and street construction tax the Icelandic

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<sup>107</sup> See Joined Cases E-17/10 and E-6/11, *Liechtenstein a.o. v EFTA Surveillance Authority*, paragraphs 141 and 142, not yet reported in EFTA Ct. Rep.

authorities are invited to provide detailed and accurate information on the amount of aid granted under the Agreement on Licensing and Charges.<sup>108</sup>

HAS ADOPTED THIS DECISION:

#### *Article 1*

In accordance with Article 8 in Part II of Protocol 3, following the withdrawal of the notification, the formal investigation procedure initiated under Article 1(2) of Part I of Protocol 3 concerning certain tax derogation which the Icelandic authorities planned to grant Verne under the later cancelled Investment Agreement for the construction of a data center is hereby closed as regards the following measures:

- (a) Corporate income tax rate
- (b) Depreciation rules
- (c) Industrial and market charges
- (d) Stamp duties
- (e) Zoning fee
- (f) Import duties
- (g) Deferral from payment of VAT on imports and electricity
- (h) Safety control fee for electricity production
- (i) Net worth tax guarantee

#### *Article 2*

The formal investigation procedure regarding the agreement between Farice and Verne dated 26 February 2008 is herewith closed as the Icelandic authorities have informed that it was cancelled.

#### *Article 3*

The Ground Lease Agreement dated 9 May 2008 as amended by the Supplementary Lease Agreement dated 30 June 2009, and the Power Contract dated 22 October 2009, entered into with Verne Holdings ehf. and Verne Real Estate ehf. do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement

#### *Article 4*

The Agreement on Licensing and Charges signed on 9 November 2009 entails state aid to Verne Holdings ehf. within the meaning of Article 61(1) of the EEA Agreement in the following measures:

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<sup>108</sup> See Joined Cases E-4/10, E-6/10 and E-7/10, *Liechtenstein a.o. v EFTA Surveillance Authority*, paragraph 174, not yet reported in EFTA Ct. Rep.

- (a) Guaranteed maximum rate of 1.65% on an annual basis for property tax
- (b) Fixed base of ISK 1 030 600 000 instead of the annual official valuation of land and existing buildings for property tax
- (c) Deferred indexation of the tax base for property tax
- (d) No property tax levied before 1 January 2011
- (e) Fixed base for future buildings instead of official valuation for property tax
- (f) No street construction tax on existing buildings
- (g) 25% street construction tax on new buildings

This aid, which corresponds to the difference between these measures and the statutory applicable rules, is not compatible with the state aid rules of the EEA Agreement.

#### *Article 5*

The preferential price of buildings granted by Iceland to Verne Real Estate ehf. amounting to ISK 220 850 000 constitutes state aid which is incompatible with the state aid rules of the EEA Agreement.

#### *Article 6*

The Icelandic authorities shall recover the aid referred to in Articles 4 and 5 from Verne Holdings ehf. and Verne Real Estate ehf. and unlawfully made available to the companies.

#### *Article 7*

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The sums to be recovered shall bear interest from the date on which they were put at disposal of Verne Holdings ehf. and Verne Real Estate ehf. until their actual recovery according to Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL. The interests shall be calculated on a compound basis.

#### *Article 8*

Within two months of notification of this Decision, the Icelandic authorities shall inform the EFTA Surveillance Authority of the total amount (principal and recovery interests) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid.

#### *Article 9*

The Agreement on Licensing and Charges shall be abolished with immediate effect to the extent its provisions entail incompatible state aid.

#### *Article 10*

Within four months of notification of this Decision, Iceland must have executed the Authority's decision and fully recovered the aid.

#### *Article 11*

This Decision is addressed to Iceland.

*Article 12*

Only the English language version of this decision is authentic.

Decision made in Brussels, on 4 July 2012.

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
*President*

Sverrir Haukur Gunnlaugsson  
*College Member*