

Case No: 70476
Event No: 678569
Dec. No: 318/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 11 September 2013

to close the case concerning the financing of the Icelandic National Broadcasting Service
Ríkisútvarpið

(Iceland)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to:

The Agreement on the European Economic Area (the “EEA Agreement”), in particular to Article 62 and Protocol 26 thereof,

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 thereof,

Article 1(1) of Part I and Article 19(1) of Part II of Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”),

WHEREAS:

- (1) By letter dated 3 June 2005 (Event No 318329), the Authority initiated the procedure provided for in Article 17(2) of Part II of Protocol 3 with respect to the financing of the Icelandic National Broadcasting Service Ríkisútvarpið (“RÚV”), thereby informing the Icelandic authorities of its preliminary view that the financing of RÚV involved existing state aid that was incompatible with the functioning of the EEA Agreement.
- (2) The measure assessed by the Authority was the financing of RÚV by the Icelandic authorities, which compensates the broadcaster for the costs of all its activities within the public service remit entrusted to it by the relevant national legislation.
- (3) RÚV, the Icelandic National Broadcasting Service, is an independent limited liability company owned by the Icelandic State. It started its operation in 1930, but was established on a commercial basis as of 1 April 2007.¹ On behalf of the State, the ownership was originally performed by the Minister of Education. Following an

¹ The company is now subject to the Act No 2/1995 on Limited Companies, with subsequent amendments, and is registered in the Icelandic Company Register.

amendment to the national legislation, from 1 October 2009, the ownership was transferred to the Minister of Finance, on behalf of the Icelandic State.² The company cannot be sold, wholly or partly, merged with other companies, or dissolved.

- (4) RÚV was established with a view to providing the national broadcasting service in Iceland. The main legal regulation of the public service remit was laid down in Act No 6/2007 on the Icelandic National Broadcasting Service, passed by the Icelandic Parliament *Alþingi* on 23 January 2007.³ The 2007 RÚV Act replaced the previous Act No 122/2000 on the Icelandic National Broadcasting Service (“the 2000 RÚV Act”).⁴ The public service remit was originally defined and entrusted to RÚV in Articles 15 – 17 of Act No 68/1985 on Broadcasting.⁵
- (5) From 1 January 2009 RÚV has been financed by a poll tax (special fee) levied under Article 93 of Act No 90/2003 on Income Tax.⁶ The special fee currently amounts to 18.000 ISK per year for each individual and legal person.⁷ Prior to 1 January 2009 RÚV was financed by a licence fee which was to be paid by all owners of receivers that could be used to receive broadcasts by the National Broadcasting Service.⁸
- (6) Based on the case law of the EU Court of Justice and the European Commission’s decision making practice, the Authority considers that the changes to the financing measure of the annual payments in favour of RÚV are merely of administrative and purely technical nature. In particular, they do not affect the substance of the aid measure and its compatibility assessment. Therefore, the change from a licence fee on each television set to a tax on persons and entities fully tax liable in Iceland as such does not change the existing nature of the aid provided to RÚV.⁹
- (7) According to Article 3, third paragraph of the RÚV Act, the Minister of Education, Science and Culture (the Minister of Education) and RÚV enter into a special service agreement covering objectives, scope and more detailed requirements regarding public service broadcasting. In line with this provision, on 23 March 2007, the Minister of Education on behalf of the Icelandic Government and RÚV¹⁰ signed a Public Service Broadcasting Contract (“the Contract”) which further specified the public service obligations entrusted to RÚV and described in further detail the purpose and role of RÚV. The Contract was valid for 5 years, for the period from 1 April 2007 to 31 March 2012.¹¹

² By means of Act No 98/2009.

³ As amended, see further details in this regard on existing aid in section 3 of part II Assessment of this Decision.

⁴ The 2007 RÚV Act repealed the provisions of the 2000 RÚV Act, with effect as of 1 April 2007, with the exception of some provisions related to the broadcasting user licence fee and the collection of it, which remained in force until 1 January 2009 or 1 January 2012 under the name Broadcasting User Fee and Collection Act.

⁵ Articles 15-17 of Act No 68/1985 correspond to Articles 3-4 of Act No 122/2000.

⁶ See Act No 90/2003, of 7.5.2003, on Income Tax.

⁷ See Article 14 of Act No 23/2013, of 20.3.2013, on the Icelandic National Broadcasting Service.

⁸ Reference is made to Chapter 3 of Part II of EFTA Surveillance Authority Decision No 38/11/COL, of 9.2.2011, for a more detailed description of the financing of RÚV.

⁹ See Case C-44/93 *Namur-Les Assurances du Crédit SA v Office National du Dueroire and the Belgian State* [1994] ECR I-3829 and Case T-195/01 and T-207/01 *Government of Gibraltar v Commission* [2002] ECR II-2309.

¹⁰ The Contract was signed by the director of RÚV on behalf of RÚV.

¹¹ This contract replaced a performance management agreement between the Ministry of Education and RÚV which was concluded under the previous legislation.

- (8) The Rules on the evaluation of public service broadcasting were adopted by the Minister of Education in the form of Regulation No 275/2007 on 23 March 2007 (the Regulation). The Regulation sets out - for the first time in the Icelandic broadcasting legal framework - a so-called *ex ante* mechanism for the introduction of new services into the public service broadcasting remit. The Regulation took effect on 1 April 2007.
- (9) By letters dated 30 January 2006 (Event No 358899), 13 April 2006 (Event No 369787), 22 September 2006 (Event No 386841), 24 November 2006 (Event No 399548), 10 October 2007 (Event No 442761), 4 April 2008 (Event No 470316), 12 November 2008 (Event No 496596), 1 September 2009 (Event No 527279) and 16 November 2009 (Event No 536644), and e-mails dated 19 October 2006 (Event No 394289), 5 September 2007 (Event No 439685) and 10 October 2007 (Event No 447108), the Authority requested Iceland to provide additional clarifications, and commented on the proposals for changes in the public financing of the broadcasting sector presented by the Icelandic authorities.
- (10) The Icelandic authorities submitted replies to the Authority's letters and other observations and documents by letters dated 10 April 2006 (Event No 369984), 7 June 2006 (Event No 377722), 13 September 2006 (Event No 387990), 3 November 2006 (Event No 396616), 9 January 2007 (Event No 406002), 20 December 2007 (Event No 458563), 23 June 2008 (Event No 482940), 17 December 2008 (Events No 502222, 502230, 502231), 28 September 2009 (Event No 531663) and 22 January 2010 (Event No 544120), and by e-mails dated 5 September 2006 (Event No 386893), 12 September 2006 (Event No 387712), 18 September 2006 (Event No 389801), 9 October 2006 (Event No 392538), 15 January 2007 (Event No 406543), 6 September 2007 (Event No 440416), 11 October 2010 (Event No 576715), 14 December 2010 (Event No 580851) and 27 January 2011 (Event No 584749).
- (11) By e-mails dated 24 January 2007 (Event No 408994), 6 February 2007 (Event No 409029) and 27 April 2007 (Event No 419187), the Icelandic authorities submitted the newly adopted broadcasting legislation and other relevant secondary legislation in the broadcasting sector.
- (12) In this correspondence, the Icelandic authorities informed the Authority that, with the entry into force of Act No 6/2007 on the Icelandic National Broadcasting Service (the "2007 RÚV Act"),¹² the unlimited state guarantee in favour of RÚV had been abolished. The Icelandic authorities also confirmed that RÚV was subject to company taxation in the same manner as other private commercial entities. The Icelandic authorities indicated that they intended to propose to the Parliament to either strengthen the role of the Broadcasting Licence Agency in the *ex ante* entrustment mechanism or to assign a new media authority, which would be created on the basis of the existing Broadcasting Licence Agency, the task of evaluating the proposals from RÚV before the adoption of new public services and to make final decisions. The Icelandic authorities also suggested adding a clarification in the contract with RÚV that any new public service activity would have to undergo a public value test before being implemented.
- (13) The Icelandic authorities also informed the Authority of the appointment of a special committee for assessing the role of public service broadcasting which had been entrusted with the task of assessing the organisational arrangement of RÚV,

¹² Act No 6/2007, of 23.1.2007, on the Icelandic National Broadcasting Service.

following the adoption of the RÚV Act, and of deliberating on proposals on the general role and organisational platform of for public service broadcasting in Iceland. The committee had suggested changes to the contract with RÚV, sharpening the public service role of RÚV and other changes with regard to the board of RÚV and the company's financing. Furthermore, as regards monitoring, the Icelandic authorities envisaged to entrust the new media authority with the task of effective supervision of the fulfilment of the public service obligations of RÚV.

- (14) On 9 February 2011, by Decision No 38/11/COL (Event No 434324), the Authority concluded that the financing of RÚV constituted existing state aid which was incompatible with the functioning of the EEA Agreement.¹³
- (15) The Authority stipulated that the Icelandic authorities should take the following appropriate measures in order to eliminate any incompatible aid resulting from the financing of RÚV:
- *First*, in view of the adoption of the new Chapter on the application of state aid rules to public service broadcasting in the Authority's State Aid Guidelines, the Authority requested that all references to the previous Chapter of Broadcasting Guidelines in the Icelandic broadcasting framework be replaced by references to the new Broadcasting Guidelines, accordingly.¹⁴
 - *Second*, the Icelandic authorities were requested to confirm that the activity of selling broadcasting material previously produced by RÚV constitutes commercial activity and follows market principles, except when it is regarded as a pay service within RÚV's public service broadcasting remit.
 - *Third*, the Icelandic authorities should establish clear guidelines for the determination of remuneration for pay services within the public service remit of RÚV, such as access to RÚV's archives.
 - *Fourth*, the scope of the *ex ante* entrustment for new services within the public service broadcasting remit should be clarified. In this context, it should be determined what is to be qualified as a significant new service, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster. In particular, the Icelandic authorities should confirm that any new offerings on the new media platforms, any activities other than the dissemination of material on different distribution platforms and services of short duration, to the extent that they constitute significant new services, are subject to the *ex ante* entrustment procedure. The appropriate changes were to be introduced into the Icelandic broadcasting framework.
 - *Fifth*, in the context of the *ex ante* entrustment procedure, the Icelandic authorities were requested to clarify which criteria are taken into account by the Ministry of Education in assessing the impact of the potential new service on the market and balancing it with the value of the service in question for society.

¹³ EFTA Surveillance Authority Decision No 38/11/COL of 9.2.2011 on appropriate measures in the financing of the Icelandic National Broadcasting Service *Ríkisútvarpið* (RÚV), available on the Authority's website: <http://www.eftasurv.int/media/decisions/38-11-COL.pdf>.

¹⁴ See the Authority's guidelines on the application of state aid rules to public service broadcasting (OJ L124, 11.5.2012, p. 40 and EEA supplement No 26, 11.5.2012, p. 1).

- *Sixth*, it should be confirmed that the entrustment body in the *ex ante* entrustment procedure is obliged to seek comments from independent authorities competent in the broadcasting sector and to take them into account when deciding on the inclusion of a new service or a significant modification of an existing service.
 - *Seventh*, the Icelandic authorities were requested to confirm that the supervision of the fulfilment of the public service broadcasting remit, leading to the imposition of appropriate remedies, was carried out on a regular basis and also includes control of qualitative standards set out in that remit.
 - *Eighth*, the Icelandic authorities were requested to establish cost accounting principles, according to which separate accounts are maintained. Furthermore, the application of the net costs principle should be clarified in the broadcasting framework in Iceland.
 - *Ninth*, the Icelandic authorities should establish clear principles for the treatment of overcompensation in line with the Broadcasting Guidelines, including regular and effective control of the use of public funding, carried out by an external body independent from RÚV, and mechanisms for recovery of overcompensation and cross-subsidisation.
 - *Tenth and finally*, RÚV's commercial activities should follow market principles as set out in the Broadcasting Guidelines. Therefore, RÚV should respect the at arms' length principle in its relations with potential future commercial subsidiaries, undertake commercial investments in line with the market economy investor principle and not engage in anti-competitive practices with regard to its competitors, based on its public funding. The Authority requested that the Icelandic authorities included appropriate provisions in this regard in the broadcasting legislation and ensured that there were appropriate mechanisms in place to allow the assessment of any potential complaint in an effective way at the national level.
- (16) The Icelandic authorities were instructed to take all legislative, administrative and other relevant actions necessary to eliminate any incompatible aid. Any such aid was to be abolished with effect from 1 July 2011.
- (17) By letter dated 2 May 2011 (Event No 596491), the Icelandic authorities accepted the appropriate measures proposed by the Authority in order to eliminate any incompatible state aid resulting from the financing of the Icelandic National Broadcasting Service.
- (18) The Icelandic authorities noted that the establishment of an independent media authority was a prerequisite condition for the adoption of a new regulatory framework for RÚV. With the enactment of the new Media Law such an authority, the Media Commission, had been established.¹⁵ Subsequently, some of the appropriate measures, such as evaluating new public service obligations, could be entrusted to the Media Commission. Furthermore, the Icelandic authorities vowed to adopt some of the other appropriate measures in the revised Public Service Broadcasting Contract with RÚV. However, the Icelandic authorities indicated that other vital measures, such as; i) establishing a regulatory role of the Media Commission for the operation of RÚV, ii) establishing an independent commercial

¹⁵ See Article 7 of Act No 38/2011, of 25.4.2011, Media law.

subsidiary of RÚV, iii) addressing the determination of remuneration for pay services within the public service remit of RÚV and iv) introducing cost accounting principles and separate accounts, required amendments to the 2007 RÚV Act. In light of this the Minister of Education, Science and Culture had appointed a committee for the task of drafting a new bill to amend the RÚV Act. Further, the Icelandic authorities indicated that that the necessary amendments to the RÚV Act could not be implemented by 1 July 2011 and therefore requested an extension of the deadline to implement the appropriate measures proposed by the Authority. By letter dated 11 July 2011 (Event No 601349), the Authority granted the Icelandic authorities an extension of the time-limit to implement Decision No 38/11/COL until 31 December 2011.¹⁶

- (19) By letter dated 16 September 2011 (Event No 608959), the Icelandic authorities submitted a translated version of the amended Public Service Broadcasting Contract with RÚV and further reiterated their commitment to make amendments to the legislative framework of RÚV in line with the proposals made by the Authority.
- (20) On 28 December 2011 (Event No 618818) the Icelandic authorities submitted to the Authority a working document of the draft bill of law concerning RÚV. After further correspondence and after having received comments from the Authority, the Icelandic authorities, by email dated 6 August 2012 (Event No 643498), submitted to the Authority a comprehensive translated version of the draft legislative proposal on the Icelandic National Broadcasting Service.
- (21) On 13 March 2013 the Icelandic Parliament adopted Act No 23/2013 on the Icelandic National Broadcasting Service, a public-service medium (the “2013 RÚV Act”).¹⁷ The Act contains the following amendments which are intended to comply with the appropriate measures proposed by the Authority:
- *First*, the notes to the Act contain several references to the Authority’s 2010 guidelines on the application of state aid rules to public service broadcasting,¹⁸ thereby complying with the first measure proposed by the Authority.
 - *Second*, according to Article 4 of the Act RÚV shall set up and operate wholly-owned subsidiaries around any type of commercial activities Therefore, the Icelandic authorities have ensured that all the commercial activities of RÚV shall follow market principles, except when they are regarded as a pay service within RÚV’s public service broadcasting remit, thereby complying with the second and the final measure proposed by the Authority.
 - *Third*, in Article 7 of the Act there are clear guidelines for the determination of remuneration for pay services within the public service remit of RÚV. This is in line with the third appropriate measure proposed by the Authority.
 - *Fourth*, according to Article 16 of the Act RÚV shall seek the authorisation of the Minister of Education and Culture to provide any new media services falling under

¹⁶ The time-limit was later extended until 30 June 2012, at the request of the Icelandic authorities (Event No 619908). By email dated 23 May 2012 (Event No 643498), the Icelandic informed the Authority about the status of the bill for the RÚV Act and that it would not be adopted by Parliament before the expiry of the deadline given by the Authority.

¹⁷ Act No 23/2013, of 20.3.2013, on the Icelandic National Broadcasting Service, a public-service medium.

¹⁸ See the Authority’s guidelines on the application of state aid rules to public service broadcasting (OJ L124, 11.5.2012, p. 40 and EEA supplement No 26, 11.5.2012, p. 1).

its public service remit. The Media Commission shall then assess the *ex ante* entrustment for new services. Interested parties and members of the public shall be granted a time limit of three weeks to submit their comments to the Media Commission. At the specific request of an interested party, the Media Commission shall seek the opinion of an independent competition expert who shall assess the impact of the service on competition. The Minister shall take the comments received from the Media Commission into account when deciding on the inclusion of a new service or a significant modification of an existing service. This procedure is in line with the fourth, fifth and sixth measure proposed by the Authority.

- *Fifth*, the supervision of the fulfilment of the public service broadcasting remit, leading to the imposition of appropriate remedies, will be carried out on an annual basis by the Media Commission in accordance with Article 15 of the Act. This procedure is in line with the seventh and ninth measure proposed by the Authority.
 - *Sixth*, according to Article 5 of the Act the finances of all operations connected with public service broadcasting under Article 3 of the Act shall be kept separate from those of other operations of RÚV or its subsidiaries. This complies with the eight appropriate measure proposed by the Authority.
 - *Finally*, there are now clear rules, in Article 13 of the Act, on internal controls and quality assurance, including the handling of comments and complaints. The decisions of RÚV with regard to comments and complaints relating to the handling and coverage of specific issues, as well as with regard to requests to exercise the right to reply, may be referred to the Media Commission. This procedure is in line with the tenth appropriate measure proposed by the Authority.
- (22) Furthermore, the Icelandic authorities have in Article 4(4) of the new *Public Service Broadcasting Contract* with RÚV established clear principles for the treatment of overcompensation in line with the Broadcasting Guidelines. There it is also clearly stated that RÚV may not spend its income from the Treasury on anything other than providing public broadcasting services.
- (23) The Authority considers that the adopted changes to the legislative and regulatory framework of RÚV comply with the appropriate measures proposed by the Authority and thereby make RÚV's financing compatible with the functioning of the EEA Agreement on the basis of Article 59(2) of the EEA Agreement.
- (24) On the basis of the above, the Authority concludes that there are no grounds for pursuing the matter further and has consequently decided to close the case.
- (25) The present decision is without prejudice to the possibility for the Authority to continuously assess existing aid schemes under Article 1(1) of Part I of Protocol 3 and to propose appropriate measures required by the progressive development or the functioning of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority records Iceland's acceptance of the appropriate measures proposed by the Authority in its Decision No 38/11/COL on appropriate

measures in the financing of the Icelandic National Broadcasting Service *Ríkisútvarpið* (RÚV) and further outlined in the present Decision.

Article 2

There are no longer grounds for pursuing the case concerning the financing of the Icelandic National Broadcasting Service. Therefore, the case is closed.

Article 3

This Decision is addressed to Iceland.

Article 4

Only the English version is authentic.

Done at Brussels, 11 September 2013

For the EFTA Surveillance Authority,

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member