

Case No: 48094 and 55944  
Event No: 434324  
Dec. No: 38/11/COL

EFTA SURVEILLANCE  
AUTHORITY

## EFTA SURVEILLANCE AUTHORITY DECISION

of 9 February 2011

on appropriate measures in the financing of the Icelandic National Broadcasting Service  
*Ríkisútvarpið (RÚV)*

(Iceland)

The EFTA Surveillance Authority (the Authority),

HAVING REGARD to the Agreement on the European Economic Area (the EEA Agreement), in particular to Articles 59 (3), 62 (1) and Protocol 26,

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 Article 1 of Part I and Article 18 of Part II of Protocol 3 to the Surveillance and Court Agreement (Protocol 3),

**Whereas:**

### I. FACTS

#### 1 PROCEDURE

By letter dated 20 September 2002, received and registered by the Authority on 30 September 2002 (Doc. No 02-6980A), Northern Lights Communications Ltd. (NLC, now *365 midlar ehf.*), a private broadcaster, lodged a complaint concerning alleged state aid granted by the Icelandic State in favour of the Icelandic National Broadcasting Service *Ríkisútvarpið (RÚV)*.

On 23 April 2004, the Authority adopted a new chapter in its State Aid Guidelines relating to the application of the state aid rules to public service broadcasting<sup>1</sup>. On the same date, the Competition and State Aid Directorate of the Authority (CSA) forwarded the complaint to the Icelandic Government for comments and requested further information on RÚV's financing, based on the above mentioned guidelines (Event No 259951), thereby initiating the review of existing aid schemes under Article 17(1) in Part II of Protocol 3.

By e-mail dated 27 May 2004, received and registered by the Authority on 1 June 2004, Einar Agustsson, former owner of Tunga.is, an Internet news provider, lodged a complaint

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<sup>1</sup> This chapter was later replaced by a new version adopted on 3 February 2010.

concerning state financing of RÚV's internet portal [www.ruv.is](http://www.ruv.is), in particular its news section (Events No 282410, 282411 and 282412 registered in Case No 55944).

By letter dated 28 June 2004, from the Icelandic Mission to the European Union forwarding a letter dated 28 June 2004 from the Icelandic Ministry of Finance, received and registered by the Authority on 29 June 2004, the Icelandic Government submitted its reply (Event No 286049).

By letter dated 15 July 2004, CSA informed the Icelandic Government about the complaint from Mr Agustsson (Event No 287077), to which the Icelandic Government replied by letter dated 23 August 2004 from the Icelandic Mission to the European Union forwarding a letter dated 23 August 2004 from the Ministry of Finance, received and registered by the Authority on 24 August 2004 (Event No 290762).

By letter dated 29 October 2004 (Event No 294909), CSA requested additional information to which the Icelandic Government replied by letter dated 11 January 2005 from the Icelandic Mission to the European Union forwarding a letter dated 10 January 2005 from the Ministry of Finance (Event No 305267).

On 23 November 2004, a meeting was held between the Icelandic Government and CSA in Brussels, in which the Icelandic Government informed the Authority about the ongoing process on amendments to the National Broadcasting Service Act of 2000.

By letter dated 8 December 2004 (Event No 300612), CSA requested further information to which the Icelandic Government replied by letter dated 11 January 2005 from the Icelandic Mission to the European Union forwarding a letter dated 10 January 2005 from the Ministry of Finance (Event No 305246).

By two letters dated respectively 9 March 2005 and 5 April 2005, from the Icelandic Mission to the European Union, forwarding two letters dated respectively on the same dates from the Ministry of Finance, additional information has been submitted to the Authority (Events No 315285 and 312637).

By letter dated 3 June 2005 (Event No 318329), according to Article 17(2) of Protocol 3, CSA informed Iceland about its preliminary assessment that the financing of RÚV was not compatible with the functioning of the EEA Agreement (hereinafter referred to as the Article 17(2) letter). The Icelandic authorities were given an opportunity to submit their views.

The Icelandic authorities submitted their comments on CSA's views expressed in the Article 17(2) letter by letter dated 15 August 2005 from the Icelandic Mission to the EU, forwarding a letter from the Ministry of Finance dated 15 August 2005, both received and registered by the Authority on 17 August 2005 (Event No 330470).

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.

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 (Events No 458468 and 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), from the Icelandic Mission to the European Union, forwarding letters from the Ministry of Finance 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).

By e-mails dated 24 January 2007 (Events No 407626 and 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.

The complainant submitted further information by e-mails dated 17 February 2006 (Event No 363782), 7 February 2008 (Event No 466048), 19 February 2008 (Event No 466050) and 13 May 2009 (Event No 519135) and letter dated 17 July 2007 (Event No 430837), registered on 23 July 2007.

Meetings were held with the Icelandic authorities on 9 January 2007, 29 October 2007, 24 October 2008 and 4-5 November 2009, and with the complainant on 21 February 2008.

On 3 February 2010, the Authority adopted a new version of the Chapter on the application of the state aid rules to public service broadcasting of the Authority's State Aid Guidelines (Broadcasting Guidelines)<sup>2</sup>.

## 2 COMPLAINTS

### 2.1 NLC, now *365 miðlar ehf.*

In its complaint, Northern Light Communications Ltd, a private broadcaster, claimed that the broadcasting licence fee and the advantages provided by law for its collection, put RÚV in a favourable position in relation to its competitors.

In the beginning of 2005, NLC merged with Frétt ehf. and formed a new media company, *365 miðlar ehf.*, which competes with RÚV for the same viewing audience. Furthermore, *365 miðlar* competes with RÚV in acquiring programming material as well as advertisements. According to the complainant, the licence fee financing and the fact that the Icelandic State is responsible for all operational losses of RÚV, makes it possible for RÚV to force down the cost of advertisements and purchase programming material above market price. *365 miðlar* runs five out of ten private television stations and five private radio stations.

### 2.2 Einar Agustsson

Einar Agustsson, the former owner of the internet portal Tunga.is, claimed that unlimited state aid granted from the Icelandic Government to RÚV, and in particular to its Internet service [www.ruv.is](http://www.ruv.is), clearly violated the state aid provisions of the EEA Agreement.

<sup>2</sup> Not yet published, available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

### 3 SCOPE OF THE AUTHORITY'S INVESTIGATION

Following the adoption of the chapter on state aid to public service broadcasting of the Authority's State Aid Guidelines in April 2004, which was replaced by a new chapter in February 2010, the Authority extended its investigation beyond the complaints, both in its Article 17(2) letter and in the current Decision. The investigation covers the general financing regime of RÚV by the public 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.

### 4 MEDIA LANDSCAPE IN ICELAND

Icelanders can choose from eleven domestic television channels. Of those eleven, seven channels broadcast to all regions of the island and can be considered to have a nation-wide reach as they can be received by at least 90 per cent of the population. In addition, some 50 foreign channels are available, either by cable or by continuous relay. There are around 20 radio stations, four of which broadcast nationally.

RÚV is also active on new media markets. It runs an Internet homepage, [www.ruv.is](http://www.ruv.is), with numerous services and a quite extensive teletext services. The other broadcasters on the Icelandic television market have not set up teletext services to a similar extent as RÚV. Also a number of other news providers in Iceland offer similar services on the Internet. Among the strongest providers are the big national newspapers ([www.mbl.is](http://www.mbl.is) and [www.visir.is](http://www.visir.is)). RÚV is also involved in activities on the mobile telephony platform.

### 5 DESCRIPTION OF RÚV'S ACTIVITIES AND FINANCING

#### 5.1 Legislative framework of the Icelandic public service broadcasting sector

RÚV was established with a view to providing the national broadcasting service in Iceland. The main legal regulation of the public service remit currently in force is laid down in the Act No 6/2007 on the Icelandic National Broadcasting Service, passed by the *Alþingi* on 23 January 2007<sup>3</sup>. The 2007 RÚV Act replaced the previous Act No 122/2000 on Icelandic National Broadcasting Service (the 2000 RÚV Act)<sup>4</sup>. Before the entry into force of the EEA Agreement, the public service remit was defined and entrusted to RÚV in Articles 15 – 17 of the Act No 68/1985 on Broadcasting<sup>5</sup>.

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 RÚV<sup>6</sup> signed a Public Service Broadcasting Contract (the Contract)<sup>7</sup> which further specifies the public service obligations entrusted to RÚV and describes in further detail the purpose and role of RÚV. The Contract is valid for 5 years, for the period from 1 April 2007 to 31 March 2012. Article 9 of the Contract foresees that the parties will meet each year to discuss the content

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

<sup>4</sup> 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.

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

<sup>6</sup> The Contract was signed by the director of RÚV on behalf of RÚV.

<sup>7</sup> This contract replaced a performance management agreement between the Ministry of Education and RÚV which was concluded under the previous legislation.

and execution of the Contract, their joint priorities and the setting of goals. If considered necessary, amendments will be made to the Contract provisions in the form of a special appendix. The Icelandic authorities have informed the Authority that the Contract is currently being re-negotiated<sup>8</sup>.

Two further documents are attached to the Contract as appendices. Appendix I is identical to the old version of the chapter on state aid to the broadcasting sector of the Authority's State Aid Guidelines, whereas appendix II contains the Rules on the evaluation of public service broadcasting (see next paragraph).

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 (see below sections 5.4.2. and 5.4.3.). The Regulation took effect on 1 April 2007.

Finally, on 5 March 2007, at the occasion of the foundation meeting of RÚV, the board of RÚV approved the company's Articles of Association.

## 5.2 Organisation of RÚV

*Ríkisútvarpið ohf.* (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<sup>9</sup>. On behalf of the State, the ownership was originally performed by the Minister of Education. Following an amendment in the national legislation<sup>10</sup>, from 1 October 2009, the owner is the Minister of Finance, on behalf of the Icelandic State. The company cannot be sold, wholly or partly, merged with other companies, or dissolved.

The administrative structure of the company has undergone certain changes in relation to the re-organisation and the establishment of RÚV on a commercial basis. Each year, the *Alþingi* nominates, under proportional representation, five persons and the same number of alternates who are then elected by the general meeting of RÚV (*i.e.* the Minister of Finance in his capacity as the owner of RÚV) to the board of RÚV.

RÚV is divided into four departments: a finance department, a radio department, a television department and a marketing department. The radio and television departments handle the acquisition and transmission of programme material. The production of programme material may take place in the departments themselves or be outsourced in accordance with special contracts. Within the radio and television departments, there is a sub-department that oversees sports and the news. RÚV does not operate any subsidiaries at the moment.

RÚV is a member of the European Broadcasting Union (EBU). EBU negotiates broadcasting rights for major sports events, operates the Eurovision and Euroradio networks, organises programme exchanges, coordinates co-productions, and provides a full range of other operational, commercial, technical, legal and strategic services.

<sup>8</sup> E-mail dated 11 October 2010, Event No 576715.

<sup>9</sup> 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.

<sup>10</sup> By means of Act No 98/2009.

### 5.3 The activities of RÚV

#### 5.3.1 Activities of RÚV considered as a public service by the Icelandic authorities

##### 5.3.1.1 General requirements of the broadcasting public service remit in Iceland

The activities of RÚV shall meet the cultural, social and democratic demands of society by means of the technical methods that can be conveniently employed at any given time. RÚV should put emphasis on presenting Icelandic culture and be a forum for democratic debate (Article 1 of the Contract). The aim of RÚV is the operation of public service broadcasting of all types and other activities as provided for in the RÚV Act (cf. section 1.0 of RÚV's Articles of Association).

According to Article 1 of the Regulation, the term “*public service broadcasting*” refers to broadcasting services as defined in the first paragraph of Article 3 of the RÚV Act, *i.e.* the operation of public service broadcasting of all types (such as radio and television service), and as specified further in detail in Article 2 of the Contract.

In line with those provisions, RÚV shall devote particular attention to the Icelandic language, the history of the Icelandic nation and its cultural heritage. This involves three different aspects. First of all, RÚV shall provide informative material of a general nature and produce programmes with a special focus on Iceland and the Icelanders, so ensuring an impartial supply of information on Icelandic society. Secondly, RÚV shall make every possible effort to employ the Icelandic language in such a way that listeners, readers and viewers can rely on broadcast speech and text being in faultless Icelandic at all times. And thirdly, RÚV shall take the initiative on presenting Icelandic culture, arts and cultural heritage and strive to involve other parties in joint projects with the aim of stimulating production in this area (cf. Article 3, first paragraph, points 1 and 4 of the RÚV Act and Article 2 of the Contract).

Furthermore, RÚV shall uphold democratic principles, human rights and the freedom of expression and opinion.

As the national broadcasting service, in providing its activities, RÚV shall take account of the interests of different groups of society. The material broadcast by RÚV shall reflect the diversity of culture in Iceland and the attitudes to life and the circumstances of people in all parts of the country. On the other hand, this also means that, for instance, disabled people shall have access to public service broadcasting materials which can be guaranteed, for example, by putting subtitles on television material, by teletext and through RÚV's website. Also, the interests of different age groups should be taken into account with particular care taken to offer material suitable for children (cf. Article 3, first paragraph, point 6 of the RÚV Act).

In practical terms, the public service broadcasting function of RÚV involves the presentation of text, sound and images. In terms of genres, RÚV shall provide sophisticated presentations of news, information, cultural material, educational material, sports coverage and entertainment (Article 2 of the Contract).

RÚV shall seek to make regular surveys of public attitudes towards its programme material and the way it is treated with a view to being able to bring its broadcast material as closely as possible into line with the demands and wishes of the Icelandic public. (Article 2 of the Contract).

RÚV shall take the initiative on employing new technology in its transmissions and services in order to facilitate user access to its public service broadcasts (Article 2 of the Contract).

In line with the requirement for a comprehensive service, as stipulated in Article 4 of the Contract, people and legal persons in Iceland shall have access to transmissions and programmes on television, radio, on a website and through other means that RÚV uses to broadcast the material. In the following description of the public service activities of RÚV, a distinction will be made between the traditional broadcasting activities, *i.e.* radio and television broadcasting on the one hand, and new media activities on the other.

### 5.3.1.2 Traditional broadcasting activities of RÚV

#### 5.3.1.2.1 Television and radio material

According to the RÚV Act, RÚV is obliged to broadcast to the entire country and the immediately adjacent fishing grounds on at least one radio and television channel all year round (cf. Article 3, first paragraph, point 2 of the RÚV Act). The Contract further specifies that RÚV's transmissions shall consist of at least two radio channels and one television channel and, in addition, regional broadcasting services, all year round (cf. Article 2 of the Contract)<sup>11</sup>. In order to fulfil these requirements, RÚV receives a licence to broadcast on the channels and at the frequencies allocated for its use and establishes facilities for programme production and broadcasting outside the Greater Reykjavík area (cf. Article 3, first paragraph, point 10 of the RÚV Act).

Currently, RÚV operates one television channel and three radio channels. The two analogue radio channels Rás 1 and Rás 2 cover the whole of Iceland, whereas Rondo is a digital radio channel with classical music only and is broadcast in the Reykjavík area. All three radio channels can be listened to on [www.ruv.is](http://www.ruv.is). In addition, regional radio programmes are broadcast from *Ísafjörður* (West-Iceland), *Akureyri* (North-Iceland) and *Egilsstaðir* (East-Iceland).<sup>12</sup>

The traditional broadcasting service of RÚV consists of producing and distributing broadcasting material of all types for radio and television in the fields of news, education, arts, sciences, history, sport and entertainment (cf. Article 3, first paragraph, points 3 and 8 of the RÚV Act). In particular, RÚV shall cover, broadcast and show material covering cultural and sports events, both in Iceland and abroad and shall ensure balance in its coverage of types of sport as far as possible. (cf. Article 3 of the Contract)

The Contract contains several further requirements with regard to the type of material to be broadcast on RÚV's radio and television channels, such as the necessary procentual coverage of Icelandic material, as well as material in other Nordic languages; the core hours for broadcasting news and news-related material in television; access to the television transmission by disabled people or the initiative to introduce and broadcast Icelandic music on the radio (cf. Article 3 of the Contract).

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<sup>11</sup> RÚV shall broadcast television material for at least 7 hours per day. In addition, one radio channel shall broadcast for at least 18 hours per day and the other shall broadcast round the clock. "*Broadcast material*" refers to a planned sequence of items that are prepared or performed by the staff of a radio or television station and transmitted to listeners or viewers.

<sup>12</sup> See [www.ruv.is](http://www.ruv.is).

As regards radio broadcasts, the volume of originally produced programme material at the time of signing the Contract should be maintained during the period covered by the Contract. It shall include broadcasts of varied cultural and educational material, material for children, news and news-related material and discussion of public issues (cf. Article 3 of the Contract).

#### **5.3.1.2.2 Regional broadcasting**

RÚV shall offer different genres of material with a view to raising the standard of its services to people living in all parts of the country (Article 3 of the Contract).

#### **5.3.1.2.3 Children and young people**

RÚV shall broadcast varied Icelandic and foreign entertainment programmes suitable for persons of all ages and various groups in society. Particular care shall be taken to offer quality entertainment and educational material suitable for children and young people, both on radio and on television (cf. Article 3 of the RÚV Act and Article 3 of the Contract)<sup>13</sup>.

#### **5.3.1.2.4 Foreign material**

RÚV shall give a prominent position to television material in the other Nordic languages, this material constituting at least 5 per cent of material broadcast, on average. RÚV shall take the initiative on publicising and showing programmes and films from other European nations, and also films from other parts of the world that have not received much publicity in Iceland (Article 3 of the Contract).

#### **5.3.1.2.5 Security services**

It is an obligation of RÚV as the national broadcasting service to maintain necessary safety and security services in the field of broadcasting (cf. Article 3, first paragraph, point 11 of the RÚV Act). This means broadcasting announcements from Iceland Civil Protection, law-enforcement authorities, safety and accident-prevention organisations and scout rescue teams and interrupting advertised programmes in cases of emergency and when this is demanded in the national interest. RÚV shall strive to the best of its ability to ensure that its transmissions can at all times be continuous (Article 4 of the Contract).

#### **5.3.1.2.6 Broadcasting from the Alþingi**

It follows from Article 75 of the Act No 55/1991 on Parliamentary Procedure (Act on Parliamentary Procedure) that RÚV is under an obligation to broadcast from the *Alþingi*.

### **5.3.1.3 New media activities**

#### **5.3.1.3.1 General provisions**

According to Article 3 of the RÚV Act, the broadcasting public service remit of RÚV comprises publishing selected parts of its material, altered or unaltered, together with other service material in altered or unaltered form, in other media, including making material

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<sup>13</sup> In addition, special measures are to be taken with regard to television programmes in order to protect children and their development and interests.



available to the public in such a way that each individual is able to access the material in a location and at a time of his own choice (cf. Article 3, first paragraph, point 2 of the RÚV Act).

The Authority notes that, based on the above provision, all of RÚV's activities on the Internet and via teletext consist only of transmission of material<sup>14</sup>.

#### **5.3.1.3.2 Internet**

Pursuant to Article 2 of the Contract, RÚV shall transmit material including news, educational material, programmes and information about individual programmes on its website as intellectual property rights permit. Efforts shall be made so that users have the easiest possible access to material on the RÚV's website at all times.

Like most other radio and television stations, RÚV has set up a website, [www.ruv.is](http://www.ruv.is). According to RÚV, this is done to take advantage of the possibilities deriving from the new technology and to service Icelanders abroad. The web page contains information on national news, international news, regional news, sports, culture, politics and business, as well as information for consumers and children.

Finally, RÚV's broadcasts are televised and archived on [www.ruv.is](http://www.ruv.is). The broadcasts are available free of charge. Podcast is also available on [www.ruv.is](http://www.ruv.is).

#### **5.3.1.3.3 Teletext**

Pursuant to Article 2 of the Contract, material including news, programme subtitles, programmes and information on programmes and individual programme items shall be broadcast on teletext.

RÚV launched its teletext service on 30 September 1991. The teletext is available on the internet at [www.textavarp.is](http://www.textavarp.is). The main categories of the teletext include news, weather, programme schedules, sports, transport information, emergency numbers, lucky pages<sup>15</sup> and financial news.

#### **5.3.1.3.4 Other new media platforms**

RÚV's signal is accessible to mobile operators in the same way as other broadcasting networks, such as ADSL, fibre-optic and micro-wave networks.

In addition, on RÚV's webpage, there is a subsection called "*mobile*" where it is possible to download news from RÚV's webpage to a mobile phone. The Authority has no information on the revenue split between RÚV and the mobile operator.

RÚV exploits mobile technology in that it uses SMS polls in relation to its programme activities. The polls are done in connection with a TV show. The results of each vote are broadcast on the teletext pages. SMS voting is, according to the Icelandic Government, only done in relation to major events and the revenue is divided between the public service broadcaster and the participating telecom operator. For instance, it is used for voting in the Eurovision Song Contest and the selection of the Icelandic representative for that

<sup>14</sup> See also letter dated 20 December 2007, Event No 458468.

<sup>15</sup> On the lucky pages there is information on the list of prizes in various lotteries.

competition<sup>16</sup>. In that regard, there exist co-operation agreements with the major telecom operators in Iceland, *Vodafone* and *Síminn*.

### 5.3.1.4 Other activities

#### 5.3.1.4.1 *Supporting and acquiring of independent programme production material*

In order to fulfil its public service remit, RÚV acquires programme material in competition with domestic as well as international broadcasters. Television programmes in Iceland are predominantly of foreign origin.

In addition, in line with Article 3 of the Contract, RÚV shall support and encourage the production of television programmes, films and documentary films by purchasing and showing material from independent producers<sup>17</sup>.

#### 5.3.1.4.2 *Equipment and property*

The provision of the public service broadcasting also involves owning or renting, and operating, equipment and property of all types, including the technical equipment and real-estate property that is necessary for the company's operations (cf. Article 3, first paragraph, point 12 of the RÚV Act).

#### 5.3.1.4.3 *Cultural heritage - the archives*

Preserving broadcasting archives is considered to be an important part of the public service remit and is financed through public means available to RÚV<sup>18</sup>.

According to Article 3, first paragraph, point 13 of the RÚV Act and Article 3 of the Contract, RÚV shall notably ensure that programme material that is broadcast for the first time, as well as other items of historical and cultural value (such as costumes, scenery, transmission equipment) is preserved on a permanent basis, providing that agreements permitting this have been made with the holders of rights to the material.

RÚV may, by a special agreement, entrust another institution with the preservation of this material and items in an appropriate manner. RÚV shall take measures to make sound recordings, images, and scripts, accessible to the public, as appropriate, either at a charge or free of charge<sup>19</sup>.

#### 5.3.1.4.4 *Cultural and educational co-operation*

Article 7 of the Contract foresees that, each year, RÚV shall receive visits by pupils and students from the media departments of senior schools and universities in order to present to them the operations of RÚV. The Authority understands that this is done in the context of developing closer collaboration with other cultural and educational bodies.

<sup>16</sup> In 2006, RÚV received 50 per cent of the income from the SMS voting for that event.

<sup>17</sup> "*Independent producer*" refers to an organisation having a legal personality separate from the broadcasting organisation and that has the freedom to define its own commercial policy including work for others than the broadcasting organization itself. RÚV shall be a purchaser or co-producer of dramatised television material, films, documentary films or other television material.

<sup>18</sup> Letter dated 20 December 2007, Event No 458468.

<sup>19</sup> As regards the use of older archive material, steps will be taken towards reaching a comprehensive agreement with the owners of intellectual property rights.

### 5.3.2 *Commercial activities*

According to Article 4 of the RÚV Act, the company may be involved in activities other than public service activities (see above 5.3.1.). This involves in particular activities related to the RÚV's activities in the field of programme production, or that make use of its equipment, the special know-how of its employees and other aspects of its facilities<sup>20</sup>.

In addition, RÚV may compile, publish and distribute material of any type, either free of charge or in return for payment, which promotes the dissemination of previously produced material owned by the company, such as written material, records, acoustic tapes, CDs, video tapes and multimedia materials. This includes, for example, publishing a programme guide for television and radio programmes<sup>21</sup>.

It follows from Article 11, paragraph 1, point 2 of the RÚV Act that the company is allowed to sell advertising space, enter into sponsoring agreements, and to sell or rent its goods connected with its programmes on all media platforms. RÚV currently offers for sale advertising space on television and radio platforms as well as on its teletext pages. The Internet presence of RÚV is advertising free for the moment.

It appears that everything which is not defined as a public service activity constitutes RÚV's commercial activity. This can be derived from the provision of Article 1 of the Contract, according to which public service broadcasting has been defined in order to distinguish it from other (*i.e.* commercial) activities on the media and competitive market. In order to provide a better understanding of this concept, the Icelandic authorities gave the following examples of commercial activities performed by RÚV: renting of studios; lease of equipment to independent producers; provision of equipment for conferences, *e.g.* NATO conference that took place in Reykjavik<sup>22</sup>.

## 5.4 **Entrustment of RÚV with new public service activities**

### 5.4.1 *The entrustment and monitoring body and the entrustment act*

Previously, the ownership and the entrustment and monitoring functions were combined in the Ministry of Education. As of 1 October 2009, the ownership of RÚV has been exercised by the Minister of Finance on behalf of the State, whereas the Minister of Education has kept its entrustment and monitoring tasks over the public service broadcaster in Iceland.

The entrustment act is in the form of the RÚV Act and the Contract. The latter is publicly available on the website of the Ministry of Education<sup>23</sup> and the website of RÚV<sup>24</sup>.

### 5.4.2 *The scope of the ex ante entrustment mechanism*

The definition of the current public service remit entrusted to RÚV is laid down in the provisions of the RÚV Act and further specified in the provisions of the Contract. Where it seems necessary to expand the definition to new activities under the public service remit, the Icelandic authorities shall first carry out an evaluation of the intended service.

<sup>20</sup> However, as further specified in the RÚV Act, RÚV may not sell items of value that have cultural and historical value for the Icelandic nation and which are kept by the company.

<sup>21</sup> Letter dated 20 December 2007, Event No 458468.

<sup>22</sup> *Idem.*

<sup>23</sup> <http://brunnur.stjr.is/mrn/logogregl.nsf/FF6C260B2319251D002567BA004D88CB/034288DD68D2E243002572A7004D5B91?OpenDocument>

<sup>24</sup> [http://www.ruv.is/other\\_files/skjol/%C3%9Ej%C3%B3nustusamningurinn%20-%20undirrita%C3%B0ur.pdf](http://www.ruv.is/other_files/skjol/%C3%9Ej%C3%B3nustusamningurinn%20-%20undirrita%C3%B0ur.pdf)

The assessment will be made *ex ante*, *i.e.* before the introduction of the service in question, and according to the conditions set out in the Regulation.

Pursuant to Article 6 of the Contract, the adoption of any new public service not covered by the Contract shall be assessed by the Minister of Education. Based on the current framework, only services consisting of the production and dissemination of broadcasting material on various platforms are subject to the *ex ante* entrustment mechanism. According to the Regulation, the term “*new service*” means “*a continuous and permanent service via a specific means of dissemination which is not regarded as falling under the services already described in Article 2 of the Contract*”. This means that any expansion of the scope of the services offered by RÚV beyond those which fall under Article 2 of the Contract as well as any amendment of the definition of the public service remit as set out in Article 2 of the Contract or Article 3 of the RÚV Act is subject to the *ex ante* mechanism for entrustment. In this context, the Icelandic authorities gave the example of a proposal to operate a new channel focusing on sports<sup>25</sup>.

The Icelandic Government has clarified that the introduction of new media platforms, such as wireless-on-demand services for existing or new types of broadcast material, would in any case have to undergo the *ex ante* assessment. However, new media distribution networks, such as fibre optic networks or satellite networks, would not have to undergo the assessment<sup>26</sup>.

#### **5.4.3 The procedure and the criteria of the entrustment mechanism**

The proposal<sup>27</sup> on the introduction of a new service in addition to the services already offered under Article 2 of the Contract would be made by the Icelandic National Broadcasting Service, *i.e.* RÚV. The proposal would then be publicly advertised on the homepage of the Minister of Education and of the RÚV, together with an invitation for comments within the deadline of three months.

The evaluation of the proposed service is carried out by the Minister of Education, taking into account the type of material to be disseminated and the proposed method of dissemination. Furthermore, it shall be ensured<sup>28</sup> that the proposed new service meets cultural, democratic and social requirements of Icelandic society. A new service is considered as meeting these demands if there is an added value for the community or groups within the community and if the service is, normally, accessible to the entire population.

In the evaluation process, the Minister of Education may seek the comments or opinion of the Competition Authority, the Post and Telecommunications Agency and the Broadcasting Licence Agency<sup>29</sup>, or other competent experts as is considered necessary. The Minister of Education does not seem to be obliged to seek the opinions of competent national authorities and the opinions of those institutions do not bind the Minister of Education when deciding on the introduction of the new service<sup>30</sup>. In the course of the discussions between the Icelandic authorities and the Authority, the Icelandic authorities suggested changing the wording of the Regulation in order to oblige the Minister of

<sup>25</sup> Letter dated 20 December 2007, Event No 458468.

<sup>26</sup> E-mail dated 6 September 2007, Event No 440416.

<sup>27</sup> At another instance, the Regulation uses also the wording “*the application for permission to introduce a new service*”.

<sup>28</sup> See letter dated 23 June 2008, Event No 482940.

<sup>29</sup> The translation of the Regulation available to the Authority refers to the Broadcasting Rights Committee.

<sup>30</sup> Letter dated 20 December 2007, Event No 458468.

Education to seek comments of independent bodies, when exercising the entrustment function with regard to new public service activities of RÚV<sup>31</sup>.

Following an evaluation as described above, and taking into account the comments submitted in the public consultation process as well as possible comments of other authorities as requested by the Minister of Education, the Minister of Education can authorise the introduction of the new service.

## 5.5 Financing of RÚV

### 5.5.1 General remarks

The guiding principle of RÚV is the operation of a high-quality public broadcasting service in return for the funding it receives from the State (cf. Article 5, paragraph 1 of the Contract). In addition, the Regulation specifies that the cost of public service broadcasting may be funded by state aid (cf. Article 1, paragraph 2 of the Regulation).

### 5.5.2 Public sources of income

#### 5.5.2.1 Financing by means of a special fee

The main source of RÚV's income is a special fee. According to Article 11 of the RÚV Act, directors of taxation impose a special fee on all individuals<sup>32</sup> and certain legal persons<sup>33</sup> liable for taxes under the Icelandic taxation legislation. It currently amounts to ISK 17,200 per year for each individual and legal person. The fee is collected by the Treasury.

Since the establishment of RÚV as a limited liability company, the following allocations have been made in its favour from the State budget:

Year	Initial allocation from the budget	Adjustment at year end	Final allocation for the year
2007	2,780	75	2,855
2008	2,930	196.8	3,126.8
2009	2,945	570	3,515
2010	3,218	3,000	6,218

Table: Annual allocations to RÚV for the budget years 2007-2010 in ISK million.

Source: Letter from the Icelandic authorities dated 22 January 2010 (Event No 544120) and e-mail dated 14 December 2010 (Event No 580851).

According to the Icelandic Government, the level of the fee is set to make sure that RÚV is able to fulfil its public service obligations<sup>34</sup>. As explained by the Icelandic authorities,

<sup>31</sup> This is also implied in the letter dated 23 June 2008, Event No 482940.

<sup>32</sup> Exemptions are foreseen for senior citizens who are also exempted from similar fees relating to the Senior Citizens' Building Fund; see also Article 10 of the Act No 125/1999 on Senior Citizens.

<sup>33</sup> Article 11 of the RÚV Act stipulates that legal persons that constitute independent entities for taxation purposes under Article 2 of the Act No 90/2003 on Income Tax are liable for the special fee under the RÚV Act. However, estates on death, bankruptcy estates and legal persons exempt from tax under Article 4 of the Act on Income Tax are excluded from the obligation to pay the special fee.

<sup>34</sup> See page 6 of letter dated 28 June 2004.

an estimation of the allocation proposed in the budget is based on the preceding year's revenues<sup>35</sup> and on forecasts of revenues from the special fee<sup>36</sup>.

The collection of the special fee occurs at the same time as the general taxes are assessed under Article 93 of the Act on Income Tax. All arrangements for the assessment, collection, monitoring and penalties are also subject to the provisions of tax legislation, *i.e.* Articles VII-XIV of the Act No 90/2003 on Income Tax, but instead of ten payment dates, there is just one due date for natural persons, namely 1 August of each year.

### 5.5.2.2 Other public sources of income

According to Article 11, paragraph 1, point 3 of the RÚV Act, RÚV is entitled to finance its operations through other sources of income that may be decided specially by the *Alþingi*.

### 5.5.3 Other sources of RÚV's income

RÚV can also finance its activities from income from advertisements, sponsoring and sale or rental of goods connected to its programmes in broadcasting media or other media (cf. Article 11, paragraph 1, point 2 of the RÚV Act). Whereas there are commercials on RÚV's television and radio channels, it is prohibited by law to sell advertising space on the webpage of RÚV [www.ruv.is](http://www.ruv.is).

## 5.6 Duties related to the carrying out of public service obligations by RÚV

### 5.6.1 Separation of accounts

According to Article 5 of the RÚV Act, the finances of all activities that are not classified as public service broadcasting shall be kept separate from the finances of public service broadcasting operations. Furthermore, the company may not use public finances to subsidise the cost of activities other than the public service, including activities that qualify as competitive operations<sup>37</sup>.

Moreover, the Contract specifies that RÚV should maintain accounts covering expenses and individual projects showing the cost of materials purchased, production and broadcasting of programmes and the utilisation of other materials broadcast to the public in such a way as to meet the demands concerning transparency. The provisions of the Act referred to at point 1a of Annex XV to the EEA Agreement (*Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings*)<sup>38</sup>, as adapted by Protocol 1 thereto (hereinafter referred to as Directive 2006/111/EC (Transparency Directive))<sup>39</sup> have been transposed into the Icelandic legal order by means of Regulation No 430/2008 on the implementation of the Commission Directive on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. In particular, earnings and expenses relating to activities in connection with public service

<sup>35</sup> See page 7 of letter dated 28 June 2004.

<sup>36</sup> Letter dated 22 January 2010, Event No 544120.

<sup>37</sup> In addition, Article 5, paragraph 5 of the Contract specifies that RÚV “*may not use public financial support to subsidise the cost of producing and/or marketing material that is covered by the second paragraph of Article 4 of the Act*”.

<sup>38</sup> OJ L 318, 17.11.2006, p.17.

<sup>39</sup> Joint Committee Decision No 55/2007, OJ No L 266, 11.10.2007, p. 15 and EEA Supplement No 48, 11.10.2007, p. 12, entry into force on 9.6.2007.

broadcasting should be separated from those relating to activities that can be classified as competitive operations.

For the purpose of monitoring the financing of RÚV's activities, RÚV establishes an accurate project and cost accounting system so that it is possible to identify accurately the costs involved in the production of its material. In addition, individual projects are also accounted for separately (cf. Article 5, paragraph 3 of the Contract).

For instance, the Icelandic authorities confirmed that in the case of programme production, the production costs are considered to fall under the public service, whereas the costs of copying, marketing and advertising the same programme for the purpose of selling it on the market fall under the non-public service classification in the accounts<sup>40</sup>.

### ***5.6.2 Calculation of the compensation for the public service remit: net public service costs and prohibition of overcompensation***

In line with Article 5, paragraph 4 of the Contract, each year, as soon as the annual financial statements have been prepared, RÚV submits information to the Ministry of Education on RÚV's earnings during the immediately preceding year, less expenses, relating to public service broadcasting on the one hand, and to the part of its operations that are considered as competitive operations on the other. On the basis of this information, RÚV submits an operational budget covering its estimated income requirements to meet the cost of public service broadcasting. The Icelandic authorities confirmed that the provision refers to both earnings and expenses and acknowledged the fact that a negative result on the commercial side of RÚV's operations (*i.e.* loss) should never be taken into account when calculating the need for compensation<sup>41</sup>. In this regard, it was proposed to add a clarification in the Contract stipulating that, when calculating the need for compensation, a loss on competitive operations shall never be taken into account<sup>42</sup>.

In line with section 5.1.2. of RÚV's Articles of Association, a decision is taken in the annual general meeting on the measures to be adopted to dispose of RÚV's profit or loss for the financial year. The Authority understands that this includes the decision on the disposal of any overcompensation.

### ***5.6.3 Financial relations with commercial companies, including RÚV's own commercial subsidiaries and prohibition of cross-subsidisation***

According to the Contract, commercial exploitation of material produced in the course of public service broadcasting shall take place on market-driven premises and in a transparent way. The Contract further specifies that this means that RÚV may not use public financial support to subsidise the cost of producing and/or marketing material that is covered by the second paragraph of Article 4 of the RÚV Act (*i.e.* material of any type, either free of charge or in return for payment, which promotes the dissemination of previously produced material owned by the company, such as written material, records, acoustic tapes, CDs, video tapes and multimedia materials).

<sup>40</sup> Letter dated 20 December 2007, Event No 458468.

<sup>41</sup> *Idem.*

<sup>42</sup> Letter dated 23 June 2008, Event No 482940. In the package meeting that took place in Reykjavik on 24 October 2008, the Icelandic authorities even suggested that the RÚV Act will be strengthened by inserting supplementary provisions concerning the calculation of compensation; see the follow-up letter after the package meeting, Event No 496596.

According to the Icelandic Government<sup>43</sup>, RÚV is currently neither a sole owner of any subsidiaries nor a stock holder in any subsidiaries engaged in commercial activities<sup>44</sup>. Nevertheless, the provisions of the Contract specify that financial connections with subsidiaries are based on market-driven premises.

It is further specified in the Contract that RÚV ensures that the cost and project accounting meet the demands set out in Article 14 of the Act No 44/2005 on Competition<sup>45</sup> with regard to the separation of earnings and expenses relating to public service broadcasting and competitive operations. This should prevent under-bidding by RÚV on the advertising market and the subsidising of its competitive operations using earnings from its public service broadcasting, *i.e.* prohibit cross-subsidisation from the public funds to the commercial activities of the public service broadcaster. According to Article 11 of the RÚV Act, the board of the company issues scales of charges for the publication of advertisements and other related sources of income (*i.e.* sponsoring and sale or rental of goods connected with RÚV's programmes in broadcasting media or other media). Finally, with the aim of ensuring the equal treatment of the company's customers, discount terms for sponsors and advertisers shall be transparent and available to all customers in return for comparable volumes of business (cf. Article 5 of the Contract).

#### 5.6.4 Monitoring of RÚV

##### 5.6.4.1 Monitoring of the fulfilment of the public service remit

Under the previous legislation on broadcasting, *i.e.* the RÚV Act of 2000, the monitoring tasks of the fulfilment of the public service remit by RÚV were executed by the Broadcasting Council. The Authority takes note, however, that, according to Interim Provision IV of the RÚV Act, the authorisation of the principals and alternates of the Broadcasting Council, who were last elected by the *Alþingi* under Article 7 of the 2000 RÚV Act, terminated on 1 April 2007<sup>46</sup>. Hence, the Authority notes that the Broadcasting Council has been abolished and, to the Authority's knowledge, has not been replaced by any alternative body with similar functions<sup>47</sup>.

In the context of its annual reporting obligations, RÚV submits to the Minister of Education information on how RÚV has discharged its duty to provide public service broadcasting<sup>48</sup>.

Furthermore, according to Article 9 of the Act No 86/1997 on National Audit, the Auditor General (*Ríkisendurskoðun*) may carry out a performance audit at those institutions, funds,

<sup>43</sup> See last section of page 3 in letter dated 28 June 2004.

<sup>44</sup> According to the Icelandic Government, the purchase of stock by RÚV in a new or existing company is subject to the approval of the Icelandic Parliament under the National Budget. In addition, RÚV is limited in this respect by law, at least as regards the media sector, as Article 1 of the RÚV Act specifies that the RÚV may not own shares in another company that publishes a newspaper or operates a broadcasting station.

<sup>45</sup> The provision states: "*In the case of public undertakings or undertakings operating to some extent under exclusive rights or protection granted by the State, the Competition Authority may order financial segregation on the one hand between part of the operation of the undertaking conducted under exclusive rights or protection and on the other hand the operation conducted in free competition with other parties. Measures shall be taken to ensure that the operation in competition is not subsidised by the operation conducted under exclusive rights or protection.*"

<sup>46</sup> See second paragraph of Article 13 of RÚV Act.

<sup>47</sup> See also letter dated 20 December 2007, Event No 458468.

<sup>48</sup> See further Article 8 of the Contract and sections 5.1.2. and 5.2.2. of RÚV's Articles of Association.



corporations and organisations where he carries out the general financial audit<sup>49</sup>. Performance audits cover the handling and utilisation of public funds, whether or not economy and efficiency are being taken care of in the operations of institutions and State-owned enterprises and whether applicable lawful instructions are being complied with in this context.

The Icelandic authorities have indicated that sanctions for not fulfilling public service obligations can be the termination of the Contract, the withholding of payments/contributions or sanctions mentioned in the Act No 53/2000 on Broadcasting, Act No 44/2005 on Competition and Act No 2/1995 on Limited Companies<sup>50</sup>.

#### **5.6.4.2 Monitoring of RÚV's financing from public sources**

It follows from Article 1 of the Act on National Audit that the Auditor General is an independent body - operating under the auspices of the *Alþingi* - in charge of the auditing of the annual accounts of the Government and the accounts of the institutions, funds and other bodies whose expenses and deficits are defrayed out of moneys provided by the Treasury pursuant to provisions of the budget, or out of other revenues pursuant to specific laws (cf. Article 6 of the Audit Act). Moreover, it carries out auditing of the accounts of corporations and organisations whose operation the Treasury is responsible for, or in which the Treasury owns 50 per cent or more.

The Auditor General may call for reports regarding the use of financial support and other governmental financial transfers and assess the actual results in relation to what was intended. The Auditor General reports the findings of the examinations which have been carried out and draws attention to any faulty procedures and points out those matters which should be considered with a view to improving them.

Article 6 of the Contract lays down the provisions relating to the monitoring of RÚV. First of all, RÚV is subject to supervision by the Auditor General in respect of the obligations under the Broadcasting Guidelines<sup>51</sup>. RÚV provides the Auditor General with all the necessary information in order for him to carry out such an assessment of compliance with the Broadcasting Guidelines. In order to demonstrate the transparent and objective analysis of the costs, RÚV provides information on the costs relating to the RÚV's public broadcasting service, based on its annual financial statements for the immediately preceding year, taking into account the earnings, less expenses, relating to the part of the RÚV's operations that are classified as competitive operations.

Furthermore, on the request of the Icelandic Competition Authority or the Auditor General, RÚV provides all the information necessary to demonstrate whether RÚV meets its obligations under Article 14 of the Act No 44/2005 on Competition.

In the context of its annual reporting obligations, RÚV submits to the Minister of Education the company's annual financial statements, which shall be in conformity with Act No 3/2006 on Financial Statements, together with an auditors' report, setting out RÚV's earnings, less expenses, relating to public service broadcasting, on the one hand, and to activities that can be classified as competitive operations on the other.

<sup>49</sup> The performance audit for the establishments owned at least 50 per cent by the central government may also be carried out by the Auditor General, even if the financial audit is carried out by another auditing organisation.

<sup>50</sup> Letter dated 20 December 2007, Event No 458468.

<sup>51</sup> The provisions of the Contract still refer to the previous version of the Chapter on the application of the State aid rules to public service broadcasting, adopted on 23 April 2004.

Finally, the Auditor General in his capacity as the company's auditor performs an audit of RÚV's annual accounts in accordance with generally accepted accounting standards and national law, including the matters that are covered by the provisions of the Contract (cf. section 6.0. of the Articles of Association).

#### **5.6.4.3 Monitoring of commercial behaviour**

At this stage, the Authority has not been informed about an independent body in charge of supervising RÚV's behaviour in commercial markets such as the selling of advertising space or purchasing of programme material, e.g. sport rights. The Authority takes note, however, that some of these tasks could be performed by the Icelandic Competition Authority on the basis of the general application of the provisions of competition law.

### **6 PRELIMINARY CONCLUSIONS OF THE AUTHORITY IN THE ARTICLE 17 (2) LETTER**

Based on the information submitted by the complainant as well as the information by the Icelandic authorities, the Authority carried out a first assessment under the state aid provisions of the EEA Agreement. Pursuant to Article 17(2) in Part II of Protocol 3, it informed the Icelandic authorities of its preliminary view that the existing financing regime was no longer compatible with the functioning of the EEA Agreement. In this so-called Article 17(2) letter of 3 June 2005, the Authority invited Iceland to submit comments.

CSA considered that the funding of RÚV from public sources constituted state aid of an existing nature, which is, however, not compatible with the functioning of the EEA Agreement, based on the following considerations.

#### **6.1 Definition of the public service**

In the Article 17(2) letter, CSA accepted the definition of the public service remit as outlined in Article 1, 3 and 4 of the 2000 RÚV Act, in combination with the objectives of the management performance agreement and the obligations under the Act on Parliamentary Procedure.

However, CSA had some doubts as to the public service character of certain activities, such as offering previously broadcast programme material for loan or for sale, collaboration with other parties in programme production and transmission or renting broadcasting equipment to other parties.

Regarding commercial activities such as e-commerce and the sale of advertising space, CSA preliminary considered an inclusion of these activities into the public service remit as a manifest error.

Furthermore, CSA was of preliminary opinion that the obligation in Article 3(4) of the 2000 RÚV Act to provide "*all services that are possible using broadcasting technology and that may be an advantage to the nation shall be offered*", which is not further specified in the management agreement or any other document, is too broad to meet the requirements of a clear public service obligation in line with the applicable state aid guidelines.

CSA's preliminary conclusion was that the public service obligation did not constitute a clearly defined service of general economic interest in accordance with Article 59(2) of the EEA Agreement. Accordingly, further clarification was needed to distinguish between

those services which can be characterised as services of general economic interest and those which do not fulfil the same democratic, social and cultural needs of the society.

## 6.2 Entrustment

In the Article 17(2) letter, the CSA's preliminary conclusion was that the public service obligation of broadcasting is formally entrusted to RÚV by way of an official act in accordance with Article 59(2) of the EEA Agreement, by means of Articles 1, 3 and 4 of the 2000 RÚV Act in combination with the objectives of the management performance agreement and the obligations under the Act on Parliamentary Procedure.

In addition, CSA expressed its preliminary opinion that new activities falling within the public service remit must be entrusted to RÚV before they are introduced. Such an *ex ante* entrustment mechanism was not in place at the moment of the Article 17(2) letter.

## 6.3 Supervision/monitoring

CSA took the preliminary view that the Broadcasting Council might be regarded as an independent monitoring authority in that its members are appointed by the *Alþingi* in proportional representation after each general election. The fact that the Minister of Education appointed the chairman and vice chairman among the elected members or that the General Director of RÚV shall have the right to address the meetings and to make proposals did not seem to have a significant impact which would alter the Broadcasting Council's independence. The Broadcasting Council did not, according to the Icelandic Government, conduct a general performance benchmarking of RÚV's activities.

However, CSA had doubts as to whether the Broadcasting Council carried out an *ex post* supervision of the fulfilment of the public service obligation. An additional concern was that the Broadcasting Council did not report on its activities. Moreover, this was to some extent done by the broadcaster itself.

Therefore, CSA did not have sufficient indications that the public service was adequately supervised to ensure that the public service was actually supplied as mandated.

## 6.4 Separate accounting

At the time of the Article 17(2) letter, there was no separate accounting system within RÚV. Such system was desirable since CSA has proved that RÚV conducted other activities in addition to public service broadcasting. Hence, the obligation to keep separate accounts within the meaning of the Directive 2006/111/EC (Transparency Directive) was applicable.

## 6.5 Calculation of net costs of the public service

To the knowledge of CSA, there was no transparent mechanism whereby net revenue from commercial activities directly or indirectly related to the public service remit was taken into account when calculating the public service compensation, *i.e.* the licence fee. According to the information available to CSA, the level of the license fee was adjusted each year by the *Alþingi* upon proposal from the Minister of Education based on the proposed budget of RÚV.

In any case, without any explicit legal provision on the cost and revenue allocation, CSA was also not certain whether commercial revenues deriving from the public service were also taken into account when calculating net costs of public service.

## 6.6 Commercial dealings, in particular with subsidiaries

Firstly, CSA noted that RÚV did not have any internal guidelines on how to conduct commercial activities (*e.g.* avoid cross-subsidisation of its commercial activities from state resources, charge third parties a market price) nor do such rules seemed to be established in other legislative or administrative acts.

Secondly, to the knowledge of CSA, there was no independent body which was obliged to regularly check RÚV's behaviour in commercial markets *e.g.* advertising or purchasing of programme material.

## 6.7 State guarantee

In the Article 17(2) letter, CSA preliminarily concluded that the unlimited State guarantee provided for in Article 2 of the 2000 RÚV Act in combination with Article 5 of the Act No 21/1991 on Insolvency constitutes incompatible state aid within the meaning of Article 61(1) of the EEA Agreement.

## 6.8 Tax measures

Finally, CSA requested the Icelandic authorities to confirm that RÚV is subject to taxation in the same manner as ordinary companies.

## 6.9 Conclusion in the Article 17(2) letter

In its Article 17(2) letter, the Authority's services stated that the above concerns could be relieved if the following conditions were fulfilled:

- *A clear definition of the public service remit is implemented.*
- *An ex ante mechanism for inclusion of new public service activities in the public service remit is implemented.*
- *An ex post supervision mechanism by an independent authority regarding the fulfilment of the public service remit is established.*
- *To the extent commercial activities are carried out within RÚV, a separation of accounts is implemented in accordance with the Directive 2006/111/EC (Transparency Directive).*
- *Establishment of a transparent mechanism whereby the net benefit of the commercial exploitation is taken into account when calculating the net public service costs and relating compensation.*
- *Any commercial exploitation of the public service should be in line with market practice. This implies a duty not to undercut advertising price. An independent authority should periodically check compliance with these rules.*
- *The State guarantee in favour of RÚV (i.e. the better financing conditions which it enjoys due to its legal form) should be limited to the financing of services of general economic interest. It should be also proportionate thereto and not result in any overcompensation. Non public service activities by RÚV can only be guaranteed by the State, if they are remunerated with a market premium.*

## 7 COMMENTS BY THE ICELANDIC AUTHORITIES

The Icelandic authorities have informed the Authority that, with entry into force of the RÚV Act, the unlimited State guarantee in favour of RÚV has been abolished.

At the request of the Authority, the Icelandic authorities confirmed that RÚV is subject to company taxation in the same manner as other private commercial entities<sup>52</sup>.

As regards the entrustment body for the *ex ante* entrustment mechanism, the Icelandic authorities indicated that they intended to propose to the *Alþingi* to strengthen the role of the Broadcasting Licence Agency in the *ex ante* entrustment mechanism. It was suggested to assign the 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<sup>53</sup>. Initially, these changes were supposed to be introduced at the occasion of changes to the broadcasting legal framework related to the incorporation of the Directive 2007/65/EC (Audiovisual Media Services Directive)<sup>54</sup> into the Icelandic national law. Strengthening the new Media Authority would also serve the purpose of centralising valuable knowledge on the broadcasting and media markets in a competent independent regulatory authority<sup>55</sup>. However, later the Icelandic authorities informed the Authority that the implementation act of the Directive 2007/65/EC (Audiovisual Media Services Directive) had not been considered an appropriate place for the provisions on the new functions of the media authority related to the public service broadcasting<sup>56</sup>.

As regards the scope of the *ex ante* entrustment procedure, the Icelandic authorities suggested adding a clarification in an addendum to the Contract stipulating that any new public service activity will have to undergo the public value test in the Regulation<sup>57</sup>. The Icelandic authorities have also explained that the “new” nature of an activity in RÚV’s services may depend amongst others, on its content as well as on the modalities of consumption. However, some forms of linear transmission, such as the simultaneous transmission of television broadcasts on alternative platforms, for example the Internet or mobile devices are not really “new” for the purposes of assessment and entrustment of new public services. The assessment of whether the new service constitutes a significant change to the services already offered by RÚV within its public service remit (or significant modification of a service already offered) takes into account the following criteria: the financial resources required for the development of the service, the expected impact on demand and the effect on competition<sup>58</sup>.

The Icelandic authorities have also informed the Authority that they considered compiling an addendum to the Contract, in which all current public service activities of RÚV would be listed<sup>59</sup>.

<sup>52</sup> Letter dated 20 December 2007, Event No 458468.

<sup>53</sup> Letter dated 23 June 2008, Event No 482940.

<sup>54</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11.12.2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27.

<sup>55</sup> Letter dated 20 December 2007, Event No 458468.

<sup>56</sup> Letter dated 28 September 2009, Event No 531663.

<sup>57</sup> Letter dated 23 June 2008, Event No 482940.

<sup>58</sup> Letter dated 22 January 2010, Event No 544120.

<sup>59</sup> *Idem*.

By letter dated 17 December 2008 (Event No 502230), the Icelandic authorities informed the Authority that the Minister of Education had presented a bill of law in *Alþingi* amending the RÚV Act. The bill has dealt with the following issues relevant for this case:

- (i) Before signing the Contract, comments shall be sought from the Broadcasting Licence Agency.
- (ii) The Broadcasting Licence Agency shall be in charge of the *ex ante* entrustment procedure and shall set itself rules of procedure (including material criteria of assessment of public service broadcasting) in this regard.
- (iii) The Broadcasting Licence Agency shall be assigned the task of establishing how RÚV had fulfilled its obligations under the valid laws and regulations pertaining to state aid for public service broadcasting. This shall include cost analysis of RÚV's activities. The Broadcasting Licence Agency may entrust an independent party with individual parts of the cost analysis.
- (iv) The insertion of a paragraph in Article 5 of the RÚV Act, according to which RÚV may use finances from the operation of other activities than public service to pay the costs of public service broadcasting.
- (v) Changes to Article 11 of the RÚV Act, some of which were later passed as Act No 174/2008<sup>60</sup>. The proposal also included the publication of scales of charges for sale of advertising space and materials from RÚV's image archive.
- (vi) Adding a new section on monitoring and executive fines. The Broadcasting Licence Agency shall monitor the application of the RÚV Act on its own initiative and impose fines up to ISK 10 million, for instance for not complying with the provisions on separation of accounts.

By letter dated 28 September 2009, the Icelandic authorities informed the Authority that the bill had not been adopted, with the exception of certain amendments to Article 11 of the RÚV Act (see further details below in section 3 on existing aid in Part II Assessment of this Decision).

The Icelandic authorities have, on several occasions, indicated the need for changes in the Contract, *inter alia*, in order to bring the Contract in line with the requirements of Article 30 of the Act No 88/1997 on Government Financial Reporting. This provision amongst others prescribes that a contract for an operations project shall include a definition of the content and quality of the service purchased by the Treasury, the length of the contract period, payment by the Treasury, inspection of the service and handling of disputes. Such contracts can be concluded for a period of between one and six years. Regulation No 343/2006 of the Minister of Finance sets further details of such contracts<sup>61</sup>.

In June 2009, a special committee for assessing the role of public service broadcasting was appointed by the Minister of Education. The committee has been entrusted with the task of assessing the experience so far of the organisational arrangements of RÚV, following the adoption of the RÚV Act, and of deliberating on proposals on the general role and organisational platform for public service broadcasting in Iceland. The main findings of the committee evolved working methods and democratic principles in the governance of RÚV. The committee suggested changes to the Contract, sharpening the public service

<sup>60</sup> See further details below in section 3.

<sup>61</sup> Letter dated 28 September 2009, Event No 531663 and letter dated 22 January 2010, Event No 544120.

role of RÚV and other changes with regard to the board of RÚV and the company's financing<sup>62</sup>.

As regards monitoring, it is envisaged to entrust the new media authority with the function of effective supervision of the fulfilment of the public service obligations of RÚV. The new authority will be independent from both the Minister of Education and RÚV. It will also take care of the *ex post* review of RÚV's finances to ensure that there is no overcompensation and cross-subsidisation, including examination of use of public service reserves<sup>63</sup>.

With regard to remedies foreseen in case of non-compliance with public service broadcasting remit, the Icelandic authorities considered the following possibilities: recovery in case of overcompensation, fines for non-compliance with decisions of the media authority, and executive fines for violation of the provisions of the Act on Media.

## II. ASSESSMENT

### 1 THE PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 61(1) OF THE EEA AGREEMENT

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.”*

That means that, to be considered as state aid, the measure must be granted by the State or through state resources and confer on the beneficiary undertaking advantages that relieve it of charges that are normally borne from its budget. Furthermore, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. Finally, the measure must distort competition and affect trade between the Contracting Parties.

Aid may be granted to public undertakings as well as to private undertakings<sup>64</sup>. A public undertaking, in order to be regarded as a recipient of state aid does not necessarily have to have a legal identity separate from the State. The criterion is whether the undertaking carries out an activity of an economic nature<sup>65</sup>.

It follows from the RÚV Act that RÚV is engaged in broadcasting activities. Broadcasting is, in the view of the Authority, clearly an economic activity and therefore RÚV is to be characterised as an undertaking within the meaning of Article 61(1) of the EEA Agreement.

#### 1.1 Presence of state resources

The measure must be financed by the State or through state resources.

<sup>62</sup> E-mail dated 14 December 2010, Event No 580851.

<sup>63</sup> Letter dated 22 January 2010, Event No 544120.

<sup>64</sup> Case 78/76, *Steinike und Weinlig v Germany* [1977] ECR 595, paragraph 18, Case C-387/92, *Banco Exterior de Espana v Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 11.

<sup>65</sup> Case C-118/85, *Commission v Italy* [1987] ECR 2599, paragraph 7-8.

Article 11 of the RÚV Act clearly specifies that the special fee flows into the State Treasury. Since the direct source of payments to RÚV is the State Treasury, public service broadcasting is directly financed by the Icelandic State.

Consequently, the Authority concludes that the funding of RÚV by means of the special fee imposed on all natural and legal persons in Iceland has to be regarded as a transfer of state resources within the meaning of Article 61(1) of the EEA Agreement.

## 1.2 Favouring certain undertakings or the production of certain goods

Firstly, the measure must confer on the aid beneficiary a financial advantage that it could not have obtained through the normal course of its business. A financial measure granted by the State or through state resources to an undertaking which would relieve it from costs which would normally have to be borne by its own budget will constitute an economic advantage<sup>66</sup>.

The special fee funding constitutes the main source of income of RÚV for which the company does not need to compete on the market, contrary to its competitors which depend on commercial revenues to finance their operations, in particular from selling advertising space. At the outset, it therefore constitutes an advantage in favour of RÚV. However, such an advantage might not exist if the licence fee funding fulfils the criteria set out by the Court of Justice of the European Union (hereinafter referred to as the Court of Justice) in the *Altmark* judgment<sup>67</sup>.

The Court of Justice clarified in the *Altmark* case that public service compensation does not constitute state aid provided that four cumulative conditions are met:

- *first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;*
- *second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;*
- *third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;*
- *fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.*

The Authority considers that, in the present case, at least the second and the fourth conditions set out in the *Altmark* case are not fulfilled. As regards the second condition, the parameters on the basis of which the compensation is calculated are not established in advance in an objective and transparent manner. As regards the fourth condition, RÚV has

<sup>66</sup> Cases T-106/95 *FFSA and Others v Commission* [1997] ECR II-229; T-46/97 *SIC v Commission* [2000] ECR II-2125 and C-332/98 *France v Commission* [2000] ECR I-4833.

<sup>67</sup> Case C-280/00 *Altmark Trans GmbH Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.



not been chosen as the public service broadcasting provider on a basis of a tender, nor has any analysis been carried out to ensure that the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate production means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

Therefore, the Authority's conclusion is that the financing of RÚV by means of the special fee constitutes an economic advantage within the meaning of Article 61(1) of the EEA Agreement.

Secondly, the advantage provided by the measure must also be selective in that it must favour "*certain undertakings or the production of certain goods*".

RÚV is the only broadcaster in Iceland that benefits from the allocations collected in the form of the special fee measure. Therefore, RÚV is favoured compared to its competitors, for instance the complainants, who do not receive the same economic advantages.

The Authority's conclusion is, thus, that the financing of RÚV by means of the special fee measure has to be regarded as a selective measure within the meaning of Article 61(1) of the EEA Agreement.

### **1.3 Distortion of competition and effect on trade between Contracting Parties**

The measure must distort, or have the potential to distort, competition within the EEA, and affect trade between the Contracting Parties to the EEA Agreement.

The Broadcasting Guidelines referring to the case law of the Court of Justice state that the "*[s]tate financing of public service broadcasters can (...) be generally considered to affect trade between the Contracting Parties. (...) This is clearly the position as regards the acquisition and sale of program rights, which often takes place at an international level. Advertising, too, in the case of public service broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one EEA State. Furthermore, services provided on the Internet normally have a global reach.*"<sup>68</sup>

RÚV is active on the international market as it exchanges television programmes and participates in the Eurovision system through the European Broadcasting Union. RÚV is in direct competition with commercial broadcasters that are active on the international broadcasting market and have an international ownership structure. When aid 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<sup>69</sup>. The financial means put at RÚV's disposal have provided RÚV with a competitive advantage to acquire audiovisual rights and to invest in programmes that can subsequently be sold. Moreover, the aid measures place RÚV in a favourable situation as compared to its competitors within the area covered by the EEA Agreement by diminishing the latter's possibilities to establish themselves in Iceland.

<sup>68</sup> Paragraph 22 of the Broadcasting Guidelines.

<sup>69</sup> Cases C-730/79 *Philip Morris Holland v Commission* [1980] ECR 2617, paragraph 11, C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 17; C-156/98 *Germany v Commission*, [2000] ECR I-6857, paragraph 33.

The Authority's conclusion is that the special fee measure collected with a view to be allocated in favour of RÚV distorts competition and affects trade between Contracting Parties to the EEA Agreement in the meaning of Article 61(1) of the EEA Agreement.

#### 1.4 Conclusion

Since all the conditions set out in Article 61(1) of the EEA Agreement are fulfilled, the Authority's conclusion is that the financing of RÚV by means of the special fee measure constitutes state aid.

## 2 PROCEDURAL REQUIREMENTS REGARDING THE REVIEW OF EXISTING AID SCHEMES

Article 1(1) of Part I of Protocol 3 provides that: *“The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement”*.

According to Article 17 of Part II of Protocol 3, the Authority must obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) of Part I of Protocol 3.

In accordance with Article 17(1) of Part II of Protocol 3, by letter dated 23 April 2004 (Event No 259951) the Authority requested information on the financing of RÚV from the Icelandic authorities. The Icelandic authorities responded by letter dated 28 June 2004 (Event No 286049).

In accordance with Article 17(2) of Part II of Protocol 3, by letter dated 3 June 2005 (Event No 318329), the Authority informed the Icelandic authorities that it does not consider the public funding of RÚV to be compatible with the functioning of the EEA Agreement. The Authority gave the Icelandic authorities an opportunity to submit comments in response and the Icelandic authorities did so by letter 15 August 2005 (Event No 330470).

On the basis of available information, the Authority concludes that its obligation to review existing systems of state aid was satisfactorily undertaken as required by Article 17 of Part II of Protocol 3.

## 3 EXISTING AID

### 3.1 Background

According to Article 1(b)(i) of Part II of Protocol 3, existing aid includes *“(...) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement”*.

According to Article 1 (c) in Part II of Protocol 3 Surveillance and Court Agreement and Article 4 of the Authority's Decision No 195/04/COL, alterations to existing aid, which are not only of a purely formal or administrative nature, constitute new aid.

In *Namur-Les Assurances*<sup>70</sup>, the Court of Justice outlined that the emergence of new aid cannot be decided according to the scale of the aid or its amount in financial terms at any

<sup>70</sup> Case C-44/93 *Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State* [1994] ECR I-3829.

moment in the life of the undertaking if the aid is provided for under earlier statutory provisions which remain unaltered<sup>71</sup>. Accordingly, the Authority must verify whether or not the legal framework under which the aid is granted has changed since its introduction.

The Court of First Instance (now: the General Court) supplemented this by stating that not every alteration to existing aid should be regarded as changing the existing aid into new aid. “*It is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.*”<sup>72</sup> It is against this background that the Authority analyses whether changes to RÚV’s financing system turn either the whole aid into new aid or whether the amendments comprise separable aid elements.

### 3.2 Financing of the measure by means of the licence fee

RÚV was entrusted with the obligation to provide public service broadcasting in 1985, when the Act No 68/1985 on Broadcasting<sup>73</sup> was adopted (Articles 15-17 of the Act). The 1985 Broadcasting Act likewise stipulated that RÚV should be funded by the licence fee. This means that the legal basis providing for financing of RÚV from public sources, in particular by means of a licence fee, has been in place before the entry into force of the EEA Agreement in Iceland on 1 January 1994.

In the following, the Authority will assess, in accordance with the case law in *Namur-les Assurances*, whether the legal framework for RÚV’s funding has substantially changed since the entry into force of the EEA Agreement in Iceland and, in accordance with the case law in *Gibraltar*, whether such changes are severable.

Act No 68/1985 on Broadcasting remained in force without any substantial changes as regards the financing of RÚV between the entry into force of the EEA Agreement in Iceland and the year 2000. It was replaced by the Act No 122/2000 on the Icelandic National Broadcasting Service<sup>74</sup> and by the Act No 53/2000 on Broadcasting<sup>75</sup>. While the Act No 122/2000 was a specific act on RÚV, the Act No 53/2000 was a general legislation regulating the broadcasting market in Iceland.

Article 22 of Act No 68/1985 provided that RÚV may collect a broadcasting licence fee to finance its public service obligations. The fact that RÚV has embarked upon new activities in light of technological development in the media sector, such as new media services, which have been financed, like traditional broadcasting activities, from the general means available to RÚV, *i.e.* the scope of the activities has been extended without, however, providing for new financial means to fund them, does not constitute a substantial change in the legal basis for RÚV’s financing. In the Authority’s view, the choice of new technology for the provision of broadcasting services is not in itself sufficient to turn funding of RÚV’s activities into new aid, if the substance of the legal basis providing for the licence fee funding has not been altered.

Act No 122/2000 did not make any substantial changes in relation to the licence fee financing of RÚV compared to the Act No 68/1985<sup>76</sup>. According to Article 12 of the Act,

<sup>71</sup> See paragraph 28 of the judgment.

<sup>72</sup> Case T-195/01 and T-207/01 *Government of Gibraltar v Commission* [2002] ECR II-2309.

<sup>73</sup> Act No 68 of 27 June 1985 on Broadcasting, entry into force on 1 January 1986.

<sup>74</sup> Act No 122 of 30 June 2000 on the National Broadcasting Service, entry into force on 30 June 2000.

<sup>75</sup> Act No 53 of 17 May 2000 on Broadcasting, entry into force on 26 May 2000.

<sup>76</sup> The legal provisions on organisation and financing of RÚV were laid down in Chapter III of the Act No 68/1985.

“[o]wners of receivers that can be used to receive broadcasts by National Broadcasting Service shall pay a user licence fee (reception licence fee) for each receiver.” This provision, together with other provisions concerning the modalities of payments of the licence fee, took effect on 1 January 1986, re-issued as the Act No 122/2000.

Act No 122/2000 was amended by Act No 50/2001<sup>77</sup> and Act No 6/2007 on the Icelandic National Broadcasting Service<sup>78</sup>.

Act No 50/2001 deleted Article 11 of the Act No 122/2000, which provided that a certain percentage of RÚV’s income would go towards building facilities for their operations. The Authority notes that this provision was not a basis for any payments towards RÚV from public sources. In addition, the deletion of this provision did not influence any other public spending on RÚV. Costs of operation of building facilities for the purpose of providing public service broadcasting are liable to be covered from the general financing regime of RÚV. Whether there is a certain percentage allocated for this purpose or not, does not have any impact on the legal basis of the licence fee financing of RÚV and is, thus, in the Authority’s view, not a significant change which turns the licence fee funding into new aid.

Act No 6/2007 has changed the status of the Icelandic National Broadcasting Service to a limited liability company fully owned by the Icelandic State (cf. Article 1 and Article 12 of the Act). In the Authority’s view, this does not affect the substance of the legal basis providing for RÚV’s financing in the form of the licence fee.

In addition, Article 13 of the Act No 6/2007 repealed Act No 122/2000 as from 1 April 2007, with the exception of certain provisions concerning the collection of the licence fee, which partly already expired on 1 January 2009 (Articles 12,13, 14 and 16) or will expire on 1 January 2012 (Articles 15, 17 and 18). The title of the Act No 122/2000 has been changed to Act on Broadcasting User Licence Fee and Collection. These administrative changes in the (now) Act on Broadcasting User Licence Fee and Collection do not affect the existing nature of the financing of RÚV.

Finally, as regards the approval of RÚV’s budget, it followed from Article 10, paragraph 3 of the Act No 122/2000 that the director of broadcasting presented the budget of RÚV to the Broadcasting Council and sent it to the Minister of Education. The RÚV’s final budget was approved by the *Alþingi* as part of the State budget. Currently, in line with the Interim Provision V. of the Act No 6/2007, the Minister of Education approves the user licence fee after receiving the proposals of the director of the RÚV.

### 3.3 Financing of the measure by means of the special fee as of 1 January 2009

On the basis of the Act No 6/2007, with the effect from 1 January 2009, the licence fee funding of RÚV was replaced by a poll tax (special fee) levied under the Income and Property Tax Act (cf. Article 11 of the RÚV Act). In the following, the Authority will compare the previous collection mechanism of the licence fee with the new special fee.

The amount of the licence fee was set at ISK 35.940 per year for each set<sup>79</sup>. The special fee amounts currently to ISK 17.200 per year for each individual and legal person. It was

<sup>77</sup> Act 50/2001 on amending Act No 122/2000 on the National Broadcasting Service entry into force on 13 June 2001.

<sup>78</sup> Adopted on 23 January 2007, with immediate effect, but the provisions on the new income source entered into force on 1 January 2009.

<sup>79</sup> Announcement 702/2008 on licence fee of 19 June 2008.

first fixed at ISK 14.580, but increased by Act No 174/2008<sup>80</sup> in December 2008 as a result of significant inflation in the country. It was estimated that the increase of the collected fee since 1 January 2009 in nominal terms will amount to 18 per cent<sup>81</sup>. Indeed, based on the information in the table on page 13 above, the increase of the final allocation from the budget between the years 2008 and 2009 amounted to approximately 12%<sup>82</sup>.

Interests were due in case of non-payment of the licence fee, amounting to a 10 per cent surcharge added on the first working day following the final due date in order to cover collection costs<sup>83</sup>. In case of default in the payment of the special fee, general interest rates applicable for collection of taxes are due.

The licence fee was liable annually, from the moment of purchase of a television or radio receiver that receives broadcast material<sup>84</sup>. The special fee is also liable annually. The Authority considers that the amendments regarding the time of collection of the special fee constitute purely administrative changes which do not affect the substance of the state aid measure provided to RÚV.

The legal basis for the collection and modalities of it for the licence fee were Articles 12-18 of the Act No 122/2000, whereas for the special fee it is Article 11 Act No 6/2007 and Sections VIII-XIV of the Act No 90/2003 on Income Tax.

In case of the licence fee, natural and legal persons that were owners of receivers were liable to pay the licence fee for each receiver they possessed. However, as regards natural persons, there was just one licence fee due per household for private use of receivers. As regards legal persons, there existed possibilities of discounts if more than one receiver was used in the same location. In the case of the special fee, all individuals liable for tax under Article 1 of Income Tax Act and all legal persons liable for tax and constituting independent entities for taxation purposes under Article 2 of the Act on Income Tax are obliged to pay the fee.

The collection of the licence fee was subject to discounts for black-and-white television receivers and for radio only. The special fee does not apply any similar discounts.

There existed a possibility of exemption from the licence fee for recipients of supplementary old-age and disability pensions under Article 17 of the Act No 117/1993 on Social Security and exemption for blind persons. Under Article 4 of the Act on Income Tax, estates of death, bankruptcy estates and other exempted legal persons are exempt from the payment of the special fee. Also individuals who are not assessed to pay the special fee to the Senior Citizens' Building Fund, or who qualify to have that fee waived under the second paragraph of Article 10 of the Act No 125/1999 on Senior Citizens are exempted from the special fee.

Under the Act No 122/2000, RÚV operated its own department for the purpose of collecting the licence fee. The collecting body in case of the licence fee was the director of

<sup>80</sup> Passed on 22 December 2008, entry into force on 1 January 2009.

<sup>81</sup> See preparatory works to the Act 6/2007.

<sup>82</sup> As regards a much higher increase of allocations between the years 2009 and 2010, the Authority has no information at this stage, whether this entails solely the collected special fee or any additional budgetary allocations.

<sup>83</sup> Article 17 of the Act No 122/2000, in force until 1 January 2012 in the Act on Broadcasting User Licence Fee and Collection.

<sup>84</sup> There was a requirement to notify RÚV about changes in the ownership of television and radio receivers, including new sales. RÚV maintained a register of all receivers in Iceland and on Icelandic ships and aircraft (cf. Article 14 of the Act 122/2000).

collections of RÚV. The special fee is collected by the directors of taxation; as the collection follows the general rules in the Act on Income Tax. Act No 136/2009<sup>85</sup> made a minor change in this regard: instead of the regional directors of taxation, the special fee is now imposed by the Commissioner of the Inland Revenue<sup>86</sup> (*Ríkisskattstjóri*). In the Authority's view, the modalities of collection, including the collecting body do not influence the substance of the state aid measure in favour of RÚV.

In case of default in the payment of the licence fee, a first priority statutory lien can be imposed on the receiver for three years to cover unpaid licence fees including interest, charges for non payment and full collection costs<sup>87</sup>. The statutory lien remains in force even if there is a change of ownership. The right of distraint shall apply regarding unpaid licence fees, surcharges under Article 17(1) of the Act No 122/2000, interest and collection costs. In addition, the director of collection may seal a receiver or have it sealed or remove the receiver if the payment of the broadcasting licence fee is in arrears<sup>88</sup>.

In case of default of payment of the special fee, general rules for the execution of due taxes are applicable.

The replacement of the licence fee by the special fee as of 1 January 2009 resulted in a change from a higher fee per television set (unit) to a lower fee per person subject to income tax, whereas there are more liable persons than liable units. The Authority considers that following the replacement of the licence fee by the special fee, the obligation to pay a fee for the purpose of public service broadcasting (now called the special fee) is still imposed on the population. The recipient of the fee and the activity performed by it has not been changed, *i.e.* the purpose of the collection of the fee is the same.

Furthermore, the overall amount of collected fee calculated after 1 January 2009 does not significantly deviate from the amount collected under the licence fee regime: the lower fee is counterbalanced by levying it on a higher number of persons and legal entities.

The increase of the fee in absolute amounts can be explained by increased financial needs of RÚV in fulfilling its public service obligations. As explained by the Icelandic authorities, in 2008 there was significant inflation in the country. Therefore, the December 2008 adjustment of the level of the special fee has to be seen in that light and indeed the original bill (passed in January 2007) envisaged changes to the fee close to the entry into force of the Act No 6/2007.

Moreover, 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 influence the legal basis for the provision of public funds to RÚV and does, thus, not constitute a significant change in the existing aid scheme in favour of RÚV.

Change of the collection mechanism and collecting bodies can be considered as purely administrative adjustments of technical nature. Indeed, it was mentioned in the preparatory

<sup>85</sup> Passed on 18 December 2009, entry into force on 1 January 2010.

<sup>86</sup> This is how the website of the Icelandic Ministry of Foreign Affairs refers to the national tax authority in Iceland:

<sup>87</sup> Article 15 of the Act No 122/2000, in force until 1 January 2012 in the Act on Broadcasting User Licence Fee and Collection.

<sup>88</sup> Article 18 of the Act No 122/2000, in force until 1 January 2012 in the Act on Broadcasting User Licence Fee and Collection.

documents to Act No 6/2007 that one of the reasons for the change was to increase administrative efficiency and save the costs incurred with the collection of the licence fee.

In conclusion, based on the case law of the Court of Justice and Commission's earlier decision making practice, it can be considered that the above 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, and, thus, do not change the existing nature of the aid provided to RÚV.

### **3.4 Transfer of funds to RÚV**

Article 11, third paragraph of the Act No 6/2007 provided: *“On the first working day of each month, the Ministry of Finance shall pay the RÚV, in advance, a sum equivalent to an estimated 1/12 of the year's total income from the annual fee under this Article.”* This provision was later repealed by Act No 174/2008. Instead, a new sentence was added after the first sentence of the first point of the first paragraph of that Article: *“The fee flows into the treasury.”* The transfer of funds for the provision of public service broadcasting has always been made in the form of allocations in the State budget. The replacement of the licence fee by the special fee has not changed anything in this regard, it, thus, does not constitute a significant alteration of the measure under investigation and, consequently, does not turn it into new aid.

### **3.5 Assessment of other changes to Act No 6/2007**

In addition to changes mentioned above, Act No 6/2007 was also amended by Act No 87/2009<sup>89</sup>. The changes concerned the director general of RÚV. Moreover, Act No 98/2009<sup>90</sup> introduced changes in the ownership of RÚV, *i.e.* the new owner on behalf of the Icelandic State is now the Minister of Finance. The Authority considers that those changes are not relevant at all for the assessment of the new or existing nature of public financing of RÚV.

### **3.6 Conclusion with regard to the nature of aid**

In light of the above, the Authority considers that no significant changes have been made to the substance of the financing measure of RÚV and in particular, the existing nature of the aid provided by the Icelandic State is not affected in this regard. Since no substantial changes have been made, the Authority considers that it is unnecessary to examine whether any new element is severable from the initial scheme. Thus, the measure under investigation in the form of the special fee constitutes existing aid.

## **4 COMPATIBILITY OF THE AID**

### **4.1 Conditions of compatibility assessment under Article 59(2) of the EEA Agreement**

The financing of RÚV by means of the special fee measure could be compatible with the functioning of the EEA Agreement on the basis of Article 59(2) of the EEA Agreement which reads:

*“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the*

<sup>89</sup> Passed on 11 August 2009, entry into force on 20 August 2009.

<sup>90</sup> Passed on 28 August 2009, entry into force on 1 October 2009.

*application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.”*

The Court of Justice has further clarified that in order for a measure to benefit from the derogation of Article 59 of the EEA Agreement, it is necessary that all the following conditions be fulfilled<sup>91</sup>:

- (a) the service in question must be a service of general economic interest and clearly defined as such by the EFTA State (definition);
- (b) the undertaking in question must be explicitly entrusted by the EFTA State with the provision of that service (entrustment);
- (c) the application of the competition rules of the EEA Agreement (in this case, the ban on state aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the EEA Agreement (proportionality test).

## **4.2 Definition of the public service remit**

### **4.2.1 Genuine service of general economic interest**

As stated above, the service in question must be a service of general economic interest (SGEI) and clearly defined as such by the EFTA State. That means that the EFTA State must establish an official definition of the public service mandate of the national broadcaster, taking account of the concept of SGEI. Such definition should be as precise and clear as possible, *i.e.* it should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the EFTA State to be included in the public service remit or not.

In line with the case law of the Court of Justice and the decision making practice of the Authority and the Commission, the Authority considers that the public service broadcasting as defined in Iceland constitutes a service of general economic interest in the meaning of the Broadcasting Guidelines. The official definition has been laid down in Article 3 of the RÚV Act and Article 2 of the currently applicable Contract. These provisions in combination with the possibility to expand current public service remit by adding significant new services or modifying current services of RÚV by means of the *ex ante* entrustment procedure providing for public consultation before the inclusion of new services or amendment of the current scope of services, subject to clarifications as specified below, the Authority considers that, in principle, a system has been put in place, on the basis of which it is possible to know whether a certain activity performed by RÚV is intended to be included into the public service remit or not.

In addition, the Authority considers that programme production as well as supporting and acquiring of independent programme production material and preserving of broadcasting material in the form of the archives belong to the activities within the public service remit and in combination with the broadcasting activities of RÚV constitute services of general economic interest. The same applies for owing equipment and property that is necessary for RÚV's broadcasting operations and educational co-operation in the sense specified in Article 7 of the Contract.

<sup>91</sup> See paragraph 36 of the Broadcasting Guidelines.



In the following, the Authority will assess in particular the traditional broadcasting activities of RÚV as well as its new media activities. The Authority also wishes to put a particular emphasis on possible manifest errors in the definition of public service broadcasting remit and focus on the inclusion of certain pay services into the public service broadcasting remit.

#### **4.2.2 Traditional broadcasting activities**

Given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered legitimate under Article 59(2) of the EEA Agreement. Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity (cf. paragraph 47 of the Broadcasting Guidelines).

Traditional broadcasting activities of RÚV comprise dissemination of television and radio material, including in particular regional broadcasting, programmes for children and young people, foreign material, security services and broadcasting from the *Alþingi*. On this basis, the Authority accepts that the wide range of programming on RÚV's television and radio platforms fulfils the criteria of balanced and varied broadcasting offer as specified in the Broadcasting Guidelines. Thus, traditional public service broadcasting based on television and radio programmes is regarded as fulfilling the objective of democratic, social and cultural needs of the Icelandic society and can, thus, be accepted as a service of general economic interest within the meaning of Article 59(2) of the EEA Agreement.

#### **4.2.3 New media activities**

The Authority considers that public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society. In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use state aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfillment of the public service remit (cf. paragraph 81 of the Broadcasting Guidelines).

Currently, RÚV's new media activities mainly consist of transmitting material including news, educational material, programmes and information about individual programmes on the Internet and in the form of teletext, and, to a certain extent, on the mobile telephony platform. The Authority considers that dissemination of the broadcasting material is platform neutral and serves the same democratic, social and cultural needs of the society as traditional broadcasting offer, *i.e.* on television and radio.

As regards services other than transmission of material on a different distribution platform, such as for example SMS polls, the Authority considers that any such new offerings, to the extent they constitute significant new changes in the meaning of the Broadcasting Guidelines, should be made subject to the *ex ante* entrustment procedure in order to assess whether they should be included into the public service broadcasting remit or not. The Authority therefore requests the Icelandic authorities to clarify this point in the legislative framework providing for public service broadcasting.

#### **4.2.4 *Manifest errors in the definition***

The role of the Authority is limited to checking for manifest errors in the definition of public service remit, *i.e.* if could not reasonably be considered to meet the democratic, social and cultural needs of each society. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising, for example. Moreover, a manifest error could occur where state aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society (cf. paragraph 48 of the Broadcasting Guidelines).

The Authority notes that Article 1 of the Contract *inter alia* specifies that laying down the definition of public service broadcasting in the Contract serves partly the purpose to distinguish public service broadcasting from other activities on the media and competitive market. However, it is not entirely clear to the Authority whether the dissemination of previously produced material owned by RÚV or any other material in RÚV's possession, such as written material, records, acoustic tapes, CDs, video tapes and multimedia material is considered to constitute public service activity or commercial activity. The Icelandic authorities are therefore requested to clarify this in the broadcasting legislative framework and to inform the Authority about the payment conditions of such supply of broadcasting material. In this regard, should the activity be regarded as part of the public service broadcasting remit, reference is made to the next section of this Decision concerning pay services (section 4.2.5). If the Icelandic authorities, however, deem the activity to be of commercial nature, reference is made to further considerations concerning the net costs principle (section 4.4.2 below) and market behaviour (section 4.4.4 below).

#### **4.2.5 *Pay services***

In fulfilling their public service remit, broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, such as access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee). Although public broadcasting services have traditionally been free-to-air, the Authority considers that a direct remuneration element in such services — while having an impact on access by viewers — does not necessarily mean that these services are manifestly not part of the public service remit provided that the pay element does not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities. The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, EFTA States may entrust public service broadcasters with such a service as part of their public service remit (cf. paragraphs 82-83 of the Broadcasting Guidelines).

The Authority notes that RÚV offers certain pay services within its public service broadcasting remit. According to Article 3 of the Contract, RÚV offers access to sound recordings and images as well as scripts, preserved in its archives, to the general public either free of charge or at a charge. The Authority recognises that access to RÚV's

archives against certain payment can be regarded as part of the public service remit, as it may serve social, democratic and cultural needs of the society and is, thus, considered to be different from purely commercial activities of RÚV. Access to archives for a fee is one of the examples of acceptable pay services mentioned in the Broadcasting Guidelines (see above).

However, it is not clear at this stage, what is the level of the remuneration for the access to RÚV's archives and on the basis of which criteria is the fee determined. In order to avoid disproportionate effects on competition and cross-border trade, the Authority requests that the Icelandic authorities establish clear guidelines, according to which the price for the access to RÚV's archives will be determined. The Icelandic authorities should ensure that the level of such payments do not have an adverse effect on the market<sup>92</sup>. As stated in the Broadcasting Guidelines, the remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee).

The same considerations apply to other pay services offered by RÚV within its public service broadcasting remit, of which the Authority has no knowledge at this stage, or future pay services to be included into the public service broadcasting remit.

### 4.3 Entrustment

#### 4.3.1 Formal entrustment

The second condition of application of Article 59(2) of the EEA Agreement is an assessment whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations.

The public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference), which shall specify the precise nature of the public service obligations and set out the conditions for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation (cf. paragraphs 50-51 of the Broadcasting Guidelines).

In Iceland, the public service broadcasting remit has been entrusted to RÚV in the form of the RÚV Act and the Contract, which is publicly available on the websites of the Ministry of Education and RÚV. In combination with the *ex ante* entrustment procedure as specified in the Regulation, the broadcasting framework provides for a definition of public service obligations and sets out the conditions for providing compensation. As regards the arrangements for avoiding and repaying any overcompensation, the Authority refers to its considerations in sections 4.4.2. and 4.4.3. below.

In this context, the Authority welcomes the fact of separation of the ownership of the public service broadcaster on behalf of the State from the regulatory functions in the Icelandic Government.

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<sup>92</sup> See for instance Decision of the EFTA Surveillance Authority No 306/09/Col of 8 July 2009 on the Norwegian Broadcasting Corporation, available on the Authority's website <http://www.eftasurv.int/state-aid/state-aid-register/norway/nr/1080>.

### 4.3.2 *Ex ante entrustment procedure*

#### 4.3.2.1 **The scope of the ex ante entrustment procedure**

Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment act(s) should be modified accordingly, within the limits of Article 59(2) of the EEA Agreement. In the interest of allowing public service broadcasters to react swiftly to new technological developments, EFTA States may also foresee that the entrustment with a new service is provided following an *ex ante* assessment of the new services to be included into the public service remit (cf. paragraph 52 of the Broadcasting Guidelines). To this end, EFTA States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of Article 59(2) of the EEA Agreement, *i.e.* in the public service broadcasting context, whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition. It is up to the EFTA States to determine, 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, what shall qualify as "*significant new service*". The "*new*" nature of an activity may depend among others on its content as well as on the modalities of consumption. The "*significance*" of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services (cf. paragraphs 84-86 of the Broadcasting Guidelines).

The Authority notes that the current scope of the *ex ante* entrustment procedure covers only editorial services. This is implied by the fact that at the moment of taking a decision on inclusion of a new service into the public service broadcasting remit, consideration is given to the material to be disseminated and the means of dissemination. It seems therefore that, except for editorial activities, any other types of new services are not subject to the *ex ante* entrustment procedure. In this context, the Authority considers that the scope of the *ex ante* entrustment procedure should be clarified in that it is expressly stated that also other potential activities of RÚV, different from dissemination of broadcasting material on different distribution platforms and also including new media activities, to the extent they constitute significant new services in the meaning of the Broadcasting Guidelines, are to be evaluated as new services by means of the entrustment mechanism prior to the introduction of a given service, taking into account potential effects on trading conditions and competition.

Moreover, the Authority considers that the current scope of the *ex ante* entrustment mechanism as set out in Article 1 of the Regulation should be further clarified. In line with the current provision, only services which do not fall under Article 2 of the Contract are subject to the procedure. The Authority notes that Article 2 of the Contract covers a very broad range of services which can be offered by RÚV. Thus, in the Authority's view, the prior entrustment procedure should serve the purpose of evaluating every new proposal for a service to be provided within the public service broadcasting, even if as such it is considered to be covered by Article 2 of the Contract, provided that it constitutes a significant new service or modification of an existing service. The Icelandic authorities should therefore determine what shall 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 this context, the Authority requests the Icelandic authorities to clarify that services of short duration are also subject to the *ex ante* entrustment procedure, if they constitute significant new services in the meaning of the Broadcasting Guidelines.

#### 4.3.2.2 The procedure

In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the consultation, its assessment as well as the grounds for the decision shall be made publicly available. In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, EFTA States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, state funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer. Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. EFTA States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster. The considerations outlined above shall not prevent public service broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the feasibility of and the value added by the foreseen service, insofar as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service (cf. paragraphs 87-90 of the Broadcasting Guidelines).

The Authority considers that the *ex ante* entrustment procedure of new services to be included into the public service offer of RÚV is carried out by a body independent from the owner and management of the public service broadcaster, *i.e.* the Ministry of Education. The Authority also generally accepts that the assessment of the new service follows the concept of added value evaluation, however, the Icelandic authorities are 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. Moreover, with regard to the public consultation, the Authority requests that the entrustment body be 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 significant modification of an existing service.

#### 4.3.3 Supervision

It is within the competence of the EFTA State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Authority to carry out its tasks under Article 59(2) of the EEA Agreement. Such supervision would only seem effective if carried out by an appropriate authority or

appointed body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations. Appropriate supervision by the EFTA States of compliance by the broadcaster with its public service remit includes also control of the qualitative standards set out in that remit (cf. paragraphs 53-54 of the Broadcasting Guidelines).

The Authority considers that the Icelandic authorities provided for an independent authority in the form of the Ministry of Education and the Auditor General to monitor the compliance of the public service broadcaster with the public service remit. As mentioned above, sanctions for not fulfilling public service obligations can be for instance termination of the Contract or withholding of payments/contributions.

Whereas reporting to the Ministry of Education is done by RÚV on an annual basis, the performance audit by the Auditor General is carried out *ad hoc*. It is, however, not clear at this stage what kind of remedies can be imposed by the Ministry of Education and what are the sanctions of the Auditor General. In this context, the Icelandic authorities are requested to confirm that the supervision of the fulfilment of the public service broadcasting remit, leading to the imposition of appropriate remedies, is carried out on a regular basis and also includes control of qualitative standards set out in that remit.

#### **4.4 Proportionality**

##### **4.4.1 Separation of accounts**

The proportionality test contains an assessment of whether or not any distortions of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. This requires an examination of whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities (cf. paragraph 39 of the Broadcasting Guidelines).

In order to be able to ensure that any compensation for SGEI is only used to cover the net additional costs of the public service and to establish that overcompensation and cross-subsidisation do not take place, there should be utmost transparency between the public service tasks and commercial activities, including a clear separation of accounts (cf. paragraphs 60 and 61 of the Broadcasting Guidelines). Member States are required by Directive 2006/111/EC (Transparency Directive) to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a SGEI and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, *i.e.* public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost accounting principles according to which separate accounts are maintained must be clearly established (cf. Article 4 of Directive 2006/111/EC (Transparency Directive)).

As regards cost allocation, Broadcasting Guidelines require that costs specific to non-public service activities (e.g. the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously

should be allocated proportionately to public service and non-public service activities respectively, whenever it is possible in a meaningful way. In other cases, whenever the same resources are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities (cf. paragraphs 65-67 of the Broadcasting Guidelines).

The Authority has also invited the EFTA States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice, in order to further ensure financial transparency, in particular the respect of the arm's length principle (cf. paragraph 68 of the Broadcasting Guidelines).

The Authority has assessed the implementation of the Directive 2006/111/EC (Transparency Directive) into the Icelandic legal order. Following a notification of the national measures considered by Iceland to ensure full implementation of the Transparency Directive, the Authority decided to close the case.<sup>93</sup>

The Authority considers that the principle of separation of accounts between public service and non-public service activities is in place in the Icelandic broadcasting framework. Based on the explanations of the Icelandic authorities, cost allocation is in line with the principles of the Broadcasting Guidelines. The Authority requests, however, that the Icelandic authorities establish cost accounting principles, according to which separate accounts are maintained.

#### **4.4.2 Net costs principle**

Furthermore, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, also taking into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity is taken into account in determining the net public service costs (cf. paragraph 71 of the Broadcasting Guidelines).

According to the Icelandic broadcasting framework, the basis for the calculation of RÚV's compensation needs are "*earnings during the immediately preceding year, less expenses, relating to public service broadcasting, on the one hand, and to the part of its operations that are considered as competitive operations on the other*". The Authority considers that the above wording is problematic for two reasons: First, it is not entirely clear whether the word "*earnings*" refers to both public service and commercial operations. This means that it is not certain whether net revenues deriving from commercial exploitation of the public service obligations are taken into account for the calculation of the adequate compensation for the discharge of the public service obligation. And secondly, application of this provision as formulated above might imply that losses of the public service broadcaster on its commercial operations are to be covered by public service income. The Authority, thus, requests the Icelandic authorities to clarify this provision accordingly.

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<sup>93</sup> Decision on the EFTA Surveillance Authority No 50/10/COL of 24 February 2010 closing an own-initiative case arising from failure by Iceland to adopt the measures necessary to implement the Act referred to at point 1a of Annex XV to the Agreement on the European Economic Area (*Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and Public undertakings as well as on transparency within certain undertakings*), as adapted to the EEA Agreement by Protocol 1 thereto, into its national law.

#### **4.4.3 Financial control**

Public service broadcasters may retain yearly overcompensation above the net costs of the public service (as “*public service reserves*”) to the extent that this is necessary for securing the financing of their public service obligations. In general, the Authority considers that an amount of up to 10 per cent of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay. By way of exception, public service broadcasters may be allowed to keep an amount in excess of 10 per cent of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a non-recurring, major expense necessary for the fulfillment of the public service mission. The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication. In order to allow the Authority to exercise its duties, EFTA States shall lay down the conditions under which the above overcompensation may be used by the public service broadcasters. The overcompensation mentioned above shall be used for the purpose of financing public service activities only (cf. paragraphs 73-76 of the Broadcasting Guidelines).

EFTA States should provide for a regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of “*public service reserves*”. Such monitoring would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis. Effective mechanisms should be put in place to recover overcompensation and cross-subsidisation (cf. paragraphs 77-78 of the Broadcasting Guidelines).

The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each financing period as provided for in the national broadcasting systems of the EFTA States, or in the absence thereof, a time period which normally should not exceed four years. Any “*public service reserves*” existing at the end of the financing period, or of an equivalent period as provided above, shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period. In case of “*public service reserves*” exceeding 10 per cent of the annual public service costs on a recurring basis, EFTA States shall review whether the level of funding is adjusted to the public service broadcasters’ actual financial needs (cf. paragraph 79 of the Broadcasting Guidelines).

As mentioned above, in line with section 5.1.2. of RÚV’s Articles of Association, in the annual general meeting, decision is taken on the measures to be adopted to dispose of RÚV’s profit or loss for the financial year. The Authority understands that this includes decision on the treatment of overcompensation. To the Authority’s knowledge, to date there are no guidelines in the Icelandic broadcasting framework on the treatment of such overcompensation. The Authority, thus, requests the Icelandic authorities to establish such guidelines in line with the above principles in the Broadcasting Guidelines, including regular and effective control of the use of public funding, carried out by an external body independent from RÚV. This should also include putting in place effective mechanisms for recovery of overcompensation and cross-subsidisation.

#### **4.4.4 Market behaviour**

In accordance with Article 59(2) of the EEA Agreement, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition



that are not necessary for fulfilling the public service mission. For example, the acquisition of premium content as part of the overall public service mission of public service broadcasters is generally considered legitimate. However, disproportionate market distortions would arise in the event that public service broadcasters were to maintain exclusive premium rights unused without offering to sublicense them in a transparent and timely manner. Therefore, the Authority invited EFTA States to ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters. When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. It should be ensured that public service broadcasters respect the at arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, insofar as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event affect trading conditions and competition in the European Economic Area to an extent which would be contrary to the common interest and thus infringe Article 59(2) of the EEA Agreement. In view of the differences between the market situations, respect of market principles by public service broadcasters, in particular the questions as to whether public service broadcasters are undercutting prices in their commercial offering, and whether they are respecting the principle of proportionality with regard to the acquisition of premium rights, shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned. The Authority considers that it is, in the first place, up to the national authorities to ensure that public service broadcasters respect market principles. To this end, appropriate mechanisms shall be put in place which allow assessing any potential complaint in an effective way at the national level (cf. paragraphs 92-96 of the Broadcasting Guidelines).

In this regard the Authority requests the Icelandic authorities to ensure that RÚV's commercial activities follow market principles as set out in the Broadcasting Guidelines. It implies that 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. This means for instance that selling of advertising space, sale and renting of goods, sponsorship agreements and other commercial operations of RÚV should be set at market price. The Authority requests the Icelandic authorities to include appropriate provisions in this regards in the broadcasting legislation and to ensure that there are appropriate mechanisms in place to allow assessing any potential complaint in an effective way at the national level.

#### **4.5 Conclusion with regard to compatibility**

On the basis of the foregoing assessment, the Authority concludes that the compatibility criteria of Article 59(2) of the EEA Agreement, as interpreted by the Court of Justice and further specified in the Authority's State Aid Guidelines are not fulfilled by the current financing measures in the form of the special fee in favour of RÚV.

## 5 RECOMMENDATION OF APPROPRIATE MEASURES

Consequently, the Authority proposes the following appropriate measures:

- 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 finds it appropriate 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.
- The Icelandic authorities are 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.
- Clear guidelines for the determination of remuneration for pay services within the public service remit of RÚV, such as access to RÚV's archives, should be established.
- 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, it should be confirmed 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. Appropriate changes are to be introduced into the Icelandic broadcasting framework.
- In the context of the *ex ante* entrustment procedure, the Icelandic authorities are 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.
- 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.
- The Icelandic authorities are requested to confirm that the supervision of the fulfilment of the public service broadcasting remit, leading to the imposition of appropriate remedies, is carried out on a regular basis and also includes control of qualitative standards set out in that remit.
- The Icelandic authorities are requested to establish cost accounting principles, according to which separate accounts are maintained.
- The application of the net costs principle should be clarified in the broadcasting framework in Iceland.
- 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.

- RÚV's commercial activities should follow market principles as set out in the Broadcasting Guidelines. It implies that 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 requests the Icelandic authorities to include appropriate provisions in this regard in the broadcasting legislation and to ensure that there are appropriate mechanisms in place to allow the assessment of any potential complaint in an effective way at the national level.

HAS ADOPTED THIS DECISION

*Article 1*

The Authority concludes that the financing of the Icelandic National Broadcasting Service *Ríkisútvarpið* (RÚV) in the form of a special fee constitutes state aid which is incompatible with the EEA Agreement and, pursuant to Article 1(1) of Part I and Article 18 of Part II of Protocol 3, proposes to the Icelandic authorities that the following measures, appropriate to facilitate the proper functioning of the internal market within the EEA, are implemented:

- a) The Icelandic authorities must take all legislative, administrative and other relevant actions necessary to eliminate any incompatible aid resulting from the financing of the Icelandic National Broadcasting Service *Ríkisútvarpið* (RÚV) in the form of a special fee, in accordance with section 5 above. Any such aid should be abolished with effect from 1 July 2011.
- b) The Icelandic authorities must inform the Authority of the actions it will take to discontinue the aid as soon as possible and in any event not later than six weeks from the date of this decision.

*Article 2*

The EFTA Surveillance Authority asks the Icelandic authorities to accept this proposal for appropriate measures, pursuant to Article 19(1) of Part II of Protocol 3, and to provide their response within six weeks of the date of this Decision.

*Article 3*

This Decision is addressed to the Republic of Iceland.

*Article 4*

Only the English language version is authentic.

Decision taken in Brussels, 9 February 2011.

*For the EFTA Surveillance Authority*

Per Sanderud  
*President*

Sabine Monauni-Tömördy  
*College Member*

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