Case No: 68640
Event No: 654153
Dec. No.: 410/12/COL
NON-CONFIDENTIAL

EFTA SURVEILLANCE AUTHORITY DECISION

of 21 November 2012

on alleged state aid through subsidised lease of optical fibres
previously operated on behalf of NATO

(Iceland)

The EFTA Surveillance Authority ("the Authority"),

HAVING REGARD to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Article 61 and Protocol 26,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("the Surveillance and Court Agreement"), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1(3) of Part I and Article 4(2) of Part II.

Whereas:

I. FACTS

1. Procedure

(1) By letter dated 16 July 2010, the Icelandic law firm LOGOS Legal Services lodged a complaint on behalf of the company Míla ehf. (hereinafter referred to as Míla or "the complainant") with the EFTA Surveillance Authority ("the Authority") concerning alleged unlawful state aid granted by the Ministry for Foreign Affairs in Iceland through subsidised lease for the use and operation of two optical fibres which were previously operated by the North Atlantic Treaty Organisation (NATO). The complaint was received and registered by the Authority on 29 July 2010 (Event No 565828).

(2) By letter dated 30 August 2010 (Event No 567175), the Authority requested the Icelandic authorities to provide all information and observations relevant for the Authority to determine whether or not the measures complained of involved state aid in the meaning of Article 61 of

the EEA Agreement and whether the measures might nevertheless qualify for an exemption from the general prohibition of state aid.

(3) By letter of the Ministry of Finance dated 28 September 2010 (Event No 571101), the Icelandic authorities provided a partial reply, and by letter of the Ministry of Finance dated 3 December 2010 (Event No 579784), an extended response was provided to the same request.

(4) At the request of the complainant, the Authority's representative attended a meeting with the complainant in Reykjavik on 10 June 2011, where the complainant explained further its views regarding the complaint.

(5) By letter dated 6 September 2011 (Event No 608312), the complainant submitted further information to substantiate its claim regarding the allegation of state aid.

(6) At the complainant's request, a teleconference took place on 13 October 2011. Following this contact, the Authority received by letter of 16 December 2011 (Event No 619096) supplementary information from the complainant regarding certain aspects of the complaint.

(7) By letter dated 5 June 2012 (Event No. 641906) the complainant submitted further information in relation to the complaint.

(8) By letter of 16 July 2012 (Event No. 641937), the Authority requested certain additional information from the Icelandic authorities and invited them to comment on additional information which the Authority had received from the complainant.

(9) By letter of the Ministry of Finance and Economic Affairs dated 10 September 2012 (Event No. 646364), the Icelandic authorities responded to the above request.

(10) On 24 September 2012, the Authority received further information from the complainant by letter dated 19 September 2012 (Event No. 647465).

(11) By emails from the Ministry for Foreign Affairs of 16 November 2012 (Event No. 653651) and 19 November 2012 (Event No. 653722), the Icelandic authorities provided further clarification regarding the ownership of the three optical fibres initially reserved for defence purposes.

2. Background: Tender for the lease of NATO optical fibres

(12) Before describing the substance of the complaint, it is appropriate to review the background to the disputed agreement.

(13) On 15 August 2007, the Icelandic Government fully took over the operation of the Radar Agency (*Ratsjárstofnun*), which had until that time been operated under the auspices of the US authorities. The Agency had previously operated three optical fibres in the approximately 1800 km long, eight-fibre optical cable circling Iceland and its North-West region[1]. This opened up opportunities for the Icelandic Government to make other use of one or more of the three fibres.

[1] The remaining five fibres are the property of Míla ehf., the complainant.

(14) On 31 August 2007, the Ministry for Foreign Affairs established a working group for the purpose of drawing up proposals for streamlining the operation and utilization of the NATO optical fibres. The working group should carry out its tasks on the basis of the following objectives: a) To lower the costs related to the operation and maintenance of the fibres; b) improve public access to high speed connection, in particular in the rural areas of Iceland; and c) to encourage competition in data transmission on the domestic market.

(15) After a thorough examination the group came to the conclusion that these objectives would best be served through a call for tender for a lease of two of the three fibres, while one fibre would solely be utilized for the Icelandic Air Defence System (IADS) and for secure governmental telecommunications. A call for tender would in the opinion of the working group be the most feasible way to receive a favourable offer from the telecommunication companies and at the same time promote competition and improved information and communication services for consumers. Accordingly, the Icelandic Government concluded that a tender be made regarding the use and operation of the two fibres, to be carried out by the State Trading Centre (*Ríkiskaup*).

(16) The details of the tender were set out in the project description of Ríkiskaup[2]. According to that document, Ríkiskaup, on behalf of the Defence Department of the Ministry for Foreign Affairs, invited tenders for the use and operation of two of the three optical fibres to be leased out to two unrelated parties, with the intention of negotiating a lease for the duration of ten years.

(17) As concerns the rental charge, the tender sets a minimum price in the following manner: "*The rental charge must, as a minimum, cover the cost of operation and maintenance of the optical fibres in order to secure the basis for the project. The said cost is estimated approximately 38.000.000 ISK per year for the two fibres, correspond to approximately 19.000.000 ISK per year for each fibre. Offers including a rental charge lower than the said amount will be rejected on operational grounds.*"[3]

(18) The invitation for tender was announced in April 2008 and the date of opening of offers was 19 June 2008 at 11:00 a.m., which was also the closing date for submitting offers.

(19) The assessment of offers was based on certain criteria, taking into account the objectives of the project. The following criteria determined the assessment of the offers:

Matter of Judgement	Points
Stimulation of Competition	40
Rental Charge	15
Commencement of Services	10
Supply of Services	10
Number of network termination points	15
One Tariff throughout the Country	10

Table 1: Selection criteria in the tender.

[2] Project No. 14477. Optical Fibres. Ministry for Foreign Affairs. April 2008.
[3] Point 1.2.4 of the description of Project No. 14477.

(20) The project description provides in section 1.2.3 an elaboration of how the above selection criteria were to be evaluated.

(21) At the Authority's request, the Icelandic authorities have provided details of the offers received in the tender and how the offers were evaluated. Five offers were received from four independent undertakings, as summarised in Table 2 below. Two of the offers were variant offers:

Name of company	**Leasing price offered**	**Selection criteria: total points scored**	
		Main offer	**Variant offer**[4]
Fjarski ehf.	20.000.000 ISK	92.18	
Og fjarskipti ehf.	19.150.000 ISK	89.67	84.67
Hringidan ehf.	24.006.900 ISK	88.60	
Gagnaveita Reykjavíkur	19.500.000 ISK		59.34

Table 2: Offers received in tender.

(22) The evaluation of received offers was made by Ríkiskaup, following assessment made by the independent consulting firm *Mannvit*. According to information from Ríkiskaup and Mannvit, all four companies submitting bids were deemed to meet the requirements of technical capacity to perform the project as well as the general requirements set out in the tender for the personal and financial situation of the candidates for the project[5].

(23) The two companies scoring highest on the basis of the selection criteria (cf. Table 1) were Fjarski ehf. (92,18 points) and Og fjarskipti ehf. (now named Fjarskipti ehf; also referred to as Vodafone) (89,67 points). Negotiations were entered into with those two companies. Due to the financial crisis in Iceland which began to take hold in the fall of 2008, negotiations did not take place until late 2009 and were subsequently finalised early 2010. Fjarski ehf. decided to pull out of the project. A lease contract was therefore negotiated for only one of the two fibres, with Og fjarskipti ehf.

(24) The contract, concluded on 1 February 2010 between Og fjarskipti ehf. and the Icelandic Defence Agency (Varnarmálastofnun Íslands), provides for the use of an optical fibre belonging to the eight-fibre, 1800 km long optical cable circling Iceland, as set out in the description of Project No. 14477 by the Ministry for Foreign Affairs. The annual lease is set at 19 150 000 ISK, indexed according to the building cost index. The term of the contract is 10 years.

[4] The proposal from Gagnaveita Reykjavíkur was classified as a variant offer, as it did not meet the minimum number of network termination points and the number of municipalities covered. One of the two offers from Og fjarskipti ehf. is also a variant offer, as it does not foresee that Og fjarskipti will use the same tariff throughout Iceland. Other items in the offer are the same, including the leasing price to be paid to the state.

[5] Mannvit makes a reservation regarding the proposal from Hringidan. According to that proposal, the project was to be performed by an undertaking to be founded by Hringidan. Mannvit did not consider it possible to assess the capacity of this unfounded undertaking.

(25) The contract states that the cable at issue was registered on NATO's inventory list. Under Article 16 of the Defence Act No. 34/2008, the lessor was entitled, on behalf of the State and of NATO, to conclude a lease for the use of such facilities. However, in view of Iceland's international commitments, it was necessary to include a clause authorising the lessor to take over the cited facilities without notice in times of war. Provisions to this effect are found in Article 8 of the contract.

3. The complaint

(26) The complaint relates in particular to the contract referred to above concluded on the basis of the tender on 1 February 2010 between the Icelandic Defence Agency (*Varnarmálastofnun Íslands*) and the telecommunication operator Og fjarskipti. The complainant claims that the awarded contract involves state aid in the form of a rent for the use of the optical fibre at a price significantly below what a market investor would have deemed acceptable.

(27) The complainant submits that according to the invitation for tender, leases for the duration of ten years were to be negotiated, with the minimum consideration of 19 million ISK per year. The invitation for tender states that the price charged for the rental of the fibres was intended to cover the government's operating costs. The complainant claims that by only charging for the operating costs of the fibres, the lessee was relieved of the financial burden normally incurred by companies in the same business and incurred by the complainant, in particular an appropriate contribution to fixed costs (i.e. the costs of construction, renewal and depreciation of the cable) and an adequate return on the capital investment.

(28) The outcome of the tender was that two companies were awarded contracts, Fjarski ehf. for the price of 20 million ISK per year and Og fjarskipti for the price of 19.15 million ISK per year. A contract was concluded with Og fjarskipti, while the complainant stated that it was not aware of a formal contract having been concluded with Fjarski.

(29) On the amount of the alleged aid the complainant provides the following details: "*The amount of the aid constitutes the difference between the rent charged by the state for the use of the cables, i.e., 19,150,000 – 20,000,000 ISK per year, and what a market investor would [have] deemed an acceptable rent, i.e. over [70-100]*[6] *million ISK. The net present value of the total amount of the aid is ISK [400-500]*[7] *million over the estimated twenty year lifetime of the fiber to each of the two companies, based on the rental price ISK 19,000,000 per year.*"

(30) The complainant's assessment of the aid amount is based on a memorandum annexed to the complaint, containing Míla's calculations of the value of the alleged subsidy. The calculations are based on Míla's own costs of operating fibres in the same cable.

(31) In the complainant's view there can be no doubt that a private investor would not accept 19-20 million ISK per year for the use of each of the two fibres. This results from the fact that this amount fails to cover the costs of operating and renewing the cable, let alone acceptable return which a market investor would normally expect from his investments.

(32) The complainant explains the criteria laid down in the tender project to be used to select the most advantageous bids, consisting of six parameters, cf. table 1 above. The "stimulation of

[6] Precise data not disclosed for reasons of professional secrecy.
[7] Precise data not disclosed for reasons of professional secrecy.

competition" criterion was given a weight of 40%, while all other criteria had a weight of either 10 or 15%, including the rental price. The complainant maintains that this method of selection effectively excluded Míla from the tendering process, as it was the only party operating in the market and was therefore by definition unable to acquire 40% of the points used in the selection evaluation. For Míla's potential bid to be successful, the rental price offered had to be much higher than the bids from other parties. According to the complaint, this left only the two companies which submitted the successful bids, Og fjarskipti and Fjarski, as parties with real interest, as they were the only other companies in Iceland operating in the business concerned.

(33) Míla did not submit a bid in the tender. Apart from Míla's view that it was effectively excluded from the tender through the formulation of the selection criteria, the reason for this, according to the complaint, was that Míla did not have any economic motive for taking part in the tender as it already had sufficient transmission capacity in its own fibres.

(34) In its letter to the Authority of 6 September 2011, the complainant mentions briefly the debt relief of Teymi as an additional ground for the complaint. It is stated that Teymi, which was previously the parent company of Vodafone (Og fjarskipti), had undergone financial restructuring in 2009 and had obtained a license to seek composition with creditors. "*As a part of the restructuring 31 billion ISK of Teymi's debts was turned into share capital or written-off. The largest part of the costs of the restructuring was borne by the state owned bank, Landsbankinn hf. This cost did in our client's opinion entail state aid. Vodafone, which is owned by Teymi, substantially upgraded its systems before the financial crisis and funded the investment by loan capital. Vodafone's debts were however substantially decreased as a part of Teymi's financial restructuring. This resulted in a moderately indebted company with the processing capacity in accordance with much more indebtedness. Vodafone has now been granted direct state aid from the Government by the low rent of the fibres.*"

(35) By letter dated 19 September 2012, the complainant once more submitted further information regarding its allegation of state aid to Og fjarskipti. On this occasion, the complainant drew attention to a new tariff by the undertaking *Orkufjarskipti*[8] for the rent of a fibre optic cable[9]. The tariff specifies the rent for each fibre in a six-fibre optical cable in terms of monthly rent in ISK per kilometre in the cable[10]. By multiplying the tariff with the length of the cable according to the lease with Og fjarskipti, 1850 km, the complainant concludes that the rent for a fibre of that length according to the tariff was ISK 107 137 200 per year, whereas Og fjarskipti pays ISK 19 000 000 per year. On this basis the complainant claims that the pricing according to the cost-based tariff is more than five times higher than according to the contract concluded with Og fjarskipti. A private investor would never have accepted the low price agreed with Og fjarskipti as it was far below true market value, based on cost analysis.

(36) As regards further grounds of the complaint, the complainant reviews the conditions relevant when examining whether or not a measure qualifies as state aid under the first paragraph of Article 61 of the EEA Agreement and concludes that all relevant conditions are fulfilled for

[8] Orkufjarskipti is jointly owned by Landsvirkjun (the National Power Company) and Landsnet (operator of Iceland's electricity transmission grid). Orkufjarskipti operates and maintains telecommunication infrastructure in Iceland for its owners.

[9] According to the complainant, the tariff entered into force on 1.8.2012, having been reviewed and accepted by the Post and Telecom Authority in Iceland following a regulatory procedure. By accepting the tariff, the Post and Telecom Authority has agreed that the tariff is based on a cost analysis.

[10] The monthly rent per kilometer varies from 4.826 ISK for fibre 1 to 7.507 ISK for fibre 6.

the lease to involve state aid. The complainant also concludes that the alleged aid measure does not qualify for any of the relevant exemptions and therefore must be considered as being incompatible with the EEA Agreement.

4. Position of the Icelandic authorities

(37) The Icelandic authorities submit that the leasing out of the NATO optical fibres does not constitute state aid as the award of the contract does not confer any economic advantage upon the lessee which goes beyond market conditions, does not entail use of state resources and does not distort or threaten to distort competition. On the contrary, the lease and the tender procedure served to make competition possible in this field. The measure therefore does not fulfil the conditions for constituting state aid within the meaning of Article 61(1) of the EEA Agreement.

(38) In this regard the Icelandic authorities refer to a Memorandum of the Ministry for Foreign Affairs dated 7 May 2008 on the proposed lease-out of NATO optical fibres. The Memorandum explains in general terms the proposed tender procedure, including the modality of the invitation for tender and the criteria for the selection of eligible lessees from among the tenderers. The Memorandum furthermore states the objectives of the project, namely to lower maintenance and operating costs of NATO's optical fibres, to increase public broadband access and to encourage competition in data transmission on the domestic market. The Memorandum concludes that the Icelandic authorities considered that the lease-out of the two fibres was a non-aid measure. The project would benefit the implementation of government policies regarding electronic communication services and information society. It would also make infrastructure competition possible in the leased-lines market in areas where there was no competition at the time, which in turn would lead to more competition in downstream markets such as the market for high-speed broadband connection.

(39) The Icelandic authorities did not consider the leasing of the fibres by way of an open invitation for tenders to constitute state aid in 2008. This assessment remains unchanged today, even though certain developments have taken place in the state aid regime concerning access to broadband and public involvement in promoting broadband access, in particular with the introduction of the Authority's Broadband Guidelines and the corresponding Commission communication, both introduced in 2009.[11]

(40) In view of the complainant's contention that the fibre was owned by the Icelandic state and that the rental price should have included fixed costs related to the construction, renewal and write-down of the cables, the Icelandic authorities give their clarifications on ownership and costs of construction. They note that it was NATO, and not the Icelandic State, which financed the installation of the cable. The cable was registered on the so-called "inventory" list of the organisation, and three out of eight fibres were reserved for use related to the operations of the American forces in Iceland. *"At the time of the departure of the American forces from Iceland in 2006 and 2007, the Icelandic State took over the operation of the three fibres, as a so-called "host-nation, user nation", on the basis of a written arrangement with NATO. That, however, did not result in the full transfer of ownership of the fibres. As a result, the following would apply: First, that Iceland still has the obligation to manage the fibres in*

[11] The Authority's guidelines on the application of state aid rules in relation to rapid deployment of broadband networks are available on its website at http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/.

accordance with NATO's "host-nation, user-nation" rules; second, if Iceland were to give up its role as a "host-nation, user-nation", another NATO country would have to take over that role; and third, the sale of the fibres could only take place with the approval by NATO and the selling price would have to be returned to the organisation."[12]

(41) The view of the Icelandic authorities is that properties, of which Icelandic authorities have assumed operational management, are formally in the possession of NATO. This understanding was confirmed in the Icelandic Defence Act of 34/2008[13] ("*Varnarmálalög*"), which entered into force in April 2008. According to the Icelandic authorities, "*[i]t is thus clear that the Icelandic State does not have the formal or exclusive ownership of the three fibres. It has therefore limited options for the disposal of the fibres. Furthermore, it is clear that the Icelandic State did not bear any cost involved in the instalment of the cables, and any costs that could potentially be contributed to the renewal or the write-down of the cables cannot be attributed to the Icelandic State. Moreover, NATO has not requested that the Icelandic State bear any such costs on the basis of its "host-nation, user-nation" role. For these reasons, there are no grounds that justify the inclusion of these costs in the lease price.*"[14]

(42) At the Authority's request, the Icelandic authorities provided additional clarification regarding the ownership of the three fibres. According to this information, an agreement was concluded on 25 July 1989 between the Icelandic government and the US government, on behalf of NATO, on the ownership, treatment, operation, maintenance of and access to three of the eight fibres of the fibre optics communication system, which were used exclusively by the US Forces in Iceland, on behalf of NATO. The agreement indicates the Icelandic State as the owner of the fibres.[15] An agreement between the Ministry for Foreign Affairs and Landssími Íslands hf., concluded on 27 March 2001, also indicates, by reference to the agreement from 1989, Iceland as the formal owner of the three fibres. However, this indication must be seen in the context of the relations between Iceland and the US/NATO under the Defence Agreement of 1951 and Iceland's Membership to NATO. The US financed the instalment of the three fibres in Iceland. The fibres were registered on the so-called "inventory list" of NATO, and they were reserved for use related to the operations of the US forces in Iceland. Iceland's clarification concludes by stating that "*[t]he Icelandic State does not have the exclusive ownership of the three fibres. While the Agreement of 1989 indicates the State as the owner of the fibres, it limits Iceland's discretion over the fibres by indicating that the US, on behalf of NATO, should have continued, uninterrupted use of the fibres as long as the Defence Agreement of 1951 remains in effect. Both Iceland and NATO considered the fibres to be a property of NATO during the stay of the US forces in Iceland, despite the wording of the agreements from 1989 and 2001. Furthermore, it is the understanding of both Iceland and NATO that as long as the Defence Agreement between Iceland and the US is in*

[12] Letter to the Authority of the Ministry of Finance dated 3.12.2010.

[13] Article 15 of the Act states that Icelandic authorities shall handle the operation, management and use of buildings and other properties located in Iceland and owned by NATO, in accordance with international obligations and the powers of Iceland as user and host state. The second paragraph of the same article refers to a list of the assets that the Icelandic authorities are responsible for, published in Notice 610/2010, where the three fibres are specifically mentioned in Annex IV (Item No. 8439).

[14] Letter to the Authority of the Ministry of Finance dated 3.12.2010.

[15] The agreement stated that (i) the three optical fibres were to be owned and operated by the Government of Iceland, (ii) the US, acting on behalf of NATO, was to pay NATO's contribution toward construction expenses, up to a certain maximum amount, and (iii) the US, on behalf of NATO, should have continued uninterrupted right of use of the fibres "as long as the Defence Agreement of 1951 remains in effect, or for the life of the system, whichever occurs first".

force, the three fibres are a property of NATO and which NATO has the priority rights to use. Iceland's rights with regard to renting out the fibres are based on the status granted to Iceland by NATO as a "host nation – user nation" with regard to the management of NATO's assets in Iceland. Such rent is on the condition that NATO has at any time priority rights to take over the use of the fibres if such use becomes necessary. Furthermore, the income from the rental of the fibres may only be used for the operation and maintenance of NATO's assets."[16]

(43) The maintenance and operation of the fibres are a part of Iceland's obligations as a member of NATO and are not optional. The Icelandic authorities state that the complainant is not correct when claiming that since two of the fibres were in active use for the IADS system, the State needed to invest 250 million ISK to make one of the fibres available and free for use by the successful bidder, implying that the IADS was operated on a single fibre. According to the Icelandic authorities, the intention was initially to lease out two fibres. The cost assessment for making both fibres free for commercial use was 20-65 million ISK. As one of the two successful bidders withdrew its offer at a later stage, only one fibre will need to be set free. The cost was therefore much lower than initially estimated and well below the annual rent for the fibre.

(44) As to the question whether remuneration in the lease agreement is acceptable, the Icelandic authorities point out that the agreement relieves the Icelandic State of costs related to the operation and maintenance of the fibres. This was indeed among the principal aims of the Government with this measure.

(45) The use of an open invitation for tenders was considered the most appropriate means of establishing the price that a market investor would consider acceptable as remuneration for the use of the fibres which in turn would ensure that any agreement made would not be subsidised by the state.

(46) As a result of the successful call for tenders the measures do not in the opinion of the Icelandic authorities involve any type of state financing. On the contrary, the measures produce revenues for the state from the fibres which the state would otherwise have had to continue to maintain by use of state resources.

(47) Furthermore, the nature of the measure is to benefit competition and therefore it does not fulfil the condition of distorting competition, i.e. changing competition in the relevant market for the worse. For this lack of negative effect on competition, the measure cannot be considered to constitute state aid.

(48) While the complainant alleges that it was effectively excluded from the tender process as a result of the criteria used in assessing offers emphasising stimulation of competition, the Icelandic authorities are of the opinion that neither stimulation of competition nor the alleged effective exclusion of an undertaking holding a monopoly position on the market can as such lead to the conclusion that the measure distorts competition or confers an advantage upon an undertaking.

(49) Finally, in case the Authority would consider the measure to constitute state aid, such aid could in the view of the Icelandic authorities be considered compatible with Article 61(3) of

[16] Email of the Ministry for Foreign Affairs to the EFTA Surveillance Authority of 16 November 2012.

the EEA Agreement, by reference to the objectives of the measure, including to increase public broadband access in assisted areas. In this regard, the Icelandic authorities also invite the Authority to assess whether such aid should be considered to constitute the financing of services of general economic interest (SGEI), cf. chapter 2.2.2 of the Authority's Broadband Guidelines.

II. ASSESSMENT

1. The presence of state aid

(50) 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.*"

(51) It follows from this provision that in order for a measure to amount to state aid the following conditions must all be met:

- The measure must favour certain undertakings or the production of certain goods;
- it must be granted by the State or through State resources;
- it must distort or threaten to distort competition;
- it must affect or be capable of affecting trade between Contracting Parties to the EEA Agreement.

1.1 Favouring certain undertakings or the production of certain goods

(52) This condition is twofold. Firstly, the measures must confer an economic advantage upon a beneficiary, which must be an entity engaged in economic activity. Secondly, the measure must be selective in that it favours "certain undertakings or the production of certain goods".

(53) It is undisputed that the potential beneficiary of the measure would be Og fjarskipti[17], a telecommunication company offering a broad range of mobile, fixed-line and internet services to individuals and companies in Iceland. The measure is therefore selective and the potential beneficiary is an undertaking.

(54) The measure concerns the leasing out by the Icelandic State for a period of ten years of the use of one out of three optical fibres at the State's disposal. Whether the disposal of such publicly held assets confers an economic advantage on the lessee depends on whether or not the State obtained a market value for the transaction.

[17] While the complaint also refers to Fjarski ehf. as a beneficiary, the Icelandic authorities have confirmed that no contract was made with this company as it had withdrawn its offer. It is therefore clear that no aid has been granted to Fjarski ehf.

(55) While the present case does not concern the sale of land or buildings but the lease of different types of assets at the disposal of the Icelandic State, it is nevertheless logical that the principles of the Authority's guidelines on state aid elements in sales of land and buildings by public authorities[18] are considered to be relevant and applicable, *mutatis mutandis*, in this case. The guidelines distinguish between sale through an unconditional bidding procedure (section 2.1) and sale without an unconditional bidding procedure (section 2.2). In the former case it is stated that "[a] sale of land and buildings following a sufficiently well-published, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid, is *by definition* at market value and consequently does not contain state aid".

(56) This case does not concern procurement but disposal through lease of certain assets. The Icelandic authorities were therefore not obliged to apply public procurement rules in this instance, but nevertheless considered the use of an invitation for tenders to be the most appropriate means of ensuring that the transaction was transparent and free of state aid. The information from the Icelandic authorities indicates that normal public procurement rules were followed, that the invitation for tender was well-published and that participation was open to all parties meeting the general, financial and technical requirements of the competence of candidates.

(57) On the basis of the facts submitted by the Icelandic authorities it must be concluded that the bidding procedure was open and unconditional. Nevertheless, it is necessary to examine closer the complainant's allegation that the rent agreed upon in the agreement with Og fjarskipti was far below the State's costs and that the complainant was effectively excluded from the bidding procedure due to the criteria for selection of offers stipulated in the invitation for tender.

(58) According to the complainant, the Government sacrificed significant revenue by both effectively excluding Míla from the tender process and by demanding a low minimum price for the rent of the fibres. The Government was required to set the minimum price at a level sufficient to reclaim its own costs. Furthermore, according to the complainant, the Government "*should have been aware that there were only two "real" potential bidders for the fibers, and they would, knowing that themselves, only bid the minimum or an amount around that figure. As it happened, this was exactly the case.*"

(59) The Authority takes note, on the other hand, of the Icelandic authorities' submission that the Icelandic State did not bear any cost involved in the installation of the cables and that NATO has not requested the Icelandic State to bear any such costs on the basis of its "host-nation, user-nation" role. Information from the Icelandic authorities furthermore confirms that the cost to the Icelandic state of releasing one fibre for commercial use is below the minimum price specified in the invitation for tender as well as below the rental charge in the contract with Og fjarskipti. Attention must also be given to the fact that the contract includes a priority clause authorising the lessor to take over the fibre at any time if it considers this necessary in view of Iceland's commitments to NATO. While the rental charge paid to the state for the leased fibre may not fully reflect investment or renewal costs of the NATO fibres or for that matter similar costs of Míla or other operators of telecommunication cables in Iceland, the facts thus speak against the view expressed by the complainant that the rental charge paid by Og fjarskipti was below the costs of the Icelandic state. Therefore, there appears to have been no sacrifice of state resources.

[18] Available on the Authority's website at http://www.eftasurv.int/?1=1&showLinkID=15142&1=1

(60) However, the market value for the use of the fibre is determined in the first instance not on the basis of a cost calculation but by the price which market players are willing to pay for obtaining the right to use the infrastructure. Only if market signals are clearly distorted would there be a reason also to examine the rental price from the cost side, and in that context, it would be necessary to take into account the actual costs of the Icelandic State as submitted by the Icelandic authorities.

(61) What is known about the prices that market participants were willing to pay are the bids submitted in the tender, cf. Table 2 above. Five offers were received from four independent contestants, including two variant offers. Although the tender prescribed a minimum leasing price, the Authority has received no evidence to suggest that these contestants did not actively compete for the project. With the reservation mentioned in footnote 5 above regarding one of the four bidders, all bidders were deemed by Ríkiskaup and its consultant Mannvit to meet the general, financial and technical requirements of competence for the project. As set out in Table 2 above, the offer from Fjarski achieved the highest points under the selection criteria, but was later withdrawn. A contract was concluded with Og fjarskipti on the basis of its offer achieving the second highest points.

(62) Míla was not formally excluded from participating in the tender procedure, but did not make use of the opportunity available to it to submit a bid[19]. In this regard, Míla has stated that it did not have a motive to submit a bid as it already had sufficient capacity on its own fibres. Thus, as there was no bid from Míla, the question whether the state could have obtained a higher rental charge in case Míla had participated is purely hypothetical[20]. Speculation on what Míla's bid could have amounted to, had it made one, can have no significance in determining the market price. It therefore cannot be concluded that the state has made any sacrifice in terms of disposal of assets below market price or loss of revenue by concluding the agreement with Og fjarskipti. On this basis the Authority finds no reason to doubt that the

[19] It should be noted in this context that for Míla to make a successful bid, it was not necessary for the company to achieve the highest points under the selection criteria. According to the project description, it was the intention of the Icelandic authorities to lease out two of the three fibres to two unrelated parties. It would therefore have been sufficient for Míla to achieve the second highest points. The same provision in the tender also implies that even if Míla had submitted a successful bid, there would always have been another new entrant to the market.

[20] In case Míla had submitted a bid offering a higher rental charge than that offered by other contestants, it might have been necessary, in order to establish the market price, to pay attention, firstly, to the condition on the relevant market before the tender took place and Míla's special position as being the only market participant at the time (according to a market analysis report from the Icelandic Post- and Telecom Administration dated 23.2.2007, Iceland Telecom (Síminn; Míla's predecessor) was designated, under the relevant EEA electronic communication framework at the time, as having significant market power in the wholesale market for terminating segments of leased lines (market 13), the wholesale market for trunk segments of leased lines (market 14) and the retail market for the minimum set of leased lines (market 7), with market shares ranging between 70 and 85%). Secondly, it could be relevant to consider the reasons indicated by Míla for not submitting a bid, in particular that Míla's interest in leasing the fibre at issue was not driven by its need for increased capacity of the infrastructure. While according to the Authority's guidelines on state aid elements in sale of land and buildings, the market value normally corresponds to the best or only bid, there are nevertheless examples in case law to indicate that bids are not always comparable and that it may be necessary under certain circumstances for the Authority to give consideration to the special circumstances of the case and the motives and possible special interests of bidders. See Case T-244/08, Judgment of the General Court of 13.12.2011, *Konsum Nord ekonomisk förening v European Commission* [not yet reported] and EFTA Surveillance Authority Decision No. 157/12/COL of 9.5.2012 on the sale of land gnr 271/8 by Oppdal municipality, available at http://www.eftasurv.int/-media/decisions/157-12-COL.pdf. Such exceptions could apply to bidders in a dominant market position, who may be motivated to submit high bids in their attempt to prevent the entry of a new participant to the market.

outcome of the bidding procedure is to be regarded as representing the market price for the lease of the optical fibre.

(63) In one of its submissions to the Authority the complainant has briefly maintained that the debt relief of Teymi, the previous parent company of Vodafone (Og fjarskipti), in relation to its financial restructuring in 2009 amounted to state aid. As concerns this allegation the Authority notes the information provided by the Icelandic authorities that the agreement of Teymi on composition with its creditors was concluded following a formal procedure provided for in the Act on Bankruptcy, etc. No. 21/1991. Under those legal provisions, composition with creditors is sought and concluded under court protection, aiming *inter alia* to ensure equal and non-discriminatory treatment of the claims of creditors covered by the agreement. The Authority has received no information to indicate that the conduct of Landsbankinn as the creditor of Teymi differed from that of other creditors or that the measures at issue were imputable to the state. On this basis, and given that the Authority has received no further information to substantiate the complainant's claim in this regard, the Authority cannot see that this allegation has any bearing on the assessment in the present case regarding the leasing by the state of a NATO optical fibre to Og fjarskipti.

1.2 Measure granted by the State or through State resources and distortion of competition

(64) In light of the conclusion under point 1.1 above and since the conditions for existence of state aid under Article 61(1) EEA are cumulative, it is not necessary to examine whether other conditions set out therein are met. The Authority notes, however, the diverging views of the parties regarding the questions of state resources and distortion of competition.

(65) Whether a measure is granted through state resources depends *inter alia* on the ownership of the asset to be disposed of. The complainant and the Icelandic state have expressed different views regarding the ownership of the optical fibres at issue. While the complainant considers them to be publicly owned, the Icelandic state has underlined that the state ownership rights are restricted, that the state does not have the right of disposal of the assets and that the state is not obliged to pay for the fixed costs of the infrastructure as if it was the owner.

(66) The parties also disagree on the question of distortion of competition. The complainant is of the view that as a result of the tender procedure followed by the Icelandic authorities and the rental charge agreed with Og fjarskipti below full costs, competition in the relevant market was distorted. The Icelandic state, on the other hand, considers that a measure ensuring the entry of a new market participant to a market with only one player, cannot by definition involve distortion of competition, as there was no competition before the tender. Competition in the relevant market has therefore not changed for the worse as a result of the tender. On the contrary, competition has been promoted.

(67) The above questions, however, need not be resolved here. It has already been concluded above that the rental charge in the contract with Og fjarskipti, which was determined on the basis of an open tender, corresponds to the market price and therefore does not involve state aid.

2. Conclusion

(68) Based on the above considerations, the Authority concludes that the conditions for the presence of state aid within the meaning of Article 61(1) of the EEA Agreement are not met

with respect to the contract concluded on 1 February 2010 between the Icelandic Defence Agency and the telecommunication operator Og fjarskipti for the lease of one of NATO's optical fibres on the basis of the tender Project No. 14477 of the Ministry for Foreign Affairs.

HAS ADOPTED THIS DECISION:

Article 1

The lease by the Defence Agency of the Ministry for Foreign Affairs in Iceland with Og fjarskipti of 1 February 2010 for the use and operation of an optical fibre does not involve state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to the Republic of Iceland.

Article 3

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 21 November 2012.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member