

EFTA SURVEILLANCE AUTHORITY DECISION

of 25 January 2017

to close the case concerning the use of publicly owned land and natural resources by
electricity producers in Iceland

(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(1), Article 62(1)(b) and Protocol 26 thereof,

The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular Article 1(1) of Part I and Article 19(1) of Part II of Protocol 3,

Whereas:

I. FACTS

- (1) By letter dated 14 October 2008,¹ the Authority requested information from the Icelandic authorities in accordance with Article 17(1) of Part II of Protocol 3, regarding the use of land and natural resources by publicly-owned electricity producers in Iceland. The Icelandic authorities were asked to provide the Authority with all necessary information to assess the measure under the state aid rules of the EEA Agreement.
- (2) By letters dated 4 December 2009,² 20 April 2010,³ 18 October 2010,⁴ 28 February 2014,⁵ and 1 October 2014,⁶ the Icelandic authorities submitted the requested information.

¹ Document No 494355.

² Document No 539362.

³ Document No 554319.

⁴ Document No 573873.

⁵ Document No 701088.

⁶ Document No 724372.

- (3) By letter dated 5 October 2015,⁷ the Authority initiated the procedure provided for in Article 17(2) of Part II of Protocol 3 with respect to the use of land and natural resources by electricity producers in Iceland, thereby informing the Icelandic authorities of its preliminary view that the state aid scheme was incompatible with the functioning of the EEA Agreement.
- (4) By letter dated 30 November 2015,⁸ the Icelandic authorities responded to the “Article 17(2) letter”. The Authority and the Icelandic authorities discussed the case during a telephone conference on 16 February 2016.
- (5) On 20 April 2016, by Decision No 75/16/COL, the Authority concluded that the practice by the Icelandic authorities of granting undertakings generating electricity concessions for the use of public land, state-owned land and their natural resources without there being a clear legal requirement to pay a market-based remuneration and without any precise criteria for determining the market price based on a transparent methodology, constitutes an existing state aid scheme that is incompatible with the functioning of the EEA Agreement.⁹
- (6) In that decision, the Authority proposed that the Icelandic authorities should take the following appropriate measures to ensure that no aid is granted in the future when natural resources are transferred to electricity producers:
 - *First*, the Icelandic authorities should ensure that there is a legally binding obligation on all emanations of the Icelandic State (*i.e.* in particular on the central government, municipalities and publicly-owned companies) that any transfer of rights to utilise public land, state-owned land and their natural resources (public natural resources) for electricity generation takes place on market terms and that, consequently, any such transfer of rights is made conditional upon adequate remuneration to be paid.
 - *Second*, the Icelandic authorities should ensure that all operators, regardless of whether they are state-owned or not, receive equal treatment as regards the adequate remuneration for the use of public natural resources for electricity generation.
 - *Third*, the Icelandic authorities should ensure that a clear and transparent methodology to set the price for the right to utilise public natural resources for electricity generation is established.
 - *Fourth*, the Icelandic authorities should review all existing contracts to ensure that electricity producers pay an adequate remuneration for the remainder of those contracts.
- (7) In Article 2 of the operative part of Decision No 75/16/COL, the Authority recommended to the Icelandic authorities that they take the necessary legislative, administrative and other measures, in order to eliminate with effect from 1 January 2017 any incompatible aid resulting from the measures covered by the Decision.
- (8) By letter dated 19 May 2016,¹⁰ the Icelandic authorities formally accepted the Authority’s proposal for appropriate measures. The Icelandic authorities informed the Authority about the appointment of a working group tasked with implementing the appropriate measures. According to the Icelandic authorities, the working group would assess what legislative or

⁷ Document No 761219.

⁸ Document No 782469.

⁹ Decision No 75/16/COL of 20.4.2016 to propose appropriate measures regarding the use of publicly owned land and natural resources by electricity producers in Iceland, available on the Authority’s website: <http://www.eftasurv.int/media/esa-docs/physical/075-16-COL.pdf>.

¹⁰ Document No 805226.

administrative measures were required and subsequently propose a draft reform package, in order to implement the appropriate measures. The working group would also establish a sufficiently clear and transparent pricing methodology for the use of natural resources for electricity production and review existing contracts with electricity producers, in order to ensure that the companies pay an adequate remuneration for the remainder of those contracts. However, the Icelandic authorities also noted that due to unforeseen early elections in Iceland, it might not be possible to implement the required measures within the stipulated deadline (*i.e.* 1 January 2017).

- (9) The implementation of the appropriate measures was further discussed at a meeting between the Icelandic authorities and the Authority in Reykjavík on 31 May 2016 and was addressed in the Authority's follow-up letter dated 27 June 2016.¹¹ Further information was provided by the Icelandic authorities by email dated 26 October 2016.¹²
- (10) By letter dated 15 December 2016,¹³ the Icelandic authorities noted that due to delays in forming a government in Iceland, it would be impossible to implement the necessary legislative or regulatory amendments within the deadline prescribed in the Authority's Decision No 75/16/COL. However, the Icelandic authorities confirmed that the appropriate measures would at the latest be fully implemented by 30 June 2017. The Icelandic authorities also confirmed that the amendments to existing contracts would in any case enter into force no later than 1 January 2017, although the review would not be finalised at that time. The amended agreements will thus have a retroactive effect and the electricity producers will therefore pay a market price for the use of public natural resources from 1 January 2017. Moreover, any new contract entered into after 1 January 2017 will be on market terms. Thus the delay in implementing the appropriate measures will not result in the continued granting of incompatible state aid. The Icelandic authorities have also committed themselves to provide the Authority with reports and updates concerning the implementing of the appropriate measures.

II. ASSESSMENT

- (11) The Authority considers that the proposed changes to the scheme regarding the use of public natural resources by electricity producers in Iceland and the review and amendments of existing contracts with electricity producers will ensure the abolition of the existing system of aid. Moreover, the Authority takes note of the Icelandic authorities' commitment to implement the required measures by 30 June 2017 and amend the existing agreements with effect from 1 January 2017. The Icelandic authorities will thus ensure that all electricity producers pay adequate remuneration for the use of public natural resources for electricity generation from 1 January 2017.
- (12) On the basis of the above, the Authority concludes that there are no grounds for pursuing the matter further and has consequently decided to close the case.
- (13) The Icelandic authorities are reminded that from 1 January 2017, any new or continued granting of concessions for the use of public natural resources without requiring market based remuneration, may constitute unlawful incompatible state aid and may consequently be subject to recovery.¹⁴

¹¹ Document No 806762.

¹² Document No 825485.

¹³ Document No 831907.

¹⁴ See for example Joined Cases E-05/04, E-06/04, and E-07/04 *Fesil and Finn fjord and others v EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraph 164.

Has adopted this decision:

Article 1

The EFTA Surveillance Authority records Iceland's acceptance of the appropriate measures proposed by the Authority in its Decision No 75/16/COL regarding the use of publicly owned land and natural resources by electricity producers in Iceland.

Article 2

There are no longer grounds for pursuing the case concerning the use of publicly owned land and natural resources by electricity producers in Iceland. Therefore, the case is closed.

Article 3

This Decision is addressed to Iceland.

Article 4

Only the English language version of this decision is authentic.

Done in Brussels, on 25 January 2017.

For the EFTA Surveillance Authority

Sven Erik Svedman
President

Frank J. Büchel
College Member

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