

Case No: 74091  
Event No: 745529  
Decision No: 260/15/COL



EFTA SURVEILLANCE  
AUTHORITY

[Non-confidential version]

[The information in square brackets is covered by the obligation of professional secrecy]

## EFTA SURVEILLANCE AUTHORITY DECISION

of 30 June 2015

concerning alleged state aid granted to Síminn for the roll-out of broadband services in rural areas in Iceland

(Iceland)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to the Agreement on the European Economic Area (“EEA Agreement”), in particular to Article 61(3)(c) and Protocol 26,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“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 7(3) of Part II,

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

Whereas:

### I. FACTS

#### 1 Procedure

- (1) By letter dated 2 February 2011,<sup>2</sup> Og fjarskipti ehf. (hereinafter referred to as “Vodafone” or “the complainant”) lodged a complaint with the Authority concerning alleged unlawful state aid granted to Síminn for the roll-out of broadband networks in rural areas of Iceland.

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<sup>1</sup> EFTA Surveillance Authority Decision No 302/13/COL of 10.7.2013 *to initiate the formal investigation procedure into potential state aid granted to Síminn for the roll-out of broadband services in rural areas in Iceland*, OJ C 347, 28.11.2013, p. 11, and the EEA Supplement No 66, 28.11.2013, p. 8. Available at: <http://www.eftasurv.int/media/state-aid-notifications/State-aid-siminn.pdf>.

<sup>2</sup> Document No 585458.

- (2) Having received all the relevant information from the Icelandic authorities and having also received substantial information from the complainant and interested parties,<sup>3</sup> the Authority decided by Decision No 302/13/COL of 10 July 2013 to initiate the formal investigation procedure into potential state aid granted to Síminn for the roll-out of broadband services in rural areas in Iceland (“Decision No 302/13/COL” or “the opening decision”).
- (3) By letter dated 15 October 2013,<sup>4</sup> the Icelandic authorities submitted comments relating to the Authority’s opening decision. The Authority also received comments from an interested party (Hringiðan ehf.) by letter dated 18 July 2013.<sup>5</sup>
- (4) On 28 November 2013, Decision No 302/13/COL was published in the Official Journal of the European Union and in the EEA Supplement thereto. Interested parties were given one month to submit comments on the Authority’s opening decision.
- (5) By letter dated 18 December 2013,<sup>6</sup> the Authority received comments and documents from Nova ehf., an interested party. By letter dated 20 December 2013,<sup>7</sup> the Authority received comments and additional documents from Síminn. Síminn also submitted an expert report, dated 24 September 2013, which it had commissioned from Analysis Mason, a specialist consultancy on telecoms and media (“the AM Report”).<sup>8</sup> By letter dated 23 December 2013,<sup>9</sup> the Authority received comments and further documents from the complainant.
- (6) On 8 January 2014, the Authority, in accordance with Article 6(2) of Part II of Protocol 3, forwarded the comments received to the Icelandic authorities and invited them to present their observations.<sup>10</sup> The Icelandic authorities submitted their comments and observations by letter dated 28 February 2014.<sup>11</sup>
- (7) Having assessed the information, reports and comments submitted, the Authority, by letter dated 2 September 2014,<sup>12</sup> requested additional information and clarifications from the Icelandic authorities. By letter dated 17 October 2014,<sup>13</sup> the Icelandic authorities replied and provided the Authority with the requested information.
- (8) Finally, on 20 November 2014, the Authority, at the request of Síminn, participated in a meeting in Brussels with Síminn’s technical experts and external lawyers.

## 2 Description of the measure

### 2.1 Background

#### 2.1.1 *The role of the Telecommunications Fund*

- (9) The Telecommunications Fund (“the Fund”) was established by Act No 132/2005, and its role, as established by statute, is to promote development in the field of telecommunications

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<sup>3</sup> Reference is made to letters from the Icelandic authorities dated 28 April 2011 (Document No 596157), 17 May 2011 (Document No 598419), 22 June 2011 (Document No 601861) and 11 March 2013 (Document No 665601) as well as letters from the complainant dated 23 May 2012 (Document No 657203) and 10 May 2013 (Document No 672303) and e-mails from an interested party dated 2 October 2011 (Document No 614576) and 19 November 2011 (Documents No 615746 and 615747).

<sup>4</sup> Document No 687314.

<sup>5</sup> Document No 679306.

<sup>6</sup> Document No 694292.

<sup>7</sup> Document No 694234.

<sup>8</sup> Document No 694237.

<sup>9</sup> Document No 694646.

<sup>10</sup> Document No 694762.

<sup>11</sup> Document No 701089.

<sup>12</sup> Document No 720418.

<sup>13</sup> Document No 729141.

in Iceland as described in the official Telecommunications Strategy (“the Strategy”) approved by the Icelandic Parliament, Althingi.<sup>14</sup> Article 2 of this act states that the Fund is established to oversee the allocation of funds to projects pertaining to the roll-out of electronic communications infrastructure, thus increasing security and competitiveness of the society in the field of electronic communications and other projects entailed in the Strategy, provided that such projects are not likely to be executed on market terms.

- (10) The Fund is financed by a statutory contribution from the Icelandic Treasury. The Fund is administered by the Ministry of the Interior, which appoints the members of the Fund’s board for a five-year term.
- (11) The Fund has worked on four key priorities stipulated in the Strategy, of which the roll-out of broadband services was the last one to be implemented. According to the Icelandic authorities, an open tender procedure was used in all of the projects.

### 2.1.2 The mapping and coverage analysis

- (12) In early 2007, the Fund hired a branch of the Farmer’s Association to verify census information in rural areas, especially the most rural ones.<sup>15</sup> This work resulted in a comprehensive and current overview of buildings that could potentially form part of the project of the roll-out of broadband services in rural areas in Iceland (see a further description in paragraph (16) below).
- (13) In February 2007 the Fund called for information on current market areas from broadband service providers<sup>16</sup> as a first step in mapping current and future broadband coverage. The aim of this exercise was to identify market failures, by distinguishing between “grey”, “black” and “white” areas in remote regions in Iceland.<sup>17</sup> A public advertisement, placed in the newspaper Morgunblaðið, called for information on all current broadband service areas (*i.e.* areas that had a continuously available (not dial-up) internet access of at least 512kb/s for a reasonable fixed monthly price), as well as planned areas (not yet serviced) that would be functional by June 2008.
- (14) The Fund received information on market areas in various forms from several broadband service providers and individuals.<sup>18</sup> With the coverage areas in place, the next step was to input GPS coordinates for all residences outside known areas of ADSL coverage. The resulting multi-layered map of residences outside of all current and planned (total) broadband coverage areas was sent to the participating broadband service providers for a further detailed review. This led to considerable updates to the map made on the basis of the service providers’ comparisons of the map with their customer databases. After this work was completed, the Fund sent to each of the 78 municipalities in Iceland a list of

<sup>14</sup> See Act No 132/2005 on the Telecommunication Fund of 20.12.2005.

<sup>15</sup> They did so by comparing the official legal residence information to information from municipalities, their own databases of farmers and by asking local people with up-to-date knowledge, and in some instances even calling particular homes or neighbors’ homes, when in doubt.

<sup>16</sup> Also referred to interchangeably herein as “service providers”, “internet service providers”, or “ISPs”.

<sup>17</sup> *Black areas* are those in which there are or there will be in the near future at least two basic broadband networks of different operators and broadband services are provided under competitive conditions. *Grey areas* are areas in which one network operator is present and another network is unlikely to be developed in the near future. *White areas* are areas in which there is no broadband infrastructure and where such infrastructure is unlikely to be developed in the near future. For further clarification, see the Authority’s guidelines on the rapid deployment of broadband networks, available online at: <http://www.eftasurv.int/media/state-aid-guidelines/Part-IV---Application-of-state-aid-rules-in-relation-to-rapid-deployment-of-broadband-networks.pdf> and paragraphs (159) to (164) below.

<sup>18</sup> The Fund provided free of charge technical assistance for all the service providers that did not have the technical capability to provide accurate shape-files that could be used in ARCis-GIS applications.

buildings outside of service areas and a print-out of the updated broadband coverage map for that municipality. Each municipality then reviewed the “white” areas on the map for missing buildings, or for buildings which did not qualify for the project. In order for a building to qualify, it had to be an official permanent year-round residence and/or place of work of at least one person.

- (15) The Fund’s mapping and coverage analysis resulted in a precise list of buildings to be included in the project. The initial scope of the project was 1 118 “white” buildings, which were individually identified by their GPS coordinates.

### 2.1.3 The tender procedure and selection of the successful bidder

- (16) In February 2008, Ríkiskaup, the State Trading Centre (“STC”), on behalf of the Fund, published a call for tender for the project “Háhraðanettengingar til allra landsmanna”. This project consisted of the roll-out of broadband services in rural areas where the Icelandic authorities had identified a market failure, on the basis that it was deemed unlikely that private operators would roll out services in those areas on market terms. The project covered the 1 118 “white” buildings identified by the Fund in its research.<sup>19</sup>

- (17) Following the publication of the tender, the STC engaged in several discussions with interested bidders, resulting in a prolongation of the deadline to submit tenders until 4 September 2008. Five tenders were received by the STC, which varied in terms of price and the technical solutions proposed. Síminn submitted two tender offers: the lowest-priced tender at the amount of ISK 379 million and the highest (for the highest average download speed offered) in the amount of ISK 5 billion.

- (18) According to the tender description the purpose of the award criteria used was to identify the most economically advantageous tender. Four evaluation criteria were used: (i) total price (50%); (ii) build-out speed (15%); (iii) download speed (25%), and (iv) 2G GSM (optional) (10%).<sup>20</sup> The STC received five valid offers (and one invalid offer by Hringiðan ehf., which failed to provide a valid bank guarantee) by 4 September 2008. The valid offers received were as follows:<sup>21</sup>

<u>Bidders, tender – 14121</u>	<u>ISK</u>	<u>Project time</u>	<u>Avg. Mb/s</u>	<u>GSM</u>	
	<u>Total price:</u>	<u>Months:</u>	<u>Downl. speed:</u>	<u>Optional:</u>	<u>Points:</u>
Síminn hf.	379.000.000 kr.	12	6,0	Yes	95
Nordisk Mobile Island ehf	974.864.503 kr.	12	3,0	Yes	NA
Vodafone	1.858.339.001 kr.	15	6,2	Yes	52
Vodafone	2.256.549.333 kr.	17	6,5	Yes	49
Síminn hf.	5.000.000.000 kr.	22	12,0	Yes	39

- (19) As the first offer from Síminn received the highest number of points (95 points) under the above-mentioned criteria the STC entered into negotiations with Síminn.<sup>22</sup> Furthermore, the STC requested that Síminn participate in several explanatory meetings; such meetings being standard procedure after the opening of a tender.

<sup>19</sup> Document No 665605.

<sup>20</sup> The provision of access to voice services was optional for potential bidders in respect of buildings that would not receive this service on market terms and was confined to the provision of 2G GSM voice services only. 2G refers to second generation mobile technology, while GSM (Global System for Mobile Communications) refers to the standard on which it is based.

<sup>21</sup> See letter from the Icelandic authorities to the Authority, dated 22.6.2011 (Document No 601861).

<sup>22</sup> Ibid.

#### 2.1.4 The expansion of the roll out area

- (20) In early December 2008, Póst- og fjarskiptastofnun, the Post and Telecom Administration in Iceland (“the PTA”) received a request from a service provider, Wireless Broadband Systems (“WBS”), asking to be deregistered as a telecommunications provider in Iceland. WBS had previously participated in the Fund’s mapping and coverage analysis and had informed the STC of its coverage plans during the period leading up to the STC’s call for tender. The departure of WBS from the market and the subsequent withdrawal of its coverage plans resulted in a substantial change to the list of buildings which neither had, nor would receive, broadband coverage in the near future on market terms. When the service provider’s planned coverage area was withdrawn from the total cumulative coverage map, 670 additional “white” buildings appeared, spread across the country. These buildings were considered by the Fund to become part of the scope of the new telecommunications policy.
- (21) The Fund requested information from the STC on whether it was possible to increase the scope of the project as part of the on-going tender procedure. According to the Icelandic authorities, the STC responded on 7 January 2009, taking the view that a certain amount of expansion could fit within the tender and that such an expansion was in line with the regulatory framework on public procurement.
- (22) To establish that existing or new providers had no intentions of increasing their service areas by including any of the 670 additional “white” buildings, the Fund requested that the STC call out again for any plans to offer services for these 670 buildings. On 23 January 2009, the STC published an announcement in the newspaper Morgunblaðið seeking information from market players on roll-out plans for broadband services in additional areas not previously included in the tender.<sup>23</sup> According to the Icelandic authorities, this was in line with the previous methodology used by STC when it made its initial call for information on service areas. By inviting information *via* an advertisement, the request for information was not exclusive to those service providers that had previously handed in their tender offers but was intended to reach all service providers.
- (23) The STC did not receive any additional or new plans for servicing the 670 identified buildings. The STC subsequently took the decision to consider these additional buildings as falling within the scope of the project. It therefore sought to revise the contractual agreement being negotiated with Síminn so as to include the additional buildings.

## 2.2 The Agreement between the Telecommunications Fund and Síminn

### 2.2.1 General

- (24) On 25 February 2009, the Fund (the purchaser) and Síminn (the seller) entered into an Agreement concerning the roll-out of broadband services in rural areas in Iceland (“the Agreement”). According to the Agreement, the seller was to build out a high-speed network and broadband services in areas which previously did not have access to such services. The network and the service was to extend to all homes where at least one person was registered and had residence all year round, and to businesses which were operational all year round. The Agreement covered a total of 1 788 buildings: the 1 118 buildings originally identified

<sup>23</sup> According to the Icelandic authorities the publication of the announcement also took account of the provisions of Act No 84/2007 on Public Procurement, in order to ensure the equal treatment of companies during public procurement. The Act implements into Icelandic legislation the Act referred to at point 2 of Annex XVI to the EEA Agreement, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ No L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18 (“The Procurement Directive” or “Directive 2004/18/EC”). The STC advertises all their projects/tenders in this particular section of the newspaper concerned.

in the tender documents, plus the additional 670 buildings added during the course of the negotiations. After the completion of the roll-out, the Agreement provided that the seller would be the owner of the network.

### 2.2.2 *The contract period and the contract amount*

- (25) According to Article 4 of the Agreement, the contract period extended from the date of signature until 1 March 2014. If both parties agreed, the period could be extended for up to two years. However, according to Article 10 of the Agreement, the period for the construction of the network formally commenced on 1 March 2009 and lasted until 1 March 2011. The Fund allowed for an extended roll-out period (18 months) because of the increase in the scope of the project. The Fund agreed to this on the condition that the roll-out for at least 1 118 buildings would be finished in the first 12 months in accordance with the tender offer from Síminn.
- (26) For the roll-out of the network and the service, the purchaser was to pay a total of ISK 606.128.801. The price for the increase in scope of 670 buildings was agreed upon, on the basis of the average unit price offered initially by Síminn, multiplied by the number of new buildings. Therefore, the payment to Síminn increased from ISK 379 million to ISK 606 million. The purchaser was to pay 70% of the total amount to the seller at the signing of the Agreement, a further 20% once the network had become operational and the final 10% after a three-month trial period had passed.<sup>24</sup>
- (27) The payments were indexed on the basis of the exchange rate with a foreign currency instead of the general consumer price index, as was originally intended. This choice of indexation was, according to the Icelandic authorities, the result of the unusual economic conditions, and of the uncertainty resulting from the financial crisis.<sup>25</sup> The foreign currency used was the Danish krone (DKK) as it stood on 3 September 2008 (1 DKK = 16,513 ISK).

### 2.2.3 *Technical requirements*

- (28) According to Article 2.1 of the tender description, the project was technologically neutral and there were no particular specifications on how the network should be constructed or which technological solution should be used.<sup>26</sup>
- (29) In addition to providing high-speed internet access to the buildings, the bidders were also encouraged to provide mobile voice services (2G GSM).<sup>27</sup> This service was to fulfil the criteria set out in the PTA's telecommunications plan (i. fjarskiptaáætlun) for 2005-2010 which included voice services, roaming possibilities and the provision of user equipment at favourable prices. The provision of mobile 2G GSM services accounted for 10% in the tender criteria.

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<sup>24</sup> See Article 16 of the Agreement.

<sup>25</sup> Document No 687314.

<sup>26</sup> The description of the technical requirements of the project are found in the tender description, which is marked as Annex I to the Agreement. The Annexes form part of the Agreement and are binding upon the parties.

<sup>27</sup> See Article 1.2.3.1 of Annex I to the Agreement and footnote 20 of this Decision.

- (30) The technical solution offered by Síminn was based on 4 different technologies: ADSL,<sup>28</sup> UMTS;<sup>29</sup> Wi-Fi,<sup>30</sup> and satellite. As it turned out, after construction of the network was completed, 55% of the buildings were connected with UMTS (3G fixed wireless), 41% with ADSL and 4% with satellite/ Wi-Fi.

#### 2.2.4 Access requirements

- (31) According to Article 2.2.13 of Annex I to the Agreement, the network was to be constructed so as to allow for access by other Internet Service Providers (“ISPs”) on a wholesale basis. Those ISPs should be able to buy on request the basic service from Síminn at wholesale prices, and should be permitted to deliver services over the network to their retail customers. Access was to be granted by convenient means (such as through access to the Broadband Remote Access Server (“BRAS”)). All ISPs were to be granted equal service and equal access to the network, irrespective of their connection to the seller.
- (32) In Annex II to the Agreement, entitled “*Enquiries and answers 1-22 during the tender period, new location lists, clarifications to the tender documents and minutes of the tender presentation.*”, there are further clarifications concerning access requirements. With regard to wholesale access, four options are outlined. They are as follows:<sup>31</sup>

Option 1: The seller (Síminn) sets up an xDSL connection for users and delivers bitstream to purchasers behind the DSLAM equipment. Purchasers (the ISPs) handle the trunk line connection from the DSLAM via ATM and/or IP network to the service centre. This gives purchasers greater control over the quality of the service they sell, but it requires a substantial investment on their part.

Option 2: The seller provides an xDSL connection from an ATM/IP network over a trunk line connection from the DSLAM. In this instance, the purchaser can control the quality of the transmission on the ATM network to a certain degree. Purchasers operate their own BRAS and can therefore control the technological variables of the equipment and maintain information on users.

Option 3: In this instance, bitstream is delivered to the purchaser via an IP network operated by the seller, who also operates the DSLAM and is responsible for the quality of the service. It is conceivable that the purchaser could negotiate for various quality terms for his customers.

Option 4: This is a typical example of Internet subscription resale. The Internet connection that the seller sells to the purchaser is the same as that which it sells to its own retail customers. The purchaser operates no part of the network and is only responsible for selling the service unchanged. It does, however, have the option of sending its customers a single invoice for all services provided via high-speed connection.

<sup>28</sup> ADSL stands for Asymmetric Digital Subscriber Line. Digital Subscriber Line (DSL) technologies use traditional (fixed) copper telephony networks to deliver digital broadband signals.

<sup>29</sup> UMTS stands for Universal Mobile Telecommunications System which refers to third generation (3G) mobile technology that can deliver higher capacity data/broadband services than under second generation (2G) mobile technology. 3G can be used for applications such as mobile voice telephony, SMS and mobile Internet access services, as well as for fixed wireless Internet access.

<sup>30</sup> Wi-Fi refers to the use of local radio links for the transmission of voice and data communications to individual homes or business premises.

<sup>31</sup> Taken from the English version of the PTA’s analysis of Market 12, available online at: <http://www.pfs.is/upload/files/Market%2012%20-%20Annex%20A%20-%20Analysis%20of%20market.Public.pdf>.

- (33) According to Annex II to the Agreement, Síminn is free to offer Options 1-4, but is obliged to at least offer Option 3 in all instances where ADSL technology is used in the project.<sup>32</sup> Furthermore, it is expressly stated that Síminn must follow the PTA's decisions and rules in this regard.<sup>33</sup>
- (34) Where UMTS technology is used in the project, Síminn is only obliged to follow Option 4.<sup>34</sup> That option entails the supply of user equipment and installation by Síminn in all instances, regardless of who the retailer is. Síminn is also obliged to handle customer and maintenance services. According to the Icelandic authorities, the main reason for this arrangement is that Síminn claims that it is necessary for it to have full access and control of the UMTS network end-to-end, including all the user equipment, in order to guarantee that the quality and service level are in line with the tender documents. Conversely, the Fund allowed for open access to be excluded with regard to satellite and Wi-Fi connections, on the grounds that it would be very difficult and impractical to implement such access.<sup>35</sup>
- (35) In Annex 10 to the Agreement, there are standardized resale agreements (endursölusamningar) between Síminn and ISP resellers for the resale of UMTS-high-speed services and ADSL services. For Option 4, these standard agreements include standard minimum discounts based on speed, as follows:<sup>36</sup>

UMTS 1 Mb/s = 10%  
 UMTS 2 Mb/s = 7,5%  
 UMTS >2Mb/s = 5%

- (36) For ADSL the following minimum discounts apply in respect of option 4 access:

ADSL 1000 = 5%  
 ADSL 2000 = 5%  
 ADSL 4000/8000 = 7,5%  
 ADSL 6000/12000 = 10%

As regards wholesale access to ADSL according to options 1-3, the ISP reseller/retailer would receive a minimum discount of 35% from Síminn's retail price. According to the Icelandic authorities, this discount was determined in line with the PTA Decision No. 8/2008 of 18.4.2008.<sup>37</sup>

- (37) According to a note from the Fund dated 14 August 2009,<sup>38</sup> concerning the organisation of access options in the Agreement, resale access is only available with regard to UMTS

<sup>32</sup> This represents 41% of the whole project.

<sup>33</sup> In Annex II to the Agreement reference is made to PTA Decision No 8/2008 of 18.4.2008, on the designation of undertakings with significant market power and imposition of obligations in the market for wholesale broadband access (market 12) (see also footnote 123 below). Furthermore, pursuant to the PTA Decision No. 26/2007, Míla, a company associated with Síminn, was designated with significant market power in the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services. Míla is consequently subject to a range of wholesale access obligations, such as an obligation to comply with reasonable requests for unbundled wholesale access to local loops, including the copper lines and related services. However, due *inter alia* to the economics of providing broadband services via unbundled local loops in remote rural areas a material demand for this wholesale access service may nevertheless be unlikely.

<sup>34</sup> This represents 55% of the whole project.

<sup>35</sup> This represents 4% of the whole project.

<sup>36</sup> These are discounts off Síminn's retail price.

<sup>37</sup> Available online at: [http://www.pfs.is/library/Skrar/akv.-og-urskurdir/akvardanir-PFS/Akv\\_nr.8\\_2008\\_M%2012.pdf](http://www.pfs.is/library/Skrar/akv.-og-urskurdir/akvardanir-PFS/Akv_nr.8_2008_M%2012.pdf).

<sup>38</sup> Document No 615746.



connections. Such connections do not benefit from more infrastructure-based wholesale access options. According to the Fund, the above discounts should therefore apply if another ISP wants resale access to Síminn's network.

- (38) For a more detailed description of the measure, reference is made to the Authority's Decision No 302/13/COL.<sup>39</sup>

### 3 Grounds for initiating the formal investigation procedure

- (39) In Decision No 302/13/COL, the Authority assessed preliminarily whether the Agreement between the Telecommunications Fund and Síminn for the roll-out of broadband networks in rural areas of Iceland could constitute state aid and, if so, whether that state aid could be considered compatible with the functioning of the EEA Agreement.
- (40) According to the Icelandic authorities the measure did not constitute state aid as the conditions of Article 61(1) of the EEA Agreement were not met. In addition, the Icelandic authorities were of the view that the contribution could be characterised as the funding of a public service and that the criteria of the "Altmark test" were fulfilled. In case the Authority would consider the measure to constitute state aid, the Icelandic authorities submitted that such aid could be considered compatible with Article 61(3)(c) of the EEA Agreement, having regard to the objectives of the measure, including to increase public broadband access in assisted areas.
- (41) However, in the preliminary view of the Authority, the Agreement between the Fund and Síminn was considered to involve state aid within the meaning of Article 61(1) of the EEA Agreement. The following aspects were identified in Decision No 302/13/COL:
- (i) The Authority noted that the Fund was established by law and owned by the Icelandic State which allocates resources to the Fund through the annual State budget, the measure thus appeared to be granted through State resources. As Síminn is Iceland's biggest telecoms operator, any potential aid involved in the agreement had been conferred upon an undertaking.
  - (ii) The Authority also found that the public financing of the project had provided Síminn with an economic advantage that would normally be covered by its budget. Although a competitive tender procedure tends to reduce the amount of financial support required, it can be discussed whether the compensation for the additional buildings was established through a competitive tender, or whether it was in fact determined after Síminn's bid was chosen. Hence, the preliminary assessment of the Authority showed that an economic advantage could not be excluded.
  - (iii) Furthermore, since Síminn was the only recipient of the state funds, it was the Authority's preliminary view that the measure appeared to be selective.
  - (iv) Finally, the Authority concluded that involvement in deploying infrastructure to provide electronic communications services strengthens the position of the selected supplier of the network in relation to its competitors. In general, the markets for electronic communications services are open to trade and competition between operators and service providers across the EEA. Therefore, in the preliminary view of

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<sup>39</sup> EFTA Surveillance Authority Decision No 302/13/COL of 10.7.2013 *to initiate the formal investigation procedure into potential state aid granted to Síminn for the roll-out of broadband in rural areas in Iceland*, OJ C 347, 28.11.2013, p. 11, and the EEA Supplement No 66, 28.11.2013, p. 8. Available at: <http://www.eftasurv.int/media/state-aid-notifications/State-aid-siminn.pdf>.

the Authority, the measure was deemed to threaten to distort competition and affect trade within the EEA

- (42) The Authority noted that support for broadband network deployment in rural and underserved areas of Iceland appeared to address well-defined objectives of common interest, was an appropriate instrument to achieve the set objectives, and provided the chosen supplier with an investment incentive. However, due to the scope of the changes to the Agreement, the Authority came to the preliminary conclusion that the procurement process might not be considered as an open and non-discriminatory tender within the meaning of the Authority's 2013 Guidelines on the Application of the State Aid Rules in relation to the Rapid Deployment of Broadband Networks ("the Broadband Guidelines").<sup>40</sup> The Authority also expressed doubts as to whether Síminn had been obliged to provide sufficient wholesale access to both the UMTS and ADSL parts of the network. The lack of a sufficient wholesale access obligation would give Síminn economic and competitive advantages. Hence, the measure appeared not to be in line with the principles of proportionality and limitation of the distortion of competition under the balancing test.
- (43) Consequently, following its preliminary assessment, the Authority had doubts whether the financing of the roll-out of broadband services in rural areas of Iceland could be found to be compatible with Article 61(3)(c) of the EEA Agreement.

## 4 Comments by the Icelandic authorities

### 4.1 The presence of state aid

- (44) As previously mentioned the Icelandic authorities submitted comments, relating to the Authority's opening decision, by letter dated 15 October 2013.<sup>41</sup> The Icelandic authorities do not consider the payments made to Síminn, under the terms of the Agreement, to involve state aid, as they take the view that the conditions of Article 61(1) of the EEA Agreement are not met since the authorities acted in line with the Market Economy Investor Principle ("MEIP"). Furthermore, the Icelandic authorities are of the view that these payments can be characterised as the funding of a public service; that the four cumulative criteria of the "Altmark test" are fulfilled, and that the measure for that reason does not constitute state aid.
- (45) The Icelandic authorities submit that the award of the Agreement in question did not confer any economic advantage on Síminn that went beyond market conditions. According to the Icelandic authorities, the use of a public tender procedure, in accordance with the framework on public procurement, has been considered sufficient to presume that no state aid is provided to the economic operator selected in the procedure, as market price is guaranteed.<sup>42</sup> Therefore, according to the Icelandic authorities, a fair market price creates a presumption that no state aid has been granted to Síminn.<sup>43</sup>
- (46) With regard to the changes in the Agreement with Síminn due to the expansion of the roll out area, the Icelandic authorities submit that according to the European Commission there is no state aid involved in changes to such a contract, if the overall terms are no more favourable to the provider than the terms of the original contract. Moreover, even if the terms are to be considered more favourable because of the change, state aid will not exist

<sup>40</sup> Available online at: <http://www.eftasurv.int/media/state-aid-guidelines/Part-IV---Application-of-state-aid-rules-in-relation-to-rapid-deployment-of-broadband-networks.pdf>.

<sup>41</sup> Document No 687314.

<sup>42</sup> They refer, in this regard, to Commission Decision No 264/2002 *London Underground*, OJ C 309, 12.12.2002, p. 15, paragraph 79, and Commission Decision SA.22843 *on state aid implemented by France in favour of Société Nationale Maritime Corse-Méditerranée*, OJ L 220, 17.8.2013, p. 20.

<sup>43</sup> They refer, in this regard, to Commission Decision No 46/2007 *Welsh Public Sector Network Scheme*, OJ C 157, 10.7.2007, p. 2.

when the procuring entity acts as a private contractor would have acted in pursuit of its commercial interests. According to the Icelandic authorities, anyone interested in partaking in the procurement procedure was free to submit a tender, since tenders from all interested parties were permitted as well as being advertised as such. The fact that in the end, Síminn, which had the lowest and most economically advantageous offer, was chosen to perform the project, therefore cannot automatically entail the favouring of a certain undertaking.

- (47) Furthermore, the Icelandic authorities emphasise that a broadband service is in general a service of general economic interest (“SGEI”).<sup>44</sup> The Icelandic authorities note that they contacted private operators and published an advertisement in order to establish whether any market investor was willing to invest in the infrastructure. Since no-one declared any interest in providing the service, the Icelandic authorities concluded that these areas did indeed suffer from a market failure and would not get high-speed internet connections without the assistance from the Fund. According to the Icelandic authorities, the provision of adequate broadband coverage to these rural areas of Iceland, where no other operators are performing or were interested in investing, should be characterised as an SGEI since the deployment of broadband to the buildings concerned was of great importance to both the areas concerned and the society as a whole.
- (48) According to the Icelandic authorities, the nature and scope of the service were clearly defined in the tender process and the subsequent Agreement with Síminn (*i.e.* to install an infrastructure to enable certain buildings to gain a high-speed internet connection). The Icelandic authorities state that Síminn, in this particular instance, was by signing the Agreement formally entrusted with the provision and discharge of this obligation.
- (49) The Icelandic authorities note that the aforementioned Agreement established the parameters of the compensation on the basis of the tender documents. The Agreement clearly establishes the compensation to be received by Síminn for the discharge of the service in a transparent manner. The compensation established by the Agreement has not been amended nor does it allow any amendments to be made in favour of Síminn.
- (50) Furthermore, the Icelandic authorities emphasise that the actual contribution is substantially lower than the cost estimated by the Fund and its advisors and no more is paid than what is necessary to complete the project. The fact that the actual cost of the project is substantially lower than the estimated cost for a similar network solution, is evidence that the Icelandic authorities did take measures to prevent overcompensation.
- (51) According to the Icelandic authorities, the negotiations after Síminn had been chosen were directly based on the tender procedure and were as such an extension of the procedure. The payments to Síminn are made in accordance with a predetermined payment schedule linked to the progress of the project, which avoids the possibility of overcompensation. Pursuant to Article 19 of the Agreement, Síminn presented a bank guarantee from New Kaupþing bank, dated 17 February 2009, which represents a claw-back mechanism, in order to avoid over-compensation.<sup>45</sup> Moreover, the Agreement stipulates a strict arrangement of payments in accordance with the progress of the project, which entails that payments are up to a point subject to actual progress of system build-up and customer take-up, as laid out in Article 16 of the Agreement. Lastly, a penalty clause is found in Article 11 of the Agreement, where

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<sup>44</sup> They refer, in this regard, to Commission Decision N 196/2010 *Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection (EstWin project)*, OJ C 60, 25.2.2011, p. 3.

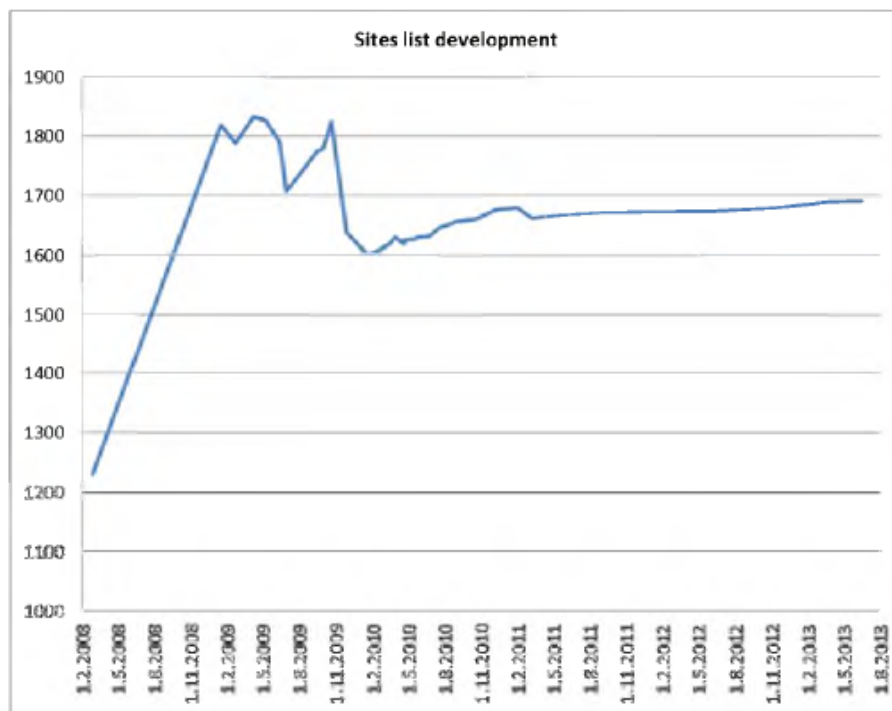
<sup>45</sup> Document No 665602.

Síminn is to pay compensation in case of delays, as well as a clause on failure to comply in Article 13 of the Agreement.

- (52) Finally, the Icelandic authorities submit that even if the Authority would conclude that the extension of scope and compensation of the project was not fully in line with the procurement framework, than the open tender procedure, along with the evaluation performed by independent advisors, should be considered as an appropriate benchmark for compensation. Together they should at least be considered as a strong indication of the costs which a typical, well-run undertaking in the relevant market would have incurred. As the compensation to Síminn was lower than that benchmark, the last criterion of the *Altmark* test should be considered fulfilled. The Icelandic authorities would also like to reiterate that even with the changes, the offer from Síminn is still by far the most economically advantageous offer.

#### **4.2 The public procurement procedure**

- (53) According to the Icelandic authorities the procurement procedure was in line with the EEA state aid rules and it fully ensured the equal treatment of all the economic operators on the market. The Icelandic authorities also note that the adaptations which were made regarding the project during the negotiations with Síminn did not violate the fundamental rules of equality and transparency, principally in the light of the built in flexibility in the project's scope.
- (54) When the planned coverage area of WBS was withdrawn from the cumulative coverage map, 670 additional "white" buildings appeared. When the Fund requested that the STC call out again for plans to offer services for these 670 buildings, this was done by means of an advertisement and not by direct contact exclusively with those few service providers that had previously handed in their tender offers. This was the method used when initially calling for information on service areas. The Icelandic authorities emphasise that bilateral communications with the parties which had submitted previous tenders were held to be inadequate.
- (55) The Icelandic authorities submit that the changes made to the scope and compensation of the Agreement were necessary to include the 670 additional "white" buildings and the resulting compensation. The price for the additional buildings was the average unit price in the original tender bid from Síminn, which was chosen in an open procedure as the most economically advantageous offer. The compensation for the additional buildings should thus be considered as an extension of the original tender, also on market terms. According to the Icelandic authorities, this is an indication of the continuity of the procedure rather than evidence that an essential term of the Agreement had been renegotiated.



- (56) As previously noted, the original scope of the project was to be at least 1,119 buildings. According to the Icelandic authorities it is the nature of such projects that the list continually changes throughout the project period. As can be seen from the chart above, there have been continuous fluctuations in the list from 2008 to 2011.<sup>46</sup> It is not until the year 2011 that one can see a stabilizing point in the project, still even then there are changes to the list that continue to this day. Considering these inevitable variables, the only way, according to the Icelandic authorities, to insure transparency regarding remuneration was to commit to an average unit-price.
- (57) The Fund also considered that a new procurement procedure would lead to an unnecessary economic inconvenience for the Icelandic authorities with overwhelming likelihood of the same or even more unfavourable result, as well as delaying the roll-out of broadband services, for months or even years. The Fund further believed that the compensation for the additional buildings and the project in whole could be considered very favourable for the Icelandic authorities since it was the same as in the original tender.
- (58) In September 2008, the Fund asked its advisors (Mannvit hf.) for a cost estimate for the buildings that only WBS had intended to service. This cost estimate, dated 8 October 2008,<sup>47</sup> estimates the potential bidding price to be ISK 410.000.000 to 820.000.000 for approximately 750 “WBS buildings” (an estimate later adjusted to 670 identified “white” buildings). That calculates to an average price per building from ISK 546.667 (simple system) to ISK 1.093.333 (advanced system).
- (59) In light of the above mentioned considerations, the average price for the additional 670 buildings was agreed upon between the Fund and Síminn using the average unit price offered initially by Síminn multiplied by the number of new buildings, *i.e.* ISK 338.998 per building. Taking into account the indexation of the agreed amount, the average unit price for the total 1 788 buildings is ISK 470.191. The Icelandic authorities consider this a

<sup>46</sup> Chart provided by the Icelandic authorities (Document No 687314).

<sup>47</sup> Document No 687320.

favourable result, taking into account the extreme economic conditions at the time and the costs estimated earlier by an independent advisor.

- (60) According to the Icelandic authorities, Síminn has expressed its view that overall, the company did not enjoy economies of scale from the expansion of the project's scope. Even though it may have been the case in certain areas, the often times scattered placement and circumstances of the "white" buildings meant that overall that was not the case. For most of the expansion Síminn had to redesign great parts of the project, although some of the additional buildings were in the same areas as buildings in the original tender, *i.e.* relocation of transmitters and antennas.
- (61) Regarding the indexing of the payments mostly to DKK and partly to the consumer and wages price indexes, the Icelandic authorities point to the extreme situation which prevailed in the autumn of 2008 and the difficulties facing the Icelandic economy. During the negotiations between Síminn and the Icelandic authorities the economic environment in Iceland changed drastically. According to the Icelandic authorities, the indexation of the Agreement amount with DKK was due to these exceptional and unforeseeable events, especially given the fact that the project involved a substantial purchase of equipment in foreign currency. At the time it was clear that the fluctuation of the ISK would render all of Síminn's preconditions for entering into the agreement void. According to information submitted to the Icelandic authorities by Síminn a total of 80% of the Agreement amount was intended for purchasing equipment in DKK.<sup>48</sup> In light of that fact, the Icelandic authorities agreed to index the price to the Danish Krona as it stood on 3 September 2008.
- (62) Moreover, according to the Icelandic authorities it became clear, once the substantive devaluation of the Icelandic Krona had been realised, that it would not be justifiable to enter into the Agreement, unless they ensured that the company would not incur major hardship due to the freefalling exchange rate of the Icelandic Krona, which had become very unstable. It is obvious that it would not be reasonable for Síminn to undertake all the risk resulting from these extreme and unforeseen circumstances. It is a recognised part of Icelandic and international contract law that in cases of unforeseen events that occur and fundamentally alter the equilibrium of a contract resulting in an excessive burden being placed on one of the parties involved, namely "hardship", the contracting party bearing such a burden can request a change to a contract or even walk away from such a contract completely. The Icelandic authorities nevertheless emphasise that this did not entail that all of the risk was put on their shoulders, since Síminn also incurred increased cost from other aspects of the project not tied to the DKK exchange rate, *i.e.* labour, oil and other input.
- (63) According to the Icelandic authorities, their approach with regard to the expansion of the scope of the project is in line with the European Commission's *London Underground* decision,<sup>49</sup> where the Commission recognised that it was relevant to consider whether, with the change, the contractor's bid would still have been the best bid. In such cases, opening an entirely new award procedure would involve disproportionate costs.
- (64) The Icelandic authorities thus decided to make changes to the Agreement rather than initiate a new competitive award procedure and note that they must have considerable discretion in this regard, especially since the Agreement was long term and complex, and given the economic situation in Iceland at the time. Firstly, according to the Icelandic authorities, even

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<sup>48</sup> According to calculations and data from Síminn, costs due to equipment purchased in foreign currency eventually amounted to 85% of the payments received for the project (Document No 694234).

<sup>49</sup> Commission Decision in Case No 264/2002, *London Underground Public Private Partnership*, OJ C 319, 12.12.2002, p. 15.

though the circumstances were unforeseen, the changes made were considered to fit within the original tender. Secondly, a new procedure would have delayed the project for months or even years. Thirdly, the Icelandic authorities considered the offer to be favourable and provide these services at the least cost for the community. It was considered highly unlikely, even impossible, that a better offer would have been presented in such a procedure, given the situation of the Icelandic economy, and the results of the original tender. The Icelandic authorities did not make changes to the Agreement in order to favour Síminn, but to ensure that the project would be performed at the least cost possible, given the (unforeseen) circumstances. Finally, the Icelandic authorities emphasise that the bid from Síminn with the additional 670 buildings, as well as the increase in compensation and DKK indexation, was still by far the best offer in economic terms.

### 4.3 The compatibility of the alleged state aid

- (65) In case the Authority would consider the measure to constitute state aid, the Icelandic authorities have expressed the view that such aid could be considered compatible with Article 61(3)(c) of the EEA Agreement, having regard to the objectives of the measure, including the objective to increase public broadband access in assisted areas.
- (66) According to the Icelandic authorities, the measure has and will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of broadband services due to the insufficient density of potential and actual subscribers to make delivering broadband services economically viable on a purely market-driven basis. The Icelandic authorities believe they have designed the measure in a way which minimises potential State aid involved and distortion of competition.
- (67) The Icelandic authorities note, further, that open access terms were available to third parties for a number of months in advance of the commencement of sales in the project. They state that, when sales began in each section, the Fund informed the inhabitants that Síminn was not the exclusive retailer and that all other retailers could sell internet services to people living/working in the area. Furthermore, according to the Icelandic Authorities, Síminn offers third-party (roaming) access to its 2G GSM voice services, while no wholesale access to 3G voice services is provided for by the tender documents or by the Agreement, since the project in question does not concern the provision of 3G voice services.
- (68) The Icelandic authorities further note that Vodafone has been offered 3G roaming access on market terms by Síminn but has, according to Síminn, been unwilling to enter into an agreement since Vodafone currently has an agreement with Nova for roaming 3G access. According to the Icelandic authorities, the complainant wrongly states that the Agreement between Síminn and the Fund was confined to resale access as opposed to wholesale access prescribed in the tender documents. On the contrary, Síminn offers wholesale access to its ADSL network to all of its competitors in accordance with the PTA's Decision No 8/2008. Furthermore, the Icelandic authorities emphasise that, as seen in the AM Report, there is a fundamental difference between wholesale access to a DSL network and to a 3G data network. The Icelandic authorities also reference AM's opinion that the existing wireless wholesale interconnection option in Iceland is adequate for the purposes of the specific Icelandic broadband coverage intervention.
- (69) Furthermore, the Icelandic authorities maintain that the project in question and the Agreement with Síminn had no or minimal effect on competition and trade. According to the Icelandic authorities, nothing has been presented in the case which indicates that Síminn gained any undue economic advantage or detrimental effect on the market structure.

- (70) According to information provided by the Icelandic authorities, the development of market shares during the past years has tended towards levelling between the three largest companies in the mobile market. In particular, Síminn's market share dropped from 62% in 2005 to 40% in 2011 and Nova's market share had risen to 24% in 2011 from 0% in 2007. Vodafone's market share decreased from 38% in 2005 to 30% in 2011. This trend continued in the year 2012 and the market share of those three companies became even closer as can be seen in the PTA Statistics Report for the years 2010-2012.<sup>50</sup> According to the Report, Síminn's market share was 37,4% in the end of 2012, when the total number of subscriptions were calculated, Vodafone's market share was 28,9% and Nova's market share had increased to 28,3%.
- (71) The Icelandic authorities also note that Síminn is and was at the time under strict supervision from the Icelandic Competition Authority ("ICA") and the PTA. The Icelandic authorities note that the parent company of Síminn, Skipti, made an agreement with ICA on 26 March 2013 which ensures that competitors of Síminn have the same access to the basic telecommunication system of Skipti. Any indications of distortion of competition would lead to a formal investigation on behalf of the above mentioned authorities. Such a distortion might lead to penalties for Síminn. According to the Icelandic authorities, there is no pending investigation from the ICA or the PTA regarding the project concerned.
- (72) The Icelandic authorities further note that the project has expanded the market for all market players. Competitors of Síminn are offered wholesale access to the network on equal terms. Therefore all interested operators have, right from the availability of the service, been able to offer services to end customers based on the same conditions and, according to information provided by Síminn, a number of competitors have wholesale access to provide either ADSL or UMTS service at the retail level. The Icelandic authorities also point to alleged misstatements in the opening decision regarding requests by the complainant, Vodafone, for wholesale access and an alleged denial by Síminn of granting such access. According to the Icelandic authorities, the fact is that the requested access to Síminn's 3G transmitters, so called roaming access, does not form part of the project in question. Síminn was ready to grant Vodafone access to the 3G transmitters but denied that such access formed part of the project.
- (73) Finally, the Icelandic authorities emphasize that the ambitious goals of the project was to introduce broadband in specific rural areas of Iceland. That goal has been reached. Iceland is in an elite group of nations that can confidently state that all its permanent residences have access to broadband services. According to the Icelandic authorities, account must be taken of the fact that the project involved up to 1.788 buildings, spread over a large rural area in Iceland and was commenced only a few months after Iceland was hit by the biggest economic crisis in its history. The Icelandic authorities are fully aware of their obligations under the state aid rules of the EEA Agreement and decision making practice in the field (later incorporated into the Broadband Guidelines) and sought to follow them in every step of the project.
- (74) On balance, the Icelandic authorities conclude that the overall effect of the measure should be deemed positive. The measure is, according to the Icelandic authorities, clearly in line with the objectives of Article 61(3)(c) of the EEA Agreement as it facilitates the development of certain economic activities (retail and wholesale broadband services) in remote and rural areas of Iceland.

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<sup>50</sup> See: [http://www.pfs.is/upload/files/Tolfraediskyrsla\\_PFS\\_IsI.fjarskiptamarkadur\\_2010\\_til\\_2012.pdf](http://www.pfs.is/upload/files/Tolfraediskyrsla_PFS_IsI.fjarskiptamarkadur_2010_til_2012.pdf) .



(75) In the light of all the above, the Icelandic authorities submit that the potential aid entailed in the measure is compatible with Article 61(3)(c) of the EEA Agreement.

## 5 Comments by Síminn

### 5.1 The presence of state aid

(76) Síminn submitted its comments on the opening decision, as well as additional documents, by letter dated 20 December 2013.<sup>51</sup> Síminn is of the view that the financing of the roll-out of broadband services in question did not involve state aid. According to Article 61(1) of the EEA Agreement, a measure must fulfil certain conditions in order to include elements of state aid. Síminn does not consider all of these conditions to be fulfilled, especially in light of the lack of economic advantage to Síminn.

(77) Síminn notes that in its *Altmark* judgement the Court of Justice of the European Union provided clarification regarding the conditions under which public service compensation does not constitute state aid owing to the absence of any advantage.<sup>52</sup> Síminn maintains that the measure in question involves the funding of a public service and that the four cumulative criteria of the *Altmark* test are fulfilled.

(78) According to Síminn, the Agreement in question did not confer any economic advantage on the company that went beyond market conditions. The use of competitive, transparent and non-discriminatory public tenders has been considered sufficient to presume that no state aid is provided to the economic operator selected in the procedure, as market price is guaranteed.<sup>53</sup> The tender procedure set out four objective evaluation criteria. The valid offer receiving most points would win the tender. Anyone interested in partaking in the procurement procedure was free to submit a tender. The tender was technologically neutral, *i.e.* open for all technical solutions, in order not to favour any operators on the market. Síminn received the most points and won the tender. Therefore, the criteria of competitive selection process and choosing the most economically advantageous offer were fulfilled. Síminn was also the tenderer offering to provide the services at the least cost to the community.

(79) According to Síminn, the changes made to the scope and compensation of the Agreement were necessary to include the 670 additional “white” buildings and the resulting compensation. The compensation for the additional buildings was the average unit price in the original tender bid from Síminn. The compensation for the additional buildings should thus be considered to have been an extension of the original tender, also on market terms. Accordingly, Síminn emphasises that there is no state aid involved since the overall terms were no more favourable to Síminn than the terms of the original tender.<sup>54</sup> Moreover, according to Síminn the fact that the company which had the lowest and most economically advantageous offer was chosen to perform the project, cannot automatically entail the favouring of a certain undertaking.

(80) According to Síminn, the actual average unit cost for Síminn (cost per building) is ISK [...], while the average unit price, received by Síminn, is ISK 470,191. As described in the opening decision, the price paid to Síminn after the expansion of the scope was still considerably lower than the price offered by other bidders, and the price estimated by the

<sup>51</sup> Documents No 694234, 694235, 694236, 694237 and 694238.

<sup>52</sup> Judgment in *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415.

<sup>53</sup> Commission Decision in Case No 264/2002, *London Underground Public Private Partnership*, OJ C 319, 12.12.2002, p. 15, paragraph 79.

<sup>54</sup> *Ibid*, paragraphs 120 and 125.

Fund's advisors in advance.<sup>55</sup> Síminn has to date received ISK 836,457,351, which includes the compensation for the 670 additional buildings and the DKK indexation. Vodafone had the second lowest valid offer in the tender for the amount of ISK 1,858,339,001, more than double the compensation received by Síminn, even when additional buildings and the DKK indexation are included.

- (81) Síminn maintains that the company did not enjoy economies of scale overall from the expansion of the project's scope. Even though it may have been the case in certain areas, the often times scattered placement and circumstances of the “white” buildings meant that overall this was not the case. For most of the expansion Síminn had to redesign great parts of the project, although some of the additional buildings were in the same areas as buildings in the original tender, *i.e.* relocation of transmitters and antennas. Therefore, according to Síminn, the company did not gain a real financial advantage which put it in a more favourable position than its competitors.<sup>56</sup>
- (82) Furthermore, according to Síminn, the fact that the actual cost of the project is lower than the estimated cost, and the compensation both transparent and cost-based, is evidence that the Icelandic authorities did include a mechanism to prevent overcompensation.
- (83) In light of the arguments presented above, along with the arguments presented by the Icelandic authorities, Síminn considers the measure to have been devoid of state aid.

## 5.2 The compatibility of the alleged state aid

- (84) If the Authority were to consider that the project should be classified as state aid, Síminn maintains that the measures should qualify as aid compatible with Article 61(3)(c) of the EEA Agreement.
- (85) Síminn maintains that the project was designed in such a way as to limit distortion of competition, by *inter alia* ensuring wholesale access to any third party. That wholesale access enables third party service providers to compete actively on the market, thereby strengthening choice and competition in the areas concerned by the measure, simultaneously avoiding the creating of regional service monopolies. The broadband network was designed to be neutral, open and available to all interested operators for wholesale access on equal terms.
- (86) According to Síminn, there is a clear obligation in the Agreement that its competitors shall have access to the infrastructure and consequently wholesale access has been provided from the start of the project.<sup>57</sup> According to Síminn, it was decided to use the ADSL access model, termed “bit stream access in fixed networks”, for the ADSL wholesale access and as well as the reference for a 3G access model, because there was no known reference model at the time for 3G. Síminn points out that the guidelines from the PTA have been followed with regards to ADSL access. To further explain the technical issues relating to the wholesale access, Síminn submitted the aforementioned AM Report.<sup>58</sup> According to the AM Report,

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<sup>55</sup> According to information provided by the Icelandic authorities (Document No 687320), the Fund's advisors' estimated that the potential bidding price would be between ISK 410,000,000 to 820,000,000 for approximately 750 additional buildings (an estimate later to be adjusted to 670 identified “white” buildings), *i.e.* an average price per building from ISK 546,667 (simple system) to ISK 1,093,333 (advanced system).

<sup>56</sup> Judgment in *European Commission v Deutsche Post AG*, C-399/08 P, EU:C:2010:481, paragraph 41.

<sup>57</sup> From the start of the project Síminn has published an offer for wholesale UMTS access on its website. The telecom company Tal has *inter alia* made such an agreement with Síminn. Further information is available online at: <https://heildsala.siminn.is/>.

<sup>58</sup> Document No 694646.

there is a fundamental difference between wholesale access to a DSL network and to a 3G data network. Moreover, according to the AM Report, the existing wireless wholesale interconnection option in Iceland is adequate for the purposes of the specific Icelandic broadband coverage intervention. The AM Report also refers to the fact that the same technical solution was used for 3G wholesale access in a similar and concurrent Irish broadband project which was approved by the European Commission.<sup>59</sup>

- (87) According to Síminn, the complainant has falsely claimed to have repeatedly requested wholesale access to the network without success and that this has given Síminn a significant first mover advantage. Síminn emphasises that Vodafone has only requested roaming access to Síminn's 3G transmitters in order to provide 3G mobile communication, which have no connection to the project in question. According to Síminn, Vodafone has been offered 3G roaming access on market terms by Síminn, but has been unwilling to enter into an agreement. Vodafone has however, according to Síminn, not requested wholesale or resale access to high speed internet services, via UMTS, ADSL and satellite, for the areas concerned in the project.
- (88) Síminn maintains that the project in question had no or minimal effect on competition and trade. According to Síminn, nothing has been presented in the case to indicate that the company gained any undue economic advantage or that the Agreement had detrimental effect on the market structure.
- (89) Síminn notes that the project only concerns those companies and individuals that live in the areas concerned. The buildings are spread out all over the country and should not be considered a special market. Rather, they form a part of the whole Icelandic broadband market. There are over 109.000 high speed internet connections in Iceland. The project regards the roll-out of broadband services in rural areas of Iceland for a total number of 1 788 buildings. Of these 1788 buildings, 1050 have subscription to the broadband service, of which broadband offered through UMTS are 559. The project therefore only affects 0,96% of the relevant market and the 559 UMTS connected buildings only 0,51%.
- (90) Furthermore, Síminn notes that it was at the time and is still under strict supervision from both the ICA and the PTA. Síminn, its parent company Skipti and Míla, also a subsidiary of Skipti, reached a settlement with the ICA on 8 March 2013, followed by a decision of the ICA no. 6/2013 that was published on 26 March 2013, which ensures that competitors of Síminn and Míla have the same access to the core fixed telecommunication networks of Skipti's subsidiaries. Any indications of distortion of competition by Síminn would therefore lead to a formal investigation on behalf of the above mentioned authorities.
- (91) In light of the above considerations, Síminn concludes that the overall effect of the measure should be deemed positive. The measure is clearly in line with the objectives of Article 61(3)(c) of the EEA Agreement as it facilitates the development of certain economic activities (retail and wholesale broadband services) in remote and rural areas of Iceland. Síminn believes the project was designed in a way that minimises any potential State aid involved and distortion of competition. As a result, should the Authority consider the measure to include state aid, Síminn submits that the potential aid is compatible with Article 61(3)(c) of the EEA Agreement.

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<sup>59</sup> See Commission Decision N 475/2007, *Ireland National Broadband Scheme (NBS)*, OJ C 18, 24.1.2009, p. 1.

## 6 Comments by the complainant (Vodafone)

- (92) By letter dated 23 December 2013, the Authority received comments and further documents from Vodafone.<sup>60</sup> According to the complaint, unlawful state aid was granted by the Fund to Síminn through the Agreement entered into between the two parties. The complainant maintains that the tender procedure was flawed since significant changes were effected in the final Agreement between Síminn and the Fund, which were at the behest of Síminn and were highly favourable to the company.
- (93) According to the complainant state aid cannot be excluded in this case by referring to the fact that Síminn's bid was significantly lower than bids submitted by other parties. First, it is clear that other bidders did not have the opportunity to submit new bids after the revision of the project. Second, it is clear that due to the significant increase in payments as a result of the changes made, it cannot be excluded that competing undertakings could have submitted lower bids for the project as changed.
- (94) The complainant maintains that the access mandated by the final Agreement was confined to resale access as opposed to the wholesale access originally prescribed in the tender document.<sup>61</sup> The complainant claims to have repeatedly requested wholesale access to the network without success.<sup>62</sup> Moreover, the complainant notes that the answers concerning access requirement it has received from the Fund have been inadequate. According to the complainant this has led to an unacceptable distortion of competition and has given Síminn a significant first mover advantage on the relevant market.
- (95) According to the complainant, there is nothing standing in the way of Síminn offering roaming access to the UMTS network. There are three general options to offer wholesale access based on GSM and later UMTS/3G network standards, *i.e.* retail access, wholesale roaming access and virtual network access.
- (96) The complainant notes that Síminn has not explained how the service will be at risk if the company would provide roaming access to its UMTS/3G networks. According to the complainant, Síminn does not produce its end equipment, which is made by several producers all over the world and can be used and bought by all players on the market. It does not matter in regard to the quality of the service whether it includes a SIM card from Síminn or Vodafone or any other telecommunication company. According to the complainant, the quality is the same.
- (97) Vodafone notes that it has submitted several requests to Síminn for access to the UMTS network funded by the Telecommunications Fund. It was not until September 2010 that Síminn, after several meetings and formal letters, offered Vodafone roaming access to the UMTS network. However, the access offered was on such terms that it would have been more viable for Vodafone to build up its own network in the area covered by the program.

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<sup>60</sup> Document No 694646.

<sup>61</sup> As further described in paragraph (32) above, the tender documents initially set out a range of possible access options where ADSL infrastructure (see footnote 28 for a definition of this technology) is used for delivery of the broadband services in question. These ranged from more resale-based options (where the access seeker relies significantly on the host operator's systems/infrastructure) to more infrastructure-based options (where the access seeker relies to varying degrees on its own systems/infrastructure), albeit not clearly mandating all of these access options as will be discussed further below. In the case of any services delivered *via* UMTS (see footnote 29 for a definition of this technology), the tender documents only proposed a resale-based access option.

<sup>62</sup> The Authority has received similar allegations from an interested party that also claims to have unsuccessfully tried to obtain wholesale access to Síminn's network (Document No 614576).

According to the offer Vodafone was offered to pay a yearly fee of ISK 1.500.000 for each of the transmitters they requested access to.

- (98) Furthermore, according to the complainant it is not clear whether the additional locations would result in a significant increase in labour costs. Justification for the increased payment can, therefore, not be based on the increase in locations alone. In this respect, it must also be considered that the changes to the agreement stipulated a longer roll-out period *i.e.* from 12 to 18 months. The changes in the roll-out period would in themselves entail an opportunity to rationalise the use of personnel in the project which in turn would, according to the complainant, decrease labour costs. Moreover, the complainant maintains that the changes in the penalties provisions suggest the mitigation of charges normally borne by an undertaking.
- (99) The complainant also notes that Article 12 of the tender documents stipulated the provision of a bank guarantee for liability claims without proof of fault. Article 13 of the Agreement, however, does not stipulate any such guarantee, only referring to Síminn's liability under general rules of tort law. This change would also suggest a mitigation of charges normally borne by an undertaking. Thus, the benefits of foregoing a bank guarantee must be assessed, *i.e.* the cost of the provision of such a guarantee in the fall of 2008.
- (100) The complainant emphasises that the Agreement has resulted in a significant, continuous and on-going distortion of competition on the market. According to the complainant, the measure affects not only the competition in rural areas of Iceland, it has effect on the whole market since one of the criterion customers use when choosing a telecommunication company is how widespread the network and service is. In this regard it should be noted that Síminn has advertised the company as the company with the most widespread network connections available in Iceland.
- (101) In light of the above considerations, the complainant submits that all the conditions for the measure to involve state aid under the first paragraph of Article 61 of the EEA Agreement are fulfilled. Furthermore, the complainant maintains 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.

## **7 Comments from interested parties**

### **7.1 Hringiðan ehf.**

- (102) Hringiðan provided comment on the opening decision by letter dated 18 July 2013.<sup>63</sup> In its comments, Hringiðan emphasises the changes that were made in the Agreement between Síminn and the Fund from the tender documents published by the STC in February 2008. For example, Hringiðan notes that in the tender documents the speed access was defined as 2 Mb/s or more, but in the Agreement there was no definition of what constituted high speed access. Hringiðan also cites other changes to the Agreement, such as the increased build up period, the expansion of the roll-out area, the payment increase and the currency indexation of the payments, instead of the consumer price index.
- (103) Furthermore, Hringiðan maintains that Síminn was not obliged to provide a bank guarantee for liability claims, despite a clear obligation to do so in Article 12 of the tender documents.<sup>64</sup> According to Hringiðan, following the economic downturn in Iceland no banks were able to provide sufficient bank guarantees to private companies which could

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<sup>63</sup> Document No 679306.

<sup>64</sup> According to Hringiðan, one of the main reasons for the STC's rejection of its offer was the lack of a sufficient bank guarantee.

have met the tender criteria imposed by the STC. Therefore, according to Hringiðan, it appears that Síminn was unable to provide a binding bank guarantee during the course of the tender procedure and that the guarantee it did provide was consequently not binding upon the bank that issued it.

(104) According to Hringiðan, the aforementioned changes are all favourable to Síminn and consequently the Agreement constitutes state aid which is incompatible with the functioning of the EEA Agreement.

## 7.2 Nova ehf.

(105) Nova submitted comments to the Authority by letter dated 18 December 2013.<sup>65</sup> According to Nova, the measure in question fails the balancing test in that there is a lack of a clear and effective wholesale access obligation with clearly defined pricing principles. According to Nova, this gives Síminn a disproportionate advantage that causes distortions of competition.

(106) Nova emphasises that mandating effective third-party wholesale access to a subsidised broadband infrastructure is a necessary component of any state measure funding the construction of a new broadband infrastructure. To avoid distortion of competition in telecom markets where state aid is involved, third party operators should be granted effective wholesale access in a technology-neutral manner and reasonably adapted to their access needs.

(107) According to Nova, the terms of the Agreement were altered from the tender documents and Síminn was only obliged to provide limited wholesale access to the ADSL network, and the access mandated to the UMTS/3G network was confined only to resale access. According to Nova, no explanations have been provided by the Icelandic authorities or Síminn as to why it is technically necessary for Síminn to have full access and control of the UMTS network in order to provide the prescribed quality and service levels and thus only to provide resale access.

(108) In Nova's view, the lack of a clear obligation to provide effective wholesale access, gives Síminn a competitive advantage with respect to the part of the 3G network that was built in accordance with the Agreement. It also gives Síminn a competitive advantage in the retail market as a whole due to the general increased coverage of Síminn's mobile networks. This allows Síminn to build up a customer base of end users and to increase market shares without effective competition from third party operators. Moreover, even if Nova were to gain resale access to the UMTS/3G network, Nova would not be able to differentiate its retail level services in terms of price or service features from that which Síminn provides.

(109) According to Nova, it repeatedly requested wholesale access to Síminn's 3G network without progress. There was therefore, according to Nova, never any will on behalf of Síminn to provide Nova with reasonable access to the network.

(110) Furthermore, Nova notes that nothing in its talks with Síminn suggested that wholesale access to the network would be technically difficult or impossible. In Nova's view this seems to indicate that the above mentioned technical necessity for Síminn having full access and control of the UMTS network in order to provide the prescribed quality and service levels cannot be rationalized.

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<sup>65</sup> Document No 694292.

(111) In light of the above considerations, Nova maintains that Síminn has been provided with an unfair advantage which distorts competition and is contrary to Article 61(1) of the EEA Agreement.

## **8 Responses by the Icelandic authorities to the comments from the complainant and from interested parties**

### **8.1 Response to comments received from the complainant (Vodafone)**

(112) The Icelandic authorities submitted their comments and observations to the comments from the complainant and from interested parties by letter dated 28 February 2014.<sup>66</sup> The Icelandic authorities consider it highly improbable that the increase in scope would have resulted in a lower bid from Vodafone, or other competing undertakings for that matter. As shown in paragraph (18) above, Vodafone submitted two bids for connecting the 1 118 buildings originally identified in the tender documents. The first bid from Vodafone amounted to around ISK 2.2 billion and the second bid amount to around ISK 1.8 billion. The original bid from Síminn however amounted to ISK 379 million, which resulted in around ISK 606 million adjusted price for the final scope of 1 788 sites, *i.e.* including the 670 additional buildings. According to the Icelandic authorities, it is only logical to assume that an adjusted bid from Vodafone would have been substantially higher than the original bid, given the increase in scope and equipment cost.

(113) According to the Icelandic authorities, the complainants' claim that the additional locations do not necessarily entail a corollary increase in costs is unfounded. Síminn has confirmed to the Icelandic authorities that the additional locations did increase the cost of the project. The increase in costs was due to the fact that the additional locations were geographically different from the original locations and spread over large areas in Iceland.

(114) The Icelandic authorities reiterate that the intended purpose of the project in question was not to provide mobile data or mobile voice services, *e.g.* "3G roaming" services, which were never intended to be part of the project at any time. It follows from the above, that the tender documents did not require any form of roaming access as part of the solution provided. The Agreement with Síminn did not change that in any way, shape or form. Technical problems associated with offering roaming access are thus irrelevant to this particular project as mobile roaming access was never a part of the project. The Icelandic authorities emphasise that the "explicit wholesale access criterion from the tender" was not removed and is reflected in the Agreement with Síminn. However, different methods are used for implementing wholesale access depending on the technology used in the project, *i.e.* ADSL or UMTS/3G. It is therefore the view of the Icelandic authorities that the wholesale access issue overall seems to be based on the fundamental misunderstanding that roaming access was to be a part of the project.

(115) With regard to the average unit price methodology, the Icelandic authorities note that it is based on chapter 2.3.4 of the tender documents, entitled "New connections and the obligation to connect". That chapter specifically mandates the use of an average price method when evaluating the cost for new sites that are added to the project. According to the Icelandic authorities, this approach is also in line with recognised practice in Icelandic contract-law.

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<sup>66</sup> Document No 701089.

(116) Finally, according to the Icelandic authorities, the Fund received a fully valid bank guarantee from New Kaupþing bank (now Arion bank hf.), dated 17 February 2009, which is included as an annex to the final agreement.

### **8.2 Response to comments received from Hringiðan ehf.**

(117) The Icelandic authorities reject the arguments put forward by Hringiðan concerning both the existence of state aid and arguments relating to the alleged state aid being incompatible with the functioning of the EEA Agreement. The Icelandic authorities have also identified several factual errors in Hringiðan's submission and feel it is necessary to address those.

(118) On the subject of bank guarantees, it is the opinion of the Icelandic authorities that the declaration provided to the Icelandic authorities by Glitnir bank on behalf of Hringiðan was not sufficient as it only stated that Glitnir bank was *“ready to consider providing a guarantee”*, while the winning bidder Síminn was able to obtain a valid guarantee from New Kaupþing bank. The guarantee provided by Síminn stated that New Kaupþing Bank was indeed willing to *“provide a bank guarantee for the project”*. The Icelandic authorities also note that the document provided by Hringiðan was submitted long after an extended deadline had expired.

(119) The Icelandic authorities emphasise that the tender bid made by Hringiðan for the original scope of 1,119 buildings was substantially higher than the selected tender bid, ISK 1,297,257,098 as opposed to the offer made by Síminn which was ISK 379,000,000. Furthermore, the Icelandic authorities note that the amount agreed upon in the end between the Icelandic authorities and Síminn after the scope of the project had been increased is still lower than the tender made by Hringiðan.

### **8.3 Response to comments received from Nova ehf.**

(120) According to the Icelandic authorities, the Agreement clearly states the minimum wholesale percentage discount that Síminn has to offer to other service providers. Síminn is nevertheless free to negotiate higher discount rates. The Icelandic authorities reiterate that roaming access to the UMTS/3G part of the network is not a part of the project and accordingly wholesale access to the project does not include roaming access. The results of prior negotiations between Síminn and Nova on roaming access therefore fall outside of the scope of the project.

(121) Furthermore, the Icelandic authorities strongly disagree with Nova's statement, that the Fund's answers dated 23 July 2009 were inadequate and simply brushed off the underlying issues. According to the Icelandic authorities, the answer from the Fund is quite clear on the issue of 3G mobile roaming, which seems to be the main underlying issue of the complaint and later responses from market operators. The answer states: *“This contract does not cover 3G mobile voice services or mobile broadband services to the identified buildings or surrounding area. The contracted service is in fact delivered from a router port within walls of homes or workplaces. Other services which are or will possibly be offered from the sellers 3G transmitters is outside the scope of the contract.”*



## II. ASSESSMENT

### 1 The presence of state aid

(122) 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.”*

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

(124) In the following chapters the state funding of the above-mentioned project will be assessed with respect to these criteria.

#### 1.1. Presence of state resources

(125) According to Article 61(1) of the EEA Agreement, a measure must be granted by the State or through State resources in order to constitute state aid.

(126) The State, for the purpose of Article 61(1), covers all bodies of the state administration, from the central government to the city level or the lowest administrative level as well as public undertakings and bodies.<sup>67</sup>

(127) The Fund is, as described above, established by law and owned by the Icelandic State which allocates resources to the Fund through the annual State budget. Therefore, the first criterion of Article 61(1) of the EEA Agreement is fulfilled.

#### 1.2. Undertaking

(128) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must confer an advantage upon an undertaking. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>68</sup> Economic activities are activities consisting of offering goods or services on a market.<sup>69</sup>

(129) Síminn is Iceland’s biggest telecoms operator, offering services such as mobile, fixed telephone, internet and TV services on the Icelandic market. It is thus clear that any aid involved in the Agreement between Síminn and the Fund has been conferred upon an undertaking.

<sup>67</sup> See the EFTA Surveillance Authority’s Decision No 55/05/COL of 11.3.2005 *to close the formal investigation procedure provided for in Article 1(2) in part I of Protocol 3 to the Surveillance and Court Agreement with regard to the sale of 1 744 rental apartments in Oslo (Norway)*, section II.3. p. 19 with further references, OJ L 324, 23.11.2006, p. 11 and EEA Supplement No 56, 23.11.2006, p. 1.

<sup>68</sup> Judgment in *Höfnér and Elser v. Macroton*, C-41/90, EU:C:1991:161, paragraphs 21-23 and Case E-5/07 *Private Barnehagers Landsforbund v. EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 61, paragraph 78.

<sup>69</sup> Judgment in *Ministero dell’Economica e delle Finanze v Cassa di Risparmio di Firenze SpA*, C-222/04, EU:C:2006:8, paragraph 108.

### 1.3. Favouring certain undertakings or the production of certain goods

- (130) Firstly, the aid measure must confer on the beneficiary undertaking an economic advantage, which it would not have obtained under normal market conditions.<sup>70</sup> A state aid measure can take different forms, and must be assessed in relation to its effects.<sup>71</sup> The most common form of such an advantage is the granting of a subsidy, *i.e.* a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services, which it produces.<sup>72</sup>
- (131) In the present case, the financing of the project by public authorities has provided an economic advantage to the selected supplier of the network that would normally be covered by its budget, and has allowed the selected operator to provide a broadband network on conditions not otherwise available on the market. In addition, it cannot be ruled out that the financial support has enabled Síminn, as the successful bidder, to conduct its commercial activities in respect of the network under conditions which would not otherwise have existed in the absence of the measure.<sup>73</sup>
- (132) Although a competitive tender procedure tends to reduce the amount of financial support required and avoid excessive profits, the aid will allow the operator to offer end-to-end services *prima facie* at lower prices than if it had had to bear all the costs itself and thus attract more customers than under normal market conditions. The selected operator will also acquire ownership of the network, as well as other tangible and intangible assets with State funds (*e.g.* equipment, customer relations), even after the lifetime of the projects. In view of the above, it is clear that an economic advantage was granted to the selected operator.<sup>74</sup>
- (133) Moreover, the Authority notes that measure aims at improving the provision of existing broadband services to residential users as well as business users in the areas concerned. Whereas residential users are not subject to state aid rules, businesses in the targeted areas will ultimately benefit from the improved broadband services and coverage in comparison with what would be provided on a purely commercial basis.
- (134) Secondly, the aid measure must be selective, in that it must favour “*certain undertakings or the production of certain goods*”. Public funding of the broadband network in rural areas of Iceland was granted to Síminn, as the successful tenderer. Since Síminn is the only recipient of the state funds, the Authority concludes that the measure is selective.

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<sup>70</sup> Judgment in *France v Commission*, C-301/87, EU:C:1990:67, paragraph 41; judgment in *De Gezamenlijke Steenkolenmijnen v High Authority of the European Coal and Steel Community*, Case 30/59, EU:C:1961:2, paragraph 19; judgment in *France v Commission (Kimberly Clark)*, C-241/94, EU:C:1996:353, paragraph 34 and judgment in *Fleuren Compost*, T-109/01, EU:T:2004:4, paragraph 53.

<sup>71</sup> Judgment in *Commission v EDF and Others*, C-124/10 P, EU:C:2012:318, paragraph 77 and the case-law cited. See also judgment in *Bouygues v Commission*, cases C-399/10 and C-401/10 P, EU:C:2013:175, paragraph 102.

<sup>72</sup> Judgment in *De Gezamenlijke Steenkolenmijnen v High Authority of the European Coal and Steel Community*, Case 30/59, paragraphs 9 et seq.

<sup>73</sup> See EFTA Surveillance Authority Decision No 231/11/COL, *on the rapid deployment of a Next Generation Access network in rural areas of the municipality of Tromsø*, OJ C 10, 2.1.2012, p. 5 and EEA Supplement No 2, 12.1.2012, p. 3, Section II.1.2, and Commission Decision SA.33063, *Italy Trentino NGA*, OJ C 323, 24.10.2012, p. 6, paragraph 77.

<sup>74</sup> Commission Decision N 14/2008 – United Kingdom, *Broadband in Scotland - Extending Broadband Reach*, OJ C 150, 17.6.2008, p. 3, paragraph 37.

#### 1.4. Distortion of competition and effect on trade between Contracting Parties

- (135) The measure must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement to be considered state aid within the meaning of Article 61(1) of the EEA Agreement.
- (136) According to settled case-law, it is not necessary to establish that the aid has a real effect on trade between the Contracting Parties to the EEA Agreement and that competition is actually being distorted, but only to examine whether the aid is liable to affect such trade and distort competition.<sup>75</sup> Furthermore, it is not necessary that the aid beneficiary itself is involved in intra-EEA trade. Even a public subsidy granted to an undertaking, which provides only local or regional services and does not provide any services outside its state of origin, may nonetheless have an effect on trade if such internal activity can be increased or maintained as a result of the aid, with the consequence that the opportunities for undertakings established in other Contracting Parties are reduced.<sup>76</sup>
- (137) Public involvement in deploying infrastructure to provide electronic communications services alters existing market conditions by strengthening the position of the selected supplier of the network in relation to its competitors.
- (138) The beneficiary of the measure will be active in deploying a broadband network infrastructure in a market which can be entered directly or through financial involvement by participants from other EEA States. In general, the markets for electronic communications services (including the wholesale and the retail broadband markets) are open to trade and competition between operators and service providers across the EEA.
- (139) Therefore, the Authority concludes that the measure is liable to distort competition and affect trade within the EEA.

#### 1.5. Funding of a public service and the *Altmark* test

- (140) The Icelandic authorities and Síminn take the view that the contribution can be characterised as funding of a public service; that the four cumulative criteria of the “*Altmark* test” are fulfilled, and that the measure, for that reason, does not constitute state aid.
- (141) The Court of Justice’s judgment in *Altmark* provided clarification regarding the conditions under which public service compensation does not constitute State aid, owing to the absence of any advantage.<sup>77</sup> However, for such compensation to escape qualification as State aid in a particular case, four main conditions, commonly referred to as the *Altmark* criteria, must be satisfied.<sup>78</sup>
- (142) The four cumulative criteria of the *Altmark* test are: (i) the beneficiary of a state-funding mechanism for an SGEI must be formally entrusted with the provision and discharge of an SGEI, the obligations of which must be clearly defined; (ii) the parameters for calculating the compensation must be established beforehand in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings; (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the SGEI, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and (iv) where the beneficiary is not chosen pursuant to a public procurement procedure, the level of

<sup>75</sup> Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 76.

<sup>76</sup> Judgment in *Libert and Others*, Joined cases C-197/11 and C-203/11, EU:C:2013:288, paragraphs 76-78.

<sup>77</sup> Judgment in *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, C-280/00.

<sup>78</sup> Judgment in *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, C-280/00, paragraphs 87-93.

compensation granted must be determined on the basis of an analysis of the costs which a typical well-run undertaking would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.

- (143) The EEA EFTA States have, in general, a wide discretion concerning the identification of a service as an SGEI, while following the relevant case-law which sets out the general principles to be respected.<sup>79</sup> The provision of adequate broadband coverage to all citizens in areas where no other operators are providing, or will provide, such services in the near future, could well be characterised as an SGEI.<sup>80</sup> In principle, public service compensation may therefore be granted to an undertaking entrusted with the construction and operation of a broadband network. According to paragraph 16 of the Broadband Guidelines, this may be the case where it can be demonstrated that private investors may not be in a position in the near future (a period of three years) to provide adequate broadband coverage to all citizens or users thus leaving a significant part of the population unconnected. Consequently, a publicly-funded network set up in white areas for all potential users, business or private, may be financed by way of public service compensation. However, a number of conditions have to be fulfilled, in particular those set out in paragraphs 17 to 23 of the Broadband Guidelines.
- (144) The Icelandic authorities have described the reasons why the roll-out of a broadband network in rural areas not served by private investment needs to be financed by the State in the general economic interest. After consulting stakeholders by conducting a mapping exercise and coverage analysis, it was established that the buildings in question would not be served by high-speed internet infrastructure on market terms within the next three years. The Icelandic authorities have emphasised why they consider it important to avoid a “*digital divide*” between urban and rural areas.
- (145) The economies of broadband provision are such that the market will not always find it profitable to invest in it in all areas. Due to economies of density, broadband networks are generally more profitable to roll out where potential demand is higher and more concentrated, *i.e.* in densely-populated areas. Because of high fixed costs of investment, unit costs increase strongly as population density declines. As a result, broadband networks tend to profitably cover only part of the population. Remoteness, such as larger distances from existing telecommunications infrastructure, could also significantly increase the investment costs necessary to roll out adequate broadband networks.<sup>81</sup>
- (146) Typically, these underserved regions are rural areas with a low population density, in which commercial providers have no economic incentives to invest in electronic communications networks to provide adequate broadband services. This may lead to a “digital divide” between the areas which have access to adequate broadband services and those that do not. As a consequence, it is in the declared general economic interest that EEA States can employ

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<sup>79</sup> See the Authority’s Guidelines on the Application of the state aid rules to compensation granted for the provision of services of general economic interest (“the Authority’s SGEI Guidelines”), available online at: <http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Compensation-granted-for-the-provision-of-services-of-general-economic-interest.pdf>.

<sup>80</sup> As expressed by the Commission previously in the area of access to broadband services, for instance in Commission Decision N 381/04, *Pyrénées-Atlantiques*, OJ C 162, 2.7.2005, p. 5. See also paragraph 49 of the Authority’s SGEI Guidelines, and paragraph 22 of the Authority’s 2010 Guidelines on the Application of state aid rules in relation to rapid deployment of broadband networks. The Authority will address the relevance of these guidelines in Section II.3.1 of this decision.

<sup>81</sup> See EFTA Surveillance Authority Decision No 444/13/COL of 13.11.2013 *on the deployment of a Next Generation Access network in the municipality of Skeiða- and Gnúpverjahreppur*, OJ C 66, 6.3.2014, p. 6 and EEA Supplement No 14, 6.3.2014, p. 1, paragraph 72.

public funds to enable connectivity in areas which would not otherwise be served by high-speed internet, either currently or in the near future.<sup>82</sup>

- (147) The Icelandic authorities have demonstrated the necessity of their intervention. As described in Chapter 2.1.2 of Part I above, the authorities have confirmed that there was a serious lack of high-speed broadband coverage in the areas concerned. Moreover, the mapping and coverage analysis revealed no investment plans to connect the buildings in the near future in view of their low commercial attractiveness for private operators, *i.e.* since they were all located in sparsely populated areas.
- (148) Moreover, Síminn seems to have been given a clear mandate assigned by way of the Agreement, which, according to the Authority's Guidelines on the Application of the state aid rules to compensation granted for the provision of services of general economic interest ("the Authority's SGEI Guidelines"), can be seen as the required entrustment act.<sup>83</sup> According to Síminn's mandate, the broadband infrastructure to be deployed should provide universal connectivity to all users in a given area. The network and the service was to extend to all homes where at least one person was registered and had residence all year round, and to businesses which were operational all year round.
- (149) Furthermore, in line with paragraphs 19-20 of the Broadband Guidelines, the publicly-funded network was to be constructed so as to allow for access by other ISPs on a wholesale basis. Those ISPs should be able to buy on request the basic service from Síminn at wholesale prices, and should be permitted to deliver services over the network to their retail customers. Access was to be granted by convenient means and all ISPs were to be granted equal service and equal access to the network, irrespective of their connection to the seller. Síminn therefore cannot refuse access to the infrastructure on a discretionary and/or discriminatory basis. Moreover, the entrustment and the aid only covers the deployment of a network and the provision of the related wholesale access services, without including retail communications services.
- (150) However, the fact that the compensation for the 670 buildings that were added to the project after the withdrawal of WBS from the market was decided on after Síminn had won the tender raises problems in relation to the rest of the *Altmark* criteria. The parameters for calculation of the compensation for the additional units were not established in an objective and transparent manner beforehand, but rather, as has been confirmed by the Icelandic authorities, determined subsequent to the public procurement procedure taking account of the average unit price in the original tender bid from Síminn.
- (151) Therefore, even though Síminn was chosen as a service provider in accordance with a public tender, only the compensation for the first 1 118 buildings was based on the public procurement process. The compensation for the additional 670 buildings was determined after Síminn had won the tender. The Authority has also received no information indicating that the Icelandic authorities conducted a benchmarking exercise, with a typical well-run and adequately-equipped undertaking, concerning the costs likely to be incurred in constructing and operating the broadband network for the additional buildings.
- (152) In light of the above, the Authority concludes that the measure in question does not fulfil all of the *Altmark* criteria.

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<sup>82</sup> See EFTA Surveillance Authority Decision No 444/13/COL of 13.11.2013 *on the deployment of a Next Generation Access network in the municipality of Skeiða- and Gnúpverjahreppur*, OJ C 66, 6.3.2014, p. 6 and EEA Supplement No 14, 6.3.2014, p. 1, paragraph 73.

<sup>83</sup> See paragraph 52 of the Authority's SGEI Guidelines.

## 1.6. Conclusion with regard to the presence of state aid

(153) With reference to the above considerations, the Authority concludes that the measure under assessment includes elements of state aid within the meaning of Article 61(1) of the EEA Agreement. Under the conditions referred to above, it is thus necessary to consider whether the measure can be found to be compatible with the functioning of the EEA Agreement.

## 2 Procedural requirements

(154) Pursuant to Article 1(3) of Part I of Protocol 3: “*the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. .... The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision*”.

(155) The Icelandic authorities did not notify the aid measure to the Authority. Moreover, the Icelandic authorities have, by tendering out and financing the broadband deployment in rural areas, put those measures into effect before the Authority has adopted a final decision. The Authority therefore concludes that the Icelandic authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3. The granting of any aid involved must therefore be considered unlawful.

## 3 Compatibility of the aid

### 3.1 Introduction

(156) Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) or Article 59(2) of the EEA Agreement and are necessary, proportional and do not cause undue distortion of competition. The Icelandic authorities argue that any aid involved in the Agreement between the Fund and Síminn is compatible with Article 61(3) of the EEA Agreement.

(157) On the basis of Article 61(3)(c) of the EEA Agreement “*aid to facilitate the development of certain economic activities or of certain economic areas*” may be considered compatible with the functioning of the EEA Agreement, where such aid does not adversely affect trading conditions and competition in the EEA to an extent that is considered contrary to the common interest.

(158) The Authority’s currently applicable Broadband Guidelines contain a detailed interpretation of Article 61(3)(c) of the EEA Agreement as regards this sector.<sup>84</sup> The previous Guidelines on the Application of State Aid Rules to the Rapid Deployment of Broadband Networks (“the 2010 Broadband Guidelines”) were first adopted on 3 February 2010, and were therefore not in effect at the time at which Síminn and the Fund entered into the Agreement. However, the Broadband Guidelines are based on existing case law and the decision-making practice of the European Commission.<sup>85</sup> The Authority will therefore not apply the Broadband Guidelines directly but rather assess the Agreement in the light of the fundamental principles concerning state aid to broadband infrastructure which are outlined in the aforementioned Guidelines, and of the case law and decisional practice that existed at the time of the signing of the Agreement and which has continued in more recent cases.

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<sup>84</sup> The EFTA Surveillance Authority guidelines on the application of state aid rules in relation to rapid deployment of broadband networks (“the Broadband Guidelines”), available online at: <http://www.eftasurv.int/media/state-aid-guidelines/Part-IV---Application-of-state-aid-rules-in-relation-to-rapid-deployment-of-broadband-networks.pdf>.

<sup>85</sup> For a list of all Commission decisions taken under the state aid rules in the broadband field, see: [http://ec.europa.eu/competition/sectors/telecommunications/broadband\\_decisions.pdf](http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf).

### 3.2 Distinction between white, grey and black areas for basic broadband networks

- (159) According to the Broadband Guidelines, in order to carry out a compatibility assessment of public financing of broadband projects, the region in which the new broadband network will be deployed needs to be defined as a white, grey or black area.<sup>86</sup>
- (160) “*White area*” refers to an area where there is no broadband infrastructure and it is unlikely that such infrastructure will be developed in the near future. The Authority acknowledges that by providing financial support for the provision of broadband services in areas where broadband is currently not available, the EFTA States pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest, provided the conditions set out in Section 3.3 below are fulfilled.
- (161) “*Grey area*” refers to an area in which one network operator is present and another network is unlikely to be developed in the near future. The mere existence of one network operator does not necessarily imply that no market failure or cohesion problem exists. If that operator has market power (monopoly) it may provide citizens with a suboptimal combination of service quality and prices. Certain categories of users may not be adequately served or, in the absence of regulated wholesale access tariffs, retail prices may be higher than those charged for the same services offered in more competitive, but otherwise comparable areas or regions of the country. If, in addition, there are only limited prospects that alternative operators enter the market, the funding of an alternative infrastructure could be an appropriate measure.
- (162) “*Black area*” refers to an area in a given geographical zone where there are or there will be in the near future at least two basic broadband networks of different operators and broadband services are provided under competitive conditions (infrastructure-based competition), it can be assumed that there is not a market failure. Accordingly, there is very little scope for State intervention to bring further benefits.<sup>87</sup>
- (163) According to the Icelandic authorities, the area of the project was, prior to the construction of the network, not covered by any broadband network. The Fund conducted a thorough mapping exercise where it called for information on all current broadband service areas (*i.e.* areas that had a continuously available (not dial-up) internet access of at least 512kb/s for a reasonable fixed monthly price), as well as planned areas (not yet serviced) that would be functional by June 2008. The Fund received information on market areas in various forms from several broadband service providers as well as individuals. The aim of this exercise was to identify market failures, by distinguishing between “grey”, “black” and “white” areas in remote regions in Iceland. The Fund’s mapping and coverage analysis resulted in a precise list of buildings which were later included in the project.
- (164) Thus, in light of the above, the Authority considers the areas covered by the project as “*white areas*” for the purposes of applying the Broadband Guidelines.

### 3.3 The balancing test and the Broadband Guidelines/decisional practice

- (165) In assessing whether an aid measure can be found compatible with the functioning of the EEA Agreement, the Authority balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side-effects, such as distortions of trade and competition (a so-called “balancing test”).

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<sup>86</sup> See paragraph 57 of the Broadband Guidelines and footnote 17 above.

<sup>87</sup> See paragraph 68 of the Broadband Guidelines.

(166) In applying this balancing test, the Authority will assess the following questions:<sup>88</sup>

- a) Is the aid measure aimed at a well-defined objective of common interest, *i.e.* does the proposed aid address a market failure or other objective?
- b) Is the aid well designed to deliver the objective of common interest? In particular:
  - (i) Is state aid an appropriate policy instrument, *i.e.* are there other, better-placed instruments?
  - (ii) Is there an incentive effect, *i.e.* does the aid change the behaviour of undertakings?
  - (iii) Is the aid measure proportional, *i.e.* could the same change in behaviour be obtained with less aid?
- c) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

(167) In line with the Broadband Guidelines,<sup>89</sup> in applying the balancing test, the Authority will consider the objective of the measure, its design and the need to limit distortions of competition.

### 3.3.3 Objective of the measure

#### 3.3.3.1 State aid in white areas

(168) Broadband connectivity is a key component for the development, adoption and use of information and communication technologies in the economy and in society. The project exclusively relates to and targets “white areas”.<sup>90</sup>

(169) The Authority believes, in line with the Broadband Guidelines, that these areas are, in principle, eligible for state aid since the project promotes territorial, social and economic cohesion and addresses a proven market failure.<sup>91</sup> However, in order to define the measure as compatible with the EEA Agreement, certain conditions must be fulfilled. Those conditions will be assessed in the following subsections.

#### 3.3.3.2 A well-defined objective of common interest

(170) Broadband connectivity is a key component for the development, adoption and use of information and communication technologies in the economy and in society. In its Europe 2020 Strategy of 3 March 2010, “A Digital Agenda for Europe”, the European Commission stated that it has the “*aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps*

<sup>88</sup> See for example Commission Decisions C 35/2005, *Broadband development Appingedam*, OJ L 86, 27.3.2007, p. 1, and N 14/2008, *Broadband in Scotland - Extending broadband reach*, OJ C 150, 17.6.2008, p. 3..

<sup>89</sup> See paragraph 28 of the Broadband Guidelines.

<sup>90</sup> See definition in footnote 17 and paragraph (160) above.

<sup>91</sup> See EFTA Surveillance Authority Decision No 219/14/COL of 11.6.2014 *on the state aid scheme for broadband rollout*, OJ C 344, 2.10.2014, p. 13 and EEA Supplement No 55, 2.10.2014, p. 4, Section 3.2.1.2.



or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps.”<sup>92</sup>

- (171) The Europe 2020 strategy recognises the importance of broadband projects in order to accelerate the contribution of broadband technologies to growth and innovation in all sectors of the economy and to social and regional cohesion. The deployment of new basic and/or NGA broadband networks contributes to job creation as well as to improving health and education services in the target areas.
- (172) Moreover, the roll-out of a broadband network contributes to reducing the “digital divide” that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not. The Authority considers that without public intervention there is a real risk of an emergence of a “digital divide” between the different regions in Iceland, mainly between rural and urban areas. This could lead to the economic and social exclusion of the local inhabitants and undertakings, and could also lead to further depopulation from already sparsely populated areas. Although there are several reasons for digital divides, one of the most important one is the lack of adequate broadband infrastructure.
- (173) Furthermore, the Authority recalls that providing broadband services to all European citizens by 2013 was one of the main goals of the Digital Agenda for Europe.<sup>93</sup> The project is therefore in line with both the Europe 2020 Strategy and the Digital Agenda for Europe.
- (174) According to the Icelandic authorities, the availability of high-speed broadband infrastructure is a key factor for the local communities in attracting businesses, improving local living conditions, as well as accelerating growth and innovation in all sectors of the local economy. The scheme has enabled households and businesses in the targeted area to have access to affordable broadband services. This is also a common interest objective, since broadband services have to be available at affordable prices in order to ensure that the maximum of citizens profit from the public aid.<sup>94</sup> Without the aid, the cost of deploying the required broadband infrastructure will be very costly for private operators in scarcely populated areas and it will be translated into high retail prices, not affordable to all citizens. As a consequence, the public financing of the broadband infrastructure has not only ensured broadband availability but it will also ensure that the services are provided at affordable prices as required in the Digital Agenda. In other words, the project enables access to retail broadband services in the targeted areas (*i.e.* low populated areas, mainly rural areas) at prices similar to those applicable in the more populated areas (*i.e.* urban areas).
- (175) The Authority considers support for broadband network deployment in rural and underserved white areas, where broadband is currently not available, as promoting territorial social and economic cohesion and addressing market failures.<sup>95</sup> The roll-out of a broadband

<sup>92</sup> EUROPE 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

<sup>93</sup> EUROPE Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM (2010) 245 A Digital Agenda for Europe, as recognised in the resolution from the 37<sup>th</sup> Meeting of the EEA Joint Parliamentary Committee on 26 October 2011. The document is available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?sessionId=Y4vLTX8KtHt58G2x4R1h26h111zYRJcHnMBhTTx3cKhqvYf4R8m0!-1629905942?uri=CELEX:52010DC0245R\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?sessionId=Y4vLTX8KtHt58G2x4R1h26h111zYRJcHnMBhTTx3cKhqvYf4R8m0!-1629905942?uri=CELEX:52010DC0245R(01)). The Digital Agenda established the objective to bring basic broadband to all Europeans by 2013 and it seeks to ensure that by 2020 the access to NGA services will be much increased (all Europeans should have access to Internet speed of above 30 Mbps, and 50% or more of European households should subscribe to Internet connections above 100 Mbps).

<sup>94</sup> Affordable broadband services is also one of the goals of the Digital Agenda, see <https://ec.europa.eu/digital-agenda/en/about-broadband>.

<sup>95</sup> See paragraph 62 of the Broadband Guidelines.

network also contributes to reducing the “digital divide” that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not.<sup>96</sup>

(176) In view of the above, the Authority concludes that the aid pursues genuine cohesion and economic development objectives, which are considered to be well-defined objectives of common interest.

### 3.3.3.3 Does the measure respond to a market failure?

(177) As already indicated, since only white areas will be eligible for state aid, the Authority accepts that in those areas a market failure exists. In other words, the market left to its own devices, without intervention, fails to deliver an efficient outcome for society.<sup>97</sup>

### 3.3.4 Design of the measure and the need to limit distortion of competition

#### 3.3.4.1 Is aid the appropriate instrument?

(178) As stated in paragraph 40 of the Broadband Guidelines, the Authority acknowledges that *ex ante* regulation might boost the development of broadband networks in urban and more densely populated areas but it is not sufficient to correct the market failure stemming from the lack of private infrastructure investments in certain areas.

(179) The Authority has not received information on whether the Icelandic authorities considered any alternatives to public financing of the broadband network in order to address the market failure. However, the Authority, as well as the Commission, has previously examined the use of grants or tax incentives to end users, as well as the possibility of using *ex ante* regulation.<sup>98</sup> These measures have been found unlikely to lead to sufficient investments for the provision of broadband services to underserved areas.

(180) As previously noted, there were only limited services of low-speed internet connections available in the area concerned and the mapping exercise showed that there were no plans by private operators to upgrade their broadband infrastructure. Moreover, the Icelandic authorities noted that the large internet service providers in Iceland had not shown any interest in improving the internet connections in the area in question or to invest in broadband infrastructure in the near future.<sup>99</sup> Hence, in situations such as the case at hand, where it has been confirmed that there is a significant under-development of broadband infrastructure and services in a given region, there seems to be no alternative to granting public funding to overcome the lack of broadband connectivity.

(181) It is therefore the Authority’s conclusion that public funding for the provision of broadband services is an appropriate instrument to achieve the set objectives.

<sup>96</sup> See for example EFTA Surveillance Authority Decision No 231/11/COL of 13.7.2011 *on the rapid deployment of a Next Generation Access network in rural areas of the municipality of Tromsø*, OJ C 10, 2.1.2012, p. 5 and EEA Supplement No 2, 12.1.2012, p. 3, Section 3.2.1.2.

<sup>97</sup> See paragraphs 33 to 35 of the Broadband Guidelines.

<sup>98</sup> See for example the EFTA Surveillance Authority Decision 231/11/COL, *on the rapid deployment of a Next Generation Access network in rural areas of the municipality of Tromsø*, OJ C 10, 2.1.2012, p. 5 and EEA Supplement No 2, 12.1.2012, p. 3, and Commission Decision N 14/2008, *Broadband in Scotland - Extending broadband reach*, OJ C 150, 17.6.2008, p. 3, paragraphs 54-55.

<sup>99</sup> The Icelandic authorities contacted private operators in order to establish whether any market investor was willing to provide broadband connectivity to the buildings in question. After finding that there was no interest in providing the service, the Icelandic authorities concluded that these areas did indeed suffer from a market failure and would not in the near future have high-speed internet connections without public intervention.

#### 3.3.4.2 Does the aid have an incentive effect?

- (182) According to the Broadband Guidelines,<sup>100</sup> in order to assess the existence of incentive effect it must be examined whether the broadband investments concerned would have been undertaken without public financing.
- (183) The public consultation conducted by the Icelandic Authorities showed that it was unlikely that a broadband network covering the unserved buildings would be provided by the market in the near future. By providing financial support to the roll-out of the network, the bidders to the public tender changed their investment decisions. Therefore, the Authority concludes that the aid provided an investment incentive for the selected provider to deploy a broadband infrastructure in areas in which it would not have invested otherwise.

#### 3.3.4.3 Proportionality of the aid and limitation of distortion of competition and effect on trade

##### **Detailed mapping and coverage analysis**

- (184) The Icelandic authorities carried out a detailed mapping and coverage analysis in 2007. Hence, the competitive conditions and structure prevailing in the given area were analysed and all stakeholders affected by the relevant measure were consulted. Against this background, the Authority finds that the mapping and coverage analysis contributed to minimising potential distortions of competition.
- (185) The withdrawal of WBS from the market resulted in a substantial change to the list of buildings that neither had, nor would, receive broadband coverage in the near future on market terms. Subsequently, the Icelandic authorities called out again for plans to offer services to the buildings originally covered by the plans of WBS. This was done by way of a newspaper advertisement which, according to the Icelandic authorities, was in line with previous communication with the market. This method of communication allowed all service providers to alert the Icelandic authorities of any roll-out plans in the area. It is thus the Authority's finding that the newspaper advertisement was an adequate method for communication in this situation.

##### **Public consultation**

- (186) The Broadband Guidelines impose an obligation to launch a public consultation with existing operators through an open and transparent procedure in order to further ensure that public funds are used only in basic broadband white areas and NGA white areas.<sup>101</sup>
- (187) As previously noted, the Fund conducted an analysis of the competitive conditions on the market and of future deployment plans by consulting stakeholders through a public advertisement, placed in the national newspaper *Morgunblaðið* to ensure full transparency. By doing so the Fund ensured that the potential distortions of competition were minimised.

##### **Open tender procedure / Most economically advantageous offer**

- (188) The Authority would like to underline that, even though the Public Procurement Directive does not apply to the procurement of broadband networks and services,<sup>102</sup> the procurement is still subject to the fundamental principles of equal and non-discriminatory treatment.<sup>103</sup>

<sup>100</sup> Paragraph 41 of the Broadband Guidelines.

<sup>101</sup> Paragraph 74(b) of the Broadband Guidelines.

<sup>102</sup> See Article 13 of Directive 2004/18/EC.

<sup>103</sup> The Court of Justice of the European Union has confirmed in its case-law that the Internal Market rules of the Treaty apply also to contracts outside the scope of the procurement directives, as long as the contract is of interest to economic operators located in other Member States. See, for example, judgment in *Telaustria*, C-324/98, EU:C:2000:669, paragraph 60; judgment in *Coname*, C-231/03, EU:C:2005:487,

It also follows from the Broadband Guidelines that whenever granting authorities decide to select a third party operator to deploy and operate the subsidised infrastructure, the selection process shall be conducted in line with the spirit and the principles of the Public Procurement Directives.<sup>104</sup> The open tender approach ensures equal and non-discriminatory treatment of all bidders, reduces budgetary costs, minimises the potential state aid involved and reduces the selective nature of the measure. The use of open tenders to promote these objectives in broadband deployment has been recognised by the Commission in decisional practice predating the Agreement under assessment.<sup>105</sup>

- (189) Within the context of a competitive tender procedure, the Broadband Guidelines emphasise that the aid granting authority shall establish qualitative award criteria on which the submitted bids are to be assessed.<sup>106</sup> The Broadband Guidelines also clarify that in order to reduce the amount of aid to be granted, at similar if not identical quality conditions, the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid.<sup>107</sup> The awarding authority shall also always specify in advance the relative weighting which it will give to each of the (qualitative) criteria chosen.
- (190) In the case at hand, the STC, on behalf of the Fund, published the tender description on its website and in national newspapers in February 2008. In line with Paragraph 74(c) of the Broadband Guidelines, the information concerning the tender procedure was published at a central website at the national level, *i.e.* the STC website,<sup>108</sup> and the tender was also announced on the website of the Ministry of the Interior.<sup>109</sup> The tender description included clear award criteria, the purpose of which was to identify the most economically advantageous tender. Four evaluation criteria were used: (i) total price (50%); (ii) build-out speed (15%); (iii) download speed (25%), and (iv) 2G GSM (optional) (10%). Following the publication of the tender, the STC engaged in discussions with interested bidders, resulting in a prolongation of the deadline to submit tenders until 4 September 2008. The STC received five valid offers and the bid that scored highest based on the award criteria was subsequently chosen.<sup>110</sup>
- (191) Based on the above, the Authority finds that the STC, on behalf of the Fund, conducted an open and transparent public procurement procedure in order to choose the provider of the broadband network. Moreover, it is clear that the principle of equal treatment was guaranteed as it was obvious to all interested bidders that price was by far the most important criteria in the tender, as it counted for 50% of the award criteria.
- (192) After the conclusion of the tender procedure, WBS withdrew from the market. This resulted in an increase in the amount of buildings in need of broadband services. As a consequence, changes to the Agreement with the chosen supplier were made concerning its scope, compensation and the roll-out period. Due to the exceptional and unforeseen circumstances

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paragraph 16, and judgment in *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 46. See also the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179, 28.11.2001, p. 2.

<sup>104</sup> Paragraph 74(c) of the Broadband Guidelines.

<sup>105</sup> See for instance, Commission Decision N 508/08 — *United Kingdom, Provision of Remote Broadband Services in Northern Ireland*, OJ C 18, 24.1.2009, p. 1, Commission Decision N 475/2007— *Ireland, National Broadband Scheme (NBS)*, OJ C 18, 24.1.2009, p. 1, and Commission Decision N 157/06 — *United Kingdom, South Yorkshire Digital region Broadband Project*, OJ C 80, 13.4.2007, p. 2.

<sup>106</sup> Paragraph 74(d) of the Broadband Guidelines.

<sup>107</sup> *Ibid.*

<sup>108</sup> <http://www.rikiskaup.is/>.

<sup>109</sup> <http://www.innanrikisraduneyti.is/sam/frettir/nr/22547>.

<sup>110</sup> See table in paragraph (18).

in the Icelandic economy, changes were also made concerning the indexation of the total payments.<sup>111</sup>

- (193) The complainant argues that other bidders did not get the chance to submit offers for the additional buildings and that the increase in locations does not necessarily entail a corresponding increase in costs and the roll-out period.
- (194) The Authority recognises that the alterations made to the draft Agreement included in the tender documents are significant and although the EEA public procurement rules do allow for some changes to be made to the Agreement through negotiations after the supplier has been selected, the changes exceed the limits laid out in the Public Procurement Directive.<sup>112</sup> As previously noted, the Procurement Directive does not apply to the procedure at hand as procurements concerning the construction of telecommunication networks are exempted from its scope.<sup>113</sup> However, according to the Broadband Guidelines the selection process shall nevertheless be conducted in line with the spirit and the principles of the Public Procurement Directives.<sup>114</sup>
- (195) It is clear that the price paid to Síminn following the expansion of the scope of the project was still significantly lower than the price offered by the other bidders,<sup>115</sup> and the price estimated by the Fund in advance. The changes may therefore have been justifiable due to the discrepancy between the prices. It was also clear from Chapter 2.3.4 of the tender description, entitled “New connections and the obligation to connect”, that the average unit price of the original tender would be used as a benchmark in case of unforeseen increases in the scope of the project. The aforementioned Chapter in fact specifically mandates the use of an average price method when evaluating the cost for new sites that are added to the project.
- (196) Furthermore, in accordance with established case law, the Authority considers that it can be acceptable, at least in extreme circumstances, for states to substitute a certain outcome for an uncertain one and obtain in that regard a fixed and satisfactory return in place of the one that could not be predicted.<sup>116</sup> Therefore, considering that the purpose of conducting a tender process is to achieve the lowest price for the community, the emphasis on price in the award criteria, the inclusion of the average price method in the tender documents as well as the great discrepancies in the bids submitted, the Authority finds that the equal and non-discriminatory treatment of all bidders was ensured in this case and that the selection process and the expansion of the scope of the project was in line with the spirit and the principles of the Public Procurement Directives.

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<sup>111</sup> The changes are explained in further detail in Section I.3.1.4 of this decision. See also paragraphs (27) and (61) above.

<sup>112</sup> See for example Article 33(3)(a) of Directive 2004/18/EC, which states that: “*In the case of works procurement, contracting authorities may award contracts by a negotiated procedure without prior publication of a contract notice in the following cases: In the case of an additional work not included in the project initially but considered essential and must, through unforeseen circumstances, be carried out by the same bidder, provided that such work cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities. The same applies if an additional work is necessary in order to finish an agreed work. The aggregate value of contracts awarded for additional work may not exceed 50% of the amount of the original contract amount.*”

<sup>113</sup> Ibid, Article 13.

<sup>114</sup> Paragraph 74(c) of the Broadband Guidelines.

<sup>115</sup> See the table in section I.2.1.3 above.

<sup>116</sup> See for example, Judgment in *Netherlands and ING Groep v Commission*, T-29/10, EU:T:2012:98, paragraph 123.

- (197) Finally, with regard to the switch from consumer price indexation to foreign currency indexation, the complainant claims that this has resulted in a further increase in payment to Síminn due to the devaluation of the ISK following the financial crisis. The Icelandic authorities have confirmed that these changes did not entail that all of the risk was put on their shoulders, since Síminn also incurred increased costs from other aspects of the project not tied to the DKK exchange rate, *i.e.* labour costs, oil and other inputs.<sup>117</sup> They have also demonstrated that even after these changes were introduced in the Agreement, the amount of aid needed was still considerably lower than the second lowest valid bid as well as the Fund's cost estimates.
- (198) In light of the above, the Authority concludes that overall the tender and the selection process were in line with the spirit and the principles of the Public Procurement Directives and that the Icelandic authorities selected the most economically advantageous offer.

### **Technological neutrality**

- (199) Pursuant to Paragraph 74(e) of the Broadband Guidelines, the tender should not favour or exclude any particular technology or network platform. Bidders should thus be entitled to propose the provision of the required broadband services using or combining whatever technology they deem most suitable. On the basis of the objective tender criteria, the granting authority should be entitled to select the most suitable technological solution or mix of technology solutions.
- (200) In accordance with Article 2.1 of the tender description, the project was technologically neutral and there were no particular specifications on how the network should be constructed or which technological solution should be used. The tender did not favour any particular technology or network platform leaving it to bidders to define the most appropriate technological solutions to connect the buildings which had been identified in the mapping exercise. The tender was therefore open for all technical solutions and hence technology neutral, as required by the Broadband Guidelines. The Authority finds that by applying the technological neutrality principle, the most appropriate technologies or a mix of them were selected.<sup>118</sup>

### **Use of existing infrastructure**

- (201) In line with the Broadband Guidelines, the EFTA States should encourage bidders to have recourse to any available existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funding.<sup>119</sup> As previously noted, the buildings in question were, prior to the construction of the network, not covered by any broadband network. Moreover, the Authority has received no indication from any network operators or interested parties concerning wasteful duplication of resources in this case.
- (202) Against this background, the use of existing infrastructure does not appear to have played an important role in the deployment of the subsidised network.

### **Wholesale access**

- (203) Mandating effective third-party wholesale access to a subsidised broadband infrastructure is a necessary component of any state measure funding the construction of a new broadband infrastructure. In particular, wholesale access enables third party operators to compete with

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<sup>117</sup> Document No 687314.

<sup>118</sup> See EFTA Surveillance Authority Decision No 219/14/COL of 11.6.2014 *on the state aid scheme for broadband rollout*, OJ C 344, 2.10.2014, p. 13 and EEA Supplement No 55, 2.10.2014, p. 4, paragraph 125(e).

<sup>119</sup> Paragraph 74(f) of the Broadband Guidelines.

the selected bidder (*e.g.* when the latter is also present at the retail level), thereby strengthening choice and competition in the areas concerned by the measure, while at the same time avoiding the creation of regional service monopolies.<sup>120</sup> Furthermore, granting effective wholesale access to competitors minimises the distortions of competition that follow from any state aid measure.

- (204) The importance of granting effective third-party wholesale access to subsidised networks has been emphasised by Commission practice which predates the Agreement under assessment.<sup>121</sup>
- (205) The Broadband Guidelines also emphasise that wholesale access obligations imposed on a subsidised network should be aligned with the portfolio of access obligations laid down under the sectoral regulation rules. However, in principle, subsidised companies should provide a wider range of wholesale access products than those mandated by national regulatory authorities (“NRAs”) under sectoral regulation since the aid beneficiary is using not just its own resources, but also taxpayers' money to deploy its own infrastructure. Such wholesale access should be granted as early as possible before starting network operation.<sup>122</sup>
- (206) Following its 2008 analysis of the market for wholesale broadband access, the Icelandic NRA, the PTA, required Síminn (as the firm designated with significant market power) to comply with all fair and reasonable requests by other electronic communications undertakings for open access to specialised network infrastructure related to copper local loops at the wholesale level, including the possibility of having bitstream services delivered at various points along the network.<sup>123</sup> It was specified therein that Síminn shall, *inter alia*, respond to reasonable and appropriate requests for access to Options 1, 2, 3 and 4 as defined in paragraph (32) above. This PTA Decision was cited in the tender description.
- (207) Indeed, the EU regulatory framework for electronic communications seeks to facilitate competition through new entrants becoming progressively more reliant on their own infrastructure over time where it is efficient for them to do so.<sup>124</sup> Regulation that promotes efficient investment in companies' own infrastructure is considered more conducive to promoting effective and self-sustaining competition. This has led to a regulatory approach

<sup>120</sup> Paragraph 74(g) of the Broadband Guidelines.

<sup>121</sup> See Commission Decisions C 53/2006 *Investment by the city of Amsterdam in a fibre-to-the home (FttH) network*, OJ L 247, 16.9.2008, p. 27, paragraph 96, and N 14/2008 *United Kingdom, Broadband in Scotland - Extending Broadband Reach*, OJ C 150, 17.6.2008, p. 3, paragraph 57(c), and N 475/2007 *Ireland, National Broadband Scheme ("NBS")*, OJ C 282, 24.11.2007, p. 1, paragraph 45(e).

<sup>122</sup> Paragraph 74(g) of the Broadband Guidelines.

<sup>123</sup> PTA Decision No 8/2008 (see footnote 33 above).

<sup>124</sup> See, for example, Article 8(5)(c) of Act referred to at point 5cl of Annex XI to the EEA Agreement (Directive 2002/21/EC of the European Parliament and of the Council of 7.3.2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”) (OJ L 108, 24.4.2002, p. 33)) (OJ No L 116, 22.4.2004, p. 60 and EEA Supplement No 20, 22.4.2004, p. 14), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (“the Better Regulations Directive”) (OJ L 337, 18.12.2009, p.37) (not yet incorporated into the EEA Agreement) and the Act referred to at point 5cl of Annex XI to the EEA Agreement (Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, (OJ L 167, 29.6.2009, p. 12); OJ L 334, 17.12.2009, p. 4 and EEA Supplement No 68, 17.12.2009, p. 4) which notes one of the objectives of the regulatory framework as the promotion, where appropriate, of infrastructure-based competition.

in electronic communications markets whereby, in the presence of significant market power, multiple access products at different levels of the network hierarchy are simultaneously available to alternative operators. Such differentiated access options accommodate differing levels of network roll-out of the alternative providers. As noted by the European Regulators' Group ("ERG", now known as the Body of European Regulators for Electronic Communications or "BEREC"), this "ladder of investment" approach to regulation is a well-established principle in the present regulatory framework for electronic communications networks and services.<sup>125</sup>

- (208) In addition to the established regulatory practice on effective wholesale access to broadband services, state aid decisions have also involved a dynamic approach to the range of access options which have been required. For example, in the 2006/2007 decisions concerning investment by the city of Amsterdam in a fibre-to-the-home broadband network,<sup>126</sup> wholesale access was to be granted at both the passive<sup>127</sup> and active<sup>128</sup> layers of the network. Furthermore, in a 2010 decision concerning the deployment of very high-speed broadband networks in France,<sup>129</sup> wholesale access was to be required on all levels of the subsidised infrastructure. Since the support was granted for the passive infrastructure of the network (*e.g.* ducts, dark fibre), access to the passive level of the network was to be facilitated as already foreseen in a decision taken by the French NRA, ARCEP, in 2010.<sup>130</sup> However, an active access product was also to be provided to any third party with a reasonable demand for such a product.<sup>131</sup> The demand was considered reasonable if the following three conditions were fulfilled: i) the access-seeker provides a coherent business plan which justifies the activation of the network, ii) the access-seeker shows that it does not have the financial means to install its active equipment, and iii) no active access product is already offered in the same geographic area by a private operator at equivalent prices to those of more densely populated areas.<sup>132</sup>
- (209) While the above examples predominantly refer to wholesale internet access to fixed-line networks, it is not clear to the Authority why a similar dynamic access approach would not also be applicable in the case of wholesale internet access to networks using mobile access technologies. For example, where NRAs have identified significant market power in the wholesale market for mobile access and call origination services in a regulatory context, a range of different access remedies have been facilitated in recognition of the differing levels of network roll-out of market participants. In its 2007 finding of dominance in the wholesale mobile access and call origination market in Iceland, the PTA observed that, given the diversity of the mobile phone market and the various needs of the parties that might conceivably seek access, all forms of wholesale access that may reasonably be granted and that can promote competition in the retail market should fall within the scope of the access

<sup>125</sup> ERG 06(33), Revised ERG Common Position on the Approach to Appropriate Remedies in the ECNS Regulatory Framework, May 2006.

<sup>126</sup> See footnote 121 above and Commission Decision (C (2007) 6072 final) on case C 53/2006 (ex N 262/2005, ex CP 127/2004), *Investment by the city of Amsterdam in a fibre-to-the home (FttH) network*, OJ L 247, 16.9.2008, p. 27.

<sup>127</sup> Passive network access refers to access to the passive network without any electronic equipment (*i.e.* physical network elements such as ducts, fibre, cabinets, etc).

<sup>128</sup> Active network access refers to access to the activated network (*i.e.* whereby the systems or technical components necessary to operate the network are in place, such as switches, routers or splitters).

<sup>129</sup> Commission Decision N 330/2010 *France – Programme national «Très Haut Débit» - Volet B*, OJ C 364, 14.12.2011, p. 1.

<sup>130</sup> This included the availability of an offer to connect the access-seekers' own networks, to connect different parts of the network and to connect to the end consumer.

<sup>131</sup> In this regard, this form of network activity was not funded by the programme, but access to active wholesale products was nonetheless required where there was a reasonable demand for such products.

<sup>132</sup> See Authority Decision No 231/11/COL, referred to in footnote 73 above, paragraph 24.



obligation.<sup>133</sup> In this respect, Síminn was required to comply with all reasonable and appropriate requests for access to (i) national roaming;<sup>134</sup> (ii) co-location and joint utilisation;<sup>135</sup> (iii) mobile virtual network operator (“MVNO”) access,<sup>136</sup> and (iv) resale.<sup>137</sup>

- (210) It follows from Article 2.1 of the tender description, which is marked as Annex I to the Agreement, that the project under assessment was technologically neutral. In accordance with this principle, Síminn deployed the publicly-funded network using ADSL, UMTS, satellite and Wi-Fi technology.<sup>138</sup> Thus, to avoid potential distortions of competition in electronic communications markets where state aid is involved, it appears that third party operators should generally be granted effective wholesale access in a technology-neutral manner and which should be reasonably adapted to their respective access needs.
- (211) The Icelandic authorities have shown that the commencement of marketing and sales for each section of the project was publicly announced on the Fund’s website over the period from August 2009 to August 2010. Moreover, in order not to favour any one service provider, the homes and businesses involved in the project received a letter from the Fund in order to explain the nature of the project and informing people that they could after a specific date begin ordering the service from any internet service provider willing to provide them with the service. The letter specifically stated that the project was open to all service providers. The Fund also sent out a notification to all registered telecom companies with the PTA at that time, including all ISPs, informing them that the new infrastructures were available for utilisation. As a result, all ISPs on the market had the possibility of launching competing retail services at the same time as Síminn.
- (212) According to Annex II to the Agreement, the seller is free to offer Options 1-4, but is only obliged to offer Option 3 in all instances where ADSL broadband technology is used in the project (see paragraph (33) above).<sup>139</sup> At the same time, however, it is stipulated in Annex II to the Agreement that wholesale access to ADSL-based services should be granted on the

<sup>133</sup> See PTA Decision No 4/2007. on the designation of undertaking with significant market power and imposition of obligations in the market for access and call origination on public mobile phone networks (Market 15), and Analysis of the wholesale market for access and call origination on public mobile telephone networks (Market 15), 5 February 2007.

<sup>134</sup> “National roaming” refers to an agreement among mobile network infrastructure operators to use each other’s networks to provide services in geographic areas where they do not yet have coverage.

<sup>135</sup> This refers to an obligation on Síminn to offer other mobile network operators the ability to physically locate their equipment on, or to jointly utilize existing land or mobile infrastructure (such as cable ducts, buildings and structures, or masts).

<sup>136</sup> “Mobile Virtual Network Operator” (MVNO) refers to a provider of mobile services which does not have its own spectrum resources and may or may not own mobile network infrastructure, depending on the particular business model pursued and the extent to which they rely on the facilities provided by the host mobile network. According to the PTA’s definition in its Decision No 4/2007, in cases involving pure virtual network access, the virtual network operator controls the system that is necessary for interconnection and roaming in other operators’ networks but does not own a distribution system (*i.e.* the wireless part of the mobile phone network).

<sup>137</sup> A reseller typically has neither mobile spectrum nor network infrastructure, but has the direct customer relationship and may handle, *inter alia*, customer billing, marketing and sales of the service to end users under an independent brand name. According to the PTA’s definition in its Decision No 4/2007, the reseller does not own any independent mobile network infrastructure and purchases virtually all support services at the wholesale level.

<sup>138</sup> As previously noted in paragraph (30) above, 55% of buildings were connected with UMTS (3G fixed wireless), 41% with ADSL and 4% with satellite/Wi-Fi.

<sup>139</sup> According to the information provided by the Icelandic authorities, wholesale access was to be effective from 2008 to 2014 and the parties to the contract can add up to 2 years to its term depending on market developments and other factors.

same terms as prescribed by the PTA's 2008 Decision No 8/2008 concerning wholesale broadband access, which obliged Síminn to provide Options 1, 2, 3 and 4.<sup>140</sup>

- (213) Furthermore, in instances where UMTS technology is used to deliver broadband services as part of the project, the seller is only required to follow an Option 4 access. According to the Icelandic authorities, the main reason for this arrangement is that the seller needs to have full access and control of the UMTS network end-to-end. Option 4 is based on the definition of basic services set out in Chapter 2.2.9 of the tender documents, which describes a traditional internet resale service whereby the reseller does not operate any part of the network. Furthermore, according to this description, Síminn supplies the user equipment and installation in all instances regardless of who the retailer is, and also handles the customer and maintenance services.
- (214) The Icelandic authorities have confirmed that, on the basis of the aforementioned obligation in the Agreement, Síminn has been obligated to provide effective wholesale access to its competitors from the very beginning of the project. Síminn has also been obliged to offer wholesale access to its ADSL network to all ISP's on the market, including Vodafone, in accordance with the PTA's Decision No 8/2008. Wholesale access has therefore been available on non-discriminatory terms to every wholesale access seeker on the market, regardless of their technical capabilities or location. Síminn has in fact, according to the information provided to the Authority, so far concluded 11 wholesale access agreements with its competitors for the provision of ADSL services, 2 wholesale agreements for the provision of UMTS/3G services and 2 agreements relating to the provision of 2G services.<sup>141</sup> The Icelandic authorities have noted that they have not been presented with any information relating to Síminn having rejected reasonable requests for wholesale access. On the contrary, wholesale access has been provided from the start of the project and Síminn has published an offer for wholesale UMTS access on its website.<sup>142</sup>
- (215) According to information provided by the Icelandic authorities, Vodafone has only requested roaming access to Síminn's 3G transmitters in order to provide 3G mobile communication. Vodafone has however not requested wholesale or resale access to high speed internet services, via UMTS, ADSL or satellite, for the areas concerned in the project. Neither Síminn nor the Icelandic authorities have received such a request from Vodafone. According to the Icelandic authorities, Vodafone has been offered 3G roaming access on market terms by Síminn but has, according to Síminn, been unwilling to enter into an agreement. According to Síminn, Vodafone currently has an agreement with Nova for roaming 3G access.<sup>143</sup>
- (216) The Icelandic authorities have demonstrated that considerable similarities exist between the project in question and the Irish National Broadband Scheme ("NBS"). The projects were implemented around the same time, both projects required the network provider to offer similar wholesale broadband access, in both projects the network providers used a mix of technologies (including wireless technology) and neither project had requirements concerning mandated UMTS/3G voice services. The NBS project also used the same technical solution for 3G wholesale access as was used in the Icelandic project. The Commission, after assessing the NBS project, concluded that the mandated access provisions would enable third party operators to compete with the selected supplier of the

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<sup>140</sup> Reference is made to Chapter 2.2.4 of Section I above for a description of Options 1-4.

<sup>141</sup> Document No 687322.

<sup>142</sup> The telecom company Tal has *inter alia* made an wholesale access agreement with Síminn, see also paragraph 86 above.

<sup>143</sup> Document No 687314.

network, thereby strengthening choice and competition in the areas concerned by the measure.<sup>144</sup>

(217) In light of the above, the Authority concludes that the Icelandic authorities have, through the Agreement with Síminn and the obligations imposed therein, ensured effective third-party wholesale access to the subsidised broadband infrastructure.

### **Wholesale access pricing**

(218) According to paragraph 74(h) of the Broadband Guidelines, wholesale access prices should be based on the pricing principles set by the NRA and on benchmarks and should take into account the aid received by the network operator. However, the Icelandic PTA did not include broadband services delivered over fibre-based infrastructures in its decision on the wholesale broadband market, *i.e.* market 5 in the Authority's Recommendation on Relevant Markets.<sup>145</sup> Fibre is also excluded from the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location (market 4). Therefore, the Icelandic PTA has to date not imposed wholesale access pricing obligations with regard to fibre networks.

(219) However, with regard to the particulars of this case, it is useful to recall that although there were no wholesale access pricing obligations imposed by the PTA, standardised resale agreements, including standard resale discounts for both ADSL and UMTS technology, were nevertheless included in Annex 10 to the Agreement. Moreover, the fact that there has been a material uptake of the wholesale access offerings over the newly constructed network<sup>146</sup> would indicate that the prices offered by Síminn are competitive and market-reflective.<sup>147</sup>

### **Monitoring and claw-back mechanism**

(220) In general terms, the granting authorities have to implement monitoring mechanisms to avoid any risk of overcompensation. However, according to the Broadband Guidelines, the granting authorities are only obliged to implement a claw-back mechanism if the aid amount of the project exceeds EUR 10 million (*i.e.* approximately 1,5 billion ISK).<sup>148</sup>

(221) In the case at hand, the Icelandic authorities have confirmed that the overall cost of the project was considerably under the EUR 10 million threshold. As a consequence, the Authority accepts that there was no need to include monitoring and claw-back mechanisms.

(222) The Icelandic authorities have nevertheless confirmed that the payments to Síminn were made in accordance with a predetermined payment schedule linked to the progress of the project, which avoided the possibility of overcompensation. Pursuant to Article 19 of the Agreement, Síminn presented a bank guarantee from New Kaupþing bank, dated 17 February 2009, which represents a claw-back mechanism in order to avoid overcompensation. The Agreement also includes a strict arrangement of payments in accordance

<sup>144</sup> Commission Decision N 475/2007, *Ireland National Broadband Scheme (NBS)*, OJ C 18, 24.1.2009, p. 1, paragraph 45.

<sup>145</sup> See the EFTA Surveillance Authority Recommendation of 5.11.2008 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive, OJ C 156, 9.7.2009, p.18.

<sup>146</sup> According to the information provided to the Authority, a number of service providers have purchased wholesale access offerings from Síminn and started selling their own services through the network.

<sup>147</sup> See EFTA Surveillance Authority Decision No 444/13/COL of 13.11.2013 *on the deployment of a Next Generation Access network in the municipality of Skeiða- and Gnúpverjahreppur*, OJ C 66, 6.3.2014, p. 6 and EEA Supplement No 14, 6.3.2014, p. 1, paragraph 114.

<sup>148</sup> Paragraph 74(1) of the Broadband Guidelines.

with the progress of the project, which entails that payments are up to a point subject to actual progress of a system build-up and customer take-up, as laid out in Article 16 of the Agreement. Finally, a penalty clause is found in Article 11 of the Agreement, where Síminn is to pay compensation in case of delays, as well as a clause on failure to comply in Article 13 of the Agreement.

### Reporting

(223) According to paragraph 74(k) of the Broadband Guidelines, the aid-granting authorities should report key information on the aid project every two years to the Authority (starting from the date when the network is put into use).<sup>149</sup> While the aid measure in question was not formally notified to the Authority, the Icelandic authorities have now provided the relevant or key information in response to the Authority's information requests. This information should now be submitted bi-annually to the Authority as part of Iceland's annual reporting obligations for state aid measures.

### 3.4 The overall balancing exercise

(224) After having assessed the measure under the relevant criteria of the balancing test and the fundamental principles concerning state aid to broadband infrastructure which are outlined in the Broadband Guidelines, the Authority concludes that, on balance, the measure contributes towards offsetting a geographic and commercial disadvantage in these rural areas which would not otherwise be addressed via market-based solutions in the near future. The measure is aimed at promoting the competitive supply of innovative and high-quality broadband services to the buildings concerned. The measure has been designed to ensure that the overall balance of its effects is positive.

(225) Furthermore, the design of the project and the possibilities for effective wholesale access (including *inter alia* the open and non-discriminatory network design and the wholesale-only business model of the aid beneficiary, together with its clear mandate to grant fair and non-discriminatory access to all service providers) ensure that any distortion of competition caused by the state intervention is kept to the minimum possible.

(226) Therefore, on the basis of the above considerations, the result of the overall balancing test is positive and the financing of the roll-out of broadband services in rural areas in Iceland constitutes an aid measure which is considered to be compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) of the EEA Agreement.

## 4. Conclusion

(227) Based on the above considerations, the Authority concludes that the Agreement between Síminn and the Telecommunications Fund of 25 February 2009 concerning the roll-out of broadband services in rural areas in Iceland constitutes state aid that is compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) of the EEA Agreement.

(228) The Icelandic authorities are also reminded that all plans to modify the individual aid to be granted, including any increase in the grants, should be notified to the Authority.

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<sup>149</sup> Such information should include, in addition to the public information referred to in paragraph 74(j) of the Broadband Guidelines, the date when the network is put into use, the wholesale access products, the number of access seekers and service providers on the network, the number of houses passed and take-up rates.

**HAS ADOPTED THIS DECISION:**

*Article 1*

The EFTA Surveillance Authority concludes that the Agreement between Síminn and the Telecommunications Fund of 25 February 2009 concerning the roll-out of broadband services in rural areas in Iceland constitutes an aid measure compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c).

*Article 2*

This Decision is addressed to Iceland.

*Article 3*

Only the English language version of this Decision is authentic.

Done at Brussels, on 30 June 2015

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
*President*

Frank Büchel  
*College Member*