

Case No: 69280
Event No: 672866
Decision No: 302/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION

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

(Iceland)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to:

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

The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1(3) of Part I and Article 4(4) of Part II.

WHEREAS:

I. FACTS

1. Procedure

- (1) By letter dated 2 February 2011 (Event No 585458), Og fjarskipti ehf. (Vodafone Iceland) lodged a complaint with the EFTA Surveillance Authority (“the Authority”) concerning alleged unlawful state aid granted to Síminn for the roll-out of broadband networks in rural areas of Iceland.
- (2) By letter dated 1 April 2011 (Event No 590838), the Authority requested additional information from the Icelandic authorities. By letters dated 28 April 2011 (Event No 596157) and 17 May 2011 (Event No 598419) and e-mail dated 31 May 2011 (Event No 599981), the Icelandic authorities requested extensions to the deadline to reply. By letter dated 22 June 2011 (Event No 601861), the Icelandic authorities replied to the request and provided the Authority with the relevant information.

- (3) By email dated 2 October 2011 (Event No 614576), the Authority received an inquiry by an interested party containing relevant new information. By letter dated 17 November 2011 (Event No 613338), the Authority acknowledged receipt of the inquiry and informed the interested party that it was free to either provide the Authority with additional information or lodge a formal complaint with the Authority. The Authority received more information from the interested party by emails dated 19 November 2011 (Event No 615746 and Event No 615747).
- (4) By email dated 23 May 2012 (Event No 657203), the Authority received further information from the complainant. By letter dated 8 January 2013 (Event No 657178), the Authority, after assessing the new information provided by the complainant, requested additional information from the Icelandic authorities. By letter dated 11 March 2013 (Event No 665601), the Icelandic authorities replied to the request and provided the Authority with the relevant information.
- (5) Finally, the Authority received further information from the complainant by letter dated 10 May 2013 (Event No 672303).

2. The complaint

- (6) The complainant, Og fjarskipti ehf. (Vodafone), is a company that is active on the electronic communications market and provides fixed telephony, mobile and data services in Iceland. The complainant is currently the second largest operator in Iceland following the incumbent Skipti hf. and its subsidiaries Síminn and Míla.
- (7) According to the complaint unlawful state aid was granted by the Telecommunications Fund (“the Fund”) to Síminn through an agreement entered into between the two parties for the roll-out of broadband services in rural areas in Iceland (“the Agreement”). The complainant maintains that the tender procedure was flawed since significant changes were effected in the final Agreement between Síminn and the Fund, from the original tender documents published by the State Trading Centre (“the STC”). The complainant maintains that these changes were at the behest of Síminn and were highly favourable to the company.
- (8) According to the complaint, the following fundamental changes were implemented in the final Agreement between the Fund and Síminn. *Firstly*, the scope of the project was increased significantly to include a total of 1 788 locations instead of the 1 118 locations that were defined in the tender documents. *Secondly*, the roll out period was extended from 12 months to 18 months and provisions concerning penalties for breach of the roll-out period were changed significantly. *Thirdly*, the payment to Síminn was increased from ISK 375 million to ISK 606 million and the indexation of the payment was based on foreign currency indexation instead of the general consumer price index as stipulated in the tender documents.
- (9) Furthermore, 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.¹ The complainant claims to have repeatedly requested wholesale

¹ As further described in paragraph (34) below, the tender documents initially set out a range of possible access options where ADSL infrastructure (see footnote 13 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

access to the network without success.² According to the complaint this has led to an unacceptable distortion of competition and has given Síminn a significant first mover advantage on the relevant market.

- (10) As regards further grounds of the complaint, the complainant is of the view 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.

3. Description of the measure

3.1 Background

3.1.1 *The role of the Telecommunications Fund*

- (11) 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 in Iceland as described in the official Telecommunications Strategy (“the Strategy”) approved by Althingi.³ 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.
- (12) The Fund is financed by a statutory contribution from the 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.
- (13) 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.

3.1.2 *The mapping and coverage analysis*

- (14) 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.⁴ This work resulted in a comprehensive and current overview of buildings that could potentially form part of the project.
- (15) In February 2007 the Fund called for information on current market areas from broadband service providers⁵ 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.⁶ A public advertisement, placed in

further below. In the case of any services delivered *via* UMTS (see footnote 14 for a definition of this technology), the tender documents only proposed a resale-based access option.

² 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 (Event No 614576).

³ See Act No 132/2005 on the Telecommunication Fund of 20.12.2005.

⁴ 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.

⁵ Also referred to interchangeably herein as “service providers”, “internet service providers”, or “ISPs”.

⁶ *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

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.

- (16) The Fund received information on market areas in various forms from several broadband service providers and individuals.⁷ 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 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.
- (17) 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.

3.1.3 *The tender procedure and selection of the successful bidder*

- (18) In February 2008, the 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.
- (19) 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 in the amount of ISK 378 million and the highest (for the highest average download speed offered) in the amount of ISK 5 billion.
- (20) 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%).⁸ The STC received four valid offers (and one invalid offer) by 4 September 2008. The offers received were as follows:

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>.

⁷ 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.

⁸ 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

<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

(21) 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.⁹ Furthermore, the STC requested that Síminn participate in several explanatory meetings; such meetings being standard procedure after the opening of a tender.

3.1.4 The expansion of the roll out area

- (22) In early December 2008, 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.
- (23) 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. 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.
- (24) 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.¹⁰ 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.

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.

⁹ See letter from the Icelandic authorities to the Authority, dated 22.6.2011 (Event No 601861).

¹⁰ 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 *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 STC advertises all their projects/tenders in this particular section of the newspaper concerned.

- (25) 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.

3.2 The Agreement between the Telecommunications Fund and Síminn

3.2.1 General

- (26) 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. 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 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.

3.2.2 The contract period and the contract amount

- (27) According to Article 4 of the Agreement, the contract period extends 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.
- (28) 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.
- (29) 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. The foreign currency used was the Danish krone (DKK) as it stood on 3 September 2008 (1 DKK = 16,513 ISK).

3.2.3 Technical requirements

- (30) 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.¹¹

¹¹ 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.

- (31) In addition to providing high-speed internet access to buildings, the bidders were also encouraged to provide mobile voice services (2G GSM).¹² This service was to fulfil the criteria set out in the PTA's telecommunications plan (i. fjaraskiptaáætlun) 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 points in the tender criteria.
- (32) The technical solution offered by Síminn was based on 4 different technologies: ADSL;¹³ UMTS;¹⁴ Wi-Fi,¹⁵ and satellite. As it turned out, after construction of the network was completed, 55% of buildings were connected with UMTS (3G fixed wireless), 41% with ADSL and 4% with satellite/ Wi-Fi.

3.2.4 Access requirements

- (33) 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 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.
- (34) In Annex II of 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:¹⁶

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.

¹² See Article 1.2.3.1 of Annex I to the Agreement and footnote 8 of this Decision.

¹³ ADSL stands for Asymmetric Digital Subscriber Line. Digital Subscriber Line (DSL) technologies use traditional (fixed) copper telephony networks to deliver digital broadband signals.

¹⁴ 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.

¹⁵ Wi-Fi refers to the use of local radio links for the transmission of voice and data communications to individual homes or business premises.

¹⁶ 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>.

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 his 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.

- (35) According to Annex II of 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.¹⁷ Furthermore, it is expressly stated that Síminn must follow the PTA's decisions and rules in this regard.¹⁸
- (36) Where UMTS technology is used in the project, Síminn is only obliged to follow Option 4.¹⁹ 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.²⁰
- (37) In Annex 10 of the Agreement, there are standardized resale agreements (i. 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:²¹

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

- (38) 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%

¹⁷ This represents 41% of the whole project.

¹⁸ In Annex II of 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 53 below). Furthermore, pursuant to the PTA Decision No. 26/2007, Mila, a company associated with Siminn, 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. Mila 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 never the less be unlikely.

¹⁹ This represents 55% of the whole project.

²⁰ This represents 4% of the whole project.

²¹ These are discounts off Síminn's retail price.

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.

- (39) According to a note from the Fund dated 14 August 2009, concerning the organisation of access options in the Agreement, there is only resale access available with regard to UMTS 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. The Authority has not yet received detailed information regarding the underlying methodology used to calculate the UMTS resale discounts set out above.

4. Comments by the Icelandic authorities

- (40) 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. 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.
- (41) The Icelandic authorities emphasise that a broadband service is in general a service of general economic interest.²² 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.
- (42) 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 formally entrusted with the provision and discharge of this obligation, which was clearly defined by means of an open tender procedure for a defined service (despite technological neutrality).
- (43) 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.
- (44) 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

²² They refer, in this regard, to Commission Decision N 196/2010 *Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection* (EstWin project) [not yet published].

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.

- (45) Finally, if the Authority were to 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) of the EEA Agreement, having regard to the objectives of the measure, including the objective to increase public broadband access in assisted areas. In this regard, the Icelandic authorities have also invited the Authority to assess whether such aid should be considered to constitute the financing of services of general economic interest (“SGEI”).

II. ASSESSMENT

1. The presence of state aid

(46) 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.”

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

1.1 State resources

(48) 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.

(49) 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.²³

(50) 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

(51) 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.²⁴ Economic activities are activities consisting of offering goods or services on a market.²⁵

(52) 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.

1.3 Favouring certain undertakings or the production of certain goods

(53) Firstly, the aid measure must confer on the beneficiary undertaking advantages that relieve it of charges that are normally borne from its budget. In the present case, the financing of the project by public authorities has provided an economic advantage to the selected

²³ See the EFTA Surveillance Authority’s Decision No 55/05/COL, *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.

²⁴ Case C-41/90 *Höfner and Elser v. Macroton* [1991] ECR I-1979, paragraphs 21-23 and Case E-5/07 *Private Barnehagers Landsforbund v. EFTA Surveillance Authority* [2008] Ct. Rep. 61, paragraph 78.

²⁵ Case C-222/04 *Ministero dell’Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, paragraph 108.

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.²⁶

- (54) Although a competitive tender procedure tends to reduce the amount of financial support required and avoid excessive profits, the aid will also allow the operator to offer end-to-end services *prima facie* at lower prices than if it had had to bear all 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 will be granted to the selected operator.²⁷ Furthermore, it is not clear that the compensation for the 670 additional buildings was established through a competitive tender, as the compensation method for this part of the project is unclear, or whether it was in fact determined after Síminn's bid was chosen.
- (55) The preliminary assessment of the Authority thus shows that an economic advantage cannot be excluded.
- (56) 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, it is the Authority's preliminary view that the measure is selective.²⁸

1.4 Distortion of competition and effect on trade between Contracting Parties

- (57) 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.
- (58) According to settled case-law, the mere fact that a measure strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, is considered to be sufficient in order to conclude that the measure is likely to affect trade between Contracting Parties and distort competition between undertakings established in other EEA States.²⁹
- (59) 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.
- (60) 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

²⁶ 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*, Section II.1.2, and Commission Decision SA.33063, *Italy Trentino NGA* (OJ C 323, 24.10.2012, p. 6), paragraph 77.

²⁷ Commission Decision N 14/2008 – United Kingdom, *Broadband in Scotland - Extending Broadband Reach* (OJ C 150, 17.6.2008, p. 3), paragraph 37.

²⁸ See EFTA Surveillance Authority Decision No 231/11/COL, cited above, footnote 26.

²⁹ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Ct. Rep. 76, paragraph 59; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11.

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.

- (61) Therefore, in the preliminary view of the Authority, the measure threatens to distort competition and affect trade within the EEA.³⁰

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

- (62) The Icelandic authorities 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.
- (63) 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.³¹ 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.³²
- (64) The four conditions are as follows: (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 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.
- (65) 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.³³ 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.³⁴ Furthermore, Síminn seems to have been given a clear mandate assigned by way of a contract, which, according to the Authority's Guidelines on the Application of the state aid rules to compensation granted for the

³⁰ See EFTA Surveillance Authority Decision No 231/11/COL and Commission Decision SA.33063 – *Italy – Trentino NGA*.

³¹ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

³² See paragraphs 87 to 93 of the judgment.

³³ 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 [not yet published], 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>.

³⁴ 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 Guidelines on the Application of the state aid rules to compensation granted for the provision of services of general economic interest), 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.2.1 of this decision).

provision of services of general economic interest, can be seen as a required entrustment act.³⁵

- (66) 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 appears to raise problems in relation to the rest of the *Altmark* criteria. The parameters for calculation of the compensation for the additional units do not seem to have been established in an objective and transparent manner beforehand.
- (67) Moreover, the Icelandic authorities have not sufficiently explained why the payments were indexed to the Danish Krone, as it stood on 3 September 2008, and what effect this arrangement had on the overall compensation to Síminn.
- (68) The public procurement rules do allow for some changes to the contract through subsequent negotiations.³⁶ However, the magnitude of the extension to the scope and compensation does cause the Authority to doubt whether the parameters for calculation of the compensation can be said to have been determined through a public procurement procedure. Furthermore, the Authority has not received information allowing it to conclude that this part of the compensation did not exceed what is necessary to cover the costs related to the additional buildings. When a project increases in scope, so may the chance that economies of scale may reduce the unit costs.
- (69) Finally, 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. Moreover, the Authority has not received information indicating that the Icelandic Authorities have 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.
- (70) Hence, at this stage, the Authority cannot conclude that all of the *Altmark* criteria are fulfilled.

1.6 Conclusion with regard to the presence of state aid

- (71) With reference to the above considerations the Authority cannot, at this stage and based on its preliminary assessment, exclude 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 Internal Market.

³⁵ See paragraph 52 of the Authority's guidelines on the Application of the state aid rules to compensation granted for the provision of services of general economic interest.

³⁶ See for example Article 33(3)(a) Directive 2004/18. The provision 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.* The Directive does not apply to the procedure at hand, as procurements concerning the construction of telecommunication networks are exempted (see Article 13), but its fundamental principles still do (see Section II.2.2.2.3 below). The Authority is in doubt whether all the criteria of Article 33(3)(a) are fulfilled.

2. Compatibility assessment

2.1 Introduction

- (72) 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.
- (73) 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 affect trading conditions and competition in the EEA to the extent that is considered to be contrary to the common interest.
- (74) The Authority’s recently published Guidelines on the Application of the State Aid Rules in relation to the Rapid Deployment of Broadband Networks (“the 2013 Broadband Guidelines”)³⁷ contain a detailed interpretation of Article 61(3)(c) of the EEA Agreement in this sector. 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 2010 Broadband Guidelines were based on the existing decision-making practice of the European Commission.³⁸ The Authority will therefore assess the Agreement in the light of the fundamental principles concerning state aid to broadband infrastructure which are outlined in the 2010 Broadband Guidelines, and of the decisional practice that existed at the time of the signing of the Agreement and which has continued in more recent cases.

2.2 The balancing test and the Broadband Guidelines/decisional practice

- (75) In assessing whether an aid measure can be found to be 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.
- (76) In applying this balancing test, the Authority will assess the following questions:³⁹
- 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?

³⁷ This latest set of Broadband Guidelines was adopted by the Authority on 20.2.2013 [not yet published], 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>.

³⁸ See paragraph 5 of the 2010 Broadband Guidelines.

³⁹ 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*.

(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?

2.2.1 Objective of common interest

(77) 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 appears to target only “white” areas.⁴⁰

(78) The Authority considers support for broadband network deployment in rural and underserved white areas as promoting territorial social and economic cohesion and addressing market failures.⁴¹ 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.⁴² It is therefore the Authority’s preliminary view that, the aid pursues genuine cohesion and economic development objectives, which are considered to be well-defined objectives of common interest.

2.2.2 Design of the measure and the need to limit distortion of competition

2.2.2.1 Is aid the appropriate instrument?

(79) 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.⁴³ These measures have been found unlikely to lead to sufficient investments for the provision of broadband services to underserved areas. Hence, in situations such as the case at hand, there seems to be no alternative to granting public funding to overcome the lack of broadband connectivity.

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

2.2.2.2 Does the aid have an incentive effect

(81) 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. Thus, the Authority’s preliminary view is that the aid provided an investment incentive.

2.2.2.3 Proportionality of the aid and limitation of distortion of competition and effect on trade

Detailed mapping and coverage analysis.

(82) 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

⁴⁰ See definition in footnote 3.

⁴¹ See paragraphs 39-40 of the 2010 Broadband Guidelines.

⁴² See for example EFTA Surveillance Authority Decision No 231/11/COL, Section 3.2.1.2.

⁴³ See for example the EFTA Surveillance Authority Decision No 231/11/COL and Commission Decision N 14/2008, *Broadband in Scotland - Extending broadband reach*, paragraphs 54-55.

and all stakeholders affected by the relevant measure were consulted.⁴⁴ Against this background, the Authority's preliminary view is that the mapping and coverage analysis contributed to minimising potential distortions of competition.

- (83) 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 preliminary opinion that the newspaper advertisement appears to have been an adequate method for communication in this situation.

Open tender procedure

- (84) It follows from the 2010 Broadband Guidelines that the open tender approach ensures that there is transparency for all investors wishing to bid, as well as minimising the potential state aid advantage and reducing 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 contract under assessment.⁴⁵
- (85) As emphasised by both the 2010 Broadband Guidelines and the fundamental principles of EEA public procurement law, equal and non-discriminatory treatment of all bidders is an indispensable condition for an open tender. The Icelandic Authorities conducted a public procurement procedure in order to choose the provider of the broadband network and subsequent services. After the conclusion of the aforementioned 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 contract with the chosen supplier were made concerning its scope, compensation and the roll-out period. Changes were also made concerning the indexation of the total payments.⁴⁶ The complainant claims that, due to changes made to the contract after the supplier was selected, the tender procedure does not meet the essential requirements of equal and non-discriminatory treatment.
- (86) The Authority would like to underline that, even though the Public Procurement Directive does not apply to the procurement of broadband networks and services,⁴⁷ the procurement is still subject to the fundamental principles of equal and non-discriminatory treatment.⁴⁸
- (87) 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.

⁴⁴ Paragraph 49(a) of the 2010 Broadband Guidelines.

⁴⁵ 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 475/07— *Ireland, National Broadband Scheme (NBS)* (OJ C 282, 24.11.2007, p. 3) and Commission Decision N 157/06 — *United Kingdom, South Yorkshire Digital region Broadband Project* (OJ C 80, 13.4.2007, p. 2).

⁴⁶ The changes are explained in further detail in Section I.3.1.4 of this decision.

⁴⁷ Directive 2004/18, Article 13.

⁴⁸ 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, Cases C-324/98 *Telaustria*, [2000] ECR I-10745, paragraph 60, C-231/03 *Coname*, [2005] ECR I-07287, paragraph 16, and C-458/03 *Parking Brixen*, [2005] ECR I-08585, 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, [DATE], p. 2.

- (88) The Authority recognises that the alterations made to the draft contract included in the tender documents are significant and may constitute infringements of the principles of equal treatment and non-discrimination amongst bidders. As mentioned in Section II.1.5 above, the public procurement rules do allow for some changes to the contract through negotiations to take place after the supplier has been selected. However, due to the considerable extent of the changes to both the scope, compensation and roll-out period, the Authority has doubts whether, the procurement process can be seen as an open tender within the meaning of the 2010 Broadband Guidelines.
- (89) Nevertheless, the price paid to Síminn after the expansion of the scope was still significantly lower than the price offered by the other bidders,⁴⁹ and the price estimated by the Fund in advance. The changes may therefore have been justifiable due to the discrepancy between the prices. However, considering that the purpose of conducting a tender process is to achieve the lowest price for the community, the Authority cannot at this stage exclude that these changes to the contract are incompatible with the principles of equal and non-discriminatory treatment of all bidders.
- (90) Moreover, 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 not sufficiently explained the reasons behind this change, nor why they decided to apply the exchange rate of 3 September 2008 and what effect this had on the final payments to Síminn. They are hereby invited to do so. The assessment of this information is necessary in order to conclude whether these changes to the final contract entailed the granting of state aid and, if so, whether the aid can be seen as compatible with the EEA Agreement.

Wholesale access

- (91) 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 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.⁵⁰ Furthermore, granting effective wholesale access to competitors minimises the distortions of competition that follow from any state aid measure.
- (92) The importance of granting effective third-party wholesale access to subsidised networks has been emphasised by Commission practice which predates the contract under assessment.⁵¹
- (93) The 2013 Broadband Guidelines have recently emphasised 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

⁴⁹ See the table in section I.3.1.3.

⁵⁰ Paragraph (49)(f) of the 2010 Broadband Guidelines.

⁵¹ 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*, paragraph 57(c), and N 475/2007– *Ireland, National Broadband Scheme (“NBS”)*, paragraph 45(e).

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.⁵²

- (94) 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.⁵³ 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 (34) above. This PTA Decision was cited in the tender description.
- (95) 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.⁵⁴ 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 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.⁵⁵
- (96) 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,⁵⁶ wholesale access was to be granted at both the passive⁵⁷ and active⁵⁸ layers of the network. Furthermore, in a 2010 decision concerning the deployment of very high-speed broadband networks in France,⁵⁹ wholesale access was to be required

⁵² Paragraph (77)(g) of the 2013 Broadband Guidelines.

⁵³ PTA Decision No 8/2008 (See footnote 18 above).

⁵⁴ 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 (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 (Better Regulations Directive) (OJ L 337, 18.12.2009, p.37) (not yet incorporated into the EEA Agreement) and Act referred to at point 5cl of Annex XI to the EEA Agreement (Regulation (EC) No 544/2009, (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.

⁵⁵ ERG 06(33), Revised ERG Common Position on the Approach to Appropriate Remedies in the ECNS Regulatory Framework, May 2006.

⁵⁶ See footnote 51 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*.

⁵⁷ 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).

⁵⁸ Active 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).

⁵⁹ Commission Decision N 330/2010 *France – Programme national «Très Haut Débit » - Volet B*.

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 2010.⁶⁰ However, an active access product was also to be provided to any third party with a reasonable demand for such a product.⁶¹ 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, and 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.⁶²

- (97) 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 obligation.⁶³ In this respect, Síminn was required to comply with all reasonable and appropriate requests for access to (i) national roaming;⁶⁴ (ii) co-location and joint utilisation;⁶⁵ (iii) mobile virtual network operator (“MVNO”) access,⁶⁶ and (iv) resale.⁶⁷
- (98) 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

⁶⁰ 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.

⁶¹ In this regard, this form of network activity was not being funded by the programme, but access to active wholesale products was nonetheless required where there was a reasonable demand for such products.

⁶² See Decision referred to in footnote 59, paragraph 24.

⁶³ The PTA, in its Decision 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.

⁶⁴ “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.

⁶⁵ 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),.

⁶⁶ “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 2007 decision, 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).

⁶⁷ 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 user under an independent brand name. According to the PTA’s definition in its 2007 decision, the reseller does not own any independent mobile network infrastructure and purchases virtually all support services at the wholesale level.

with this principle, Síminn deployed the publicly-funded network using ADSL, UMTS, satellite and Wi-Fi technology.⁶⁸ Thus, to avoid potential distortions of competition in electronic communications markets where state aid is involved, it appears that third party operators should be generally granted effective wholesale access in a technology-neutral manner and reasonably adapted to their respective access needs.

- (99) According to Annex II of 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 (34) above).⁶⁹ At the same time, however, it is stipulated in the Agreement that wholesale access to ADSL-based services should be granted on the same terms as prescribed by the PTA's 2008 decision concerning wholesale broadband access, which, obliged Síminn to provide Options 1, 2, 3, and 4. However, this obligation to provide all four options was not entirely clear from the tender documents and the subsequent Agreement, given that they only expressly noted an obligation to offer Option 3. Furthermore, the PTA's 2008 wholesale broadband access decision is potentially subject to change and would not therefore appear an adequate substitute for a clear specification of the access obligations in the actual tender documents and subsequent Agreement itself.
- (100) Furthermore, in the 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/resale-based form of access.⁷⁰ According to the Icelandic authorities, the main reason for this arrangement is that the seller claims that it is necessary for it to have full access and control of the UMTS network end-to-end (see paragraph (36) above). 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.
- (101) The contract/tender documents thereby oblige the seller to provide limited wholesale access to the ADSL network (i.e. Option 3), and only resale access to the UMTS/3G network.⁷¹ Furthermore, based on the latest information received from the complainant, it appears that such access to the UMTS/3G network has not yet been agreed between Síminn and the complainant.⁷² As noted in paragraphs (37) and (39) above, standardised resale agreements, including standard resale discounts for both ADSL and UMTS technology, were included in Annex 10 of the Agreement. However, the Authority has not yet received full details regarding the precise underlying methodology used to calculate all of these resale discounts and cannot therefore come to a concrete view at this stage on the extent to which this access pricing would replicate competitive market conditions or contribute to avoiding anti-competitive pricing by the seller.

⁶⁸ As previously noted, 55% of buildings were connected with UMTS (3G fixed wireless), 41% with ADSL and 4% with satellite/ Wi-Fi.

⁶⁹ 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. (See paragraph (27) above).

⁷⁰ Reference is made to Chapter 3.2.4 of Section I for a description of Options 1-4.

⁷¹ The Fund, in its note dated 14.8.2009, confirms that only resale access is available with regard to UMTS connections.

⁷² As regards voice services, and as further noted in footnote 8 above, the Icelandic authorities state that access to voice services in this project was confined to the provision of 2G GSM to a few identified buildings only and that Síminn offers third-party 2G (roaming) access in this regard.

- (102) Furthermore, the Authority has not yet received fully comprehensive information on all of the access-related correspondence between the affected parties to date and thus cannot come to a view regarding the reasonableness of any such access requests or refusals at this time. While, as noted above, it is claimed that Síminn requires full access and control of the UMTS network in order to guarantee the specified quality and service levels, it has not been explained precisely why it is necessary for Síminn to control the entire value chain, and why greater involvement from third-party access seekers' own systems/infrastructure is not feasible in this regard. In the absence of any clear justification in this respect, the lack of a defined wholesale access obligation which allows for different levels of involvement of the access-seeker's own infrastructure in relation to the UMTS network would appear to give Síminn a competitive and commercial advantage in respect of this part of the network. This could allow Síminn to establish the initial relationship with the end user and thereby build up a customer base and take market shares without having to compete effectively with third party operators. This is because, under a resale-only access obligation, third-party operators would be limited in terms of the extent to which they could differentiate their services (for example, in terms of price and product features/functionality) from that of Síminn.
- (103) In addition, the apparently limited nature of the wholesale access options formally prescribed for the ADSL-based broadband services in receipt of state support may also have restricted the extent to which third-party operators could meaningfully differentiate their offering relative to Síminn's retail offering.⁷³ According to the complainant, it took years to get satisfactory wholesale access to the ADSL service rolled out under the Agreement. While, as noted above, the Authority has not yet received fully comprehensive information on all of the access-related correspondence to date, the Authority cannot exclude that Síminn has been granted a first-mover advantage in relation to a significant part of the publicly-funded broadband infrastructure. If this is the case, this would in turn result in economic and competitive advantages for Síminn, which does not seem to be in line with the principles of proportionality and limitation of the distortion of competition under the balancing test.
- (104) This view is supported by the *Mediaset case*, where the European Courts found that a subsidy granted to consumers who purchased a terrestrial digital TV-decoder created an economic advantage for terrestrial broadcasters, in comparison to satellite broadcasters. The Courts observed that “*building up an audience is a crucial part of the business for broadcasters of TV programmes [...] the aid measure at issue created an incentive for consumers to switch from the analogue to the digital terrestrial mode, while limiting the costs that digital terrestrial TV broadcasters had to bear, enabling those same broadcasters to consolidate their existing position on the market – as compared with the position of new competitors – in terms of brand image and customer retention.*”⁷⁴

2.3 Conclusion with regard to the balancing test and the compatibility of the measure

- (105) After having assessed the measure under the relevant criteria of the balancing test, the Authority's preliminary conclusion is that it cannot exclude that the lack of a clear and effective wholesale access obligation with clearly defined pricing principles gave the

⁷³ It appears from the tender documents and from the Agreement that only Option 3 was clearly mandated, although the PTA's 2008 wholesale broadband access decision may have provided some further support for third-party requests for access to the more infrastructure-based wholesale Options 1 and 2.

⁷⁴ Case T-177/07 *Mediaset SpA v European Commission* [2010] ECR II-02341, paragraph 62, upheld by Case C-403/10, *Mediaset SpA v European Commission* [not yet published], paragraph 64.

network operator a disproportionate advantage that may cause distortions of competition. Hence, the Authority is, at this stage, not able to conclude that the aid to Síminn is compatible with the state aid rules of the EEA Agreement.

3. Procedural requirements

- (106) Pursuant to Article 1(3) of Part I of Protocol 3, “[t]he 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 th[e] procedure has resulted in a final decision”.
- (107) The Icelandic authorities did not notify the aid measures to the Authority. Moreover, the Icelandic authorities have, by tendering out and financing the broadband network, 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 might therefore be unlawful.

4. Opening of the formal investigation

- (108) Based on the information submitted by the complainant and the Icelandic authorities, the Authority, after carrying out the preliminary assessment, takes the view that the contract between Síminn and the Fund concerning for the roll-out of broadband services in rural areas in Iceland appears to involve state aid within the meaning of Article 61 of the EEA Agreement.
- (109) Given these doubts and the potential impact of state aid on the investments of private operators it appears necessary that the Authority opens the formal investigation procedure.
- (110) Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority is obliged to initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measure in question is compatible with the functioning of the EEA Agreement or that they do not constitute aid.
- (111) The opening of the procedure will also enable interested third parties to comment on the questions raised and on the impact of the project on relevant markets.
- (112) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, hereby invites the Icelandic authorities to submit their comments and to provide *all documents, information and data* needed for the assessment of the compatibility of the measures within one month from the date of receipt of this Decision.
- (113) The Authority must remind the Icelandic authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted already to the beneficiaries will have to be recovered, unless (exceptionally) this recovery would be contrary to a general principle of EEA law.
- (114) Attention is drawn to the fact that the Authority will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties, by publication of a notice in the EEA Supplement to the Official Journal of the European. All interested parties will be invited to submit their comments within one month of the date of such publication.

HAS ADOPTED THIS DECISION:

Article 1

The contract between Síminn and the Telecommunications Fund concerning for the roll-out of broadband services in rural areas in Iceland appears to involve state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is initiated regarding the aid referred to in Article 1.

Article 3

The Icelandic authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 4

The Icelandic authorities are requested to provide, within one month from notification of this Decision, all documents, information and data needed for assessment of the measures under the state aid rules of the EEA Agreement.

Article 5

This Decision is addressed to Iceland.

Article 6

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 10 July 2013.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member