

Icelandic Ministry of Finance and Economic Affairs  
Arnarhvoli  
101 Reykjavík  
Iceland

**Subject: University summer courses (complaint)**

## 1 Summary

- (1) The EFTA Surveillance Authority (“ESA”) wishes to inform Iceland that, having assessed the additional funds granted by the Icelandic authorities to certain higher education institutions in Iceland for organising summer courses (“the measure”), it considers that the measure does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.<sup>1</sup> ESA has based its decision on the following considerations.

## 2 Procedure

- (2) On 29 June 2020,<sup>2</sup> the Icelandic Federation of Trade (*Félag atvinnurekenda*) lodged a complaint with ESA concerning additional funds granted to certain higher education institutions in Iceland for organising summer courses.
- (3) On 30 June 2020,<sup>3</sup> ESA forwarded the complaint to the Icelandic authorities and requested their comments. On 16 September 2020,<sup>4</sup> the Icelandic authorities provided their comments on the complaint.
- (4) On 1 October 2020,<sup>5</sup> ESA, pursuant to paragraph 48(b) of ESA’s Guidelines on Best Practices for the conduct of state aid control procedures,<sup>6</sup> provided the complainant with its preliminary assessment of the complaint. On 30 October 2020,<sup>7</sup> the complainant provided ESA with additional comments.
- (5) On 4 November 2020,<sup>8</sup> ESA forwarded the complainant’s additional comments to the Icelandic authorities, and invited them to provide additional comments. On 30 November 2020,<sup>9</sup> the Icelandic authorities submitted their comments.

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<sup>1</sup> Reference is made to Article 4(2) of the Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

<sup>2</sup> Document No 1141102.

<sup>3</sup> Document No 1141197.

<sup>4</sup> Document No 1153147 with ten attachments, Documents No 1153149, 1153151, 1153153, 1153155, 1153157, 1153159, 1153161, 115361, 1153165 and 1153165.

<sup>5</sup> Document No 1153316.

<sup>6</sup> [OJ L 82, 22.3.2012, p. 7](#) and EEA Supplement No 17, 22.3.2012, p. 1.

<sup>7</sup> Document No 1160959.

<sup>8</sup> Document No 1161374.

<sup>9</sup> Document No 1166283.

- (6) By emails dated 13 April 2021 and 31 May 2021, the complainant shared with ESA letters it had sent to the Icelandic Competition Authority and to the Ministry of Education, Science and Culture (“the Ministry”).<sup>10</sup>

### 3 Description of the measure

#### 3.1 Background

- (7) On 11 March 2020, the COVID-19 outbreak was classified as a pandemic by the World Health Organisation.<sup>11</sup> The pandemic has had far-reaching economic consequences beyond the spread of the disease itself, and efforts to contain it have caused a major shock to national economies and affected the everyday life of people.
- (8) On 13 March 2020, pursuant to Article 5 of a Notice on the Restrictions for Schooling in Iceland due to the Pandemic,<sup>12</sup> junior colleges and higher education institutions were closed to students but continued serving them through online distance learning. However, in many cases studies in the spring semester 2020 came to a halt, due to restricted access to teaching and research facilities in junior colleges and higher education institutions. According to the Icelandic authorities, this resulted in secondary level graduates in the spring of 2020 being less prepared for higher education than they usually are.
- (9) On 22 April 2020, the Ministry announced its intention to allocate additional funds of ISK 500 million (approx. EUR 3 million) to universities in Iceland for organising summer courses.<sup>13</sup> On 11 May 2020, Parliament passed a Supplementary Budget Act, approving the budget for the measure.<sup>14</sup> The measure was part of the Government’s efforts to counter the economic and social effects of the COVID-19 pandemic. The Government’s objectives were to: (i) better prepare secondary level graduates for higher education, and compensate for the negative impact and disruptions caused by the pandemic on the educational system; and (ii) respond to the increased unemployment rate and foreseeable lack of summer jobs for students that resulted from the outbreak of the pandemic. To achieve these objectives, the Government sought to increase education opportunities (in particular for young people) by providing affordable summer courses.
- (10) The target groups of the measure were: (i) secondary level graduates, (ii) future higher education students, (iii) current higher education students, and (iv) individuals who wanted to strengthen their skills and job opportunities, or to shift or advance their careers.
- (11) Seven (public and private) higher education institutions were granted additional funds, in order to organise summer courses for those target groups. These were: (i) the University of Iceland, (ii) the University of Akureyri, (iii) the Agricultural University of Iceland, (iv) Hólar University, (v) Bifröst University, (vi) Reykjavik University, and (vii) Iceland University of the Arts. All seven higher education institutions had to submit an application for additional funding to the Ministry.

<sup>10</sup> Documents No 1194275 and 1203960.

<sup>11</sup> <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>12</sup> Notice No 216/2020 on the Restrictions for Schooling in Iceland due to Pandemic, available online at: <https://www.stjornartidindi.is/Advert.aspx?RecordID=8c62ca54-58f8-4e3d-9202-070e59c34d04>.

<sup>13</sup> Available online at: <https://www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2020/04/22/800-milljonum-kr.-varid-til-ad-efla-sumarnam/>.

<sup>14</sup> Available online at: <https://www.althingi.is/altext/pdf/150/s/1371.pdf>.

- (12) The higher education institutions were required to limit their study offers to their accredited field of study and research, and to take into account the conditions that accompany the allocation of funding for specific study resources and demand. The higher education institutions also had to pay particular attention to the Government's education policy. In the summer of 2020, the higher education institutions organised the summer courses.
- (13) The Ministry was responsible for distributing additional budget appropriations to higher education institutions for the summer courses. The Ministry was also responsible for collecting statistical information with a view to monitoring and assessing the impact of the measure.
- (14) For public higher education institutions, appropriation grant letters were issued, and for private higher education institutions, agreements were made with written conditions for contributions and settlement. The higher education institutions were to submit data on participants, gender, age, their place of residence, type of assessment, and the number of participants who met the requirements for academic progress, graduation, etc. Following signature of the grant letters and the agreements, 50% of the total sum was paid out. The prerequisite for disbursing the remaining 50% was that the higher education institutions would hand in an operating summary of the project in accordance with the provisions of the agreements.

### **3.2 The Icelandic legal framework on higher education institutions**

- (15) Pursuant to Article 76(2) of the Icelandic Constitution, everyone shall, by law, have the right to an education.<sup>15</sup> Article 76(2) of the Icelandic Constitution states that “[t]he right to general education and suitable training shall by law be guaranteed to all”. The Higher Education Act No 63/2006<sup>16</sup> defines (i) the role of universities in Iceland, (ii) their accreditation, (iii) the organisation of teaching and research, (iv) governance, (v) finances, etc.
- (16) Article 2(1) of the Higher Education Act provides that a higher education institution is an independent educational institution that pursues teaching, research, the preservation and search for knowledge, and creative activity in the fields of science, the humanities, technology or the arts.
- (17) The Public Finance Act No 123/2015<sup>17</sup> provides that in the State budget the Parliament determines the appropriation for the allocation of public money to expenditure areas and expenditure functions. In the case of budget provision to individual higher education institutions, the Ministry submits its proposal for the division of appropriation for Higher Education to the Ministry of Finance and Economic Affairs.
- (18) Article 24(1) of the Public Higher Education Act<sup>18</sup> provides that each public higher education institution shall receive a separate appropriation in the State budget to cover expenses related to teaching, research and other tasks.
- (19) In addition to allocations from the State budget, higher education institutions may seek financing through registration fees, tuition fees and separate funding for

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<sup>15</sup> Available online at: <https://www.althingi.is/lagas/nuna/1944033.html>.

<sup>16</sup> Available online at: <https://www.althingi.is/lagas/nuna/2006063.html>.

<sup>17</sup> Available online at: <https://www.althingi.is/lagas/nuna/2015123.html>.

<sup>18</sup> Available online at: <https://www.althingi.is/lagas/nuna/2008085.html>.

research and other operations. In accordance with Article 24(2)(a) of the Public Higher Education Institutions Act, the registration fees for students enrolled at public higher education institutions are capped at ISK 75 000. Public higher education institutions can claim no further tuition fees. Private higher education institutions, however, can collect tuition fees from enrolled students.

- (20) Furthermore, Article 21 of the Higher Education Act provides that the Ministry may negotiate agreements with private higher education institutions for the duration of three to five years, for the funding of teaching and research activities at higher education institutions accredited by the Ministry. Article 21 states that the existence of such agreements is a prerequisite for the provision of funding to the higher education institutions concerned.

#### **4 The complaint**

- (21) The complainant, the Icelandic Federation of Trade, is a trade association that represents Icelandic companies involved in most types of business and trade in Iceland, including companies that provide education and training to the public.
- (22) The complainant alleges that the Icelandic authorities have granted unlawful state aid to the continuing education centres of three of the higher education institutions listed in paragraph (11), namely: (i) the Continuing Education Centre of the University of Iceland, (ii) the Open University of Reykjavík University, and (iii) the Continuing Education of the University of Akureyri (“the alleged beneficiaries”).
- (23) The complainant maintains that this meets the cumulative criteria for state aid within the meaning of Article 61(1) of the EEA Agreement. Moreover, according to the complainant, the state aid would be unlawful, since it has already been granted in breach of the standstill obligation set out in Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.
- (24) According to the complainant, receiving the additional funds from the State enabled the alleged beneficiaries to offer courses that normally would cost students tens of thousands of ISK for only a fraction of that price. According to the complainant, its members offer similar courses as those offered by the alleged beneficiaries, and they are therefore in direct competition with them. The complainant maintains that the Icelandic authorities could have fulfilled the goal of the measure by also providing funds to companies that provide education and training to the public, instead of only providing funds to higher education institutions.
- (25) Finally, the complainant contends that by accepting that the activities in question are non-economic, ESA would be providing the Icelandic authorities with too wide discretion for subsidising various activities and thereby distorting competition.

#### **5 Comments by the Icelandic authorities**

- (26) According to the Icelandic authorities, the measure falls outside the scope of the state aid rules, as the alleged beneficiaries, when organising the contested courses, are not carrying out economic activities, and consequently do not qualify as undertakings within the meaning of Article 61(1) of the EEA Agreement.
- (27) The Icelandic authorities also maintain that higher education organised within the national educational system, funded and supervised by the State, should be

classified as a non-economic activity. The non-economic nature of higher education is in principle not affected by the fact that students of higher education institutions, in most cases, pay enrolment and tuition fees, which contribute to the operating expenses of the institutions. Such financial contributions only cover a fraction of the true costs of the higher education service and can therefore not be considered as remuneration for the teaching provided.

- (28) Moreover, according to the Icelandic authorities, none of the private education institutes represented by the complainant are accredited higher education institutions, and so the courses offered by these institutes do not incur European Transfer Credit (ECTS). Therefore, the private education institutes represented by the complainant do not meet the criteria for additional funds set by the legislator, that is to offer ECTS credit-bearing summer courses for the target groups of the measure.

## 6 Presence of state aid

### 6.1 Introduction

- (29) 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.”
- (30) The qualification of a measure as aid within the meaning of this provision requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.
- (31) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement, a measure must confer an advantage on an undertaking or undertakings. Therefore, ESA considers it appropriate to look first at the question whether the alleged beneficiaries qualify as undertakings, within the meaning of Article 61(1) of the EEA Agreement, when providing the aforementioned summer courses.

### 6.2 Undertakings

#### 6.2.1 Introduction

- (32) Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>19</sup> Economic activities are activities consisting of offering goods or services on a market.<sup>20</sup> Conversely, entities that are not commercially active, in the sense that they are not offering goods and services on a given market, do not constitute undertakings.

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<sup>19</sup> Judgment of 23 April 1991, *Höfner and Elser*, C-41/90, [EU:C:1991:161](#), paragraphs 21–23, judgment of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, [EU:C:2000:428](#), paragraphs 74–75, and Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 78.

<sup>20</sup> See [the Authority's Guidelines on the notion of State aid as referred to in Article 61\(1\) of the EEA Agreement](#) (NoA) (OJ L 342, 21.12.2017, p. 35), paragraph 12, and judgment of 10 January 2006 *Ministero dell'Economica e delle Finanze v Cassa di Risparmio di Firenze*, C-222/04, [EU:C:2006:8](#), paragraph 108, and judgment of 22 January 2002, *Cisal*, C-218/00, [EU:C:2002:36](#), paragraph 23.

- (33) Moreover, Article 61(1) of the EEA Agreement does not apply when public entities exercise public powers or where public entities act in their capacity as public authorities.<sup>21</sup> An entity may be deemed to exercise public powers where the activity in question forms part of the essential functions of the State, or is connected with those functions by its nature, its aim and the rules to which it is subject.<sup>22</sup> In establishing and maintaining a system of public education, which is, as a general rule, financed from public funds and not by pupils or their parents, the State is not seeking to engage in gainful activity, but is fulfilling its social, cultural and educational obligations towards its population.<sup>23</sup>
- (34) Furthermore, as previously noted, whether or not an entity, public or private, is to be classified as an undertaking depends on the nature of its activity.<sup>24</sup> It cannot matter whether the activity might, in principle, be pursued by a private operator. Such an interpretation would bring any activity of the State, not consisting in an exercise of public authority, under the notion of economic activity.<sup>25</sup>
- (35) Finally, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.<sup>26</sup>
- (36) It is therefore necessary to determine whether the organisation of the summer courses by the alleged beneficiaries constitute economic activities. In so far as some of the alleged beneficiaries may also be carrying out activities that qualify as economic, ESA may also have to assess whether safeguards are in place to ensure that no cross-subsidisation occurs between the two.

#### 6.2.2 Does the provision of the summer courses constitute an economic activity?

- (37) When assessing whether the provision of the summer courses constitutes economic activities, the case law of the Court of Justice and the EFTA Court, concerning the notion of “service” within the meaning of the fundamental freedoms, can be transposed to a state aid case, such as the one at hand.<sup>27</sup>
- (38) According to the first paragraph of Article 37 of the EEA Agreement: “Services shall be considered to be ‘services’ within the meaning of this Agreement where they are normally provided for remuneration [...]”. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service rendered.<sup>28</sup>

<sup>21</sup> Judgment of 16 June 1987, *Commission v Italy*, C-118/85, [EU:C:1987:283](#), paragraphs 7–8, and judgment of 4 May 1988, *Bodson*, 30/87, [EU:C:1988:225](#), paragraph 18.

<sup>22</sup> Judgment of 19 January 1994, *SAT/Eurocontrol*, C-364/92, [EU:C:1994:7](#), paragraph 30, and judgment of 18 March 1997, *Cali & Figli*, C-343/95, [EU:C:1997:160](#), paragraphs 22–23.

<sup>23</sup> Judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, [EU:C:2007:492](#), paragraph 39, and judgment of 27 June 2017, *Betania*, C-74/16, [EU:C:2017:496](#), paragraph 50.

<sup>24</sup> Judgment of 23 April 1991, *Höfner and Elser*, C-41/90, [EU:C:1991:161](#), paragraphs 21–23, judgment of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, [EU:C:2000:428](#), paragraphs 74–75, and Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 78.

<sup>25</sup> E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 80, and Case E-9/19 *Abelia and WTW* [2020] EFTA Ct. Rep. 31, paragraph 88.

<sup>26</sup> NoA, paragraph 10, and judgment of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, [EU:T:2000:290](#), paragraph 108.

<sup>27</sup> Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 80.

<sup>28</sup> Case E-13/19 *Hradbraut* [2020] EFTA Ct. Rep. 36, paragraph 91, and Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 81.

- (39) That characteristic is, however, absent in the case of education provided under a national education system, provided (i) that the State, in establishing and maintaining such a system, is not seeking to engage in a gainful activity, but is fulfilling its duties towards its own population in the social, cultural, and educational fields.<sup>29</sup> Moreover, (ii) the non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can therefore not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse.<sup>30</sup>
- (40) As for the present case, first, the additional funding to the higher education institutions was part of the Icelandic Government response to the increased unemployment rate that resulted from the first wave of the COVID-19 outbreak during the spring of 2020. The measure was intended to increase educational opportunities and counter the foreseeable lack of summer jobs for students. The measure was introduced in order to counter the negative impact and disruptions caused by the COVID-19 pandemic on the educational system and employment. The nature of the contested services provided by the higher education institutions are therefore closely related to the State's role to provide public higher education, as well as its role in the social field. The activities of the higher educational institutions in question satisfy the requirement of being connected, by their nature, their aim and the rules to which they were subject, to fulfilling the State's duties towards its population in the social and educational fields.<sup>31</sup>
- (41) Within the social and educational fields, the Contracting Parties do not only have a considerable degree of discretion in deciding on the objective of their tasks, but also in determining how to fulfil that objective.<sup>32</sup> The Icelandic authorities decided not to restrict the summer courses to students already enrolled at the higher education institutions, but rather to allow for those courses to also be made available to new full-time and part-time students. The purpose of this is, *inter alia*, to also accommodate those that have either lost their jobs, due to the outbreak, or those wanting to improve their skills and job opportunities. This decision of the Icelandic authorities does not appear to exceed the aforementioned discretion that Contracting Parties enjoy when it comes to determining how to best fulfil their educational and social objectives. ESA has previously found that the spread of knowledge beyond the immediate circle of intended addressees is a common practice in European teaching traditions, and that lectures at European public universities are commonly open to the general public, and universities regularly provide audio and audio-visual representations of lectures online. These practices can be seen as merely an extension of the education mission of the relevant higher education institutions.<sup>33</sup>
- (42) Therefore, the fact that some of the courses are also open to students that weren't previously registered at the relevant higher education institutions does not entail

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<sup>29</sup> Judgment of 27 September 1988, *Humbel and Edel*, 263/86, [EU:C:1988:451](#), paragraph 18, and Case E-13/19 *Hraðbraut* [2020] EFTA Ct. Rep. 36, paragraphs 92–93.

<sup>30</sup> E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 83.

<sup>31</sup> See NoA, paragraph 28.

<sup>32</sup> See Decision No 244/14/COL (Norway) *potential aid to the Nasjonal digital læringsarena (NDLA)* ([OJ L 277, 22.10.2015](#), p. 41, and EEA Supplement No 65, 22.10.2015), paragraph 82.

<sup>33</sup> *Ibid.*

that these activities carried out by the higher education institutions are economic in nature. Consequently, the criteria under (i) are met.

- (43) Second, as to the criteria under (ii), it is not of significance whether the public funding is determined in an act of Parliament or a decision of a Minister adopted on the basis of domestic law and rules.<sup>34</sup>
- (44) The Icelandic authorities have confirmed that the public and private higher education institutions were restricted from claiming any additional registration fee from students already enrolled for the spring semester, since the summer courses were defined as part of the 2019/2020 academic year.<sup>35</sup> The higher education institutions also had to commit to collecting only reasonable tuition fees from those students that were not already enrolled for the spring semester. The tuition fee that the higher education institutions collected for the summer courses constituted only a fraction of the true costs of the service and can therefore not be considered as remuneration for the services provided. Accordingly, the criteria under (ii) are met.
- (45) Indeed, the courses are organised within the national educational system, funded and supervised by the State, where both public and private schools are subject to the same legislation, quality standards and State supervision. The services are financed entirely or mainly by public funds. The fees paid by pupils cannot be considered as a remuneration for the service provided, and they do not affect the public nature of the service.
- (46) Finally, it is settled case law that the criteria set out in paragraph (39) can be applied to a range of public educational services, including the provision of education at universities.<sup>36</sup>
- (47) Based on the above, ESA concludes that the alleged beneficiaries, when providing the summer courses, are not carrying out economic activities, and consequently do not qualify as undertakings within the meaning of Article 61(1) of the EEA Agreement.

### 6.2.3 No cross-subsidisation

- (48) As previously noted, it is possible that a single entity may carry on a number of activities, both economic and non-economic. However, it is necessary to keep separate accounts for the different funds received so as to exclude any risk of cross-subsidisation of economic activities by means of public funds received for non-economic activities.<sup>37</sup> In the absence of a separation of non-economic and economic activities, the entirety of the public funding received may qualify as state aid.
- (49) However, in the present case, the prerequisite for getting the second 50% of the funds was that the higher education institutions would hand in an overview of the operation in accordance with the provisions of the agreements that they had to sign beforehand. The higher education institution therefore had to account specifically for the use of the funds, and document that they were used towards providing the summer courses.

<sup>34</sup> Case E-13/19 *Hraðbraut* [2020] EFTA Ct. Rep. 36, paragraph 92.

<sup>35</sup> Document No 1153147.

<sup>36</sup> Judgment of 7 December 1993, *Wirth*, C-109/92, [EU:C:1993:916](#), paragraphs 14 to 22. See further NoA, paragraph 29.

<sup>37</sup> Judgment of 27 June 2017, *Betania*, C-74/16, [EU:C:2017:496](#), paragraph 51.

- (50) In light of the above considerations, ESA concludes that there are adequate safeguards in place to ensure that no cross-subsidisation occurs between the State funded non-economic activities and any economic activities carried out by the alleged beneficiaries.

## **7 Conclusion**

- (51) ESA concludes that the measure does not constitute state aid, as the alleged beneficiaries, when providing the summer courses, do not qualify as undertakings within the meaning of Article 61(1) of the EEA Agreement. Moreover, ESA concludes that there are adequate safeguards in place to ensure that no cross-subsidisation occurs between the non-economic activities funded by the State and any economic activities carried out by the alleged beneficiaries.
- (52) On the basis of the foregoing assessment, ESA concludes that the measure does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

For the EFTA Surveillance Authority,

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