



EFTA SURVEILLANCE AUTHORITY DECISION No 086/23/COL
of 21 June 2023
on alleged State aid to Gagnaveita Reykjavíkur (Iceland) [2024/335]

THE EFTA SURVEILLANCE AUTHORITY ('ESA'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 and 62,

Having regard to Protocol 26 to the EEA Agreement,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24,

Having regard to Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Articles 7(5) and 14 of Part II, and

having called on interested parties to submit their comments ⁽¹⁾, and having regard to their comments,

Whereas:

I. FACTS

1 Procedure

1.1 The complaint and the formal investigation procedure

- (1) By letter dated 26 October 2016 ⁽²⁾, Síminn hf. ('the complainant') filed a complaint regarding alleged State aid granted by Orkuveita Reykjavíkur ('OR') to its subsidiary Gagnaveita Reykjavíkur ('GR') ⁽³⁾.
- (2) By Decision No 086/19/COL ('the Opening Decision') ⁽⁴⁾, ESA initiated the formal investigation procedure. The procedure prior to the adoption of the Opening Decision is described in section 2 thereof.
- (3) ESA initiated the formal investigation procedure as regards the following four measures (collectively referred to as 'the Measures') ⁽⁵⁾:

Measure 1: not paying market interest to OR on the advantage GR obtained through a temporary suspension of interest payments.

Measure 2: the indirect funding by OR to GR for the layout of a fibre optic cable network in Ölfus Municipality.

Measure 3: short-term lending from OR to GR.

Measure 4: the inclusion of a condition in GR's loan agreements with private lenders on OR's continued majority ownership in GR.
- (4) In the Opening Decision, ESA considered preliminarily that the Measures constituted State aid and expressed doubts as to the Measures compatibility with the functioning of the EEA Agreement. The Measures are explained in more detail in section 2.4.

⁽¹⁾ Decision No 086/19/COL of 5 December 2019 to initiate the formal investigation procedure concerning Gagnaveita Reykjavíkur (OJ C 40, 6.2.2020, p. 16 and EEA Supplement No 8, 6.2.2020, p. 17).

⁽²⁾ Document No 825150, and Annexes 1 to 43 (Documents No 825151, 825152, 825153 and 825156).

⁽³⁾ On 12 October 2021, GR changed its name to Ljósleiðarinn.

⁽⁴⁾ See footnote (1).

⁽⁵⁾ These measures are identified in paragraph 97 of the Opening Decision as measures (i) to (iv).

- (5) In paragraph 113 of the Opening Decision, ESA invited the Icelandic authorities to submit, by 6 January 2020 their comments. ESA also published a meaningful summary and invited interested parties to submit comments within one month of the date of such publication ⁽⁶⁾.
- (6) By letter dated 5 March 2020 ⁽⁷⁾, the Icelandic authorities submitted comments to the Opening Decision in the form of a letter dated 4 March 2020 together with annexes from GR and OR ⁽⁸⁾. No other interested party submitted comments to ESA.
- (7) By letter dated 4 November 2021, ESA sent a formal request for information to the Icelandic authorities ⁽⁹⁾. By letter dated 14 January 2023 ⁽¹⁰⁾, the Icelandic authorities sent a response to that request and submitted additional information in a letter dated 21 January 2022 ⁽¹¹⁾.
- (8) By letter dated 14 March 2023, ESA requested further information from the Icelandic authorities ⁽¹²⁾. The Icelandic authorities sent a response to that request by letter dated 25 April 2023 ⁽¹³⁾. By letter dated 9 June 2023, the Icelandic authorities submitted additional clarifications ⁽¹⁴⁾.

2 Factual background

2.1 *The beneficiary*

- (9) GR is a telecommunications company established in 2007, and fully owned by OR ⁽¹⁵⁾. OR is a public undertaking established under Act No 139/2001 ⁽¹⁶⁾, and it is owned by the municipalities of Reykjavík, Akranes and Borgarbyggð ⁽¹⁷⁾. GR was established as an independent legal entity to comply with the requirements of the Post and Telecom Administration in Iceland ('PTA') ⁽¹⁸⁾ on separation between the competitive and non-competitive operations of OR ⁽¹⁹⁾.
- (10) Through its various subsidiaries, OR is active in electricity, geothermal water for heating, cold water and sewage services ⁽²⁰⁾. Its subsidiary GR ⁽²¹⁾ operates a telecommunications and data transmission network in Iceland. It provides wholesale access to its fibre optic network to retail service providers offering different fixed broadband and data transmission services.

2.2 *The complainant – Siminn hf.*

- (11) The complainant is a company providing telecommunications solutions in Iceland. This includes mobile and fixed broadband services to residential and corporate customers. At the time of submitting the complaint to ESA, the complainant was the parent company of Míla ⁽²²⁾, a company owning and operating a telecommunications network covering the entire country.

⁽⁶⁾ OJ C 40, 6.2.2020, p. 16 and EEA Supplement No 8, 6.2.2020, p. 17.

⁽⁷⁾ Document No 1118756.

⁽⁸⁾ Document No 1118758.

⁽⁹⁾ Document No 1262677.

⁽¹⁰⁾ Document No 1262679.

⁽¹¹⁾ Documents No 1264404 and 1264406.

⁽¹²⁾ Document No 1343794.

⁽¹³⁾ Document No 1369194.

⁽¹⁴⁾ Document No 1378355.

⁽¹⁵⁾ See OR organisational chart.

⁽¹⁶⁾ See explanatory memorandum that followed Act No 136/2013.

⁽¹⁷⁾ See Act No 136/2013.

⁽¹⁸⁾ On 1 July 2021, the PTA became the Electronic Communications Office.

⁽¹⁹⁾ The PTA Decision No 10/2006 of 13 November 2006.

⁽²⁰⁾ See OR organisational chart.

⁽²¹⁾ See GR's Articles of Association.

⁽²²⁾ Ardian France SA acquired Mila from Siminn on 15 September 2022.

2.3 Relevant regulatory context

- (12) Until 1 July 2021, the PTA's competence in the area of telecommunication was set out ⁽²³⁾ in the Act on Post and Telecom Administration No 69/2003, implementing the EU's regulatory framework for electronic communications ⁽²⁴⁾. PTA ensures, *inter alia*, in accordance with Article 36 of the Electronic Communications Act No 81/2003 ('ECA') ⁽²⁵⁾, that revenues stemming from non-competitive sectors do not subsidise operations in the competitive telecommunications sector.
- (13) As part of its duties in enforcing Article 36 ECA, the PTA is entrusted with scrutinising OR's investments in the telecommunications market and the business relations between GR and OR. Such investigations can start at the PTA's own initiative or through complaints from interested parties. GR is also obligated to notify specific measures, such as increase in share capital ⁽²⁶⁾, to the PTA to obtain prior approval and interested parties can be parties to such cases, if they demonstrate that they have a legitimate interest in the result of the case ⁽²⁷⁾.

2.4 Factual background of the Measures

2.4.1 Measure 1

- (14) OR and GR signed a Framework Agreement on 8 March 2007 ('the Framework Agreement') ⁽²⁸⁾. The Framework Agreement contains several addendums, including addendum number 4, the '*Loan Agreement designated in Foreign Currency*' ('the Addendum'), which regulated a loan from OR to GR ⁽²⁹⁾. ESA will refer to the mentioned documents as the Framework Agreement and the Addendum.
- (15) According to the Framework Agreement and the Addendum, the loan was to be paid by GR to OR over a payback period of twelve years and with 24 due dates, on 1 May and 1 November every year. For the first 14 due dates, only interest would be due. The first due date for the interest payment was on 1 November 2007. The repayment of the principal amount should only start from 1 November 2014 and then 1 May and 1 November each year. The last due date for both the interest rate and the down payment on the principal amount was foreseen for 1 May 2019.
- (16) The PTA concluded in its Decision No 32/2008 of 30 December 2008 ⁽³⁰⁾ that the lending period in the Framework Agreement and the Addendum should be shortened from twelve to five years. The interest due dates should be similar to what was agreed in the initially signed Addendum and the settlement of the principal amount should take place on 1 May 2012.
- (17) On 1 October 2009, GR and OR signed an Annex, which changed the duration of the Framework Agreement and the Addendum from 12 years to 5 years. This was in line with Decision No 32/2008 from the PTA. The annex set May 2012 as the final due date specified that the borrower should fully repay the debt as well as accrued interests by 1 May 2012.

⁽²³⁾ The Act is no longer in force. The now applicable act is the Act on Electronic Communications Office of Iceland, Act No 75/2021

⁽²⁴⁾ The framework is made up of a package of primarily five Directives and two Regulations: Framework Directive 2002/21/EC (OJ L 108, 24.4.2002, p. 33); Access Directive 2002/19/EC (OJ L 108, 24.4.2002, p. 7); Better Regulation Directive 2009/140/EC (OJ L 337, 18.12.2009, p. 37); Authorisation Directive 2002/20/EC (OJ L 108, 24.4.2002, p. 21); the Universal Service Directive 2002/22/EC (OJ L 108, 24.4.2002, p. 51); the Regulation on Body of European Regulators for Electronic Communications (BEREC) (OJ L 337, 18.12.2009, p. 1); and the Regulation on roaming on public mobile communications networks (OJ L 172, 30.6.2012, p. 10).

⁽²⁵⁾ The Act is no longer in force. The now applicable Act is Act No 70/2022.

⁽²⁶⁾ PTA Decision No 14/2010 of 21 May 2010.

⁽²⁷⁾ PTA Decision No 20/2013 of 10 October 2013.

⁽²⁸⁾ Document No 1369230.

⁽²⁹⁾ Document No 1369230.

⁽³⁰⁾ Document No 862639.

- (18) On 25 November 2009, GR, as the borrower, entered into a loan agreement in the form of a credit line ('the Credit Line Agreement') ⁽³¹⁾ with NBI Ltd. (the former Landsbankinn), as the lender. The Credit Line Agreement was in the amount of ISK 1 400 million and had the end date of 15 July 2011 ⁽³²⁾.
- (19) A clause found in Article 12(k) of the Credit Line Agreement prohibited the borrower to repay instalments and/or interests of loans during the lifetime of that agreement. This entailed that the interest rates under the Framework Agreement and Addendum could not, according to the provisions of the Credit Line Agreement, be paid as long as the Credit Line Agreement was still in force.
- (20) Therefore, the payments by GR to OR under the Framework Agreement and the Addendum were suspended during the duration of the Credit Line Agreement, more specifically until 15 July 2011. Following that date, limitations would no longer apply, as the Credit Line Agreement was no longer in force.
- (21) As the lender to GR under the Framework Agreement and the Addendum, OR's consent was necessary for any changes to be made.
- (22) The suspension of interest payments under the Framework Agreement and the Addendum implied a change to the original agreement between OR and GR. OR's consent – as the lender under that agreement – was therefore necessary for such changes. On 14 October 2009, GR sent a letter to OR ⁽³³⁾, requesting the latter to approve the suspension of interest payments under the Framework Agreement and the Addendum ⁽³⁴⁾. This letter also specifies that the final date of the Credit Line Agreement is 15 July 2011.
- (23) On 16 October 2009, the OR board of directors agreed to the terms of the Credit Line Agreement ⁽³⁵⁾. On 19 October 2009 OR sent a letter ⁽³⁶⁾ to GR, announcing the approval of the suspension of interest payments. In practice, this meant that OR had agreed to suspend the interest payments of 1 November 2009, 1 May 2010, 1 November 2010 and 1 May 2011 under the Framework Agreement and the Addendum.
- (24) The dates and amounts of the suspended interest payments were as follows: 1 November 2009 / ISK 81 240 732; 1 May 2010 / ISK 61 415 704; 1 November 2010 / ISK 55 994 167 and 1 May 2011 / ISK 62 994 280.
- (25) PTA concluded in Decision No 25/2010 of 7 September 2010 ⁽³⁷⁾ that article 12(k) of the Credit Line Agreement breached Article 36 ECA and PTA's previous decisions of 13 November 2006 No 10/2006 and of 30 December 2008 No 32/2008. By its Decision No 25/2010, PTA required GR to make interest payments to OR in accordance with the Framework Agreement and the Addendum.
- (26) At the time of taking PTA Decision No 25/2010, GR was already compliant with the obligations imposed by that decision as GR had already made the two interest payments in question to OR. More specifically, the interest payment of 1 November 2009 was made on 16 December 2009 (44 days after the suspension of the payment), and the interest payment due on 3 May 2010 was made on 30 August 2010 (120 days after the suspension of the payment) ⁽³⁸⁾. As explained by the Icelandic authorities, GR made these interest payments prior to the adoption of PTA's Decision No 25/2010 on the basis of its correspondence with PTA concerning the application of Article 36 ECA ⁽³⁹⁾.

⁽³¹⁾ Document No 1262829 (the Credit Line Agreement).

⁽³²⁾ *Idem*, paragraph 18.1.

⁽³³⁾ Document No 1262827

⁽³⁴⁾ According to that, the final date of the Credit Line Agreement is 15 June 2011, even if the Credit Line Agreement Point 18.1 has 15 July 2011 as the end date.

⁽³⁵⁾ Document No 1262837 Part 3 states that 'A report is submitted from the CEO of GR dated 14 October 2009 regarding the financing of GR. The board approves the presentation together with the attached statement.' This paragraph is also included in the Credit Line Agreement, page 23.

⁽³⁶⁾ Document No 126282, page 21.

⁽³⁷⁾ PTA Decision No 25/2010 of 7 September 2010.

⁽³⁸⁾ See the Statement on Interest Payments in regard to Loan Agreement Gagnaveitu Reykjavíkur with Orkuveitu Reykjavíkur of 1 September 2010 (Document No 1118758).

⁽³⁹⁾ Document No 1369196.

- (27) The other two interest payments, due on 1 November 2010 and 1 May 2011, were never suspended, as the PTA decision was adopted prior to the due date of these interest payments.
- (28) The PTA did not order in any of its decisions GR to calculate and pay interest that had accrued during the suspension period of the interest payments in question, nor was it done by GR in practice.
- (29) In the Opening Decision, paragraph 97, ESA took the preliminary view that GR had obtained an advantage within the meaning of Article 61(1) of the EEA Agreement by not paying market interest on the advantage that it obtained through the temporary suspension of interest payments.

2.4.2 Measure 2

- (30) On 28 April 2006, OR and Ölfus Municipality ('Ölfus') signed an agreement ('ORF Agreement') ⁽⁴⁰⁾ establishing the Ölfus Revegetation Fund ('ORF').
- (31) Under the ORF Agreement OR committed to making yearly payments of ISK 12.5 million for six years into the ORF. The purpose of the ORF, as set out in the ORF Agreement, was revegetation of land in the municipality disturbed by power plants as well to improve land in the municipality in general. In the ORF agreement, OR further committed to support building of a fibre-optic network within Ölfus.
- (32) On 25 October 2007, Ölfus approved the establishment of the ORF as a fund with separate management, stating in the approval decision that Ölfus was the sole owner of the ORF. The ORF had a board of directors composed of three directors. Two of them were nominated by Ölfus and one by OR. Resolutions of the board of directors of the ORF were made under the majority vote rule, which is also the general principle of voting under Icelandic laws ⁽⁴¹⁾.
- (33) On 31 January 2014, OR and Ölfus signed an agreement on the completion of projects under the ORF Agreement. Under the agreement, OR assigned and waived all the rights, the duty to administer and the responsibility for the ORF to Ölfus ⁽⁴²⁾.
- (34) On 31 January 2014, GR and Ölfus concluded an agreement on the rollout of a fiber-optic broadband network and its operation within Ölfus ('2014 fiber-optic broadband network agreement'). According to Article 8 of the agreement, Ölfus had to pay for the building, operation, administration of, and services provision on that broadband network. In particular, Ölfus had to pay to GR ISK 80 million in three instalments from 1 June to 1 August 2014 ⁽⁴³⁾. Other costs and expenses of building and operating of the network had to be borne by GR.
- (35) In a press release of 5 February 2014, Ölfus announced dissolving the ORF and repurposing its funds ⁽⁴⁴⁾.
- (36) On 23 May 2014, Ölfus adopted a resolution dissolving the ORF. According to the resolution, Ölfus had the unconditional right to allocate capital from the former ORF funds to other projects within the municipality ⁽⁴⁵⁾.
- (37) On 2 June 2015, the PTA adopted Decision No 11/2015 ⁽⁴⁶⁾, assessing whether the former ORF funds originating initially from OR had been allocated to GR by means of an agreement between Ölfus and GR. PTA also assessed whether Ölfus had transferred the ownership of the broadband network to GR contrary to Article 36 ECA.

⁽⁴⁰⁾ Document No 1369212.

⁽⁴¹⁾ Document No 1369214.

⁽⁴²⁾ Document No 1369218.

⁽⁴³⁾ Ölfus transferred the former ORF funds to GR on 1 June (ISK 30 million), 1 July (ISK 30 million) and 1 August 2014 (ISK 20 million).

⁽⁴⁴⁾ Ölfus Press Release of 5 February 2014.

⁽⁴⁵⁾ Document No 1118758, page 53.

⁽⁴⁶⁾ PTA Decision No 11/2015 of 2 June 2015.

- (38) The PTA decided that GR had to reimburse Ölfus the payments made under the 2014 fiber-optic broadband network agreement. The PTA suggested either reimbursement in cash or, alternatively, granting to Ölfus an ownership interest in the broadband network. In case of the latter, the value of the ownership interest would have to amount to the capital contribution made by Ölfus under the agreement where the required rate of return would be on market conditions ⁽⁴⁷⁾.
- (39) On 3 December 2015, following exchanges with the PTA concerning compliance with Decision No 11/2015, GR submitted a draft agreement on the ownership, operation and lease of the broadband network to the PTA. After several additional exchanges between the PTA and GR ⁽⁴⁸⁾, the PTA concluded in letter dated 26 May 2016 ⁽⁴⁹⁾ that the draft agreement was in line with Article 36 ECA. The PTA also considered that the funds in question were granted to GR by Ölfus rather than OR ⁽⁵⁰⁾.
- (40) On 25 November 2016, Ölfus and GR signed an Agreement on Ownership, Operation and Lease of Broadband networks ⁽⁵¹⁾. The content of the agreement corresponds to that of the draft assessed by the PTA. Article 2 of that agreement provides for the reimbursement of the capital contribution in the form of ownership interest in the network based on the proportion of the contribution submitted by Ölfus to the roll out ⁽⁵²⁾.
- (41) In the Opening Decision, ESA formed the preliminary view that GR had obtained an advantage through receiving funds indirectly from OR for the layout of a fibre optic cable network in Ölfus. The funds in the question are the funds described in Section 2.4.2.

2.4.3 Measure 3

- (42) By letters dated 20 April 2015 ⁽⁵³⁾ and 7 July 2015 ⁽⁵⁴⁾, GR inquired and the PTA confirmed that the former's participation in an OR operated cash pool would be in compliance with Article 36 ECA.
- (43) On 1 December 2016, GR and OR signed an agreement allowing GR access to the cash pool ⁽⁵⁵⁾.
- (44) On 20 March 2019, the PTA concluded in its Decision No 3/2019 ⁽⁵⁶⁾ that the short-term lending to GR from the OR cash-pool was not in accordance with Article 36 ECA. The PTA considered that by not reflecting market conditions, the cash pool loan infringed PTA's Decision of 13 November 2006 No 10/2006 ⁽⁵⁷⁾ and, thereby, Article 36 ECA.
- (45) In the Opening Decision, ESA formed the preliminary view that GR had obtained an advantage through receiving short-term lending from OR via the shared cash pool.

2.4.4 Measure 4

- (46) Measure 4 concerns replacement of OR loans to GR loans by loans from private lenders. The private lenders' loans in question included a condition whereby decrease of OR ownership in GR below 50 % gave the lender the right to demand repayment, terminate the loan agreement, or declare the loan due ('the change of control clause'). According to the complainant, the interest rates applied by private lender had continuously been set below market level due to that clause.

⁽⁴⁷⁾ *Idem*, page 26.

⁽⁴⁸⁾ Document No 1118758, Annexes 10 to 13.

⁽⁴⁹⁾ Document No 1118758, Annex 12.

⁽⁵⁰⁾ *Idem*.

⁽⁵¹⁾ Document No 1118758, Annex 14.

⁽⁵²⁾ Ownership interest for Ölfus and GR of 78 % and 22 %, respectively.

⁽⁵³⁾ Document No 1369222.

⁽⁵⁴⁾ Document No 1369224.

⁽⁵⁵⁾ Document No 1262835.

⁽⁵⁶⁾ PTA Decision No 3/2019 of 20 February 2019.

⁽⁵⁷⁾ PTA Decision No 10/2006 of 13 November 2006.

- (47) In its Decision No 3/2019, the PTA considered that by that clause, private lenders connected the ownership of OR to the loan agreements to minimise the probability of default ⁽⁵⁸⁾. Accordingly, the PTA considered that the clause could lead to more advantageous loan terms ⁽⁵⁹⁾.
- (48) Ultimately, the PTA decided that GR's loan agreements with private lenders could not contain the change of control clause. In the Opening Decision, paragraph 97, ESA preliminary considered that GR might have obtained an advantage through the inclusion of the change of control clause with private lenders.

3 Comments from the Icelandic authorities

3.1 Measure 1

- (49) In their comments, the Icelandic authorities point out that only the two interest payments were actually suspended, due on 2 November 2009 and 3 May 2010. These interest payments were finally made, respectively, 44 and 120 days after the due date. No payments from OR have since been suspended or deviated from terms and conditions of the loan agreements.
- (50) The measure in question concerns not paying market interest on the advantage that OR obtained through a temporary suspension of the interest payments. The Icelandic authorities acknowledge that it relieves the borrower of an economic burden and frees up capital that would otherwise be used for the payments and could in principle constitute an advantage.
- (51) According to the calculations provided by the Icelandic authorities on the two actually suspended interest payments until the date of payment, the interest calculated using interest rate provided by the ESA's Guidelines on Reference and Discount Rates ⁽⁶⁰⁾ amounts ISK 13 212 965 / EUR 94 588. The Icelandic authorities considered that sum to amount to *de minimis* aid ⁽⁶¹⁾. The Icelandic authorities have also confirmed that no other *de minimis* aid was granted to the beneficiary.
- (52) The Icelandic authorities also argue that the 10-year limitation period set out in Article 15 of Part II of Protocol 3 was exceeded. As the suspended interest payments were paid on 16 December 2009 and 30 August 2010, the Icelandic authorities are of the view that the limitation period had come to an end as regards Measure 4. In their view, communication with ESA in the wake of the complainant's letter of 26 October 2016 cannot be considered to amount to an action taken by ESA, interrupting the limitation period.

3.2 Measure 2

- (53) In their comments, the Icelandic authorities argue that the measure is not imputable to OR. OR did not have a direct or indirect (such as through the board of directors of ORF) role in the dissolving and disposal of the ORF. It was Ölfus rather than OR deciding on the payment of ISK 80 million to GR.
- (54) The Icelandic authorities consider that ESA was wrong in stating that '*OR had joint control of the ORF, together with the representatives of the municipality*' ⁽⁶²⁾ as the decision of the board of directors of the ORF was made by majority vote without OR representative having veto rights. ESA was also wrong in stating that '*in 2014 the ORF decided to use its funds to finance the GRs rollout of a fibre optic network*' ⁽⁶³⁾. The Ölfus Municipality, as the sole owner of the ORF, had made the decision to dissolve the latter and dispose of its funds. The Icelandic authorities note that also the PTA considered that the funds were contributed by the municipality ⁽⁶⁴⁾.

⁽⁵⁸⁾ PTA Decision No 3/2019 of 20 February 2019, paragraph 353.

⁽⁵⁹⁾ *Idem*, paragraph 353.

⁽⁶⁰⁾ ESA's Guidelines on Reference and Discount Rates.

⁽⁶¹⁾ The Icelandic authorities refer to the Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

⁽⁶²⁾ Paragraph 49 of the Opening Decision.

⁽⁶³⁾ *Idem*.

⁽⁶⁴⁾ Document No 1118758.

- (55) Furthermore, the Icelandic authorities consider that in any event the measure in question was repaid and that the State aid is therefore already clawed back. The repayment was made in line with PTA's Decision No 11/2015 and was paid back in full by GR to Ölfus Municipality. This includes both the principal of each payment, and rate of return on market conditions. The Icelandic authorities state that this is reflected in the ownership percentage of the network, which amounts to 78 % ownership to Ölfus Municipality.
- (56) If ESA considers that the measure was not fully clawed back, the Icelandic authorities submit that the measure is compatible with the functioning of the EEA Agreement, either under its Article 59(2) or 61(3)(c). The Icelandic authorities state in connection with both of these articles that market failure existed in the rural areas of Ölfus since no parties had indicated plans or willingness to independently deploy and operate broadband network in the area within a three year period.

3.3 *Measure 3*

- (57) In their comments, the Icelandic authorities submit that the PTA did not take into account the cumulative state aid conditions set out in Article 61(1) of the EEA Agreement. While the PTA focused on formal requirements of loan arrangements between related entities like OR and GR, it did not assess whether the loan conferred an advantage on GR not available on the market.
- (58) The Icelandic authorities argue that when determining the cash pool loan terms, OR and GR matched interest rates and payment terms to market, in accordance with PTA's letter of 7 July 2015.
- (59) More precisely, OR and GR based interest rates on loans in the cash pool on the terms of [...], GR's commercial bank. In December 2016, [...] determined interest rate for similar loans at [...] ⁽⁶⁵⁾, equalling to the interest rates of [...] ⁽⁶⁶⁾ for GR's cash pool loan. Additionally, in December 2016, [...] had made GR an offer ⁽⁶⁷⁾ on financing loans with [...] that lead to concluding a actual loan agreement on 28 December 2016 ⁽⁶⁸⁾.
- (60) According to the Icelandic authorities the terms and interest rates of the loans were therefore on market terms and GR's access and utilisation of the cash pool did not confer on it an advantage.

3.4 *Measure 4*

- (61) According to the Icelandic authorities, the change of control clause is a standard contract clause in loan agreements and it was not specifically drafted with OR and GR in mind. The Icelandic authorities also submitted a legal opinion considering the clause to be common in loan agreements in Iceland and Europe.
- (62) The Icelandic authorities consider that the assumption of the PTA that the change of control clause offers comfort for lenders is unsubstantiated. Any measure at the disposal of OR to assist GR in repaying loan in distress ⁽⁶⁹⁾ are subject of serious scrutiny and prior approval of PTA under Article 36 ECA. Therefore, ownership does not give assurance for timely and effective intervention by the parent company to a lender. Also, the absence of liens or guarantees in GR's loan agreements is a further indication of lenders considering GR as an independent debtor on the basis of its economic position, operations and future prospect of the company.
- (63) Consequently, the Icelandic authorities consider that evidence must be provided showing that there is real and actual causation between ownership and lower or abnormal interest rates, premium and/or payment terms.

⁽⁶⁵⁾ [...] basis points plus [...].

⁽⁶⁶⁾ [...].

⁽⁶⁷⁾ Document No 1267408.

⁽⁶⁸⁾ Document No 1262817 (Annex E.4).

⁽⁶⁹⁾ Such as guarantees, increase of capital, loans or other financial support.

- (64) According to the Icelandic authorities, the PTA did not conduct any benchmarking exercise. GR on the other hand had submitted to the PTA a detailed study on the credit terms offered to GR and compared them to credit terms offered to similar undertakings on credit markets.
- (65) According to that benchmarking analysis, the change of control clause did not result in any advantage for GR. The change of control did not have the alleged effect of securing GR better interest rates spread than the company would have enjoyed without the ownership of OR. To the contrary, the analysis indicated that the loan agreement was on market terms. The Icelandic authorities also point out that the PTA had concluded that the spread ⁽⁷⁰⁾ for GR were equal to those offered to telecommunications companies used by the PTA benchmarking.
- (66) The Icelandic authorities also point out that the PTA prohibited in its Decision No 3/2019 the inclusion of the change of control clauses in GR's new loan agreements. After the adoption of PTA's Decision No 3/2019, GR entered into a new loan agreement on 21 June 2019 with a private lender, with the interest level not being impacted by removal of the change of control clause. The Icelandic authorities therefore argue that the clause did not have the effect alleged by the PTA and that the loan agreements were on market terms.

II. ASSESSMENT

4 Presence of State aid

- (67) 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.'
- (68) The qualification of a measure as aid within the meaning of this provision therefore 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 ⁽⁷¹⁾.

4.1 *Measure 1: temporary suspension of interest payments from GR to OR*

4.1.1 *Introduction*

- (69) Prior to the assessment of the measure, ESA notes that contrary to the comments of the Icelandic authorities summarised in paragraph 52, the limitation period has not expired as regards Measure 1.
- (70) According to Article 15(1) of Part II of Protocol 3, the powers of ESA to recover aid shall be subject to a limitation period of ten years. Under Article 15(2) of Part II of Protocol 3, the limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary as individual aid. Further, any action taken by ESA with regard to the unlawful aid shall interrupt the limitation period. ESA considers that Measure 1 was granted on 16 October 2009 (see Section 4.3.1 below). By letter dated 28 November 2016 ⁽⁷²⁾, ESA forwarded the complaint and the additional information received to the Icelandic authorities for comments. ESA therefore considers that the limitation period has not come to an end as regards Measure 1 by the time of adopting the current decision.

⁽⁷⁰⁾ In Icelandic *vaxtakjör*.

⁽⁷¹⁾ See, for instance, judgment of the Court of Justice of 17 November 2022, *Volotea v Commission*, Joined Cases C-331/20 P and C-343/20 P, ECLI:EU:C:2022:886, paragraph 102.

⁽⁷²⁾ Document No 828509.

- (71) Further, based on the facts and arguments presented in the case, ESA finds it appropriate to start the measure's assessment by analysing whether it meets the conditions set out for *de minimis* aid, and therefore does not amount to State aid as the measure is deemed not to meet all the cumulative criteria in Article 61(1) of the EEA Agreement.
- (72) ESA has decided that on certain conditions, smaller aid amounts are deemed not to meet all the criteria laid down in Article 61(1) of the EEA Agreement and are therefore not subject to the notification procedure. Such *de minimis* aid can be deemed not to have any effect on trade between the EEA States and not to distort or threaten to distort competition.
- (73) For the reasons set out in paragraphs 76–79 below, ESA considers that the conditions for assessing whether Measure 1 amounts to *de minimis* aid are set out in the Commission Regulation (EU) No 1407/2013 ('the 2013 *De Minimis* Regulation'), as incorporated into the EEA Agreement ⁽⁷³⁾.
- (74) Measure 1 concerns the interest payments due on 1 November 2009, 1 May 2010, 1 November 2010 and May 2011 that were suspended by the board of OR agreeing to GR signing the Credit Line Agreement on 16 October 2009 (see paragraph 23).
- (75) ESA notes that in Decision No 25/2010, the PTA considered that the interest payments were not allowed to be suspended (see paragraph 25). Consequently, only the first two interest payments, predating the PTA decision, were actually suspended. These actually suspended interest payments were ultimately made on 16 December 2009 (44 days after the suspension of the payment) and on 30 August 2010 (120 days after the suspension of the payment), respectively. When these payments were made, interest had already accumulated on the suspended amounts and were not clawed back.

4.1.2 *Applicability and scope of the 2013 De Minimis Regulation*

- (76) According to Article 8 of the 2013 *De Minimis* Regulation, the regulation shall enter into force on 1 January 2014. The 2013 *De Minimis* Regulation was incorporated into the EEA Agreement through a Decision of the EEA Joint Committee taken on the 16 May 2014 and entered into force in the EEA on 17 May 2014 ⁽⁷⁴⁾. Hence, the regulation entered into force after the measure was granted.
- (77) Article 7(1) of the 2013 *De Minimis* Regulation sets out that the regulation shall apply to aid granted before its entry into force if the aid fulfils all the conditions laid down in that regulation. Any aid which does not fulfil those conditions will be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.
- (78) Further, the 2013 *De Minimis* Regulation applies to aid granted to undertakings in all sectors with the exceptions listed in Article 1(a) to (e) of that regulation. As these exceptions do not apply in this case, ESA considers that Measure 1 falls within the scope of the 2013 *De Minimis* Regulation.
- (79) Against this background, ESA will assess whether Measure 1 amounts to *de minimis* aid under the 2013 *De Minimis* Regulation, in accordance with Articles 1(1) and 7(1) of that regulation.

4.1.3 *The moment of grant of aid*

- (80) The board of OR accepted the suspension of the payments of interest rate payments on 16 October 2009 under the Framework Agreement and the Addendum (see paragraph (23)).

⁽⁷³⁾ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1). Incorporated into the EEA Agreement at point 1ea of Annex XV.

⁽⁷⁴⁾ Decision of the EEA Joint Committee No 98/2014 of 16 May 2014 amending Annex XV (State aid) to the EEA Agreement. According to Article 3 of the Joint Committee Decision the Decision entered into force on 17 May 2014.

- (81) It follows from Article 3(2) of the 2013 *De Minimis* Regulation that aid shall be deemed to be granted 'at the moment the legal right to receive the aid is conferred on the undertaking on the applicable national legal regime irrespective of the date of payment of the *de minimis* aid to the undertaking'.
- (82) Under Icelandic law, general interest rates will only be paid on monetary claims that result from a contract, custom or law ⁽⁷⁵⁾. If this is not the case, it is considered that there is no obligation to pay general interest ⁽⁷⁶⁾. When the parties decided to suspend the interest payments, they did not agree that interest would accumulate on these suspensions. In other words, GR had no contractual obligation to pay interest on the suspended interest payments, nor did this follow from custom or law. The aid was therefore in ESAs view granted at the point in time when the board of OR decided to suspend the interest payments.
- (83) Accordingly, ESA considers that Measure 1 was granted on 16 October 2009.

4.1.4 *De minimis* aid amount, calculation of gross grant equivalent and cumulation (Articles 3(2), 4(1) and (7) and 5 of the 2013 *De Minimis* Regulation)

- (84) Under Article 2(2) of the 2013 *De Minimis* Regulation 'the total amount of *de minimis* aid granted per Member State to a single undertaking shall not exceed EUR 200 000 over any period of three fiscal years'.
- (85) Article 4(1) of the 2013 *De Minimis* Regulation sets out that the regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante* without need to undertake a risk assessment ('transparent aid').
- (86) Further, Measure 1 does not correspond to aid instruments specified in Article 4(2) to (6) of the 2013 *De Minimis* Regulation ⁽⁷⁷⁾. According to Article 4(7) of the regulation, aid comprised in other instruments shall be considered as transparent *de minimis* aid if the instrument provides for a cap ensuring that the relevant ceiling is not exceeded.
- (87) ESA reiterates that on 16 October 2009, i.e. the date of granting Measure 1, OR suspended four interest payments. ESA notes that at that point in time OR did not know that the PTA would intervene with its Decision No 25/2010 of 7 September 2010 and not allow interest payments suspension (see paragraph (23)). Therefore, on 16 October 2009, OR's suspension decision covered all four interest payments (see paragraph (24)). Accordingly, ESA considers that, for assessing whether Measure 1 complies with the rules on total amount of *de minimis* aid and whether it is transparent (Articles 3(2), 4(1) and 4(7) of the 2013 *De Minimis* Regulation), interest must be calculated on all four suspended interest payments.
- (88) As regards the duration of the suspension periods of the four interest payments, the suspension of these payments was grounded on the provisions of the Credit Line Agreement. Hence, the suspended interest payments were to be paid at the latest on the maturity dates of the Credit Line Agreement.
- (89) It follows from the above that on the date of the aid grant (16 October 2009), it was possible to calculate the exact amount of interest that would accumulate on the suspended interest payments - from the aid grant date until the end of the Credit Line Agreement. ESA therefore considers that Measure 1 qualifies as transparent aid under Article 4(1) of the 2013 *De Minimis* Regulation. Moreover, as the duration of the interest payments' suspension was set for a fixed period, Measure 1 also complies with Article 4(7) of the 2013 *De Minimis* Regulation.
- (90) As regards the regulation's requirement to assess compliance with the *de minimis* aid ceiling on the level of a 'single undertaking' ⁽⁷⁸⁾, the Icelandic authorities have confirmed that no other undertaking controlled by the City of Reykjavik or their subsidiaries has been granted *de minimis* aid over any period of three fiscal years, in this case 2007–2011. It is therefore only the amount of the interest calculated on the suspension periods of the four interest payments in question ⁽⁷⁹⁾ that are relevant for assessing compliance with the *de minimis* aid ceiling set by Article 3(2) of the 2013 *De Minimis* Regulation.

⁽⁷⁵⁾ See Article 3 of Act No 38/2001 on interest and indexation.

⁽⁷⁶⁾ See Icelandic Supreme Court Judgment from 6 May 2004 No 443/2003.

⁽⁷⁷⁾ Article 4(2) to (6) of the 2013 *De Minimis* Regulation refers to grants, interest rate subsidies, loans, capital injections, risk finance measures and guarantees.

⁽⁷⁸⁾ See Articles 2(2) and 3(2) of the 2013 *De Minimis* Regulation.

⁽⁷⁹⁾ See paragraph 24.

- (91) ESA calculates the *de minimis* aid amount on the basis of the following elements: the sums of the suspended interest payments, the number of days that the interest payments were suspended and the interest rates that applied were GR to borrow the suspended amounts for the durations of the suspension periods on the market.
- (92) According to the information provided by the Icelandic authorities, the market interest rate to be applied in this case is 11,45 %, also used in the Credit Line Agreement between GR and a private lender. That interest rate is based on the preferred Interest Base rate K-1 of 10,45 % to which 100 basis points were added ⁽⁸⁰⁾. ESA considers that level of interest to be adequate for the purposes of calculating the amount of *de minimis* aid. In particular, that rate was offered to GR by a private lender for a similar loan at the relevant time. ESA also notes that its reference rate used as a proxy for the market interest rate was in any case lower in October 2009 (i.e. 7,67 %).
- (93) The interest on the suspended payments for the purposes of assessing the amount of *de minimis* aid is consequently calculated as follows:

Interest on the suspension of interest payment due on 1 November 2009

Suspended interest payment: ISK 81 240 732

Days suspended: 638

Date of payment: 15 July 2011

Interest rate: 11,45 %

Interest for the suspended days: ISK 16 601 673,62 (EUR 98 142 ⁽⁸¹⁾)

Interest on the suspension of interest payment due on 1 May 2010

Suspended interest payment: ISK 61 415 704

Date of payment: 15 July 2011

Days suspended: 441

Interest rate: 11,45 %

Interest for the suspended days: ISK 8 663 969,43 (EUR 51 218)

Interest on the suspension of interest payment due on 1 November 2010

Suspended interest payment: ISK 55 994 167

Date of payment: 15 July 2011

Days suspended: 257

Interest rate: 11,45 %

Interest for the suspended days: ISK 4 514 280,43 (EUR 26 686)

Interest on the suspension of interest payment due on 1 May 2011

Suspended interest payment: ISK 62 994 280

Date of payment: 15 July 2011

Days suspended: 76

Interest rate: 11,45 %

Interest for the suspended days: = ISK 1 501 852,67 (EUR 8 878)

⁽⁸⁰⁾ Preferred Interest Base rate K-1 (in Icelandic *Kjörvaxtaflokkur K-1*) was determined and published on the financial market in Iceland by the commercial lender (*Landsbankinn*). According to the information provided by the Icelandic authorities, the commercial lender would add to the base rate 75 basis points before, and 100 basis points after 1 July 2009.

⁽⁸¹⁾ For expressing the amount of *de minimis* aid in EUR, ESA uses ISK/EUR average annual exchange rate for 2009.

- (94) Based on the above, the total *de minimis* aid under Measure 1 amounts to EUR 184 924.
- (95) According to Article 2(6) of the 2013 *De Minimis* Regulation and for the purposes of the ceilings in paragraph 2, the aid shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid. It also follows that aid payable in several instalments shall be discounted to its value at the moment of its being granted. The interest rate to be used for discounting purposes and to calculate the gross grant equivalent shall be the reference rate applicable at the time of grant.
- (96) In this case the aid was granted by way of suspending future interest payments on 16 October 2009. The amount of EUR 184 924 should therefore also be discounted back to its value at the moment of aid grant. Although ESA has not performed the discounting exercise, ESA notes that discounting would lead to an even lower aid amount, supporting the conclusion that the *de minimis* ceiling is respected in this case.
- (97) Accordingly, ESA considers that aid under Measure 1 does not exceed the ceiling set out in Article 3(2) of the 2013 *De Minimis* Regulation.

4.1.5 Monitoring (Article 6 of the 2013 *De Minimis* Regulation)

- (98) According to Article 6(1), first sentence, of the 2013 *De Minimis* Regulation, where a Member State intends to grant *de minimis* aid to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid (expressed as gross grant equivalent) and of its *de minimis* character, making express reference to this Regulation, and citing its title and publication reference in the Official Journal of the European Union.
- (99) Under Article 6(2) of the 2013 *De Minimis* Regulation, where a Member State has set up a central register of *de minimis* aid containing complete information on all *de minimis* aid granted by any authority within that Member State, the first subparagraph of paragraph 1 shall cease to apply from the moment the register covers a period of three years.
- (100) As explained by the Icelandic authorities, on 16 October 2010 the central register of *de minimis* aid had not yet been set up. Therefore, the first subparagraph of paragraph 1 of Article 6 applies to the Measure 1. Hence, it was upon the Icelandic authorities, when intending to grant *de minimis* aid to GR, to inform the latter in writing of the prospective amount of the aid (expressed as gross grant equivalent) and of its *de minimis* character, making express reference to this regulation and citing its title and publication reference in the *Official Journal of the European Union*.
- (101) The Icelandic authorities have confirmed that GR was not informed of the intent to grant *de minimis* aid in line with Article 6(1) of the 2013 *De Minimis* Regulation. However, ESA considers that this omission does not prevent the application of the 2013 *De Minimis* Regulation to Measure 1, in line with the interpretation of that regulation by the Commission that is also reflected in the latter's Notice on the recovery of unlawful and incompatible State aid ⁽⁸²⁾ ('the 2019 Recovery Notice').
- (102) Although ESA has not yet adopted guidelines that correspond to the Commission's 2019 Recovery Notice ⁽⁸³⁾, ESA considers its paragraphs 100 and 101 on *de minimis* aid to reflect general principles that ESA applies *mutatis mutandis*.
- (103) According to paragraph 101 of the 2019 Recovery Notice, the Commission can accept the retrospective application of the *de minimis* rule to an aid beneficiary under three conditions:

— the entire amount of aid must be below the *de minimis* ceiling ⁽⁸⁴⁾;

⁽⁸²⁾ Communication from the Commission – Commission Notice on the recovery of unlawful and incompatible State aid, C/2019/5396 (OJ C 247, 23.7.2019, p. 1).

⁽⁸³⁾ ESA currently applies its 2008 Guidelines on the recovery of unlawful and incompatible aid (OJ L 105, 21.4.2011, p. 32, and EEA Supplement No 23/2011, 21.4.2011, p. 1). These Guidelines correspond to the Commission Notice Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4).

⁽⁸⁴⁾ The aid amount of Measure 1 is below the *de minimis* ceiling (see paragraph 94).

- when verifying retrospectively the amount of *de minimis* aid granted over any period of 3 fiscal years, a Member State must consider each 3-year fiscal period which includes the date on which the aid should purportedly be excluded from recovery ⁽⁸⁵⁾; and
- all the conditions laid down in the applicable Regulation, which can be applied retrospectively must be met.

(104) The preceding analysis shows that, except for the first sentence of Article 6(1), Measure 1 met from the moment it was granted all the *de minimis* aid requirements set out in the 2013 *De Minimis* Regulation. Further, the requirements of Article 6(1), first sentence, are not possible to apply retrospectively. ESA therefore considers that Measure 1 is in line with all three conditions set out in paragraph 101 of the 2019 Recovery Notice and that Measure 1 consequently falls under the 2013 *De Minimis* Regulation.

4.1.6 Conclusion

(105) Based on the above, ESA concludes that Measure 1 complies with the 2013 *De Minimis* Regulation and that it therefore does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

4.2 Measure 2: the funding of the layout of a fibre optic cable network in Ölfus Municipality

4.2.1 The scope of the Opening Decision

(106) In the Opening Decision, ESA formed the preliminary view that Measure 2, i.e. the receipt of funds indirectly from OR for the layout of a fibre optic cable network in Ölfus Municipality, fulfilled all criteria in Article 61(1) of the EEA Agreement and therefore constituted State aid ⁽⁸⁶⁾.

(107) In assessing the scope of the complaint and, accordingly, deciding on the scope of the Opening Decision, ESA considered the complaint to concern alleged State aid granted solely by OR to GR through various means ⁽⁸⁷⁾. Both in the initial complaint and the following submissions, the complainant has consistently raised concerns as regards taking various measures by OR to the benefit of GR ⁽⁸⁸⁾. This is also the case with Measure 2.

(108) The limitation of the scope of the Opening Decision to measures taken solely by OR is also evident from Section 6 thereof. Thus, in paragraph 57 of the Opening Decision, ESA considered the mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it imputable to the State. In the same vein, in paragraph 58 of the Opening Decision, ESA stated that '[t]he Authority will therefore need to assess, in light of the aforementioned indicators, whether OR, in its dealings with GR, was acting as an autonomous entity, free of any influence from its owners, or whether its actions are imputable to the Icelandic authorities, i.e. the City of Reykjavík and the municipalities of Akranes and Borgarbyggð.'

(109) Further, in paragraph 63 of the Opening Decision, ESA took the view that in light of the legal status of OR, the composition of its Board and the general circumstances described above, ESA is unable to exclude that the measures are imputable to the State and that they entail the transfer of State resources, if and to the extent they confer advantages on GR. In paragraph 64 of the Opening Decision, ESA invited the Icelandic authorities to comment on the issue of imputability. Hence, ESA limited the imputability assessment to OR and its link to the City of Reykjavík and the municipalities of Akranes and Borgarbyggð rather than any other entity such as Ölfus or the ORF.

(110) Based on the above, ESA considers that the scope of the Opening Decision is limited to measures, including Measure 2, taken solely by OR.

⁽⁸⁵⁾ According to the information provided by the Icelandic authorities, this condition is met (see paragraph 90 and Document No 1369196, page 13).

⁽⁸⁶⁾ Opening Decision, paragraph 104.

⁽⁸⁷⁾ *Idem*, paragraph 12.

⁽⁸⁸⁾ See Section 2 of the Opening Decision.

- (111) According to well-established case-law of the Court of Justice of the European Union ('the Court') concerning the formal investigation phase of State aid procedure, 'under Article 108(2) TFEU, the Commission has a duty to put the interested parties on formal notice to put forward their comments during the formal investigation phase [...]. This rule is in the nature of an essential procedural requirement. [...]' ⁽⁸⁹⁾. ESA notes that Article 108(2) of the Treaty on the Functioning of the European Union corresponds to Article 1(2) of Part I of Protocol 3.
- (112) The Court has further held that '[i]n accordance with Article 6(1) of Regulation No 659/1999, the initiating decision must summarise the relevant issues of fact and law, include a preliminary assessment of the Commission and set out the doubts as to its compatibility with the internal market. The formal investigation procedure permits a more in-depth examination and clarification of the questions raised in the initiating decision [...]. The Commission must, however, without being required to present a complete analysis of the aid in question, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to submit their comments [...]. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with internal market [...]' ⁽⁹⁰⁾. Article 6(1) of Regulation No 659/1999 ⁽⁹¹⁾ corresponds to Article 1(2) of Part I of Protocol 3.
- (113) Further, according to the General Court, '[i]t follows that Article 4 of Regulation 2015/1589, applicable in the present case by virtue of Article 15(1) of that regulation, concerning Commission decisions on unlawful aid, therefore lays down an exhaustive list of decisions which the Commission may adopt following the preliminary examination of the national measure in question, which do not include the possibility of adopting a decision declaring a national measure compatible with the internal market without the Commission having first taken a decision on the classification of that measure as State aid. In particular, Article 4(3) of Regulation 2015/1589 provides that the Commission may declare a measure compatible with the internal market, 'provided that it falls within the scope of Article 107(1) TFEU.' ⁽⁹²⁾. Articles 4 and 15 of Regulation 2015/1589 ⁽⁹³⁾ correspond to Articles 4 and 13 of Part II of Protocol 3.
- (114) ESA's assessment of Measure 2 is based on the scope of the Opening Decision and the above-explained principles deriving from well-established case-law as regards the rights of defence. ESA also takes note of the General Court's judgment as regards the duty to conclude on the existence of aid prior to the compatibility assessment of an aid measure.

4.2.2 Assessment of Measure 2

- (115) As explained in the previous subsection, the scope of the Opening Decision was limited to alleged State aid granted solely by OR through various means to GR ⁽⁹⁴⁾.

⁽⁸⁹⁾ Judgment of the General Court of 12 December 2018, *Freistaat Bayern v Commission*, T-683/15, ECLI:EU:T:2018:916, paragraph 46, and case-law cited.

⁽⁹⁰⁾ *Idem*, paragraph 47 and case-law cited.

⁽⁹¹⁾ Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1), as amended.

⁽⁹²⁾ Judgment of the General Court of 6 Nov 2022, *Netherlands v Commission*, T-469/20, ECLI:EU:T:2022:713, paragraph 59 (ESA's unofficial translation in English). Appeal pending at the Court of Justice, *Commission v Netherlands*, C-40/23 P. Paragraph 59 of the judgment in T-469/20: 'Il en résulte que l'article 4 du règlement 2015/1589, applicable en l'espèce en vertu de l'article 15, paragraphe 1, dudit règlement, relatif aux décisions de la Commission en matière d'aide illégale, fixe donc une liste exhaustive des décisions que la Commission peut adopter à l'issue de l'examen préliminaire de la mesure nationale en cause, au nombre desquelles ne figure pas la possibilité d'adopter une décision déclarant une mesure nationale compatible avec le marché intérieur sans que la Commission se soit au préalable prononcée sur la qualification d'aide d'État de cette mesure. En particulier, l'article 4, paragraphe 3, du règlement 2015/1589 prévoit que la Commission peut déclarer une mesure compatible avec le marché intérieur, « pour autant qu'elle entre dans le champ de l'article 107, paragraphe 1, TFUE ».'

⁽⁹³⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽⁹⁴⁾ This implies that through the adoption of the Opening Decision, interested parties were given the opportunity to comment on measures to the extent taken by solely by OR.

- (116) In the comments to the Opening Decision, the Icelandic authorities explained that Ölfus was obliged to and made payments to GR under an agreement entered into between the two on 31 January 2014 (see paragraph 34) ⁽⁹⁵⁾. Also, it was Ölfus that had the competence to dissolve the ORF (see paragraphs (35) and (36)).
- (117) ESA notes that the PTA's statements in Decision No 11/2015 (see paragraph (37)) indicate that Measure 2 was not taken solely by OR. This view of the PTA is evident from its conclusion in Decision No 11/2015 that OR and Ölfus jointly allocated the fund's capital to the fibre optic network ⁽⁹⁶⁾. The view of the PTA that Measure 2 was not taken by OR is also implied by the PTA's appropriate measures suggestions concerning the repayment of funds received by GR from the ORF. In particular, the PTA suggested that GR could either repay the funds to Ölfus or that Ölfus could obtain an appropriate share in the project proportional to its investment. ESA reiterates that this view of the PTA is also an indication that the measure was taken by Ölfus rather than OR, and at the very least not solely by OR.
- (118) ESA concludes that – differently from its provisional view set out in the Opening Decision – Measure 2 was not taken solely by OR. Therefore, ESA considers that Measure 2 does not amount to a measure taken by OR to the benefit of GR.
- (119) ESA considers that the scope of the Opening Decision is limited to measures solely taken by OR towards GR ⁽⁹⁷⁾. Therefore, ESA does not conclude in the present decision on whether Measure 2 constitutes State aid to the extent the measure was taken by a person other than (or jointly with) OR.
- (120) Further, according to the judgment of the General Court in T-469/20, ESA has to assess the existence of aid prior to a measure's compatibility assessment (see paragraph 113. In the present decision, ESA concluded that Measure 2 did not amount to State aid granted to GR by OR. Therefore, ESA does not assess the arguments of the Icelandic authorities concerning the compatibility of the measure with the EEA Agreement.
- (121) Lastly, ESA notes that, based on the arguments of the Icelandic authorities, a potential advantage from Measure 2 appears to have been repaid by GR to Ölfus (paragraph 55). However, for the reasons set out in the previous paragraph, ESA does not conclude in the present decision on whether a potential advantage from the measure has been recovered by GR.

4.2.3 Conclusion

- (122) ESA concludes that Measure 2 does not constitute State aid in the meaning of Article 61(1) of the EEA Agreement granted by OR to GR.

4.3 Measure 3: short-term lending from OR to GR

4.3.1 Introduction

- (123) The EEA legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of EEA States to act as economic operators ⁽⁹⁸⁾. However, as stated by ESA in its Guidelines on the notion of State aid ('NoA'), when public authorities directly or indirectly carry out economic transactions in any form, they are subject to the EEA State aid rules ⁽⁹⁹⁾.

⁽⁹⁵⁾ The Icelandic authorities also submitted the agreement of 31 January 2014 between GR and Ölfus. See Document No 1369220.

⁽⁹⁶⁾ PTA Decision No 11/2015 of 2 June 2015, Chapter 4.2.

⁽⁹⁷⁾ See also the case-law referred to in the previous subsection.

⁽⁹⁸⁾ Article 125 of the EEA Agreement provides that 'This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership'.

⁽⁹⁹⁾ ESA's Guidelines on the notion of State aid ('NoA'), paragraphs 40 and 41 and the case-law cited (OJ L 342, 21.12.2017, p. 15 and EEA Supplement No 82, 21.12.2017, p. 1, paragraph 73).

- (124) Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ⁽¹⁰⁰⁾. In order to make this assessment a concept known as the ‘market economy operator principle’ has been developed by the EEA courts. The decisive element of the market economy operator test is whether the public bodies acted as a market economy operator would have done in a similar situation. Whether a State intervention is in line with market conditions must be examined on an *ex ante* basis, having regard to the information available at the time the intervention was decided upon ⁽¹⁰¹⁾. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favourable position compared to that of its competitors ⁽¹⁰²⁾.
- (125) Whether a transaction is in line with market conditions must be established through a global assessment of the effects of the transaction on the undertaking concerned without considering whether the specific means used to carry out that transaction would be available to market economy operators ⁽¹⁰³⁾.
- (126) In this context, it is for ESA to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether GR would manifestly not have obtained comparable facilities from a comparable private operator ⁽¹⁰⁴⁾.
- (127) In the same way as any other transaction, loans granted by public bodies (including public undertakings) may entail State aid if they are not in line with market terms ⁽¹⁰⁵⁾. In the absence of specific market information on a given debt transaction, the debt instrument’s compliance with market conditions may be established on the basis of a comparison with comparable market transactions (that is to say through benchmarking) ⁽¹⁰⁶⁾. Benchmarking often does not establish one precise reference value but rather establishes a range of possible values by assessing a set of comparable transactions. Where the aim of the assessment is to consider whether the State intervention is in line with market conditions, it is normally appropriate to consider measures of central tendency such as the average or the median of the set of comparable transactions ⁽¹⁰⁷⁾.
- (128) ESA’s preliminary view in the Opening Decision was that the test applied by the PTA under Article 36 ECA generally ensures that all transactions between GR and OR, or other related companies, are on market terms. However, this does not necessarily imply that all measures infringing Article 36 also constitute State aid within the meaning of Article 61(1) of the EEA Agreement.
- (129) The PTA had found that in order to ensure that the effectiveness of Article 36 ECA is guaranteed, the concept of ‘subsidy’ should be understood in a broad sense, so as to include any measures from OR, both direct and indirect, which potentially provide GR with an advantage that its competitors on the market do not enjoy ⁽¹⁰⁸⁾. This distinguishes PTA’s interpretation of Article 36 from the concept of State aid in Article 61(1) of the EEA Agreement. For the latter to apply, a mere potential advantage for the undertaking in question is not sufficient.
- (130) It has been confirmed by the EEA courts that ESA cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage ⁽¹⁰⁹⁾.

⁽¹⁰⁰⁾ NoA, paragraph 74.

⁽¹⁰¹⁾ NoA, paragraph 78.

⁽¹⁰²⁾ NoA, paragraph 76.

⁽¹⁰³⁾ NoA, paragraph 80.

⁽¹⁰⁴⁾ See Case C-244/18 P, *Larko v Commission*, ECLI:EU:C:2020:238, paragraph 29 and the case-law stated therein.

⁽¹⁰⁵⁾ NoA, paragraph 108.

⁽¹⁰⁶⁾ NoA, paragraph 111.

⁽¹⁰⁷⁾ NoA, paragraph 100.

⁽¹⁰⁸⁾ The Opening decision, paragraph 84.

⁽¹⁰⁹⁾ Judgment in *BTB Holding Investments and Dufenco Participations Holding v Commission*, C-148/19 P, ECLI:EU:C:2020:354, paragraph 48.

- (131) The short-term lending based on the cash pool agreement between OR and GR does not seem to be in line with the normal purpose of an intra-group cash pool arrangement. A cash pool arrangement normally aims at managing the short-term liquidity within the group in an efficient manner by allowing the participating group companies to combine their short-term credit and debit positions in various accounts into one account. Rather, the purpose of GR's arrangement for short-term lending from OR was to finance investments in building up of fibre optic cable infrastructure in the area of Reykjavik and nearby municipalities. ESA therefore finds it more appropriate to compare the short-term lending based on the cash pool agreement with a regular loan transaction, when assessing relevant benchmark transactions.

4.3.2 *Indications of a potential advantage*

- (132) PTA Decision No 3/2019 focuses on the fact that a lack of formalisation of the short-term loan arrangement between OR and GR creates doubts as to the efficient financial separation of the two companies, which would ensure that revenues stemming from non-competitive sectors do not subsidise GR's operations in the competitive sector of telecommunications. The fact that the cash pool agreement lacks conditions normally found in loan agreements between independent parties, and the potential risk of distorting competition on that basis, seems to be sufficient for the PTA to establish an infringement of Article 36 ECA. However, for Article 61(1) of the EEA Agreement to apply, an actual advantage has to be conferred on the borrower, namely GR.
- (133) ESA notes that it is not unusual that short-term loan agreements within a group of companies are formalised to a lesser degree than between independent companies, given the joint control of borrower and lender which amongst other reduces transactional risks otherwise present between independent parties ⁽¹¹⁰⁾. This feature of intra-group transactions is not specific to publicly owned companies. Even though the cash pool agreement does not regulate issues such as duration and covenants, which would normally have been included in a loan agreement between independent parties, ESA does not see this lack of formalisation in itself to be capable of positively establishing the actual existence of an advantage.
- (134) In addition, the complainant submits ⁽¹¹¹⁾ that the interest rates on GR loans are not on market terms that reflect the credit risk inherent in an undertaking such as GR, with a very high debt/EBITDA ratio ⁽¹¹²⁾. As with the PTA decision, ESA finds that this information is an indication of a potential advantage, but not a fact that in itself is capable of positively establishing the actual existence of an advantage to GR. The debt/EBITDA ratio is just one of several relevant factors taken into account when private market lenders assess what interest terms to offer to a borrower and when credit rating agencies set their credit ratings ⁽¹¹³⁾.

4.3.3 *Additional relevant evidence*

- (135) ESA has also assessed whether additional relevant evidence together with the information available from the PTA decision and the complainant, is capable of positively establishing the actual existence of an advantage to GR.
- (136) It is not possible, based on the information at hand, to establish compliance with market conditions directly through transaction-specific market data. The loan transaction's compliance with market conditions, therefore, has to be assessed on the basis of other available methods ⁽¹¹⁴⁾. One available method is to assess a transaction's compliance with market conditions in the light of the terms under which comparable transactions carried out by comparable private operators have taken place in comparable situations (benchmarking) ⁽¹¹⁵⁾.

⁽¹¹⁰⁾ See for example, paragraphs 10.54 to 10.56 in Chapter C 1.1.1. in the OECD pricing guidance on financial transactions.

⁽¹¹¹⁾ Opening decision, paragraph 13.

⁽¹¹²⁾ Earnings before interest, tax, depreciation and amortization (EBITDA) is a measure of a company's operating performance.

⁽¹¹³⁾ In a letter of 13 September from the complainant to ESA, the complainant points out that GR should have a low rating based on Moody's methodology for setting credit ratings, due to the debt/EBITDA ratio of the company and that this would mean that 780–900 basis points should be added to the reference rate according to ESA's own guidelines. However, this specific metric is only weighted as 15 % in the overall Moody's rating methodology, as indicated by the 'sub-factor weight'.

⁽¹¹⁴⁾ NoA, paragraph 97.

⁽¹¹⁵⁾ NoA, paragraph 98.

4.3.4 Benchmark transactions

- (137) To identify an appropriate benchmark transaction, it is necessary to pay particular attention to the kind of operator concerned, the type of transaction at stake and the market or markets concerned. The timing of the transactions is also relevant, particularly when significant economic developments have taken place between the conclusion of the transactions under assessment ⁽¹¹⁶⁾.
- (138) A strong indication of the loan transaction's compliance with market conditions is established if GR at the time the short-term lending based on the cash pool agreement commenced, had comparable alternative loan transactions available that carried similar interest terms. The same holds true if reasonably accurate adjustments can be made for any economically significant differences between the benchmark transactions and the short-term lending based on the cash pool agreement. Using such transactions as benchmarks has the advantage that no further assessment of the kind of operator and market concerned would be necessary, given that GR itself would be party to the benchmark transactions.
- (139) According to the Icelandic authorities, two loans from private commercial lenders were offered to GR on 21 and 22 December 2016, respectively. This was after the cash pool agreement was signed on 1 December 2016, but before the actual short-term lending from OR to GR started in January 2017. As explained by the Icelandic authorities, the terms were discussed with the private lender prior to signing the cash pool agreement and OR took into account prior loan offers from private lenders in setting the spread ⁽¹¹⁷⁾.
- (140) First, as regards the loan offer of 21 December 2016 from [...] ⁽¹¹⁸⁾, ESA points out that this was a binding offer ⁽¹¹⁹⁾. A comparison of the economically most significant terms of that loan offer with those of the cash pool agreement is set out in the table below.

Table 1.1

Loan offer from [...] v cash pool agreement with OR

Economically significant terms:	Loan offer from [...]	Cash pool agreement with OR
Interest terms	[...] ⁽¹⁾ [...]	[...]
Other fees	[...]	[...]
Duration	[...]	[...]
Loan amount	[...]	[...]
Collateral	[...]	[...] ⁽²⁾
Debt rank	[...]	[...]
Covenants	[...]	[...] ⁽³⁾

⁽¹⁾ In Icelandic *Óverðtryggt lán, kjörvextir*. See [...].

⁽²⁾ The lender's control and ownership of the subsidiary which makes the granting of security less relevant to its risk analysis as a lender, cf. Paragraph 10.56 in Chapter C.1.1.1 of the OECD pricing guidance on financial transactions.

⁽³⁾ There may be less information asymmetry between entities (that is, better visibility) in the intra-group context than in situations involving unrelated parties. Intra-group lenders may choose not to have covenants on loans to associated enterprises, partly because they are less likely to suffer information asymmetry, cf. Paragraph 10.86 in Chapter C.1.1.5 of the OECD pricing guidance on financial transactions.

⁽¹¹⁶⁾ NoA, paragraph 99.

⁽¹¹⁷⁾ Document No 1369196, page 22.

⁽¹¹⁸⁾ Document No 1267408.

⁽¹¹⁹⁾ *Idem*.

- (141) ESA notes that both the [...] offer and the cash pool agreement have variable interest rates relying on market rates. The Reibor-based cash pool agreement resulted in an interest rate close to non-indexed prime rate of the [...] offer. At the very least, it is an indication of the cash pool agreement's interest rate being agreed upon a level acceptable for the market.
- (142) The cash pool agreement did not have any covenants attached to it, which is quite common in intra-group loan transactions (see paragraph 133). However, by adhering to the covenants in the loan from [...], the same creditor protection achieved by restricting the minimum equity ratio, would to a large extent also effectively benefit OR.
- (143) ESA notes that the cash pool agreement does not include arrangement and commitment fees. However, ESA considers that the absence of these fees in an intra-group cash pool agreement does not have a material impact for assessing the level of the interest rate of the latter.
- (144) As regards the arrangement fee, it relates to asymmetry of information and related additional risk and administrative costs not present in an intra-group transaction. Regarding the commitment fee, it relates to a third party lender committing to make a certain level of funding available throughout the duration of a credit line agreement. However, an intra-group cash pool does not have such features as it is not to be used for third party lending and can be terminated by the parent company at any given moment.
- (145) Moreover, even if such fees would be relevant for assessing an intra group cash pool agreement (*quod non*), the level of these fees in the 21 December 2016 offer (see table 1.1) does not mean that the interest level of the cash pool agreement would be outside market level interest rate range. ESA reiterates that the cash pool arrangement is set up between related parties, not meant for lending to third parties and can be terminated by the parent company at any time. Therefore, the relevant fees would presumably be set in a cash pool agreement at a level even lower than in the [...] 21 December 2016 offer.
- (146) Having considered the economically most significant terms of the loan offer from [...], ESA finds that the actual interest rate offered to GR seems economically comparable to that of the cash pool agreement.
- (147) Even though loan offers are not to be fully equalised with actual transactions as benchmarks, as they have not resulted in binding transactions, a binding offer is none the less a good indicator of GR's alternative lending possibilities. Information of a borrower's realistically available alternative transactions would be among the sources of information a private lender would typically take into consideration when negotiating the terms of a loan agreement.
- (148) Secondly, GR received another loan offer of 22 December 2016 from [...] that lead to concluding a loan agreement on 28 December 2016 (see paragraph 59). A comparison of the economically most significant terms of that agreement with those of the cash pool agreement is set out in the table below.

Table 1.2

Loan agreement with [...] v cash pool agreement with OR

Economically significant terms	Loan agreement with [...]	Cash pool agreement with OR
Interest terms	[...]	[...]
Other fees	[...]	None
Duration	[...]	[...]
Loan amount	[...]	[...]
Collateral	[...]	[...] ⁽¹⁾
Debt rank	[...]	[...]

4.3.5 *Alternative benchmarks and proxy rates*

- (155) ESA finds the above-mentioned loan offer and loan agreement to be more representable of realistically available financing costs of GR than those that would apply under ESA's Guidelines on Reference and Discount Rates. The rates under these guidelines are only proxies to be used in situations where comparable market transactions are not easy to identify ⁽¹²⁰⁾. The uncertainty about the reliability of this proxy rate is here further increased by the fact that there is significant uncertainty in setting the right input values needed to produce the proxy rate, that is setting the correct rating class and degree of collateral/loss given default for GR.
- (156) On this basis, ESA considers that the loan offer from [...] of 21 December 2016 and the loan agreement with [...] to GR of 28 December 2016 represent the best available proxies for the market interest rate. ESA therefore considers that GR does not seem to have received an economic advantage which it would not have obtained under normal market conditions.

4.3.6 *Conclusion*

- (157) ESA concludes that the available information does not positively establish that the short-term lending based on the cash pool agreement with OR in the period from January 2017, with all loans paid in full by the end of year 2017, conferred an advantage on GR. The information available to ESA rather indicates that the interest terms reflect normal market conditions for a comparable loan. Given that not all the conditions of Article 61(1) of the EEA Agreement are satisfied, Measure 3 does not constitute State aid within the meaning of that Article.

4.4 ***Measure 4: the inclusion of a condition in GR's loan agreements with private lenders on OR's continued majority ownership in GR (change of control clause)***

- (158) Article 61(1) of the EEA Agreement stipulates as one of the cumulative conditions for a measure to qualify as State aid that the measure must be granted by the State or through State resources (see also section 4).
- (159) GR is a private limited liability company wholly-owned by OR. Resources of public undertakings may constitute State resources within the meaning of Article 61(1) of the EEA Agreement because the State is capable of directing the use of these resources ⁽¹²¹⁾.
- (160) However, in case of measures taken by public undertakings, it is also necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure. The mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it imputable to the State ⁽¹²²⁾.
- (161) In relation to Measure 4, OR is the only relevant entity that may have undertaken an intervention on behalf of the State to the advantage of GR. ESA reiterates that the Opening Decision covers measures taken solely by OR (see paragraph (110)).
- (162) In the Opening Decision, ESA considered that it needed to assess whether OR, in its dealings with GR, was acting as an autonomous entity, free of any influence from its owners, or whether its actions are imputable to the Icelandic authorities, i.e. the City of Reykjavík and the municipalities of Akranes and Borgarbyggð (paragraph 58 of the Opening Decision). ESA was unable to conclude whether the measures were imputable to the State and entailed the transfer of State resources (paragraph 63 of the Opening Decision).
- (163) Following the adoption of the Opening Decision, the Icelandic authorities submitted comments demonstrating that OR was not a party to any of the relevant loan agreements concluded between GR and the two private lenders ⁽¹²³⁾. There is also no evidence of the State (including municipalities) being involved in negotiating or approving the loan agreements or the change of control clause. ESA notes that no other interested party submitted comments to the Opening Decision.

⁽¹²⁰⁾ NoA, paragraph 113.

⁽¹²¹⁾ NoA, paragraph 49.

⁽¹²²⁾ NoA, paragraphs 40 and 41 and the case-law cited.

⁽¹²³⁾ Documents in appendix E to Document No 1262679.

- (164) ESA thus finds that OR is not a party to nor has it participated in negotiating the change of control clause and there is no evidence of the participation of the State in taking Measure 4.
- (165) The Icelandic authorities argued and submitted evidence on that the change of control clause was introduced at the request of the lenders ⁽¹²⁴⁾. They also submitted an opinion of a legal expert on change of control clauses being commonly used by financial institutions both in Iceland and more broadly in Europe ⁽¹²⁵⁾. The fact that that clause is commonly used in Iceland is also acknowledged by the PTA. In its Decision No 3/2019, the PTA did not challenge GR's claim on the change of control clause being comparable to standardised international agreements. To the contrary, the PTA acknowledged that control clauses are normal market practice of lenders ⁽¹²⁶⁾.
- (166) The Icelandic authorities also submitted evidence showing that the removal of the change of control clause did not have an impact on access to and the level of interest rate with a private lender (see paragraph (66)). It is evident from the exchanges between the lender and GR that the former had placed no importance on the removal of the change of control clause ⁽¹²⁷⁾. The discussions clearly concerned GR's financial aspects unrelated to its ownership.
- (167) According to well-established case-law, it is for ESA to provide proof of the existence of State aid within the meaning of Article 61(1) of the EEA Agreement ⁽¹²⁸⁾.
- (168) As explained above, OR was not a party to the loan agreements relevant for Measure 4 and there is no information on the State being involved in taking Measure 4. Rather, it appears that the measure was introduced at the request of the lenders, being normal market practice.
- (169) Further, the evidence at ESA's disposal shows that – contrary to the preliminary view formed by ESA in the Opening Decision – the change of control clause did not lead to more advantageous loan terms or access to loan capital for GR.
- (170) ESA also notes that following the adoption of the Opening Decision, no comments were submitted that would contradict ESA's assessment as regards imputability and advantage of the measure.
- (171) ESA concludes that Measure 4 does not entail an intervention by the State or through State resources, imputable to the State. ESA also considers that the measure did not confer an advantage on GR. Given that not all the conditions of Article 61(1) of the EEA Agreement are satisfied, Measure 4 does not constitute State aid within the meaning of that Article.

5 Conclusion

- (172) On the basis of the foregoing assessment, ESA concludes that the Measures 1 to 4 do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement granted by OR to GR,

HAS ADOPTED THIS DECISION:

Article 1

Measures 1 to 4 do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement granted by OR to GR. The formal investigation is hereby closed.

⁽¹²⁴⁾ Document No 1378355.

⁽¹²⁵⁾ Document No 1118758.

⁽¹²⁶⁾ PTA Decision No 3/2019 of 20 February 2019, paragraphs 352 and 353.

⁽¹²⁷⁾ Document No 1378355.

⁽¹²⁸⁾ See, for instance, Judgment of the Court of Justice of 19 September 2018, *European Commission v French Republic and IFP Énergies nouvelles*, C-438/16 P, ECLI:EU:C:2018:737, paragraph 110.

Article 2

This Decision is addressed to Iceland.

Article 3

Only the English language version of this decision is authentic.

Done at Brussels, 21 June 2023.

For the EFTA Surveillance Authority,

Arne RØKSUND
President
Responsible College Member

Stefan BARRIGA
College Member

Árni Páll ÁRNASON
College Member

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