

## III

*(Other acts)*

## EUROPEAN ECONOMIC AREA

## EFTA SURVEILLANCE AUTHORITY DECISION

No 081/17/COL

of 26 April 2017

**to close the formal investigation into alleged state aid granted through the rent of land and property in the Gufunes area (Iceland) [2017/1911]**

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

Having regard to:

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

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

Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 1 of Part I and Articles 7(2) and 13 of Part II, and

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

Whereas:

## I. FACTS

## 1. PROCEDURE

- (1) By email dated 2 April 2014, Gámaþjónustan hf. ('the complainant') lodged a complaint with the Authority concerning alleged unlawful state aid granted by the City of Reykjavík ('the City') through the rent of property and land in the Gufunes area in Reykjavík, Iceland, to Íslenska Gámafélagið ('ÍG'), allegedly below market price <sup>(2)</sup>.
- (2) Following a preliminary examination the Authority, on 30 June 2015, adopted Decision No 261/15/COL to initiate a formal investigation into the alleged aid. By letter dated 1 October 2015 <sup>(3)</sup>, the Icelandic authorities responded to the Authority's decision.

<sup>(1)</sup> Decision No 261/15/COL to initiate the formal investigation procedure into potential state aid granted through the rent of land and property in the Gufunes area, published in OJ C 316, 24.9.2015, p. 22 and EEA Supplement No 57, 24.9.2015, p. 21.

<sup>(2)</sup> Document Nos 704341-704343.

<sup>(3)</sup> Document No 774957.

- (3) On 24 September 2015, the Authority's Decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* and in the EEA Supplement to it, giving interested parties one month to comment on the Authority's preliminary views <sup>(1)</sup>.
- (4) Having received a one week extension, ÍG submitted comments by letter dated 29 October 2015 <sup>(2)</sup>. The Authority received no other comments. After the expiry of the one month deadline to submit comments, the Authority received market information from the complainant by email dated 25 November 2015 <sup>(3)</sup>. By letter dated 26 November 2015 <sup>(4)</sup>, the Authority forwarded the comments and the market information to the Icelandic authorities who were given the opportunity to respond. By letter dated 5 January 2016, <sup>(5)</sup> the Icelandic authorities responded. The matter was also discussed between representatives of the Icelandic authorities and the Authority at a meeting in Reykjavík on 12 February 2016.
- (5) Finally, the Authority received additional information concerning developments in the Gufunes area, from the complainant by emails dated 21 May 2016 <sup>(6)</sup>, 27 May 2016 <sup>(7)</sup> and 15 December 2016 <sup>(8)</sup>.

## 2. DESCRIPTION OF THE MEASURE

### 2.1. THE GUFUNES AREA

- (6) The Gufunes area is situated in the Grafarvogur district of Reykjavík, Iceland. Until the year 2001, a fertiliser factory, Áburðarverksmiðjan, was operating in the area. In 2002, the planning fund of Reykjavík (Skipulagssjóður Reykjavíkur, 'SR') bought the factory and the surrounding area from the shareholders of Áburðarverksmiðjan ('the purchase agreement'). According to the Icelandic authorities, the plan at the time was to remove all the buildings and installations from the area. In 2007, SR was dissolved and a new fund, Eignasjóður, was founded to take over SR's assets and tasks.
- (7) According to the Reykjavík Municipal Zoning Plan 2001-2024, the Gufunes area is intended for residential purposes and not for industrial activities <sup>(9)</sup>. Additionally, the area is intended for the construction of the Sundabraut highway, connecting Laugarnes and Gufunes. Moreover, according to the Reykjavík Municipal plan for 2010-2030, the industrial area of Gufunes is regressing and a mixed urban area of residential units and clean commercial activities is anticipated in the future <sup>(10)</sup>. Neither plan foresees that industrial activities will continue to be located in the area in the future.

### 2.2. AGREEMENTS CONCLUDED BETWEEN THE CITY OF REYKJAVÍK AND ÍSLENSKA GÁMAFÉLAGIÐ FOR THE RENT OF LAND AND PROPERTIES IN THE GUFUNES AREA

- (8) In February 2002, when SR purchased the land and the properties in the Gufunes area, the area was occupied by several tenants (mainly contractors and developers). At the time, ÍG had a lease agreement with Áburðarverksmiðjan, which had been concluded 29 October 1999 ('the 1999 Agreement'). The 1999 Agreement set out a monthly rental fee of ISK 159 240, based on a price per square meter <sup>(11)</sup>. ÍG used the land for its waste management business. According to the purchase agreement, SR took over all obligations and rights from Áburðarverksmiðjan regarding the existing lease agreements, including the 1999 Agreement with ÍG.
- (9) According to the City, the Gufunes area was continually busy and difficult to manage. Moreover, the buildings and installations were in bad shape, some tenants were not paying rent and there had been an accumulation of scrap, such as car wreckages. It was therefore clear to the City that in order to serve its role as a landowner, it would have to hire staff to control the area during day and night.

<sup>(1)</sup> Decision No 261/15/COL to initiate the formal investigation procedure into potential state aid granted through the rent of land and property in the Gufunes area, published in OJ C 316, 24.9.2015, p. 22 and EEA Supplement No 57, 24.9.2015, p. 21.

<sup>(2)</sup> Document No 778453.

<sup>(3)</sup> Document No 781877.

<sup>(4)</sup> Document No 781927.

<sup>(5)</sup> Document No 786716.

<sup>(6)</sup> Document No 805588.

<sup>(7)</sup> Document No 806264.

<sup>(8)</sup> Document No 831665.

<sup>(9)</sup> Available online at: <http://skipulagssja.skipbygg.is/skipulagssja/>. See also [http://reykjavik.is/sites/default/files/adalskipulag/08\\_grafarvogur.pdf](http://reykjavik.is/sites/default/files/adalskipulag/08_grafarvogur.pdf)

<sup>(10)</sup> Ibid.

<sup>(11)</sup> Document No 716986, page 17.

- (10) In light of that situation, it was not considered realistic to offer the area for rental purposes. It was therefore decided not to renew the current lease agreements and instead conclude an agreement with one party only. Consequently, SR decided to negotiate terms regarding lease, clean-up and supervision of the area with ÍG, which was the largest single tenant at the time, in addition to being on time with its rental payments <sup>(1)</sup>. The following is an overview of the agreements concluded between SR and ÍG:
- (i) **22 February 2005.** SR and ÍG concluded a lease agreement on some of the properties in the area, replacing the 1999 Agreement. The total monthly rental fee was set at ISK 960 000 for a total of 4 676 square meters (including a 500 square meter lot) <sup>(2)</sup>.
  - (ii) **14 October 2005.** SR and ÍG concluded an agreement ('the 2005 General Lease Agreement'), replacing the previous agreement from 22 February 2005, regarding lease, clean-up and supervision of land in the area of Gufunes. According to the agreement, ÍG had the obligation to carry out all maintenance work and improvements on the property. The 2005 General Lease Agreement was valid until 31 December 2009. The 2005 General Lease Agreement did not set out how many square meters of property ÍG rented. However, as an annex to the 2005 General Lease Agreement, an aerial printout demonstrated which parts of the area were rented to ÍG <sup>(3)</sup>. The Icelandic authorities have explained that the agreement covered an area of about 130 000 square meters. The 2005 General Lease Agreement did not set out the price paid per square meter or the value of ÍG's obligations. The total monthly rental fee was set at ISK 2 000 000, recalculated monthly in accordance with the consumer price index <sup>(4)</sup>.
  - (iii) **29 December 2006.** The validity of the 2005 General Lease Agreement was extended, through an amendment, until 31 December 2011. ÍG was also obliged to demolish specified properties and remove equipment on the ground. ÍG was allowed to keep devices and installations removed from the ground at its own expense <sup>(5)</sup>.
  - (iv) **21 December 2007.** The validity of the 2005 General Lease Agreement was extended, through an amendment, until 31 December 2015. The owner could at any time take over part or all of the leased land if necessary due to changes in land use planning. ÍG also committed to reconnect pipes for electricity, water and heating that had become unusable. Moreover, ÍG withdrew a tort claim against the City <sup>(6)</sup>.
  - (v) **15 June 2009.** The validity of the 2005 General Lease Agreement was extended, through an amendment, until 31 December 2018. ÍG undertook to handle the maintenance of the area and to raise a levee, and an existing lease of a boat storage owned by Reykjavík Yacht club was extended. ÍG also committed to withdraw a claim against the City regarding maintenance costs <sup>(7)</sup>.
- (11) According to the City, although the size of land rented by ÍG is 130 000 m<sup>2</sup>, only 110 000 m<sup>2</sup> is usable for their purposes. The total registered size of the buildings is 24 722 m<sup>2</sup>. According to the Icelandic Property Registry, the value of the land previously owned by Áburðarverksmiðjan is ISK 211 000 000. The value of the land which ÍG rents has not been assessed, but the value of the entire land previously owned by Áburðarverksmiðjan it is estimated by the City at around ISK 137 000 000. The total registered value of buildings rented by ÍG is ISK 850 323 512 <sup>(8)</sup>.
- (12) According to Article 4(2) of the Icelandic Act on Municipal Income No 4/1995, the property owner shall pay the property tax except where leased farms, leased lots or other contractual utilisation of land are involved, in which case the tax shall be paid by the resident or the user. The land, buildings and installations in question are on a defined harbour area which belongs to Faxaflóahafnir sf. and is leased to the City. The City therefore pays the property tax on the leased land and the properties rented out to ÍG.
- (13) Although none of the agreements include information concerning the value of the services provided by ÍG, the City has provided a table setting out an estimation of ÍG's costs stipulated in the 2005 General Lease Agreement and later amendments (hereafter collectively referred to as 'the rental agreements') from the time when the 2005 General Lease Agreement was concluded and until the end of the lease period in 2018 <sup>(9)</sup>. The estimation was

<sup>(1)</sup> Documents No 716985 and 742948.

<sup>(2)</sup> Document No 716986, page 21.

<sup>(3)</sup> See Document No 716985.

<sup>(4)</sup> Document No 716986, page 25.

<sup>(5)</sup> Document No 716986, page 29.

<sup>(6)</sup> Document No 716986, page 31.

<sup>(7)</sup> Document No 716986, page 33.

<sup>(8)</sup> Document No 716985.

<sup>(9)</sup> Document No 742948.

carried out by the City's expert analysts. Furthermore, the information provided contains the cost of both finished and unfinished demolition projects. According to the information provided, the average monthly cost borne by ÍG is ISK 10 815 624, including the rental fee. The rental fee per month is therefore approximately 25 % of ÍG's total cost per month.

- (14) When the lease agreement dated 22 February 2005 was concluded, SR did not impose any obligations on ÍG. ÍG's obligations were introduced with the 2005 General Lease Agreement of 14 October 2005 and determined in light of the proposed demolitions and estimated costs of cleaning, disposal and supervision of the area. The cleaning and disposal obligations were considered extensive in light of the area's condition. Below is an evaluation of ÍG's costs in accordance with their obligations stipulated in the 2005 General Lease Agreement <sup>(1)</sup>:

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<sup>(1)</sup> All figures are in ISK.



Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>Soil</b>	10 000 000	10 000 000	10 000 000	10 000 000	5 000 000	4 000 000	4 000 000	4 000 000	4 000 000	4 000 000	4 000 000	4 000 000	4 000 000
<b>Fire alarm</b>	10 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000	1 000 000
<b>Total obligations</b>	138 393 684	109 393 684	104 893 684	112 593 684	95 394 284	91 594 284	89 394 284	81 894 284	91 494 284	90 494 284	90 494 284	90 494 284	79 894 284
<b>Total ISK</b>	170 763 999	141 763 999	137 263 999	144 963 999	127 764 599	123 964 599	121 764 599	114 264 599	123 864 599	122 864 599	122 864 599	122 864 599	112 264 599
<b>Average per month</b>	14 230 333	11 813 667	11 438 667	12 080 333	10 647 050	10 330 383	10 147 050	9 522 050	10 322 050	10 238 717	10 238 717	10 238 717	9 355 383
<b>Average</b>	<b>10 815 624</b>												

Source: City of Reykjavík.

## 2.3. RECENT DEVELOPMENTS IN THE GUFUNES AREA

- (15) In early 2014 the Reykjavík City Council agreed to establish a steering committee to present a vision for the Gufunes area <sup>(1)</sup>. The committee proposed an open idea competition concerning the future planning of the Gufunes area. At a meeting of the Reykjavík City Council in June 2015 it was agreed to publish an advertisement announcing a competition where interested parties were encouraged to submit ideas about the future organisation of the Gufunes area <sup>(2)</sup>. The City received four ideas following the advertisement. One of those submissions came from RVK Studios, a film production company, which expressed its interest to buy part of the buildings in the Gufunes area with the objective to establish a film industry in the area. The buildings which RVK Studios expressed an interest in purchasing are some of the old Áburðarverksmiðjan properties which were rented out to ÍG through the rental agreements.
- (16) The City and RVK Studios subsequently had two independent real estate agents appraise the part of the Gufunes area in question <sup>(3)</sup>. At a meeting of the City Council on 18 November 2015, the Council agreed to assign the Office of Property Management and Economic to begin negotiations with RVK Studios on the basis of the appraisals <sup>(4)</sup>. Furthermore, the Council assigned the Office to begin negotiations with ÍG on evacuation and possible relocation in accordance to the provisions of the 2005 General Lease Agreement.
- (17) On 19 May 2016, the Reykjavík City Council agreed to enter into an agreement with RVK Studios for the purchase of certain properties in the Gufunes area <sup>(5)</sup>. The City subsequently announced that ÍG would move its operations to the City's new industrial area in Esjumelar <sup>(6)</sup>. On 20 May 2016, the Mayor of Reykjavík and the CEO of ÍG signed agreements concerning the termination of the rental agreements and the relocation of ÍG, and broke ground on ÍG's new premises in Esjumelar. On 27 May 2016, the City signed an agreement with RVK Studios concerning the sale of some of the old Áburðarverksmiðjan properties <sup>(7)</sup>. The size of the properties sold to RVK Studios is 8 400 m<sup>2</sup> and the purchase price was ISK 301 650 000. The City also granted RVK Studios an option for the purchase of an area east of the buildings, totalling 19 200 m<sup>2</sup>. RVK Studios will pay ISK 1 000 per m<sup>2</sup> annually for the option.

## 3. THE COMPLAINT

- (18) According to the complainant, the City has granted unlawful state aid to ÍG through the rent of property and land in the Gufunes area at prices which are below market rates. In its complaint to the Authority, the complainant states that although it is difficult to pinpoint the exact aid amount, the price is clearly far below reasonable market price. Since ÍG is not paying normal market price, the company enjoys a competitive advantage. Furthermore, according to the complainant, the land at Gufunes is of interest for many companies that need spacious land for their operations, for instance transport hubs and storage companies.
- (19) The complainant noted that the rental price was set at ISK 2 million in the 2005 General Lease Agreement, with annual increases in accordance with the consumer price index (the property tax, which is not paid by ÍG, but by the owner of the property, i.e. the City, amounts to 41 % of the yearly rental amount). Furthermore, ÍG has certain maintenance obligations, which are considered as being a part of the rental price, although the approximate costs of those obligations are not to be found in the agreements. Moreover, the rental agreements do not forbid ÍG from subleasing the land to third parties. The complainant stressed that there is no evaluation in the rental agreements concerning the possible income from subletting parts of the property, and whether this affected the rental price.
- (20) The complainant also notes that it is unclear what the price per square meter is and how the rental price was determined. According to the complainant, the market price for the lease of the property should be between ISK 12 and 41 million per month, based on different recognised pricing methodologies. The complainant maintains that the renting of the property to ÍG at a price that is far below market value is contrary to EEA state aid rules.

<sup>(1)</sup> Document No 716985.

<sup>(2)</sup> Announcement available online at: <http://www.hugmyndasamkeppni.is/samkeppnir/gufunes-framtidharskipulag>.

<sup>(3)</sup> Document No 786718.

<sup>(4)</sup> Minutes of the City Council meeting are available online at: <http://reykjavik.is/fundargerð/fundur-nr-5386>.

<sup>(5)</sup> Minutes of the City Council meeting are available online at: <http://reykjavik.is/fundargerð/fundur-nr-5407>.

<sup>(6)</sup> Announcement available online at: <http://reykjavik.is/frettir/islenska-gamafelagid-flytur-esjumela>.

<sup>(7)</sup> Announcement available online at: <http://reykjavik.is/frettir/gengid-fra-kaupum-rvk-studios-fasteignum-undir-kvikmyndaver>.

## 4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (21) In Decision No 261/15/COL, the Authority preliminarily assessed whether the agreements concluded between the City and ÍG concerning the lease of the Gufunes area constitute state aid within the meaning of Article 61(1) of the EEA Agreement and, if so, whether the state aid could be considered compatible with the functioning of the EEA Agreement.
- (22) Having assessed the information submitted by the Icelandic authorities, the Authority came to the preliminary conclusion that it could not be excluded that the agreements between the City and ÍG constitute state aid within the meaning of Article 61(1) of the EEA Agreement. The following aspects were identified in Decision No 261/15/COL:
- (i) The State, for the purpose of Article 61(1) EEA, covers all bodies of the state administration, from the central government to the municipality level. Since the land and properties rented to ÍG belonged to the City, any discount on rental price would therefore constitute a transfer of state resources.
  - (ii) The Authority expressed doubts as to whether the City, when entering into the agreements with ÍG, had acted like a private lessor finding itself in a comparable legal and factual situation. The preliminary assessment of the Authority was that an economic advantage in favour of ÍG could not be excluded.
  - (iii) Since no other companies had the opportunity to negotiate with the City for the lease of the land and the properties, it was the Authority's preliminary view that the measures appeared to be selective.
  - (iv) Finally, the Authority noted that any aid granted to ÍG, in the form of discounted rent, would in theory have allowed the company to increase or at least maintain its activities as a result of the aid. The aid was thus liable to limit the opportunities for undertakings established in other Contracting Parties, which might have wanted to compete with ÍG on the Icelandic waste collection market. The aid was thus liable to distort competition and affect trade within the EEA.
- (23) According to the Authority, further evidence was needed in order to determine whether the terms of the rental agreements could be regarded as compatible with the functioning of the EEA Agreement.
- (24) Consequently, the Authority had doubts as to whether the rental agreements between the City and ÍG constituted state aid, and if so, whether they could be found to be compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c).

## 5. COMMENTS BY THE CITY TO THE OPENING DECISION

- (25) According to the City, the agreements with ÍG do not involve state aid within the meaning of Article 61(1) of the EEA Agreement, since ÍG did not receive an advantage.
- (26) According to the City, the agreements dated 22 February 2005 and 14 October 2005 were entered into on normal market conditions, since the rental fee was based on the rental fee determined following an open advertising process towards the end of the year 2003 and was in line with analyses/estimations conducted by the City's experts.
- (27) The City rejects that the methodologies that the complainant had presented are suitable for determining the market rental price. Instead, the City draws a comparison with the rent of another property, *i.e.* the old State cement factory at Sævarhöfði 31, which is located in an industrial area similar to Gufunes.
- (28) In 2014, the City purchased the Sævarhöfði 31 property. In 2013, Central Public Procurement (*Ríkiskaup*), on behalf of the Icelandic State, advertised the property for rent. When the City purchased the property, it pledged to take the highest bid according to the advertisement. Central Public Procurement received four bids, the highest ISK 420 000 per month, without any special services or obligations set out for the lessee. The property evaluation of the property at Sævarhöfði 31 is ISK 293 028 000. Therefore, the highest rental bid as a percentage of the property evaluation is 0,147 %. By comparison the rental price according to the 2005 General Lease Agreement with ÍG is 0,320 % of the Gufunes property evaluation. The City highlights that the rental price of Sævarhöfði 31 was found after an open advertisement procedure and fairly reflects the market value of industrial areas in the City under normal market conditions. This comparison shows that the rental price paid by ÍG can by no means be considered below the market value of industrial areas in the City, especially bearing in mind that the rental price for Sævarhöfði 31 did not take into account the factors that affected the rental price for the Gufunes area.



- (29) According to the City, the fact that other parties were later interested in the area is of little relevance when assessing the demand for the area at the time when the 2005 General Lease Agreement was concluded, i.e. in October 2005. At that time it was not considered realistic to offer the area for rental purposes. ÍG has carried all the costs of cleaning the area and bringing the buildings to proper conditions. Furthermore, other parties did not show an interest when the area was advertised for rent in 2003. It must therefore be presumed that the late interest is related to the condition of the area after ÍG took over the management of the area.
- (30) According to the City, the highest price is not the only factor that the Authority should take into account when the market economy operator test is applied. Instead, the relevant question is whether a market economy operator would have entered into the transaction in question on the same terms <sup>(1)</sup>. Furthermore, the comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time.
- (31) When the agreements were concluded between the City and ÍG the market conditions were not normal as there was no active market to be found for industrial property of this type and in that condition. Therefore, according to the City, normal market conditions must be assessed from objective and verifiable perspective that existed at that time. With reference to the above, the City considers that such information is found in the documents Reykjavik has submitted in this case. Furthermore, if one could demonstrate normal market conditions for industrial areas of this type, the example of the rental price obtained in the year 2014 for the former State cement factory at Sævarhöfði 31 demonstrates the market value for industrial areas such as Gufunes.
- (32) According to the City, the obligations imposed on ÍG by the rental agreements cannot be compared to the obligations in dispute in the case of *Haslemoen Leir* <sup>(2)</sup>. The price reducing obligation disputed in that case concerned a possible loss for Haslemoen AS in not being able to lease out a certain building. However, the obligations imposed on ÍG concerned maintenance work and improvements on the property, demolition, reconnecting pipes for electricity, water and heating and other constructions on the area. The costs of these obligations were estimated by the City's expert analysts based on the results of recent tenders for similar projects. Despite the lack of documentation supporting the precise economic impact of the services entrusted to ÍG and the zoning uncertainty, the Authority must accept that these obligations had the effect of reducing the rental price. According to the City, discarding the impact of the obligations would be unreasonable, especially since the actual costs that ÍG has carried due to the obligations is in accordance to the estimation.
- (33) According to the City, it acted as a market economy operator and took into account zoning considerations when concluding the rental agreements with ÍG. The City included very onerous and short termination clauses to be able to clear the area in a short time, if and when the State agreed to start the construction of Sundabraut highway. SR was thoroughly acquainted with the properties and the area, and was in a good position to make an objective assessment of whether the condition of the area was proper enough so that it could be rented out on the market. A private investor would always pay attention to zoning plans when making decisions regarding the use of plot and properties.
- (34) In light of the above considerations, the City maintains that the rental agreements with ÍG comply with the market economy operator test.

## 6. COMMENTS FROM ÍG

- (35) According to ÍG, the large size of the land is of very limited benefit for them as a tenant and only makes the maintenance and supervision obligations more cumbersome and costly. Moreover, although the buildings are voluminous in square meters they are in a very bad condition. ÍG highlights that the buildings were indeed bought in order to tear them down. A total demolition was planned and it was foreseen that there would be a residential area and a highway on the site. Therefore, any calculation based on square meters or the size of the land is irrelevant for the purposes of determining the market rental value of the area.
- (36) In 2003, SR had used the area and the buildings in Gufunes to provide storage for various individuals and companies that had been ordered by SR to evacuate other areas in the City. This arrangement soon became problematic for SR, from a logistical point of view, and therefore SR offered ÍG to rent the entire area with the aim of having the area cleaned up. ÍG was very reluctant in the beginning to take on the task as the area presented several problems, such as difficult tenants and a collection of car wrecks and industrial waste.

<sup>(1)</sup> Judgment in *Westdeutsche Landesbank Girozentrale v Commission*, T-228/99 and T-233/99, EU:T.2003:57.

<sup>(2)</sup> See the Authority's Decision No 90/12/COL of 15.3.2012 on the sale of certain buildings at the Inner Camp at Haslemoen Leir, available at: <http://www.eftasurv.int/media/decisions/90-12-COL.pdf>, paragraph 81.

- (37) For the last 10 years, ÍG has spent ISK 16,5 million on average each month in maintenance and other costs that should normally have been borne by a lessor. Those costs must be taken into consideration when assessing the market value of the rent.
- (38) According to ÍG, the conditions of the buildings in the Gufunes area are dire, despite the resources spent on renovations. Almost every building leaks and most of the roofs of the buildings are damaged and useless. Moreover, almost all windows apart from in the office building are damaged and useless, many floors of the buildings are in dangerous conditions and there are holes in some places and stairs that do not fulfil regulatory conditions. In addition, most of the buildings have no water, no toilets, and electricity that does not comply with regulatory measures.
- (39) Furthermore, ÍG has for the largest part of the rental period been faced with the fact that the City could have requested the land back on short notice. The short termination provision of 18 months and the obligation to return part of the land upon request with only 12 months' notice, was a drawback in running a business such as waste disposal, which involves heavy machines and equipment
- (40) According to ÍG, the late interest of the complainant has limited meaning when assessing the demand for the area when the 2005 General Lease Agreement was concluded. The situation in 2005 was such that at that time it was not considered realistic to offer the area for rental purposes. Since then, ÍG has spent considerable resources to renovate, clean up and maintain the area. Therefore it must be presumed that the late interest is related to the condition of the area after ÍG took over the management of the area.
- (41) Finally, ÍG submitted an independent lease assessment, dated 15 October 2015, from 101 Reykjavík Fasteignasala <sup>(1)</sup>. The lease assessment provides an estimate of the value of the 2005 General Lease Agreement in October 2005 based on the value and the condition of the individual properties. The conclusion of the appraiser is that the total monthly rental value of the properties and the area is ISK 1 870 000.

## II. ASSESSMENT

### 1. THE PRESENCE OF STATE AID

- (42) 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.'

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

#### 1.1. NO ADVANTAGE

##### 1.1.1. General

- (44) In the following, the Authority sets out its reasoning for why it has come to the conclusion that the rental agreements do not provide ÍG with an advantage within the meaning of Article 61(1) of the EEA Agreement.
- (45) An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit which an undertaking would not have obtained under normal market conditions, *i.e.* in the absence of state intervention, thus placing it in a more favourable position than its competitors <sup>(2)</sup>. If the transaction was carried out under favourable terms, in the sense that ÍG was paying a rent below market price, the company would be receiving an advantage within the meaning of the state aid rules.

<sup>(1)</sup> Document No 778453.

<sup>(2)</sup> Judgment in *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60, and judgment in *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

- (46) To examine this question, the Authority applies the ‘*market economy operator*’ (‘MEO’) test whereby the conduct of states or public authorities when selling or leasing assets is compared to that of private economic operators <sup>(1)</sup>.
- (47) The purpose of the MEO test is to assess whether the State has granted an advantage to an undertaking by not acting like a private market economy operator with regard to a certain transaction, e.g. the sale or lease of assets <sup>(2)</sup>. The public authority must disregard public policy objectives and instead focus on the single objective of obtaining a market rate of return or profit on its investments and a market price for the sale or lease of assets <sup>(3)</sup>. The Authority notes, however, that this assessment normally must take into account any special rights or obligations attached to the asset concerned, in particular those that could affect the market value.
- (48) Compliance with market conditions, and whether the agreed price in a transaction corresponds to market price, can be established through certain proxies. Organising an open, transparent and unconditional bidding procedure is generally an appropriate means to ensure that the sale or lease by national authorities of assets is consistent with the MEO test and that a fair market value has been paid for the goods and services in question. However, this does not automatically mean that the absence of an orderly bidding procedure or a possible flaw in such a procedure justifies a presumption of state aid. The Authority can also rely on other proxies, including expert valuations.

#### 1.1.2. The absence of a competitive procedure

- (49) In light of the above consideration, the Authority must first examine whether the City organised a tender procedure, adequate and well-suited to establish a market price <sup>(4)</sup>. However, in this case it has been confirmed that no public tendering was initiated regarding the area in question. Additionally, an independent valuation was not performed in advance of the 2005 General Lease Agreement.
- (50) The City has nevertheless highlighted that the various existing rental agreements in the area, which were concluded following open advertisements in the Icelandic media in 2003, were considered when determining the rent in the 2005 General Lease Agreement with ÍG. However, the Authority considers that these advertisements were merely calls for interest and would not constitute an open and competitive bidding procedure. Moreover, they did not concern the area in its entirety, offered for lease to one tenant, but rather individual properties within that area.
- (51) The Authority therefore concludes that this advertisement procedure does not meet the requirements of the MEO test. Accordingly, this procedure cannot provide a reliable proxy for establishing the market price for the lease right in question.

#### 1.1.3. Expert valuation of the rental value

- (52) As stated above, the absence of a sufficient tender process does not exclude the possibility of the Authority applying the MEO test. However, the Authority needs to examine the substance of the transaction in question, and in particular compare the agreed price to the market price. For this purpose, the Authority normally refers to an independent expert valuation study as a proxy for the market price. Such a study should ideally be prepared at the time of the transaction. However, the Authority can also rely on an *ex post* valuation study in its assessment <sup>(5)</sup>.
- (53) The City has stated that there are several issues that affect the market rental price for the Gufunes area. Firstly, the buildings and installations were in poor shape, some tenants were not paying rent and there had been accumulation of scrap which needed clean-up. Secondly, uncertainty has reigned concerning the zoning plans for

<sup>(1)</sup> For the application of the MEO test, see Case E-12/11 *Asker Brygge* [2012] EFTA Ct. Rep. 536 and judgment in *Land Burgenland and Others v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682. These cases concern the sale of an outright property right in land. However, they also provide guidance for the sale of other rights in land, including the lease right in the present case.

<sup>(2)</sup> See the Authority’s Guidelines on the notion of State aid as referred to in Article 61(1) of the EEA Agreement, paragraph 133. Available at: <http://www.eftasurv.int/media/esa-docs/physical/EFTA-Surveillance-Auhtority-Guidelines-on-the-notion-of-State-aid.pdf>.

<sup>(3)</sup> Judgment in *Land Burgenland and Others v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682.

<sup>(4)</sup> EFTA Surveillance Authority Decision No 61/16/COL to close the formal investigation into potential aid through the lease of an optical fibre previously operated on behalf of NATO, not yet published, available online at: <http://www.eftasurv.int/media/esa-docs/physical/061-16-COL.pdf>, paragraph 80.

<sup>(5)</sup> Case E-12/11 *Asker Brygge* [2012] EFTA Ct. Rep. 536, paragraph 81 and EFTA Surveillance Authority Decision No 61/16/COL to close the formal investigation into potential aid through the lease of an optical fibre previously operated on behalf of NATO, not yet published, paragraph 88.

the Gufunes area. Industrial activity is retreating in the area according to previous and current Municipal Plans and the City is therefore unable to conclude a long term rental agreement for the property. Thirdly, ÍG has the obligation to return part of the land upon request upon 12 months' notice and the notice period for the entire area, including the buildings, was as short as 18 months.

- (54) As previously noted, the City had two independent real estate agents appraise the value of the properties and the lease rights when they conducted their negotiations with RVK Studios for the sale of the buildings in the Gufunes area. Although these independent assessment do not directly concern the market rental price for the properties, they do confirm the bad state of the properties and their market value. Both the independent appraisers highlight that the buildings leak, are insufficiently isolated, contain considerable industrial waste from the time the land was occupied by a fertiliser company, and are generally run down. In addition, some of the buildings contain asbestos, and others need to be torn down.
- (55) As previously noted, the City has also provided a comparison with a similar industrial property located at Sævarhöfði 31. The property was advertised for rent by Central Public Procurement and the highest of four bids, worth ISK 420 000 per month, was accepted. This rental agreement did not include any special services or obligations to be carried out by the lessee. The highest rental bid as a percentage of the property valuation is 0,147 % whereas the rental price according to the 2005 General Lease Agreement with ÍG is 0,320 % of the Gufunes area property valuation.
- (56) Moreover, 101 Reykjavík Fasteignasala has conducted an independent valuation of the 2005 General Lease Agreement <sup>(1)</sup>. The valuation is dated 15 October 2015. It is based on the value and the state of the individual properties, which were individually assessed and scrutinised. The valuation looks at the conditions of the properties and the area at the time the General Lease Agreement was concluded in 2005 as well as the prevailing market conditions then. The conclusion of the appraiser is that the total monthly rental value of the properties was ISK 1 870 000 in October 2005. However, in accordance with the 2005 General Lease Agreement the monthly rental fee for ÍG was set at ISK 2 000 000, recalculated monthly in accordance with the consumer price index <sup>(2)</sup>. The fee paid monthly by ÍG is thus higher than the market rental price according to the expert valuation.
- (57) Having taken into account all of the above, the Authority considers that the 2005 General Lease Agreement was not entered into below market price.
- (58) Finally, the Authority notes that neither the comparison to the property located at Sævarhöfði 31 nor the valuation prepared by 101 Reykjavík Fasteignasala take into account the special obligations contained in the rental agreements, in particular the short notice period (which has now been evoked) and the various maintenance obligations. The financial impact of these obligations on the rental price are difficult to quantify. However, they inherently favour the City at the expense of ÍG, further comforting the Authority's conclusion that the 2005 General Lease Agreement was concluded on market terms.
- (59) In light of the above, the Authority concludes that ÍG did not receive an economic advantage from the rental agreements.

## 2. CONCLUSION

- (60) Based on the above assessment, the Authority considers that the rental agreements concluded between the City and ÍG concerning the lease of the Gufunes area do not entail state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

### *Article 1*

The rental agreements concluded between the City of Reykjavík and Íslenska Gámafélagið concerning the lease of the Gufunes area do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement. The formal investigation is hereby closed.

<sup>(1)</sup> Document No 778453.

<sup>(2)</sup> Document No 716986, page 25.

*Article 2*

This Decision is addressed to Iceland.

*Article 3*

Only the English language version of this decision is authentic.

Done in Brussels, on 26 April 2017.

*For the EFTA Surveillance Authority*

Sven Erik SVEDMAN

*President*

Frank J. BÜCHEL

*College Member*

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