

EURÓPAI GAZDASÁGI TÉRSÉG

EFTA FELÜGYELETI HATÓSÁG

Felhívás észrevételek megtételére a Felügyeleti és Bírósági Megállapodás 3. jegyzőkönyve I. része 1. cikkének (2) bekezdése szerint az izlandi tenger alatti kábel projekthez (Farice) nyújtott állami támogatással kapcsolatban

(2005/C 277/08)

A 2005. május 26-i 125/05/COL határozattal, amelynek szövege a hiteles nyelvi változatban ennek az összefoglalónak a végén megtalálható, az EFTA Felügyeleti Hatóság eljárást kezdeményezett az EFTA-államok közötti, a Felügyeleti Hatóság és a Bíróság létrehozásáról szóló megállapodás (Felügyeleti és Bírósági Megállapodás) 3. jegyzőkönyve I. része 1. cikkének a (2) bekezdése szerint. Az izlandi kormányt tájékoztatták az e határozatról készült másolat útján.

Az EFTA Felügyeleti Hatóság ezúton felkéri az EFTA-államokat, az EU tagállamait, valamint az érdekelt feleket, hogy ezen értesítés közzétételétől számított egy hónapon belül az alábbi címen tegyék meg a kérdéses intézkedéssel kapcsolatos észrevételeiket:

EFTA Felügyeleti Hatóság
35, Rue Belliard
BE-1040 Brussels

Az észrevételeket továbbítják az izlandi kormánynak. Az észrevételeket előterjesztő érdekelt felek írásban kérhetik – kérésük okát megnevezve –, hogy kilétüket bizalmasan kezeljék.

ÖSSZEFOGLALÁS

Az eljárás

2005. február 27-én kelt levelükben az izlandi hatóságok értesítették az EFTA Felügyeleti Hatóságot (a továbbiakban: a Hatóság) egy izlandi tenger alatti kábel projekt számára nyújtandó állami garanciáról. Azonban a projektet már azelőtt megvalósították, hogy a Hatóságnak lehetősége nyílt volna észrevételei megtételére. A Hatóság a versenypolitika területén, különálló eljárás keretében is kért információt a Farice hf.-től annak érdekében, hogy az EGT Megállapodás 53. és/vagy 54. cikkének megfelelően elemzést végezhesen.

A támogatási intézkedés leírása

A Farice projekt az Izlandot és a Feröer-szigeteket Skóciával összekötő tenger alatti híradástechnikai kábel kiépítését és kezelését foglalta magában.

1994 óta Izlandot és a Feröer-szigeteket nemzetközileg a CANTAT-3 tenger alatti híradástechnikai kábel kötötte össze. A CANTAT-3 kábel nemzetközi és izlandi partnerek (Og Vodafone és Landssími Islands hf – a továbbiakban: Síminn) társulása révén jött létre. Izlandot semmilyen más száloptikai kábelrendszer nem érintette. A CANTAT-3 technikai korlátai és a műholdak gazdaságtalan volta miatt más – megbízható kapcsolatot biztosító – adatátviteli megoldásokat kerestek.

A Farice projekt a majdnem 100 %-ban állami tulajdonú izlandi távközlési szolgáltató Síminn és a Feröer-szigeteken működő Føroya Tele távközlési szolgáltató kezdeményezéseként jött létre. 2002-ben világhosszú vált, hogy a Farice projekt pusztán kereskedelmi üzletként nem rendelkezik elég lendülettel. Ezért úgy határoztak, az izlandi állam aktív szerepet vállal a projektben. Továbbá kérték az Og Vodafone-nak a projektben való részvételét. Az E-Farice holdingtársaság, amely a Farice hf valamennyi izlandi részvényét birtokolja (az E-Farice a Farice hf 80 %-át birtokolja), megvásárolta az Og Vodafone és a Síminn CANTAT-3 részvényeit. További tárgyalásokat terveztek a CANTAT-3 konzorcium tagjai közé tartozó Teleglobe-tól való további CANTAT-3 kapacitás bérléséről. A bejelentés szerint az E-Farice kezeli Izland összes nemzetközi távközlési kapcsolatát.

A bejelentés a Farice hf. számára nyújtott 9,4 millió euro kölcsön állami garanciájára vonatkozik. Ez a kölcsön egy szélesebb – legfeljebb 34,5 millió euróig terjedő – hosszúlejáratú hitelcsomag részét képezi (amely három, különböző bankok által nyújtott hitelt tartalmaz). A Farice hf. előzetesen megfizette az éves alapon számított szokásos piaci díjat. A két másik kölcsönt a Síminn és a Føroya Tele garantálták; a negyedik kölcsönre nem volt garancia. Az izlandi állam által garantált kölcsön rendelkezett a legkedvezőbb piaci feltételekkel, azaz évi [...] (*) Euribor (összevetve az évi [...] Euribor-ral a nem fedezett kölcsön esetében).

(*) A zárójelbe olyan adatokat jelölnek, amelyeket a szakmai titoktartás kötelezettsége folytán töröltek.

2003 januárjában az izlandi állam – a Farice hf. teljes részvénytőkéjének növelése során – részvényeit a kezdeti 27 %-ról 46,5 %-ra növelte. Az izlandi hatóságok állítása szerint a magánszolgáltatók nem kívántak több részvénytőkét biztosítani. A Síminn, amely előzőleg a részvények 47 %-át birtokolta, részvénytőkéjét 33,33 %-ra csökkentette.

Állami támogatás az EGT-megállapodás 61. cikke (1) bekezdése értelmében

A Hatóság megjegyzi, hogy az izlandi hatóságok – azáltal, hogy a két támogatási intézkedésről a Hatóságot megkésve értesítették – nem tettek eleget a szüneteltetési kötelezettségnek, melynek következményeként ezek a Felügyeleti és Bírósági Megállapodás 3. jegyzőkönyve II. része 1. cikkének (f) bekezdése értelmében „új támogatásnak” minősülnek, amennyiben az EGT-megállapodás 61. cikke (1) bekezdése értelmében úgy találják, hogy ezen intézkedések állami támogatások.

A Hatóság úgy véli, az izlandi állam által a Farice projektnek nyújtott hitelgarancia és a részvénytőke emelése nem olyan általános infrastrukturális projektnek nyújtott támogatás, amely nem minősülhetne állami támogatásnak. A Hatóság úgy ítéli meg, hogy – ellentétben egy megkülönböztetéstől mentesen minden felhasználó számára nyitott infrastrukturális projekttel – ez a projekt bizonyos célzott szolgáltatóknak, azaz a távközlési szolgáltatóknak nyújt előnyöket. Ezen szolgáltatók egy magánkezdeményezést hoztak létre, melyre az állam válaszolt. Továbbá a Farice hf., mint az infrastruktúra igazgatási szerve, díjazás ellenében nyújt szolgáltatást. A Bizottság gyakorlatának megfelelően ilyen helyzetben tagadhatatlan a különálló vállalkozásnak nyújtott előny.

A Hatóság a hitelgarancia állami támogatásként való értékelését a Hatóság állami támogatásokról szóló iránymutatásai 17.4. fejezetének (2) bekezdése alapján végzi, amely felsorolja azokat a feltételeket, amelyek szerint a garancia mentesülhet az EGT-megállapodás 61. cikke (1) bekezdésének hatálya alól. A Hatóság megjegyzi, hogy az állam beavatkozása jobb kamatokhoz vezetett. Az izlandi hatóságok nem tagadják ezt, de azzal érvelnek, hogy az állami garancia mindig jobb piaci feltételeket teremt, és az egyetlen fontos szempont az, hogy megfelelő ellentételezést fizettek-e. A Hatóság kétli, hogy az állami garancia nélkül a Farice hf. képes lett volna 9,4 millió euro hitelt kieszközölni, tekintettel arra, hogy a projekt finanszírozására már felvett más kölcsönöket. A Hatóság úgy ítéli meg, hogy a négy hitelt külön kell vizsgálni, mivel eltérő bankok nyújtották őket, a visszafizetési mechanizmusaik és kamataik különböznek, és más kezések garantálják őket. E tekintetben a Hatóság figyelembe veszi azt is, hogy az izlandi állam a 9,4 millió eurós hitel 100 %-át garantálja. A Hatóság úgy ítéli meg, a fizetett díj nem szünteti meg az állam beavatkozásából eredő előnyöket. A Hatóság elsődleges véleménye szerint a Farice hf.-nek nem nyújthatók olyan előnyös pénzügyi feltételek, amelyeket az állam beavatkozása nélkül

nem lett volna képes a piacon kieszközölni. Úgy véli, hogy a Farice hf – különösen a garanciával nem fedezett hitelhez viszonyítva – haszonhoz jut a kedvezőbb pénzügyi feltételek által, amelyeket nem ellentételez megfelelőképpen.

A Hatóság a részvénytőkének az izlandi állam általi növelését a Hatóság állami támogatásokról szóló iránymutatásai 19. fejezetének megfelelően értékelte. Megjegyzi, hogy amíg a Farice hf. teljes részvénytőkéje jelentős mértékben nőtt és magánszolgáltatók által megnövelt részvénytőkét is tartalmazott, az izlandi állam tulajdonrésze aránytalanul – 20 százalékponttal – nőtt a magánrészvényesekéhez viszonyítva. Mivel az izlandi hatóságok kijelentették, hogy a Síminn a projektet pénzügyileg kockázatos vállalkozásnak tekintette, a Hatóság előzetes véleménye az, hogy a magánszolgáltatók a kis várható haszon miatt léptek vissza bizonyos mértékig a projekttől.

A Hatóság előzetes véleménye szerint az intézkedések megerősítik a Farice hf.-et azon versenytársakkal szemben, akik nem támaszkodhatnak állami részvételre vagy hitelgaranciákra, és ebből kifolyólag ezen intézkedések a versenyt torzítják, vagy annak torzításával fenyegetnek. Mivel a telekommunikációs szolgáltatás kereskedelemben hozható tevékenység, a szerződő felek közötti kereskedelmet is befolyásolja.

Az EGT-megállapodás 61. cikkének (3) bekezdése c) pontjával való összeegyeztethetőség

A Hatóság az intézkedéseket közvetlenül az EGT-megállapodás 61. cikkének (3) bekezdése c) pontja szerint értékelte, mivel nem léteznek olyan iránymutatások, illetve csoportmentességek, amelyek alapján az intézkedések indokolhatók lennének.

A támogatási intézkedések szükségességét illetően a Hatóság elismeri, hogy az Izlandhoz kapcsolódó elsődleges átviteli kapcsolatot jelentő új tenger alatti kábel nagyobb kapacitással bír, megbízhatóbb és – a CANTAT-3 támogatásával együtt – képes az Izlandra irányuló távközlési szolgáltatásokat biztosítani. A szélessáv hozzáférhetősége jogos célkitűzés, valamint olyan típusú szolgáltatás, amely természetéből adódóan képes számos ágazat és tevékenység termelékenységét és növekedését kedvező irányban befolyásolni. Az állam részvétele nélkül a projekt vagy késedelemmel, vagy egyáltalán nem valósult volna meg, mivel nem volt üzletileg életképes.

Az arányosság vizsgálata során a Hatóságnak az Izlandra irányuló megbízható távközlési szolgáltatás biztosításának előnyeit kell szembeállítania a verseny – más, hasonló projekteket megvalósító, de állami támogatáshoz hozzá nem férő versenytársakhoz viszonyított – torzulásából származó hátrányokkal. Ezért a Hatóság a hivatalos vizsgálati eljárás során többek között a következő pontokat fogja vizsgálni:

– Először is, a Hatóság megjegyzi, hogy a Farice hf. nem nyílt pályázat útján kapta a kábel kiépítését és kezelését.

- A Hatóság megjegyzi, hogy a részvényesek közötti egyezmény piaci feltételek melletti, megkülönböztetéstől mentes, átlátható árazásról rendelkezik. Miközben a részvényesek közötti egyezmény nyitva áll az új belépők számára, a Hatóság figyelembe veszi, hogy az egyezmény kiköti: az alapító feleknek mindig lehetőségük van fenntartani saját tőkepozíciójukat, miáltal az új résztvevők hátrányos helyzetbe kerülnek.
 - A Hatóság figyelembe veszi a támogatás teljes összegét, amely a garanciát illetően korlátozva van. Az állam részvényeinek növekedése vonatkozásában a Hatóság megjegyzi, hogy 2003 júniusában az állam részvénytőkéje 41 %-ra csökkent, míg a Síminn tulajdonrésze 29 %-ra nőtt.
 - A Hatóságnak aggodalmai vannak a versenyt illetően. Az Európai Bíróság megállapította, hogy az állami támogatásokra vonatkozó rendelkezések alapján történő összeegyeztethetőségi vizsgálat eredménye nem állhat ellentétben más szerződésben foglalt rendelkezésekkel, amelyek az EGT-megállapodás 53. és/vagy 54. cikkét is magukban foglalják. Erre tekintettel a Hatóság *többek között* megjegyzi, hogy bár a fennálló CANTAT-3 infrastruktúra a helyén marad, aggodalomra ad okot, hogy a jövőben minden Izlandra irányuló CANTAT-3 kapcsolódás a Farice hf. részvényeinek többségét kézben tartó E-Farice hf.-en keresztül zajlik majd. Tehát fennáll a veszély, hogy az izlandi távközlési kapcsolat terén a verseny megszűnik, és csak egyetlen szolgáltató marad fenn a piacon.
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EFTA SURVEILLANCE AUTHORITY DECISION**No 125/05/COL****of 26 May 2005****to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to State aid in favour of Farice hf.**

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area ⁽¹⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽²⁾, in particular to Article 24 as well as Article 1(2) in Part I and Articles 4(4) and 10 in Part II of Protocol 3 thereof,

Having regard to the Authority's Guidelines ⁽³⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular Chapter 17 on State guarantees and Chapter 19 on public authorities' holdings,

Whereas:

I. FACTS

1. Procedure

By letter dated 27 February 2004 of the Icelandic Mission to the European Union, forwarding a letter from the Ministry of Finance dated 26 February 2004, the Icelandic authorities notified the EFTA Surveillance Authority (hereinafter 'the Authority') of a State guarantee in favour of a submarine cable project in Iceland, i.e. the Farice project. The letter was received and registered on 1 March 2004 (Event No: 257593).

Supplementary information was submitted by letter from the Icelandic Mission dated 14 May 2004, forwarding a letter by the Icelandic Ministry of Finance dated 13 May 2004. The letter was received and registered by the Authority on 14 May 2004 (Event No: 281472).

The Authority requested further information on the notification by letter dated 22 April 2004 (Event No: 261084). The Icelandic authorities responded by letter dated 25 June from the Icelandic Mission, forwarding a letter from the Ministry of Finance. The letter was received and registered by the Authority on 28 June 2004 (Event No: 285971).

The Authority requested further information by letter dated 10 August (Event No: 286427), to which the Icelandic Mission responded by letter dated 8 September 2004, forwarding a letter from the Ministry of Finance dated 7 September 2004 (Event No: 291944).

By letter dated 16 December 2004, the Authority informed the Icelandic authorities about its doubts concerning the compatibility with the EEA Agreement of the notified guarantee and of the increase of the Icelandic State's share capital in Farice hf. (Event No: 299813). The Icelandic authorities reacted to that by letter dated 21 January 2005 from the Icelandic Mission, forwarding a letter from the Ministry of Finance dated 21 January 2005. The letter was received and registered by the Authority on 24 January 2004 (Event No: 306 312).

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

⁽²⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽³⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplement 3.9.1994 No 32. The Guidelines were last amended on 15.12.2004.

In addition, under separate competition proceedings, the Authority had, by letter to Farice hf. dated 31 January 2003, expressed certain competition concerns and requested information concerning the FARICE project in order to enable the Authority to facilitate the assessment of the project's competitive impact. By letter dated 6 May 2004 the Authority addressed a formal request for information to Farice hf. ⁽⁴⁾. Farice hf.'s reply was received by the Authority on 21 October 2004.

2. Description of the Farice project

The Farice project concerns the construction and management of an undersea telecommunications cable connecting Iceland and the Faeroe Islands with Scotland.

Since 1994, Iceland and the Faeroe Islands were internationally connected with the undersea telecommunication cable CANTAT-3. CANTAT-3 was set up as a consortium cable. Access to CANTAT-3 was secured via membership of the consortium ⁽⁵⁾, by defeasible rights of use and by leasing capacity from the consortium member Teleglobe. CANTAT-3 has connection points in Canada, Iceland, the Faeroe Islands, Denmark, the United Kingdom and Germany. With the build-up of trans-Atlantic cable systems competing with CANTAT-3, the founders of CANTAT-3 had access to other, more economical connections. The Icelandic and the Faeroe parties, however, still had to rely on the CANTAT-3 connection. That was one consideration for these parties to consider the development of a new connectivity. Besides, the CANTAT-3 cable had certain technical limitations, as it was an older generation cable which is not always reliable and has limited capacity. No other single international fibre network project has reached these two countries since 1994, despite a general capacity growth of international and interregional telecommunications routes. According to information by the Icelandic authorities, the geographically isolated location of the two countries and the limited market size prevented this.

Satellite connections which serve as a second connectivity are expected to rise in costs and are, in any event, not considered appropriate for transmitting delay sensitive internet traffic. In order to handle the increased telecommunication traffic, an alternative had to be developed.

The Farice project came about from an initiative by the almost 100 % State owned Icelandic telecom operator Landssími Íslands hf (hereinafter Síminn) and the incumbent telecom operator in the Faeroe Islands, Føroya Tele, which were considering the development of a submarine cable linking Reykjavík, Tórshavn and Edinburgh. However, in 2002 it became clear that the FARICE project seemed unable to gain momentum as a purely commercial business case ⁽⁶⁾. A feasibility study conducted in March 2002 concluded that it would not be possible to fund the project through conventional project financing. A broad alliance behind the project was sought in order to secure its realisation. This resulted in two decisions:

Firstly, the communication authorities of Iceland and the Faeroe Islands became involved in the preparation of the project. In particular the largest sponsors, Síminn and Føroya Tele, made it clear that they were not interested in providing the necessary loan guarantees on behalf of the whole telecom market ⁽⁷⁾. The State would therefore have to participate and contribute actively in the project.

Secondly, it was considered important that Og Vodafone, a major player in the Icelandic telecom market, should participate actively in the project. It was decided that besides the establishment of Farice hf, a holding company *Eignarhaldsfélagið Farice ehf.* (hereinafter 'E-Farice') ⁽⁸⁾ should be established. This company, while holding all the Icelandic shares in Farice, should buy Og Vodafone's capacity in CANTAT-3. A similar offer was made to Síminn which, according to the IBM report submitted by the Icelandic authorities, resulted in E-Farice handling all international connectivity for Iceland. As stated in the notification, CANTAT-3 capacity will consequently be operated and sold by E-Farice ⁽⁹⁾.

⁽⁴⁾ In accordance with the provisions of Protocol 21 to the EEA Agreement and Article 11 of Chapter II, Protocol 4 to the Surveillance and Court Agreement.

⁽⁵⁾ The consortium included *inter alia* the Icelandic telecom operator Landssími Íslands hf., Teleglobe and Deutsche Telekom.

⁽⁶⁾ See Summary Report, provided as Annex 1 to the notification.

⁽⁷⁾ See also the following comment by the Icelandic authorities: „Although the designated universal service provider, and as such required to provide secure long-distance communication, Síminn felt that increasing the capacity to meet demand, as well as providing an alternative route for emergencies, was a financially risky undertaking, providing little return on investment. In order to facilitate the necessary upgrade in capacity, particularly in view of the short time frame available until capacity would be outstripped by demand, the government stepped in.”

⁽⁸⁾ In 2003, E-Farice ehf held 80 % of the shares in Farice hf, with the 20 % remaining shares held by Føroya Tele (17,3 %) and other Faeroe parties (together 2,7 %).

⁽⁹⁾ The IBM report stresses the business possibility that E-Farice's purchase of CANTAT-3 connectivity gives the possibility to ring-connect the two cable systems in such a way that Farice hf. can offer its customers secured connectivity. The report further describes negotiations of E-Farice with Teleglobe to further lease CANTAT-3. It has been discussed whether Farice hf. or E-Farice should lease *all* available capacity to Iceland and the Faeroe Islands.

In 2002 the new limited company, Farice hf, was established with the purpose of preparing, constructing and operating a submarine communication cable system to transfer telecommunications and internet traffic between Iceland, the Faeroe Islands and the UK. The shareholders of this company were Síminn (47,33 %), Og Vodafone (1,33 %), the Government of Iceland (27,33 %), three other Icelandic operators which held together 3,99 %, Føroya Tele (17,33 %), and two other Faeroe telecom operators, which each held 1,33 %⁽¹⁰⁾. The new Farice cable includes an Iceland backhaul (Reykjavík to Seyðisfjörður), a submarine section (Seyðisfjörður to Dunnet Bay), a Faeroese backhaul (from Funningsfjörður to Tórshavn) and a UK backhaul (Dunnet Bay to Edinburgh). No public tender was carried out to entrust the management of the cable, which was granted to Farice hf.

A shareholders' agreement dated 12 September 2002 provided that the pricing policy of Farice should be based on the principles of cost orientation, transparency and non-discrimination.

The Icelandic authorities have further pointed out that the use of the Farice cable is open to foreign and domestic operators alike, on equal terms and prices. The shareholders' agreement is also open to new shareholders. It stipulates, however, that the existing shareholders will always be offered the possibility of maintaining their equity position in the company if the share capital is increased.

The formal opening of the Farice submarine transmission cable was in February 2004. While it will constitute the primary transmission line for Iceland's telecommunications, the CANTAT-3 capacities will be used as a back-up.

3. Description of the aid measure

a. The loan guarantee

The object of the notification concerns the grant by the State of a guarantee for a loan of EUR 9,4 million in favour of Farice (hereinafter: the A Term Loan). This loan forms part of a broader long-term loan package for a maximum amount of EUR 34,5 million.

According to the information provided by the Icelandic authorities, in particular the Agreement between Farice hf, Íslandsbanki hf, other financial institutions and other guarantors, on 27 February 2004 signed loans (hereinafter: the loan agreement) for a maximum amount of EUR 34,5 million, break down as follows:

| Loan | Million EUR | Lender | Interest rate ⁽¹⁾ | Interest periods | Repayment | | Guarantor |
|----------|-------------|----------------------------|------------------------------|------------------|------------------------|--------------------|-------------------------------|
| | | | | | Number of instalments | Start of repayment | |
| A | 9,4 | The Nordic Investment Bank | [...] (*) | 6 months | 8 semi-annual payments | Sept. 2011 | Government of Iceland |
| B | 4,7 | The Nordic Investment Bank | [...] | 6 months | 5 semi-annual payments | Sept. 2009 | Landssími Íslands hf (Síminn) |
| | 4,7 | Íslandsbanki hf | | | | | |
| C | 4,7 | Føroya banki | [...] | 3 months | 10 quarterly payments | Sept. 2009 | Telefon verkið P/F |
| D | 11 | Íslandsbanki hf | [...] | 1 month | 48 monthly payments | Sept. 2005 | None |

⁽¹⁾ Although in the letter accompanying the notification reference is made to Libor as the basis for establishing the rate of interest to the Loan for each tranche, clause 7.1 of the Loan Agreement refers to Euribor. For this reason, the Authority considers the Euribor rate to be the valid reference for the determination of the rate of interest applicable to the Loan for each interest period.

(*) Brackets throughout the text indicate figures which have been deleted because they are covered by the obligation of professional secrecy.

The State guarantee for the A term loan is a guarantee of collection, i.e. Farice hf. will be fully liable for payment of the loan and the creditor will need to exhaust the recourses for collection from the company before the State guarantee can take effect. Farice hf. was obliged to pay an annual market premium of [...] (established by the Icelandic National Debt Management) and a fee of [...] ISK. The payment was done in advance [...].

⁽¹⁰⁾ Initial capital contributions, which were later changed. The holding company E-Farice holds all the shares of the Icelandic parties in Farice hf.

An earlier guarantee of collection was signed in July 2003 in relation to a bridge loan of EUR 16 million. The guarantee of collection covered EUR 6,4 million, i.e. 40 % of that loan. The bridge loan was paid up upon the release of the long-term loan of EUR 34,5 million and the guarantee of collection for the bridge loan ceased to exist the same day. Farice hf. paid a [...] guarantee fee and a guarantee charge of [...] ISK for that guarantee.

b. *The Icelandic government's increase in share capital*

In the beginning of January 2003, the State participation in Farice hf increased from an initial share of 27 % up to 46,5 %. Following the explanation given by the Icelandic authorities in their reply of June 2004,

'As the business plan evolved, the funding needs of the company became clearer and it was decided to increase the company's share capital. All operators in Iceland and Faeroe Islands were invited to buy shares in the share capital increase. As Síminn made it clear that the company would not want to provide more than 33,33 % of the share capital, Telefonverkið would provide necessary share capital from the Faroese site (19,93 %), the Icelandic government had to provide 46,53 % of the necessary share capital as other operators in Iceland did not have the financial capacity to buy more than 1,2 % of the share capital.'

As stated by the Icelandic authorities, the total share capital of Farice hf was increased from EUR 337 000 to EUR 14 million. Details on the share capital contribution of the different shareholders can be seen from the table below:

Share capital of Farice hf.

(amounts in '000s)

| | Preparation phase | | | January 2003 | | | June 2003 | | |
|--------------------------------|-------------------|-----|----------|--------------|--------|----------|-----------|--------|----------|
| | ISK | EUR | Share | ISK | EUR | Share | ISK | EUR | Share |
| Eignarhaldsfélagið Farice ehf. | | | | 947 944 | 11 965 | 79,90 % | 947 944 | 10 657 | 79,90 % |
| Government of Iceland | 8 200 | 92 | 27,33 % | 552 067 | 6 206 | 46,53 % | 491 737 | 5 528 | 41,45 % |
| Síminn | 14 200 | 160 | 47,33 % | 395 477 | 4 446 | 33,33 % | 352 259 | 3 960 | 29,69 % |
| Og Vodafone | 400 | 4 | 1,33 % | 400 | 1 312 | 0,03 % | 103 949 | 1 169 | 8,76 % |
| Lína.Net | 400 | 4 | 1,33 % | 400 | 4 | 0,03 % | 400 | 4 | 0,03 % |
| Fjarski ehf. | 400 | 4 | 1,33 % | 400 | 4 | 0,03 % | 400 | 4 | 0,03 % |
| RH-net | 400 | 4 | 1,33 % | 400 | 4 | 0,03 % | 400 | 4 | 0,03 % |
| Telefonverkið | 5 200 | 58 | 17,33 % | 236 486 | 2 659 | 19,93 % | 236 486 | 2 659 | 19,93 % |
| Kall | 400 | 4 | 1,33 % | 400 | 4 | 0,03 % | 400 | 4 | 0,03 % |
| SPF spf. | 400 | 4 | 1,33 % | 400 | 4 | 0,03 % | 400 | 4 | 0,03 % |
| Total | 30 000 | 337 | 100,00 % | 1 186 430 | 14 646 | 100,00 % | 1 186 430 | 13 338 | 100,00 % |

4. Comments by the Icelandic authorities

The Icelandic government first states that the measures cannot constitute State aid within the meaning of Article 61(1) of the EEA Agreement, as the Farice project constitutes infrastructure, which is open to all potential users on a non-discriminatory basis.

Further, the Icelandic authorities argue that the State guarantee fulfils all the conditions set out in Chapter 17.4 of the Authority's State Aid Guidelines. The Icelandic authorities point out that — as can be seen from the three other tranches of the loan — Farice would have been able to secure a loan on market conditions. It is, however, clear that interest rates will always be more favourable in the case of a State guaranteed loan and that, therefore, these conditions should not be expected to be the same as normal conditions on the financial market. As long as the market price paid for the guarantee is correct, there is no room for State aid. The banks were asked to provide a non indicative bid for a loan up to EUR 32 million. Four offers varying in form and cost offered interest rates ranging from [...].

The authorities further point out that the EUR 34,5 million loan should be seen as *one* loan subdivided into four tranches. In that respect, the Farice project is financed to a large extent independently of the State guarantee, which only covers 27,25 % of the full loan.

As to the share capital increase, the Icelandic authorities point out that the increase in share capital took place in January 2003, i.e. only four months after the establishment of Farice hf. The Icelandic State's share increase should therefore not be seen as an injection of fresh capital, but rather as the initial setting up of a company. In this respect it should be noted that the private investors provided for almost 60 % of the total share capital increase or EUR 8,1 million compared to the government share of EUR 5,5 million ⁽¹¹⁾. According to the Icelandic authorities, this does not only show that the private share holders were willing to participate in the company, but also that they were willing to participate to a significant degree.

In any event, given the size of the Farice project, the project would qualify as aid to small and medium sized undertakings.

In any event, given its significant importance for securing the necessary connectivity of Iceland to the world, the support should be allowed under Article 61(3)(b) or (c) of the EEA Agreement.

II. APPRECIATION

1. Obligation to notify

According to Article 2(1) read together with Article 3 in Part II of Protocol 3 to the Surveillance and Court Agreement, *'any plans to grant new aid shall be notified to the Authority in sufficient time by the EFTA State concerned and shall not be put into effect before the Authority has taken, or is deemed to have taken, a decision authorising such aid.'*

Farice hf. was established in 2002 and the construction work started already in June 2003. The cable was officially opened in February 2004 ⁽¹²⁾. The share capital increase took place in January 2003 and the guarantee of collection by the Icelandic authorities dates to 27 February 2004, i.e. before the Authority had a chance to express a view on the notification of the measures on 27 February 2004.

The Authority therefore notes that the Icelandic government has not respected the stand-still obligation, with the consequence that if the measures were found to be State aid within the meaning of Article 61(1) of the EEA Agreement, they would constitute 'new aid' within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement, subject to potential recovery, if declared incompatible with the EEA Agreement.

2. State aid within the meaning of Article 61(1) of the EEA Agreement

Article 61(1) of the EEA Agreement reads as follows: *'...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.'*

The Authority will therefore assess whether:

- there is an intervention by the State or through State resources;
- which confers an advantage on the recipient;
- distorts or threatens to distort competition; and
- which is liable to affect trade between the Contracting Parties.

2.1 The Farice project as an infrastructure project

The Icelandic authorities argue that the support to the Farice project does not comprise any State aid, given that the submarine cable qualifies as infrastructure and support in its favour therefore constitutes a 'general' and not a selective measure. As stated in the European Commission Communication COM (2001) 35 final, 'Reinforcing quality service in sea ports: a key for European transport' ⁽¹³⁾, the criterion of selectivity is an important benchmark for deciding whether a concrete financing measure constitutes State aid.

⁽¹¹⁾ It seems however, that this statement by the Icelandic authorities rather refers to the share capital split between the capital holder in June 2003. In January 2003, the Icelandic government had a share of EUR 6,2 million.

⁽¹²⁾ Press release of 3 February 2004.

⁽¹³⁾ Communication of 13.2.2001, COM (2001) 35 final.

In Commission practice State funding for the construction or management of infrastructure is not to be regarded as aid, if the infrastructure is directly managed by the State (which is not the case in the present project) or if there is a public tender for the selection of the manager and if access to the infrastructure is open to all potential users on a non-discriminatory basis ⁽¹⁴⁾.

The Authority notes that while wide participation might have been sought within the project, neither the construction nor the management of the company was organised by a public tender. The government participation rather responded to a private initiative, started by the two incumbent telecommunication operators ⁽¹⁵⁾.

The Authority also has doubts concerning the non-discriminatory access. While the participation in the company according to the shareholders' agreement is not restricted, the Authority notes that the founding shareholders keep certain pre-emptive rights (see section I.2 of this Decision), which seems to place them in a better position than new shareholders.

Regardless of this, in line with Commission practice, a measure in any event constitutes aid and not a general measure, if the body managing the infrastructure is pursuing an economic activity, as this may provide a potential advantage to the beneficiary ⁽¹⁶⁾ in relation to competing operators. In this respect it suffices to note that the State support benefits Farice hf. which manages the cable and sells users' rights to interested parties against remuneration. According to the case law of the European Court of First Instance, the management of infrastructure constitutes an economic activity within the meaning of Article 61(1) of the EEA Agreement ⁽¹⁷⁾. Farice hf. is able to profit from an infrastructure construction secured with a State guarantee and with government participation in a situation in which private parties were not willing to ensure the full financing of the project, whereas other operators might have to finance 100 % of it on their own.

In addition, for State aid purposes, it should be noted that the participation in the company is mainly geared towards telecommunication operators. Connectivity via the Farice cable is currently only sold in large units to business operators who resell the service on the downstream market to end users. It was these business operators who took the initiative to which the State responded. The type of service is therefore targeted at commercial operators and not at the general public. The Authority therefore, at this stage of the proceedings, considers that the project should be looked at rather as being a dedicated facility for undertakings, which is within the scope of State aid control, rather than a general infrastructure ⁽¹⁸⁾.

2.2. *The loan guarantee by the Icelandic State*

In general, a State guarantee enables its beneficiary to obtain better financial terms for a loan than those normally available on the financial markets. Therefore, guarantees given by the State may fall within the scope of Article 61(1) of the EEA Agreement.

However, on the basis of the provisions of Chapter 17.4 (2) of the Authority's State Aid Guidelines on State Guarantees (hereinafter: the Guidelines), the Authority considers that an individual State guarantee does not constitute State aid under Article 61(1) of the EEA Agreement if it fulfils all the following conditions:

- (a) The borrower is not in financial difficulty;
- (b) The borrower would, in principle, be able to obtain a loan on market conditions from the financial markets without any intervention by the State;

⁽¹⁴⁾ Commission decision N 527/02 — Greece Financial support of a private company for the design, construction, testing and commissioning of the aviation fuel pipelines for supply of the new Athens International Airport.

⁽¹⁵⁾ See Commission decision C 67-69/2003 concerning aid for the construction of a propylene pipeline between Rotterdam, Antwerp and the Ruhr-area, paragraph 48. The Authority will further look at the argument of the Icelandic authorities that according to Directive 2002/20/EC the license can only be granted by way of authorisation and that therefore the requirement of a public tender cannot be relevant. The Authority takes the preliminary view that, given all the other circumstances in this case, even if the argument was found valid, it is not likely to make a difference for the assessment.

⁽¹⁶⁾ See Commission decision N 527/02 with further references in footnote 8. Also Commission decision N 860/01 — Austria on the ski resort Mitterer Alm where the running of ski lifts was considered to be an economic activity benefiting the operator of the ski lift and therefore not constituting an infrastructure measure. See Commission decision C 67-69/2003, paragraph 48.

⁽¹⁷⁾ See Case T-128/98, *Aéroports de Paris v. European Commission*, [2000] ECR II-3929.

⁽¹⁸⁾ See Commission decision N 213/2003 — Project Atlas, broadband infrastructure for business parks.

- (c) The guarantee is linked to a specific financial transaction, is for a fixed maximum amount, does not cover more than 80 % of the outstanding loan and is not open-ended;
- (d) The market price for the guarantee is paid (which reflects, amongst other things, the amount and duration of the guarantee, the security given by the borrower, the borrower's financial position, the sector of activity and the prospects, the rates of default, and other economic conditions).

First/second condition

According to the information provided by the Icelandic authorities, the project could not gain momentum as a purely commercial business case and required the involvement of the State. Although the borrower was not technically in financial difficulty, the fact that the banks did not only require a guarantee of the State for the A Term Loan but also of the two former State telecommunication monopolists (Síminn for the B Term Loan and Telefonverkið P/F for the C Term Loan), which are still owned by the respective States, shows that Farice was not in the position to obtain a loan on market conditions without any intervention by the State. For this reason, it is questionable whether the second condition is fulfilled.

The Icelandic authorities however argue that the second condition should be understood to be that the borrower was able to obtain 'a' loan, not necessarily 'the loan on the same conditions'. In particular the D tranche loan shows that it was possible for Farice hf. to obtain a loan 'as such'. Furthermore, the Icelandic authorities argue that it is evident that, backed up with the State guarantee, the loan would be granted at more favourable conditions. The decisive factor therefore is only whether the price for the guarantee is a market price.

The Authority agrees that the first condition only states that the borrower would 'in principle' be able to obtain a loan on market conditions. However, it still needs to be considered that point 17.1(1) of the Guidelines describes State guarantees as normally enabling the borrower to obtain *better* financial terms than those normally available on the financial markets, which leads to distortions of competition and the potential classification as 'aid'. It is exactly that advantage resulting from the State intervention which raises a State aid concern. Against this background, there would be no aid element involved if the State backed-up loan did not lead to any advantages in the interest rate. However, if the State intervention leads to 'better' market conditions, this must be taken into account for the assessment under the State aid provisions. The Authority does not exclude, at this stage of the proceedings, that the distortive effect resulting from better market conditions can be adequately — but then also would have to be — considered in the assessment of the adequacy of the market premium (fourth condition), and will investigate that further in the formal investigation procedure.

However, the Authority notes, that while Farice hf. was able to secure an EUR 11 million loan on market conditions (D loan), it is not clear whether the banks would have granted any *further* loans to the project without any intervention from the State. *This* aspect would have to be assessed under the first condition. The Authority is therefore not entirely certain about the relevance of the argument that Farice hf. was able to negotiate the EUR 11 million loan.

Third condition

The overall loan package is made up of four (or five) different loan amounts with different borrowing conditions, different lenders and different guarantees. Therefore, the Authority is of the preliminary opinion that each part of the overall loan amount constitutes an independent loan as such. For this reason, the Authority initially considers that the guarantee of the State covers 100 % of the guaranteed A Term Loan for a maximum amount of EUR 9,4 million. Hence, the third condition laid down in Chapter 17.4(2) of the Guidelines to exclude the existence of State aid does not seem to be fulfilled.

The Icelandic authorities argue that there is only one loan at stake, at EUR 34,5 million. However, as can be seen from the loan agreement, while granted for the same collateral, the four loans are granted by different banks which assume the responsibility for *their* loan amount only. None of the banks would take over — in case of a failure of Farice hf. — the liability for any of the other loans. The different loans do not only have different repayment periods and a different number of instalments, but also different guarantors. Against this background, the combination of the loans in one joint document does not appear to be of significant relevance.

It should further be noted that the 80 % rule should ensure that the creditor still has an incentive to reflect on the risk which he is willing to assume. Against this background, it does not seem correct to take into account — in relation to the business decision made by the Nordic Investment bank and in order to establish the loan basis to which the 80 % rule applies — that other loans are granted by Íslandsbanki. The Nordic investment bank has not assumed any responsibility for these loans and would not consider them in its decision to support Farice.

If anything, the A loan could be considered together with the second loan granted by the Nordic Investment bank, i.e. the first part of the B loan. However, the Authority still has doubts on this perspective, as the B loan is secured by the 100 % State owned company Síminn. The incentive for Nordic investment bank to assume an ordinary risk assessment, the same as it would undertake for a borrower who cannot rely on the State or State owned companies, is therefore considerably reduced.

Fourth condition

Regarding the fourth condition, the Authority notes that the Icelandic State Guarantee Fund assessed the appropriate guarantee fee and guarantee charge for a State guarantee in relation to the A Term Loan. It charged a fee of ISK [...] plus a proportional fee of [...] p.a. on the balance of the loan at the beginning of each period. The total charge amounted to [...] and was already paid in advance.

Assuming only that the State Guarantee Fund took into account, in the assessment of the premium, the concrete characteristics of the guaranteed loan, in particular the conditions for repayment⁽¹⁹⁾ and that it followed for its assessment the so-called market investor principle, would the fourth condition laid down in Chapter 17.4(2) of the Guidelines be fulfilled. However, despite being invited to prove that this is a market rate, the Icelandic authorities have not substantiated this point, but mainly limited themselves to repeat the relevant provisions of the State Guarantee Fund Act. The Authority notes that while taking into account that the guarantee in question is a guarantee of collection with a lesser risk, the premium charged to Farice is at the very low end of the spectrum of interest rates to be fixed by the National Debt Management Agency [...], which has not been reasoned by the Icelandic authorities.

Further indication of the appropriate market rate can be derived from point 17.1(2) of the Guidelines which identifies the amount of aid, i.e. the cash grant equivalent, for an individual guarantee, as the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums have been deducted. This is based on the understanding that if the borrower profits from a favourable interest rate, which he would not have gotten without State intervention, the aid element is the amount which remains in comparison to the market rate and *after* the premium has been deducted. If the premium does not fully remove this advantage, the State guarantee would still benefit the recipient and thus distort the market. In such circumstances the advantage resulting from the guarantee has not been clawed away by the premium and would have to be classified as aid⁽²⁰⁾.

The Authority notes that the difference between the A tranche loan of [...] points compared to [...] of the B loan, is [...], which is not fully compensated by the [...] premium paid by the State. However, the Authority still considers comparing the interest rate of the A tranche with the D tranche of the loan, which is the only tranche not backed up by the State or a State owned company, which results in a remaining aid element of [...]. Firstly, the Authority assumes that the guarantee given by the 100 % owned telecom operators Síminn is also imputable to the State, but will investigate that point further during the investigation. In any event, operators in similar projects might not be able to secure such guarantees — and the favourable market conditions resulting therefrom — so that in the Authority's preliminary view the comparison with the D loan seems to be the valid comparison⁽²¹⁾.

The intervention of the State strengthens the position of Farice hf. in securing the project financing versus competitors who do not profit from such a guarantee and would have to make the investment solely on market terms. The guarantee is given for a project which is carried out by multinational business operators and constitutes an activity which is subject to trade between the Contracting Parties.

2.3 The increase in the participation of the State as shareholder of Farice hf.

Between the time of the establishment of the company in September 2002 and the time of the notification at the beginning of 2004, the State participation in Farice hf increased from an initial share of 27 % up to 46,5 %. Following the explanation given by the Icelandic authorities in their reply of June 2004, Síminn made it clear that it did not intend to provide more than 33,33 % of the share capital⁽²²⁾.

⁽¹⁹⁾ The provisions of the loan agreement foresee the possibility of prepaying the whole or part of the loan, except for the A term loan, without any prepayment fee.

⁽²⁰⁾ The Icelandic authorities do not consider that aspect, but look at the adequacy of the market price as such. The result is that the fact that the State guarantee has led to better loan conditions than market conditions, is neither considered under the first condition (see above) nor under the fourth condition.

⁽²¹⁾ According to Clause 7.4 of the Loan Agreement, solely the margin for the A Term Loan can be modified after signature of the agreement. Such an amendment may take place on 18 March 2011 and will be effective until the loan maturity. As this is depending on the future negotiations, the Authority is not in a position to assess whether such a modified margin would constitute State aid within the meaning of Article 61(1) of the EEA Agreement or whether such aid could be authorised. However, the Icelandic authorities would be able to identify the existence of an aid element for any future modification by applying the calculation parameters laid down in the previous paragraph and, in case of the existence of an aid element, would have to notify the aid measure to the Authority.

⁽²²⁾ See section I 3.b of this Decision.

For State aid purposes, it has to be established whether the capital increase at Farice engaged by the State is directly in conformity with the market investor principle. Chapter 19 of the Guidelines establishes the general approach of the Authority with regard to the acquisition of share holdings by public authorities.

According to Chapter 19.6.(b) of the Guidelines, no State aid is involved where fresh capital is contributed to an undertaking in circumstances that would be acceptable to a private investor operating under normal market economy conditions. This can apply when public holdings in a company are to be increased, provided that the capital injected is proportionate to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder. The private investor's holding must have real economic significance.

On the other hand, there is State aid where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions. Following Chapter 19.6.(c) of the Guidelines, this is, amongst others, the case where the injection of capital into companies whose capital is divided between private and public shareholders makes the public holding reach a significantly higher level than it was originally and the relative disengagement of private shareholders is largely due to the companies' poor profit outlook.

The Icelandic authorities point out that the Icelandic's State share capital increase should not be looked at as an injection of fresh capital, but rather as the initial setting up of the company. The Authority points out that the State Aid Guidelines consider the share capital increase, regardless of at what point in time it takes place, as a subcategory of the injection of fresh capital. As the Guidelines reflect the general principle of private market investor behaviour, the share capital increase must be analysed on its merits. Even if the Government had assumed the higher share already during the preparation phase, this still would have made the increase subject to an analysis under the State aid provisions. For that assessment it is therefore only relevant whether the share capital increase reflects the rationale of a private market investor.

The Authority does not deny that in real terms the private operators' holdings occurred at the same time of the capital increase by the State. However, the Authority takes the (preliminary view) that the share increase of the private operators was not proportionate to the share capital increase by the State.

As can be seen from the table above (see section I.3.b. of this Decision) Farice hf.'s capital rose from EUR 337 000 to EUR 14 646 000 in January 2003. The share of the Icelandic State grew from 27,33 % (EUR 92 000) to 46,5 % (EUR 6 206 000), i.e. by almost 20 percentage points. While it is correctly stated by the Icelandic authorities that the share of Síminn grew from EUR 160 000 to EUR 4 446 000, in relative terms the share of Síminn fell from 47,33 % to 33,33 % (14 percentage points). Except for Telefonverkið, the shares of all other participants also fell (from 1,33 % to 0,33 %), which shows that in relative terms the private operators disengaged from the project.

This is likely to result from the poor outlook of the company's profit. In their letter of September 2004, the Icelandic authorities have submitted that:

'Síminn felt that increasing the capacity to meet foreseeable demand, as well as providing an alternate route for emergencies, was a financially risky undertaking, providing little return on investment (especially for a limited company in line for privatisation). In order to facilitate the necessary upgrade in capacity, particularly in view of the short time frame available until capacity would be outstripped by the demand, the Government stepped in.'

The Icelandic authorities further state that the market's reluctance towards the project was indicated in the preparatory phase when Síminn and Telefonverkið engaged IBM Consulting to advise them on the economic viability of the project and its financing possibilities. The findings strongly suggested that the funding could not be done via traditional means ⁽²³⁾.

It seems from this that the initial lack of engagement from private investors was the reason for the subscription of the necessary capital increase by the Government in early 2003 ⁽²⁴⁾, which raised the State participation in Farice hf.

The increase in the State's share of Farice was further accompanied by the grant of a State guarantee to cover the A Term Loan of EUR 9,4 million. It is thus the preliminary opinion of the Authority that State aid can be presumed in the capital injection subscribed by the Icelandic authorities in Farice which led to an increase in the State share in the company from 27 % to up to 46,5 %. Additionally, according to Chapter 19.6(d) of the Guidelines, there is a presumption that there is State aid where the authorities' intervention takes the form of acquisition of a holding combined with other types of interventions which need to be notified pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

⁽²³⁾ See letter by the Icelandic authorities dated 25 June 2004, page 3.

⁽²⁴⁾ The Authority is aware of the reference of the Icelandic authorities to the speech of the chairman on 24 January 2004. However, this speech only states that there is a 'modestly profitable business case' and that the private operators also provided securities. The latter point has never been denied by the Authority; the question whether the share increase by the State is proportionate is, however, not answered.

The intervention of the State strengthens the position of Farice hf. in securing the project financing versus competitors who do not profit from such a State participation in a situation in which private operators are not willing to raise additional funds. The share increase concerns a project which is carried out by multinational business operators and constitutes an activity which is subject to trade between the Contracting Parties.

a. *Conclusion*

In the Authority's preliminary view, the State guarantee and the capital share increase by the Icelandic State constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

3. Compatibility

In the Authority's view, the aid measures do not comply with any of the exemptions provided for under Article 59(2) ⁽²⁵⁾ and Article 61(2) or (3)(a) and (d) of the EEA Agreement. In the Authority's preliminary view, the State support also cannot be justified under Article 61(3)(b) of the EEA Agreement. Despite the fact that the project is transnational, the aid in question presents itself in the form of sector aid, benefiting an individual company (Farice hf) and brought about by a private initiative of a group of business operators. It is therefore questionable that this can be regarded as a project which is of common European interest.

It needs to be assessed whether the aid could be justified under Article 61(3)(c) of the EEA Agreement. Under this provision aid may be declared compatible if '*it facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*'.

However, the Authority finds that none of the Authority's State Aid Guidelines can be applied to assess aid measures that target this objective. The Authority in particular does not share the Icelandic authorities' view that the measure falls under the Act mentioned in point 1 f) of the EEA Agreement concerning aid to small and medium sized undertakings ⁽²⁶⁾. In order to fall under the block exemption, Farice would have to be an independent enterprise in the meaning of Article 1(3) in conjunction with Article 1(1) in Annex I of the Act. However, more than 25 % of the capital is owned by operators which fall outside the SME definition (this goes both for the State owned Síminn and the share ownership of the Icelandic State).

The Authority therefore considers that the compatibility assessment is to be based directly on Article 61(3)(c) of the EEA Agreement.

In this respect, the Authority will have to investigate the necessity and the proportionality of the measure. The Authority, however, notes that the Icelandic authorities have not yet provided sufficient information to enable the Authority to carry out a full analysis of this issue. On the basis of the information available, the Authority has come to the preliminary conclusions below.

3.1 *The necessity of the aid measures*

The Authority notes that the project intends to secure internet connectivity to Iceland by having a reliable transmission method to which the former CANTAT-3 connection will serve as a back-up. Because of its geographic location, Iceland is particularly dependent on having access to economic and reliable telecom connectivity. As can be seen from section I.2 of this Decision, alternatives in the form of the existing CANTAT-3 cable or satellites were no longer options, either because of their technical limitations or dependencies on other consortium shareholders (CANTAT-3 ⁽²⁷⁾) or their rising costs (satellites). The new submarine cable, which is to become the primary transmission connection to Iceland, has greater capacities, is more reliable and — together with the backup by CANTAT-3 — is able to secure the provision of telecommunication services to Iceland. The availability of broadband ⁽²⁸⁾ has been acknowledged in Commission policy and State aid decisions ⁽²⁹⁾ as a legitimate objective and type of service which is by its nature capable of positively affecting the productivity and growth of a large number of sectors and activities.

⁽²⁵⁾ The Icelandic authorities have not provided information which enables the Authority to make an assessment under that provision.

⁽²⁶⁾ Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 (OJ L 63, 28.2.2004, p. 22). The point 'Aid to small and medium enterprises' was inserted by Joint Committee Decision No 88/2002 (OJ L 266, 3.10.2002, p. 56 and EEA Supplement No 49, 3.10.2002, p. 42), e.i.f. 1.2.2003. The amendment was inserted by Decision No 131/2004 (OJ No L 64, 10.3.2005, p. 67 and EEA Supplement No 12, 10.3.2005, p. 49), e.i.f. 25.9.2004.

⁽²⁷⁾ As stated in the summary report submitted by the Icelandic authorities in the notification dated 27 February 2004, the consortium member Teleglobe, in particular, was faced with business difficulties.

⁽²⁸⁾ Data transmission in which a single medium can carry several channels at once. The term is also used to compare frequency bandwidth greater than 3 MHz narrowband frequencies. Broadband can transmit more data at a higher speed.

⁽²⁹⁾ See e-Europe 2004 Action Plan, Communication from the Commission, An information society for all, 28.5.2002, COM (2002) 263 final, see Commission Decision N 231/2003 Project Atlas — broadband infrastructure for business parks and N 307/2004 Broadband in Scotland — remote and rural areas.

As can be seen from its history (in particular the feasibility study of March 2002), the Farice project was not able to emerge as a purely private initiative. Both, State guarantees and share capital increases resulted from the need of a greater State participation to make the project economically viable. Without State participation, the project would either have been delayed or not undertaken at all, so that the Authority takes the preliminary view that the State support was necessary.

3.2 *The proportionality of the aid measures*

In order for the aid measures to be compatible with Article 61(3)(c) of the EEA Agreement, it must be proportionate to the objective and not distort competition to an extent contrary to the common interest. The trade-off between the advantages in terms of guaranteeing a reliable provision of telecommunication services to Iceland must be weighed against the disadvantages of the distortion of competition in comparison to competitors, which do not have access to public funding when realising similar projects.

The Authority cannot yet make a final assessment of that question on the basis of the available information. However, it will — in the formal investigation procedure — consider the following aspects:

- The Authority first notes that neither the construction nor the management of the cable were given to Farice hf. after an open tender. The Authority is not yet convinced that the widespread information on this project as claimed by the Icelandic authorities can replace a formal tender procedure, in particular as the desirable widespread participation was limited to Icelandic and Faeroe parties⁽³⁰⁾. The Authority points out that the open tender was considered a positive, although not necessarily mandatory, element for the approval of broadband projects in Commission practice⁽³¹⁾. In these decisions it was, in particular, stressed that the tendering out of the management of the cable to an independent asset manager secured the neutrality of the infrastructure manager better than in a situation in which the service provider has control over the infrastructure, as is the case here.
- The Authority notes that the shareholders' agreement provides for a non-discriminatory, transparent pricing on market terms.
- The Authority will also consider that the shareholders' agreement is in principle open to new entrants. The Authority has however doubts on the position of new entrants in relation to the founding parties, as section 7 of the Shareholders agreements protects the founders' position by giving them the possibility to maintain their equity position.
- The total amount of aid is, with regard to the State guarantee, rather limited. As to the State's share increase, the Authority notes that in June 2003 the State's share capital has already decreased to 41 %, whereas Síminn's participation rose to 29 %. The Authority also notes that while the State disproportionately increased its share capital in January 2003, the private operators showed willingness to multiply their support.
- The Authority has, in its correspondence with Farice hf. under the competition proceedings, raised certain competition concerns. The European Court of Justice has established that a compatibility assessment under the State aid provisions should not produce a result which is contrary to other treaty provisions. Consequently, for the assessment under the State aid provisions, it is also relevant whether State support is given to a project which might raise competition concerns under the application of Article 53 and/or 54 of the EEA Agreement⁽³²⁾. In this regard, the Authority *inter alia* notes that although the existing infrastructure CANTAT-3 still remains in place⁽³³⁾, there is a concern that in the future, all CANTAT-3 connectivity to Iceland will be channelled through E-Farice hf, which holds the majority of shares in Farice hf.⁽³⁴⁾ Hence, there is a risk that competition in connectivity to Iceland would be eliminated, as only one supplier would remain on the market.

4. Conclusion

The Authority therefore concludes that it has doubts as to whether the support in favour of Farice hf. is compatible with the functioning of the EEA Agreement, in particular with Article 61(3)(c) of the EEA Agreement.

⁽³⁰⁾ The Icelandic authorities state: 'Widespread participation was sought in Iceland and the Faeroe Islands for shareholders in the Farice project and all telecoms operators were invited to participate in the foundation of the company.'

⁽³¹⁾ Commission Decision N 307/2004, N 199/2004 and N 213/2003.

⁽³²⁾ Cf. Case C-225/91, *Matra SA v Commission*, [1993] ECR-3203, paragraph 41.

⁽³³⁾ On the co-existence of existing infrastructure, see Commission Decision N 307/2004, paragraph 45, where it is positively outlined that this minimises the risk of unnecessary duplication and limits the economic impact for operators that already have infrastructure in place. See also Commission Decision N 199/2004, paragraph 41, N 213/2003, paragraph 47.

⁽³⁴⁾ See footnote 8 of this Decision.

Consequently, and in accordance Article 4(4) in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1(2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority. The Authority may conclude that the measures in question would be compatible with the functioning of the EEA Agreement, if they were necessary and proportionate and thus would fulfil the requirements for being exempted from the prohibition against State aid as laid down in Article 61(1) of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Icelandic authorities to submit its comments within one month of the date of receipt of this Decision.

In light of the foregoing considerations, the Authority requires the Icelandic government, within one month of receipt of this Decision, to provide all documents, information and data needed for the assessment of the compatibility of the support measures in favour of Farice hf.,

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the support measures in favour of Farice hf.
2. The Icelandic government is requested, pursuant to Article 6(1) in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit its comments on the opening of the formal investigation procedure within one month from the notification of this Decision and to provide all such information as may help to assess the aid measure.
3. The Icelandic government shall be informed by means of a letter containing a copy of this Decision.
4. The Icelandic Government is invited to notify without delay the potential aid beneficiary of the initiation of the proceedings.
5. The EC Commission shall be informed, in accordance with Protocol 27(d) of the EEA Agreement, by means of a copy of this Decision.
6. Other EFTA States, EU Member States, and interested parties shall be informed by the publishing of this Decision in its authentic language version, accompanied by a meaningful summary in languages other than the authentic language version, in the EEA Section of the *Official Journal of the European Union* and the EEA Supplement thereto, inviting them to submit comments within one month from the date of publication.
7. This Decision is authentic in the English language.

Done at Brussels, 26 May 2005.

For the EFTA Surveillance Authority

Einar M. BULL

Acting President

Bernd HAMMERMANN

College Member
