INFORMACJE DOTYCZĄCE EUROPEJSKIEGO OBSZARU GOSPODARCZEGO

URZĄD NADZORU EFTA

Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 w części I protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości, dotyczących potencjalnej pomocy państwa udzielonej przedsiębiorstwu Landsvirkjun w postaci gwarancji państwowych na kontrakty na instrumenty pochodne

(2017/C 242/06)

Decyzją nr 085/17/COL z dnia 3 maja 2017 r. zamieszczoną w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu Urząd Nadzoru EFTA wszczął postępowanie na mocy części I art. 1 ust. 2 protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości. Władze Islandii otrzymały stosowną informację wraz z kopią wyżej wymienionej decyzji.

Urząd Nadzoru EFTA wzywa niniejszym państwa EFTA, państwa członkowskie UE oraz inne zainteresowane strony do zgłaszania uwag w sprawie omawianego środka w terminie jednego miesiąca od daty publikacji niniejszego zaproszenia na poniższy adres Urzędu Nadzoru EFTA:

EFTA Surveillance Authority
Registry
35, Rue Belliard/Belliardstraat 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

Uwagi zostaną przekazane władzom islandzkim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

Streszczenie

Procedura

W piśmie przesłanym pocztą elektroniczną dnia 24 marca 2015 r. władze Islandii zwróciły się do Urzędu Nadzoru EFTA z zapytaniem, czy zobowiązania finansowe przedsiębiorstwa Landsvirkjun wynikające z kontraktów na instrumenty pochodne mogą być gwarantowane w ramach istniejącego systemu gwarancji państwowych Islandii. System ten stanowił przedmiot decyzji Urzędu nr 159/13/COL [1].

Urząd wystąpił o informacje dotyczące tego środka i otrzymał je od władz islandzkich w pismach z dnia 11 lutego 2016 r. i 22 marca 2016 r. Sprawa ta została również omówiona na spotkaniu władz islandzkich oraz Urzędu w Reykjaviku dnia 31 maja 2016 r. W następstwie spotkania Urząd wysłał do władz Islandii pismo, w którym zapisano przebieg spotkania oraz poproszono o dalsze wyjaśnienia. W piśmie nadesłanym pocztą elektroniczną dnia 31 października 2016 r. władze Islandii odpowiedziały na pismo Urzędu oraz przedstawiły pewne dodatkowe dokumenty.

Okoliczności faktyczne

Landsvirkjun jest spółką partnerstwa publicznego, podlegającą ustawie nr 42/1983 w sprawie Landsvirkjun, z późniejszymi zmianami; Landsvirkjun stanowi wspólną własność Skarbu Państwa (99,9 %) oraz Eignarhlutir ehf (0,1 %) – spółki z ograniczoną odpowiedzialnością należącej w całości do Skarbu Państwa. Landsvirkjun jest obecnie największym wytwórcą energii elektrycznej w Islandii, posiadającym ponad 75 % udziału w krajowej produkcji energii elektrycznej, oraz jednym z 10 największych przedsiębiorstw w Europie prowadzących działalność w sektorze energii odnawialnej.

Dział Zarządzania Długiem Publicznym to dział Banku Centralnego Islandii. Bank Centralny Islandii jest niezależną instytucją publiczną, której właścicielem jest państwo islandzkie.

Przedsiębiorstwo Landsvirkjun jest narażone na ryzyko wynikające z wymiany walut (FX) oraz ryzyko stopy procentowej w odniesieniu do jego portfela dłużnego. Landsvirkjun korzysta z różnych rodzajów kontraktów na instrumenty pochodne, aby kontrolować swoje ryzyko rynkowe oraz nim zarządzać.

Zgodnie z obecnym stanem wiedzy Urzędu na temat okoliczności faktycznych, Dział Zarządzania Długiem Publicznym udziela przedsiębiorstwu Landsvirkjun gwarancji na pewne instrumenty pochodne przynajmniej od 2013 r. Decyzja dotyczy gwarancji udzielonych przez Dział Zarządzania Długiem Publicznym na następujące kontrakty na instrumenty pochodne: swapy walutowe, opcje walutowe oraz swapy stóp procentowych.

[1] Decyzja Urzędu nr 159/13/COL z dnia 24.4.2013 r. dotycząca zamknięcia postępowania w sprawie istniejącej pomocy przyznanej przedsiębiorstwom Landsvirkjun oraz Orkuveita Reykjavíkur za pośrednictwem nieograniczonych gwarancji państwa (Dz.U. C 237 z 15.8.2013, s. 3 oraz Suplement EOG nr 45 z 15.8.2013, s. 28).

Zgodnie z pkt 3.2 wytycznych w sprawie gwarancji państwowych („Wytyczne w sprawie gwarancji") [2] łączne spełnienie następujących warunków wystarczy, aby wykluczyć występowanie elementów pomocy państwa w indywidualnej gwarancji:

a) kredytobiorca nie znajduje się w trudnej sytuacji ekonomicznej;

b) zakres gwarancji można odpowiednio zmierzyć w momencie jej udzielenia;

c) gwarancja obejmuje nie więcej niż 80 % niespłaconego kredytu lub innego zobowiązania finansowego; oraz

d) za gwarancje płaci się cenę odpowiadającą cenie rynkowej.

Urząd uznaje wstępnie, że gwarancje udzielone przedsiębiorstwu Landsvirkjun przez Dział Zarządzania Długiem Publicznym na transakcje na instrumentach pochodnych, o których mowa powyżej, nie spełniają warunków b), c) oraz d). Na tym etapie obecność elementów pomocy państwa nie może zostać wykluczona na podstawie pkt 3.2 wytycznych w sprawie gwarancji.

Po pierwsze, dotychczas władze Islandii nie były w stanie wyjaśnić, czy wspomniane gwarancje są powiązane z konkretnymi zobowiązaniami, jaka jest maksymalna kwota gwarancji oraz czy gwarancje są ograniczone w czasie. Urząd jest zatem obecnie zdania, że warunek b) pkt 3.2 wytycznych w sprawie gwarancji nie został spełniony.

Po drugie, gwarancje zdają się pokrywać wszystkie zobowiązania finansowe przedsiębiorstwa Landsvirkjun w ramach odnośnych kontraktów na instrumenty pochodne. Władze Islandii nie przedstawiły dotychczas żadnych informacji, które pozwoliłby na ocenienie, czy gwarancja jest ograniczona do 80 % niespłaconych zobowiązań finansowych. Co więcej, nie ma informacji pozwalających na oszacowanie zobowiązań finansowych przedsiębiorstwa Landsvirkjun w ramach kontraktów na instrumenty pochodne, które są gwarantowane przez Dział Zarządzania Długiem Publicznym. Urząd jest zatem obecnie zdania, że warunek c) pkt 3.2 wytycznych w sprawie gwarancji nie został spełniony.

Po trzecie, zgodnie z wytycznymi w sprawie gwarancji, ponoszone ryzyko powinno być normalnie wynagradzane odpowiednią stawką prowizji za kwotę będącą przedmiotem gwarancji lub regwarancji. Jeżeli chodzi o gwarancje udzielone przez Dział Zarządzania Długiem Publicznym na swapy walutowe i opcje walutowe, wydaje się, że Landsvirkjun nie płaci żadnej prowizji. Jeżeli chodzi o gwarancje udzielone przez Dział Zarządzania Długiem Publicznym na swapy stóp procentowych, władze Islandii twierdzą, że Landsvirkjun płaci odpowiednią stawkę prowizji gwarancyjnej za zobowiązania netto wynikające z kontraktów na instrumenty pochodne, które wykazują stratę netto dla przedsiębiorstwa Landsvirkjun. Urząd nie otrzymał jednak wystarczających informacji dotyczącej metodologii, jaka została użyta do obliczenia stawki prowizji, oraz tego, czy stawka prowizji może być uznana za rynkową.

Ocena

Urząd jest obecnie zdania, że gwarancje, o których mowa w niniejszej decyzji, stanowią korzyść w rozumieniu zasad pomocy państwa. Wydaje się też, że przedmiotowy środek ma selektywny charakter, może naruszać konkurencję i wpływać na wymianę handlową na terenie EOG. W związku z tym Urząd nie może wykluczyć, że środek ten stanowi pomoc państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG. Władze islandzkie nie przedstawiły na obecnym etapie żadnych argumentów na uzasadnienie zgodności potencjalnej pomocy państwa, o której mowa, z art. 59 ust. 2 lub art. 61 ust. 3 Porozumienia EOG.

Wniosek

W świetle powyższych zastrzeżeń Urząd podjął decyzję o wszczęciu formalnego postępowania wyjaśniającego zgodnie z częścią I art. 1 ust. 2 protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości. Zainteresowane strony wzywa się do nadsyłania uwag w terminie jednego miesiąca od publikacji niniejszego zawiadomienia w *Dzienniku Urzędowym Unii Europejskiej*.

EFTA SURVEILLANCE AUTHORITY DECISION

No 085/17/COL

of 3 May 2017

to initiate the formal investigation procedure into potential state aid granted to Landsvirkjun through state guarantees on derivatives contracts

(Iceland)

The EFTA Surveillance Authority ('the Authority'),

Having regard to:

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

[2] Dz.U. L 105 z 21.4.2011, s. 32 oraz Suplement EOG nr 23 z 21.4.2011, s. 1.

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 4(4), 6 and 13(1) of Part II,

Whereas:

I. **FACTS**

1. **Procedure**

(1) In an email dated 24 March 2015 ([3]), the Icelandic authorities asked the Authority to clarify whether Landsvirkjun's financial obligations from derivatives contracts could be guaranteed under Iceland's existing state guarantee scheme. That scheme was the subject matter of the Authority's decision No 159/13/COL ([4]).

(2) Following the Authority's letter of 13 April 2015 ([5]) and email of 20 April 2015 ([6]) asking for additional information, the Icelandic authorities responded in a letter dated 11 February 2016 ([7]).

(3) In a letter dated 24 February 2016 ([8]), the Authority requested additional information from the Icelandic authorities. The Icelandic authorities replied to the information request in a letter dated 22 March 2016 ([9]).

(4) Moreover, the matter was discussed during a meeting between the Icelandic authorities and the Authority in Reykjavík on 31 May 2016. Following the meeting, the Authority sent a letter to the Icelandic authorities, recording the content of the meeting and requesting additional clarifications ([10]). By an email dated 31 October 2016 ([11]), the Icelandic authorities responded to the Authority's letter and submitted some additional documents.

2. **Description of the measure**

2.1. ***The beneficiary: Landsvirkjun***

(5) Landsvirkjun is a public partnership company regulated by Act No 42/1983 on Landsvirkjun, as amended. As of 1 January 2007, the State Treasury took over the full ownership in Landsvirkjun. The company remained a partnership company with joint liability of the owners. Landsvirkjun is jointly owned by the State Treasury (99,9 %) and Eignarhlutir ehf. (0,1 %). The latter is a limited liability company wholly owned by the State Treasury ([12]).

(6) After the introduction of competitive power markets in Iceland in 2003, Landsvirkjun has focused on marketing and operations rather than construction of new power plants ([13]). Landsvirkjun is currently the largest electricity generator in Iceland, holding over 75 % market share in domestic electricity generation, and one of the ten largest renewable energy companies in Europe. The company produces electricity from hydro (96 %) and geothermal (4 %) sources, and operates 18 power stations ([14]).

2.2. ***The aid granting authority***

(7) In Iceland, the Ministry of Finance ('Ministry') is responsible for the central government's debt management, sets the strategy and makes decisions regarding debt issues. This is done in cooperation with the Central Bank of Iceland ('Central Bank') ([15]).

(8) The Central Bank is an independent public institution, owned by the Icelandic state. The principal objective of the Central Bank is to promote price and financial stability. The Central Bank was established by an act of Parliament in 1961, although the history of central banking in Iceland is much longer. The current Central Bank Act is No 36/2001, as amended ([16]).

([3]) Document No 753626.
([4]) The Authority's Decision No 159/13/COL of 24 April 2013 to close the case concerning existing aid granted to Landsvirkjun and Orkuveita Reykjavíkur through unlimited state guarantees (OJ C 237, 15.8.2013, p. 3 and EEA Supplement No 45, 15.8.2013, p. 28).
([5]) Document No 753593.
([6]) Document No 754498.
([7]) Document No 793116.
([8]) Document No 793783.
([9]) Document No 798576.
([10]) Follow-up letter of the Authority of 27 June 2016 (Document No 806762), Annex 9.
([11]) Document No 824636.
([12]) The Authority's Decision No 193/16/COL of 24 October 2016 on the sale of electricity to Norðurál (OJ C 26, 26.1.2017, p. 7, and EEA Supplement No 7, 26.1.2017, p. 2), paragraphs 4 and 6.
([13]) The Authority's Decision No 193/16/COL, paragraph 5.
([14]) Information from Landsvirkjun's website and the 2015 Annual report, available in English at: http://annualreport2015.landsvirkjun.com/
([15]) Information on the webpage of the Central Bank of Iceland, available in English at: http://www.cb.is/about-the-bank/central-bank-of-iceland/
([16]) *Ibid.*

(9) According to the information available on the Central Bank's web page the Central Bank is ultimately under the administration of the Prime Minister and a Supervisory Board. The Parliament elects all of the seven members to the Supervisory Board after each parliamentary election. The Prime Minister appoints the Governor and Deputy Governor of the Central Bank for a five-year term. Decisions on applying the Central Bank's monetary policy control mechanisms are taken by the Monetary Policy Committee. In other respects, the Bank's direction is in the hands of the Governor ([17]).

(10) In the letter dated 11 February 2016 ([18]), the Icelandic authorities explained that the Government Debt Management ('GDM') is a unit within the Central Bank under Treasury and Market Operations which operates in accordance with an agreement made with the Ministry. According to that agreement, the Ministry entrusts the GDM with tasks related to Government guarantees and relending.

2.3. ***Derivatives contracts entered into by Landsvirkjun***

(11) According to the email from the GDM of 24 March 2015 ([19]), Landsvirkjun has for some time hedged its risks from exposure to shifts in aluminium prices through derivatives.

(12) According to the Icelandic authorities ([20]), Landsvirkjun's three largest customers operate in the aluminium industry and total sales to these customers constitute around 70 % of Landsvirkjun's annual sales of electricity. Landsvirkjun's exposure to risk due to possible aluminium price fluctuations is substantial as around 30 % of Landsvirkjun income is linked to the price of aluminium.

(13) The functional currency of Landsvirkjun is the US dollar (USD). Landsvirkjun is exposed to foreign currency exchange ('FX') risk as well as interest rate risk on its debt portfolio. Landsvirkjun uses various forms of derivatives contracts to control and manage its market risk ([21]).

(14) The Authority is currently, in connection with the GDM guarantees, looking into the following types of derivatives contracts entered into by Landsvirkjun: FX swaps, FX options and interest rate swaps. The Icelandic authorities have not presented to the Authority the different derivatives contracts entered into by Landsvirkjun. The below description of these derivatives contracts is based on the explanations of the Icelandic authorities ([22]).

2.3.1. *FX swaps*

(15) An FX swap is a contract for a currency exchange between two parties. FX swap contracts swap one loan (principal and interest payments) in one currency, e.g., a loan in EUR, into a 'new' loan in another currency, e.g. USD. Thereby, the contract creates an asset that exactly mirrors the EUR debt thereby transferring currency risk of the loan from EUR over to USD. The principal amount is traded on FX markets. The interest rate part of the contract is often decided by the financial corporation offering to do the deal (counterparty) depending on market condition at any given time.

2.3.2. *FX options*

(16) An FX option is a financial instrument that gives the right, but not the obligation, to exchange money into another currency at a pre-agreed exchange rate on a specified date. FX options trading is mostly done over the counter. Future payments that are hedged using this kind of contracts involve payments on loans already taken.

(17) The Authority notes that there is no information on whether Landsvirkjun is a buyer or also a seller of FX options.

2.3.3. *Interest rate swaps*

(18) An interest rate swap (IRS) is an agreement between two parties where one stream of future interest payments (e.g. interest payments based on fixed interest) is exchanged for another (e.g. interest payments based on floating interest) based on a specified notional principal amount.

(19) The notional principal is not exchanged between parties and the currency is the same for both interest payments. IRS contracts are used to limit or manage exposure to fluctuations in interest rates. Landsvirkjun uses these derivatives for loans that have already been entered into, e.g. to swap USD floating interests to USD fixed interest without swapping the principal.

([17]) *Ibid.*
([18]) Document No 793116.
([19]) Document No 753626.
([20]) Document No 793116.
([21]) For the avoidance of doubt, the current decision does not concern derivatives contracts for hedging risks due to aluminium price fluctuations.
([22]) *Ibid.*

2.4. *GDM guarantees on Landsvirkjun's derivatives contracts*

(20) According to the Authority's current understanding of facts, at least since 2013 GDM has granted guarantees to Landsvirkjun on the derivatives contracts referred to in sections 2.3.1-2.3.3 above. During the meeting with the Authority on 31 May 2016, GDM explained that Landsvirkjun would not be able to enter into the hedging derivative agreements without the underlying state guarantee ([23]).

(21) According to the Icelandic authorities, Landsvirkjun pays a premium for the state guarantee on the loans underlying the FX swaps and option ([24]). However, there is no information on whether Landsvirkjun pays any premium at all for the guarantees on the derivatives contracts. The Authority notes that paying a premium for a guarantee on a loan underlying a derivative transaction is not equal to paying a premium for a guarantee on the derivative transaction itself ([25]).

(22) As regards the IRSs, the Icelandic authorities have explained that IRS contracts have a net position, i.e. there is either a gain or a loss for Landsvirkjun from these contracts. Contracts that show loss for Landsvirkjun are on the liability side of the balance sheet and therefore enjoy a state guarantee. According to the Icelandic authorities, the same guarantee premium should be paid for these net liability positions as is paid for the guarantee on loans ([26]).

(23) According to the Icelandic authorities, Landsvirkjun already pays a guarantee premium for loans the interests of which are swapped. The Icelandic authorities also submit that Landsvirkjun pays a 0,48 % p.a. guarantee premium on net liabilities of derivatives contracts that show a net loss for Landsvirkjun ([27]). In connection with the latter premium the Icelandic authorities also explained the following: *'The guarantee fee is based on a report made for the Icelandic State Guarantee Fund by Summa ehf. "Premium for guarantees granted to Landsvirkjun". In discussing the conclusion of the report Summa* ([28]) *concludes "In the referenced reports the premiums, 48 bp, is estimated by assessing the advantage that LV enjoys in the credit market due to a guarantee from the state or the municipality. Consequently, an appropriate premium should eliminate the advantage the company enjoys in the credit markets due to the guarantee, i.e. a competitor that does not receive a guarantee should not be at a competitive disadvantage." The guarantee premium of each individual derivative contract is in line with the fee paid on the corresponding loan that the derivative is based on. Therefore, the premium can change if derivative contracts are based on new guaranteed loan contracts that have a lower or higher guarantee fee than previous ones'* ([29]).

(24) The Authority notes that several aspects necessary for the state aid assessment of the GDM guarantees to Landsvirkjun on derivatives contracts referred to in sections 2.3.1-2.3.3 above remain unclear. In particular, insufficient information has been provided to assess whether the guarantees are limited, how GDM's exposure to potential liabilities could be quantified and how the value of the guarantees ([30]) and the guarantee premium for IRS related guarantees is calculated.

2.5. *The previously closed procedure on existing aid measures as regards state aid granted through unlimited state guarantees*

(25) By a letter dated 26 September 2006 (Document No 280834), the Authority initiated the procedure on existing aid measures provided for in Article 17(2) of Part II of Protocol 3 with respect to certain measures in favour of electricity utilities in Iceland, including unlimited state guarantees to Landsvirkjun. In that letter, the Authority informed the Icelandic authorities of its preliminary view that these measures involved existing state aid that was incompatible with the functioning of the EEA Agreement.

(26) After several exchanges with the Icelandic authorities, the Authority concluded in its Decision of 8 July 2009 No 302/09/COL (Document No 465443) ([31]) that the unlimited state guarantees constituted existing state aid. The Authority found that this state aid was not in line with the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement, in particular with the then applicable Chapter on state guarantees ([32]). Therefore, these guarantees were incompatible with the functioning of the EEA Agreement.

([23]) Follow-up letter of the Authority of 27 June 2016 (Document No 806762), Annex 9.
([24]) Document No 793116.
([25]) *Ibid.*
([26]) *Ibid.*
([27]) Documents No 793116 and 798576.
([28]) According to the Icelandic authorities, Summa is an independent financial company regulated by the FSA.
([29]) Document No 798576.
([30]) The Authority notes that the Commission has accepted in the past methodologies for assessing the value of 100 % hedging guarantees where it was not possible to calculate in advance the final amount that would be effectively covered by the guarantees. See Commission decision of 24 April 2002 in case N706/2002, paragraph 48 and 76 *et seq.*
([31]) The Authority's Decision No 302/09/COL of 8 July 2009 to propose appropriate measures with regard to state aid granted to Landsvirkjun and Orkuveita Reykjavíkur, available on the Authority's website: http://www.eftasurv.int/?1=1&showLinkID=17084&1=1.
([32]) Chapter of the EFTA Surveillance Authority's State Aid Guidelines on state guarantees (OJ L 274, 26.10.2000, p. 29, and EEA Supplement No 48, 26.10.2000, p. 45).

(27) More precisely, according to the Authority's Decision No 302/09/COL, the public owners of Landsvirkjun were liable for all of its obligations. The main guarantor, the State Treasury, was not subject to bankruptcy rules. Therefore, Landsvirkjun would never be excluded from the market by means of an insolvency procedure, since the State guarantees all of its liabilities and accordingly assures the continuation of the company in the market.

(28) The Authority's Decision No 302/09/COL provided that the Icelandic authorities should take appropriate measures to abolish the unlimited state guarantees. The Authority proposed that the guarantees be abolished with effect from 1 January 2010.

(29) After subsequent exchanges with the Icelandic authorities, the Authority recorded Iceland's acceptance of the appropriate measures proposed by the Authority in its Decision No 302/09/COL with regard to the existing state aid scheme to Landsvirkjun and Orkuveita Reykjavíkur ([33]).

(30) The amended legislative framework for state guarantees included, inter alia, the following conditions for ruling out the presence of state aid:

— Landsvirkjun must pay a state guarantee premium which covers the benefits it enjoys due to the state guarantee. The premium is determined annually by an independent party and the adequacy of the premiums will be reviewed at least once a year;

— Landsvirkjun cannot obtain a guarantee which covers more than 80 % of either an outstanding loan or financial obligation.

(31) Furthermore, in line with Iceland's amended legislative framework for state guarantees and point 3.4 of the currently applicable state aid guidelines on state guarantees ('Guarantee Guidelines') ([34]), it has to be possible to measure the extent of the guarantees when they are granted. The guarantees must be linked to specific financial transactions, for a fixed maximum amount and limited in time.

(32) The Authority notes that the 80 % limitation does not apply to guarantees covering debt securities. However, derivatives do not constitute debt securities according to the definition in Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market ([35]). This form of financial transaction would therefore not be exempted from the 80 % guarantee limitation.

(33) However, the guarantees issued by GDM to Landsvirkjun on the derivatives contracts referred to in sections 2.3.1-2.3.3 above do not appear to comply neither with the conditions of the amended legislative framework for state guarantees nor with the Guarantee Guidelines. In particular, Landsvirkjun does not appear to pay a premium covering the benefits it enjoys due to the guarantees; the guarantees appear to cover more than 80 % of any outstanding obligations; and the guarantees do not appear to be linked to specific financial transactions, for a fixed maximum amount and limited in time.

(34) For these reasons, the Authority is currently of the opinion that the guarantees in question are not covered by Iceland's legislative framework for state guarantees as amended to implement the appropriate measures proposed by the Authority in its Decision No 302/09/COL.

II. **ASSESSMENT**

1. **The presence of state aid**

(35) 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.*'

(36) 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) is selective; (iii) confers an economic advantage on the beneficiary; and (iv) is liable to affect trade between Contracting Parties and to distort competition.

([33]) The Authority's Decision No 159/13/COL.
([34]) OJ L 105, 21.4.2011, p. 32 and EEA Supplement No 23, 21.4.2011, p. 1.
([35]) According to article 2(1)(b) of the Directive 2004/109/EC: '"debt securities" means bonds or other forms of transferable securitised debts, with the exception of securities which are equivalent to shares in companies or which, if converted or if the rights conferred by them are exercised, give rise to a right to acquire shares or securities equivalent to shares'.

1.1.1. *State resources*

(37) State resources within the meaning of Article 61(1) of the EEA Agreement are not limited to direct grants via the budget of the state. Guarantees given by the State may also constitute state aid ([36]).

(38) Where the state forgoes all or part of a guarantee premium, there is both a benefit for the undertaking and a drain on the resources of the state. Thus, even if it turns out that no payments are ever made by the state under a guarantee, there may nevertheless be state aid under Article 61(1) of the EEA Agreement ([37]).

(39) The guarantees in question are granted to Landsvirkjun by GDM. GDM is a part of the Central Bank and the latter is a part of the Icelandic public administration. Thus, the granting of guarantees by GDM is imputable to the state ([38]).

1.1.2. *Selectivity*

(40) Article 61(1) of the EEA Agreement requires that a measure, in order to be defined as state aid, favours 'certain undertakings or the production of certain goods'. The Authority has previously found that even if an aid measure concerns a whole economic sector, it does not prevent it from being covered by Article 61(1) of the EEA Agreement ([39]). The Authority maintained that position in its recently adopted Guidelines on the notion of state aid ('NoA Guidelines') ([40]).

(41) According to the Authority's current understanding of the facts, the guarantees in question are granted to Landsvirkjun only. Thus, the measure is selective within the meaning of Article 61(1) of the EEA Agreement.

1.1.3. *Economic advantage*

(42) An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention ([41]).

(43) The benefit of a state guarantee is that the risk associated with the guarantee is carried by the state. Such risk-carrying by the state should normally be remunerated by an appropriate premium ([42]).

(44) The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee. Whether or not a guarantee constitutes state aid, and, if so, what the amount of that state aid may be, must be assessed at the moment when the guarantee is given ([43]).

(45) Under point 3.2 of the Guarantee Guidelines, the fulfilment of the following cumulative conditions is sufficient to rule out the presence of state aid elements in an individual guarantee:

(a) The borrower is not in financial difficulty;

(b) The extent of the guarantee can be properly measured when it is granted;

(c) The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation; and

(d) A market-oriented price is paid for the guarantee.

(46) The Authority is of the preliminary view that the guarantees granted by GDM to Landsvirkjun on derivatives transactions referred to in sections 2.3.1-2.3.3 of part I above do not fulfil the conditions (b), (c) and (d). Accordingly, at this stage the presence of state aid elements cannot be ruled out on the basis of point 3.2 of the Guarantee Guidelines.

Proper measurement of the extent of the guarantee

(47) This condition means that the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time ([44]).

([36]) Guarantee Guidelines, point 2.1.
([37]) *Ibid.*
([38]) The role of GDM is further described in section 2.2 in part I.
([39]) The Authority's decision No 302/09/COL, section 1.2.2 of part II.
([40]) The Authority's Guidelines on the notion of State aid as referred to in Article 61(1) of the EEA Agreement, paragraph 118, available in English at: www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/
([41]) See for instance judgments in *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 60 and *Spain v Commission*, C-342/96, EU:C:1999:210, paragraph 41.
([42]) Guarantee Guidelines, point 2.1.
([43]) *Ibid.*
([44]) Guarantee Guidelines, point 3.2

(48) The Icelandic authorities have so far not been able to explain whether the guarantees are linked to specific obligations, what the maximum amount of the guarantees is, and whether the guarantees are limited in time. Therefore, the Authority is currently of the view that condition (b) of point 3.2 of the Guarantee Guidelines is not met.

The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation ([45])

(49) The guarantees appear to cover all of the financial obligations that Lansdsvirkjun has under the respective derivatives contracts. The Icelandic authorities have so far not provided any information that would allow to assess further whether the guarantee is limited to 80 % of the outstanding financial obligations. Also, there is no information allowing to quantify Landsvirkjun's financial obligations under the derivatives contracts that are guaranteed by GDM.

(50) Therefore, the Authority is currently of the view that condition (c) of point 3.2 of the Guarantee Guidelines is not met.

A market-oriented price for the guarantee

(51) Under the Guarantee Guidelines, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid. If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, must be compared to the market price of a similar non-guaranteed loan ([46]).

(52) As regards the guarantees related to the IRSs, the Icelandic authorities claim that Landsvirkjun pays a 0,48 % p.a. guarantee premium on net liabilities of derivatives contracts that show a net loss for Landsvirkjun ([47]). The Icelandic authorities also refer to a report made for the Icelandic State Guarantee Fund by Summa that should allegedly rule out any advantage Landsvirkjun enjoys in the credit market due to guarantees from the State or from a municipality ([48]).

(53) However, it is not clear to the Authority why the guarantee premium level described above should be considered as market-oriented.

(54) Firstly, the Icelandic authorities have not submitted the Summa report to the Authority. It is therefore not clear what methodology and arguments were used in concluding that the premium level of 0,48 % p.a. corresponds to the market price for guaranteeing Landsvirkjun's derivatives exposure.

(55) Secondly, from the brief explanations of the Icelandic authorities provided so far, it appears that this premium level covers all types of guarantees granted to Landsvirkjun (by the State or by a municipality) ([49]). The Authority has doubts whether a premium level that could be seen as appropriate for certain guarantees would necessarily also be market level on other occasions. The Authority further doubts whether the premium of 0,48 % p.a. is appropriate for the IRSs, as the guarantee seems to cover all of Landsvirkjun's financial liabilities under the IRS contracts and the risks to GDM are therefore potentially unlimited. In any event, the information submitted by the Icelandic authorities so far does not contain any meaningful explanations on why that premium level corresponds to market price, taking into account the characteristics of the guarantee, the underlying IRS contracts and the beneficiary.

(56) As regards the GDM guarantees on FX swaps and FX options, Landsvirkjun does not appear to pay any premium at all. The Icelandic authorities claim that Landsvirkjun pays a premium for the state guarantee on the original loans underlying the FX swaps and options ([50]). However, paying a premium for a guarantee on the transaction underlying the derivative contract does not equal to paying a premium for the guarantee covering the derivative contract itself. The Authority therefore doubts that the GDM guarantees on FX swaps and FX options are remunerated at market level.

(57) In addition, the Icelandic authorities have explained that Landsvirkjun would not be able to enter into the hedging derivative contracts without the state guarantees ([51]). However, the Icelandic authorities have not explained what would be the market price for such guarantees.

(58) Therefore, the Authority is currently of the view that the guarantees addressed in this decision do not meet the terms of point 3.2 of the Guarantee Guidelines and constitute an advantage within the meaning of the state aid rules.

([45]) The Authority notes that under the Guarantee Guidelines the 80 % limitation does not apply to guarantees covering debt securities. However, that exception is not applicable. See paragraph 32 of the decision.
([46]) Guarantee Guidelines, point 3.2.
([47]) See paragraph 23.
([48]) *Ibid.*
([49]) Document 798576.
([50]) See paragraph 21.
([51]) See paragraph 20.

1.1.4. *Distortion of competition and effect on trade*

(59) The aid measure must be liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.

(60) According to the case law of the Court of Justice and the EFTA Court, whenever state aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid ([52]). There is no threshold or percentage below which it may be considered that trade between the Contracting Parties is not affected ([53]).

(61) The Authority found already in its Decision No 302/09/COL that in an EEA-wide liberalised electricity sector, measures foreclosing a national market from competitors have an effect on trade ([54]). This is in particular so as Landsvirkjun is the largest electricity generator in Iceland and one of the ten largest renewable energy companies in Europe ([55]).

(62) The GDM guarantees covering the derivatives transactions of Landsvirkjun have a twofold effect on competition and trade. On the one hand, they strengthen the company and support the conditions under which it can compete with other companies active in energy markets throughout Europe, as well as in the provision of related services to these markets. On the other hand, the state guarantee in favour of Landsvirkjun also strengthens the financial capacities of the company with respect to the home market and has the indirect effect of foreclosing the Icelandic electricity market not only to foreign but also to national competitors. In addition, the guarantees support the conditions under which Landsvirkjun can compete with other companies active in trading derivatives in Europe. Therefore, the guarantees in question is liable to distort competition and to affect trade between the Contracting Parties.

(63) On this basis, the Authority reaches the preliminary conclusion that the guarantees referred to in section 2.4 of part I above may constitute aid within the meaning of Article 61(1) of the EEA Agreement.

2. **Existing aid**

(64) The Court of Justice has consistently held that the question of whether an aid is new or existing must be answered by reference to the legal provisions laying down the measure ([56]). According to the Guarantee Guidelines, whether a guarantee constitutes state aid and what the amount of that state aid may be, must be assessed at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee ([57]).

(65) The Authority's current understanding of the facts is that the guarantees in question were granted after the entry into force of the EEA Agreement, and also after 1 January 2010, i.e. the date by which Iceland agreed to implement the appropriate measures proposed by the Authority in its Decision No 302/09/COL. The guarantees in question do not appear to be covered by Iceland's amended legislative framework for state guarantees ([58]). Therefore, the Authority currently considers that the guarantees referred to in section 2.4 of part I of the decision qualify as new aid under Article 1(c) rather than existing aid under Article 1(b) of Part II of Protocol 3.

3. **Procedural requirements**

(66) Pursuant to Article 1(3) of Part I of Protocol 3: '*The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. … The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision.*'

(67) Point 3.2 (c) of the Guarantee Guidelines provides that if an EFTA State wishes to provide a guarantee above the 80 % threshold and claims that it does not constitute aid, it should duly substantiate the claim, for instance on the basis of the arrangement of the whole transaction, and notify it to the Authority so that the guarantee can be properly assessed with regard to its possible state aid character.

(68) The Icelandic authorities have not notified the guarantees in question to the Authority. The Authority therefore reaches the preliminary conclusion that the Icelandic authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3, and that the granting of the aid in the form of guarantees referred to in section 2.4 of part I above is therefore unlawful.

([52]) Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 74, paragraph 59; Judgment in *Philip Morris v Commission*, Case 730/79, EU:C:1980:209, paragraph 11.

([53]) Judgments in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 81 and *Wolfgang Heiser v Finanzamt Innsbruck*, C-172/03, EU:C:2005:130, paragraph 32.

([54]) The Authority's Decision No 302/09/COL, section 1.3 of Part II.

([55]) See section 2.1 of Part I.

([56]) Judgments in *Alzetta a o. v Commission*, Joined Cases T-298/97-T-312/97 EU:F:2000:151, *Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State* Case, C-44/93 EU:C:1994:311, *P.J. van der Hulst's Zonen v Produktschap voor Siergewassen*, C-51/74 EU:C:1975:9.

([57]) Guarantee Guidelines, point 2.1.

([58]) See section 2.5 of part I.

4. **Compatibility of the aid**

(69) Measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for an exemption under Article 61(2) or (3) of the EEA Agreement. The Authority notes that Iceland so far has not provided any arguments regarding the potential compatibility of the measure under these provisions.

(70) The Authority considers that the exemptions under Article 61(2) of the EEA Agreement are not applicable to the aid measure under assessment since it is not designed to achieve any of the aims listed in this provision.

(71) The aid also cannot be justified under Article 61(3)(a) of the EEA Agreement, which provides for regional support, as Iceland does not have any regions that are eligible under this provision. As the state guarantee was not given to promote the execution of an important project of common European interest nor to remedy a serious disturbance in the economy of Iceland, the Authority considers that Article 61(3)(b) of the EEA Agreement is not applicable either.

(72) Furthermore, the Authority notes that the aid in question is not linked to any investment. It just reduces the costs which companies would normally have to bear in the course of pursuing their day-to-day business activities and is consequently to be classified as operating aid. Operating aid is only rarely considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement. It is only permissible in special circumstances, normally in accordance with the Authority's state aid guidelines. None of these guidelines apply to the aid in question. The Authority therefore doubts that the aid measure could be declared compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c).

(73) Finally, Article 59(2) of the EEA Agreement does not seem to be applicable to the case at hand since there is no public service obligation justifying the grant of an unlimited state guarantee.

5. **Conclusion**

(74) As set out above, the Authority considers at this stage that the state guarantee on derivatives contracts referred to in section 2.4 of part I above granted by Iceland to Landsvirkjun may constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

(75) The Authority has doubts as to whether the measure is compatible with the functioning of the EEA Agreement.

(76) Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measure does not constitute state aid or that it is state aid compatible with the functioning of the EEA Agreement.

(77) The Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Icelandic authorities to submit, by 6 June 2017 their comments and to provide all documents, information and data needed for the assessment of these measures in light of the state aid rules.

(78) The Authority requests the Icelandic authorities to forward a copy of this decision to the potential aid recipient.

(79) The Authority must remind the Icelandic authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted to the beneficiaries will have to be recovered, unless (exceptionally) this recovery would be contrary to a general principle of EEA law.

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the guarantees on derivatives contracts referred to in section 2.4 of part I above granted by Iceland to Landsvirkjun.

Article 2

The Icelandic authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure by 6 June 2017.

Article 3

The Icelandic authorities are requested to provide by 6 June 2017, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to Iceland.

Article 5

Only the English language version of this decision is authentic.

Done at Brussels, 3 May 2017.

For the EFTA Surveillance Authority

Sven Erik SVEDMAN
President

For Frank J. BÜCHEL
College Member