



JUDGMENT OF THE COURT

22 July 2013

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Sale of land by public authorities – Market investor principle – State Aid Guidelines – Well-publicised bidding procedure comparable to an auction – Manifest error of assessment – Principle of sound administration – Obligation to state reasons)

In Case E-9/12,

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, acting as Agent, Haraldur Steinþórsson, Legal Officer, acting as Co-Agent, and Dóra Sif Tynes, Attorney at Law, acting as Counsel,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Auður Ýr Steinarsdóttir and Gjermund Mathisen, Officers, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for the partial annulment of the EFTA Surveillance Authority's Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf.,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties and the written observations of the Danish Government, represented by Vibeke Pasternak Jørgensen and Maria Søndahl Wolff, Ministry of Foreign Affairs, acting as Agents, and the European Commission (“the Commission”), represented by Davide Grespan and Paul-John Loewenthal, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Iceland (“the applicant”), represented by Dóra Sif Tynes; the EFTA Surveillance Authority (“ESA” or “the defendant”), represented by Auður Ýr Steinarsdóttir; and the Commission, represented by Paul-John Loewenthal, at the hearing on 15 May 2013,

gives the following

Judgment

I Introduction

- 1 On 4 July 2012, ESA adopted Decision No 261/12/COL concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. (“the contested decision”). In Articles 4 and 5 of the contested decision, ESA found that an agreement concerning municipal tax measures to Verne Holdings ehf., and the sale of five buildings to Verne Real Estate ehf. (“Verne”), respectively, entail State aid incompatible with the EEA Agreement. By Article 6 of the contested decision, ESA ordered the Icelandic authorities to recover the aid granted through the tax measures and the sale of real estate.
- 2 By its application, Iceland seeks an annulment of the contested decision in so far as it concerns the sale of real estate.
- 3 The application is based on two pleas in law. First, the applicant argues that ESA misapplied Article 61(1) EEA as it failed to demonstrate that the relevant buildings were sold below their market value, partly by not analysing the bidding procedure held, and partly by erring in the assessment of the market value of the buildings. Second, the applicant argues that ESA failed to duly investigate the case and to state reasons.

II Legal background

EEA law

4 Article 61 EEA provides as follows:

1. 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 the Contracting Parties, be incompatible with the functioning of this Agreement.

...

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate 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;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

5 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) reads as follows:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

6 Article 1(3) of Part I of Protocol 3 SCA reads as follows:

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. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

7 Article 5 of Part II of Protocol 3 SCA reads as follows:

1. Where the EFTA Surveillance Authority considers that information provided by the EFTA State concerned with regard to a measure notified pursuant to Article 2 of this Chapter is incomplete, it shall request all necessary additional information. Where an EFTA State responds to such a request, the EFTA Surveillance Authority shall inform the EFTA State of the receipt of the response.

2. Where the EFTA State concerned does not provide the information requested within the period prescribed by the EFTA Surveillance Authority or provides incomplete information, the EFTA Surveillance Authority shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period, either the period has been extended with the consent of both the EFTA Surveillance Authority and the EFTA State concerned, or the EFTA State concerned, in a duly reasoned statement, informs the EFTA Surveillance Authority that it considers the notification to be complete because the additional information requested is not available or has already been provided. In that case, the period referred to in Article 4(5) of this Chapter shall begin on the day following receipt of the statement. If the notification is deemed to be withdrawn, the EFTA Surveillance Authority shall inform the EFTA State thereof.

State Aid Guidelines

8 By Decision No 4/94/COL of 19 January 1994 (OJ 1994 L 231, p. 1), having regard in particular to Articles 5(2)(b) and 24 SCA and Article 1 of Part I of Protocol 3 SCA, ESA adopted Procedural and Substantive Rules in the Field of State Aid (“State Aid Guidelines”).

9 It follows from Decision No 4/94/COL that the purpose of the State Aid Guidelines is to provide national administrations and enterprises with information on how ESA interprets and applies the EEA State aid rules. The State Aid Guidelines correspond to guidelines, communications and notices adopted by the Commission in the EU. The aim of the State Aid Guidelines is thus to ensure a uniform and transparent application of the EEA State aid rules throughout the EEA.

10 By Decision No 275/99/COL of 17 November 1999 (OJ 2000 L 137, p. 28), ESA amended the State Aid Guidelines, introducing a new chapter, Chapter 18B, on State aid elements in sales of land and buildings by public authorities (“Land Sale Guidelines”). The Land Sale Guidelines correspond to the Commission

Communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3).

- 11 In Point 2.1, under the heading “Sale through an unconditional bidding procedure”, the Land Sale Guidelines state, in particular, that:

1. A sale of land ... following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid.

(a) An offer is ‘sufficiently well-publicised’ when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

The intended sale of land and buildings, which in view of their high value of other features may attract investors operating on a Europe-wide or international scale, should be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.

...

- 12 In Point 2.2, under the heading “Sale without an unconditional bidding procedure”, the Land Sale Guidelines state, in particular, as follows:

(a) Independent expert evaluation

If public authorities intend not to use the procedure described under 18B.2.1, an independent valuation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

(b) Margin

If, after a reasonable effort to sell the land and buildings at the market value, it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5 % from that value can be deemed to be in line with market conditions. If, after a further reasonable time, it is clear that the land and buildings cannot be sold at the value set by the valuer less this 5 % margin, a new valuation may be carried out, which is to take account of the experience gained and of the offers received.

(c) Special obligations

Special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them, irrespective of whether or not he runs a business or of the nature of his business. The economic disadvantage of such obligations should be evaluated separately by independent valuers and may be set off against the purchase price. Obligations whose fulfilment would at least partly be in the buyer's own interest should be evaluated with that fact in mind: there may, for example, be an advantage in terms of advertising, sport or arts sponsorship, image, improvement of the buyer's own environment, or recreational facilities for the buyer's own staff.

The economic burden related to obligations incumbent on all landowners under the ordinary law are not to be discounted from the purchase price (these would include, for example, care and maintenance of the land and buildings as part of the ordinary social obligations of property ownership or the payment of taxes and similar charges).

Icelandic law

- 13 Article 1 of Act No 6/2001 on the Registration and Assessment of Real Property (“Act No 6/2001”) reads as follows:

Registers Iceland supervises the management of the registration of real property according to this Act as well as the operation of data and information system, named the Register of Real Property, on a computerised basis.

All real property in the country shall be registered in the Real Property Register. The core of the Real Property Register contains information on land and lots, the coordinates of their borders, structures thereon and rights pertaining thereto. The Register of Real Property is the basis for the Titleholder Register of Real Property, the assessment of real property and the building register of Registers Iceland and shall be so organised as to be a database for land information systems. The history of changes in the registration of a real property shall be kept in the Real Property Register.

- 14 Article 27 of Act No 6/2001, before the entry into force of amendments on 1 January 2009, reads as follows:

The registered valuation of real estate shall be the going price, converted into cash, which it can be assumed that the property would have traded for in the month of November preceding the valuation, based on authorized use and potential use of the property at the given time.

If such going price of comparable properties is not known, the registered value shall be determined on the basis of the best available knowledge of comparable going price taking into account the cost of constructing buildings, their age, position with regard to transportation, exploitation potentials, perquisites [facilities], soil type, vegetation, landscape and other elements which may influence the going price of the property.

...

- 15 Article 27 of Act No 6/2001, as amended by Act No 83/2008 and in force from 1 January 2009, reads as follows:

The registered value of a real property shall be the going price converted to a cash basis, based on the permissible and possible use at each time that the property presumably had in purchases and sales in the month of February before the assessment [sic], and it should enter into effect in the period from 31 December to the end of February. If an assessment enters into effect in the period from 1 March to 20 December, it shall be based on the month of February next before the assessment, cf. Article 32 a.

If the going price of the real property is not known, the registered value shall be determined according to the best available knowledge of the market value of comparable properties with regard to income thereof, the cost of structures, their age, location with regard to communications, possibilities of use, perquisites, soil properties, vegetation, natural beauty and such other factors that may influence the market value of the property.

...

- 16 Article 31 of Act No 6/2001 reads as follows:

A person that can have a substantial interest in the assessed value of a property and is not in agreement with the registered assessment, according to Articles 29 and 30, can request a new decision by Registers Iceland on the assessment. The request for a revised assessment shall be in writing, based on grounds and necessary documents.

...

- 17 Article 8 of Icelandic Regulation No 486/1978 on the registration of real property and real property assessment reads as follows:

1. The assessed value of a real property as a whole shall be the market price converted to a cash basis that is likely to be the going price in purchases and sales. In addition to the base price cf. Article 7 of this Regulation, regard shall mainly be had to the factors listed in paragraphs 2-6 of this Article.

...

3. Account shall be taken of income derived from a real property, its geographic location and relation to other real properties. Account shall also be taken of the location of the real property with respect to communications, business and entrepreneurial conditions and its use with respect to the general provisions of laws on building and zoning, the Road Act and any preservation legislation as well as the decisions of authorities concerned with such matters. No account shall be taken of special provisions on the maximum sale price of real properties.

4. The nature of the location of the real property shall be considered, economic developments in the area as well as the situation of business, communications, prospects for education, health services and any other services rendered by the public or private sectors [sic].

III Facts

Background

- 18 Between 1951 and 2006, United States armed forces (“US military”) were deployed in the area next to Keflavik International Airport under the terms of the 1951 Bilateral Defence Agreement between Iceland and the United States of America. Under the terms of that agreement, Iceland was to acquire land in the area and permit the US military to use it without compensation.
- 19 In September 2006, the US military left Iceland and handed over the area and its constructions, ranging from residential buildings to large warehouses, to the Icelandic State. Subsequently, a specific body, Keflavík Airport Development Corporation (Þróunarfélag Keflavíkur ehf.) (“KADECO”), fully owned by the Icelandic State, was established to develop, administer and to sell/let real estate within the area on behalf of the State.
- 20 On 26 February 2008, Verne agreed to buy five of the buildings. The purchase price was USD 14 500 000, comprising a deposit of USD 25 000, paid on 26 February 2008, and the closing payment paid on 26 March 2008. Transfer of the title was signed on 9 May 2008.
- 21 The five buildings purchased were:
- 1) Building No 868, NATO warehouse/supply building, 11 064 m²
 - 2) Building No 869, “Navy Exchange” warehouse, 16 606 m²
 - 3) Building No 872, warehouse/cold storage, 1 009 m²
 - 4) Building No 866, warehouse, 782 m²

5) Building No 864, electrical power plant, 1 547 m².

- 22 ESA's formal investigation procedure arose in the context of an investment agreement initiated on 23 October 2009 between Verne and the Icelandic authorities concerning the establishment of a data centre in the municipality of Reykjanesbær. On 1 September 2010, the investment agreement was notified to ESA pursuant to Article 1(3) of Part I of Protocol 3 SCA.
- 23 On 3 November 2010, ESA decided to initiate the formal investigation procedure (Decision No 418/10/COL).
- 24 On 23 September 2011, the investment agreement was officially cancelled. By letter of 28 September 2011, the notification was withdrawn. However, ESA continued its investigation of the other agreements between the Icelandic State and Verne.

The contested decision

- 25 On 4 July 2012, ESA adopted the contested decision, where it found, inter alia, that the agreements concerning (i) the sale of real estate to and (ii) municipal tax measures in favour of Verne entailed State aid incompatible with the EEA Agreement.
- 26 As regards the sale of real estate, ESA found, first, that KADECO had not followed an open and unconditional bidding procedure within the meaning of the Land Sale Guidelines or a procedure comparable to a bidding procedure. Therefore, the possibility could not be excluded that Verne had been provided with State aid. ESA stressed that only one building (No 869) was advertised specifically in various newspapers in Iceland. Other than that, regular advertisements were published with reference to KADECO and its homepage, calling for ideas for development in the area.
- 27 ESA noted that one bid was received for building 869, submitted on 23 April 2007 by Atlantic Film Studios ("Atlantic"). It offered a square metre price of ISK 35 000. Given the estimate of the size of building 869 at the time, 13 000 m², this represented a bid price of ISK 455 000 000. In addition, Atlantic offered to pay ISK 15 000 000 for an asphalted area outside building 869. The contested decision states that, according to the explanations given by the Icelandic authorities, this offer was rejected.
- 28 ESA then assessed whether aid could be excluded on the basis of an independent expert evaluation. It concluded that the evaluation conducted on 23 April 2007 by a local real estate agent concerning building 869 could not be regarded as representative of the square metre price. Consequently, the evaluation could not constitute an independent expert evaluation within the meaning of the Land Sale Guidelines in relation to all five buildings sold to Verne. ESA noted that the evaluation only concerned one of the relevant buildings, had taken place 10 months prior to the sale of the real estate to Verne, and finally, it was

questionable whether the evaluation had been based on generally accepted market indicators and evaluation standards.

- 29 Given that neither of the procedures to exclude automatically the existence of State aid was applicable, ESA concluded that the most reliable determination of the market value of the real estate at hand was provided by the annual value assessment of all civil real estate in Iceland. This assessment is carried out by Registers Iceland (Þjóðskrá Íslands), a central independent authority in Iceland.
- 30 The contested decision states that, at the time of the purchase of the five buildings by Verne, Registers Iceland valued the buildings as follows:

1) Building No 868:	ISK 452 050 000
2) Building No 869:	ISK 578 550 000
3) Building No 872:	ISK 52 700 000
4) Building No 866:	ISK 23 650 000
5) Building No 864:	ISK 70 900 000.

According to Registers Iceland, the total value of the five buildings at the time of the purchase was ISK 1 177 850 000.

- 31 According to the contested decision, the purchase price of USD 14 500 000 corresponded to ISK 957 000 000, or a square metre price of ISK 31 000.
- 32 Consequently, ESA held that State aid had been granted by the Icelandic State when the real estate purchase agreement was entered into, as the purchase price was below the market value of the buildings as determined by Registers Iceland. ESA held the aid amount granted as ISK 220 850 000, reflecting the difference between the market value and the purchase price.
- 33 ESA dismissed the possibility that the aid could be considered lawful pursuant to Article 61(3)(c) EEA and the Regional Aid Guidelines. According to ESA, the aid granted was not connected to a specific investment project. Furthermore, the aid had not been awarded on condition that the investment project was maintained for a minimum of five years after it had been completed, as required under the Regional Aid Guidelines.
- 34 The operative part of the contested decision reads, in extract, as follows:

Article 5

The preferential price of buildings granted by Iceland to Verne Real Estate ehf. amounting to ISK 220 850 000 constitutes state aid which is incompatible with the state aid rules of the EEA Agreement.

Article 6

The Icelandic authorities shall recover the aid referred to in Articles 4 and 5 from Verne Holdings ehf. and Verne Real Estate ehf. and unlawfully made available to the companies.

Article 7

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The sums to be recovered shall bear interest from the date on which they were put at disposal of Verne Holdings ehf. and Verne Real Estate ehf. until their actual recovery according to Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL. The interests shall be calculated on a compound basis.

...

IV Procedure and forms of order sought

35 By application registered at the Court on 7 September 2012, the applicant lodged the present action. ESA submitted a statement of defence, which was registered at the Court on 23 November 2012. The reply from Iceland was registered at the Court on 16 January 2013. The rejoinder from ESA was registered at the Court on 18 February 2013.

36 The applicant requests the Court to declare that:

(1) Article 5 of the EFTA Surveillance Authority Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. is annulled;

(2) Article 6 of the EFTA Surveillance Authority Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. is void as concerns the reference to Article 5; and

(3) the EFTA Surveillance Authority is ordered to pay the full legal costs.

37 ESA claims that the Court should:

- (i) dismiss the application;*
- (ii) order the applicant to bear the costs.*

38 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Commission and the Danish Government submitted written observations, registered on 21 and 23 January 2013, respectively.

- 39 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

V Law

- 40 The applicant submits that the contested decision must be partially annulled. First, ESA has failed to demonstrate that the real property was sold below market value and that the sale resulted in an economic advantage for Verne. In Iceland's view, ESA did not analyse the bidding procedure held by KADECO correctly and erred in its assessment of market value.
- 41 Second, the applicant argues that ESA failed properly to investigate the case and state reasons for its decision. It argues that ESA should have made inquiries about the bidding procedure used by KADECO with a view to assessing its compliance with the Land Sale Guidelines. Furthermore, Iceland asserts that the defendant did not state its reasons for concluding that the procedure adopted by KADECO did not qualify as a bidding procedure within the meaning of Article 61(1) EEA.

First part of the first plea: Failure to demonstrate an economic advantage by not adequately analysing the bidding procedure held by KADECO

Arguments of the parties and the other participants in the proceedings

- 42 The applicant, supported by the Danish Government, submits that ESA erred in its analysis of the bidding procedure by KADECO. A well-publicised, open, transparent and unconditional bidding procedure, or a procedure comparable to that, was carried out by KADECO. As a consequence, State aid can be excluded in the present case.
- 43 First, the applicant submits that KADECO's offer was widely and repeatedly advertised in various national newspapers and on its website. This was done over a long period of time, with the first advertisement appearing on 17 and 18 March 2007.
- 44 Initially, every property was advertised specifically. From June 2007, the advertisements included a general call for interest in purchasing property in the area in question. Potential buyers were directed to the KADECO website, where detailed information in Icelandic and English was listed for each property. According to the applicant, online advertising is the best way to reach out to as many potential bidders as possible, in particular when the website is published in English as well as in Icelandic.
- 45 According to the Danish Government, the fact that complete information on all five buildings was not given in the newspaper advertisements does not mean that the criterion of well-publicised is not met. The purpose of advertising the buildings is to make it known that the buildings are for sale. Once this is known

to the potential bidders, a reference to further details available on the internet must suffice, as advertisements on the internet would in themselves meet the criteria.

- 46 The applicant submits that where properties are sold *en masse*, as in the present case (with a total of 210 buildings), it is self-evident that the advertising of each individual property in a newspaper is administratively unmanageable. A general call for interest in the press, and a reference to more detailed information on a website, is not only administratively more manageable but has the potential to reach a far greater audience.
- 47 Second, the applicant and the Danish Government assert that the bidding procedure must be regarded as unconditional, as no restrictions were imposed on bids or on bidders.
- 48 Finally, Atlantic's bid was withdrawn, not rejected. Thus Verne's bid was the only bid. In any event, Iceland submits, Verne's bid was higher than Atlantic's bid, as ESA erred in its calculation of the purchase price and comparison of Verne's and Atlantic's bids, including the assessment of the size of the buildings. Consequently, all the conditions specified in point 2.1 of the Land Sale Guidelines are fulfilled, and State aid is therefore excluded.
- 49 The defendant, supported by the Commission, submits that the market economy investor principle and, consequently, the Land Sale Guidelines were not complied with when KADECO sold the five buildings to Verne. It asserts that a private investor in similar circumstances would not have accepted the price paid by Verne for the buildings and would most likely also have used different methods when publicising the buildings for sale.
- 50 First, ESA maintains that no procedure substantially comparable to a bidding procedure was organised. The real estate was not sufficiently well-publicised. KADECO published some advertisements in national newspapers. However, only building 869 was advertised specifically. Other than that, the advertisements contained only a general text stating that KADECO sought new ideas on the use of the buildings as well as bids in relation to them. The advertisements further stated that more information on the properties was published on KADECO's website. In ESA's view, the call for expressions of interest published is too general in nature to constitute a sufficiently precise offer.
- 51 At the oral hearing, the Commission argued that publication on the internet may fulfil the criterion of well-publicised, in so far as advertisements are placed in internet publications equivalent to paper publications which would have fulfilled the criterion. Conversely, placing advertisements on its own special-purpose website, as KADECO did, cannot fulfil the criterion.
- 52 Second, according to ESA, the procedure was not open and unconditional. The advertisements for specific properties imply that KADECO could refuse an offer if the proposed use was not suitable.

- 53 Finally, on the question whether the best, or only, bid was accepted, ESA submits that all the information provided by the Icelandic authorities during the investigation established that the bid from Atlantic had been rejected. It asserts that the calculation of the purchase price paid by Verne, and the comparison with Atlantic's bid, is correct.

Findings of the Court

- 54 The concept of State aid in Article 61(1) EEA includes not only positive benefits, such as subsidies, loans or direct investment in the capital of undertakings, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see Case E-12/11 *Asker Brygge v ESA* [2012] EFTA Ct. Rep. 536, paragraph 55, and the case law cited).
- 55 A sale of land or buildings by public authorities to an undertaking involved in an economic activity may include elements of unlawful State aid, in particular where it is not made at market value. In order to determine whether a sale is made at market value, ESA must apply the private investor test, to ascertain whether the price paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires ESA to make a complex economic assessment (see *Asker Brygge v ESA*, cited above, paragraph 79, and the case law cited).
- 56 Where ESA adopts a measure involving a complex economic assessment, it enjoys a wide discretion. In that connection, ESA may find it appropriate to clarify beforehand how it will exercise its discretion. This may take the form of measures such as general guidelines. ESA has adopted such general guidelines within the context of sale of land or buildings by public authorities (the Land Sale Guidelines).
- 57 By adopting guidelines, ESA must observe the requirements it has laid down in those guidelines, provided the guidelines do not depart from the rules in the EEA Agreement (see, for comparison, Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraph 62, and, concerning guidelines on the assessment whether aid is compatible with the EEA Agreement within the meaning of Article 61(3) EEA, Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord and Others* [2005] EFTA Ct. Rep. 117, paragraph 107).
- 58 Although such guidelines certainly help to ensure that ESA acts in a manner which is transparent, foreseeable and consistent with legal certainty, they cannot bind the Court. However, they may form a useful point of reference (compare, to that effect, Cases C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 52, and C-387/97 *Commission v Greece* [2000] ECR I-5047, paragraphs 87 and 89).

- 59 The parties concerned are therefore entitled to rely on those guidelines. The Court will ascertain whether ESA complied with the rules it has itself laid down when it adopted the contested decision.
- 60 The Land Sale Guidelines describe a simple procedure that allows EFTA States to handle sales of land and buildings in a way that automatically precludes the existence of State aid.
- 61 To this end, point 2.1 of the Land Sale Guidelines states that a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value. Consequently, no State aid is involved.
- 62 Moreover, under point 2.2 of the Land Sale Guidelines, if public authorities intend not to use the procedure described under point 2.1, State aid can be excluded only by an independent evaluation carried out by one or more independent asset valuers prior to the sale negotiations. In this way, the market value based on generally accepted market indicators and valuation standards will be established.
- 63 As regards the scope of judicial review, it must be recalled that State aid is a legal concept and must be interpreted on the basis of objective factors. As a consequence, the Court must, in principle, having regard both to the specific features of the case before it and to the technical or complex nature of ESA's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 61(1) EEA (see, to that effect, Case E-6/98 *Norway v ESA* [1999] EFTA Ct. Rep. 74, paragraph 42, and, for comparison, Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraph 111, and the case law cited).
- 64 However, judicial review of a measure involving a complex economic assessment, such as whether a sale of land or buildings by public authorities is made at market value, must be limited to verifying whether ESA complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (*Asker Brygge v ESA*, cited above, paragraph 80, and Joined Cases E-10/11 and E-11/11 *Hurtigruten and Norway v ESA* [2012] EFTA Ct. Rep. 758, paragraph 156).
- 65 The Land Sale Guidelines describe two methods which automatically exclude the existence of State aid. These are an unconditional bidding procedure or an ex ante evaluation by an independent expert. In these cases, a sale is by definition at market value. ESA's assessment of whether one of these methods has been applied does not in itself involve a complex economic appraisal. Consequently, the Court's jurisdiction to review ESA's assessment in this regard is not limited. Indeed, it is only if ESA finds that the methods in the Land Sale Guidelines have

not been applied that it has to undertake the complex economic assessment of ascertaining whether a sale has been made at market value.

- 66 In the contested decision, ESA was unable to conclude that a sufficiently well-publicised, open and unconditional bidding procedure, or a procedure comparable to that, was followed by KADECO for the sale in question. ESA emphasised that only one building (No 869) was advertised specifically in various newspapers in Iceland. Other than that, regular advertisements were published calling for ideas for development in the area. In these advertisements reference was made to KADECO's website on the internet, where all buildings were specifically listed.
- 67 Pursuant to subparagraph (a) of point 2.1 of the Land Sale Guidelines, an offer is regarded as sufficiently well-publicised when it is repeatedly advertised over two months or more in the national press, estate gazettes or other appropriate publications and through real estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.
- 68 The criterion of an offer being well-publicised must be interpreted such that where two or more properties are offered on sale together, but not necessarily only as one single unit, specific advertisements must be made for the individual properties. A general call for interest cannot suffice, as such a method cannot reasonably be expected to reach all potential buyers of specific properties.
- 69 As regards the publication format, the wording of the Land Sale Guidelines does not in principle exclude adequate publication on the internet. However, advertisements must be placed in a publication, be it printed or digital, which is appropriate for reaching all potential buyers. The seller's own website can only exceptionally be regarded as such a publication.
- 70 In the present case, four of the five buildings in question were specifically advertised solely on KADECO's website. There is nothing to suggest that this website was appropriate for reaching all potential buyers. It must therefore be held that ESA did not err in finding itself unable to conclude that a sufficiently well-publicised bidding procedure, or a procedure comparable to that, was followed.
- 71 As the conditions in point 2.1 of the Land Sale Guidelines are cumulative, there is no need for the Court to assess the applicant's arguments on whether the bidding procedure was unconditional, and whether the best bid was accepted.
- 72 The first part of the first plea must therefore be rejected.

Second part of the first plea: Failure to demonstrate an economic advantage by erring in the assessment of market value as the basis for a finding of State aid

Arguments of the parties and the other participants in the proceedings

- 73 The applicant submits that the defendant incorrectly applied Article 61(1) EEA and the Land Sale Guidelines when it determined the market value of the five buildings in question by relying on the valuations issued by Registers Iceland.
- 74 The applicant asserts that in the case at hand the defendant merely referred to the valuations of Registers Iceland, and did not carry out a complex economic assessment. Consequently, it cannot be said to have enjoyed a wide discretion. Therefore, the Court may review whether the methodology in question can be relied upon for the purposes of determining the presence of State aid. The Court must assess whether the method of valuation adopted by Registers Iceland is appropriate for determining the market value of the relevant buildings.
- 75 The applicant submits that the valuation of properties for the purposes of Act No 6/2001 is to determine the likely value of a property for tax purposes. The private investor test cannot rely solely on that valuation. The fact that valuations by Registers Iceland were not challenged and appealed by KADECO or Verne does not prove that the valuations correspond to the correct market value.
- 76 Second, the assessment of whether State aid has been granted must take into consideration the situation at the time when the measure actually was implemented. In this case, that is February 2008, when the real estate purchase agreement was concluded. However, in the contested decision, reference is made to an amended version of Act No 6/2001, which had not entered into force at the time of the conclusion of the agreement.
- 77 Moreover, Registers Iceland applied the cost method in its valuation of the five buildings. This method is based on the costs of replacing a building as new. The other method available to Registers Iceland is the sales value method, based on the recorded sales values in the preceding year. It appears from the contested decision that the defendant based its conclusion on the assumption that the valuation by Registers Iceland of the five buildings was based on previous sales contracts. Iceland asserts, therefore, that the defendant's conclusion in the contested decision is based on a wholly incorrect assumption.
- 78 There is nevertheless an uncertainty attached to the valuation of the buildings in question. The increase in unemployment and in the number of sale properties at the time when the buildings in question were put on the market made it difficult for Registers Iceland to properly estimate the value of the relevant buildings. This is further underlined by the fact that the properties were former military buildings, and had never been registered or put on the market before.
- 79 The applicant claims that the defendant failed in particular to take account of the cost of converting the electric power network in the buildings from American to European standards. Other alterations were necessary, too.
- 80 Finally, the applicant contends that ESA should have considered the economic advantage in selling a group of properties and not simply a single property. This would reflect the approach likely to be taken by a private investor.

- 81 ESA, supported by the Commission, rejects Iceland's arguments and maintains that Verne received an economic advantage. The properties at issue were sold to Verne at a price below market value, as demonstrated in the contested decision
- 82 The valuations by Registers Iceland are based on law and are commonly accepted and used in Iceland as the benchmark when the market price of a property must be established.
- 83 ESA submits that it examined thoroughly all the documents put forward by the Icelandic Government during the investigation. The most appropriate method to ascertain the market price was to use the valuations made by Registers Iceland. ESA concedes that in the case of other countries the valuation issued for tax purposes may not necessarily represent market value. However, Iceland has a special system established by law to evaluate the market price of properties. Pursuant to Article 27 of Act No 6/2001, Registers Iceland is obliged to evaluate the market price of properties in Iceland. The valuations are not only issued for tax purposes. The tax authorities do not have any part in the valuation. Moreover, according to ESA, the explicit statement by the Icelandic authorities in an email that the valuation "is generally understood to reflect the market rate" further strengthens the conclusion.
- 84 ESA asserts that its reliance on the amended version of Article 27 of Act No 6/2001 is of no significance, since the amendments were not to the parts of the provision of relevance in the case at hand.
- 85 According to ESA, the fact that Registers Iceland had to use the cost method instead of the sales value method when assessing the five buildings is of no significance as both methods serve the same purpose, i.e. to establish the market price.
- 86 ESA fails to see how any renovation and alteration costs for the five buildings at issue could be regarded as resulting from "special obligations" within the meaning of point 2.2(c) of the Land Sale Guidelines.
- 87 As regards the argument that it should have considered the economic advantage entailed in the bid encompassing a bundle of properties, ESA observes that it follows from the letter of intent that Verne offered USD 15 000 000 for the largest three of the five buildings eventually sold. In its view, this demonstrates that the two smaller buildings were considered to be of little value. Moreover, in total, the five buildings together constitute only some 15% of the commercial real estate in the area.
- 88 The Commission contends that ESA's reliance on the valuations produced by Registers Iceland does not imply that it failed to examine the contested sale in accordance with the market economy investor test. At the time of the contested decision, the valuations by Registers Iceland were the most reliable information available to ESA for determining the market value of the properties in question.

In the view of the Commission, ESA did not commit a manifest error of assessment in relying on those valuations.

Findings of the Court

- 89 In the contested decision, ESA found that neither an unconditional bidding procedure nor an ex ante evaluation by an independent expert had been undertaken. ESA therefore had to assess if the sale was made at market value. ESA concluded that the most reliable determination of the market value of the properties in this case was provided by the annual value assessment of all civil real estate in Iceland carried out by Registers Iceland. The Court's review of ESA's assessment in this regard is limited as stated in paragraph 64 above.
- 90 Iceland has a system established by law to evaluate the market price of properties. Pursuant to Article 1 of Act No 6/2001, all real property in the country shall be registered in the Real Property Register, operated by Registers Iceland. According to Article 27 of Act No 6/2001, Registers Iceland is obliged to evaluate and register the market price of properties in Iceland.
- 91 The applicant argues, first, that the purpose of the valuation carried out by Registers Iceland is to determine the likely value of a property for tax purposes, and that the private investor test cannot rely solely on that valuation.
- 92 It is true that valuation in the context of a tax audit does not necessarily show the market value of land (see, for comparison, Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 97). However, in an email of 13 May 2012, the Icelandic authorities themselves confirmed that, as a matter of Icelandic practice, the valuation for taxation purposes is generally understood to reflect the market rate.
- 93 Second, the applicant argues that, in the contested decision, reference is made to an amended version of Act No 6/2001, which had not entered into force at the time of the conclusion of the agreement.
- 94 The question whether a measure constitutes aid within the meaning of Article 61(1) EEA must be resolved having regard to the situation existing at the time when the measure was implemented. As regards a sale by public authorities of land or buildings to an undertaking involved in an economic activity, the relevant time for assessing the existence of State aid must, in principle, be the time when the sale was carried out (see *Asker Brygge v ESA*, cited above, paragraphs 62 and 63, and the case law cited).
- 95 As to whether ESA committed a manifest error of assessment by relying on the valuations by Registers Iceland of the properties in question, the Court notes that, in order to establish that ESA committed a manifest error in assessing the market value of the buildings in question, the evidence adduced by the applicant must be sufficient to make the factual assessments used in the decision implausible (see,

to that effect, *Hurtigruten and Norway v ESA*, cited above, paragraph 156, and the case law cited).

- 96 The fact that, in its description of national law in the contested decision, ESA referred to a version of Article 27 of Act No 6/2001 which was not in force at the time of the sale does not in itself make ESA's assessment implausible. The amendments only concerned the reference month of the valuation, which was changed from November to February, and a possibility, when the going price is unknown, to take account of the potential revenue of similar properties.
- 97 The applicant's third argument is that, in the contested decision, ESA incorrectly assumed that Registers Iceland conducted the valuation of the five buildings on the basis of previous sales contracts. Instead, Registers Iceland applied the cost method, that is to say the costs of replacing a building as new.
- 98 However, there is nothing to suggest that ESA assumed Registers Iceland's valuations of the buildings in question to be based on previous sales contracts. In the contested decision, both valuation methods of Registers Iceland are mentioned when the valuation procedure is described in a general manner in paragraphs 137 to 142. Nothing is said or indicated as to which method was used by Registers Iceland when assessing the value of the five buildings in question.
- 99 Finally, the applicant claims that ESA should have collected further information on the cost of altering the buildings, and that ESA should have considered the economic advantage in selling a group of properties and not simply a single property.
- 100 This argument must also be rejected. To the extent that the applicant relies, in support of its application, on information which was not available at the time when the contested decision was adopted or was not brought to ESA's attention during the procedure under Part II of Protocol 3 SCA, it must be recalled that in an action for annulment based on Article 36 SCA the lawfulness of the measure concerned must be assessed in the light of the matters of fact and of law existing at the time when that measure was adopted (see, for comparison, Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7, and Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1998] ECR II-2405, paragraph 81).
- 101 An EEA/EFTA State therefore cannot rely before the Court on matters of fact which were not put forward in the course of the pre-litigation procedure laid down in Part II of Protocol 3 SCA (see, to that effect, Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 31, and Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraphs 49 and 76).
- 102 During the formal investigation procedure, the Icelandic authorities did not provide any information to suggest that the valuation by Registers Iceland of the five buildings in question was not appropriate. Moreover, the valuation of the

buildings could have been challenged pursuant to Article 31 of Act No 6/2001. Such a challenge did not take place.

103 Thus, ESA did not make a manifest error of assessment when it determined the market value of the five buildings in question by relying on the valuations issued by Registers Iceland.

104 Consequently, also the second part of the first plea must be rejected.

The first part of the second plea: Failure to duly investigate the case

Arguments of the parties and the other participants in the proceedings

105 The applicant submits that ESA did not carry out a diligent and impartial examination of the case. It neglected to investigate whether KADECO carried out an open and unconditional bidding procedure or a procedure comparable thereto. In its view, the defendant committed manifest errors in its assessment whether State aid was involved and those manifest errors demonstrate that ESA did not carry out a diligent and impartial investigation, as required by the principle of sound administration.

106 Iceland notes that the possible presence of State aid in relation to the sale of real estate to Verne was first mentioned by ESA on 3 November 2010 in the decision to open the formal investigation procedure. That procedure resulted from the notification of the 2009 investment agreement. The decision mentioned briefly that ESA lacked evidence to assess whether the real estate purchase agreement complied with the market investor principle.

107 On 28 February and 21 June 2011, the applicant submitted information to ESA on the sale of the buildings. It asserts that the defendant never raised questions or asked for additional material during its investigations. The applicant contends that it repeatedly asked for the opportunity to submit further comments during the formal investigation procedure, but that it was not invited to do so before the contested decision was adopted.

108 Although it follows from the duty of loyal co-operation that it is for the national authorities to provide all relevant information to ESA during a State aid investigation, the principle of sound administration entails that the situation must shift when of its own accord ESA gathers information and starts looking into new avenues in a case. Consequently, according to Iceland, when ESA sought to base its findings on information or evidence other than that provided by the applicant, such as the valuations of Registers Iceland, ESA should have afforded the Icelandic authorities the opportunity to submit comments.

109 The applicant also argues that ESA was required to continue its investigation by requesting further information by formal or informal means, or by issuing a formal order in accordance with Article 10(3) of Part II of Protocol 3 SCA, requesting all necessary information.

- 110 ESA, supported by the Commission, rejects the applicant's assertions. According to ESA, the applicant's pleadings include nothing to substantiate the allegation that the investigation was not impartial. This plea is therefore not sufficiently clear and precise to enable ESA to prepare a defence and for the Court to give a ruling. Accordingly, this plea must be dismissed as inadmissible.
- 111 ESA rejects the argument that the investigation was not diligent. The decision to open the formal investigation procedure repeatedly addressed whether the real estate purchase agreement complied with the requirements of the market economy investor test.
- 112 The Icelandic authorities were also expressly invited to provide the necessary information to assess whether the real estate purchase agreement entailed State aid or not. Indeed, as the applicant itself submits, in its response to the opening decision, it provided ESA in a letter of 28 February 2011 with detailed information on KADECO's sale of five buildings to Verne. In a letter of 21 June 2011, the applicant provided ESA with an overview of KADECO's sales procedure. Finally, in an email of 13 May 2012, the Icelandic authorities stated that they could not see what other information needed to be provided.
- 113 According to ESA, it is only if the EEA State concerned does not comply with an information request, or if it provides incomplete information, that ESA may proceed to issue an information injunction. In the present case, the applicant replied and ESA had no reason to consider the information incomplete or incorrect.
- 114 In the Commission's view, the applicant knew that it was uncertain whether the contested sale complied with the market economy investor test and, in addition, should have been aware of the two methods to exclude the presence of State aid set out in the Land Sale Guidelines. Thus, if the applicant was intending to rely on the bidding procedure method, it was clearly its responsibility to provide ESA with sufficient information to support such a claim during the formal investigation. Moreover, in an email of 13 May 2012, the applicant itself declared that it did not see what other information needed to be provided with a view to determining the market value for the properties. According to the Commission, therefore, ESA was entitled to consider the information made available to it complete and was under no obligation to adopt any information injunction.

Findings of the Court

- 115 The applicant's argument that ESA's investigation was not impartial must be rejected outright. It is based on an assertion that ESA committed manifest errors in its assessment as to the existence of State aid. However, the Court has already found that ESA did not commit any errors in this assessment which must lead to annulment.

- 116 Iceland argues that ESA's investigation was not diligent, because it should have requested further information. ESA should have afforded the Icelandic authorities the opportunity to submit comments were it to base its findings on information or evidence other than that provided by the applicant.
- 117 In the interest of sound administration of the fundamental rules of the EEA Agreement relating to State aid, ESA is required to conduct a diligent and impartial examination of the contested measures. When adopting its final decision, ESA will then have complete and reliable information for its purpose (see, for comparison, *Commission v Scott*, cited above, paragraph 90).
- 118 Moreover, as regards the sale of land and buildings by public authorities, ESA must examine all the relevant features of the transaction at issue and its context, particularly in applying the market investor test (see *Asker Brygge v ESA*, cited above, paragraph 90, and the case law cited).
- 119 In cases concerning an examination of alleged unlawful aid, pursuant to the second paragraph of Article 10(1) of Part II of Protocol 3 SCA, ESA shall, if necessary, request information from the EEA State concerned. Furthermore, under Article 2(2) of Part II of Protocol 3 SCA, the EEA State concerned shall provide all information necessary to enable ESA to take a decision. According to Article 5(1) and (2) of Part II of Protocol 3 SCA, ESA shall request additional information if it considers that the information provided by the EEA State is incomplete. Only if the EEA State does not comply with a reminder shall ESA issue an information injunction under Article 10(3) of Part II of Protocol 3 SCA (see, *Asker Brygge v ESA*, paragraphs 86 to 89, and *Hurtigruten and Norway v ESA*, paragraphs 268 to 271, both cited above).
- 120 In the present case, the decision to open the formal investigation procedure clearly showed that, in ESA's view, the Icelandic authorities had not submitted sufficient evidence to assess whether the real estate purchase agreement complied with the requirements of the market investor principle. The decision also mentioned, albeit in the context of a municipal property tax, the valuations made by Registers Iceland, and their legal basis. Furthermore, the opening decision invited the Icelandic authorities to provide ESA with all necessary information. In letters of 28 February and 21 June 2011, the Icelandic authorities provided ESA with general and detailed information on the procedure used for the sale of the five buildings. In an email of 13 May 2012, the Icelandic authorities stated that they could not see what other information needed to be provided.
- 121 Consequently, the Icelandic authorities were aware that ESA needed more information to consider whether the real estate purchase agreement entailed State aid. They must also have been aware of the two possibilities in the Land Sale Guidelines to automatically exclude the existence of State aid, and of the fact that if, in ESA's view, the requirements in this respect were not fulfilled, ESA would have to assess the market value of the five buildings. Also, the Icelandic authorities knew that ESA was aware of Registers Iceland's assessment of the market value of the five buildings.

122 In these circumstances, ESA was entitled to consider the information made available to it complete and correct. It cannot be complained that ESA failed to take into account matters of fact or of law which were not submitted to it during the administrative procedure. ESA is under no obligation to consider of its own motion and on the basis of prediction what information might have been submitted to it (see, for comparison, Case T-489/11 *Rousse Industry v Commission*, judgment of 20 March 2013, not yet reported, paragraph 33, and the case law cited). Accordingly, ESA was in a position to make a definitive assessment as to the existence of State aid on the basis of the information available to it. There was therefore no need to require Iceland in an information injunction to clarify further the factual information before adopting the contested decision (see *Asker Brygge v ESA*, cited above, paragraph 93, and the case law cited). The first part of the second plea must therefore be rejected.

The second part of the second plea: Failure to state reasons

Arguments of the parties and the other participants in the proceedings

123 In the applicant's view, ESA failed to state any reason for concluding that the sales procedure adopted by KADECO did not qualify as a bidding procedure within the meaning of the Land Sale Guidelines.

124 ESA's examination of the sales procedure merely contains references to the annual report and the performance audit report issued by the Icelandic National Audit Office and KADECO's sale advertisements. However, ESA does not attempt to analyse or draw any conclusions on the basis of its references or available evidence to substantiate its reasoning why the sales procedure adopted by KADECO does not qualify as a proper bidding procedure within the meaning of the Land Sale Guidelines.

125 According to the applicant, the reasoning in paragraphs 98, 99 and 119 of the contested decision regarding the effect on trade and distortion of competition is deficient. A general reasoning based on the reaffirmation of principles laid down in settled case law cannot by itself be considered to satisfy the requirement to state reasons. ESA must consider whether the aid is capable of strengthening the position of an undertaking, compared to other undertakings competing in EEA trade.

126 ESA disagrees, and observes that paragraph 114 of the contested decision states that there was no "sufficiently well-published, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid". Paragraphs 115 to 122 of the contested decision then demonstrate that no other comparable procedure applied. In particular, paragraphs 119 to 121 demonstrate that only very few buildings were advertised specifically. Moreover, paragraph 121 shows that the bid by Atlantic, which was rejected, entailed a square metre price clearly higher than that paid by Verne.

- 127 As regards the reasoning concerning effect on trade and distortion of competition, ESA submits, first, that neither paragraphs 98 and 99 nor paragraph 119 of the contested decision concern that issue. The effect on trade and distortion of competition are addressed in paragraph 109, pointing to the fact that Verne intends to operate a global wholesale data centre where the service will be available to customers across the EEA. In ESA's view, paragraph 109 must also be read in light of the fuller reasoning in paragraphs 102 and 103.
- 128 The Commission supports ESA's arguments. In essence, the Commission considers that, although the decision is reasoned in a concise manner, it enables the interested parties and the Court to understand the reasons underlying ESA's decision, and thus for the Court to review its legality.

Findings of the Court

- 129 The statement of reasons required by Article 16 SCA must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA. The duty has two purposes: to allow interested parties to know the justification for the measure so as to enable them to protect their rights and to enable the Court to exercise its power to review the legality of the decision (see, for example, *Hurtigruten and Norway v ESA*, cited above, paragraph 252, and the case law cited).
- 130 The statement of reasons must be adapted to the circumstances of each case. In particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations, must be emphasised. It is not a requirement for the reasoning to go into all the relevant facts and points of law. Whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, for example, *Hurtigruten and Norway v ESA*, cited above, paragraph 254, and the case law cited).
- 131 The applicant argues that ESA failed to sufficiently state reasons with regard to its examination of the sales procedure, and the effect on trade and distortion of competition.
- 132 First, ESA's examination of the sales procedure has been contested also on a substantive level by the applicant. It is clear from the Court's assessment of the first part of the first plea that even though the contested decision is drafted in a brief manner in this regard, it has permitted the applicant to safeguard its rights and enabled the Court to exercise its power of review.
- 133 Second, the reasoning concerning effect on trade and distortion of competition has not been contested in substance by the applicant. There is therefore a need to assess whether that reasoning satisfies the requirements of Article 16 SCA.

- 134 In this regard, the very circumstances in which aid is granted may be sufficient to show that the aid is capable of affecting trade between Contracting Parties and of distorting or threatening to distort competition. In such situations, ESA must nevertheless set out those circumstances in the statement of reasons (see, for comparison, Case T-171/02 *Regione autonoma della Sardegna v Commission* [2005] ECR II-2123, paragraph 74).
- 135 In paragraph 109 of the contested decision, ESA points to the fact that Verne intends to operate a global wholesale data centre where the service will be available to customers within the EEA and the world market. This must also be read in light of the general statement on effect on trade and distortion of competition in paragraph 102, concerning the agreement on Licensing and Charges.
- 136 It was thus not impossible for the applicant to identify the facts set out by ESA in the contested decision on the effects or possible effects on trade between Contracting Parties and on competition. The reasoning must therefore be considered adequate for the purposes of Article 16 SCA.
- 137 In the light of the foregoing, also the second part of the second plea must be rejected. Consequently, the application must be dismissed in its entirety.

VI Costs

- 138 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. ESA has asked for the applicant to be ordered to pay the costs. Since Iceland has been unsuccessful in its application, it must be ordered to pay the costs. The costs incurred by the Danish Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Dismisses the application.**
- 2. Orders the applicant to pay the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 22 July 2013.

Magnus Schmauch
Acting Registrar

Carl Baudenbacher
President