



FUNDARGERÐ 482. FUNDAR STJÓRNAR SORPU

Stjórnarfundur SORPU bs., kt. 510588-1189, föstudaginn 16. júní 2023. Fundurinn er settur klukkan 07:30. Fundurinn er staðfundur að Tjarnargötu 12, 101 Reykjavík, og fjarfundur.

Fundarstjóri: Valdimar Víðisson, formaður stjórnar.

Fundarritari: Gunnar Dofri Ólafsson.

Mætt: Aldís Stefánsdóttir, Árelía Eydís Guðmundsdóttir, Svana Helen Björnsdóttir, og Valdimar Víðisson.

Sækja fund með fjarfundarbúnaði: Guðfinnur Sigurvinsson, og Orri Hlökkversson.

Jón Viggó Gunnarsson framkvæmdastjóri, Sigríður Katrín Kristbjörnsdóttir fjármálastjóri og Gunnar Dofri Ólafsson, samskipta- og viðskiptaþróunarstjóri sækja staðfund.

Til fundarins hafði verið boðað með lögformlegum hætti í samræmi við starfsreglur stjórnar og er því fundurinn ákvörðunar- og ályktunarbær.

Tekið fyrir

1. Útboð á flutningi og brennslu á brennanlegum úrgangi

Ari Karlsson lögmaður tekur sæti á fundinum við upphaf fundar og gerir grein fyrir minnisblaði um útboð á flutningi og brennslu á brennanlegum úrgangi.

Umræður í kjölfarið.

Stjórn bókar eftirfarandi í trúnaðarbók: „Stjórn SORPU samþykkir, með fyrirvara um að Stena Recycling AB standist allar kröfur um fjárhagslegt hæfi og önnur skilyrði útboðsgagna að samþykkt verði að ganga að tilboði Stena Recycling AB að gættu því að það standist fjárhagslegt hæfi og önnur skilyrði útboðsins.

Að þeim fyrirvörum afléttum veitir stjórn SORPU framkvæmdastjóra umboð til samningagerðar á grundvelli niðurstöðu útboðs. Málinu er vísað til fundar eigenda til upplýsinga.“

Ari vikur af fundi klukkan 08:02

2. Staða og horfur á urðun í Álfsnesi

Framkvæmdastjóri gerir grein fyrir stöðu og horfum á urðun í Álfsnesi. Aldís Stefánsdóttir vekur athygli á þeim sjónrænu áhrifum sem urðunarstaðurinn hefur í Mosfellsbæ og Grafarvogi og kallar eftir að tryggt verði að sýnileiki þess úrgangs sem er urðaður í Álfsnesi verði lágmarkaður. Lagt hefur verið til að ný urðunarrein verði gerð á norðanverðu Álfsnesi til að lágmarka sjónræn áhrif. SORPA vinnur nú að skógrækt og öðrum aðgerðum til að draga úr sjónrænum áhrifum.



3. Staðan á samræmingu og sérsöfnun á höfuðborgarsvæðinu

Ísól Fanney Ómarsdóttir, verkefnastjóri hjá SORPU, tekur sæti á fundinum klukkan 08:13. Ísól gerir grein fyrir stöðu fjögurra flokka tunnuverkefnisins. Verkefnið gangi vel, álag á þjónustuver sveitarfélaganna sé farið að róast og hafa fulltrúar sveitarfélaganna orð á hversu vel breytingunum hafi verið tekið.

Dreifingu á tunnum er lokið í Kjós. Búið er að dreifa í yfir 50% heimila í Garðabæ, Hafnarfirði, Kópavogi og Mosfellsbæ. Dreifing á Seltjarnarnesi tafðist en verður lokið í byrjun júlí. Gert er ráð fyrir að dreifingu ljúki í ofangreindum sveitarfélögum í júlí.

Í Reykjavík er búið að dreifa tunnum til heimila austast í borginni – Kjalarnesi, Grafarvogi, Grafarholti og Úlfarsárdal – í samræmi við áætlanir. Dreifing í Árbæ og Breiðholti hefst í júní. Gert er ráð fyrir að dreifingu ljúki í borginni allri í lok september.

Dreifing á tunnum á Suðurnesjum gengur vel og búið að dreifa í Grindavík, Garði og Sandgerði. Dreifing í Reykjanesbæ sé um það bil hálfnuð.

Ísól vikur af fundi klukkan 08:21.

4. Frumniðurstöður ESA um undanþágur á greiðslu tekjuskatts byggðarsamlaga

Peter Dalmay tekur sæti á fundinum klukkan 08:25.

Peter gerir grein fyrir minnisblaði um frumniðurstöður ESA um undanþágur á greiðslu tekjuskatts byggðasamlaga. Af frummatinu má ráða að ESA telji undanþágu á tekjuskattsskyldu byggðarsamlaga sem stunda atvinnurekstur fela í sér ólögmæta ríkisaðstoð af hendi ríkisins til byggðasamlaga. Frumniðurstaðan er þýðingarmikil í yfirstandandi stefnumótun SORPU.

Guðfinnur og Peter vikja af fundi klukkan 08:48

Næsti fundur

Næsti fundur er boðaður þriðjudaginn 27. júní 2023 klukkan 08:00.

Fleira var ekki gert og fundi slitið klukkan 08:55.

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Brussels, 16 May 2023
Case No: 81738
Document No: 1112666

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Icelandic Ministry of Finance and Economic Affairs
Lindargata 7
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Subject: Sorpa

- *Letter pursuant to Article 17(2) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice*

1 Procedure

- (1) By email dated 19 February 2018,¹ the EFTA Surveillance Authority (“ESA”) received a complaint concerning an income tax exception enjoyed by the municipal cooperative Sorpa bs. (“Sorpa”). The complainant requested that its identity be kept confidential.
- (2) By letter dated 5 March 2018,² ESA invited the Icelandic authorities to comment on the non-confidential version of the complaint.³ The Icelandic authorities provided their comments by letter of 4 May 2018.⁴ By letter of 19 June 2019, ESA requested more information from the Icelandic authorities,⁵ which was provided by letter dated 19 August 2019.⁶
- (3) By letter dated 3 October 2019,⁷ ESA initiated the review procedure for existing aid schemes, according to Article 17(1) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“Protocol 3 SCA”), requesting information on how Sorpa operated and was financed. The Icelandic authorities responded by letter dated 4 December 2019.⁸
- (4) The complaint was held up by ESA having to allocate most of its resources to the handling of the heavy caseload caused by the COVID-19 pandemic.

2 Complaint

- (5) The complaint concerns alleged State aid, within the meaning of Article 61(1) of the EEA Agreement (“EEA”), in the form of an income tax exemption enjoyed by

¹ Document No 898436.

² Document No 898596.

³ Document No 898604.

⁴ Document No 912237.

⁵ Document No 1074144.

⁶ Document No 1084030.

⁷ Document No 1087187.

⁸ Documents No 1101954, 1101956, 1101958 and 1101960.

Sorpa. The complainant maintains that this tax exemption represents an advantage, which other privately owned competitors, active in waste management, do not benefit from, as they are subject to the general rules of the Income Tax Act.⁹

- (6) The complainant does not allege that the aid is unlawful.¹⁰ The complainant maintains that the tax exemption constitutes existing aid¹¹ as the tax exemption has been in effect since before the entry into force of the EEA Agreement.

3 The organisation of Sorpa

- (7) Sorpa was established on 15 February 1988 as a cooperative agency through an agreement between several municipalities and is active in the waste management sector.¹² Sorpa is now owned by six municipalities in the capital area of Iceland.¹³
- (8) Outside the capital area, most municipalities procure waste collection services from private undertakings. They often procure the entire handling of the waste from collection to disposal or treatment.¹⁴
- (9) Sorpa's board of directors is composed of one representative from each municipality. The board members must be either elected members of the municipal government or the mayor of the municipality. Sorpa is therefore under the direct control of the municipalities.¹⁵
- (10) Article 2 of Sorpa's founding agreement states that the purpose of Sorpa is to handle waste for the six municipalities in accordance with Act No 55/2003 on Waste Disposal ("the Waste Disposal Act"). These are the more specific tasks of Sorpa:¹⁶
- a) Providing and operating a landfill for waste.
 - b) Building and operating reception centres.
 - c) Transport of waste from reception centres to recycling or landfills.
 - d) Production and sale of fuel and energy from waste.
 - e) Processing and sale of waste materials for recycling.
 - f) Cooperation with companies operating in the field of recycling waste materials.
 - g) Monitoring technological developments in the field of waste disposal and recycling.
 - h) Disposing hazardous waste.
 - i) Developing new methods for extracting value from waste materials.
 - j) Presenting Sorpa's projects and the value of environmental considerations in waste management.
 - k) Making regional plans, cf. legal requirements at any given time.

⁹ Article 2(1) of the Income Tax Act No [90/2003](#).

¹⁰ Within the meaning of Article 1(f) of Part II of Protocol 3 SCA.

¹¹ Within the meaning of Article 1(b) of Part II of Protocol 3 SCA.

¹² Document No 912237, paragraph 18.

¹³ Document No 928489, paragraph 4.

¹⁴ See [Competition in the Waste Management Sector](#), 2016 Report from the Nordic Competition Authorities, page 89.

¹⁵ Document No 928489, paragraph 5.

¹⁶ See Article 2 of the [founding agreement of Sorpa](#).

- l) Other tasks that the owners entrust to Sorpa (like operating “the Good Shepherd” a non-profit market for household goods).
- (11) Sorpa’s operations can be roughly divided into two parts: First, operations which the municipalities are explicitly obliged to carry out in accordance with the Waste Disposal Act. Second, obligations which are not explicitly stated in the law but can be derived from various provisions of the Waste Disposal Act and relevant regulations.¹⁷
- (12) Sorpa’s activities are divided into 12 different divisions, where each division has a separate budget:¹⁸
- a) Financial office.
 - b) Weighbridge.
 - c) House leasing.
 - d) Good Shepherd.
 - e) Research and development.
 - f) Landfill.
 - g) Gas upgrading facility.
 - h) Biogas facility.
 - i) Environmental and education facility.
 - j) Receiving station.
 - k) Recycling centres.
 - l) Drop off centres.

4 Legal Framework

4.1 The Income Tax Act

- (13) Article 2(1) of the Income Tax Act provides the general rule that legal entities are subject to taxation.
- (14) Article 4(1)(2) of the Income Tax Act, provides that local governments, as well as companies and institutions operated by them, and under their unlimited guarantee, are exempt from income tax. Given that Sorpa is a municipally owned cooperative agency, its corporate status falls within the scope of this tax exemption.

4.2 The Waste Disposal Act

- (15) The Waste Disposal Act regulates how waste is handled in Iceland.
- (16) The municipalities are responsible for waste management. Pursuant to Article 6(1) of the Waste Disposal Act, a municipality shall, either by itself or jointly with other municipalities, draw up and confirm a regional 12-year plan for the management of waste for the given area that shall follow a policy on waste management and prevention.
- (17) According to Article 8 of the Waste Disposal Act, municipalities have the responsibility to ensure that there is a system in place for the treatment of both household waste as well as waste from companies in their territories.

¹⁷ Document No 1084030, paragraph 16.

¹⁸ Document No 1101956, paragraph 17.

- (18) According to Article 14 of the Waste Disposal Act, private operators are allowed to operate receiving stations.
- (19) According to Article 23 of the Waste Disposal Act, all operators of waste related services are legally obliged to charge a fee for the services. The fees shall not exceed the cost incurred.

5 Recent court cases

- (20) The EFTA Court, the Icelandic Supreme Court and the Icelandic Competition Authority (“ICA”) have in recent years examined the operations of Sorpa in light of the competition rules of the EEA Agreement and the Icelandic Competition Act.¹⁹
- (21) The proceedings were initiated by ICA in response to a complaint alleging that Sorpa had violated the Icelandic Competition Act. After conducting an examination, ICA issued decision No 34/2012, concluding that Sorpa had abused its dominant position by granting its owners a significant discount on the fee for waste acceptance and the fee for waste disposal at its landfill site, as well as granting Sorpstöð Suðurlands substantial discounts on the fee for waste acceptance. ICA identified two relevant product markets: i) the market for waste acceptance, including the sorting and bundling of waste; and ii) the market for waste disposal.²⁰
- (22) Sorpa appealed ICA’s decision to the Competition Appeals Committee, which upheld ICA’s decision. Subsequently, Sorpa requested the annulment of the Appeals Committee’s ruling before the district courts. The District Court rejected that request. Sorpa then appealed the judgment of the District Court to the Supreme Court of Iceland, which sought an advisory opinion from the EFTA Court.²¹
- (23) The EFTA Court held that an entity of public law constitutes an undertaking within the meaning of Article 54 EEA when it does not act in the exercise of official authority but engages in an economic activity, which consists in offering goods or services on a market.²²
- (24) The EFTA Court noted that to determine whether the provision of waste management services by a municipality or a municipal cooperative agency such as Sorpa is an economic activity, account must be taken of the existence of competition with private entities and the level of the compensation received. The EFTA Court further noted that under the Waste Disposal Act, licences for the operation of waste disposal centres and landfill sites may be granted to private entities, and one licence was granted to Gámaþjónustan, a private entity.²³
- (25) Additionally, the EFTA Court noted that under Article 59(2) EEA, undertakings are exempted from the application of EEA competition rules where (i) they are entrusted with the operation of services of general economic interest, and (ii) the

¹⁹ Icelandic Competition [Act No 44/2005](#).

²⁰ ICA Decision No [34/2012](#) of 21 December 2012.

²¹ See the Supreme Court of Iceland judgement of 2 February 2017 in Case [No 273/2015](#), *Sorpa bs. v Samkeppnisefirlitið*.

²² Case [E-29/15 Sorpa bs. v The Competition Authority](#) [2016] EFTA Ct. Rep. 825, paragraph 72.

²³ *Ibid*, paragraphs 57 to 60.

application of such rules would obstruct the performance of their tasks.²⁴ The EFTA Court held that waste management may be regarded as a service of general economic interest, but it was for the referring court to determine whether the application of Article 54 EEA would make it impossible for the municipalities to provide the services they have been entrusted with, or to perform them under economically acceptable conditions.²⁵

- (26) The Supreme Court of Iceland then came to the following conclusions: i) Sorpa was an undertaking within the meaning of the competition rules, ii) Sorpa's waste management constituted a service of general economic interest ("SGE") within the meaning of Article 59(2) EEA, and iii) the application of the competition rules would not make it impossible for the municipalities to provide the waste management services they have been entrusted with, or to provide them under economically acceptable conditions.²⁶

6 Comments by the Icelandic authorities

- (27) The Icelandic authorities maintain that Sorpa does not carry out economic activities and should therefore not be considered as an undertaking within the meaning of Article 61(1) EEA. They state that Sorpa merely provides fundamental services requested of municipalities in accordance with Icelandic law.²⁷
- (28) Furthermore, it is submitted that should Sorpa be considered an undertaking, it is entrusted with services of general economic interest. Thereby benefitting from a derogation from State aid rules in so far as applying them would obstruct the performance of the particular tasks that have been assigned to them in accordance with Article 59(2) EEA.²⁸
- (29) Moreover, the Icelandic authorities maintain that the conditions of the *Altmark* judgment are met and therefore, the tax exemption does not constitute State aid and does, therefore, not require notification under Article 1(3) Protocol 3 SCA.²⁹
- (30) Additionally, it is submitted that Sorpa is not in the same factual situation as any privately owned undertaking in the waste management sector, due to the public service it has been entrusted with.³⁰
- (31) Further, the Icelandic authorities state that the tax system of an EEA State is not covered by the EEA Agreement. Consequently, the Icelandic authorities argue that the tax exemption applicable to Sorpa is not contrary to the State aid rules of the EEA Agreement.³¹

²⁴ *Ibid*, paragraph 66.

²⁵ *Ibid*, paragraphs 72 and 73.

²⁶ See the Supreme Court of Iceland judgement of 2 February 2017 in Case [No 273/2015](#), *Sorpa bs. v Samkeppniseftirlitið*.

²⁷ Document No 912237, paragraph 24.

²⁸ *Ibid*, paragraph 25.

²⁹ *Ibid*, paragraphs 32 to 35.

³⁰ *Ibid*, paragraph 37.

³¹ *Ibid*, paragraphs 12 and 13.

- (32) Finally, the Icelandic authorities maintain that Sorpa's exemption from income tax is not liable to affect trade and distort competition within the meaning of Article 61(1) EEA.³²

7 The presence of State aid within the meaning of Article 61(1) EEA

7.1 Introduction

- (33) Article 61(1) EEA reads as follows: “[...] any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”
- (34) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) a measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade. In the following, the tax exemption enjoyed by Sorpa is assessed with respect to these criteria.

7.2 State resources

- (35) Sorpa is exempt from income tax. A shortfall in tax revenue due to exemptions or reduction in taxes granted by an EEA State, fulfils the State resources requirement of Article 61(1) EEA, as that State foregoes State revenues.³³

7.3 Undertaking and economic activity

7.3.1 Introduction

- (36) Only advantages granted to “undertakings” are subject to the State aid rules. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.³⁴ The public or private status of an entity has no bearing as to whether that entity constitutes an “undertaking”.³⁵
- (37) Economic activities are activities consisting of offering goods or services on a market.³⁶ Conversely, entities that are not commercially active, in the sense that they are not offering goods and services on a given market, do not constitute undertakings.

³² See Document No 1101956, paragraph 16.

³³ See ESA's Guidelines on the notion of State aid (“[NoA](#)”), OJ L 342, 21.12.2017, p. 35, and EEA Supplement No 82, 21.12.2017, p. 1, paragraph 51.

³⁴ Case [E-9/19 Abelia and WTW](#) [2020] EFTA Ct. Rep. 31, paragraph 87; Judgments in *Pavlov and others*, C-180/98 to C-184/98, [EU:C:2000:428](#), paragraph 74; and *Cassa di Risparmio di Firenze and others*, C-222/04, [EU:C:2006:8](#), paragraph 107; Case [E-5/07 Private Barnehagers Landsforbund](#) [2008] EFTA Ct. Rep. 62, paragraph 78.

³⁵ Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, [EU:C:2017:496](#), paragraph 42.

³⁶ See [NoA](#), paragraph 12, and Judgment of 10 January 2006 *Ministero dell'Economica e delle Finanze v Cassa di Risparmio di Firenze*, C-222/04, [EU:C:2006:8](#), paragraph 108; and Judgment of 22 January 2002, *Cisal*, C-218/00, [EU:C:2002:36](#), paragraph 23.

- (38) The classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.³⁷
- (39) In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers that entity acts as an undertaking in relation to that activity. In contrast, if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking.³⁸
- (40) The nature of Sorpa's activities then need to be preliminary assessed.

7.3.2 Economic or non-economic activities

- (41) To establish the nature of Sorpa's activities, it must be verified whether those activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of public powers or whether they have an economic character which justifies the application of State aid rules.³⁹
- (42) For this to be established it is necessary to verify whether the activities of Sorpa are independent of each other or whether the activities form part of a whole from which they cannot be separated. If the activities can be separated, it is necessary to demonstrate that each activity, taken separately, is connected with the exercise of public powers.⁴⁰
- (43) It must be noted that when examining the general characteristics of a possible State aid measure, ESA is not required to assess all the activities of Sorpa. It is sufficient to identify, in a general and abstract manner, the relevant economic activities.⁴¹ Furthermore, after such an examination, it is possible to conclude, that an activity is, at least in part, economic.⁴²
- (44) The organisation and activities of Sorpa are described in section 3. Its main activity is to handle waste for the six municipalities. Other tasks are, *inter alia*, operating a waste acceptance centre and landfill sites. Furthermore, as can be seen in section 3, all twelve divisions of Sorpa have a separate budget.
- (45) As described in section 5, the EFTA Court noted that under the Waste Disposal Act, licences for the operation of waste acceptance centres and landfill sites may be granted to private entities, and one licence for the operation of a waste acceptance centre was granted to a private entity. Therefore, Sorpa faced actual and/or potential competition from private entities on the markets for waste acceptance and waste disposal.⁴³ Moreover, the EFTA Court found, that the provision of waste acceptance and waste disposal services by Sorpa could be

³⁷ [NoA](#), paragraph 10.

³⁸ [NoA](#), paragraph 18.

³⁹ Judgment of 28 September 2017, *Tenderned*, Case T-138/15, [ECLI:EU:T:2017:675](#), paragraph 38.

⁴⁰ *Ibid*, paragraph 41.

⁴¹ See Judgment of 20 September, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, [EU:T:2019:652](#), paragraph 66.

⁴² *Ibid*, 50.

⁴³ Case [E-29/15](#) *Sorpa bs. v The Competition Authority* [2016] EFTA Ct. Rep. 825, paragraph 60.

regarded as carrying out an economic activity even though the amount of the fees received by Sorpa for the provision of those services cannot exceed the costs incurred.⁴⁴

- (46) From the EFTA Court's findings, it appears possible to separate the activity of waste acceptance and waste disposal from Sorpa's other activities in such as Sorpa accepts fees for those services and categorise them as an economic activity. A further indicator that it is possible to categorise these activities as economic is the fact that it is prescribed in the Waste Disposal Act that private entities may engage in the activity of waste acceptance and waste disposal, given that they fulfil the conditions of the legal basis for a licence.
- (47) Finally, it must be noted that, the mere fact that there may be an economic link between those activities, in that Sorpa's economic activities finance, in whole or in part, their non-economic activities, is not sufficient for a finding that those activities cannot be separated from each other.⁴⁵

7.3.3 Conclusion

- (48) In light of the above, it is ESA's preliminary view that Sorpa's activities in the market of waste acceptance and waste disposal are, at least, partly economic in nature. Consequently, Sorpa is to be regarded as an undertaking when it carries out said activities.

7.4 Advantage

- (49) The qualification of a measure as State aid requires that it confers an advantage on the recipient. An advantage, within the meaning of Article 61(1) EEA, is any economic benefit that an undertaking could not have obtained under normal market conditions.⁴⁶
- (50) The measure constitutes an advantage not only if it confers positive economic benefits, but also in situations where it mitigates charges normally borne by the budget of the undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities.⁴⁷
- (51) In its *Altmark*⁴⁸ ruling the Court of Justice of the European Union ("CJEU") stated that compensation for carrying out a service of general economic interest would not constitute an advantage provided that all the following conditions were met:
- First, the recipient undertaking must actually have service obligations of general economic interest to discharge and those obligations must be clearly defined.
 - Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.

⁴⁴ *Ibid*, paragraph 61.

⁴⁵ *Ibid*, paragraph 87.

⁴⁶ [NoA](#), paragraph 66.

⁴⁷ [NoA](#), paragraph 68.

⁴⁸ Judgment of 24 July 2003, *Altmark*, C-280/00, [EU:C:2003:415](#), paragraphs 87 to 93.

- Third, the compensation cannot exceed what is necessary to cover all or part of the costs in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
 - Fourth, where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined by a comparison with an analysis of the costs which a typical well run and adequately equipped undertaking would have incurred in discharging those obligations.
- (52) The CJEU has clarified that if all these cumulative conditions are not met, the measure will be considered as providing an advantage to the recipient.⁴⁹
- (53) Concerning the second condition, the exemption provides an advantage to Sorpa when the undertaking turns a profit. When the undertaking does not turn a profit in the relevant tax year, the exemption does not provide an advantage to the undertaking. The tax exemption as a mechanism does not directly correlate to the costs borne by Sorpa in carrying out its public service obligation. In other words, the parameters of the tax exemption mechanism are not tailored to the costs related to the public service obligation.
- (54) Concerning the third condition, the tax exemption is not designed to ensure that Sorpa does not get compensation in excess of the net costs of providing the public service. If Sorpa turns a profit, Sorpa benefits from the corporate tax exemption, regardless of the scope of the costs incurred in relation to the public service. No heed is paid to the issue of whether Sorpa would then receive compensation, through the tax exemption, that exceeds what is necessary to cover all or part of the costs in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. The tax exemption is in this sense unsuited as a tool for compensation for the costs of providing a public service.
- (55) Concerning the fourth condition, the Icelandic authorities have not presented information that would verify that the level of compensation to Sorpa is determined by a comparison with an analysis of the costs which a typical well run and adequately equipped undertaking would have incurred in discharging those obligations.
- (56) In light of the above, it appears that the *Altmark* conditions are not met. Therefore, it is ESA's preliminary view that Sorpa's exemption from income tax qualifies as an advantage within the meaning of Article 61(1) EEA.

7.5 Selectivity

7.5.1 Introduction – the three-step analysis.

- (57) The selectivity of tax measures, such as an income tax exemption, is normally assessed by means of a three-step analysis.⁵⁰

⁴⁹ Judgment of 24 July 2003, *Altmark*, C-280/00, [EU:C:2003:415](#), paragraph 94.

⁵⁰ [NoA](#), paragraph 128.

- (58) First, the reference system must be identified. The reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.⁵¹
- (59) The second step in the three-step analysis is to determine whether a measure constitutes a derogation from the reference system. A measure is a derogation if it is liable to favour certain undertakings as compared with other undertakings which are in a similar factual and legal situation, in light of the intrinsic objective of the reference system.⁵² If the measure does not constitute a derogation from the reference system, it is not selective.⁵³
- (60) A third step of the analysis entails an assessment of whether a derogation is justified by the nature and logic of the reference system and is only carried out if a derogation is indeed identified.

7.5.2 Applying the three-step analysis

7.5.2.1 First step – establishing the reference system

- (61) As stated above, the first step of the three-step analysis is establishing the reference system. The measure under assessment is the income tax exemption enjoyed by local governments, as well as companies and institutions operated by them and under their unlimited guarantee. Therefore, ESA considers that the correct system of reference in this case is the Icelandic Income Tax Act.

7.5.2.2 Second step – preliminary derogation assessment

- (62) It must then be assessed whether the measure constitutes a derogation from the reference system identified, i.e., the Income Tax Act. Therefore, it must be ascertained whether Sorpa is favoured compared to other undertakings which are in a similar factual and legal situation.
- (63) ESA notes that the CJEU has stated that regulatory technique cannot be decisive in order to determine whether a tax measure is selective, so that it is not always necessary for that technique to derogate from a common or normal tax system. Even a measure which is not formally a derogation and founded on criteria that are in themselves of a general nature may be selective, if it in practice discriminates between companies which are in a comparable situation in the light of the objective of the tax system concerned.⁵⁴
- (64) ESA notes that according to Article 2(1) of the Income Tax Act, the main rule is that legal entities are obliged to pay income tax. Sorpa, as a legal entity, engaged in economic activity would normally be obliged to pay income tax if it were not for the exemption in Article 4 of the Income Tax Act.

⁵¹ [NoA](#), paragraph 133.

⁵² [NoA](#), paragraph 135.

⁵³ [NoA](#), paragraph 128.

⁵⁴ Judgment of, 8 September 2022, *Fiat Chrysler Finance Europe*, C-885/19 P and C-898/19 P, [ECLI:EU:C:2022:859](#), paragraph 70.

- (65) Article 4 of the Income Tax Act provides an exemption from that objective for certain enumerated entities. When evaluating these entities, it is apparent these are entities that share a non-economic nature and that therefore the income tax exemption is supposed to be enjoyed by entities partaking in non-economic activities. However, as stated above, Sorpa is engaged in economic activity.
- (66) The Icelandic authorities have stated that Sorpa is not in the same factual situation as privately owned undertakings in the waste management sector as the Icelandic municipalities and thereby Sorpa has been entrusted to fulfil specific tasks by various laws and regulations unlike any undertaking in private ownership.⁵⁵
- (67) According to Article 14 of the Waste Disposal Act a privately owned undertaking can get a permit to operate on the waste acceptance market. Additionally, according to Article 14(8) of the same act, a recipient of such a permit must fulfil the conditions of the Waste Disposal Act and the relevant regulations. Therefore, it appears, that the recipients of such a permit are in a similar factual and legal situation as Sorpa. However, unlike Sorpa, the recipients of such a permit are subject to income tax.
- (68) In light of the above, ESA considers the measure to constitute a derogation from the reference system as it differentiates between economic operators that are, in light of the objectives intrinsic to the system, in a comparable factual and legal situation.

7.5.2.3 Third step – justification by the nature or general scheme of the system

- (69) In any event, a measure which derogates from the reference system (*prima facie* selectivity) is not selective if it is justified by the nature or general scheme of the system of which they form part. The need to avoid double taxation, to take into account administrative manageability and the principle of tax neutrality are recognised as grounds for justification.⁵⁶
- (70) It is not sufficient to rely on external policy objectives to justify a measure which derogates from the reference system. Rather, the differentiation must relate to the logic of the system to which the measure belongs.⁵⁷
- (71) Furthermore, EEA States should introduce and apply appropriate control and monitoring procedures to ensure that derogations are consistent with the logic and general scheme of the tax system. For derogations to be justified by the nature or general scheme of the system, it is also necessary to ensure that those measures are proportionate and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures.⁵⁸
- (72) ESA considers that the non-application of income tax with regard to economic activities on the waste market – if considered a derogation – cannot be considered consistent with the logic and objective of the system as a whole as

⁵⁵ Document No 1101956, paragraph 6 and Document No 912237, paragraph 37.

⁵⁶ [NoA](#), paragraph 139.

⁵⁷ [NoA](#), paragraph 138.

⁵⁸ [NoA](#), paragraph 140.

undertakings who are also active on the waste management market are able to operate without the use of the tax exemption.

- (73) Moreover, it could be argued that the measure goes beyond what is necessary to achieve the legitimate objective pursued since, as stated in section 7.4, the tax exemption does not correlate with the cost borne by Sorpa and no heed is paid to the issue of whether Sorpa receives compensation, through the tax exemption, that exceeds what is necessary to cover all or part of the costs in the discharge of the public service obligations.⁵⁹

7.5.3 Preliminary view on selectivity

- (74) In light of the above, ESA takes the preliminary view that the measure appears to be selective within the meaning of Article 61(1) EEA.

7.6 Effect on trade and distortion of competition

- (75) In order to constitute State aid within the meaning of Article 61(1) EEA, the measures must be liable to distort competition and affect trade between EEA States.
- (76) Measures granted by the State are considered liable to distort competition when they are liable to improve the position of the recipient compared to other undertakings with which it competes. A distortion of competition within the meaning of Article 61(1) EEA is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector, where there is, or could be, competition.⁶⁰
- (77) Public support is liable to distort competition even if it does not help the recipient undertaking to expand or gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided.⁶¹
- (78) The measures must also be liable to affect trade between EEA States. Where State aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, this is assumed to have effect on trade between EEA States.⁶²
- (79) Any aid granted to Sorpa, in the form of tax exemption, could in theory have allowed the company to increase or at least maintain its activities as a result of the aid. The aid is therefore liable to limit the opportunities for undertakings established in other EEA States, which might have wanted to compete with Sorpa on the Icelandic market for e.g. receiving stations.
- (80) Moreover, waste handling and treatment is increasingly an international industry. As an example of this, Sorpa exports waste to Sweden and Britain.⁶³

⁵⁹ See [NoA](#), paragraph 140 and Judgment of 6 October 2021, *World Duty Free Group SA*, C-51/19 P and C-64/19 P, [EU:C:2021:793](#), paragraph 140.

⁶⁰ [NoA](#), paragraph 187.

⁶¹ [NoA](#), paragraph 189.

⁶² Judgment of 14 January 2015, *Eventech*, C-518/13, [EU:C:2015:9](#), paragraph 66.

⁶³ See [Sorpa's information page for small electronics](#).

- (81) Therefore, ESA cannot exclude that the measure is liable to distort competition and affect trade within the EEA.

7.7 Conclusion

- (82) In light of the above, ESA is of the preliminary view that Sorpa's exemption from paying income tax in relation to its economic activities fulfils the criteria in Article 61(1) EEA and therefore constitutes State aid.

8 New or existing aid

8.1 Legal framework

- (83) According to Article 62(1) EEA and Article 1(1) of Part I of Protocol 3 SCA, ESA shall, in co-operation with the EFTA States, keep under constant review all systems of existing aid in those States and propose to the latter any appropriate measures required by the progressive development of or by the functioning of the EEA Agreement.
- (84) Article 1(b)(i) of Part II of Protocol 3 SCA defines "existing aid" as all "aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA State, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement". Alterations to such aid represent new aid according to Article 1(c) of Part II of Protocol 3 SCA.
- (85) Article 1(d) of Part II of Protocol 3 SCA provides that an "aid scheme" is (i) any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner or (ii) any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

8.2 Aid scheme

- (86) The legal basis for the tax exemption enjoyed by Sorpa is Article 4 of the Income Tax Act. There are no further implementing measures required for the granting of aid in the form of a tax advantage, provided that the beneficiaries fulfil the conditions set out in Article 4 of the Income Tax Act. Moreover, the aid is not linked to a specific project and it may be awarded to several beneficiaries for an indefinite period of time and for an indefinite amount.
- (87) Therefore, ESA takes the preliminary view that the tax exemption, if it entails aid within the meaning of Article 61(1) EEA, constitutes an aid scheme within the meaning of Article 1(d) of Part II of Protocol 3 SCA

8.3 Existing aid

- (88) As stated above, the alteration of existing aid gives rise to new aid. However, not every alteration of existing aid is necessarily new aid. Alterations of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure are not to be regarded as alterations to existing

aid. In order to qualify as new aid, an alteration to existing aid must be substantial.⁶⁴

- (89) Furthermore, the European Courts have held that the question of whether aid constitutes new or existing aid must be made by reference to the provisions providing for the aid.⁶⁵
- (90) The tax exemption providing for the scheme has its legal basis in Income Tax Act No 90/2003. The tax exemption is originally from 1978 (Act No 40/1978). Consequently, the aid scheme under consideration was put into effect before entry into force of the EEA Agreement in 1994. The Income Tax Act has been amended and renewed several times since then. However, the exemption providing for the scheme, which is now set out in Article 4(1)(2) in Income Act No 90/2003, has remained unchanged.⁶⁶

8.4 Conclusion

- (91) In light of the above, ESA takes the preliminary view that the scheme that has existed since before the entry into force of the EEA Agreement in Iceland on 1 January 1994 has not been substantively altered since then to the effect of having turned into new aid, within the meaning of Article 1(c) of Part II of Protocol 3 SCA. The scheme, provided it entails State aid, therefore remains an existing aid scheme.

9 Compatibility

9.1 Legal framework

- (92) The compatibility of public service compensation for waste management is assessed on the basis of Article 59(2) EEA in conjunction with ESA's Framework for State aid in the form of public service compensation ("the Framework").⁶⁷
- (93) The principles set out in the Framework apply to public service compensation only in so far as it constitutes State aid not covered by Commission Decision 2012/21/EU on the application of Article 106(2) of the Treaty of the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ("SGEI Decision").⁶⁸
- (94) According to the case-law of the CJEU, it is up to the Member State to invoke possible grounds for compatibility and to demonstrate that the conditions of compatibility are met.⁶⁹ The Icelandic authorities maintain that the measure at hand does not constitute State aid pursuant to the *Altmark* case. The Icelandic authorities have not provided arguments substantiating why the measure should be considered compatible with the functioning of the EEA Agreement. ESA has also not identified any clear grounds for compatibility.

⁶⁴ Case [E-1/22](#), *G. Modiano Limited & Standard Wool (UK) Limited v ESA*, Judgment of 24 January 2023, not yet reported, paragraph 56.

⁶⁵ Judgment of 9 August 1994, *Namur-Les-assurances du crédit*, C-44/93, [EU:C:1994:311](#), paragraph 32 and Case [E-1/22](#), *G. Modiano Limited & Standard Wool (UK) Limited v ESA*, Judgment of 24 January 2023, not yet reported, paragraph 59.

⁶⁶ See Article 4(1)(3) of the proposed legislation which became [Act No 40/1978](#).

⁶⁷ [ESA's Framework for state aid in the form of public service compensation](#).

⁶⁸ [OJ L 7, 11.1.2012](#), p. 3, incorporated at point 1h of Annex XV of the EEA Agreement.

⁶⁹ Judgment of 28 April 1993, *Italy v Commission*, C-364/90, [EU:C:1993:157](#), paragraph 20.

9.2 The SGEI decision

- (95) The SGEI Decision lays down the conditions under which certain types of public service compensation are to be regarded as compatible with the functioning of the EEA Agreement pursuant to its Article 59(2) and exempt from the requirement of prior notification under Article 1(3) of Part I of Protocol 3 SCA. ESA notes that in so far as the “scheme” represents a system of existing aid, the Icelandic authorities are under no obligation to notify it.
- (96) ESA has doubts as to whether the conditions of the SGEI Decision are met. Such as the condition pursuant to Article 5(1) of the SGEI Decision as ESA doubts that the Icelandic authorities have ensured that Sorpa does not receive compensation in excess of the amount needed to cover the net cost incurred in discharging the public service obligations, including a reasonable profit, as expressed above in section 7.4.
- (97) State aid in the form of public service compensation that falls outside the scope of the SGEI Decision, can be found compatible with the Article 59(2) EEA and the Framework.⁷⁰

9.3 The Framework

- (98) According to Paragraph 16(d), cf. paragraph 15, of the Framework, one of the compatibility conditions that must be fulfilled is that the entrustment act, which specifies the public service obligation, in this case the Waste Disposal Act, shall include the arrangements for avoiding and recovering any overcompensation.
- (99) On the basis of the considerations in section 7.4, ESA finds that Sorpa may potentially have been overcompensated for the provision of the public service. Furthermore, the Waste Disposal Act seemingly does not include the arrangements for avoiding and recovering overcompensation that an undertaking might receive due to its tax exempt status, such as Sorpa.

9.4 Conclusion concerning the compatibility of the measure

- (100) The Icelandic authorities have not put forward any compatibility considerations. Therefore, to the extent that the measure constitutes State aid, ESA’s preliminary view is that there are doubts as to whether the measure is compatible with the functioning of the EEA Agreement.

10 Conclusion

- (101) In light of the above, ESA takes the preliminary view that the tax exemption applicable to Sorpa constitutes State aid within the meaning of Article 61(1) EEA.
- (102) It is ESA’s preliminary view that the State aid does not appear to be compatible with the EEA Agreement. If that view is upheld and provided that the measure constitutes existing aid, ESA proposes the following appropriate measure:

In so far as it carries out economic activities, Sorpa should be subject to income tax.

⁷⁰ [ESA’s Framework for state aid in the form of public service compensation](#), paragraph 7.

(103) Pursuant to Article 17(2) of Part II of Protocol 3 SCA, the Icelandic authorities are invited to submit their comments on this preliminary assessment **by 16 June 2023**.

Yours faithfully,

Harald Evensen
Director
Competition and State Aid Directorate

This document has been electronically authenticated by Harald Evensen.



MINNISBLAÐ

Frá: Mörkinni lögmannsstofu hf.
Til: Sorpu bs
Dags.: 2. júní 2023
Efni: **Mál Eftirlitsstofnunar EFTA nr. 81738**

I.

Inngangur

Sorpa hefur óskað eftir umfjöllun Markarinnar lögmannsstofu hf. um mál Eftirlitsstofnunar EFTA (hér eftir „ESA“) nr. 81738 sem varðar meinta ríkisaðstoð til Sorpu. Í þessu minnisblaði verður í stuttu máli gerð grein fyrir aðdraganda málsins og frummati ESA. Þá verður vikið að líklegri niðurstöðu málsins og næstu skrefum.

II.

Aðdragandi

Málið hófst með kvörtun ótilgreinds aðila til ESA í febrúar 2018 vegna skattaundanþágu sem Sorpa nýtur góðs af samkvæmt 2. tölulið 1. mgr. 4. gr. laga nr. 90/2003 um tekjuskatt. Í erindinu var því borið við að skattaundanþágan samræmdist ekki 1. mgr. 61. gr. EES-samningsins. Ákvæðið mælir fyrir um að hvers kyns aðstoð, sem EES-ríki veitir eða veitt er af ríkisfjármunum og raskar eða er til þess fallin að raska samkeppni með því að ívilna ákveðnum fyrirtækjum, sé ósamrýmanleg framkvæmd EES-samningsins að því leyti sem hún hefur áhrif á viðskipti milli EES-rikkjana.

Kvörtunin var send íslenska ríkinu til umsagnar. Í kjölfar athugasemda ríkisins bárust frekari upplýsingabeirðir frá ESA vegna málsins á árunum 2018 og 2019. Síðasta svarbréfið af hálfu ríkisins var afhent ESA í árslok 2019.

III.

Frummat ESA

Frummat ESA barst með bréfi 16. maí 2023. Í frummatinu er komist að þeirri niðurstöðu skattaundanþágan hvað varðar Sorpu feli í sér yfirstandandi ríkisaðstoð sem samræmist ekki framkvæmd EES-samningsins. Í frummatinu er rakið að samkvæmt fyrrgreindum tölulið 4. gr. laga nr. 90/2003 séu sveitarfélög ásamt fyrirtækjum og stofnunum sem þau reka og bera ótakmarkaða ábyrgð á undanþegin skyldu til að greiða tekjuskatt. Sorpa sé byggðasamlag sem sé rekin af sveitarfélögum og fellur því undir umrætt ákvæði.

Í frummati ESA kemur jafnframt fram að samkvæmt lögum nr. 55/2003 um meðhöndlun úrgangs sé heimilt að veita jafnt einkaaðilum sem opinberum aðilum leyfi til reksturs



móttökustöðva og förgunarstaða úrgangs. Af því leiðir að Sorpa telst að mati eftirlitsstofnunarinnar í raunverulegri og/eða mögulegri samkeppni við einkaaðila á markaði fyrir móttöku og förgun úrgangs. Auk þess kemur fram það mat ESA að skattaundanþágan sé ekki nauðsynleg fyrir Sorpu til þess að sinna þeim verkefnum sem lúta að meðferð úrgangs samkvæmt fyrrgreindum lögum. Frummat ESA er því sú að Sorpu beri að greiða tekjuskatt vegna starfsemi sem telst vera „*efnahagslegs eðlis*“ (e. „*In so far as it carries out economic activities*“).

IV.

Næstu skref

ESA veitti íslenska ríkinu frest til 16. júní 2023 til þess að koma á framfæri athugasemdum við framangreint frummat stofnunarinnar. Óskað var eftir viðbótarfresti af hálfu íslenska ríkisins sem var veittur til 16. ágúst 2023. Fyrirhugaðar athugasemdir verða unnar í samráði við embætti borgarlögmanns og viðeigandi ráðuneyti.

Komist ESA að þeirri niðurstöðu að yfirstandandi aðstoðarkerfi samrýmist ekki framkvæmd EES-samningsins skal hún gefa út tilmæli til ríkisins þar sem hún gerir tillögur um viðeigandi ráðstafanir. Í tilmælunum geta einkum falist eftirfarandi tillögur:

- a) að gerðar skuli verulegar breytingar á aðstoðarkerfinu;
- b) að settar verði fram kröfur um málsmeðferð; eða
- c) að aðstoðarkerfið skuli fellt niður.

Ef íslenska ríkið samþykkir ekki fyrirhugaðar ráðstafanir og ESA telur enn að ráðstafanirnar séu nauðsynlegar tekur stofnunin ákvörðun um að ríkið skuli leggja niður eða breyta aðstoðinni innan frests sem hún ákveður. Ef ríkið hlítir ekki þeirri ákvörðun innan tilsetts frests getur ESA vísað málinu til EFTA-dómstólsins.

Líklegasta niðurstaðan í málinu er sú að ESA muni staðfesta frummat sitt. Þar sem um er að ræða endurskoðun á yfirstandandi aðstoðarkerfi, sem var hafin fyrir gildistöku EES-samningsins, mun eftirlitsstofnunin að öllum líkindum mæla fyrir um skyldu ríkisins til þess að gera verulegar breytingar á aðstoðarkerfinu þannig að tryggt verði að Sorpa greiði tekjuskatt vegna starfsemi sem telst vera efnahagslegs eðlis.

Að okkar mati er full ástæða til þess að huga að hugsanlegum aðgerðum í framhaldinu og greina nánar starfsemi Sorpu með tilliti til framangreindra. Í þessu sambandi er stefnt að því að eiga í frekari samskiptum við ESA.

Mörkin lögmannsstofa hf.



Peter Dalmay, lögmaður