ZAWIADOMIENIA DOTYCZĄCE EUROPEJSKIEGO OBSZARU GOSPODARCZEGO

URZĄD NADZORU EFTA

Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 części I Protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości, dotyczących pomocy państwa w odniesieniu do niektórych zmian do ustawy nr 50/1988 w sprawie podatku od wartości dodanej mających zastosowanie do klientów islandzkich centrów danych

(2013/C 111/07)

Decyzją nr 3/13/COL z dnia 16 stycznia 2013 r., zamieszczoną w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA wszczął postępowanie na mocy art. 1 ust. 2 części I Protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości. Władze Islandii otrzymały stosowną informację wraz z kopią wyżej wymienionej decyzji.

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

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

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

STRESZCZENIE

Procedura

W marcu 2011 r. władze islandzkie zwróciły się do Urzędu Nadzoru EFTA („Urzędu") w celu omówienia ewentualnego zgłoszenia środków pomocy państwa dotyczących niektórych zmian do ustawy nr 50/1988 w sprawie podatku od wartości dodanej (ustawy w sprawie VAT) w odniesieniu do klientów islandzkich centrów danych. Urząd przekazał uwagi na etapie poprzedzającym zgłoszenie i wyraził opinię, że przedmiotowe środki mogą potencjalnie zawierać elementy pomocy państwa.

Pismem złożonym w dniu 2 września 2011 r. władze Islandii zgłosiły Urzędowi – ze względu na pewność prawa – zmiany do ustawy w sprawie VAT, które mają wpływ na branżę centrów danych w Islandii, twierdząc, że zgłoszone środki nie stanowią pomocy państwa. Do tego czasu zmiany wprowadzone w ustawie w sprawie VAT weszły już w życie z mocą od dnia 1 maja 2011 r.

Ocena środków pomocy

Zgodnie z islandzkim systemem podatku od wartości dodanej (VAT) zobowiązanie podatkowe obejmuje wszystkie krajowe transakcje dotyczące produkcji i dystrybucji towarów oraz świadczenia usług na wszystkich etapach, w tym przywozu. Nierezydenci mają możliwość, w pewnych okolicznościach, ubiegania się o zwrot podatku VAT od islandzkich organów podatkowych.

Urzędowi zgłoszono następujące zmiany wprowadzone do ustawy w sprawie VAT, dotyczące klientów centrów danych:

(i) nieopodatkowanie podatkiem VAT transakcji dotyczących usług świadczonych drogą elektroniczną na rzecz nierezydentów;

(ii) nieopodatkowanie podatkiem VAT transakcji dotyczących świadczenia przez centra danych usług mieszanych na rzecz nierezydentów;

(iii) zwolnienie z podatku VAT przywozu serwerów i podobnych urządzeń przez niektórych nierezydentów w celu wykorzystania w centrach danych.

Według władz islandzkich celem zmian wprowadzonych do ustawy w sprawie VAT jest zapewnienie, by otoczenie gospodarcze centrów danych w Islandii było, pod względem przepisów dotyczących podatku VAT, porównywalne z otoczeniem ich konkurentów działających w państwach członkowskich UE. Zmiany mają również na celu unikanie podwójnego opodatkowania. Ponadto, jak stwierdzono w uwagach załączonych do projektu ustawy zmieniającej przedmiotową ustawę, jednym z celów odnośnych zmian jest zwiększenie konkurencyjności islandzkich centrów danych oraz promowanie nowego zastosowania zasobów energetycznych Islandii na potrzeby branży centrów danych.

Jeśli chodzi o pierwszy środek, Urząd jest zdania, że nieopodatkowanie podatkiem VAT transakcji dotyczących usług świadczonych drogą elektroniczną jest zgodne z zasadą eksportowania świadczeń określoną w islandzkim ustawodawstwie dotyczącym podatku VAT, zgodnie z którą podatek VAT nie jest pobierany od towarów i usług świadczonych za granicą. Ponieważ środek jest zgodny z logiką i ogólnym charakterem islandzkiego systemu podatku VAT, nie można uznać go za selektywny, a zatem nie stanowi on pomocy państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG.

Jeśli chodzi o drugi środek, Urząd stwierdził, wbrew stanowisku władz islandzkich, że należy go ocenić oddzielnie. Ponieważ termin „usługi mieszane" jest otwarty, nie można stwierdzić, że wszystkie usługi mieszane świadczone przez islandzkie centra danych na rzecz klientów niebędących rezydentami są faktycznie wykorzystywane za granicą i tam też czerpie się z nich korzyści, a zatem że wchodzą w zakres stosowania „zasady eksportowania świadczeń", tak jak w przypadku usług świadczonych drogą elektroniczną. W toku zwykłej działalności gospodarczej podatkiem VAT byłyby opodatkowane transakcje obejmujące usługi mieszane, które są uznawane za świadczone w Islandii. A zatem poprzez nieopodatkowanie podatkiem VAT usług mieszanych klientom centrów danych niebędącym rezydentami przyznaje się zasadniczo korzyść gospodarczą w postaci niższej ceny nabycia przedmiotowej usługi. Niemniej jednak Urząd przyznaje, że w zakresie, w jakim usługi mieszane centrów danych stanowią usługi dodatkowe do usług świadczonych drogą elektroniczną, tj. są niepodzielne i są ze sobą nieodłącznie powiązane oraz są wykorzystywane za granicą i tam też czerpie się z nich korzyści, ma zastosowanie to samo stwierdzenie dotyczące braku korzyści gospodarczej.

Jeśli chodzi o trzeci środek, Urząd wstępnie stwierdza, że przedsiębiorstwa z innych państw EOG i z Wysp Owczych, które przywożą serwery i podobne urządzenia do Islandii do własnego użytku w islandzkich centrach danych, uzyskują korzyść gospodarczą w postaci niższych kosztów swojego sprzętu komputerowego z powodu zwolnienia z płatności islandzkiego podatku VAT. Ponadto Urząd stwierdził, że środek jest selektywny i wykracza poza logikę i ogólny charakter islandzkiego systemu podatku VAT.

Podsumowanie

Urząd wstępnie stwierdził, że środki w formie zwolnienia z VAT przywozu serwerów i podobnych urządzeń oraz nieopodatkowanie podatkiem VAT transakcji obejmujących usługi mieszane niebędące usługami dodatkowymi do usług świadczonych drogą elektroniczną stanowią pomoc państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG. Urząd ma wątpliwości co do zgodności tych środków z postanowieniami Porozumienia EOG dotyczącymi pomocy państwa.

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

Zgodnie z art. 14 protokołu 3 wszelka bezprawnie przyznana pomoc może podlegać odzyskaniu od beneficjentów.

EFTA SURVEILLANCE AUTHORITY DECISION

No 3/13/COL

of 16 January 2013

to initiate the formal investigation procedure concerning certain amendments to Act No 50/1988 on Value Added Tax applicable to customers of Icelandic data centres

(Iceland)

THE EFTA SURVEILLANCE AUTHORITY ('THE AUTHORITY'),

HAVING REGARD to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

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

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 1(2) and (3) of Part I and Article 4(2) and (4) and Article 6 of Part II,

Whereas:

I. FACTS

1. Procedure

(1) Following pre-notification contacts by the Icelandic authorities (Events Nos 589334 and 593656), concerning amendments to the Act No 50/1988 on Value Added Tax ('VAT Act') applicable to customers of Icelandic data centres, the Authority on 6 May 2011 expressed its preliminary view that the measures possibly could entail State aid elements, and advised the Icelandic authorities not to introduce the amendments until they had been notified and approved by the Authority (Event No 597148).

(2) By e-mail dated 20 June 2011 (Event No 603148), the Icelandic authorities informed the Authority that the proposed amendments to the VAT Act had been adopted by the Icelandic Parliament in the form of Act No 163/2010 on 18 December 2010 ('Act No 163/2010') that entered into force on 1 May 2011.

(3) By letter submitted on 2 September 2011 (Event No 607650), the Icelandic authorities notified to the Authority, for reasons of legal certainty, the amendments to the VAT Act affecting the data centre industry in Iceland, claiming that the notified measures do not constitute State aid.

(4) By letter dated 21 December 2011 (Event No 610293), the Authority informed Iceland that it considered issuing a suspension injunction, pursuant to Article 11 of Part II of Protocol 3, with regard to the notified VAT Act amendments and invited the Icelandic authorities to provide comments. The Icelandic authorities subsequently submitted their comments and observations (Events Nos 622893, 632551 and 638241).

(5) By letter dated 16 July 2012 (Event No 640476), the Authority requested additional information regarding the VAT amendments and their implementation. The Icelandic authorities responded to the Authority's request by letter of 11 September 2012 (Event No 646375) and submitted a draft regulation on the value added tax on the sale of services to foreign parties, purchases of services from abroad and services delivered by electronic means ('the draft regulation').

(6) Finally, on 5 December 2012, the Icelandic authorities submitted a letter summarising their position regarding VAT rules on data centre services and on the import of servers (Event No 655502).

2. Legal framework: the Icelandic system of value added tax

(7) According to Article 1 of the VAT Act, '[a] value added tax shall be paid to the Treasury of all inland transactions at all stages, as well as of imports of goods and services, as provided for in this Act.' Further, Article 2 of the VAT Act specifies: 'The tax liability covers all goods […] and services.' In line with Article 3, taxable persons are 'those who sell or deliver goods or valuables on a professional or independent basis or perform taxable labour or service.'

(8) Article 11 provides: 'The taxable turnover of a registered party includes all sales or deliveries of goods and valuables against payment, as well as sold labour and services.' Based on Article 12 of the VAT Act, transactions involving certain goods and services are not included in the taxable turnover.

(9) The basis for calculation of value added tax (VAT) on imports of goods is the customs price of the taxable good, which is determined in accordance with the provisions of the Customs Act No 88/2005, as amended. Article 36 of the VAT Act specifies certain exemptions from VAT upon importation, such as duty-free goods; goods exempted on the basis of international agreements; certain aircraft and ships; works of art; written material sent without payment and not for business purposes to scientific institutions, libraries and public institutions; and the import of goods (other than alcohol and tobacco products) under a specific value.

(10) The currently applicable VAT rate in Iceland is 25,5 %, except for certain goods and services listed in Article 14(2) of the VAT Act, for which a reduced rate of 7 % is applicable.

3. Description of the measures

(11) The Icelandic authorities have notified amendments to the VAT Act in the form of three different measures which were put in place by means of Articles 4 and 12 of Act No 163/2010: 1. non-imposition of VAT on transactions involving services supplied electronically to non-residents; 2.

non-imposition of VAT on transactions involving the supply of mixed services by data centres in Iceland to non-residents; and 3. VAT exemption for the import of servers and similar equipment by non-residents for use in data centres in Iceland ([1]).

3.1. ***Non-imposition of VAT on electronically supplied services***

(12) According to Article 12(1) of the VAT Act,

'Taxable turnover does not include:

1. An exported good as well as labour and services provided abroad. […]

10. Sales of services to parties neither domiciled nor having a venue of operations in this country, provided that the services are wholly used abroad. […] Sales of services to parties neither domiciled nor having a venue of operations in this country are, in the same manner, exempt from taxable turnover, even if the service is not wholly used abroad, provided the purchaser could, if its operations were subject to registry in this country, count the value added tax on the purchase of the services as part of the input tax, cf. Article 15 and 16. […]'

(13) The original list of services falling within the scope of Article 12(1), point 10 of the VAT Act was amended to exclude from taxable turnover ([2]):

(i) '[…] data processing and the transfer of information' ([3]);

(ii) 'electronically supplied services; these services shall always be considered to be used where the buyer of the services has his residence or a place of business; the same applies to the sale by data centres of mixed services to buyers with residence abroad and not with a permanent establishment in this country' ([4]).

(14) As a result of these amendments, non-resident customers of data centres may purchase electronically supplied services in Iceland without paying Icelandic VAT.

(15) According to Chapter 3 of the draft regulation, the concept of 'electronically supplied services' 'encompasses a service delivered over the Internet or another network, automatically with a minimum of human interference where the use of information technology is a necessary part of the delivery' ([5]). The regulation lists what types of services are to be considered as 'electronically supplied services' and what types of services fall outside the scope of the concept. Examples of 'electronically supplied services' include the Web hosting and maintenance of software and equipment for remote processing and services delivered automatically from computer equipment over the Internet or a network in response to a special data input from the recipient. The delivery of CD-ROM's, disk and similar tangible means, repair for computer equipment and services due to data storage are clearly excluded from the term 'electronically supplied services'.

3.2. ***Non-imposition of VAT on supply of mixed services to customers of data centres***

(16) Act No 163/2010 also amended Article 12(1), point 10 of the VAT Act to exclude from taxable turnover mixed services provided by data centres to customers established abroad. These services are considered to be used abroad and, thus, are not subject to Icelandic VAT.

(17) The Icelandic authorities have explained that mixed services are inherently linked to, and inseparable from, the provision of electronically supplied services of data centres, but do not fall under this term. As examples, the Icelandic authorities mentioned hosting, supervision and the cooling of servers. However, unlike the concept of 'electronically supplied services', there is no clear definition in the applicable laws, regulations or guidelines of the term 'mixed services' in Article 12(1), point 10 of the VAT Act.

3.3. ***VAT exemption for import of servers***

(18) The new Article 42A of the VAT Act states that:

([1]) In the notification, the Icelandic authorities refer to all three measures as VAT exemptions. However, in the view of the Authority, following the logic of the VAT system, the measures involving electronically supplied services and mixed services should rather be referred to as being subject to a 'zero VAT rate', as the suppliers of those services, the Authority understands, have a right to deduct input VAT paid on purchases relating to the given supply.

([2]) Cf. Article 4 of Act No 163/2010.

([3]) Article 12(1), point 10(c) of the VAT Act.

([4]) Article 12(1), point 10(d) of the VAT Act. The Icelandic authorities have explained that the term 'computer services' only covered a limited scope of services provided electronically and the purpose of the amendment was to extend this exemption to a wider range of electronically supplied services.

([5]) When it enters into force the regulation will replace Regulation (EEC) No 194/1990 on value added tax on services for foreign parties and on services purchased abroad.

'[i]mportation of servers and similar equipment shall be exempted from VAT under the condition that the owners are residents in another Member State of the EEA, EFTA or the Faeroe Islands and do not have a permanent establishment in Iceland within the meaning of Article 3, point 4 of Act No 90/2003 on Income Tax. Similar equipment shall mean equipment which forms an integral part of the functionality of the servers and can only be used by the real owner of the server.' This provision shall be subject to revision after two years from the time it has entered into force.

(19) According to this provision, non-resident owners of servers are exempted from paying VAT on the import of servers and similar equipment into Iceland, provided the following additional requirements are cumulatively fulfilled ([1]):

— the owner of the server(s) and similar equipment must be a taxable person for VAT transactions in his country of residence,

— the taxable activity of the owner of the server(s) and similar equipment would be subject to registration and taxable in Iceland according to the VAT Act, if it was operated in Iceland,

— servers and similar equipment must be imported into Iceland exclusively to be used and located in a data centre with which the owner conducts business,

— servers and similar equipment must be exclusively used by the owner, and not in any other operation of the data centre,

— the processing of servers and similar equipment must be used abroad or for the benefit of persons who do not have a residence or a permanent establishment in Iceland.

(20) The Icelandic authorities have explained that 'similar equipment' necessary for the functioning of a server can, inter alia, be computers, cables and other electronic devices. Pursuant to the Guidelines issued by the Ministry of Finance to the Director of Customs on 29 June 2011 ('the Guidelines'), servers fall under tariff number 8471 and similar equipment under tariff number 8517.

(21) The Icelandic authorities have clarified that the owners of the servers can be large computer companies that produce the servers themselves and smaller companies that decide to store their servers purchased abroad in Iceland. Therefore, the exemption covers various situations: the owner has produced the server (no VAT due) which is being transported to the Icelandic data centre; the owner has purchased the server for its own use in the country of operation (has paid VAT in the country of operation) and then decided to place this server in the Icelandic data centre; or the owner has purchased the server in order to import it into Iceland (no VAT due in Iceland, for instance under Article 146(1)(a) of the EU VAT Directive). In all those cases, the customers remain the owner of the servers after they have been transported into Iceland.

(22) The Icelandic authorities have explained that it is likely to be considered that the place of business (so-called 'permanent establishment' in the terminology of the Act on Income Tax No 90/2003) of a customer of a data centre with facilities such as offices, machinery or equipment situated in the Icelandic territory is Iceland ([2]). However, in the view of the Icelandic authorities, only the operation of large companies would constitute a 'permanent establishment' and therefore trigger the VAT and income tax liability in Iceland ([3]).

4. **Beneficiaries**

(23) The Authority has identified three groups of potential beneficiaries of the notified measures:

(a) any customer of Icelandic data centres, that is established abroad and does not have permanent residence in Iceland;

(b) importers of servers and similar equipment to Iceland; and

(c) indirectly: data centres established in Iceland.

([1]) See Article 42A of the VAT Act.

([2]) In this context, there was a proposal submitted by the representative of the data centre industry in Iceland to modify the Act on Income Tax to the effect that imported servers placed in Icelandic data centres and owned by non-residents would not constitute a permanent establishment in Iceland. This proposal was however not developed further in the Parliament.

([3]) See the examples given by the Icelandic authorities in their e-mail of 5 April 2011, p. 5: a network server company from an EU Member State hosting its servers in a data centre company located in Iceland and purchasing data storage services from the Icelandic data centre would be considered to have a permanent establishment in Iceland and thus, based on the current rules in force, would not be VAT exempted (cf. Article 42A of the VAT Act). However, an accounting office from an EU Member State the core operation of which is not in relation to hosting data on servers would not be determined to have permanent establishment in Iceland, even if it moved its servers to an Icelandic data centre for the purpose of storage.

5. **Duration**

(24) The amendments to the VAT Act entered into force on 1 May 2011. The Icelandic authorities have not provided any indication as to the duration of these exemptions. Article 42A shall however be subject to revision after two years from the time it entered into force, i.e., by May 2013.

6. **Comments by the Icelandic authorities**

(25) As stated in the opinion of the Economic and Tax Committee of the Althingi, the aim of the amendments is to ensure that the business environment of data centres in Iceland, in terms of VAT treatment, is comparable with that of their competitors operating in the EU. In particular, the amendment concerning electronically supplied services is considered to be of a general nature adapting the VAT system to a changing environment in the area of electronic sales of goods and services, where the border between the country of the seller and the country of the customer has become blurred or even no longer exists. Furthermore, the objective is to enhance the competitiveness of the Icelandic data centres and promote new use of Iceland's energy resources for the needs of the data centre industry.

(26) The Icelandic authorities have submitted that the measure relating to 'electronically supplied services' is in line with the export principle in the Icelandic VAT Act. According to this principle, taxable turnover does not include exported goods and services provided abroad (cf. Article 12(1), point 1 of the VAT Act). In addition, the amendment is built upon provisions of Directive 2006/112/EC on the common system of value added tax (the 'EU VAT Directive') ([1]) to ensure consistency between the term 'electronically supplied services' in Iceland and the same concept in the EU ([2]).

(27) The VAT exemption for import of servers was proposed during the discussions of Act No 163/2010 in the Economic and Tax Committee of the Althingi. The Icelandic authorities have explained that the amendment for electronically supplied services alone would not be sufficient to bring the Icelandic data centre industry to a comparable level with the data centre industry in the EU. The amendment would therefore, according to the Icelandic authorities, adapt the Icelandic VAT system to that of EU Member States ([3]).

(28) Furthermore, the Icelandic authorities have claimed that since the provision of data centre services requires the use of servers, and certain customers insist on the use of their own servers in the data centres, this requires the transfer of such servers from the customer's location to Iceland. Upon transfer to Iceland, the customers remain the owners of the servers. There is therefore no question of supply or acquisition of goods, which would trigger an obligation to pay VAT. The servers are not put into free circulation in Iceland. This situation, in the view of the Icelandic authorities, reflects the principle that when goods are transferred only for the purposes of the provision of a service, and without a change in ownership, the transfer of such goods forms part of the provision of the service and is therefore not taxed separately for VAT purposes.

(29) Moreover, in the view of the Icelandic authorities, the exemption from VAT on the import of servers is inherent in the Icelandic VAT system, as pursuant to Article 36(1) of the VAT Act there exists a possibility to exempt specified imported goods from VAT.

([1]) OJ L 347, 11.12.2006, p. 1, as amended.

([2]) Under the EU VAT system, 'electronically supplied services' include services such as cultural, artistic, sporting, scientific, educational, entertainment, information and similar services, as well as software, video games and computer services generally. An indicative list of such services is contained in Annex II to the EU VAT Directive and has been further specified by means of provisions of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax ('the Implementing Regulation (EU) No 282/2011') (OJ L 77, 23.3.2011, p. 1). According to Article 7 of the Implementing Regulation (EU) No 282/2011, electronically supplied services are 'services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology'. Examples of such services cover online data warehousing where specific data is stored and retrieved electronically (cf. Annex I, point (1)(d) of Implementing Regulation (EU) No 282/2011). However, offline physical repair services of computer equipment, offline data warehousing services, supply of CD-ROMs, floppy disks and similar tangible media are explicitly excluded from the term 'electronically supplied services'. The list in the EU VAT legislation ('electronically supplied services') is not definitive or exhaustive (cf. recital 11 of Implementing Regulation (EU) No 282/2011).

([3]) A similar refund system exists under the EU VAT regime and has been introduced by the Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ L 326, 21.11.1986, p. 40) ('Directive 86/560/EEC'). In line with Directive 86/560/EEC, taxable persons not established in the EU who incur VAT in connection with their business activities in a Member State in which they do not make supplies of goods or services are entitled to claim a refund of VAT from the Member State in which VAT was charged. This applies in respect of services rendered by other taxable persons or in respect of importation of goods into the Member State concerned. The refunds are granted upon application by the taxable person. Detailed arrangements, including, inter alia, time limits, competent authority, mechanisms for prevention of fraud, etc., are to be determined by the Member States in their respective national provisions (cf. Article 3 of Directive 86/560/EEC).

(30) Finally, the Icelandic authorities refer to Article 138 of the EU VAT Directive, according to which there is no VAT due on intra-Community transactions.

(31) The Icelandic authorities have also argued that most (if not all) comparable VAT systems have exemptions from their scope of application which are based on economic facts and considerations, and are in line with the nature and general structure of the tax system.

II. **ASSESSMENT**

1. **The presence of State aid**

(32) Article 61(1) of the EEA Agreement reads as follows:

'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

1.1. ***Transfer of State resources***

(33) The aid measure must be granted by the State or through State resources. The granting of a tax exemption involves a loss of tax revenues which is equivalent to the granting of State resources ([1]). The three measures introduced with the entry into force of Act No 163/2010 all involve loss of revenue for the Icelandic State in the form of VAT not being charged.

1.2. ***Economic advantage***

(34) The measures confer upon the identified direct beneficiaries an advantage by relieving them of charges (non-payment of VAT for purchasing services and importing servers) that would normally be borne from their budgets.

(35) The payment of taxes is an operating cost incurred in the normal course of an undertaking's economic activity, which is normally borne by the undertaking itself. In general, an exemption from a tax that would normally be due or the non-imposition of a tax confers an advantage on the eligible companies. These companies are granted an advantage because their operating costs are reduced in comparison with others that are in a similar factual and legal position.

(36) As regards services that are considered to be supplied in Iceland, in the normal course of business, VAT would have been levied on those transactions. Therefore, by the non-imposition of VAT, the customers of electronically supplied services as well as those of mixed services are in principle afforded an economic advantage in the form of a lower purchase price for the respective services due to the relief from the Icelandic VAT.

(37) Companies from other EEA countries and the Faeroe Islands that import servers and similar equipment to Iceland for their use in Icelandic data centres are afforded an economic advantage in the form of lower costs for the computer equipment imported to Iceland due to the relief from the payment of the Icelandic VAT, as described above. In the normal course of business, VAT would have been levied on those goods upon their entry into the Icelandic customs territory. The owners of such servers and similar equipment imported to Iceland are, therefore, provided with an economic advantage over other importers of goods.

(38) By exempting customers of data centres located in Iceland from some normally levied VAT, the costs of the customers are reduced and therefore it becomes more attractive for these undertakings to conduct business with data centres in Iceland.

1.3. ***Selectivity***

(39) For a measure to be aid, it must be selective in that it favours 'certain undertakings or the production of certain goods'.

(40) The assessment of selectivity requires determining whether under a particular legal regime a national measure favours certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation ([2]). The concept of State aid does not refer to measures which differentiate between undertakings and which are, *prima facie*, selective where that differentiation arises from the nature or the general scheme of the system of which they form part ([3]).

([1]) See point 3(3) of the Authority's State Aid Guidelines on Business Taxation, Case 248/84 *Germany* v *Commission* [1987] ECR 4013 and Case E-6/98 *Kingdom of Norway* v *EFTA Surveillance Authority* [1999] EFTA Court Reports, paragraph 34.

([2]) Joined Cases C-106/09 P and C-107/9 P *Commission and Spain* v *Government of Gibraltar and United Kingdom*, 15 November 2011 (not yet published), paragraph 75.

([3]) Ibidem, paragraph 145.

(41) In the following, the Authority will assess whether the notified amendments constitute selective measures and, the case being, whether they fall within the logic and general nature of the VAT system in Iceland.

1.3.1. *The notified amendments constitute* prima facie *selective measures*

(42) The non-imposition of VAT for the electronically supplied services and mixed services benefits only certain groups of undertakings, namely, non-resident customers of data centres located in Iceland.

(43) The exemption from VAT for the import of servers to be used in Iceland by foreign customers also benefits a selective group of undertakings. It only concerns foreign undertakings that import their own servers into Iceland to be used in data centres located in Iceland.

(44) The Authority considers that all undertakings which receive services from companies located in Iceland or import their own goods to be used in Iceland are in the same legal and factual position as the identified beneficiaries of the notified VAT amendments. Other companies receiving services from Icelandic undertakings or importing own goods necessary for carrying out their business activities are subject to generally applicable VAT rules. Therefore, the preliminary opinion of the Authority is that the notified amendments are selective. At this stage, the Authority is of the view that there is no reason to conclude that the beneficiary undertakings are in a different legal and factual situation to the other undertakings subject to VAT taxation in Iceland. Therefore, the notified amendments are selective.

(45) The Authority notes that according to the information provided by the Icelandic authorities the measures regarding electronically supplied services and mixed services are applicable to all non-resident customers of such services whereas the exemption for the import of servers only benefits persons residing in another Member State of the EEA, the European Free Trade Association (EFTA) and the Faeroe Islands. The Icelandic authorities have however not provided any justification for their decision to determine potential beneficiaries of the three measures differently. They are hereby invited to do so.

1.3.2. *Logic and general nature of the scheme*

(46) A specific or selective tax measure can nevertheless be justified by the logic of the tax system ([1]). Measures intended partially or wholly to exempt firms in a particular sector from the charges arising from the normal application of the general system can constitute State aid if there is no justification for the exemption on the basis of the nature and logic of the general tax system ([2]). The Authority must assess whether the different treatment of undertakings as regards advantages or burdens introduced by the tax measure in question arise from the nature or the general system of the overall scheme which applies. Where such a differentiation is based on objectives other than those pursued by the overall scheme, the measure in question would in principle be considered selective.

(47) According to established case law, it is for the EFTA State that has introduced different treatment between undertakings to prove that it is justified by the nature and general scheme of the system in question ([3]). The Authority must thereafter consider whether an amendment to the tax rules meets the objectives inherent in the tax system itself, or whether it pursues other objectives.

(48) According to the information provided by the Icelandic authorities, the objective of the notified amendments is to bring the Icelandic data centre industry to a comparable level with the data centre industry in the EU. The non-imposition of VAT for electronically supplied services and mixed services and the exemption from VAT for the import of servers are designed to attract a mobile (and tax sensitive) service sector to Iceland, the data centre industry.

(49) It is important to note that in this case the reference tax framework regarding which it has to be examined whether the objective pursued with the notified amendments falls within its general nature and logic of the system is the Icelandic VAT system.

([1]) Case E-6/98 *Norway* v *EFTA Surveillance Authority* [1999] EFTA Court Report, p. 76, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord, PIL and others and Norway* v *EFTA Surveillance Authority* [2005] EFTA Court Report, p. 117, paragraphs 84-85; Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Alava and others* v *Commission* [2002] ECR II-1275, paragraph 163, Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 42; Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 42, Case C-172/03 *Wolfgang Heiser* [2005] ECR I-1627, paragraph 43.

([2]) Case E-6/98 *Norway* v *EFTA Surveillance Authority*, cited above, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord, PIL and others and Norway* v *EFTA Surveillance Authority*, cited above, paragraphs 76-89; Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 16.

([3]) Case E-6/98 *Norway* v *EFTA Surveillance Authority*, mentioned above, paragraph 67, Case C-159/01 *Netherlands* v *Commission* ECR [2004] I-4461, paragraph 43, Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom*, mentioned above, paragraph 146.

1.3.2.1. The non-imposition of VAT on electronically supplied services

(50) The Authority considers that the non-imposition of VAT on electronically supplied services provided abroad falls within the logic of the VAT system. Under the general principle of the Icelandic VAT legislation, services provided abroad are not subject to the Icelandic VAT. This is in line with the so-called 'export principle' (also called 'destination principle'), according to which VAT is levied in the place where the service is actually used and enjoyed, with the aim of preventing double taxation, non-taxation or distortion of competition ([1]). Since electronically supplied services provided from Iceland to the non-resident customers are effectively used and enjoyed outside Iceland, normally in the country of residence of the customer, they are not considered to be supplied in the Icelandic territory and therefore the providers of those services are not obliged to charge the Icelandic VAT. As the place of taxation for those transactions is the country of establishment of the customer, in order to avoid double taxation, the country of supplier of the service does not levy VAT ([2]). Tax neutrality is not only a principle in the Icelandic VAT system but also a general principle in international VAT systems.

(51) In light of the above, the Authority concludes that the non-imposition of VAT on non-resident taxable customers of services supplied electronically from Iceland is in line with the general principle of tax neutrality in the Icelandic VAT system and throughout the EEA. Therefore, it does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

1.3.2.2. The non-imposition of VAT on mixed services

(52) There is no definition of mixed services to be found in Icelandic legislation. The term 'mixed services' is open-ended and it cannot be established that all mixed services provided by the Icelandic data centres to non-resident customers are actually used and enjoyed abroad.

(53) To the extent that the mixed services are inseparable from and inherently linked to electronically supplied services, and are used and enjoyed abroad, they are covered by the same considerations regarding tax neutrality as electronically supplied services. Therefore, the non-imposition of VAT on those mixed services that are, in this sense, 'ancillary' to the electronically supplied services provided by the Icelandic data centres to non-resident customers also falls within the logic of the VAT system.

(54) As regards those mixed services which cannot be considered to be supplied abroad, according to the Icelandic authorities, most comparable VAT systems contain certain rules on items and services which are not included in the taxable turnover and are therefore exempted from VAT liability. At the outset, the Authority considers the fact that other VAT systems provide for certain exemptions does not in itself justify non-imposition of VAT in Iceland. Whether a particular exception falls within the logic of the system has to be assessed first and foremost with respect to the reference taxation system ([3]).

(55) The Authority considers, at this stage, that the Icelandic authorities have not provided sufficient reasons to justify that the non-imposition of VAT on those mixed services that are not inseparable from and inherently linked to electronically supplied services falls within the nature and logic of the Icelandic VAT system.

1.3.2.3. The VAT exemption on the import of servers

(56) In relation to the import of servers, the Icelandic authorities have argued that Article 36(1) of the VAT Act provides for a possibility to exempt specified imported goods from VAT, and therefore the VAT exemption on the import of servers is inherent in the VAT system. In addition, they have argued that most VAT systems provide for certain exemptions which are based on economic facts and the nature and general structure of the tax system in the country in question.

(57) The Authority considers that the exemptions foreseen under Article 36(1) (artist works imported by the author, specific literary works, vehicles for rescue purposes, goods exempt from custom duties, etc.) are very limited and not necessarily linked to the provision of an economic activity, which is ultimately the reason for taxing VAT. On the contrary, the companies that will benefit from the exemption from VAT on the import of servers will carry out this import of their servers as an intrinsic part of their economic activities. Economic activities are normally subject to taxation.

([1]) See for instance Article 59a of the EU VAT Directive and *International VAT/GST Guidelines* issued in February 2006 by OECD.

([2]) In the context of transactions between the Icelandic data centres and their non-resident customers, VAT is levied in the country of establishment of the customer under a so-called 'self assessment mechanism' and not in Iceland. Non-resident customers of data centres will normally offset the domestic input VAT paid on their transaction with the Icelandic supplier of electronically supplied services from their output VAT connected to the same business activity. The outcome of this deduction must be, as a principle, neutral to taxable persons.

([3]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom*, 15 November 2011 (not yet published), paragraphs 75 and 90.

(58) It is not within the general nature and logic of the Icelandic VAT system to favour the production of Icelandic goods or to improve the competitive conditions of Icelandic companies over their competitors established elsewhere in the EEA. The proposed amendments ultimately appear to lead to improved competitive conditions for the data centres industry established in Iceland over their competitors elsewhere in the EEA. Indeed the Icelandic authorities have not pointed to any examples of such provisions in the VAT Act to justify the notified amendments. If there were any such examples, they would be likely to constitute a violation of Article 14 of the EEA Agreement ([1]).

(59) The Icelandic authorities have further invoked a principle, according to which when goods are transferred only for the purposes of the provision of a service, and without a change in ownership, the transfer of such goods forms part of the provision of the service and is therefore not taxed separately for VAT purposes. However, in the preliminary view of the Authority, this principle is not applicable in the case of imported servers, as the goods are not transferred for the purpose of provision of a service by the customer of the data centre, but rather in order to be provided with a service by the Icelandic data centre.

(60) In light of the above considerations, the Authority has doubts as to whether the exemption from VAT payment on the import of servers and the non-imposition of VAT on mixed services does not appear to be an adaptation of a general scheme particular to the nature and overall structure of the Icelandic VAT system. On the contrary, the amendments seem to have been adopted with the economic and political objective ([2]) of attracting foreign undertakings to purchase data centre services in Iceland and consequently improving the competitiveness of the Icelandic data centre industry ([3]). These considerations, in the Authority's preliminary opinion, do not form part of the logic and general nature of a consumer tax system ([4]).

(61) The Icelandic authorities claim that the measures in question are meant as an attempt to adapt the Icelandic VAT system to the VAT systems of EU Member States in order to secure a similar competitive environment for the domestic date industry as has been created within the EU. In the latest correspondence with the Authority, the Icelandic authorities provided some information regarding the VAT treatment of import of servers in some EU Member States ([5]). The Authority nevertheless invites the Icelandic authorities to provide more substantial information not only supporting their statements that the new VAT amendments mirror the VAT systems of EU Member States but more importantly that the amendments fall within the logic of the Icelandic VAT system.

1.4. ***Distortion of competition and effect on trade between contracting parties***

(62) The measures are aimed at entities established outside Iceland, including residents of other EEA countries. They will benefit from the measures when they enter into business relations with Icelandic data centres which are, in turn, in competition with operators of similar services in the EEA. In addition, the measures have been deliberately introduced as a means of attracting customers from the EU and global market players to purchase data centre services in Iceland. Since those customers are undertakings operating in competition with other entities in their respective sectors across the EEA, the measures therefore appear to affect trading conditions between the contracting parties to the EEA Agreement and distort or threaten to distort competition across the EEA.

1.5. ***Conclusion with regard to the existence of aid***

(63) On the basis of the above, the Authority has concluded that the non-imposition of VAT on non-resident taxable customers not only of services supplied electronically from Iceland, but also of 'ancillary' services, is in line with the general 'export principle' of Icelandic and international value added tax legislation and therefore does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

(64) The Authority has further concluded, in light of the foregoing considerations, that the measures in the form of the VAT exemption for the import of servers and similar equipment by non-resident customers for the use in the Icelandic data centres and non-imposition of VAT on transactions involving mixed services, except for services 'ancillary' to electronically supplied services, may constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

([1]) Case E-1/01 *Hörður Einarson* v *The Icelandic State* [2002] EFTA Court Reports, paragraphs 35-36.
([2]) Notification letter of 2 September 2011.
([3]) See Joined Cases E-17/10 and E-6/11 *Principality of Liechtenstein and VTM Fundmanagement AG* v *EFTA Surveillance Authority*, 30 March 2012, not yet reported, paragraph 76.
([4]) See for a similar argumentation, Commission Decision of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, paragraph 95.
([5]) Letter from the Icelandic authorities dated 5 December 2012 (Event No 655502) submitting information on the VAT systems in Sweden, Finland, Denmark, the Netherlands and the United Kingdom.

2. **Procedural requirements**

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

(66) The Icelandic authorities did not notify the aid measures to the Authority in sufficient time before their implementation on 1 May 2011. Moreover, the Icelandic authorities have put those measures into effect before the Authority has adopted a final decision. The Authority therefore concludes that the Icelandic authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3. The granting of any aid involved is therefore unlawful.

3. **Compatibility of the aid**

(67) The Icelandic authorities have not put forward any arguments that the State aid involved in the VAT measures, as specified above, could be considered as compatible State aid.

(68) Aid measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) of the EEA Agreement.

(69) The derogation under Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor does Article 61(3)(a) or (b) of the EEA Agreement apply to the case at hand. Further, the Authority has been provided with no information showing that the beneficiaries of the aid are located in a region which can benefit from regional aid within the meaning of Article 61(3)(c) of the EEA Agreement. Nor is the derogation in Article 59(2) of the EEA Agreement applicable in the present case.

(70) The Authority's preliminary conclusion is that the VAT exemption for the import of servers and similar equipment by non-resident customers for the use in the Icelandic data centres and non-imposition of VAT on transactions involving mixed services provided to non-resident customers of the Icelandic data centres to the extent those services are not ancillary to the electronically supplied services do not appear to be justified under the State aid provisions of the EEA Agreement.

4. **Opening of the formal investigation procedure**

(71) Based on the information submitted by the Icelandic authorities, the Authority preliminarily considers that the VAT exemption for the import of servers and similar equipment and the non-imposition of VAT on transactions involving mixed services that are not ancillary to electronically supplied services, as described above, constitute State aid within the meaning of Article 61(1) of the EEA Agreement. The Authority doubts that these measures comply with Article 61(2) and (3) of the EEA Agreement and Article 59(2) of the EEA Agreement. The Authority, therefore, doubts that the above measures are compatible with the functioning of the EEA Agreement.

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

(73) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, hereby invites the Icelandic authorities to submit their comments and to provide all documents, information and data needed for the assessment of the compatibility of the measures within one month from the date of receipt of this Decision.

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

HAS ADOPTED THIS DECISION:

Article 1

The non-imposition of value added tax (VAT) on non-resident taxable customers of services supplied electronically and ancillary (inseparable and inherently linked) mixed services does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

Article 2

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is initiated regarding the amendments to Act No 50/1988 on Value Added Tax in the form of a VAT exemption for the import of servers and similar equipment and the non-imposition of VAT on transactions involving mixed services that are not ancillary to (i.e. inseparable from and inherently linked to) electronically supplied services, applicable to customers of Icelandic data centres.

Article 3

The Icelandic authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 4

The Icelandic authorities are requested to provide, within one month from notification of this Decision, all documents, information and data needed for assessment of the measures under the State aid rules of the EEA Agreement.

Article 5

This Decision is addressed to Iceland.

Article 6

Only the English language version of this Decision is authentic.

Done at Brussels, 16 January 2013.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sabine MONAUNI-TÖMÖRDY
College Member