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Same Rules, Different Watchdog: Power Purchase Agreements in Iceland and the Prospect of EU Accession

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Summary

This thesis explores the differences between the enforcement of State aid within the EU compared to the EEA EFTA States, in an effort to find out whether Iceland's accession to the EU could affect the legal status of power purchase agreements entered into by Iceland's National Energy Company, Landsvirkjun, and energy-intensive user. These agreements have already been reviewed by the EFTA Surveillance Authority on several occasions, and are somewhat controversial in Iceland, especially as regards the pricing of the energy sold.

Accordingly, the thesis contains an overview of EU and EEA State aid law, as well as enforcement mechanism found therein. Moreover, the power purchase agreements themselves are explored, as well as the relevant existing decisional practice of the EFTA Surveillance Authority. That practice is then compared with relevant jurisprudence and the practice of the Commission in similar matters. Additionally, potential gaps in enforcement are taken into account, along with political influences, all of which are liable to affect the legal standing of the aforementioned agreements.

Ultimately, the thesis finds that, while it might be difficult to assert that the legal status of the power purchase agreements would be negatively affected by Iceland's accession to the EU, it is very likely that they would be subject to more active and detailed examinations than currently, given the Commission's institutional strengths compared to the EFTA Surveillance Authority, increased access to judicial remedies for third parties, and, to some extent, the political climate within the EU.

Preface

Like always at such an occasion, there are far too many people that ought to be thanked. However, I feel I must extend my gratitude to a select few.

To my supervisor, Anil Öztürk, thank you ever so much for your input during the writing of this thesis, your help was incredibly important.

To all the new friends I've made during my time at the University, thank you for all the great moments and experiences. I hope to visit all of you someday.

To friends and family in Iceland, thank you, always.

Lund, 24 May 2026

Arnaldur Starri Stefánsson

Abbreviations

EEA	European Economic Area
EEC	European Economic Community
ECSC	European Coal and Steel Community
EFTA	European Free Trade Association
ESA	EFTA Surveillance Authority
EU	European Union
GWh	Gigawatt-hour
IEA	International Energy Agency
IRENA	International Renewable Energy Agency
kWh	Kilowatt-hour
MEO	Market Economy Operator
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
PPA	Power Purchase Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNDP	United Nations Development Programme
UNSD	United Nations Statistics Division
WHO	World Health Organisation
UN	United Nations

1 Introduction

1.1 General Background

1.1.1 Iceland and the EU

Iceland is in many ways uniquely situated within Europe. It sits isolated in the North Atlantic, and with only 394,324 inhabitants as of the start of 2026,[1] it is among Europe's least populous countries. Nevertheless, the country's gross domestic product per capita ranks as the fifth highest globally in 2025,[2] underlining its relatively strong economy. Moreover, Iceland was ranked number one on the UNDP Human Development Index in 2023, which considers life expectancies, education and income indicators.[3]

Iceland, however, is not currently a member of the EU. In July 2009, Iceland officially applied for EU membership. The Commission issued a positive opinion in February 2010, and the Council decided in June 2010 to open accession negotiations. However, when a new coalition government came into power in May 2013, Iceland put the negotiations on hold. Then, in March 2015, the Icelandic Government requested that 'Iceland should not be considered as an applicant country for EU membership' in a letter to the Council. The Council took this into account and adjusted its procedures accordingly.[4] The application process then essentially lay dormant for the better part of a decade, until a new coalition government was elected at the end of 2024.[5] This new coalition government then confirmed that on 29 August 2026, a national referendum will be held in Iceland on whether to resume accession negotiations. If the Icelandic people vote to resume negotiations, and negotiations are then concluded, a second referendum will be held on whether to join the EU.[6]

Notwithstanding the possibility of Iceland joining the EU in the near future, it should be noted that Iceland currently enjoys a positive and fruitful rela-

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[1] 'Population/Inhabitants Overview' (*Statistics Iceland*, 1 January 2026) <https://statice.is/statistics/population/inhabitants/overview/> accessed 13 April 2026

[2] 'GDP per capita. current prices' (*International Monetary Fund*, 2026) <https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOWORLD> accessed 22 April 2026.

[3] Gabija Leclerc, 'EU-Iceland relations', Briefing PE 782.591, (January 2026). See also, Explore HDI' (UNDP, 2026) <https://hdr.undp.org/data-center/human-development-index#/indicies/HDI> accessed 22 April 2026.

[4] 'Ísland og ESB' (*Delegation of the European Union to Iceland*, 29 July 2021) <https://www.eeas.europa.eu/iceland/island-og-esb_is?s=212#9089> accessed 13 April 2026.

[5] Leclerc (n 3).

[6] 'The Icelandic Governments proposed referendum on continued EU accession negotiations' (*Government of Iceland*) <https://www.government.is/topics/foreign-affairs/iceland-in-europe/referendum/> accessed 14 April 2026.

tionship with the EU. The most important factor therein is the EEA Agreement, to which Iceland is a member along with the EU, Norway and Liechtenstein (‘EEA EFTA States’). On the basis of the EEA Agreement, Iceland enjoys access to the single market, enabling free movement of goods, services, capital and people within the EEA. Moreover, the EEA Agreement covers competition and state aid matters, consumer protection, energy, environmental and social policies, as well as other areas. Iceland is also aligned with the EU on key foreign policy issues as well as security and defence matters, *inter alia*, through NATO. Additionally, Iceland is a member of the Schengen Agreement, through which it cooperates with the EU on justice and home affairs matters.[7]

1.1.2 Iceland and Energy

Despite its size, Iceland is a significant producer of energy. However, it is not solely the amounts of energy produced which might pique one’s interest, but also the methods used for production. Of the 19.606 GWh produced in 2024, 69% were produced via hydroelectric methods and roughly 31% through geothermal power plants.[8] As such, essentially all energy in Iceland is produced using renewable resources. In this context it is worth noting that in a 2022 progress report compiled by IEA, IRENA, UNSD, the World Bank and WHO, tracking the UN’s Sustainable Development Goal 7, Iceland was found to have the highest share of modern renewables in final energy consumption of any country in the world, or 82.21%.[9]

Naturally, Iceland is also a large user of electrical power. In fact, according to data collected by the World Bank Group, Iceland’s electric power consumption of 48.998 kWh per capita in 2024 was the highest in the world.[10] This is not least because of several heavy industries that have been set up in Iceland over the last decades in order to make use of the energy produced there. According to information provided by Iceland’s National Energy Company, Landsvirkjun, energy-intensive users[11] account for around 80% of all electricity usage in Iceland. Other industries then use roughly 15% of the electricity produced in Iceland, whilst Icelandic homes only account for around 5% of usage.[12] Landsvirkjun, Iceland’s largest power company, has entered into PPAs with many of these energy-intensive users. These PPAs have come

[7] Leclerc (n 3).

[8] ‘Raforkuvinnsla á Íslandi eftir uppsprettu og framleiðendum’ (*Icelandic Environment and Energy Agency*) <https://uos.is/raforkueftirlitid/greiningar-og-gogn/raforkuvinnsla> accessed 13 April 2026. It should be noted that Iceland also produced 12.7 GWh using wind farms and 3.3 GWh using oil in 2024.

[9] IEA and others, ‘Tracking SDG 7: The Energy Progress Report’ (2022).

[10] ‘Electric power consumption (kWh per capita) – Iceland’ (*World Bank Group*) <https://data.worldbank.org/indicator/EG.USE.ELEC.KH.PC?locations=IS> accessed 14 April 2026.

[11] A user is considered an energy-intensive user if it uses 80 GWh per year at a single location, cf. Art. 3(20) of the Electricity Act, No. 65/2003.

[12] ‘Raforkumarkaðurinn’ (*Landsvirkjun*) <https://www.landsvirkjun.is/raforkumarkadurinn> accessed 16 April 2026.

under significant scrutiny by ESA, which has examined whether they constitute State aid on several occasions.[13] Moreover, the PPAs have routinely been a source of heated discussion in Iceland, not least regarding the amounts paid for energy.[14]

1.2 Research and Methodology

1.2.1 Research Question

Given Iceland's possible accession to the EU, the legal status of the PPAs has become even more relevant. As such, this thesis seeks to explore the differences in State aid enforcement in the EU and in the EFTA countries, and whether any such differences could affect the legal status of the PPAs if Iceland were to join the EU. The focus on possible shifts in enforcement specifically is necessary since Iceland is already subject to the State aid rules of the EU via the EEA Agreement, cf. Chapter 1.2.2 below. In line with this, the thesis will address the following question:

> If Iceland were to accede to the EU, would possible shifts in State aid enforcement be likely to affect the legal status of power purchase agreements entered into by Landsvirkjun and energy-intensive users?

1.2.2 Delimitation

Here, it is important to note that PPAs are confidential agreements between Landsvirkjun and the pertinent energy-intensive users.[15] However, information on the content of the agreements can be gleaned from ESA's previous decisions, as well as publicly published information in Iceland and reports on the topic, namely a 2020 report compiled by the Fraunhofer Institute for Systems and Innovation Research.[16] The confidentiality of the PPAs must nevertheless be kept in mind in the context of this thesis, since it results in information pertinent to the research question not being fully accessible.

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[13] An overview of these decisions is found in Chapter 3.3.

[14] See 'Hræðilegur samningur við Alcoa' (*Kjarninn*, 15 April 2016) <https://kjarninn.heimildin.is/skodun/2016-04-15-hraedilegur-samningur-vid-alcoa/> accessed 17 April 2026; 'Ráðherra vill að stjóriðjan birti samninga við Landsvirkjun' (*Vísir*, 23 July 2020) <https://www.visir.is/g/20201994267d/radherra-vill-ad-storidjan-birti-samninga-vid-landsvirkjun> accessed 17 April 2026.

[15] Ragnheiður E Árnadóttir (Minister of Industry and Trade), 'Svar iðnaðar- og viðskiptaráðherra við fyrirspurn frá Vigdísi Hauksdóttur um stóriðju og orkuverð' (Parliamentary Document no 646, 145th parliamentary session, 2015–2016). It should be noted that PPAs with Norðurál have been made public.

[16] Lin Zheng and Barbara Breitschopf, 'Electricity Costs of Energy Intensive Industries in Iceland: A Comparison with Energy Intensive Industries in Selected Countries' (Fraunhofer Institute for Systems and Innovation Research ISI 2020).

Additionally, due to length restrictions, the thesis is limited to PPAs concerning Landsvirkjun, and not those entered into by other smaller power companies in Iceland.[17] Similarly, ESA decisions which pertain to the Icelandic electricity sector, but do not explicitly concern PPAs, fall outside the scope of the thesis. Thus, decisions on, *inter alia*, transmission agreements,[18] public involvement in construction projects,[19] state guarantees granted to Landsvirkjun,[20] and publicly owned land and natural resources used by electricity producers[21] are not examined specifically.

Finally, the thesis operates on the assumption that the substantive State aid rules within the EU and the EEA are largely materially analogous, since the EEA Agreement covers, *inter alia*, State aid.[22] As such, divergencies in the enforcement of State aid between the EU and the EEA will be the sole focus herein. Whilst there are other aspects that might hypothetically affect the legal status of the aforementioned PPAs, e.g., exemptions granted to Iceland in the accession negotiations, such aspects fall outside of the scope of this thesis.

1.2.3 Methods, Materials and Literature Review

In order to accomplish the objective described above, this thesis will employ doctrinal legal research. Thus, comparative legal research forms the most important part of the thesis, since, at its core, the research question involves the comparison of State aid enforcement in two different legal spheres. Moreover, in order to fully explore the research question and compare the two enforcement systems, traditional doctrinal research must take place. Given the confidentiality of the PPAs, the doctrinal research pertains primarily to the analysis of judgements, decisions and other enforcement actions concerning

[17] As of 2020, Landsvirkjun contributed to 71% of all electricity generation in Iceland. Reykjavík Energy ON then produced around 17%, and HS Orka approximately 7%, cf. Zheng and Breitschopf (n 16) 9.

[18] See *Transmission of electricity to PCC at Bakki* (77190) ESA Decision 206/15/COL [2015] OJ C282/3.

[19] See *Financing and tax measures concerning the construction of an aluminium plant in the township of Fjarðabyggð* (03-1411 I) ESA Decision 40/03/COL [2003] OJ C127/34; *Investment aid to PCC Bakki* (74081) ESA Decision No 111/14/COL [2014] OJ L207/42; *Investment aid in favour of Silicor Materials* (79243) ESA Decision No 161/16/COL [2016] OJ C447/11.

[20] See *Existing state aid granted to Landsvirkjun and Orkuveita Reykjavíkur through unlimited state guarantees* (70958) ESA Decision No 302/09/COL [2009] OJ C237/3; *Landsvirkjun's state guarantees and derivatives contracts* ESA Decision 83/18/COL [2019] OJ L27/42.

[21] See *The use of publicly owned land and natural resources by electricity producers in Iceland* (78027) ESA Decision 010/17/COL [2017] OJ C123/4.

[22] The scope of the EU Treaties and the EEA Agreement are not identical. As regards State aid, product coverage provisions are different, and aid to the fisheries sector is regulated differently within the EEA EFTA States, see Jörgen Hettne, 'State Aid' in Graham Butler (ed), *Research Handbook on EEA Internal Market Law* (Edward Elgar Publishing 2025) 202; Maria Segura, Egill Olafsson and Marianne Clayton, 'The EEA and EFTA States' (2018) 17(4) *European State Aid Law Quarterly* 556.

State aid in the energy sector in the EU and the EEA, as well as public statements made by Landsvirkjun.[23]

The research will focus on the primary law most relevant to State aid, namely Art. 107-109 TFEU and Art. 61-64 of the EEA Agreement. Additionally, relevant secondary law will be explored. Importantly, relevant enforcement decisions and jurisprudence on State aid in the energy sector will also be examined and compared in order to answer the research question. As to literature and articles relevant to the thesis, it shall be noted that whilst the topic of State aid in the EU has been thoroughly covered in legal academia, there is, perhaps naturally, less written about State aid as it pertains specifically to the EEA EFTA States. As such, this thesis must rely to some extent on other materials such as reports, guides and governmental websites. Finally, the only way in which Generative Artificial Intelligence is employed in this thesis is to review spelling and formatting.

1.2.4 Outline

Following this introductory chapter, Chapter 2 will provide an overview of current EU/EEA legislation on State aid, both primary and secondary law. Moreover, the chapter will provide an outline of State aid enforcement in the region and the entities tasked with said enforcement. Next, Chapter 3 focuses on the PPAs themselves, providing some historical background on Iceland's energy sector, before examining ESAs existing decisional practice regarding the PPAs. Chapter 4 then explores the changes Iceland's accession to the EU could bring to State aid enforcement, comparing the practices of the Commission and ESA, while also looking at EU jurisprudence in the area, potential enforcement gaps, as well as relevant political issues. The aim of the chapter is thus to sum up the relevant State aid enforcement issues which might prove pertinent to the PPAs. Finally, Chapter 5 will bring together the previous chapters in order to provide an answer to the research question.

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[23] See, e.g., Terry Hutchinson, 'Doctrinal research' in Dawn Watkins and Mandy Burtin (eds), *Research Methods in Law* (3rd edn, Routledge 2025) 8.

2 State Aid in the EU/EEA and its Enforcement

2.1 Key Legislation Governing State Aid in the EU/EEA

2.1.1 Primary Legislation

The first subsidy control rules relevant to the ECSC, the predecessor of the EU, were then introduced in the Treaty of Paris in 1951. As per Art. 4(c) of said Treaty, subsidies were incompatible with the common market for coal and steel and were strictly and unconditionally banned.[24] This strict approach was not replicated in the drafting of the Rome Treaties. Instead, a more balanced method was introduced in the Treaty establishing the EEC. The core article pertaining to State aid was found in Art. 87 of the Treaty establishing the EEC, which is now Art. 107 TFEU. The first paragraph of the article provides that 'Save as otherwise provided in the Treaties, any aid granted by a Member State 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 Member States, be incompatible with the internal market.' Accordingly, for a measure to constitute State aid as per the article, it must be: i) granted by the State or through State resources, ii) confer an economic advantage on the beneficiary, iii) selective, and iv) liable to affect trade between Member States and distort competition.[25]

Art. 107(2) then goes on to describe aid that shall be compatible with the internal market, whilst Art. 107(3) lists aid that *may* be considered compatible. Thus, the TFEU, and previously the EEC Treaty, provide for a mixed approach, coupling incompatibility with threats to competition and effect on Member State trade, while also providing numerous exceptions, instead of introducing a strict, unconditional ban on State aid.[26] Next, Art. 108 TFEU sets out procedural rules which apply in different scenarios pertaining to State aid. Firstly, Art. 108(1) pertains to existing State aid, noting that the Commission, along with Member States, shall keep under review any such existing aid. This applies even when the Commission has greenlit such aid in line with

[24] Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From internal market to competition and beyond* (Oxford University Press, 2015) 21-35.

[25] See, e.g., *Power contract between Landsvirkjun and Íslenska kísilfélagið ehf* (69969) ESA Decision No 392/11/COL [2012] OJ C76/10.

[26] Piernas López (n 24) 34-35. For a detailed breakdown of the definition of State aid see Frank Montag and Franz Jürgen Säcker, 'Article 107 TFEU' in Franz Jürgen Säcker and Frank Montag (eds*), European State Aid Law: A Commentary* (Bloomsbury Publishing 2016) 51.

Art. 107.[27] Secondly, Art. 108(2)-(3) provide a two-fold mechanism concerning new State aid. In short, the Commission is to be informed of any plans to grant or alter aid, cf. Art. 108(3), which also allows for a preliminary review of any such plans to take place. However, if the results of a preliminary review are not positive, Art. 108(2) applies, which provides as follows: 'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'[28]

Art. 109 rounds out the section on State aid within the TFEU. The article allows the Council, following a proposal by the Commission and consultation with the European Parliament, to make regulations concerning the application of Art. 107 and 108.

As to the EEA EFTA States, Art. 61-64, alongside Art. 49 and 59 of the EEA Agreement, set forth the primary framework concerning State aid. Here, Art. 61 of the EEA Agreement mirrors Art. 107 TFEU almost entirely, providing for a ban on certain aid while also listing aid that is and may be considered compatible with the functioning of the EEA Agreement.[29]

2.1.2 Secondary Legislation and Soft Law

Notwithstanding the abovementioned Treaty articles, it is important to highlight some of the secondary legislation, as well as soft law, applicable in the field. On the basis of the aforementioned Art. 109 TFEU, several regulations have been introduced by both the Council, as well as the Commission, acting on power delegated to it by the Council.[30] These include the Procedural Regulation,[31] which sets out key rules on the enforcements, monitoring and examining of State aid,[32] in addition to several regulations which touch upon

[27] Paul Craig and Gráinne de Búrca, *EU Law* (8th edn, Oxford University Press 2024) 1179.

[28] *Ibid*. 1179-1183.

[29] Notwithstanding references to EFTA-specific concepts, the only way in which Art. 61 of the EEA Agreement deviates materially from Art. 107 TFEU is that Art. 61 of the EEA Agreement does not include a reservation like the one found in Art. 107(3)(d) TFEU, which states that aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest, may be considered to be compatible with the internal market.

[30] Craig and de Búrca, (n 27) 1165-1166.

[31] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9.

[32]'State Aid Procedures' (*European Commission*) <https://competition-policy.ec.europa.eu/state-aid/procedures_en> accessed 29 April 2026.

industry specific issues and exemptions, including a de minimis regulation and a general block exemption regulation ('GBER').[33]

Interestingly, this recourse found within Art. 109 TFEU has been used relatively sparingly.[34] This is not least because of the use of guidelines, a form of soft law, which the Commission may adopt in order to clarify how it will exercise its discretion to assess State aid compliance, cf. Art. 107(3) TFEU.[35] Whilst guidelines are not strictly legally binding on Member States, they entail *de facto* limits on how Member States implement State aid. This is because the guidelines bind the Commission itself, and since it has exclusive power to assess notified aid, the guidelines ultimately effect Member States, even if such effects are indirect.[36] The guidelines on State aid for climate, environmental protection and energy ('CEEAG') are undoubtedly the most important guidelines as regards the energy sector. The current version of CEEAG were introduced in 2022, replacing an older version from 2014, and were, *inter alia*, intended to help Member States meet the objectives of European Green Deal by aligning the guideline with EU legislation and policies concerning environmental and energy sectors.[37]

As for the EFTA Member States, binding secondary legislation on State aid is contained within Annex XV to the EEA Agreement.[38] These include the GBER, the de minimis regulation, and more. A great deal of guidelines have also been adopted by ESA, both regarding procedural issues as well as sector

[33] Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2023] OJ L2023/2831; Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1; 'State Aid Regulations' (*European Commission)* <https://competition-policy.ec.europa.eu/state-aid/legislation/regulations_en> accessed 29 April 2026.

[34] Craig and de Búrca, (n 27) 1183.

[35] Sofia Gierow, 'Beyond Administrative Guidance: Legal Effects of State Aid Guidelines and the Need for Judicial Review' (2025) 21 European Competition Journal 189, 192-193.

[36] *Ibid*, 209-210. It should be noted that when guideline have been built into State aid schemes by Member States, they are binding on that Member State, cf. Case C-311/94 *Ijssel-Vliet Combinatie BV v Minister van Economische Zaken* [1996] ECR I-5023.

[37] See European Commission, 'Guidelines on State Aid for Climate, Environmental Protection and Energy 2022' [2022] OJ C80/1; 'Guidelines on State Aid for Climate, Environmental Protection and Energy 2022' (*European Commission*, 26 January 2022) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_566> accessed 1 May 2026.

[38] 'Legal Framework' (*ESA*) <https://www.eftasurv.int/state-aid/legal-framework> accessed 1 May 2026.

specific rules, including CEEAG, which was adopted by ESA with a decision dated 9 February 2022.[39] These guidelines are binding on ESA.[40]

2.2 Enforcement of State Aid within the EU/EEA

In the previous subchapter, an overview has been provided of the most important legislation relating to State aid in the EU/EEA. However, the topic of the enforcement of these rules, which is central to the question this thesis seeks to address, must be explored in a more detailed manner. As such, the following chapters will provide a look at the institutions tasked with enforcement, both judicial as well as non-judicial.

2.2.1 The Commission

The role of the Commission in matters of State aid was discussed briefly in Chapter 2.1.1, namely in relation to Art. 108 TFEU. Therein lies perhaps the central task of the Commission in this area, that is, its role as a watchdog, ensuring that Art. 107 TFEU is not breached. It accomplishes this task through a variety of means, e.g., by reviewing aid that has been notified in accordance with Art. 108(3). Additionally, on the basis of the Procedural Regulation, complaints against alleged unlawful State aid can be lodged by interested parties, which Art. 1(h) of the Procedural Regulation defines as 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.'[41]

When enforcing State aid, the Commission must examine multiple factors, including the presence of state resources, the selectivity of a measure and effect on competition and trade between Member States. Importantly, it must also assess whether measures provided by Member States are in line with those acceptable to a private commercial operator, which is often referred to as the MEO test. In its application of the test, the Commission has developed distinct methods for establishing compliance, which can be broadly categorised in the following four groups.[42] Firstly, MEO compliance can be demonstrated where transactions take place *pari passu* by the Member State and the private operator. Secondly, sales of assets, goods and services can be consid-

[39] ESA Decision No 029/22/COL of 9 February 2022 amending the substantive rules in the field of State aid by introducing new Guidelines on State aid for Climate, Environmental Protection and Energy 2022 [2022] OJ L277/218.

[40] For an overview of guidelines on State aid adopted by ESA, see 'State Aid Guidelines' (*ESA*) <https://www.eftasurv.int/state-aid/state-aid-guidelines> accessed 2 May 2026.

[41] For further information, see 'State Aid Complaint Form' (*European Commission*) <https://competition-policy.ec.europa.eu/state-aid/complaints_en> accessed 2 May 2026.

[42] Nicole Robins and Laura Puglisi, 'The Market Economy Operator Principle: An Economic Role Model for Assessing Economic Advantage' in Leigh Hancher and Juan Jorge Piernas López (eds), *Research Handbook on European State Aid Law* (2nd edn, Edward Elgar Publishing 2021) 15. See also Montag and Säcker (n 26) 168-237 as regards a further breakdown of scenario-specific MEO tests.

ered to be compliant with the MEO test if they are carried out following competitive and legally sound tender procedures. Thirdly, benchmarking analysis may be employed. In such instances, price and other terms of a public measure are compared with analogous transactions undertaken by private entities, in order to establish a range of possible values. The relevant public measure must then fall within the that range in order to pass the MEO test. Fourthly, profitability analysis entails the comparison of the expected return of a public measure with a level of return which a private entity would, under such circumstances, deem acceptable. If the expected return of a public measure is thus higher than what a private entity would require from projects involving similar risk, it is not considered to entail an economic advantage, cf. Art. 107 TFEU.[43]

Formal investigations made by the Commission, e.g. under Art. 108(2) TFEU or following complaints, can result in three separate outcomes. Firstly, the Commission can deem a measure compatible with the internal market. Secondly, it can find a measure compatible with internal market, subject to specific conditions. Thirdly, the Commission can find that a measure is incompatible with the internal market. When the result of an investigation is negative, the Commission generally orders the pertinent Member State to recover aid already paid out. However, where a decision on existing aid is made, the recovery of aid already given is not permitted, whilst future aid is barred.[44]

Notwithstanding the Commissions role as a watchdog, it is worth reiterating that it also acts as a developer of policy in the area. It holds considerable power to legislate as regards State aid, on the basis of Art. 109 TFEU, in instances where the Council has delegated power to the Commission, and introduces guidelines, like previously mentioned. In addition to this, it develops policy in the area through its decisions.[45] Taken as a whole, it is therefore clear that significant power lies with the Commission in the area of State aid.

2.2.2 ESA

The role of ESA as regards the enforcement of State aid in EFTA countries is in many ways the same as the Commission's role as regards the EU, i.e., its core role is that of surveillance. However, the EEA Agreement approaches surveillance of State aid in a slightly different manner than the TFEU. As such, Art. 62(1) sets out that all existing systems of State aid, as well as plans to grant or alter State aid, are subject to constant review as regards their compatibility with Art. 61 of the EEA Agreement. The article clarifies that, as regards the EEA EFTA States, ESA is responsible for carrying out such reviews according to the rules set out in an agreement between the EEA EFTA States establishing ESA, whilst the Commission is carry out such reviews as relates to the EU Member States. Moreover, Art. 62(2) states that, in order to

[43] *Ibid*, 21-38.
[44] European Commission (n 32).
[45] Craig and de Búrca (n 27) 1165-1166.

ensure uniform surveillance of State aid, the Commission and ESA are to cooperate in accordance with provisions set in Protocol 27 to the EEA Agreement, which is important to avoid diverging policies.[46] Subsequently, Art. 64 handles situations in which either the Commission or ESA consider that the implementation by the other surveillance authority of Art. 61 and 62 of the EEA Agreement is not in conformity with the maintenance of equal conditions of competition within the EEA. In such situations, an exchange of views shall be held. If an agreed solution has not been found within two weeks of such an exchange, interim measures may be adopted to remedy the pertinent distortion of competition, which may become definitive if no commonly acceptable solution is found.[47]

Moreover, it must be kept in mind that ESA does not hold the same influence over policy as the Commission. Instead, it follows guidelines set by the Commission, as well as other relevant rules and legislation developed by the Commission and other EU institutions.

2.2.3 EU and EFTA Courts

All decisions made by the Commission, as well as all procedural acts, are subject to judicial review by the EU Courts. However, case law has shown that the courts are mindful of how intricate the evaluations of social and economic data involved in State aid cases are. As a result, in matters pertaining to Art. 107(2) and 107(3), the EU Courts generally do not go against the views of the Commission. Instead, they limit their review to procedural rules, the facts on which the decision was based and whether any manifest errors of assessment or misuses of power took place.[48] The same can be said about the EFTA Court, as regards decisions made by ESA.[49]

Nevertheless, the EU Courts have of course had an impact on the overall development of State aid within the EU. Thus, Piernas López has argued that the legal concept of State aid has evolved in conjunction with the general evolution of case law of the Court of Justice. In this context, he notes that in the 1970s and 1980s, the Court of Justice routinely supported the Commission's proposals, even going beyond them in order make the State aid rules operational.[50]

[46] Jörgen Hettne, 'State Aid' in Graham Butler (ed*), Research Handbook on EEA Internal Market Law* (Edward Elgar Publishing 2025) 202, 217-219.

[47] *Ibid*.

[48] Craig and de Búrca (n 27) 1165. See also Case T-198/01 *Technische Glaswerke Ilmenau GmbH v Commission* [2004] ECR II-2717; Case T-189/03 *ASM Brescia SpA v Commission* [2009] ECR II-1831; Hettne (n 46) 223.

[49] Hettne (n 46) 224.

[50] Piernas López (n 24) 253-256; Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 58; Case 173/73 *Italy v Commission* [1974] ECR 709.

2.2.4 National Courts

Finally, national courts play a complementary role alongside the Commission as regards the implementation of State aid control. Namely, in cases where unlawful aid is granted, e.g., when Member States have failed to obtain authorisation from the Commission before putting a State aid measure into effect, national courts safeguard the rights of those third parties impacted.[51] Fernando Pastor-Merchante and Giorgio Monti summarised the role of national courts in State aid enforcement in the following manner:

> To sum up, EU law assigns to national courts the role of enforcing the stand- still clause against any attempt by national authorities to put in place their State aid plans without the prior authorization of the Commission. In their role as guardians of the procedure, national courts may be called to discharge two different functions. Their first function is 'prophylactic': if seized on time, national courts must prevent unlawful State aid measures from reaching the market. Their second function is 'restorative': to the extent that it is no longer possible to achieve that goal, their mission is to restore the market to the situation in which it would be if the implementation of the unlawful aid had not taken place (the but-for scenario). In order to do so, national courts may have to take action along different axes, including recovery of the value of the contested measure, along with the illegality interest, as well as compensation of damages suffered by third parties and restitution of any taxes specifically levied with the aim of funding unlawful aid measures.[52]

The role of national courts if further expounded upon in Commission Notice 2021/C 305/01, which also clarifies how cooperation between national courts and the Commission is to take place.[53] As for the national courts in EEA EFTA States, their roles are also primarily limited to safeguarding the rights of third parties.[54] However, as Chapter 4.3,1 below explains, this role does not appear to have been fully implemented in the EEA EFTA States.

[51] European Commission (n 32).

[52] Fernando Pastor-Merchante and Giorgio Monti, 'The Functions of National Courts in the Private Enforcement of State Aid Law' in Pier L Parcu, Giorgio Monti and Marco Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2019) 121, 138-139.

[53] Commission Notice on the enforcement of State aid rules by national courts [2021] OJ C305/1.

[54] Hettne (n 46) 222.

3 Landsvirkjun's Power Purchase Agreements

3.1 General Information on PPAs

Landsvirkjun, which is a public partnership company, was established jointly by the Icelandic State Treasury and the City of Reykjavík, in 1965, in connection to an agreement between the Government of Iceland and Alusuisse (later acquired by Alcan) regarding the construction of an aluminium plant in Iceland.[55] As such, Landsvirkjun's history is directly intertwined with the development of heavy industries in Iceland. The company is governed by Act No 42/1983 on Landsvirkjun and has, since January 2007, been wholly owned by the State Treasury of Iceland.[56] During the first decades of its existence, Landsvirkjun focused primarily on the construction of new power plants, but following implementation of competitive power markets in Iceland in 2003, its emphasis moved towards focusing on marketing and operations.[57]

According to information provided by Landsvirkjun, it is currently entered into PPAs with 11 different energy-intensive users. The users can be categorized into four different industries, i.e., aluminium production (four companies),[58] ferrosilicon/silicon metal producers (two companies), data centres (three companies) and land-based salmon farming (two companies).[59] Additionally, Landsvirkjun sells its energy at a wholesale level to ten different redistributors.[60]

3.2 2020 Fraunhofer Report

As was explained in Chapter 1, the PPAs are largely confidential. However, in addition to the ESA decisions discussed below, a report compiled in 2020 by the Fraunhofer Institute gives some insight into electricity costs of energy-intensive users in Iceland. The report was compiled at the request of the Government of Iceland, following disputes about electricity prices and their impacts on the competitiveness of energy-intensive industries. [61] The Fraunhofer

[55] Hörður Árnason, 'Raforkuverð og hlutverk Landsvirkjunar' (*Viðskiptablaðið*, 15 January 2026) <https://vb.is/skodun/raforkuverd-og-hlutverk-landsvirkjunar-/> accessed 2 May 2026; *Power contract between the National Power Company in Iceland (Landsvirkjun) and Alcan for Straumsvík Aluminium Plant* (68563) ESA Decision No 391/11/COL [2011] OJ C76/9 12.

[56] *Sale of electricity to Norðurál* (79525) ESA Decision No 193/16/COL [2017] OJ C26/7.

[57] *Arbitral award between Landsvirkjun and* Elkem (83877) ESA Decision No 064/19/COL [2019] OJ C419/11 9.

[58] Alcoa, Norðurál and RioTinto all operate aluminum smelting plants, while TDK Foil Iceland is a producer of aluminum foils.

[59] 'Viðskiptavinir Landsvirkjunar' (*Landsvirkjun*) <https://www.landsvirkjun.is/vidskiptavinir> accessed 2 May 2026.

[60] *Ibid*.

[61] Zheng and Breitschopf (n 16) 5.

Institute was given access to pricing information regarding all but one of the energy-intensive users, but the data itself is not presented in the report, as it is confidential.[62] As regards the Icelandic electricity market itself, the report found that high upfront investment costs could lead to 'risk exposures for suppliers to agree on electricity prices that cover only their operational costs.'[63] It also noted that beside long-term planning failure, that there existed 'no functioning market mechanism' but instead a situation where a dominant electricity supplier entered into confidential contracts with a handful of energy-intensive users. In this context, the report states that only market transparency and clear trading rules, including information on prices, could ensure a functioning price mechanism and trust in the market. [64]

Notwithstanding the foregoing, the report ultimately found that electricity prices in Iceland were, in general, competitive in the contexts that were investigated in the report, cf. the following extract:

> In summary, electricity prices in Iceland vary across industries and contracts. The prices within an industry show similar levels or ranges compared to their competitors in the comparison countries and do not negatively impact the energy intensive industries' competitiveness in general. However, there might be specific cases (contracts) that pose challenges to Icelandic companies. With respect to other drivers of competitiveness, such as energy efficiency, flexibility and circular economy, Icelandic industries and energy suppliers generally have advantages. Nevertheless, there is in some cases room for improvements. Besides energy prices and efficiency, many other factors, such as state subsidies, tax reduction for operation or investment, reduced pollution standards, grants for investments or research and development efforts, economies of scale, proximity to markets, etc., affect the competitiveness of companies.[65]

3.3 ESA Decisional Practice Regarding PPAs

In order to fully answer the research question at the centre of this thesis, it is crucial to look into the cases concerning PPAs entered into by Landsvirkjun, that have already been reviewed by ESA. As such, the following subchapters provide an insight into the instances in which ESA has made such decisions, including the only time were ESA initiated an in-depth investigation (see Chapter 3.3.5 – PCC Silicon). Again, it is important to note that while all of

[62] Ragnhildur Sverrisdóttir, 'Staðreyndir um stærstu samningana' Fréttablaðið (26 January 2021) 12.
[63] Zheng and Breitschopf (n 16) 16.
[64] *Ibid.*
[65] *Ibid* 46.

the decisions listed below concern PPAs, ESA has also delivered further decisions which concern other aspects of Iceland's energy market, cf. Chapter 1.2.2.

3.3.1 Decision 174/98/COL – Norðurál I

The first PPA-related decision delivered by ESA pertained to public involvement in agreements concerning the construction and operation of an aluminium smelter at Grundartangi, which, *inter alia*, included a PPA between Landsvirkjun and Norðurál Grundartangi ehf. ('Norðurál'). However, given that the decision only pertained partially to a PPA, and ESA's examination of the agreement was rather brief, its value as a precedent is perhaps limited. Notwithstanding this, ESA ultimately found that the PPA did not entail State aid, primarily on the basis that calculations provided by Landsvirkjun estimated an acceptable rate of return (6.5%) on the investments relevant to the PPA.[66]

3.3.2 Decision 391/11/COL – Alcan

ESA's next decision marks the first instance where ESA's examination was limited to a PPA, and no other related investment agreements. The decision concerned a PPA entered into by Landsvirkjun and Alcan Iceland Ltd., signed on 15 June 2010 and notified to ESA by Icelandic authorities on 9 July 2010. This PPA had a duration of 25 and a half years and replaced on older agreement between the same parties, but Alcan had operated an aluminium smelting plant in Iceland since 1969.[67] The parties entered renegotiations, *inter alia*, since Landsvirkjun had concluded that the terms that had been offered to Alcan were not acceptable, citing an assessment conducted by CRU, which found that out of 184 aluminium smelting plants in the world, Iceland provided the fourteenth lowest price worldwide, and the third lowest in Europe.[68]

The terms of the new PPA were reviewed by ESA, which started its assessment by examining whether the measure at hand was imputable to the Icelandic State. ESA found, that 'in light of the legal status of Landsvirkjun, the past evident use of Landsvirkjun as a tool to attract foreign investment and the general circumstances', that it could not exclude that the measure was imputable to the Icelandic State, and that it had in fact entailed state resources.[69]

Next, ESA examined whether the measure favoured certain undertakings or the production of certain goods and applied the MEO test. In doing it so, it

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[66] *Public involvement in agreements concerning the construction and operation of an aluminium smelter at Grundartangi* (98-1960-I) ESA Decision No 174/98/COL [1998] OJ C337/7.

[67] *Power contract between the National Power Company in Iceland (Landsvirkjun) and Alcan for Straumsvík Aluminium Plant* (68563) ESA Decision No 391/11/COL [2011] OJ C76/9 3-17.

[68] *Ibid* 21.

[69] *Ibid* 50.

first looked at the potential profitability of the construction of the power plant that was necessary in order to deliver the power according to the PPA, concluding that appeared to yield an 'acceptable return' on the basis of profitability calculations provided by Landsvirkjun. Next, ESA moved on to verifying that the price and other terms of the PPA reflected market price. However, that proved to be somewhat problematic, as the following extract shows:

> In the case at hand, however, a market price for electricity to power intensive industry in Iceland is not readily available. In this respect it should be noted that there is no alternative outlet in the general Icelandic market for supply of electricity of the magnitude as in the case at hand. The isolated and limited size of the Icelandic market for general consumption of electricity would not be able to absorb the production generated by Landsvirkjun. The only outlet would be, as in the current case, large industrial consumers located in Iceland. The isolation of the market also means that the benchmark cannot be established as being the price in Europe.
>
> In the absence of a relevant benchmark the Authority must rely on the information provided by the Icelandic authorities on the average price paid to Landsvirkjun in the past under the contracts with other power intensive businesses as described under paragraph 37 above, also considering the background of the Power Contract and the much less favourable terms for Landsvirkjun in the Old Contract.[70]

Consequently, ESA found that it had to rely on information provided by Icelandic authorities on the average price paid to Landsvirkjun in past agreements made with energy-intensive users. Ultimately, ESA concluded that the terms of the PPA fell within the margin of discretion that public companies enjoy in running their business, citing that it provided for more favourable pricing than the previous agreement between the parties, *inter alia*, since the price was no longer linked with aluminium prices. Moreover, ESA noted that the existence of a mid-term revision clause and a take-or-pay obligation supported this conclusion.[71] Given this, ESA concluded that the notified PPA did not constitute State aid.

3.3.3 Decision 392/11/COL – Íslenska Kísilfélagið

On the same day that ESA delivered it decision in the Alcan case, it also delivered a decision pertaining to a PPA between Landsvirkjun and Íslenska Kísilfélagið ehf. This agreement was made in connection with plans to construct a silicon metal production plant and had a duration of 18 years. In order to deliver the total amount of energy agreed upon in the PPA, Landsvirkjun

[70] *Ibid* 62-63.
[71] *Ibid* 64-66.

would have had to construct a new hydro power plant, which it planned to do at Búðarháls in Iceland.[72]

ESA's examination of the agreement was in almost all aspects the same as in the Alcan case. ESA again found that it could not exclude that the conclusion of the PPA was imputable to the State and then applied the MEO test. It cited the same challenges in identifying applicable market prices and ultimately concluded that the terms of the agreement fell within the margin of discretion that public companies enjoy in running their business. To support this decision, ESA put forward four distinct arguments. Firstly, it noted that the base price that was to be paid according the PPA was higher than prices paid by other large users, and that payment would be guaranteed due to a take-or-pay obligation. Secondly, ESA cited the fact that the agreement contained annual increases and no linkages to world markets prices, as was done in previous agreements, thus removing a business risk for Landsvirkjun. Thirdly, ESA cited the duration of the agreement, in that it was shorter than the average duration of existing agreements, allowing for further pricing flexibility. Fourthly, and lastly, ESA referenced the fact that Landsvirkjun had demonstrated the profitability of the construction project at Búðarháls, which was necessary to deliver the full contract power, which it deemed an indicator that the contract was in line with market terms. As such, ESA concluded that the notified PPA did not constitute State aid.[73]

3.3.4 Decision 67/15/COL – United Silicon

The next decision was delivered by ESA on 25 March 2015 and concerned a PPA between Landsvirkjun and United Silicon. Whilst the decision is in many ways comparable to the ones concerning Alcan and Íslenska Kísilfélagið, it is more detailed. This is, *inter alia*, the case because ESA also examined a transmission agreement which was made in conjunction with the PPA.[74]

ESA's assessment regarding the presence of State aid also differs slightly from the previous cases, as it does not start by examining the imputability of the measure, stating that it was 'only relevant if the Power Contract is not concluded on market conditions in line with the market economy operator (MEO) test.'[75] Again, ESA reference the lack of market prices due to the peculiarities of the Icelandic market. In that context, the decision notes that ESA would have to base its examination on 'indicators other than "*pari passu*" transactions; an open, transparent, non-discriminatory and unconditional tender procedure; or benchmarking (comparable transactions carried out by comparable private operators in comparable situations).'[76] As such, ESA took into

[72] *Power contract between Landsvirkjun and Íslenska kísilfélagið ehf.* (69969) ESA Decision No 392/11/COL [2011] OJ C76/10 12-22.

[73] *Ibid* 29-50.

[74] *Sale and transmission of electricity to United Silicon hf.* (75358) ESA Decision No: 67/15/COL [2015] OJ C232/12 27-51, 76-96.

[75] *Ibid* 61.

[76] *Ibid* 66.

account calculations provided by Landsvirkjun, which showed that average prices in the PPA were higher than average costs of production of electricity in its current system. ESA noted that these calculations were a strong indicator of the PPA being in line with market terms. Additionally, ESA noted that the duration of the agreement was shorter than existing PPAs and cited the existence of a bonus arrangement in the PPA, along with a take-or-pay obligation and curtailment options, all of which reduced risks for Landsvirkjun. Interestingly, ESA explicitly referenced its decision in the Íslenska Kísilfélagið case, noting that '[t]he prices and terms negotiated in the Power Contract currently under assessment, for the same volume of energy as in the previous contract, are not less favourable for Landsvirkjun than in the contract entered into with Íslenska Kísilfélagið ehf.', which further indicated that the PPA was on market terms. [77]

With reference to the foregoing, ESA found that the PPA fell within the margin of discretion that public companies enjoy in running their business, and that it did not constitute State aid.[78]

3.3.5 Decisions 543/14/COL and 207/15/COL – PCC Silicon

ESA has delivered a total of five decisions relating to the PCC silicon metal plant. This line of cases started with decision 111/14/COL, where ESA greenlit the granting of regional investment aid for the construction of a silicon metal smelter at Bakki in the Northeast part of Iceland, by PCC BakkiSilicon hf ('PCC').[79]

Next, ESA delivered what is arguably its most interesting and detailed decision regarding PPAs, i.e., decision 543/14/COL. The matter pertained to a PPA entered into by Landsvirkjun and PCC in connection with the aforementioned silicon metal plant. As regarded imputability, ESA concluded that it was unable to exclude that the measure was imputable to the Icelandic State, citing similar reasonings as in the Alcan case, but also a letter of intent between the Government of Iceland and municipalities local to the area in which the plant was to be built.[80] ESA then moved on to the application of the MEO test, where it again underlined the challenges in terms of finding relevant market data and that data submitted by Landsvirkjun would thus have to form the basis of ESA's review. Here, however, ESA found that calculations provided by Landsvirkjun regarding the construction costs of a power plant at Þeistareykir, which was necessary in order to deliver the energy according the PPA, were suspect, cf. para. 98 of the decision:

[77] *Ibid* 67-72.

[78] *Ibid* 74-75.

[79] *Investment aid to PCC Bakki* (74081) ESA Decision No 111/14/COL [2014] OJ L2017/42. ESA ultimately found that the notified measures were in line with the general provision of the National Regional Aid Guidelines 2007–2013 [2006] OJ C54/13.

[80] *The Power Contract and the Transmission Agreement for the PCC Silicon Metal Plant at Bakki* (76459) ESA Decision No 543/14/COL [2014] OJ C92/3 61-82.

> Landsvirkjun has provided profitability calculations with and without already accrued costs. They demonstrate that building a 45 MW power station would not be profitable, taking into account the already accrued costs, by the estimated income generated by the Power Contract, as calculated by Landsvirkjun. Landsvirkjun has presented a base case with CAPEX of USD […] million and a discount rate (cost of capital) of […]%. Given these assumptions and the income generated by the Power Contract, the investment in the Power Station would not be profitable when the accrued costs are taken into account.

Furthermore, ESA noted that the PPA did not provide Landsvirkjun with the option to delay the start of delivery of the power and to provide the energy from an alternative source than the power plant at Þeistareykir. In fact, the PPA did not include any provisions relating to the Þeistareykir power plant, meaning Landsvirkjun bore all risk relating to its constructions, or delay thereof. Thus, for the first and only time in case concerning PPAs, ESA claimed that it had doubts that the PPA was concluded on market terms and found reason to open a formal investigation procedure.[81]

However, the formal investigation was eventually closed, cf. ESA Decision 238/15/COL. This was due to Icelandic authorities informing ESA that the 2014 PPA had been terminated via a mutual termination agreement signed by Landsvirkjun and PCC on 25 February 2015.[82] Moreover, on 31 March 2015, Icelandic authorities notified ESA of a new PPA entered into by Landsvirkjun and PCC. This new agreement was then examined by ESA in decision 207/15/COL where it reapplied the MEO test, finding that it was concluded on markets terms. Crucially, Landsvirkjun had submitted updated financial information regarding the power plant at Þeistareykir, which included calculations which appear to have been absent in the earlier decision. Landsvirkjun also identified other possible revenue streams relating to the PPA, including 'additional revenues through the sale of green certificates, bi-products coming from geothermal power plants such as hot water, low pressure steam, CO2 and H2S that can be developed into valuable products for sale, etc.'[83] With reference to these calculations, ESA found that the PPA would generate an acceptable rate of return for Landsvirkjun, citing also a take-or-pay obligation and flexible curtailment options, limiting risks for Landsvirkjun, as well as the fact that the duration of the PPA was shorter than the average existing PPAs.[84]

[81] *Ibid* 89-107.

[82] *2014 PCC Power Contract and 2014 Transmission Agreement* (76459) ESA Decision No 238/15/COL [2015] OJ C52/14.

[83] *Sale of electricity to PCC at Bakki* (77201) ESA Decision No 207/15/COL [2015] OJ C282/3 70.

[84] *Ibid* 51-72. It should be noted that ESA also concluded that a transmission agreement concerning the project did not constitute State aid, cf. ESA Decision No: 206/15/COL.

3.3.6 Decision 130/16/COL – Thorsil

Following the rather detailed assessment found in the PCC line of cases, ESA returned to a more straightforward examination in its decision concerning a PPA made between Landsvirkjun and Thorsil. The PPA was made in connection with Thorsil's plans of constructing a silicon metal plant in Helguvík, Iceland. The project, however, never came to fruition.[85] ESA's assessment of the PPA mirrors its previous decisional practice, as it references that profitability calculations provided by Landsvirkjun support the conclusion that the PPA had been concluded on market terms. Again, ESA also makes note of the existence of a take-or-pay obligation, curtailment rights and a shorter duration than in existing agreements.[86]

What is of interest, is that Landsvirkjun noted in its submissions that two new power plants were in development, but neither were directly related to the Thorsil PPA. Despite this, ESA also examined the PPA on the premise that investment in new power generation was in fact specific to the Thorsil PPA. This, however, did not change ESA's finding, i.e., that the agreement was concluded on market terms.[87]

3.3.7 Decision 193/16/COL – Norðurál II

ESA's penultimate decision regarding PPAs concerned an amendment made to the 1997 agreement between Landsvirkjun and Norðurál, which Icelandic authorities notified to ESA on 6 September 2016. In their comments, Icelandic authorities noted that the amendment, *inter alia*, concerned the linking of contract price to the Nordpool Elspot System Price,[88] instead of global aluminium prices. This was viewed as a positive step, since it allowed 'Landsvirkjun to sell power at the same prices as competing companies in the Nordic countries.'[89] ESA seemed to welcome this change, noting that it was in line with the practices of competitors in the Nordics.[90]

In its assessment, ESA examined the economic effects of this amendment in a similar manner as previously. It again relied heavily on Landsvirkjun's calculations and predictions. These calculations appear to be somewhat more detailed than before, as the decision references the specific methodology, software and parameters used in estimations performed by Landsvirkjun. It is also apparent that Landsvirkjun performed specific calculations relating to the aforementioned Nordpool Elspot System Price explicitly at the request of

[85] 'Ekkert verður af kísilveri og Thorsil gjaldþrota' (*Morgunblaðið*, 22 April 2026) <https://www.mbl.is/frettir/innlent/2026/04/22/ekkert_verdur_af_kisilveri_og_thorsil_gjaldthrota/> accessed 4 May 2026.

[86] *Sale of electricity to Thorsil* (79159) ESA Decision No 130/16/COL [2016] OJ C413/7 33-52.

[87] *Ibid* 45.

[88] For further information on Nordpool Elspot, see 'About us' (*Nord Pool*) <https://www.nordpoolgroup.com/en/About-us/> accessed 9 May 2026.

[89] ESA (n 56) 28.

[90] *Ibid* 47.

ESA.[91] ESA concluded that these calculations, which showed that there was a 90% probability that the amendment would achieve or surpass the required minimum rate of return, supported the conclusion that the PPA was concluded on market terms. Furthermore, ESA referenced the inclusion of a fairness clause and the fact that the amendment was more favourable than previous agreements as regarded transmission costs. Lastly, ESA highlighted that the contract extension that was agreed upon in the amendment exposed both parties to 'fair market risks since short-term direct exposure to power markets replaces long-term direct exposure to aluminium markets, and the short contract period gives Landsvirkjun the opportunity to renegotiate when the electricity markets and the aluminium markets may be more balanced.'[92] Thus, ESA once more found that the PPA did not constitute State aid.

3.3.8 Decision 064/19/COL – Elkem Iceland

The latest ESA decision concerning a PPA was delivered on 10 September 2019. This decision differed substantially from previous ones, since it pertained specifically to an arbitral award between Landsvirkjun and Elkem. The parties had entered into a PPA in 1975 in connection with the operation of a ferrosilicon plant in Hvalfjörður. Later, in 2007, the PPA was amended to include an arbitration clause in relation to the agreements' renewal in the future. This clause was then triggered in 2017, following unsuccessful renewal negotiations. Subsequently, in 2018, an arbitration tribunal took place which resulted in a new contract price being decided for the extension period of the PPA.[93]

In line with the foregoing, ESA did not examine the PPA in its entirety, noting that it deemed it unnecessary to determine whether the precise level of the power price resulting from the arbitration was in line with market conditions. Instead, ESA examined the arbitration clause itself and its parameters, and whether a prudent private market operator would have agreed to the inclusion of such a clause.[94] In doing so, ESA found the parameters of the arbitration clause to be based on objective criteria, *inter alia*, since it would likely establish an 'appropriate price relying on predefined and clear criteria based on the characteristics of the Icelandic electricity market and prices for other power intensive companies operating in the same field.'[95] It is worth noting that as per the decision, Landsvirkjun has inserted similar arbitration clauses in at least five of their PPAs.[96]

Despite ESA reaching the conclusion that no advantage had been conferred onto Elkem with the PPA, it found that the measure was also not imputable

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[91] *Ibid* 43-47.

[92] *Ibid* 48-53.

[93] *Arbitral award between Landsvirkjun and Elkem* (83877) ESA Decision No 064/19/COL [2019] OJ C419/11 11-41.

[94] *Ibid* 56.

[95] *Ibid* 61.

[96] *Ibid* 49.

to the Icelandic State, since 'the process leading to the arbitral award, its final adoption by an independent arbitration tribunal and its binding effect on the parties, do not suggest that it has been exposed to any State influence.'[97] As such, this is the only ESA decision concerning PPAs in where a measure has been found not to be imputable to the Icelandic State.

3.3.9 Summary

The decisions described above collectively showcase the relatively limited development of ESA's assessment of PPAs throughout the years. It is clear from ESA's earliest decision that it faced difficulties in terms of finding market prices which it could use a comparison when applying the MEO test. ESA expounded on this slightly in the Alcan case, explaining that the peculiarities of the Icelandic market meant that information and calculations provided by Landsvirkjun would have to form the basis of its assessment and that comparisons would primarily have to be made with average prices paid to Landsvirkjun in the past under contracts with other power intensive users. Additionally, in the Alcan case, ESA took into account contract terms that it deemed favourable to Landsvirkjun, such as take-or-pay obligations and curtailment options, while also noting that the PPA's duration was shorter than existing agreements. This formula is then repeated in nearly all of ESA's following decisions; calculations are deemed to demonstrate profitability, risk-mitigating clauses are considered favourable, and comparisons with previous PPAs routinely show that prices are higher than before and that durations are shorter.[98]

However, this constant comparison with Landsvirkjun's previous agreements, both as regards contract prices and duration, is somewhat problematic since such a comparison is only logical if previous contracts have also been concluded on market terms. In this context, it is worth noting that Landsvirkjun's CEO, Hörður Arnarsson, has publicly confirmed that power prices paid by Alcan in recent years have been close to the average cost price of Landsvirkjun's power plants and that Landsvirkjun had to accept relatively low prices in its earliest PPAs, knowing it would be possible to negotiate higher prices eventually.[99] Additionally, ESA has in some instances looked positively upon pricing links with global aluminium prices being removed from PPAs, citing a mitigation of risks. This is of interest considering the major rises in aluminium prices in recent times, which have already delivered considerable profits to Landsvirkjun.[100] Another factor worth mentioning, is

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[97] *Ibid* 66.

[98] The notable exception is ESA Decision No 543/14/COL, where it found that calculations provided by Landsvirkjun did in fact show that the construction of the infrastructure necessary for the project was not profitable. However, as was explained in Chapter 3.3.5, Landsvirkjun seemed to rectify this in the updated PPA with PCC.

[99] Árnason (n 55).

[100] *Trausti Hafliðason* 'OR hækkaði hlutfall álvarna úr 47% í 68%' (*Viðskiptablaðið*, 11 May 2026) <https://vb.is/skodun/raforkuverd-og-hlutverk-landsvirkjunar-/> accessed 12 May 2026

the fact that silicon metal producers, which make up a decent share of Landsvirkjun's counterparts in the PPAs, have faced considerable operational difficulties over the last years. As was noted above, the Thorsil project never came to fruition, with the company going under in early 2026,[101] and the PCC silicon metal plant has not been operational since July 2025.[102] These operational difficulties have affected Landsvirkjun to some extent, but its CEO has confirmed that mitigation clauses in the PPA with PCC have limited the damages somewhat.[103] Nevertheless, this brings on questions of whether a prudent private investor would have entered into such PPAs, given the apparent volatility in the silicon metal market.

Finally, two future developments must be mentioned. Firstly, on 28 November 2023, ESA received a formal complaint alleging infringements of Art. 54 of the EEA Agreement. Subsequently, on 30 April 2025, ESA opened a formal investigation into the matter, examining specifically whether Landsvirkjun abused its dominant position by refusing to supply electricity to hydrogen and/or e-fuel producers in Iceland, thereby hindering or delaying market entry or expansion in the markets for such products.[104] This is of interest, since a measure must, *inter alia*, be liable to distort competition in order for it to constitute State aid within the meaning of Art. 107 TFEU and Art. 62 of the EEA Agreement. ESA's investigation is ongoing, but Landsvirkjun has confirmed that the reason it has not been able to sell electricity to e-fuel projects is, *inter alia*, the very high utilization of its system and the fact that it has had to limit delivery of both capacity and energy to existing customers with curtailment clauses in their contracts.[105] Secondly, as per Landsvirkjun's 2025 yearly report, the largest renegotiation round in Landsvirkjun's history will soon start, with many PPAs expiring within the next five years.[106] The results of these renegotiations will be of major interest, since they might usher in a new wave of decisional practice from ESA.

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[101] (n 86).

[102] Ágúst Ólafsson 'Rekstur kísilvers PCC á Bakka stöðvast á sunnudag' (*RÚV*, 16 júlí 2025) <https://www.ruv.is/frettir/innlent/2025-07-16-rekstur-kisilvers-pcc-a-bakka-stodvast-a-sunnudag-448844> accessed 13 May 2026.

[103] Ólöf Rún Erlendsdóttir 'Óvíst hvað verður um afgangs raforku á meðan allt er slökkt hjá PCC' (*RÚV*, 23. júlí 2025) <https://www.ruv.is/frettir/innlent/2025-07-23-ovist-hvad-verdur-um-afgangs-raforku-a-medan-allt-er-slokkt-hja-pcc-449301> accessed 13 May 2026.

[104] *Decision to open proceedings against Landsvirkjun* (91314) ESA Decision No 068/25/COL [2025]; 'ESA initiates investigation into possible anticompetitive conduct by Landsvirkjun, a power company in Iceland' (*ESA*, 30 April 2026) <https://www.eftasurv.int/newsroom/updates/esa-initiates-investigation-possible-anticompetitive-conduct-landsvirkjun-power> accessed 4 May 2026.

[105] 'ESA Initiates Investigation' (*Landsvirkjun*, 30 April 2025) <https://www.landsvirkjun.com/news/esa-initiates-investigation> accessed 4 May 2026.

[106] Landsvirkjun, '*Ársskýrsla Landsvirkjunar 2025'* (*Landsvirkjun*, 27 February 2026) 24

4 State Aid Enforcement – Comparing ESA and the Commission

4.1 General Background

The previous chapters have described Iceland's energy sector, relevant EU/EEA State aid legislation, enforcement roles in the field, in addition to the PPAs entered into by Landsvirkjun and the related ESA's decisional practice. What remains is the exploration of possible changes in enforcement following Iceland's accession to the EU, which is central to the thesis' research question. Accordingly, the next chapters will set out issues which could theoretically affect the legal status of the PPAs, looking first at pertinent Commission decisions and case law, then potential gaps in enforcement and institutional discrepancies, and finally by exploring political realities which might be of relevance. Before moving on to specific issues, it is important to note that there is a significant difference in the institutional capacities of the two authorities, with ESA in 2025 employing 90 staff members,[107] compared to the Commission, which in total employs around 32.000.[108] As was noted above, the two authorities do cooperate on some State aid matters, but this gap in staff numbers in nevertheless of note.

4.2 Relevant Practice and Jurisprudence on State Aid and the MEO Test

4.2.1 The Private Supplier Test

A decent amount of decisional practice on State aid by reductions or waivers of energy tariffs, as well as preferential tariffs, exists within the EU.[109] The following extract from Arhold explains these situations well:

> A tariff which is lower than the price usually offered on the market may constitute an economic advantage within the meaning of Article 107(1) TFEU, if the Member State or the public institution/undertaking forgoes revenue which it usually would have received (forgone revenue). In such circumstances the tariff is not calculated in an economically justified way but so as to grant an advantage to the energy consumers concerned. A preferential tariff for certain undertakings or sectors is suspicious of being aid if it displays a downward trend which is not reflected by the tariffs applicable to undertakings in other sectors. However, even in this

[107] ESA, '*Annual Report 2025'* (ESA 2026) 8.

[108] 'Commission Staff' (*European Commission*) <https://commission.europa.eu/about/organisation/commission-staff_en> accessed 13 May 2026.

[109] Christoph Arhold, 'D. Energy and Coal' in Franz Jürgen Säcker and Frank Montag (eds), *European State Aid Law: A Commentary* (Bloomsbury Publishing 2016) 1236, 1267.

> case it may still be proven that the preferential tariff is, in the context of the market in question, objectively justified for economic reasons. This can be the case, for example, if the preferential tariff is objectively justified by the need to resist competition in the same market from other energy sources.[110]

In order to assess the existence of State aid in such instances, the European Court of Justice developed the Private Supplier Test, which has been of particular importance in sectors in which Member States have a monopoly or a significant market share, such as the energy sector.[111] This test was first employed by the Court in *van der Kooy*,[112] a case which pertained to Gasunie, a seller of gas, owned by the Government of the Netherlands. Gasunie had decided to limit the price of gas sold to horticultural producers, which it justified with reference to the fact that producers might switch to alternative energy sources, i.e. coal, which had become cheaper. The Commission did not question this argument as such, but ultimately showed that the tariff went below what was necessary in order to protect against this conversion to coal.[113] The test was then used by the Commission in its decision regarding *EDF*,[114] a French state-owned energy supplier, which had granted price discounts to a number of paper mills. Interestingly, the Commission found that the discount did not constitute aid since they had been granted before the electricity market opened up to competition and because France had in fact been faced with overcapacity. Thus, the Commission applied commercial logic to the situation and found that a prudent market operator would, when faced with overcapacity or overstock, maximise profit by selling at a discount instead of not selling at all.[115]

The Commission has since continued to apply the Private Supplier test in numerous decisions relating to the energy sector. These include decisions concerning electricity tariffs in Spain,[116] return tariffs levied in France,[117] and surcharge schemes in Germany and Austria.[118] Furthermore, many of these

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[110] *Ibid* 1268.

[111] Christoph Arhold, 'Part II: Article 107 TFEU' in Franz Jürgen Säcker and Frank Montag (eds), *European State Aid Law: A Commentary* (Bloomsbury Publishing 2016) 52, 136-137.

[112] Cases 67, 68 and 70/85 *Van der Kooy v Commission* [1988] ECR 219. See also Case C-56/93 *Belgium v Commission* [1996] ECR I-723.

[113] Arhold (n 111) 136

[114] *Measures implemented by EDF for certain firms in the paper industry* (notified under document number C(2000) 1061) Commission Decision 2001/274/EC [2001] OJ L95/18.

[115] Arhold (n 111) 137.

[116] *Regulated Electricity Tariffs in Spain* (State aid No C 3/07 (ex NN 66/06)) Commission Decision 2007/C 43/10 [2007] OJ C43/9.

[117] *Regulated electricity tariffs in France* (State Aid C 17/07 (ex NN 19/07)) Commission Decision 2009/C 96/08 [2009] OJ C96/18.

[118] *Exemption from Network Charges for Large Electricity Consumers* (State aid SA.34045 (2012/C) (ex 2012/NN) Commission Decision 2013/C 128/06 [2013] OJ C128/43; *Support of Renewable Electricity and of Energy-Intensive Users* (Aid Scheme SA.33995 (2013/C) (ex 2013/NN)) Commission Decision 2015/1585/EU [2015] OJ L250/122; *State aid for energy-intensive businesses under the Green Electricity Act in Austria* (State aid

cases have ultimately ended up before the EU Courts. Thus, in *Austria v. Commission*,[119] the General Court examined the surcharge scheme implemented by Austrian authorities, which granted reductions to energy-intensive users. After evaluating the economic arguments and legal pleas of the Austrian Government, the General Court found that the scheme entailed State aid given it resulted in forgone revenues, while also selectively favouring energy-intensive users. Moreover, Austria had failed to show that reductions granted to such users were necessary in order to achieve the goals that were pursued, which were of an environmental nature.[120]

Notably, there is also a second line of cases concerning EDF, the aforementioned French electricity company, that are worth highlighting. In *EDF v Commission I*,[121] the General Court examined a decision of the Commission, where it found that France's decision to waive certain taxes for EDF in connection with the liberalisation of France's electricity market entailed State aid. The case centred around the applicability of the MEO test, with the General Court confirming that its applicability ultimately depended on the pertinent Member State having conferred an economic benefit on an undertaking as a shareholder, but not in its capacity as a public authority.[122] Then, in *EDF v Commission II*, [123] the French government challenged a later decision, where the Commission found that the French Government had not provided sufficient evidence that established that its actions were in line with the MEO test.[124] In a detailed judgement, the General Court came to the conclusion that the Commission had applied the MEO test correctly, while also concurring with the Commission that the French Government had not submitted unequivocal evidence showing that the measure had been adopted by the French Government in its capacity as a shareholder.[125]

Additionally, it is pertinent to highlight two decisions, both of which specifically concern aid granted to aluminium producers through electricity tariffs. The first matter relates electricity price subsidies granted to Alcoa by the Italian Government, which were examined by the Commission in an investigation that started in 2006.[126] The Commission found that Italy had granted operating aid to Alcoa, which reduced Alcoa's operating costs and gave it an

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measure C 24/09 (ex N 446/08)) Commission Decision 2011/528/EU [2011] OJ L235/42; Arhold (n 109) 1273-1274.

[119] Case T-251/11 *Austria v Commission* EU:T:2014:1060

[120] *Ibid*; Arhold (n 109) 1273-1274.

[121] Case T-156/04 *EDF v Commission* [2009] ECR II-4503, upheld on appeal.

[122] Leigh Hancher and Francesco Maria Salerno, 'State Aid in the Energy Sector' in Leigh Hancher and Juan Jorge Piernas López (eds*), Research Handbook on European State Aid Law* (2nd edn, Edward Elgar Publishing 2021) 64 67-68.

[123] Case T-747/15 *EDF v Commission* EU:T:2018:926.

[124] Hancher and Salerno (n 122) 67-68.

[125] *Ibid*.

[126] *Preferential electricity tariff in favour of Alcoa* (State Aid measure C 38/A/04 (ex NN 58/04) and C 36/B/06 (ex NN 38/06)) Commission Decision 2010/460/EC [2010] OJ L227/62.

unfair advantage over competitors. Originally, ENEL, an energy producer owned by the Italian State, was to supply electricity to Alcoa at a fixed tariff for ten years, which the Commission had previously deemed an ordinary business transaction. However, this tariff was then prolonged, without it being fully adapted to market prices.[127] The matter ended up before the General Court,[128] which, *inter alia*, examined the Commission's economic analysis of the underlying market and the market price. In that regard, the General Court found that the Commission's analysis had been detailed, rejecting Alcoa's view that it had been 'vitiated by many serious deficiencies in the statement of reasons on important points'.[129]

A comparable situation was reviewed by the Commission in a decision concerning alleged State aid for Aluminium of Greece SA.[130] The company had been established in 1960 and had enjoyed certain privileges by the Greek State from that time, which included reduced electricity prices. This subsidy scheme was to expire in 2006 but was ultimately extended by the decision of a Greek court, that ordered an interim measure which kept the preferential rate in use until a substantial judgement was delivered in the matter. Aluminium of Greece SA then continued to pay a preferential rate until 2008, when the interim decision was overturned. The Commission investigated the situation and found that the contested tariff was lower than tariffs paid by other energy-intensive users. As such, the Commission stated that 'market economy vendor would not accept to charge a monthly reduced tariff without any specific justification. In this regard, Greece did not submit any convincing arguments permitting to conclude that this preferential tariff was a market tariff although the Commission formally raised this issue in its correspondence.'[131] The decision was ultimately upheld by the General Court.[132]

It is clear from the aforementioned cases that the Commission has applied the MEO test, and specifically the Private Supplier Test, with considerable precision and carried out quite detailed analyses, including of market prices, in connection with the assessment of whether State aid was granted. Likewise, the EU Courts have employed a high evidentiary standard in such cases, cf. *EDF v Commission II*. This is perhaps understandable, given the importance of State aid rules in the energy sector, which Arhold explains, firstly with reference to the fact that energy producers were largely state-controlled prior

[127] *Ibid*; 'State Aid: Commission Prohibits Electricity Price Subsidies for Alcoa and Orders Partial Recovery of Aid Already Granted' (*European Commission*, 19 November 2009) <https://ec.europa.eu/commission/presscorner/detail/en/ip_09_1750> accessed 12 May 2026.

[128] Case T-177/10 *Alcoa Trasformazioni v Commission* EU:T:2014:897.

[129] *Ibid* 41-57.

[130] *Aluminium of Greece SA* (State aid No SA.26117 - C 2/10 (ex NN 62/09)) Commission Decision 2012/339/EU [2011] OJ L/166/83.

[131] *Ibid* 27.

[132] Case T-542/11 RENV *Alouminion tis Ellados v Commission* EU:T:2018:166.

to market liberalisation, and secondly by noting that energy plays an important role in modern society, meaning Member States have a strong interest in regulation the field in order to guarantee affordability and other objectives, such as environmental ones.[133]

4.2.2 EFTA Court Jurisprudence

The EFTA Court has also delivered interesting case law regarding the application of the MEO test. Here, *Eviny AS v ESA*,[134] is of special interest. The matter concerned a decision delivered by ESA,[135] where it found that agreements entered into by a Norwegian municipality and Eviny AS, a renewable energy company under public ownership, entailed State aid. More specifically, ESA found that agreements concerning the operation and maintenance of streetlight infrastructure resulted in overcompensation, noting that price clauses in agreements between the parties were not in line with market standards and that submitted evidence did not disproof the existence of overcompensation.[136] Additionally, ESA referenced figures from a public services database, according to which the pertinent municipality had paid the highest costs for light points among similar municipalities, noting that this indicated that overcompensation had taken place.[137]

The EFTA Court, however, found that ESA's investigation and application of the MEO test had been fundamentally flawed due to manifest errors of assessment. In its judgement, the EFTA Court firstly clarified that in State aid matters, ESA was tasked with conducting a diligent and impartial examination of the measures at hand, and that it may be necessary for ESA 'to go beyond a mere examination of the matters of fact and law brought to its knowledge'.[138] Then, the EFTA Court expounded on ESA's obligations as follows:

> The aim of the recovery of State aid from a beneficiary is to eliminate the distortion of competition brought about by a certain competitive advantage and, thus, to re-establish the status quo before the aid was granted. Thus, ESA cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage […]. ESA is obliged to prove the existence of an advantage. It is not for the undertakings concerned to show the absence of one […]. This must not be understood as a prohibition

133 Arhold (n 109) 1237.

134 Case E-10/22 *Eviny AS v ESA* (21 March 2024).

135 *Aid in relation to the streetlight infrastructure in Bergen (Norway)* (83223) ESA Decision No 161/22/COL [2022] OJ L10/77.

136 *Ibid* 160-172.

137 *Ibid* 173-175.

138 *Eviny AS v ESA* (n 134) 53-55.

> on ESA against using and applying negative presumptions in the assessment of whether the undertaking has benefited from an advantage. However, there must be other evidence capable of positively confirming the presumption and thus establishing the existence of an advantage. The amount and quality of the additional evidence required depends, inter alia, upon what could be expected of the relevant comparable private operator in the case at hand.[139]

Accordingly, the EFTA Court clearly stressed that it for ESA to sufficiently prove that a measure entails State aid as per Art. 61(1) of the EEA Agreement, using the powers at its disposal to obtain all the relevant information. Following this, the EFTA Court reviewed the evidence on which ESA based its decisions, finding that it contained incorrect data and that it was partially irrelevant to the case at hand.[140] Accordingly, the EFTA Court annulled ESA's decision. The case clearly showcases that the burden of proof lies with ESA when it applies the MEO test, and that the evidentiary standard can be relatively high. This is also in line with CJEU case law on the Commission's duties as regards MEO tests, see, e.g., *Volotea v Commission*,[141] which is referenced numerous times in the EFTA Court's judgement.

4.3 Potential Enforcement Gaps

A significant issue worth mentioning, as regards the differences between ESA and the Commission, is the existence of disparities in the means of enforcement available within the EEA EFTA States versus within the EU. While the EEA Agreement aims to establish 'a dynamic and homogeneous European Economic Area',[142] including by providing satisfactory means of enforcement,[143] enforcement gaps do exist. The following subchapters will focus on two specific issues, i.e., private enforcement and transposition deficits, both of which may contribute to the non-homogenous enforcement of State aid between the EU and the EEA EFTA States.

4.3.1 Private Enforcement of State Aid Rules by National Courts in the EEA EFTA States

As regards private enforcement, it is firstly important to note that the EEA legal framework does not contain a provision corresponding to Art. 19(1) TEU, which clarifies that Member States are to provide remedies sufficient to ensure effective legal protection in fields covered by EU.[144] However, the

[139] *Ibid* 58.

[140] *Ibid* 74-92.

[141] Case C-331/20 P *Volotea v Commission* EU:C:2022:887. See also Case C-211/20 P *Commission v Valencia Club de Fútbol* EU:C:2022:862; Case C-244/18 P *Larko v Commission* EU:C:2020:238.

[142] Agreement on the European Economic Area [1994] OJ L1/3, recital 3 of the preamble.

[143] Ólafur Ísberg Hannesson, 'Public and Private Enforcement' in Graham Butler (ed), *Research Handbook on EEA Internal Market Law* (Edward Elgar Publishing 2025) 349, 349.

[144] *Ibid* 351.

EFTA Court has addressed this, as is evident by the following extract from Hannesson:

> […], to strengthen the application and enforcement of EEA law in national courts, the EFTA Court has, like the CJEU, subjected the procedural autonomy of the EFTA-EEA states to the *Rewe* requirements of equivalence and effectiveness. By adopting these twin principles from the CJEU, the EFTA Court made clear that it intervenes into remedies and procedures. However, it is not only through the *Rewe* requirements that the EFTA Court interferes with remedial and procedural law. It should be recalled that the Charter has not been formally incorporated into the EEA Agreement. However, this should not pose large problems from the perspective of homogeneity, as the EFTA Court has held, as it did in *Telenor v ESA*, that '[t]he principle of effective judicial protection, including the right to a fair trial, which, inter alia, is enshrined in Article 6 ECHR, is a general principle of EEA law'. There can thus be no doubt that, despite the fact that civil judicial cooperation, which is covered by Title V of the TFEU, does not fall within the scope of the EEA Agreement, the question of access to the justice systems of the EFTA-EEA states does.[145]

Notwithstanding the above, a 2019 ESA-commissioned study on private enforcement of State aid rules by national courts in the EEA EFTA States found that a very limited number of State aid cases had in fact been delivered before the national courts of the EEA EFTA States in the preceding 25 years.[146] The study theorised that ambiguity of State aid rules in national law, in addition to a lack of knowledge of State aid rules among legal practitioners and judges in the countries, could explain this lack of jurisprudence.[147] As regards Iceland specifically, the study found that private enforcement of State aid rules was practically non-existent,[148] noting also that Iceland's legal framework created obvious hindrances for private enforcement, particularly stemming from the fact that a standstill obligation has not been correctly implemented into Icelandic law.'[149] Accordingly, the study recommended numerous changes, including i) unequivocal implementation of the standstill obligation, as well as clear regulation governing the consequences of a breach, including the obligation of national courts to order recovery, ii) clearer and more detailed procedural rules for private enforcement, and enforcement of recovery alike, iii) amendments making it easier for third parties to invoke an injunction under the Act of Injunction, as the then current regulation was unclear on

[145] *Ibid*.

[146] ESA 'Study on Private Enforcement of State Aid Rules by National Courts in the EEA EFTA States' (July 2019).

[147] 'New Study on State Aid in the EEA EFTA States' (*ESA*, 19 July 2019) <https://www.eftasurv.int/newsroom/updates/new-study-state-aid-eea-efta-states> accessed 13 May 2026.

[148] ESA (n 146) 22.

[149] *Ibid* 18.

whether such interim relief was available, and iv) amending the exclusion of state liability, which provided an obstacle to private enforcement since it made it impossible for a competitor to claim damages from the state for losses caused as a result of State aid rules.[150]

It is worth noting that the study referenced an Icelandic draft bill for a new Act on State Aid Procedures, which amended some of these issues, but not, *inter alia*, problems stemming from the exclusion of state liability in cases of unlawful aid. As of May 2026, however, the act has not entered into law in Iceland.[151] Moreover, in May 2023, ESA adopted new guidelines on private enforcement,[152] partially based on the aforementioned study, which were meant to provide: i) guidance on the enforcement of State aid rules at national level focusing on cases where private parties seek remedies for the unlawful implementation of aid, ii) clarifications on general principles applicable, iii) clarifications on the respective roles of ESA and of the national courts, and iv) guidance on the use of the cooperation tools between national courts and ESA.[153] The impact of these updated guidelines on private enforcement matters in the EEA EFTA countries, including Iceland, remains to be seen.

4.3.2 Transposition Deficits

Furthermore, certain disparities between EU law and law in EEA EFTA States may be explained by the fact that EEA EFTA States sometimes lag behind EU Member States in implementing directives and regulations, an issue commonly referred to as a transposition deficit. In this context, the 55th editions of the Internal Market Scoreboard, which provides an overview of the number of directives and regulations that still need to be implemented in the EEA EFTA States, found that Iceland's transposition deficit as regarded directives amounted to 2.1%, meaning 17 directives were yet to be implemented. Regulations not fully transposed into national law by Iceland were 65 in total, resulting in a transposition deficit for regulations of 1.4%. Overall, the average transposition deficit for the EEA EFTA States' was 1.3%, compared to the EU-27 average of 0.8%., with only five EU Member States having a transposition deficit above 1%, along with Iceland and Norway.[154] The

[150] *Ibid* 20. For information on the Government of Iceland's reactions to the study, see Government of Iceland, 'Úttekt ESA á beitingu ríkisaðstoðarreglna fyrir landsdómstólum' (November 2019).

[151] The draft bill was published in the Government's Consultation Portal in 2019 and was featured on the parliamentary calendar for the 149th and 150th parliamentary sessions (2018-2020). However, it was never formally submitted to Parliament. The draft bill does not feature on the 2025-2026 parliamentary calendar.

[152] ESA, 'Guidelines on the Enforcement of State Aid Rules by National Courts' (31 May 2023).

[153] 'Private Enforcement' (*ESA*) <https://www.eftasurv.int/state-aid/private-enforcement> accessed 15 May 2026.

[154] ESA, 'Internal Market Scoreboard No 55: EEA EFTA States, including EU Member States Figures' (January 2025); 'Internal Market Scoreboard: EEA EFTA States lag behind

transposition deficit in Iceland is also evident by examining the 125 infringement cases (69 of which pertained to the failure to implement directives) brought by ESA against the EEA EFTA States before the EFTA Court between 1994 and 2022. Out of those 125 cases, 72 were brought against Iceland, while 32 cases were brought against Norway and 21 against Liechtenstein.[155] Iceland's transposition struggles can be explained by a variety of reasons, some of which are of a practical nature, e.g. insufficient manpower and funds, as well as time-consuming translation processes. Moreover, Iceland has faced difficulties in implementing unclear directives, and stakeholder group influence, linkages with other legislative reform and dissimilarities with domestic legislation have led to long deliberation times in the Icelandic Parliament.[156] Add to this the fact that regulations must be specifically implemented into national law in Iceland, unlike in EU Member States, and the result is the aforementioned transposition deficit.

In this context, the EFTA Court has repeatedly noted that national implementation of regulations and directives must take place before individuals and companies can enjoy the rights therein, meaning timely implementation is crucial for the proper functioning of the EEA Agreement.[157] Thus, as regards State aid, it can for example be pointed out that Commission Implementing Regulation (EU) 2025/905 of 12 May 2025, which provides public access to justice (via NGOs) in environmental matters in relation to EU State aid decisions,[158] has not yet been implemented in the EEA EFTA States. While the date of compliance in the EU was 3 July 2025, the Draft Joint Committee Decision is still under consideration by the EU and the EEA EFTA States.[159] Accordingly, the regulation might eventually make its way into the EEA Agreement, and subsequently the national laws of EEA EFTA States. In the meantime, however, public access to justice in environmental State aid matters will remain stronger within the EU than in the EEA EFTA States.

4.4 Political Pressures and Influences

Lastly, it is relevant to note that political realities undoubtedly must be considered when discussing differences in State aid enforcement. In this regard, Hannesson noted, when discussing the characterisation of the infringement process, that 'ESA's role differs from that of the Commission, due to the fact

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EU Member States in implementing Directives' (*ESA*, 29 January 2025) <https://www.eftasurv.int/newsroom/updates/internal-market-scoreboard-eea-efta-states-lag-behind-eu-member-states> accessed 15 May 2026.

[155] Hannesson (n 143) 354-356.

[156] Margrét Einarsdóttir, 'Incorporation and Implementation: The Execution of the EEA Agreement by the Icelandic State' (2019) 2(1) NJEL 1. See also Hannesson (n 143) 366-371.

[157] Hannesson (n 143) 372-373.

[158] See 'Commission amends State aid rules to provide public access to justice in environmental matters' (*European Commission*, 12 May 2025) <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1153> accessed 16 May 2026.

[159] 'Factsheet - 32025R0905' (*EFTA*) <https://www.efta.int/eea-lex/32025r0905> accessed 16 May 2026.

that its supervision is not political in nature. Thus, it might not always be appropriate to closely follow the same enforcement priorities as the Commission. Rather, the ESA's powers of enforcement retain more flexibility.'[160] Accordingly, the Commission's supervision is somewhat political, and it undoubtedly has a greater role in developing policy than ESA. Moreover, historical analysis shows that the Commission's policy has developed in line with economic and political circumstances in the EU.[161] For example, environmental objectives and the EU Green Deal have already influenced State aid policies,[162] while housing policy is area in which the influence of State aid has increased in line with political developments in the EU.[163]

While it is a herculean task to accurately predict the future development of State aid policy within the EU, it is pertinent to note that the EU is currently facing an energy crisis, fuelled by geopolitical conflicts.[164] While the Commission has introduced several tools to bring relief to EU industries and households,[165] it is clear that the full impact of this energy crisis has not yet been felt. For example, on 17 May 2026, the Italian Prime Minister, Giorgia Meloni, stated in a letter to Commission President Ursula von der Leyen, that Italy could pull out of the Security Action for Europe defence scheme if Italy was not given further budgetary leeway to address the energy crisis.[166] In view of this, it is not improbable that State aid policy will be impacted by this energy crisis in the near future.

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[160] Hannesson (n 143) 372-373.

[161] Piernas López (n 24) 65; Pier L Parcu, Giorgio Monti and Marco Botta, 'Introduction' in Pier L Parcu, Giorgio Monti and Marco Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2019) 1, 2.

[162] Hancher and Salerno (n 122) 84-85; Jakub Kociubiński, 'Environmental Common Interest? Incorporating the Green Deal's Environmental Objectives into State Aid Compatibility Criteria' (2025) 21(3) European Competition Journal 584.

[163] Hettne (n 46) 224.

[164] 'EU Action to Address the Energy Crisis' (*European Commission*, 18 February 2026) <https://commission.europa.eu/topics/energy/eu-action-address-energy-crisis_en> accessed 18 May 2026.

[165] *Ibid*; 'Commission Proposes Actions to Protect Europeans from the Fossil Energy Crisis and Accelerate the Shift to Clean, Homegrown Energy' (*European Commission*, 22 April 2026) <https://ec.europa.eu/commission/presscorner/detail/en/ip_26_629> accessed 18 May 2026.; 'Commission Provides EU Countries with Practical Examples to Address Energy Crisis' (*Directorate-General for Energy*, 13 May 2026) <https://energy.ec.europa.eu/news/commission-provides-eu-countries-practical-examples-address-energy-crisis-2026-05-13_en> accessed 18 May 2026.

[166] Giuseppe Fonte, 'Italy Tells EU it May Pull Out of SAFE Defence Scheme Without Budget Leeway on Energy' (*Reuters*, 18 May 2026) <https://www.reuters.com/business/italy-tells-eu-it-may-pull-out-safe-defence-scheme-without-budget-leeway-energy-2026-05-18/> accessed 18 May 2026.

5 Conclusions

This thesis sought to explore whether a shift in State aid enforcement, following Iceland's possible accession to the EU, would be likely to affect the legal status of PPAs entered into by Landsvirkjun and energy-intensive users. The previous chapters show that there is unlikely to be a sudden, clear shift in that regard. This is the case, not only since Iceland is subject to the substantive EU State aid rules via the EEA Agreement, but also since ESA generally conducts its enforcement and supervision in line with the Commission, and guidelines and other such tools published by the Commission. However, the thesis has identified three categories of differences that might come into play if Iceland were to join the EU, which could affect how the PPAs are examined, and therefore their legal status.

The first category may be referred to as 'Institutional and Methodological Disparities', which references differences in institutional strengths and the methodologies employed by the Commission, compared to ESA. As the summary of relevant ESA decisions, found in Chapter 3.3, shows, ESA decisional practice as regards PPAs has been somewhat limited, with only one case reaching the stage of in-depth investigation. Furthermore, ESA's application of the MEO test in these decisions has been rather minimal, as ESA has primarily relied on data submitted by Landsvirkjun itself, as well as self-referential comparisons with older PPAs. Comparatively, the Commission has considerably more experience in applying the MEO test and appears to do so quite meticulously. Add to this the clear differences in institutional resources, including manpower, and it becomes relatively clear that the Commission is, on paper at least, in a better position to conduct detailed examinations of the PPAs, including the application of MEO tests. Notwithstanding the foregoing, it is extremely important to note that the unique market situation in Iceland, i.e., it not being physically linked to the EU power grid, explains to some extent the difficulties faced by ESA when examining the PPAs, namely the lack of comparable market prices. If Iceland were to join the EU, the Commission would also be faced with these same difficulties, that is, if a physical connection to the EU power grid is not established.

The second category pertains to 'Procedural Disparities', cf. Chapter 4.2. This includes the transposition deficit faced by Iceland, which is likely to improve upon accession to the EU given the lower transposition deficits therewithin. As was noted in Chapter 4.2.2, this deficit has led to Icelandic parties not enjoying the same rights to access as those within the EU. More importantly, the findings of the 2019 ESA-commissioned study on private enforcement of State aid rules by national courts still appear applicable to this day. As such, third parties, including competitors of parties who have entered into PPAs, appear to have very limited access to judicial remedies compared to their EU counterparts. If Iceland were to join the EU, it is likely that increased access to judicial remedies, including for NGOs in environmental matters, would result in more jurisprudence and in-depth reviews of the PPAs.

The third category concerns ‘Political Disparities’. These issues are somewhat speculative by their very nature but are nevertheless relevant to the research question. As such, it can be argued, given the policy role of the Commission and the current energy crisis within the EU, that the Commission will shift its focus more towards the energy sector, as it has done previously with other politically important sectors. This could then result in the PPAs entered into by Landsvirkjun being pushed further into the limelight and coming under increased scrutiny if Iceland were to join the EU. However, this complex issue requires a more detailed examination, taking into account, *inter alia*, the EU’s policies on environmental issues, including renewable energy, which could provide the Icelandic government with some leeway as regards the PPAs, as they concern energy produced via renewable methods.

As per the above, while it might be difficult to assert that the legal status of the PPAs would be *negatively* affected by Iceland’s accession to the EU, it is likely that they would be subject to more active and detailed examinations than currently, given the Commission’s institutional strengths compared to ESA, increased access to judicial remedies for third parties, and, perhaps, the political climate within the EU.

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