

Case No: 61084
Event No: 464136
Dec. No: 290/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 1 July 2009
on the aid granted in the airline pilot education sector in Troms County
(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹,

Having regard to the Agreement on the European Economic Area², in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

Having regard to Article 1(2) of Part I and Articles 7(2), 7(5), 13 and 14 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement⁴, in particular the Chapters on public service compensation and on State guarantees,

Having regard to Decision 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 of the Surveillance and Court Agreement⁵,

Having regard to Decision 389/06/COL of the Authority of 13 December 2006 to initiate the procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement⁶,

Having called on interested parties to submit their comments⁷ and having regard to the comments received,

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, and EEA Supplement No 32 of 03.09.94. The Guidelines were last amended on 25 April 2007. Hereinafter referred to as the State Aid Guidelines.

⁵ OJ 2006 L 139, p. 37.

⁶ Hereinafter referred to as the Decision to open the formal investigation.

⁷ OJ 2007 C 77, p. 35, and EEA Supplement No 17 of 05.04.07.

Whereas:

I. FACTS

1 Procedure

By letter dated 17 March 2006, North European Aviation Resources AS (hereinafter referred to as “NEAR” or “the complainant”) filed a complaint against the granting of aid, through the Revised National Budget, to the Norwegian Aviation College (hereinafter referred to as “NAC”). The letter was received and registered by the Authority on 20 March 2006 (Event No 366921). By letter dated 25 August 2006, received and registered by the Authority on 28 August (Event No 385471), NEAR filed an extension to their complaint concerning various monies granted to NAC by Troms County and the Municipality of Målselv.

By letters dated 11 April 2006 (Event No 369763) and 7 September 2006 (Event No 385794), the Authority informed the Norwegian authorities of the complaint and the extension thereto and invited them to comment upon the same.

After having examined those comments, the Authority informed the Norwegian authorities, by letter dated 13 December 2006 (Event No 401508), that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement in respect of aid granted in the airline pilot education sector in Troms County.⁸ The Government of Norway was invited to comment on the decision. By letter dated 15 February 2007, received and registered by the Authority on 19 February 2007 (Event No 410248), the Norwegian authorities submitted their comments.

Decision No 389/06/COL to initiate the formal investigation procedure was published in the Official Journal of the European Union and the EEA Supplement thereto. The Authority called on interested parties to submit their comments.⁹

The Authority received two sets of comments from interested parties. By letter dated 10 October 2007 (Event No 446322), the Authority forwarded these to the Norwegian authorities, and gave them the opportunity to react. By letter dated 13 November 2007 (Event No 451773), the Norwegian authorities submitted comments.

2 Description of the proposed measure

2.1 Measures under examination

a) Grant in favour of NAC

According to the Norwegian Government, Parliament introduced a grant of NOK 4,5 million for “airline pilot education located in Tromsø/Bardufoss” in June 2005. The Ministry of Education and Research allocated this grant directly to NAC on 8 July 2005.

⁸ For more detailed information on the correspondence between the Norwegian authorities and the Authority, reference is made to the Decision to open the formal investigation procedure.

⁹ See footnote 7 above.

A further NOK 4,5 million was written into the 2006 State Budget and was proposed again in the draft budget for 2007. However, according to the Norwegian Government, Parliament was notified of the complaint and further allocations to NAC were suspended pending resolution of the matter.

b) Project Funding for Norsk Luftfartshøgskole

Troms County confirmed that, by decision of 6 July 2006, it granted project funding of NOK 1,9 million to the Norsk Luftfartshøgskole (NLH), a body which the Norwegian authorities describe as a non-commercial foundation established for the purposes of facilitating pilot education in the north of Norway.

c) Loan to NAC from Troms County and subsequent remission thereof

According to Troms County, it granted a loan of NOK 400 000 to NAC in 1999 in accordance with the Regional Loan Scheme notified to and authorised by the Authority. The original loan foresaw repayment at prevailing interest rates after an initial three-year period. Following extensions to the repayment period, Troms County granted remission of the loan by decision of 6 July 2006 on the condition that all other creditors participate in the sanitation of NAC debts.

d) Loan guarantee

Troms County confirmed that it has guaranteed NOK 500 000 of NAC debt for the period from 1 September 2002 until 1 September 2012 without asking NAC to pay a guarantee premium.

e) Loan to NLH from the Municipality of Målselv

The Municipality of Målselv stated that, by decision of 19 July 2006, it granted a subordinate loan of NOK 1,3 million to NAC at an interest rate of 8.5% per annum, the full amount plus interest falling due no later than end 2007. By decision of 24 April 2008, the Municipality of Målselv extended the repayment deadline until 31 December 2008. The Norwegian authorities have since confirmed that the loan was in favour of and paid out to NLH.

2.2 The objective of the measures under examination

a) Grant

According to the Norwegian Government, both the capacity of the Air Force to train pilots for service outwith the armed forces and the financial support for airline pilot education provided by the SAS airline have been declining in recent years. The contested funding may be seen as a consequence of these changes. The grant may be used only to ensure the continuance of existing airline pilot education at NAC, the concern being to maintain the existing capacity for educating airline pilots in Norway and to avoid a crisis in pilot recruitment.

b) Project Funding for NLH

According to Troms County, the project funding aims to ensure that the existing aviation competence in the County is developed and strengthened.

c) Loan to NAC from Troms County and subsequent remission thereof

According to Troms County, the financial situation of NAC made it necessary to grant extensions to the deadline for repayment of the loan and eventually to write it off completely.

d) Loan guarantee

The guarantee was required of the owners of NAC in proportion to their ownership share and in respect of a loan to finance a flight simulator.

e) Loan to NLH from the Municipality of Målselv

No objectives specified.

2.3 National legal basis for the aid measure

The direct grant, amounting to NOK 4,5 million, is provided for in the context of the Revised National Budget for 2005 (Kap. 281, post 1). This budget line also includes NOK 574 000 for other purposes not related to the measures under examination.

The other measures are a result of decisions of either Troms County Council or the Executive Committee of the Municipality of Målselv.

2.4 Recipients

NAC is a limited liability company registered in Norway since 1993. It was owned by SAS (60%), Norsk Luftfartshøgskole (29%), and other smaller shareholders. In November 2006, NLH increased its participation in NAC to 95,65%. The remaining 4,35% of the shares are held by Hurtigruten AS.

NAC, which runs the only airline pilot education in the Tromsø/Bardufoss region, was found to be the only possible beneficiary for the parliamentary grant.

NAC is also the specific beneficiary of the (subsequently remitted) loan and loan guarantee from Troms County. The project funding was granted by Troms County to Norsk Luftfartshøgskole, as was the loan from the Municipality of Målselv.

Norsk Luftfartshøgskole is a foundation registered in Norway since 1997. Its founding members are Troms fylkeskommune, SAS Flight Academy and the Municipalities of Bardu and Målselv. The purpose of this non profit-making foundation is registered as the renting of property and its objective is stated as facilitating the operation of airline pilot education in the north of Norway by developing, initiating and coordinating educational offers and securing the necessary premises.

3 The decision to open the formal investigation procedure

In the Decision to open the formal investigation procedure, the Authority came to the preliminary conclusion that the existence of state aid could not be excluded and that, based

on the information available, doubts subsisted as to the compatibility of that aid with the functioning of the EEA Agreement.

4 Comments by the Norwegian authorities to that Decision

The Norwegian authorities submitted that the contested funding does not constitute state aid because the education offered by NAC is not an economic activity and therefore does not fall to be assessed under Article 61 EEA. The Norwegian authorities also argued that, even if the activity fell within the scope of that provision, the contested funding would be compensation for the provision of a service of general economic interest within the meaning of Article 59(2) EEA.

The Norwegian authorities submit that education, even when it falls outside the scope of the national education system, may be viewed as a non-economic activity. The content and standard of the course offered by NAC is set out in a public act, the Norwegian Aviation Act. Moreover, the possibility is currently being explored of integrating pilot education into the national education system. The Norwegian authorities identify a potential recruiting problem in the current trend to place the burden of the costs of the education on the students (traditionally costs were shared between aviation companies and the students). The cost of offering such education is high and, although the education is provided by private operators, it does not appear to involve gainful economic activity.¹⁰ The Norwegian authorities therefore submit that, in line with the case law of the ECJ, the contested funding simply represented the State fulfilling its duty towards its population in the educational field.

In the alternative, the Norwegian authorities are of the view that the contested funding, when examined in the light of Article 59(2) EEA, is lawful. They highlight the discretion left to the State when defining what constitutes a ‘service of general economic interest’ and submit that this concept applies to the pilot education provided by NAC. They highlight, in this respect, that the specific education offered by NAC, being the only integrated Airline Traffic Pilot Programme for which the training takes place in Norway, has played a key role in the recruitment of pilots to serve the Norwegian market. Thus the support of pilot training at NAC is a matter of national education policy directly linked to the long-term benefit to the public and does not discriminate, there being no other providers of integrated education in Norway.

The Norwegian authorities submit that the first condition in Article 59(2) EEA, that of entrustment, is achieved by way the specific budget allocation “*for airline transport pilot education in Troms County/Bardufoss*” together with the Norwegian Aviation Act. The Norwegian authorities submit that the second condition involves a check for ‘manifest error’ as opposed to a “*reasonable relationship between the aim and the means employed*”. They submit that the derogation applies if it is necessary in order to allow the undertaking to perform its tasks on acceptable financial terms.¹¹ The Norwegian authorities exclude the possibility of overcompensation, noting that the allocation of NOK 4,5 million covers only 20% of the costs of the airline pilot programme.

The Norwegian authorities highlight that the requirement in Article 59(2) EEA that trade is not affected “*to such an extent as would be contrary to the interests of the Contracting*

¹⁰ The Norwegian authorities appear to refer to the winding up proceedings initiated by the board of NAC as support for this proposition.

¹¹ The fact that NAC is currently the subject of bankruptcy proceedings is used to support this statement.

Parties” is less strict than the criterion of effect on trade for the purposes of establishing the presence of aid under Article 61(1) EEA. They cite the balancing exercise referred to by the Court of Justice in its case law¹², and consider that the burden of proof in this matter lies with the Authority.¹³

Specific comments by Troms County

Troms County is of the opinion that securing a proper airline pilot education is a vital task of national importance. It views its participation, both direct (loan guarantee and remission of loan) and indirect (as owner of NLH), in the financial restructuring of NAC as normal market practice and underlines that its contribution was based on the condition that other creditors participated in the debt restructuring.¹⁴

Troms County explained that the guarantee secures a loan to finance a flight simulator. The ultimate owners of NAC were required, in order to avoid upfront payment, to guarantee the loan. The guarantee by Troms County represents 12,27% of the loan amount. Troms County highlights the parent-subsidiary nature of the relationship between NAC and the County. It also states that any premium, had one been demanded, would not have exceeded the *de minimis* threshold for aid.

Specific comments by the Municipality of Målselv

The Municipality of Målselv underlines that the financial difficulties experienced by NAC at the time of the loan were perceived to be temporary and, as an interested party, the Municipality participated in the ongoing refinancing process. The Municipality submits that, as long as the risks are adequately and objectively assessed at the time the decision to grant a loan was made, the Authority should desist from reviewing the level of interest set unless it appears that there were no objective *bona fide* grounds for reasonably expecting that a private investor would have lent money in the circumstances of the case.

5 Comments submitted by interested third parties

By letter dated 3 May 2007, received and registered by the Authority on the same day (Event No 420011), Rørosfly AS submitted comments to the Decision to open the formal investigation. They support the complainant and underline the competitive advantage public support of only one flight school entails.

By letter dated 4 May 2007, received and registered by the Authority on the same day (Event No 420422), the complainant submitted comments to the decision to open the formal investigation. As a preliminary remark, the complainant refutes the description of the pilot education system given by the Norwegian authorities and maintains that both it and NAC have the same licence (granted by the Norwegian Civil Aviation Authority) and both offer integrated education in Norway to become an Airline Transport Pilot.¹⁵

¹² Case 202/88 *Commission v France (Telecommunications Terminal Equipment)* [1991] ECR I-1223, paragraph 12.

¹³ The Norwegian authorities cite Case C-159/94 *Commission v France* [1997] ECR I-5815, paragraphs 112 and 113, in support of this statement.

¹⁴ Troms County submitted evidence that two other, privately owned companies with outstanding loans of NOK 200 000 each also granted remission of the debt to NAC as part of the restructuring exercise.

¹⁵ The complainant notes that students at NEAR are offered the possibility to carry out their entire training in Norway but that most choose to take up the opportunities offered abroad. The difference is that NAC does not offer these foreign placements and so all students carry out their training only in Norway.

With reference to the argument that NAC does not perform an economic activity, the complainant recalls the breadth of the term ‘undertaking’, suggesting that the test is whether the entity is engaged in an activity that is an economic one, involving the offering of goods or services on the market which could, at least in principle, be carried on by a private undertaking in order to make profits.¹⁶ In the view of the complainant, NAC conducts a typical commercial business with an evident economic purpose. In support of this position, the complainant refers to NAC’s extensive advertising as characteristic of market participants. NEAR also refers to the increase in its own intake of students since the winding-up of NAC as illustrative of the competitive relationship between the various flight schools.

With regard to the application of Article 59(2) EEA, the complainant queries the precise content of the SGEI invoked by the Norwegian authorities. All flight schools in Norway must comply with the same national and international rules. Consequently, the activities of NAC as a whole cannot be regarded as an SGEI; NAC must provide something ‘extra’ compared to the other schools. The complainant identifies the provision of the entire training in Norway as the only possible ‘extra’ element offered by NAC. And yet, while the characteristic of a SGEI is that it will not be provided without public intervention, NEAR offers integrated pilot education with training exclusively in Norway (at a lower price than that offered at NAC). The complainant therefore concludes that classifying the service in question as a SGEI amounts to manifest error. In any event, the complainant argues that the conditions provided for in Article 59(2) EEA are not satisfied. The complainant contests the statement by the Norwegian authorities that entrustment in an official act took place via the Norwegian Aviation Act and the budget allocation. Moreover, with reference to the State Aid Guidelines on public service compensation, neither the precise nature of the SGEI nor the parameters for calculating, controlling and reviewing the compensation are specified in any official act. In this respect, the complainant notes that the Norwegian authorities have not documented the costs related to any SGEI (i.e. the costs related to a potential ‘obligation’ to carry out all flying lessons in Norway). Indeed, the complainant submits that the same education could be offered by NEAR for a lower price.¹⁷

Finally, the complainant comments on the ‘market investor principle’. It is submitted that NAC has been in financial difficulty at least since SAS decided to withdraw its support in 2005 and that, at the time of the ‘investments’, the Norwegian authorities had no basis for expecting a reasonable return on the capital invested. With respect to the fact that the authorities had an ownership stake in NAC, the complainant refers to case law of the ECJ and submits that, contrary to that case law, the ‘investments’ were not made in the abstract but that social, regional and sectoral considerations came into play. More specifically, the complainant submits that Norsk Luftfartshøgskole must be regarded as an undertaking within the meaning of Article 61(1) EEA and that the grant of NOK 1,9 million to that entity constitutes an economic advantage which threatens to distort competition. Moreover, the fact that the foundation is non profit-making, investments can hardly be said to comply with the market investor principle. The complainant reiterates the points made above and concludes that Norsk Luftfartshøgskole is not entrusted with a public

¹⁶ The complainant refers, in this respect, to Cases C-41/90 *Höfner* [1991] ECR I-1979 and C-244/94 *Fédération Française des Sociétés d’Assurance* [1995] ECR I-4013. On the other hand, the purely social function of the entity in Case C-159/91 *Poucet et Pistre* [1993] ECR I-637 is used as an example of classification as other than an undertaking.

¹⁷ Based on an estimated cost of education per student at NAC of NOK 937 500, the complainant submits that NAC is over-compensated, the cost of education at NEAR and exclusively in Norway being NOK 512 000.

service obligation under Article 59(2) EEA, nor does the amount granted bear any relation to the cost of any alleged SGEI.

The complainant also identifies, from the comments of the Norwegian authorities to the Decision to open the formal investigation, two further potential elements of aid: NLH relieved NAC of its rent obligations in relation to the dormitory for students for a period of time and it reduced the level of payments due for the lease of the hangar and administration facilities. The complainant considers that these actions could not have been undertaken in line with the market investor principle and that they therefore constitute state aid from NLH to NAC.

With regard to the remission of the loan¹⁸, the complainant submits that it is not sufficient to demonstrate that private investors also granted remission and maintains its claim that the loan remission amounts to state aid which is not in line with the market investor principle. In particular, the complainant notes that no evidence documenting a restructuring plan which would lead to an adequate return on investment has been submitted by the County.

With regard to the loan guarantee, the complainant contests the statement by the Norwegian authorities that parent companies do not tend to charge a guarantee premium on loans to subsidiaries and refers to sections 3-8 and 3-9 of the Norwegian Act relating to limited liability companies in support of its claim that the opposite is true.

Finally, with regard to the interest rate of 8,5% charged on the loan from the Municipality of Målselv, the complainant reiterates the considerations underlying the market investor principle and concludes that, given the financial situation of NAC, the interest rate does not reflect the risk attached to the loan and should be classified as a grant/subsidy which a private investor would not have made.

6 Comments by the Norwegian authorities to those submissions

The Norwegian authorities responded to the comments submitted by Rørosfly and the complainant by stressing, firstly, that NAC no longer exists as a legal entity and, secondly, that since NEAR does not actively encourage students to take their entire training in Norway, support to NAC was perceived to be the best way to contribute to the aviation learning environment in Norway.

II. ASSESSMENT

1 Scope of the present decision

In their comments to the Decision to open the formal investigation, the Norwegian authorities describe the relationship between NLH and NAC and mention that, in light of the financial difficulties faced by the latter, NLH temporarily suspended rent obligations in relation to the dormitory it rented to NAC and reduced the payments due as a result of the lease of hangar and administration facilities.

¹⁸ The complainant notes that the County did not comment on the initial granting of the loan, nor on the postponement of repayment in 2003. It maintains its claim that these elements also amount to state aid.

The complainant highlights this action as two further instances of aid to NAC while the authorities maintain that such action was normal in the circumstances. These measures were not part of the Decision to open the formal investigation.

Moreover, in light of the information provided by the Norwegian authorities regarding the recipient of the loan from the Municipality of Målselv, that measure no longer corresponds to the description in the Decision to open the formal investigation. The Norwegian authorities have also confirmed that both this loan and the project funding allocated to NLH from Troms County were transferred to NAC “*for services necessary to carry out a development project*”. Again, this transfer of funds was not mentioned in the Decision to open the formal investigation.

In relation to the change in recipient of the loan from the Municipality of Målselv, the Authority considers that the contested measure, funds from the municipality at a preferential rate, remains identifiable with that described in the Decision to open the formal investigation and will therefore assess that measure in relation to the new beneficiary rather than NAC. However, concerning the other points raised, it does not appear clear to the Authority that no doubts can be raised as to the conformity of these various measures with the state aid rules. As a result, these measures cannot be concluded upon and will not be considered further in the present decision. The scope of this decision therefore extends only to the measures described at I-2.1(a) to (e) above.

2 The presence of state aid within the meaning of Article 61(1) EEA

Article 61(1) EEA reads as follows:

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

Before looking at these criteria in turn, a preliminary point should be made regarding the nature of the activity carried out by NAC, namely the provision of airline pilot education.

It would appear that a competitive market exists for the provision of such services, the cost of which is not insubstantial. The fact that the service presents an educational aspect does not, of itself, alter the economic nature of the activity. On the contrary, the case law invoked by the Norwegian Government would appear to support the view that while courses provided under the national education system do not constitute services within the meaning of Article 50 EC¹⁹, courses which are financed essentially from private funds, in particular by students or their parents, do fall within the scope of that article.²⁰ Moreover, this reasoning, which relates to the notion of ‘service’ within the meaning of Articles 49 EC and 36 EEA, can be transposed to the field of state aid and the question of whether an activity is economic and thus performed by an undertaking within the meaning of Article 61(1) EEA.²¹ It has not been argued, nor does the information on the file support a conclusion that the course at NAC is not funded essentially from private funds. The

¹⁹ Article 37 EEA is framed in identical terms.

²⁰ See Case C-109/92 *Wirth* [1993] ECR I-6447, paragraphs 14-17. The EFTA Court has recently confirmed this view in Case E-5/07 *Private Barnehagers Landsforbund*, judgment of 21 February 2008 not yet reported, at paragraphs 80 *et seq.*

²¹ Case E-5/07 *Private Barnehagers Landsforbund*, cited above, at paragraph 80.

Authority therefore concludes that the airline pilot education provided by NAC before it went bankrupt was an economic activity and that NAC is an undertaking for the purposes of Article 61 EEA.

2.1 Presence of state resources

The aid measure must be granted by the State or through state resources.

The contested funding consists of a direct grant allocated in the context of the Revised National Budget, or of monies disbursed or advantages granted by the local authorities. It is therefore clear that all the contested funding was granted by the State or through State resources.

2.2 Favouring certain undertakings or the production of certain goods

First, the aid measure must confer on the recipients advantages that relieve it of charges that are normally borne from its budget. However, only transfers of resources which favour undertakings fall to be assessed under Article 61(1) EEA. Thus, before turning to the specific measures under examination, it must first be considered whether the recipients of the funding are undertakings within the meaning of that provision.

As noted above, NAC is clearly an undertaking and the fact that it performs an educational function does not, in the present case, alter that conclusion.

However, it would appear that NLH does not carry out any form of economic activity in relation to which it receives funding. According to settled case law, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity.²² The Authority has not been presented with any information indicating that facilitating the operation of airline pilot education in the north of Norway may be defined in those terms. Indeed, again in line with settled case law, only services normally provided for remuneration are to be considered as services within the meaning of the EEA Agreement.²³ Not only is the NLH not paid for what it does, but the funding which it disburses in line with its aim to facilitate the operation of airline pilot education in the north of Norway is more akin to the social objectives identified by the EFTA Court in the *Private Barnehagers* case, when it held that the Norwegian State was not seeking to engage in gainful activity but was fulfilling its duties towards its own population in the social, cultural and educational fields.²⁴ Indeed, the funding granted to NLH from Troms County resembles more an internal transfer of resources, thereby earmarking the funding for use in the promotion of airline pilot education in the geographical area for which the County is responsible, than a payment for services rendered. Further disbursement of these funds to undertakings such as NAC, engaged in the economic activity of providing airline pilot education, may indeed amount to state aid but, as noted above at II-1, fall outside the scope of this decision. As regards the initial disbursements to NLH, the Authority concludes that, at least at the time the disbursements were made, the NLH itself could not be considered to be a recipient of aid and the two measures in relation to which NLH was the beneficiary need not be assessed further. The Authority will therefore only consider the existence of an advantage in relation to the measures of which NAC was the beneficiary, namely:

²² Case C-205/03 P *FENIN* [2006] ECR I-6295, paragraph 25.

²³ Case E-5/07 *Private Barnehagers Landsforbund*, cited above, at paragraph 81.

²⁴ Case E-5/07 *Private Barnehagers Landsforbund*, cited above, at paragraph 83.

- direct grant of NOK 4,5 million from the State budget;
- loan from Troms County and subsequent remission thereof
- loan guarantee granted by Troms County without payment of a premium.

A direct grant aimed at alleviating operational costs clearly satisfies this condition.

According to the Norwegian authorities, the loan from Troms County was granted under the Regional Loan Scheme notified to and authorised by the Authority in 1999. Remission of a loan also lessens the financial burden which the recipient would otherwise have to bear. However, no advantage, within the meaning of Article 61(1) EEA, can be said to accrue to the beneficiary if normal market principles govern that action. According to the information provided by the Norwegian authorities, in late 2005, the following entities were long-term unsecured creditors of NAC: Sparebanken Finans Nord-Norge AS (NOK 2 877 000), Troms County (NOK 400 000), Indre Troms Samvirkelag BA (NOK 200 000) and Eriksen Eiendom (NOK 200 000). The Norwegian authorities confirmed that the latter two, both of which are to be considered as private investors, authorised remission of the loans they had granted to NAC, while Sparebanken Finans Nord-Norge granted postponement of instalments for the second half of 2006, but not exemption from interest payments. Thus, while public authorities must pursue their debtors with the same vigour as a private creditor, the Authority considers that since private market players also granted remission of outstanding loans to NAC, the same action by Troms County does not amount to state aid.

Section 2.1 of the State Aid Guidelines on State guarantees stipulates that State guarantees constitute a benefit to the borrower and a drain on State resources when no premium is paid in return for the guarantee. It would therefore appear that the guarantee granted to NAC by Troms County conferred an advantage on NAC, thus favouring that undertaking within the meaning of Article 61(1) EEA.

Second, the aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. The measures under examination were directed specifically at NAC and are therefore clearly selective.

2.3 Distortion of competition and effect on trade between Contracting Parties

For the measures to constitute state aid, they must distort competition and affect trade between the Contracting Parties. On the basis that NAC is in direct competition with other institutions in Norway and around Europe which offer airline pilot education according to common European rules (Joint Aviation Authorities Flight Crew Licence, or JAA-FCL), it would appear that the funding strengthens the position of the recipient and thus has the potential to distort competition between these various schools and affect trade between the States in which they are established.

2.4 Conclusion

On the basis of the foregoing considerations, the Authority concludes that the following measures do not amount to State aid within the meaning of Article 61(1) EEA:

- project funding to NLH from Troms County (I-2.1(b) above);
- the grant of remission of a loan from Troms County in favour of NAC (I-2.1(c) above); and
- loan to NLH from the Municipality of Målselv (I-2.1(e) above),

and that the following measures, granted in favour of NAC, do amount to state aid within the meaning of Article 61(1) EEA:

- direct grant of NOK 4,5 million from the State budget (I-2.1(a) above); and
- loan guarantee granted by Troms County without payment of a premium (I-2.1(d) above).

3 Procedural requirements

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

The Norwegian authorities did not notify the aid measures described above to the Authority. The Authority therefore concludes that, in relation to the measures identified as aid (namely the direct grant and the loan guarantee described, respectively, at I-2.1(a) and (d) above), the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement. The support granted therefore amounts to ‘unlawful aid’ within the meaning of Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement.

4 Compatibility of the aid

4.1 Assessment under Article 61 EEA

None of the situations described in Article 61(2) EEA can be applied to the present case.

The region in question does not fall within the scope of Article 61(3)(a) EEA and paragraph (b) of Article 61(3) EEA does not apply to the present case.

The contested funding does not appear to promote horizontal Community objectives within the meaning of Article 61(3)(c) EEA directly, such as research and development, employment, the environment etc. Indeed, the Norwegian authorities have not invoked this derogation. The Authority therefore considers that the contested funding cannot be considered to be compatible with the functioning of the EEA Agreement within the meaning of that paragraph.

4.2 Assessment under Article 59(2) EEA

Pursuant to Article 59(2) EEA, *“undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Agreement, in*

particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties”.

The application of that provision has been developed in the State Aid Guidelines on public service compensation, paragraph 25 of which stipulates that the Guidelines will be applied to the assessment of non-notified aid which was granted after the adoption of those Guidelines. In all other cases, the provisions in force at the time the aid was granted will be applied. The two measures under examination pre-date the adoption of the Guidelines (20 December 2005).

No specific rules on public service compensation existed prior to the introduction of what was then Chapter 18C of the State Aid Guidelines (now simply called the Chapter on public service compensation). The Authority nevertheless finds it appropriate to base the assessment of earlier measures on the Commission Communication on services of general economic interest in Europe²⁵ read together with case law of the Court of Justice rendered prior to the granting of the aid.

Moreover, the Authority finds that the content of Chapter 18C of the State Aid Guidelines did not fundamentally alter the basis for assessment, but simply clarified what is required in order to fulfil the various criteria contained in Article 59(2) EEA.

Compatibility of the two measures under examination will therefore be assessed on the basis of the following (cumulative) principles, taking due account of the timing of the measures and with due regard to the fact that Article 59(2) EEA constitutes a derogation and as such must be interpreted restrictively:

- the service in question must be a ‘service of general economic interest’ and must be clearly defined as such;
- the undertaking in question must be officially entrusted with the provision of that service;
- the application of the competition rules would obstruct the performance of the particular tasks assigned to the undertaking in question; and
- development of trade must not be affected to an extent contrary to the interests of the Contracting Parties.

Service of general economic interest

EFTA States have a wide discretion in determining the level of services in the general economic interest and may, where necessary, impose public service obligations in order to ensure that level. The definition by a State of what it regards as a service of general economic interest is subject only to control for manifest error. However, in all cases, for the derogation in Article 59(2) EEA to apply, the public service mission must be clearly defined.

In this respect, it follows from case law that the concept of ‘service of general economic interest’ covers services that exhibit special characteristics as compared to the economic interest of economic activity in general.²⁶ One such special feature may be the fact that the public authorities consider that the service needs to be provided even where the market

²⁵ OJ C 17, 19.01.2001, p. 4.

²⁶ See, for example, Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 28.

may not have sufficient incentive to do so.²⁷ Thus, where certain services are deemed to be in the general interest and market forces do not result in satisfactory provision of such services, the State concerned can lay down specific public service obligations to secure the level of service provided.

In relation to the direct grant of NOK 4,5 million, the Authority notes that the relevant post in the State budget for 2005 allocates funding to ‘airline pilot education located in Tromsø/Bardufoss’. The Authority is of the view that this cannot amount to a clear definition of a public service mission. Moreover, even if it were to be argued that the special characteristic is the fact that the entire course takes place in Norway and that this is the ‘general interest’ element of the service, the Authority notes that nothing in the budget or in other documents submitted to the Authority makes the grant conditional on such a feature.

The Authority is therefore of the opinion that in the present case the definition of a service of general economic interest amounts to manifest error. Thus, the condition for Article 59(2) EEA to apply (*i.e.* that an undertaking performs a service of general economic interest) is not fulfilled in the case at hand.

Finally, in relation to the measure identified at I-2.1(d) above, the Authority is of the view that a guarantee for a certain amount of debt, defined in general, cannot amount to ensuring the fulfilment of a particular task of general economic interest and that this measure therefore does not fall to be assessed under Article 59(2) EEA.

Entrustment

Even assuming that the service in question had been properly defined, in order for the exception in Article 59(2) EEA to apply the public service mission must be specifically entrusted through an act of public authority. The Authority notes that both measures under examination would appear to grant a financial advantage to NAC without entrusting them with any public service mission in return for the funding. With reference to the argument of the Norwegian authorities based on Commission practice, the Authority is of the opinion that it does not follow from the decisions of that body that simply receiving funding from the State amounts to entrustment, when no description of the public service mission or the conditions under which it must be ensured is given.²⁸ In this respect, the Authority again refers to the fact that, if the special characteristic of the training provided at NAC is the fact that the entire course takes place in Norway and that this is the ‘general interest’ element of the service, nothing in the budget or in other documents submitted to the Authority makes the grant conditional on such a feature.

Thus, even if it were clear that the Norwegian authorities had a specific public service mission in mind when they decided to grant funding to the airline pilot education sector, the Authority cannot see any evidence of that mission having been specifically entrusted to NAC. As a result, Article 59(2) EEA cannot be applied to the situation at hand.

²⁷ See, for example, Commission Communication on services of general economic interest in Europe, cited above at footnote 25, paragraph 14.

²⁸ Commission Decision 2006/225/EC of 2 March 2005 on the aid scheme implemented by Italy for the reform of the training institutions (OJ 2006 L 81, p. 25) expressly acknowledges that the institutions in question “*assured institutional, social targeted vocational training ... delivered in the framework of the public education system*” (paragraph 48) and that they were therefore “*entrusted with a public service mission, within the framework of the relevant national and regional rules, by means of binding acts*” (paragraph 57).

Proportionality

The final two elements of Article 59(2) EEA amount, together, to a proportionality assessment. In considering whether the measures adopted exceed what is necessary to guarantee effective fulfilment of the public service mission, the Authority notes, first, that the necessity of the funding is questionable in the absence of any conditions attaching thereto and, second, that no objective evaluation of how much funding would be required appears to have been undertaken. The Authority therefore concludes that, even if the other criteria had been satisfied, this element of Article 59(2) EEA is not fulfilled in the present case.

4.3 Conclusion

The Authority concludes that neither the direct grant (I-2.1(a) above) nor the loan guarantee (I-2.1(d) above) fulfil the conditions for Article 59(2) EEA to apply and that both measures are therefore incompatible with the functioning of the EEA Agreement.

5 Conclusion

The Authority finds that the following measures do not amount to State aid within the meaning of Article 61(1) EEA:

- project funding from Troms County (I-2.1(b) above);
- remission of a loan from Troms County (I-2.1(c) above); and
- loan from the Municipality of Målselv (I-2.1(e) above).

However, the Authority concludes that the Norwegian authorities have unlawfully implemented the following aid measures:

- direct grant of NOK 4,5 million from the State budget (I-2.1(a) above); and
- loan guarantee granted by Troms County without payment of a premium (I-2.1(d) above),

in breach of Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

The aid measures described do not satisfy the conditions for applying Article 59(2) EEA and are therefore not compatible with the functioning of the EEA Agreement.

It follows from Article 14 of Part II of Protocol 3 to the Surveillance and Court Agreement that the Authority shall decide that unlawful aid which is incompatible with the state aid rules under the EEA Agreement must be recovered from the beneficiaries.

HAS ADOPTED THIS DECISION:

Article 1

The project funding granted to NLH by Troms County and the loan to that entity by the Municipality of Målselv, together with the remission by Troms County of a loan granted by it to NAC do not constitute state aid within the meaning of Article 61(1) EEA.

Article 2

The direct grant of NOK 4,5 million from the State budget and the loan guarantee granted by Troms County constitute state aid in favour of NAC which is not compatible with the functioning of the EEA Agreement within the meaning of Article 61(1) EEA.

Article 3

The Norwegian authorities shall take all necessary measures to recover the aid referred to in Article 2 and unlawfully made available to NAC.

Article 4

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of NAC until the date of its recovery. Interest shall be calculated on the basis of Article 9 in Decision No 195/04/COL.

Article 5

The Norwegian authorities shall inform the EFTA Surveillance Authority, within two months of notification of this Decision, of the measures taken to comply with it.

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version is authentic.

Done at Brussels, 1 July 2009
For the EFTA Surveillance Authority,

Per Sanderud
President

Kristján Andri Stefánsson
College Member