

Case No: 72678
Event No: 660956
Decision No: 129/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 20 March 2013

to propose appropriate measures with regard to state aid granted to the Analysis Centre
Trondheim

(Norway)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to:

The Agreement on the European Economic Area (the “EEA Agreement”), in particular Article 61(3)(c) and Protocol 26 thereof,

The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the “Surveillance and Court Agreement”), in particular Article 24,

Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular Article 1 of Part I and Article 18 of Part II,

WHEREAS:

I. FACTS

1. Procedure

- (1) By letter dated 1 July 2010 (Event Number 563018), the EFTA Surveillance Authority (“the Authority”) received a complaint alleging that the Municipality of Trondheim granted illegal State aid to Analysesenteret Trondheim (“the Analysis Centre”). By letter dated 27 October 2010 (Event Number 574297), the Authority requested additional information, which the Norwegian authorities provided by letter dated 17 December 2010 (Event Number 581166). By letter dated 31 January 2011, the Authority requested further information (Event Number 582445), which the Norwegian authorities provided by letters dated 22 February 2011 (Event Number 589797) and 15 March 2011 (Event Number 590640).
- (2) By letter dated 9 September 2011 (Event Numbers 609057, 609060 and 609067) the Authority received a second complaint on the same issue. By letter dated 25 November 2011 (Event Number 616342), the Authority forwarded the second complaint to the Norwegian authorities and requested further information. The Norwegian authorities replied by letters dated 9 January 2012 (Event Numbers 620580 and 620577) and 15 May 2012 (Event Number 635109).

- (3) On 19 September 2012 (Event No. 634932) the Authority sent a letter to the Norwegian authorities in accordance with Article 17 of Protocol 3 informing them of the preliminary view of the Authority that certain measures in favour of the Analysis Centre constituted existing aid which was no longer compatible with the functioning of the EEA Agreement.
- (4) The Norwegian authorities replied to the preliminary assessment by letter dated 6 December 2012 with which they attached a reply by the Municipality of Trondheim dated 5 December 2012 (Event No. 655662).

2. Description of the aid measure

- (5) Historically, the municipalities responsibility for verifying the quality of drinking water and foodstuffs was enshrined in the Act on the Supervision of Foodstuffs. In 1978 the Act on the Coordinated Foodstuffs Control allowed for intermunicipal coordination in the control of foodstuffs. In 2004 the Act on Food Production and Security established the Norwegian Food Safety Authority (Mattilsynet), which formally took over responsibilities from the municipalities although it immediately delegated some operations back to them so that the municipal level effectively remained in charge of these tasks. According to the Norwegian authorities, the Municipality of Trondheim has been operating a laboratory as an integrated department for 120 years.
- (6) According to the Norwegian authorities, the main purpose of the Analysis Centre is the control of the municipal water supply system. Furthermore, the Analysis Centre monitors shellfish production for the Food Safety Authority. The Norwegian authorities have argued that this task is essential to cover the investment costs of the Analysis Centre and to develop a highly competent staff. The Norwegian authorities have further submitted that the delivery of services to private clients on the open market is only a secondary activity even if it is increasing in volume.
- (7) According to the Norwegian authorities, the Analysis Centre provides invoiced services to the municipality of Trondheim (e.g. analysis of the municipality's water supply), non-invoiced services to the municipality of Trondheim (e.g. supervision of purification facilities, drainage facilities, municipal kitchens, consultancy, etc.), invoiced services to the Food Safety Authority (e.g. control of shellfish production) as well as invoiced services to the private sector.
- (8) For 2010 these services contributed to the Analysis Centre's turnover as follows:

Revenues in 2010	NOK	EUR¹
Municipality of Trondheim (invoiced)	3 000 000	402 000
Municipality of Trondheim (non-invoiced)	4 000 000	536 000
Food Safety Authority (invoiced)	3 000 000	402 000
Private sector clients (invoiced)	6 000 000	804 000

¹ Where converted from NOR values, all EUR values in this decision are based on the interbank rate from 13 March 2012 (1 NOK = 0.134 EUR).

Total	16 000 000	2 144 000
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- (9) According to the Norwegian authorities, the Analysis Centre has generated a small profit in recent years, even though the table below shows that the Analysis Centre generated a small loss in 2009 and 2010.

Annual results	NOK	EUR
2004	405 000	54 270
2005	180 000	24 120
2006	94 000	12 596
2007	118 000	15 812
2008	118 000	15 812
2009	- 5 000	- 670
2010	- 5 000	- 670

- (10) Although the Analysis Centre provides services both “in-house” to the Municipality as well as to public and private customers, the Norwegian authorities have submitted that historically there exists no system of separate accounting for those services. However, the Norwegian authorities have submitted that the Municipality of Trondheim has decided to take the following actions:

- separate the accounts of the Municipality of Trondheim from the accounts of the Analysis Centre; and
- within the accounts of the Analysis Centre, to separate the accounts for services to the Municipality of Trondheim from services provided to the market.

At the same time the Analysis Centre is to remain part of the Municipality of Trondheim

- (11) The new practice entered into force on 1 July 2012. Based on the new practice the Norwegian authorities provided in their latest submission an estimate of profits and losses, split between services provided to the Municipality of Trondheim and services provided on the market. According to the Norwegian authorities a preliminary examination indicates that in 2011 the staff of the laboratory spent 45% of its time on services for the Municipality of Trondheim and 55% for services provided to the market. The figures provided by the Norwegian authorities are set out in the table below:

	Competitive part (NOK)	Public part (NOK)	Sum (NOK)
Split	55%	45%	100%
Wage and social expenses	6 441 987	5 270 717	11 712 704
Goods and services	2 913 218	2 383 542	5 296 761
Transfer to others	2 054	1 680	3 734
Sum Expenses	9 357 259	7 655 940	17 013 199
Sales	-9 972 786	-3 406 362	-13 379 148
Refunds	-445 100	-364 173	-809 273
Transfers from others	-248 339	-203 187	-451 526
Sum Income	-10 666 225	-3 973 722	-14 639 947
Operating result	-1 308 966	3 682 218	2 373 252
Ind. operating expenses	359 150	293 850	653 000
Capital expenditure	839 850	687 150	1 527 000
Net profit	-109 966	4 663 218	4 553 252

- (12) The Norwegian authorities have stressed that these are preliminary numbers, which will be subject to correction after the new accounting system has been put in place. The Authority notes that the table appears to show income (i.e. sales, refunds, etc.) as negative value. Consequently, the above table shows that what the Norwegian authorities consider to be the “competitive part” of the Analysis Centre generated a profit of 109 966 NOK (14 735 EUR) in 2011, while the “public part” incurred losses of 4 663 218 NOK (624 871 EUR).

Form of Aid

- (13) Both of the complainants have argued that the Analysis Centre receives State aid in the form of direct grants as part of the yearly investment budget, the provision of premises free of charge and the provision of collective services free of charge. Furthermore, one of

the complaints argued that the Analysis Centre receives State aid in the form of a preferential tax treatment and a State guarantee.

Direct Grants

- (14) According to the Norwegian authorities, the Municipality of Trondheim transfers approximately 2 000 000 NOK (268 000 EUR) per year to the Analysis Centre as an investment budget. These funds are supposed to be used for upgrading the building and equipment.

Premises

- (15) According to the Norwegian Authorities, the Municipality of Trondheim built the premises for its laboratory service in 1990 and it has been occupied by the Analysis Centre ever since. The Norwegian Authorities have submitted that the Municipality of Trondheim has no formal rental contract with the Analysis Centre and it seems from the submissions that the Analysis Centre initially did not pay any rent to the Municipality of Trondheim, but covered the daily operational and maintenance expenses for its premises. Now, it seems, that the Analysis Centre pays a ground rent of 100 000 NOK (13 400 EUR) per year for the usage of two of the three floors of the building. It is unclear when this obligation was put into effect and whether it is based on a formal contract. Furthermore, the Authority notes that according to the second complaint the appropriate market rent for two floors of a building of this size in this location would amount to at least 1 500 000 NOK (201 000 EUR).²

Collective Services

- (16) According to the Norwegian authorities, the Analysis Centre makes use of the municipality's collective services (e.g. accounting, auditing, telecommunication, internet technology, archival, etc.) and it seems from the submissions that the Analysis Centre initially did not pay for these services. Now, it seems, that under the new accounting practice these costs will be split between the "competitive" part and the "public" part of the Analysis Centre. Under the new practice the Municipality of Trondheim monitors the costs of these services to the municipal budget. However, the Authority notes that according to the second complaint the appropriate market price for the accounting services alone would amount to 250 000 NOK (33 500 EUR) and the market price for the auditing services could amount to 460 000 NOK (61 640 EUR). These figures do not yet take into account the market prices for other services such as telecommunication, internet technology, archival and others.

Tax Exemption

- (17) According to the Norwegian authorities the Analysis Centre – being an integrated part of the Municipality of Trondheim – is not subjected to income tax, since it is legally organised as an integrated part of the municipal administration and not as an undertaking.

² This assumption is calculated on the basis of a yearly market rent of 1,259/sqm and a size of 1248 sqm for the two floors, which would lead to an alleged market rent of 1 571 232 NOK (210 545 EUR) per year. The complainant estimated the appropriate rent per sqm on the Basis of the DnBNOR market report for mid-Norway from the first half of 2011 (see: <https://www.dnb.no/bedrift/naeringseiendom/markedsrapporter.html>).

3. Comments by the Norwegian authorities

- (18) The Norwegian authorities replied by letter dated 6 December 2012, which forwarded to the Authority comments made by the Municipality of Trondheim dated 5 December 2012 (Event No. 655662). The Municipality of Trondheim agreed with the Authority's assessment as laid down in the letter sent on 19 September 2012 in accordance with Article 17(2) in Part I of Protocol 3 (Event No. 634932). In particular, the Municipality of Trondheim agreed that the aid, which it provides to the Analysis Centre, constitutes state aid in breach of EEA law. Moreover, the Municipality agreed to organise the activities of the Analysis Centre in a way which conforms with EEA law requirements.

II. ASSESSMENT

1. The Presence of State Aid

- (19) Article 61 (1) EEA postulates that “[s]ave as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting parties, be incompatible with the functioning of this Agreement”.

1.1. Undertaking

- (20) It follows from Article 61(1) EEA that state aid rules only apply to undertakings. It is established case law that the concept of an undertaking comprises “[a]ny entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed”.³ It is also established case law that an activity can be considered to be economic, if there exists a market for the service or good in question and if the entity in question offers its goods or services on this market.⁴ Conversely, entities that are not commercially active in the sense that they are not offering goods and services on a given market do not constitute undertakings.
- (21) The notion of offering goods or services on a market implies that the entity provides its goods or services against remuneration. The essential characteristic of remuneration lies in the fact that it constitutes a consideration for the service or the goods in question, which is normally agreed upon between the supplier and the recipient.⁵ It should be noted that the concept applies irrespective of the status of the entity under national law⁶ and irrespective of the entity's profitability or non-profitability.⁷
- (22) As described above, the Analysis Centre carries out a number of activities. Some of these are services which the Analysis Centre provides to the municipality without remuneration,

³ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para. 21; Joint Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para. 74; Case C-309/99 *Wouters* [2002] ECR I-1577, para. 46.

⁴ Case 118/85 *Commission v Italy* [1987] ECR 2599, para. 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, para. 36; Joint Cases C-180/98 to C-184/98 *Pavlov and Others*, cited above, para. 75.

⁵ Case 263/86 *Belgian State v Humbel* [1988] ECR 5383, para. 17; Case C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] I-6464, para. 15.

⁶ Case C-41/90 *Höfner and Elser*, cited above, para. 21; Joint Cases C-180/98 to C-184/98 *Pavlov and Others*, cited above, para. 74; Case C-309/99 *Wouters*, cited above, para. 46.

⁷ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1980] ECR 3125, para. 21; Case C-244/94 *FFSA and Others* [1995] ECR I-4013, para. 87-89; Case C-49/07 *MOTOE* [2008] ECR I-4863, para. 27 and 28.

for example the supervision of its facilities and hygiene control in public kitchens. The Analysis Centre is thus entrusted with certain tasks that form part of the essential functions of the municipality. Unless the EFTA State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities.⁸ Consequently, the aforementioned services cannot be considered as economic activities.

- (23) However, the Analysis Centre also provides laboratory services in exchange for remuneration. The recipients of such services may be other public entities, as well as private companies. In that regard the Authority notes that there is a market for laboratory services in Norway on which the Analysis Centre competes with various market operators. The information at hand indicates that the Analysis Centre offers its services on the market for laboratory services in the manner of an economic activity.
- (24) The Authority further notes that according to the Norwegian authorities, there has been no system of economically separating services provided to the public and services provided to the private sector.
- (25) On the basis of the above the Authority comes to the conclusion that where the Analysis Centre provides services on a commercial basis in exchange for remuneration, the Centre is engaged in economic activities and therefore is to be considered as an undertaking within the meaning of Article 61 (1) EEA.

1.2. Advantage

- (26) It follows from established case law that a measure involves an advantage if it transfers an economic benefit which the recipient would not have obtained under normal market conditions⁹ or if it mitigates charges which are normally included in the budget of an undertaking.¹⁰

Direct Grants

- (27) According to the Norwegian authorities, the Municipality of Trondheim allocates an annual investment budget of approximately 2 million NOK to the Analysis Centre. The budget is used for upgrading the building and equipment. There are no indications that a private investor would have transferred these funds to the Analysis Centre as part of a regular investment with a view on future profits (private investor principle). The Authority concludes from the above that the budget allocation transfers an economic benefit to the Analysis Centre which the entity would not have obtained under normal market conditions and which thus constitutes an advantage.

Premises

- (28) The Norwegian Authorities have submitted that the Municipality of Trondheim has no formal rental contract with the Analysis Centre. The information provided indicates that the Analysis Centre initially did not pay any rent to the Municipality of Trondheim, but

⁸ See the Authority's Guidelines on the Application of the state aid rules to compensation granted for the provision of services of general economic interest (n.y.p.), available on the Authority's website: <http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Compensation-granted-for-the-provision-of-services-of-general-economic-interest.pdf>, para. 16.

⁹ Case C-301/87 *French Republic v Commission* [1990] ECR I-307, para. 41

¹⁰ Case 30/59 *De Gezamenlijke Steenkolenmijnen v High Authority of the European Coal and Steel Community* [1961] ECR 50, p. 19; Case C-241/94 *France v Commission* [1996] ECR I-4551, para. 34; Case T-109/01 *Fleuren Compost* [2004] ECR II-132, para. 53.

merely covered the daily operational and maintenance expenses for its premises. Now, the Analysis Centre pays a ground rent of 100 000 NOK (13 400 EUR) per year for the usage of two of the three floors of the building. However, according to the second complainant the appropriate market rent for two floors of a building of this size in this location would amount to at least 1 500 000 NOK (201 000 EUR).¹¹ The Authority notes that the Norwegian authorities have not provided specific comments to this information, neither have they provided an independent expert evaluation to determine the market rent for the part of the premises the Analysis Centre uses for its commercial activities.¹² On the basis of the above, the Authority concludes that the conditions under which the Municipality of Trondheim provides the premises to the Analysis Centre are more advantageous than the market conditions would be and thus constitute an advantage.

Collective Services

- (29) On the basis of the information at hand it seems that the Municipality of Trondheim provides a number of collective services (e.g. accounting, auditing, IT-services, archive services, etc.) to the Analysis Centre for free or at least at a price below the market price. Under normal market circumstances the Analysis Centre would have had to pay an appropriate price to the municipality as the provider of these services. On the basis of the above the Authority concludes that the provision of these services constitutes an advantage.

Tax Exemptions

- (30) The Analysis Centre does not pay any income taxes. An exemption or a partial exemption from taxes or charges constitutes an advantage, if it mitigates the charges normally included in the budget of the undertaking. This is the case if the exemption favours this undertaking in comparison with others which are in a legal and factual situation which is comparable in the light of the objective pursued by the tax or charge in question.¹³ It has been established above that the Analysis Centre carries out economic activities. However, while other undertakings have to include in their budget regular income taxes, the Analysis Centre is not subject to these taxes under the Norwegian Tax Code, because it operates as an integrated part of the Municipality of Trondheim and not as an undertaking under Norwegian Tax Law. This constitutes a *de facto* tax exemption of the economic activities of the Analysis Centre and favours it compared to other undertakings in Norway. On the basis of the above the Authority concludes that the *de facto* tax exemption constitutes an advantage.

Conclusion

- (31) Based on the above, the Authority concludes that the above-mentioned measures constitute an advantage for the Analysis Centre.

¹¹ See footnote 2, above, for the basis for this calculation

¹² According to the Authority's State Aid Guidelines, EEA States may show through an independent expert evaluation that the price for a piece of land was at market value (see Part V: Specific Aid Instruments, State aid elements in sales of land and buildings by public Authorities, Point 2.2 a: see <http://www.eftasurv.int/?1=1&showLinkID=15142&1=1>). The Authority accepts a similar approach to determine the market conformity of leases or rents (see Authority's Decision No 125/11/COL of 3 December 2009 on the lease agreement between Skedsmo municipality and Akershus Energi Varne AS).

¹³ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, para. 28-31; Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para. 41.

1.3. State Resources

- (32) In order to constitute state aid, a measure must be financed by the State or through State resources (in any form whatsoever). It is established case-law that a measure is financed by the State or through State resources if the measure imposes a burden on the public budget, e.g. as a result of an active transfer of resources (such as a grant), the provision of goods or services at a price below the market price (such as a guarantee of preferential rates¹⁴), or the waiver of public debts (such as social security contributions¹⁵ or taxes¹⁶).
- (33) The grants allocated to the Analysis Centre for upgrading the building and equipment stem from the budget of the Municipality of Trondheim and are thus financed through State resources. Furthermore, it appears that the Municipality of Trondheim provides premises and certain collective services to the Analysis Centre for prices below the market price or even free of charge (such as accounting, auditing, IT-services, or archive services). Finally, the non-taxation of income entails the use of State resources in the form of the waiving of a public debt.
- (34) Based on the above the Authority concludes that the above-mentioned measures are financed by the State.

1.4. Selectivity

- (35) A measure is selective if it favours only certain undertakings or the production of certain goods. By contrast it is not selective if it applies to all undertakings in the national territory regardless of their activity.¹⁷ Even if a measure is selective, it does not qualify as State aid if the selectivity is justified by the nature and the scheme of the system.¹⁸ However, it is for the Member State to adduce sufficient evidence in that regard.¹⁹
- (36) The information at hand indicates that the Municipality of Trondheim allocates funds from the annual budget to the Analysis Centre and provides premises as well as collective services (e.g. accounting, auditing, IT-services, archive services, etc.) on conditions more favourable than the market conditions, while other undertakings in Norway do not benefit from these advantages. Furthermore, the information at hand indicates that the Norwegian tax authorities do not impose income taxes on the activities of public entities, which operate as an integrated part of the public administration and are not registered as public undertakings. Private undertakings and public undertakings are – on the other hand – subjected to the income taxes. However, there is no indication that the exemption of public entities, which are not registered as public undertakings but do nonetheless engage in economic activities, could be justified by the nature and the scheme of the system. It is the nature of the taxation system to tax economic activities, but the economic activities of the Analysis Centre do not seem to be subjected to the income taxes.
- (37) Based on the above the Authority concludes that the advantages conferred through the above mentioned measures are selective.

¹⁴ Joined cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267 para. 82.

¹⁵ Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECR I-3913, para. 19.

¹⁶ Case C-295/97 *Piaggio v Italia*, [1999] ECR II-3761, para. 42; Case C-156/98 *Germany v Commission* [2000] ECR I-6857, para. 26.

¹⁷ Case C-143/99 *Adria-Wien Pipeline*, cited above, para. 41.

¹⁸ Case C-308/01 *Gil Insurance Ltd* [2004] ECR I-4777, para. 60; Case C-487/06 P, *British Aggregates v Commission* [2008] ECR I-10505, para. 83.

¹⁹ Case C-409/00 *Spain v Commission* [2003] ECR I-1487, para. 53; Joined Cases T-127/99, T-129/99 and T-148/99, *Diputación Foral de Álava and Others v Commission* [2002] ECR II-1275 para. 250.

1.5. Effect on Competition and Trade

- (38) The beneficiary is active in the market for laboratory services, which is a sector subject to competition between commercial providers in different EEA States. This is demonstrated by the fact that one of the complainants is part of an international group providing services also in other EEA States. Consequently, the Authority concludes that the above-mentioned measures affect trade between Contracting Parties and distort or threaten to distort competition in the EEA.

1.6. Conclusion

- (39) Based on the above the Authority concludes that the above-mentioned measures constitute state aid. The Norwegian authorities have agreed that this is the case.

2. Existing aid

- (40) The Authority notes that the municipalities in the past were responsible for verifying the quality of drinking water and foodstuffs. The Municipality of Trondheim has been operating a laboratory for more than 100 years in order to carry out these activities as part of its administrative tasks. As of 1933 the municipality's responsibility to verify the quality of foodstuff was included in the Act on the Supervision of Foodstuffs. In 1978 the Act on the Coordinated Foodstuffs Control reiterated the municipality's responsibility for controlling foodstuff while allowing for inter-municipal cooperation in the exercise of this responsibility. In 2004 the Act on Food Production and Security established the Norwegian Food Safety Authority, which immediately delegated some of its responsibilities back to the Analysis Centre (e.g. the monitoring of shellfish production). The Analysis Centre also remained responsible for controlling its water supply facilities, kitchens and sanitary installations. Moreover, the Analysis Centre continued to provide its services to the general public.
- (41) Against this background, the Authority has assessed whether the different aid measures constitute new or existing aid. New aid is defined in Article 1 (c) of Part II of Protocol 3 as *“all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.”* Existing aid is defined in Article 1 (b) (i) of Part II of Protocol 3 as *“all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after the entry into force of the EEA Agreement”*.
- (42) The EEA Agreement entered into force in Norway on 1 January 1994. The question, whether the aid measures were put into effect before or after this date depends on whether the aid qualifies as individual aid or as aid granted under a scheme.
- (43) The Authority notes that the Analysis Centre has been carrying out its activities as public tasks since 1933 and it is – in principle – in their public nature that these tasks are financed by the State. It therefore seems that the allocation of a certain budget to the Analysis Centre and the provision of premises and collective services constitute an aid scheme, which predates the entry into force of the EEA Agreement on 1 January 1994. Consequently, these measures qualify as existing aid.²⁰

²⁰ This approach is in line with the Authority's Decision No 491/09/COL Norsk Film group (OJ C 174, 1.7.2010, p. 3) which states in Chapter II.2 p. 8 that *“the yearly payments made by the Norwegian State since the 1970s to Norsk FilmStudio AS/Filmparken AS for the production of feature films and to maintain an infrastructure necessary for the production of films were based on an existing system of aid. The Authority considers that in this case, where regular payments were consistently made over a very long period of time,*

- (44) As regards the tax exemption the relevant provisions are based on Section 2-30 (1) (c) of the Norwegian Tax Code. The tax code allows the public authorities to grant aid in the form of the tax exemption to all public entities which are engaged in economic activities for an indefinite period of time and for an indefinite amount. The system for tax exemptions for economic activities of public authorities therefore constitutes an aid scheme. Furthermore, the Tax Code in its current form entered into force in 2000. However, the tax exemption is based on a similar provision in Section 26 (c) of the Tax Code of 1912. The provision has been transposed into the new tax code without having been significantly altered. The tax exemption therefore likewise constitutes existing aid.²¹
- (45) Based on the above the Authority concludes that the above-mentioned measures constitute existing aid.

3. Procedural requirements

- (46) Article 1(1) of Part I of Protocol 3 provides that “[t]he EFTA Surveillance Authority shall, in co-operation with the EFTA States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement”.
- (47) According to Article 17(1) of Part II of Protocol 3, the Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with that State, of existing aid schemes pursuant to Article 1(1) of Part I of Protocol 3. By letters dated 27 October 2010 (Event Number 574297), 31 January 2011 (Event Number 582445) and 25 November 2011 (Event Number 616342), the Authority requested information, which the Norwegian authorities provided by letters dated 17 December 2010 (Event Number 581166), 22 February 2011 (Event Number 589797), 15 March 2011 (Event Number 590640), 9 January 2012 (Event Numbers 620580 and 620577) and 15 May 2012 (Event Number 635109).
- (48) By letter dated 19 September 2012 (Event Number 634932) and in accordance with Article 17(2) of Part II of Protocol 3, the Authority informed the Norwegian authorities that it considered the existing aid scheme not to be compatible with the functioning of the EEA Agreement. It gave the Norwegian authorities an opportunity to submit comments. By letter dated 6 December 2012 (Event Number 655662) the Norwegian authorities submitted their comments.

4. Compatibility of the aid

- (49) Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement. The derogation of Article 61(2) of the EEA Agreement is not applicable to the aid measures under assessment in this Decision since they are not designed to achieve any of the aims listed in this provision. The aid can also not be justified under Article 61(3) of the EEA Agreement, since – based

the practice shows that state support was an essential element in the financing of the company. The Authority considers on that basis that the annual grants were made under an existing system of state aid within the meaning of Article 62 EEA.” In that case, the Authority opened the formal investigation into a payment of NOK 36 million that had been made in addition to the regular payments and an alleged preferential tax measure. With Decision No 204/11/COL (OJ L 287, 18.10.2012, p. 14) the Authority closed the procedure on the basis that the NOK 36 million payment was made on the basis of the existing aid scheme and that the tax measure did not constitute state aid.

²¹ See footnote 20. This approach is also in line with Commission Decision in Case E-45/2000 (Netherlands) *Fiscal exemption in favour of Schiphol Group* (OJ C 37, 11.2.2004, p. 13); see also Opinion of AG Warner in Case 177/78 *Pigs and Bacon* [1979] ECR 1129.

on the information at hand – the measures do not address any of the objectives listed in this provision.

- (50) The measures can also not be justified as a service of general economic interest (SGEI) under Article 59 (2) of the EEA Agreement. Under this provision the granting of compensation to an undertaking for carrying out certain services is in line with State aid rules, if these services are of general economic interest and if the undertaking has been properly entrusted with these tasks. The act of entrustment must specify the content and duration of the public service obligation, the identity of the undertaking and, where applicable, the territory concerned, the nature of any exclusive or special rights assigned to the undertaking by the granting authority, the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation and the arrangements for avoiding and recovering any overcompensation.²² The Norwegian authorities have not provided any information on the basis of which the Authority could conclude that the Analysis Centre carries out a service of general economic interest which has been properly entrusted to it and the compensation of which has been accurately calculated in line with the State Aid Guidelines on State aid in the form of public service compensation. On the contrary, the Norwegian authorities have agreed that the aid provided to the Analysis Centre is in contradiction with EEA law.
- (51) Based on the above, the Authority concludes that the measures in question are incompatible with the functioning of the EEA Agreement. The Norwegian authorities have already accepted this conclusion.

5. Recommendation of appropriate measures

- (52) For the above mentioned reasons, the Authority considers that the measures examined above constitute incompatible state aid and should accordingly be abolished by means of appropriate measures. Therefore, the Authority proposes that the above-mentioned measures for the benefit of the Analysis Centre Trondheim be abolished with effect from 1 January 2014.
- (53) The Authority considers that the following measures would qualify as appropriate means to abolish the effects of the above mentioned state aid:
- The Municipality of Trondheim should ensure that the accounts of the Analysis Centre are split between the economic and the non-economic activities of the Centre and that there is no cross-subsidisation between the two parts;
 - The Municipality of Trondheim should seize all other direct payments to the part of the Analysis Centre engaging in economic activities;
 - The Municipality should also require that the part of the Analysis Centre that performs economic activities pays an appropriate portion of what would constitute the market rent on the buildings it occupies;²³
 - The Municipality should ensure the part of the Analysis Centre that performs economic activities pays an appropriate portion of what would constitute the market price for the collective services referred to above; and

²³ The market rent should be established by an independent expert.

²³ The market rent should be established by an independent expert.

- Finally, the rules of business taxation should be modified to include the taxation of the economic activities of the of the Analysis Centre.

In the absence of a suitable modification to the rules of business taxation, the Municipality of Trondheim could incorporate the economic activities of the Analysis Centre in a separate legal entity, which would be subject to the regular business taxation under the existing rules.

The Norwegian authorities should communicate to the Authority the relevant measures it will take to discontinue the aid as soon as possible and in any event not later than 1 June 2013.

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 1(1) of Part I and Article 18 of Part II of Protocol 3, the Authority proposes that the Norwegian authorities shall take any legislative, administrative and other measures, such as those recommended in paragraph (53) above, necessary to eliminate any incompatible aid granted to the Analysis Centre Trondheim. Any such aid measures should be abolished with effect from 1 January 2014.

Article 2

The EFTA Surveillance Authority invites the Norwegian authorities to accept this proposal for appropriate measures, pursuant to Article 19(1) of Part II of Protocol 3, and to provide the answer within one month of receipt of this proposal.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 20 March 2013

For the EFTA Surveillance Authority,

Oda Helen Sletness
President

Sabine Monauni-Tömördy
College Member