

EFTA SURVEILLANCE AUTHORITY DECISION
of 24 April 2013
on alleged state aid to lessors of premises to public schools
(Norway)

The EFTA Surveillance Authority (“the Authority”)

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

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

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement, in particular to Article 13 and 4 (2) of Part II,

Whereas:

I. FACTS

1 Procedure

- (1) On 19 March 2010, Abelia, the business association of Norwegian knowledge- and technology based enterprises¹, lodged a complaint against Norway concerning alleged state aid to the lessors of premises to public sector service providers, and in particular to public schools. The letter of complaint was sent by email and received and registered by the Authority on 23 March 2010 (Event No 551057). On 5 June 2010, the Authority also received a letter from the Private Barnehagers Landsforbund regarding the subject matter (Event No 563022).
- (2) By letter dated 21 October 2010 (Event No 572609), the Authority requested information from the Norwegian authorities. By letter dated 25 November 2010 (Event No 578799), the Norwegian authorities replied to the information request.
- (3) Abelia provided further information in meetings in Oslo on 24 and 25 January 2011 (Event No 584288 and 584290) as well as by letters dated 31 May 2011 (Event No 600079) and 30 November 2011 (Event No 616796). In particular, this latter letter contained detailed information from a market operator on the functioning of the real estate market in relation to the renting of premises to schools.

¹ Abelia is a trade and employers’ association associated with Norway’s largest employers’ organisation, the NHO (Confederation of Norwegian Business and Industry).

- (4) Pursuant to paragraph 48(b) of the State Aid Guidelines² on Best Practice for the conduct of state aid control procedures, the Authority's Competition and State Aid Directorate communicated its preliminary view that the measure concerned by the complaint does not result in the granting of state aid to undertakings by letter addressed to Abelia on 21 November 2012 (Event No 571584). Abelia reacted to this preliminary view by letter dated 20 December 2012 (Event No 657491), in which it reaffirmed its earlier position but did not provide any new information on the alleged state aid.
- (5) The detailed information in the complaint and the subsequent correspondence relate almost exclusively to the particular circumstances of Norwegian schools. In view of the available information, the Authority therefore can only assess the question of alleged state aid to lessors of premises to public schools in Norway. However, the findings in the present decision most likely also apply to other comparable situations.

2 Description of the measure

2.1 The relevant provisions of the VAT Act and VAT Compensation Act

- (6) The complainant alleges that certain provisions of the Norwegian VAT Act³ and the VAT Compensation Act⁴ have the effect of granting state aid to the lessors of premises to public schools.
- (7) Following Article 3-5 of the Norwegian VAT Act, education services are exempt from the application of the VAT Act. According to Article 3-11 of the VAT Act, the letting of real estate property is equally exempt. However, according to Articles 2(b) and 3 of the VAT Act, lessors of premises to public entities can voluntarily register for VAT. Such registration would enable them to charge VAT on the rent paid by the lessee, and to deduct any input VAT they have incurred. Lessors of premises to public schools thus can register for VAT, which enables them to charge output VAT and to deduct input VAT.
- (8) As regards public schools, the Authority understands that they do not ultimately have to bear VAT themselves, since they are subsequently compensated for the VAT paid. This follows from Articles 2 (a) and 3 of the Norwegian VAT Compensation Act.
- (9) In contrast, lessors of premises to private schools cannot register for VAT in respect of their rental activities. Consequently, they cannot charge VAT on the rent and are thus unable to deduct input VAT. This means that the entire input VAT represents a normal expense for the lessors, which must be covered through the rent. This extra cost will therefore most likely be passed on to the private school in the form of higher rent.
- (10) In principle, private schools can also receive VAT compensation under Articles 2 (c) and 3 of the VAT Compensation Act. However, in case of rent payments, this compensation is not available to them since their lessors are unable to charge VAT in the first place.

2.2 The funding mechanism for schools in Norway

- (11) Public schools in Norway are fully state-funded. Norwegian private schools are also entitled to public funding: they receive approximately 85% of their funding from the

² Procedural and Substantive Rules in the Field of State Aid (State Aid Guidelines), adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, as amended by Decision 313/06/COL. The State Aid Guidelines are available on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

³ Lov om merverdiavgift (merverdiavgiftsloven), LOV-2009-06-19-58.

⁴ Lov om kompensasjon av merverdiavgift for kommuner, fylkeskommuner mv, LOV-2003-12-12-108. This Act has already been scrutinised by the Authority in Decision 155/07/COL of 3 May 2007.

Norwegian state in the form of a compensation rate, and a maximum of 15% from student fee payments. Private schools are not allowed to increase the amount paid by students, even if their costs increase. Furthermore, private schools are not allowed to make a profit.

- (12) The compensation rate paid to private schools per pupil is based on the costs incurred by equivalent public schools, as reported by the local governments through the KOSTRA system.⁵ The relevant expenses are calculated exclusive of VAT, i.e. the VAT expenses of the public schools are deducted from the basis for the calculation of the compensation for private schools. The reason for this deduction is that any VAT paid by both public and private schools is reimbursed under the VAT Compensation Act.
- (13) As a result, the rental cost of public schools excluding VAT enters into the calculation of the compensation rate applicable to both public and private schools. Accordingly, the higher rent level lessors to private schools are likely to charge (see 2.1 above) are not taken into account.

2.3 The procurement of premises by public and private schools

- (14) According to the information at the Authority's disposal, both public and private schools procure rental services mainly by way of public tender. In general, it can therefore be presumed that in both cases the lessors are not able to charge more than market rent for their premises. However, the market level is likely to differ depending on the lessee. In the case of public schools, rent would be subject to VAT (provided the lessor decides to register for VAT). In case of private schools, the market rent would most likely also include the input VAT incurred by the lessor and therefore be higher.

3 Main arguments put forward in the complaint

- (15) The complainant alleges that the system of VAT compensation favours public schools to the detriment of private ones. Lessors of premises to public schools can charge VAT on rent, which the public schools get reimbursed by the Norwegian state. This VAT compensation, however, is not available to private schools, whose lessors cannot charge VAT. Public schools thus de facto receive more financial means from the Norwegian state than private schools, which leads to a distortion in the market for school services. However, the complainant concedes that schools in Norway do not qualify as undertakings as they do not engage in economic activities.
- (16) The complainant alleges that, as a consequence of the unequal treatment of public and private schools, the upstream market for the provision of rental services to public and private schools is distorted. Lessors to public schools can charge VAT on rent to cover their input VAT, which is readily paid by the public schools as they get reimbursed under the VAT Compensation Act. In comparison, lessors to private schools need to add their input VAT to the rent itself, resulting in significantly higher rent levels. Private schools, however, are not compensated for these higher rental costs, as the public subsidies are calculated exclusive of VAT in the KOSTRA system. Private schools therefore often do not have sufficient means to cover higher rent levels, and may not be able to afford the same type of premises as public schools.
- (17) In addition, private schools allegedly have an incentive to build and operate their own premises, as the costs in relation to these activities are subject to VAT and thus lead to

⁵ The reported amounts are corrected in order to exclude expenses only borne by public schools or expenses that are compensated otherwise to private schools.

VAT compensation. According to the complaint, this incentive to self-supply premises further distorts competition in the market.

II. ASSESSMENT

1 The presence of state aid

- (18) Article 61(1) of the EEA Agreement reads as follows: “Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”
- (19) The following conditions must be met for a measure to constitute state aid within the meaning of Article 61(1) of the EEA Agreement:
- The measure must involve the use of State resources;
 - The measure must distort or threaten to distort competition by conferring an advantage on the beneficiary;
 - The advantage must be selective in that it is limited to certain undertakings;
 - The measure must affect trade between EEA States.
- (20) State resources are present as payments under the VAT Compensation Act to schools are made by the Norwegian state from its budgetary resources. Furthermore, the measure is liable to affect trade between EEA States as undertakings from other EEA States may engage in the upstream provision of rental services.
- (21) However, a finding of state aid also requires that the measure is liable to distort competition by favouring certain undertakings or the production of certain goods.

1.1 Norwegian public schools are not undertakings

- (22) The complainant alleges that the measure described above favours public schools to the detriment of private ones, but considers that Norwegian schools do not engage in economic activities.
- (23) From the information at its disposal, the Authority considers that public schools indeed directly benefit from the possibility of VAT compensation. However, the state aid rules only apply where a selective advantage is granted to undertakings. The notion of “undertaking” requires that the aid recipient engages in an economic activity.⁶ In order for an activity to be considered “economic”, it is not sufficient that it might, in principle, be carried out by private operators. Rather, the Authority has to assess the specific circumstances under which an activity is carried out.
- (24) According to standing case law, the provision of services does not qualify as an economic activity if they are provided in fulfilment of a state’s duty towards its population and

⁶ See Judgment of the EFTA Court in Case E-8/00 *Landsorganisasjonen i Norge v Kommunenes Sentralforbund and Others* [2002] EFTA Court Report 114, para. 62.

according to the principle of national solidarity, i.e. there is no connection between the actual cost of the services and the fees paid by those who benefit from them.⁷

- (25) In setting up and maintaining a national education system, the state fulfils its duties towards its own population. Furthermore, according to the information available to the Authority, Norwegian public schools are fully funded by the state. Private schools receive approximately 85% of their funding from the state, and a maximum of 15% is covered by student fees. They have no possibility to increase the amount paid by the students, even if their costs increase. Moreover, schools have to be operated as non-profit entities.
- (26) It follows from the above that there is no connection between the real costs of providing the private schooling service and the fees paid by the students. The students' fees constitute only a fraction of the real costs of providing the private school service, whereas the remainder of the costs is borne by the Norwegian state. Finally, public and private schools are under strict control of the state as to the provision of their services.
- (27) For these reasons, the Authority concurs with the complainant's view that the provision of schooling in Norway does not constitute an economic activity. Consequently, the subsidies in favour of public schools, including under the VAT Compensation Act, fall outside the ambit of the state aid rules.

1.2 No advantage to lessors of real estate to public schools

- (28) The complainant argues that the lessors of premises to public schools receive an indirect advantage because they are able to charge VAT, which in turn leads to VAT compensation in favour of public schools. This compensation increases the financial means available to public schools. In comparison, private schools do not receive VAT compensation on rent, leading to a situation where they have more limited financial means available to spend on rental properties. They may even decide to self-supply their real estate instead of renting.
- (29) The Authority understands that lessors of premises to schools in Norway are generally free to charge any rent they can for their premises. At the same time, both public and private schools generally follow tender procedures to ensure that they pay no more than market rent. These tenders are open to all potential lessors active in the relevant local rental market. There is no *a priori* distinction or discrimination between lessors to public schools and lessors to private schools that would prevent any operator from offering its rental services to either type of school.
- (30) The Authority further understands that the Norwegian VAT system results in different cost structures for lessors to public schools and those renting to private schools. The Authority does not consider, however, that as a result lessors of premises to private schools are disadvantaged as compared to the lessors to public schools, since they are likely to pass on any VAT paid in connection with their input factors to their (private) lessees in the form of higher rent. In this respect, it is irrelevant that overall, private schools have at their disposal more limited financial means than public schools. According to the information at the Authority's disposal, private schools have at least some discretion in allocating their available funds, and may thus decide – within the limits of the statutory conditions – either to spend less funds on rent (e.g. by renting smaller or lower quality premises in a less expensive location) or to limit spending on other cost items in order to be able to afford higher rent in comparison to a similar public school. In either scenario,

⁷ Judgment of the EFTA Court in Case E 5-07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Court Report 64, paras 80-82, with further references.

interested potential lessors would nevertheless be able to compete for the supply of the rental services as defined and required by the individual private school.

- (31) Regarding the alleged incentive for private schools to self-supply premises stemming from the Norwegian VAT system, the Authority understands that the availability of VAT compensation may represent a consideration in the decision whether to rent or self-supply premises. However, this would at most affect the structure of demand for rental services. It would not result in any favouring of one category of lessors over another as all potential lessors are free to compete for business with public and private schools alike.
- (32) For the reasons set out above, the Authority finds that there is no evidence of an indirect advantage in favour of lessors of premises to public schools.

2 Conclusion

- (33) On the basis of the foregoing assessment and in view of the information available, the Authority concludes that the provisions of the Norwegian VAT Act and the VAT Compensation Act do not have the effect of granting state aid within the meaning of Article 61(1) of the EEA Agreement to public schools or the lessors of premises to public schools.

HAS ADOPTED THIS DECISION:

Article 1

The provisions of the Norwegian VAT Act and VAT Compensation Act do not constitute state aid in favour of public schools or the lessors of premises to public schools within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English language version of this decision is authentic.

Made at Brussels, 24 April 2013

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sabine Monauni-Tömördy
College Member