

Case No: 71782  
Event No: 640750  
Dec. No:246/12/COL

EFTA SURVEILLANCE AUTHORITY DECISION  
of 27 June 2012

to initiate the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to a Charter Fund for Northern Norway

(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,

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

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

Whereas:

## I. FACTS

### 1. Procedure

- (1) The Norwegian authorities approached the Authority in June 2011 regarding their plan to establish a Charter Fund scheme for Northern Norway (“the Scheme”). A pre-notification document setting out the main elements of the Scheme was communicated on 24 June 2011 (Event No. 602898).
- (2) The Authority provided some initial feed-back on 5 August 2011 (Event No. 605972).
- (3) After several exchanges of email, the Authority, by e-mail dated 16 January 2012 (Event No. 621292), informed the Norwegian authorities that the pre-notification phase could be considered as complete. It furthermore identified some issues which the notification should address and alleviate.
- (4) The Norwegian authorities notified the Scheme, pursuant to Article 1(3) of Part I of Protocol 3 by letter of 2 May 2012 (Event Nos. 632837 and 322824).

## 2. The Scheme

### 2.1 The objective and the scope of the Scheme

- (5) The Scheme entails the establishment of a Charter Fund (“the Charter Fund”) which will grant aid to tour operators flying air charter<sup>1</sup> to three counties in Northern Norway, Nordland, Troms and Finnmark.
- (6) The objective of the Scheme is to increase the use of the airports in Northern Norway and thereby to contribute to the economic development in the region.
- (7) The Northern Counties are low density population areas with an average population density of 4.2 inhabitants per km<sup>2</sup> thereby falling within the definition of least populated regions as set out by the Chapter of the Authority’s State Aid Guidelines on national regional aid (“the Regional Aid Guidelines”)<sup>2</sup>. Moreover they face depopulation.<sup>3</sup>
- (8) The Charter Fund will be a non-profit company acting as a vehicle for granting aid. The Fund will be capitalised with public money granted by the Counties of Nordland, Troms and Finnmark and will be owned by the Counties.
- (9) The Scheme will cover charter flights to all airports in Northern Norway regardless of the size of the airplanes and the airports. The Norwegian authorities have however indicated that they expect only large airplanes to be concerned as they are the only ones suitable for charter flights. The following airports can currently handle large planes: Tromsø, Bodø, Harstad Narvik/Evenes, Alta, Kirkenes, Høybuktmoen, Bardufoss, Svalbard<sup>4</sup>, Banak, Andøya (“the Northern lights airports”). All these airports have excess capacity.
- (10) A few routes have been operated to Northern Norway in the past but without success.<sup>5</sup> According to the industry, a reason for this could be the cancellation rules applying to air charters. Cancellation at a late stage is very expensive. The deadline for deciding whether to cancel or not is several months before the operation of the air charter series. If the sale of tickets until that date is limited, the series is often cancelled. The tour operator would otherwise risk having to pay a cancellation fee or bear the loss corresponding to the empty seats. Several charter series have been cancelled due to limited sales up until the cancellation deadline. The industry believes that if the risk is reduced, many of the flights would go ahead. Such flights could even be profitable. However, tour operators seem to prefer to cancel flights due to the risk of empty seats rather than to wait and hope that late sales will make the flight profitable.

### 2.2 The beneficiaries of the Scheme

- (11) The beneficiaries of the Scheme may be located inside or outside Northern Norway and inside or outside the EEA.

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<sup>1</sup> A charter flight is defined as a non-scheduled flight. A charter series is charter flights between two destinations repeated over a limited period of time (for example, weekly flights between Bodø and London from February to April).

<sup>2</sup> Available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

<sup>3</sup> The three northernmost Counties are NUTS II regions. The lowest population density can be found in Finnmark: 1.6 inhabitants per km<sup>2</sup>.

<sup>4</sup> See Protocol 40 to the EEA Agreement.

<sup>5</sup> In 2009, the Authority approved an aid scheme for route development from the second largest city in Northern Norway, Bodø, see Decision No. 179/09/COL. The Route Development Fund Bodø has not yet granted any aid under the scheme.

- (12) The aid applicant is the tour operator *i.e.* the charterer and signature partner of the airline contract. The Norwegian authorities have however indicated that all applications must be supported by three parties:
- The tour operator who is the direct aid recipient;
  - The destination provider which could be a destination management company, a hotel a tourist office, or any other service provider. Aid from the Charter Fund will not be granted to “air only packages”. It must be demonstrated that the tour package includes a so-called “land arrangement” in the target area with a value of at least NOK 800 (approx. EUR 106) per tourist;
  - The airline outlining all costs, deadlines, penalties, obligations and responsibilities applicable to the charter series.
- (13) The panel in charge of selecting projects may reject an application if:
- Fund limitations set by the Board of directors of the Charter Fund for the period in question have been reached;
  - Any of the supporting partners are believed to be unable to meet the expected commercial performance described in the application;
  - The application is incomplete or does not comply with published guidelines of the Charter Fund.
- (14) The Norwegian authorities anticipate that the Scheme will trigger 16 charter series with 7 flight rotations per charter series the first year.

### 2.3 Form of the aid

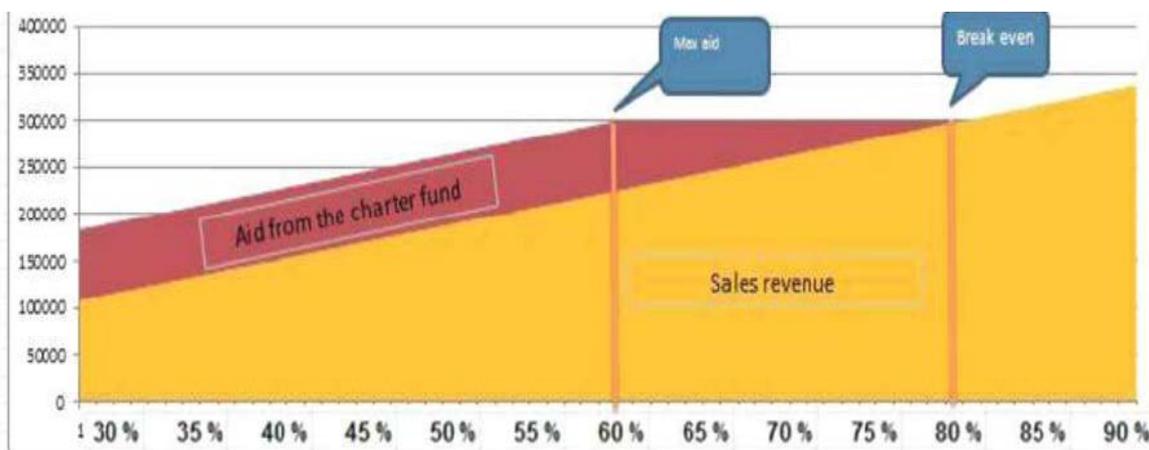
- (15) The aid will take the form of a payment of up to 25% of the total charter costs and will be limited to the charter costs only (financial obligations under the contact with the airlines). Other costs borne by tour operators are not eligible costs.
- (16) The aid will be paid out from the Charter Fund to the tour operators after the flights to Northern Norway have been conducted.
- (17) The aid will be calculated with reference to the average cabin factor of the operated flights under the charter series excluding empty legs.<sup>6</sup> The cabin factor is the percentage of sold seats. The cabin factor will be determined according to the actual number of departing passengers divided by the maximum seat capacity of the aircraft. Passenger data will be based on the official numbers recorded by the Norwegian airport authorities. Empty legs will not be taken into account when calculating the average cabin factor but will be included when the total eligible costs for the charter series are calculated.
- (18) The tour operators will be required to set a break-even point at 80% cabin factor which is the industrial break-even standard. Maximum support (25%) will be given for cabin

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<sup>6</sup> Empty legs are flights operated in order to position an aircraft at the start and at the end of a charter series. The return flight on the first departure will be empty and the flight to pick up the last passengers will also be empty. Empty legs represent a considerable cost for short charter series.

factors of 60% or less. The aid intensity will gradually decrease to zero when cabin factors reach an average of 80%.

- (19) If the planes operated under a charter series reach between 60 and 80% cabin factor, the contribution paid by the Charter Fund will cover the tour operator's losses connected to the charter series. The following figure illustrates how the Scheme will work:



- (20) As shown in the table above, if flights are operated with a cabin factor of less than 60%, the tour operator will lose money, as the combination of sales revenues and an aid intensity of 25% will not be enough to reach the break-even point. The Charter Fund will actually cover the tour operator's losses only when the cabin factor lies between 60 and 80%.

## 2.4 Cumulation, monitoring and advertising

- (21) Aid under the Scheme may be cumulated with other forms of aid. Funding of the same eligible costs under other schemes will be coordinated with the Scheme and the aid ceilings in the applicable guidelines will not be exceeded. Operating aid under the Scheme shall not be cumulated with *de minimis* support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in the Regional Aid Guidelines.
- (22) The Scheme will be published under a new subpage on Avinor's homepage<sup>7</sup> and on [www.visitnorthandnorway.com](http://www.visitnorthandnorway.com). It will furthermore be advertised in international conferences.
- (23) The Charter Fund undertakes to ensure that a list of tour operators receiving aid is published annually, in each instance indicating the source of public funding, the recipient company, the amount of aid paid out and the number of passengers concerned.
- (24) In the event that a tour operator fails to comply with the criteria set by the Charter Fund when the aid was granted, penalty mechanisms will be implemented.

## 2.5 Duration and budget

- (25) The Norwegian authorities have indicated that the Scheme will be in place for ten years but will be re-notified if required by the revision of the Regional Aid Guidelines.

<sup>7</sup> Avinor AS is the state-owned company that operates most of the civil airports in Norway.

- (26) The Norwegian authorities have said that the budget for the three first years will be of NOK 30 million. Thereinafter, capital will be injected only when necessary. However, the Charter Fund will never be capitalised with more than NOK 30 million.

## II. ASSESSMENT

### 1. The presence of state aid

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

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

#### 1.1 Presence of state resources

- (28) The aid measure must be granted by the State or through state resources.
- (29) The Norwegian authorities have indicated that the Charter Fund will most likely be financed directly from the three Northern Counties’ budgets (it cannot be excluded that it may also at some stage be financed directly by the Norwegian State).
- (30) The Authority considers that the condition regarding use of state resources is met as the Scheme will be financed either by the Counties or the State’s budgets.<sup>8</sup>

#### 1.2 Favouring certain undertakings or the production of certain goods

- (31) Firstly, the aid measure must confer on the beneficiaries advantages that relieve them of charges that are normally borne from their budget.
- (32) The tour operators benefiting from the Scheme will receive a direct grant which will reduce the amount they have lost on a given charter series. Similarly, the service providers located in the three Northern Counties gaining from an increase in the tourist population will also benefit indirectly from the Scheme.
- (33) Secondly, the aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”.
- (34) Only those tours operators that operate charter flights to Northern Norway will benefit directly from the Scheme. Similarly, only those operators that are located in the three Northern Counties will indirectly benefit from the scheme.
- (35) The Authority therefore considers that the measure is indeed selective.

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<sup>8</sup> The Norwegian authorities have also mentioned the fact that the Charter Fund may, at some stage in the future, be co-financed by private undertakings. The assessment carried out by the Authority will not examine this possibility as this option seems to be relatively uncertain.

### 1.3 Distortion of competition and effect on trade between Contracting Parties

- (36) The aid measure must distort or threaten to distort competition and affect trade between the Contracting Parties to the EEA Agreement.
- (37) Aid is regarded as distorting competition if it is granted to an undertaking which carries out activities in competition with others. The aid beneficiaries of the Scheme are tour operators. Tour operators are active in a sector characterised by strong competition. Therefore, any aid granted under the Scheme may be regarded as distorting competition.
- (38) Furthermore, state aid to specific undertakings is regarded as affecting trade between the Contracting Parties if the recipient firm carries out an economic activity involving trade between the Contracting Parties. The state funding affects trade between Contracting Parties as it will be granted to operators offering holiday packages in different countries, which by definition is a cross-border activity.
- (39) The Authority therefore considers that all the conditions set out in Article 61(1) of the EEA Agreement are met and that consequently the notified scheme entails state aid.

## 2. Procedural requirements

- (40) The Regional Aid Guidelines (para. 81) provide that “*operating aid schemes are not covered by the regional aid maps, and are assessed on a case by case basis on the basis of a notification by the EFTA State concerned pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement*”.
- (41) Pursuant to Article 1(3) of Part I of Protocol 3, “*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*”.
- (42) By submitting a notification of the Scheme on 2 May 2012 (Event No 632837), the Norwegian authorities complied with the requirement to do so set out in Article 1(3) of Part I of Protocol 3.
- (43) By not implementing the notified scheme, the Norwegian authorities have complied with the standstill obligation provided for under Article 3 of Part I of Protocol 3.

## 3. Compatibility of the aid

- (44) The Regional Aid Guidelines (para. 1) provide: “*on the basis of Article 61(3)(a) and Article 61(3)(c) of the EEA Agreement, state aid granted to promote the economic development of certain disadvantaged areas within the EEA may be considered to be compatible with the functioning of the EEA Agreement. This kind of state aid is known as national regional aid. National regional aid consists of aid for investment granted to large companies, or in certain limited circumstances, operating aid, which in both cases are targeted on specific regions in order to redress regional disparities”.* (Emphasis added)

(45) In the case at hand, the aid granted is operating aid, *i.e.* aid which releases an undertaking from costs which it would normally have to bear in its day to day management or normal activities.<sup>9</sup>

(46) The Regional Aid Guidelines (para. 69) furthermore provide:

*“(in derogation from the previous paragraph,) operating aid which is not both progressively reduced and limited in time may only be authorised in the least populated regions, in so far as it is intended to prevent or reduce the continuing depopulation of these regions.”<sup>10</sup> The least populated regions represent or belong to regions at NUTS-II level for Norway and NUTS IV level for Iceland with a population density of 8 inhabitants per km<sup>2</sup> or less and extend to adjacent and contiguous smaller areas meeting the same population density criterion”.*

### **3.1 The aid may only be authorised in the least populated regions**

#### *3.1.1 The three Northern Counties belong to the least populated regions*

(47) As provided by para. 69 of the Regional Aid Guidelines, the operating aid measure which is not progressively reduced and limited in time may only be granted in the least populated regions. The least populated regions are those regions with less than 8 inhabitants per km<sup>2</sup>.<sup>11</sup>

(48) The three Northern Counties have a population density of 4.2 inhabitants per km<sup>2</sup>. They consequently meet the conditions set by the Regional Aid Guidelines to benefit from the more flexible compatibility assessment.

#### *3.1.2 The direct beneficiaries of the scheme are not necessarily located in the least populated regions*

(49) However, the aid as such will be paid to tour operators which may be situated anywhere in the world. The direct beneficiary of the aid will therefore not necessarily be located in the least populated region.

(50) During the pre-notification phase, the Authority expressed some concerns regarding the fact that the aid beneficiaries would not necessarily be located in the least populated regions. The companies located in the Northern Counties involved in the package sold by the tour operator would benefit from the increase in the tourist population but only in an indirect manner.

(51) The Norwegian authorities have argued that the link between the aid to the tour operator and the regional development was sufficient for the following reasons:

- The Scheme will apply to charter flights to Northern Norway exclusively;
- only those packages including a “land arrangement” would be eligible; and
- the aid will be paid out from the Charter Fund to the tour operator after the flights to the target area have been conducted.

<sup>9</sup> See Case T-384/04 *SIDE v Commission* [2008] ECR I-nyr, para. 99, Case T-162/06 *Kronoply GmbH v Commission* [2009] ECR II-nyr, para. 75.

<sup>10</sup> “It is the task of the EFTA State to demonstrate that the aid proposed is necessary and appropriate to prevent or reduce continuing depopulation”. (Emphasis added.)

<sup>11</sup> See para. 22(a) of the Regional Aid Guidelines.

- (52) The Norwegian authorities have argued that if indeed the direct beneficiaries of the aid will be tour operators who may be located outside the three Northern counties, there will be many indirect beneficiaries of the Scheme in the region. They therefore consider that as the link between the direct beneficiaries of the aid – the tour operators – and the indirect beneficiaries – hotels, restaurants, etc. – is sufficiently strong, the Scheme may be held to be compatible with the EEA Agreement.
- (53) The Authority however, considers that the Regional Aid Guidelines were meant to encourage the granting of aid in the regions to be developed. Paragraph 1 of the Regional Aid Guidelines provides that “*national regional aid consists of aid for investment granted to large companies, or in certain limited circumstances, operating aid, which in both cases are targeted on specific regions in order to redress regional disparities*”. (Emphasis added.)
- (54) Furthermore, paragraph 72 of the Regional Aid Guidelines states that “*in order to verify the effects on trade and competition of operating aid schemes, EFTA States will be required to provide each year a single report in respect of each NUTS II region in which operating aid is granted which provides a breakdown of total expenditure, or estimated income forgone, for each operating aid scheme approved in the region concerned and identifies the ten largest beneficiaries of operating aid in the region concerned*”. (Emphasis added.)
- (55) The Authority therefore considers that the way the Regional Aid Guidelines were drafted indicates that the intention was that operating aid could only be granted in the regions concerned, here in the three Northern Counties. The Authority questions whether the fact that the undertakings in the regions concerned are only indirectly targeted by the Scheme constitutes a sufficiently strong link for the regional development of the area.
- (56) Despite the supporting data put forward by the notifying party, the Authority still questions whether a scheme providing for the grant of operating aid to beneficiaries that may be situated outside the least populated regions may be held to be compatible with the Regional Aid Guidelines.

### **3.2 The aid must be necessary and appropriate to prevent or reduce continuing depopulation**

- (57) The Regional Aid Guidelines provide that it is up to the EFTA State to demonstrate that the Scheme is necessary and appropriate (para. 69).
- (58) According to the Regional Aid Guidelines, the Norwegian authorities must demonstrate that the Scheme is necessary to prevent depopulation: that to reach the objective of preventing or reducing continuing depopulation, there is a need for a state intervention. The Norwegian authorities have explained that Northern Norway – which is one of Europe’s least populated areas – has always been extremely sparsely populated and has suffered from depopulation for decades. The Norwegian authorities therefore consider that it is necessary to take further measures to stabilise the settlement and to prevent further depopulation. They recognise that the establishment of the Charter Fund on its own will not solve the issue of depopulation but as a part of a general policy will increase the economic activity in the region and maintain and create new jobs. Employment opportunities and expected income are the most decisive factors influencing a person’s choice of residence.

- (59) For the notified measure to be appropriate, the Norwegian authorities must demonstrate that to reach the objective of preventing or reducing continuing depopulation, the establishment of the Scheme is the best instrument as it is the one with the most chances of success and the least distortive effects.
- (60) The Regional Aid Guidelines (para. 10) also provide that:
- “where, exceptionally, it is envisaged to grant individual ad hoc aid to a single firm or aid confined to one area of activity, it is the responsibility of the Member State to demonstrate that the project contributes towards a coherent regional development strategy”.* (Emphasis added.)
- (61) The notified scheme will concern tour operators directly and the tourism industry and the local economy as a whole more indirectly. The Norwegian authorities have however indicated that the notified measure is part of a more general regional development policy.
- (62) Thus, the High North is considered as a priority in terms of regional development. It is the government’s ambition to prevent depopulation and to encourage settlement in this region. Support for the tourism industry is seen as a key to the development of the region.<sup>12</sup> To that effect, they have argued that the creation of employment possibilities is of particular interest to achieve the aim of preventing or reducing depopulation in the region. They have indicated that the High North has always been extremely sparsely populated and has suffered from depopulation for decades.
- (63) The Institute of Transport Economics estimated that in 2007, foreign air bound tourists used NOK 7480 (approx. EUR 992) on prepaid purchases and NOK 6730 (approx. EUR 892) on local purchases. It is estimated that travellers to Northern Norway will spend NOK 9000 (approx. EUR 1193) per person in 2012.
- (64) The Authority understands that the indirect economic impact the Scheme may have on the three Northern Counties may contribute to stabilising the settlement of population in the region. It is however, not convinced that this objective could not be reached by another means than by using operating aid which is the most distortive instrument. Moreover, the Authority questions whether the objective of reducing depopulation could not be reached by an instrument that directly benefits the undertakings located in the target area. The Authority thus questions whether it is appropriate to grant direct aid to tour operators located outside the region to be aided.

### 3.3 The aid must be proportionate to the objective of the Scheme

- (65) According to Article 61(3)(c) of the EEA Agreement, aid granted in order to facilitate the development of certain economic areas may be considered to be compatible with the functioning of the Agreement “*where such aid does not adversely affect trading conditions to an extent contrary to the common interest*”. In order to be compatible with the common market, the scheme must be proportionate to the objective of the scheme.
- (66) The Norwegian authorities have indicated that the Scheme has been designed so that only the necessary level of aid is granted. The aid will take the form of a payment of up to 25% of the total charter costs which must be specified in accordance with generally accepted project accounting principles. If the planes operated under a charter series have somewhere between 60% and 80% cabin factor, the Charter Fund will reimburse the tour

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<sup>12</sup> See *The high North. Vision and policy instruments, the Government’s political platform for the period 2009 until 2013 and the Governments’ tourism strategy.*

operator's losses connected to the charter series. Maximum support (25%) from the Charter Fund will be given at cabin factors of 60% or less. The aid intensity will gradually decrease to zero when cabin factors reach an average of 80%. At 80% cabin factor, the tour operator has passed the break-even point and will therefore generate a profit (see above, Part I, Section 2.3).

- (67) The Norwegian authorities have indicated that the risk reducing aspect of the Scheme will most likely lead to a cabin factor exceeding 60% and that therefore it is unlikely that the aid intensity will correspond to 25% of the charter costs.
- (68) They have furthermore argued that the tourist industry being a major industry in the EEA, it is unlikely that the relatively small amounts of aid likely to be granted under the Scheme are liable to affect trade in a particularly negative way.
- (69) The Norwegian authorities have furthermore indicated that the Scheme will expire after ten years of operation but that the Scheme will be re-notified if necessary due to the adoption by the Authority of new Guidelines.
- (70) The Authority refers to para. 71 of the currently applicable Regional Aid Guidelines which provide: *"In all cases, the need for and level of operating aid should be regularly re-examined to ensure its long term relevance to the region concerned. The Authority will therefore only approve aid schemes for the duration of these guidelines".* (Emphasis added.) The Regional Aid Guidelines are applicable until 31 December 2012.
- (71) The Authority doubts that, should it consider that the scheme is compatible with the EEA Agreement at the end of the formal investigation phase, it will be able to approve the scheme beyond 31 December 2013.

#### **4. Conclusion**

- (72) Based on the information submitted by the Norwegian authorities, the Authority considers that all the conditions set out in Article 61(1) of the EEA Agreement are met and that consequently the notified scheme entails state aid. The Authority has doubts that the Scheme complies with Article 61(3) of the EEA Agreement, read in conjunction with the requirements laid down in the Authority's Chapter of the State Aid Guidelines on national regional aid. The Authority, therefore, doubts that the above measures are compatible with the functioning of the EEA Agreement.
- (73) Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.
- (74) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision.
- (75) In light of the foregoing considerations, within one month of receipt of this decision, the Authority request the Norwegian authorities to provide all documents, information and data needed for the assessment of the compatibility of the measure.

HAS ADOPTED THIS DECISION:

*Article 1*

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the Charter Fund for Northern Norway scheme notified by the Norwegian authorities.

*Article 2*

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

*Article 3*

The Norwegian authorities are requested to provide within one month from notification of this decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

*Article 4*

This Decision is addressed to the Kingdom of Norway.

*Article 5*

Only the English language version of this decision is authentic.

Decision made in Brussels, on 27 June 2012.

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
*President*

Sabine Monauni-Tömördy  
*College member*