

Case No: 70957
Event No: 662276
Decision No: 267/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 26 June 2013
on the financing of safety training courses by county 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,

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,

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

Whereas:

I. FACTS

1. Procedure

- (1) By letter dated 29 July 2010,¹ the EFTA Surveillance Authority initiated the review procedure for existing aid regarding a possible cross-subsidisation of commercial activities by county schools. By letter dated 28 October 2010,² the Norwegian authorities responded and submitted further information by letter dated 22 November 2010.³
- (2) By letter dated 1 March 2012,⁴ the Authority initiated the procedure provided for in Article 17(2) of Part II of Protocol 3 in respect of the financing of safety training courses by county schools, thereby informing the Norwegian authorities of its preliminary view that the financing of county school safety training courses involved state aid that is incompatible with the functioning of the EEA Agreement. The Norwegian authorities responded by letter dated 4 June 2012.⁵

¹ Event No 562253.

² Event No 575101.

³ Event No 578341.

⁴ Event No 610263.

⁵ Event No 611738.

2. Description of the measure

- (3) The measure assessed in this decision is cross-subsidisation of commercial activities. In particular, the Authority is to assess whether county schools in Norway have benefitted from cross-subsidisation in providing safety and emergency training courses (hereinafter “safety training courses”) to employees of the offshore and maritime industries.

3. The financing history of county schools

- (4) Secondary schools in Norway are divided into two parts, i.e. lower secondary school and upper secondary school. The municipalities⁶ are responsible for lower secondary schools⁷ (and also for primary schools) and the counties⁸ are responsible for upper secondary schools⁹ pursuant to the Education Act of 27 July 1998 No. 61 (“the 1998 Education Act”).¹⁰ The latter Act repealed and replaced the Primary Education Act of 13 June 1969 No. 24 (“the Primary Education Act”)¹¹ and the Secondary Education Act of 21 June 1974 No. 55 (“the Secondary Education Act”).¹²
- (5) The schools that are relevant for the decision at hand are the upper secondary schools, which come within the financial and organisational responsibility of the counties pursuant to the 1998 Education Act. Therefore, these upper secondary schools will be collectively referred to as the “county schools”. When the EEA Agreement entered into force in Norway on 1 January 1994, the financing of county schools was thus based on the Secondary Education Act, which was later repealed by the 1998 Education Act. Accordingly, the system of public financing of county schools predates the EEA Agreement.

4. The organisation of safety training courses by county schools

4.1 Safety training courses offered by county schools as part of upper secondary education

- (6) Pursuant to the 1998 Education Act, Norwegian students have a right to education free of charge. After completing their compulsory lower secondary school education, Norwegian students may select different areas of specialisation for their three years of upper secondary school education in county schools. In particular, Norwegian students may choose between vocational programmes (leading to learning a trade) and general studies (leading to university admission)
- (7) County authorities have a lot of freedom in organising the education offered in these upper secondary schools. Some county schools offer maritime- and offshore-related education as part of their vocational programme. One of the courses proposed in those programmes is safety training. The provision of these safety training courses to students forms part of the educational activities of the schools. The safety training courses were first provided on the basis of the Secondary Education Act, which was later replaced by the 1998 Education Act.

⁶ There are 430 municipalities in Norway.

⁷ Students in lower secondary schools are typically between 12 and 15 years old.

⁸ There are 19 counties in Norway.

⁹ Students in upper secondary schools are typically between 16 and 19 years old.

¹⁰ *Lov 1998-07-17 nr 61: Lov om grunnskolen og den vidaregåande opplæringa.*

¹¹ *Lov 1969-06-13 nr 24: Lov om grunnskolen.*

¹² *Lov 1974-06-21 nr 55: Lov om vidaregåande opplæring.*

4.2 Safety training courses offered by county schools on the market

- (8) In addition to providing safety training courses to their students as described above, some county schools engage in commercial activities by providing safety training courses to employees of the oil and maritime industries with the aim of generating profit. The provision of safety training courses to such employees falls outside the public education remit set out in the Secondary Education Act, and that of its replacement, the 1998 Education Act.
- (9) These commercial safety training courses are regulated in accordance with specific standards as regards content, curriculum and number of lessons. In this regard, the schools' commercial offer of safety training courses compete directly with similar courses offered by privately-held undertakings.
- (10) The Norwegian authorities agree with the assessment of the Authority that the provision of safety training courses to employees of the oil and maritime industries is a provision which takes place on the market for such courses.¹³
- (11) There are two types of ways in which such courses are provided. In some instances, county schools provide safety training courses directly on the market, while in others the courses are sold on the market by intermediary bodies, to whom the county schools act as subcontractors. The present decision covers both ways of provision, regardless of whether the county schools provide safety training courses directly on the market or through an intermediary body.

5. Organisation of the county schools providing safety training courses on the market

- (12) The Norwegian authorities have explained that the county schools offering safety training courses on the market manage their activities in different ways.
- (13) First, some of the county schools have set up separate legal entities (i.e. limited liability companies or foundations), to deal with the organisation of the safety training courses. These legal entities have their accounts examined and approved by a State-authorized auditor.¹⁴
- (14) However, there is no legislation or system in place that ensures that these separate legal entities pay market prices for the use of the publicly-financed school infrastructure (buildings, canteens, teaching equipment, IT infrastructure, electrical systems, parking lots) and workforce (teachers, maintenance and cleaning staff) according to clear, predefined and objective price formula.
- (15) Second, other safety training courses are not provided by separate legal entities but rather by separate departments within the schools. According to the information provided by the Norwegian authorities, some of these departments keep separate accounts, while others do not.

¹³ Letter from the Norwegian authorities dated 19.12.2005 (Event No 355129).

¹⁴ All limited liability companies (AS) and foundations in Norway must keep accounts (bookkeeping) in accordance with The Accounting Act (*Lov 1998-07-17 nr 56: Lov om årsregnskap m.v.*) and Bookkeeping Act (*Lov 2004-11-19 nr 73: Lov om bokføring*). They are required to have an annual statutory independent audit of their accounts and must engage the services of a registered or State-authorized auditor to examine and approve the accounts.

- (16) However, regardless of whether or not these county schools keep separate accounts distinguishing between their commercial and public education activities, there is likewise no legislation or system in place that ensures that the commercial activities cover all the costs which they incur which are related to the use of the publicly-financed school infrastructure and workforce, according to objective and transparent cost allocation mechanisms (i.e. taking into account all variable costs and an appropriate share of the fixed costs).
- (17) Accordingly, the Authority finds that there is currently no legislation or system in place ensuring that county schools offering safety training courses on the market cover the costs of, or pay a market price for, using the public schools' infrastructure and workforce.

6. Further comments by the Norwegian authorities

- (18) The Norwegian authorities have stated that none of the county schools offering safety training courses on the market fall within the scope of the Transparency Directive, which places an obligation on certain undertakings to maintain separate accounts.¹⁵
- (19) The Norwegian authorities have also stated that, if the Authority were to conclude that some form of cross-subsidisation is taking place, they would agree that such cross-subsidisation would be contrary to Article 61(1) of the EEA Agreement. However, the Norwegian authorities have stated that such cross-subsidisation would be to a very limited extent.
- (20) In such an instance, the Norwegian authorities have stated that they would agree that some measures could be appropriate to prevent cross-subsidisation, but that they consider that measures other than the ones initially proposed by the Authority could also remedy the situation, for example the introduction of an organisational division of the different activities of the county schools.
- (21) Moreover, the Norwegian authorities propose to use their powers under the 1992 Local Government Act to monitor compliance by the counties in particular by relying on its right to request information on the activities of the counties or to inspect county working documents.¹⁶

¹⁵ Commission Directive 2006/111/EC of 16.11.2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (the "Transparency Directive") OJ L 318, 17.11.2006, p. 17. The Transparency Directive has been incorporated into the EEA Agreement by means of Article 1a of Annex XV; Decision No. 55/2007/COL of 8.6.2007, OJ L 266, 11.10.2007 p. 15 and EEA Supplement no. 48, 11.10.2007, p.12.

¹⁶ Section 59(6) of the Local Government Act (*Lov 1992-09-25 Nr 107: Lov om kommuner og fylkeskommuner – Kommuneloven*).

II. ASSESSMENT

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

(22) Article 61(1) of the EEA Agreement reads:

“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.”

(23) The Authority will assess the financing of county schools as an existing aid scheme (see Section II.2 below). In line with current case-law,¹⁷ it will review only the general characteristics of the financing scheme as a whole without examining each concrete application of the scheme in order to determine whether state aid is involved in accordance with Article 61(1) of the EEA Agreement.

1.1 State resources

(24) According to Article 61(1) of the EEA Agreement, a measure must be granted by the State or through State resources in order to constitute state aid.

(25) At the outset, the Authority notes that both local and regional authorities are considered to be equivalent to the State.¹⁸

(26) As the schools in question are financed by the counties, the Authority considers that the condition regarding the use of state resources is met.

1.2 Undertaking

(27) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement, the measure must confer an advantage upon an undertaking. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.¹⁹ Economic activities are activities consisting of offering goods or services on a market.²⁰ 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.

¹⁷ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 76, paragraph 57; Case C-66/02 *Italy v. Commission* [2005] ECR I-10901, paragraphs 91-92; Cases C-15/98 and C-105/99 *Italy v Commission* [2000] ECR I-8855, paragraph 51; and C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraph 24.

¹⁸ Article 2 of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings (OJ L 318, 17.11.2006, p. 17), incorporated at point 1a of Annex XV to the EEA Agreement.

¹⁹ Case C-41/90 *Höfner and Elser v Macroton* [1991] ECR I-1979, paragraphs 21-23, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451 and Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 61, paragraph 78.

²⁰ Case C-222/04 *Ministero dell'Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, paragraph 108.

- (28) The legal form of the entity is irrelevant when it comes to the assessment of what constitutes an undertaking²¹ and economic and non-economic activities can co-exist within the same sector and sometimes even be provided by the same organisation.²² Even if the safety training courses are carried out by the county schools themselves, the services will be deemed to be carried out by an undertaking provided that they are economic in nature.
- (29) The case-law of the Court of Justice of the European Union makes it clear that national education financed, entirely or mainly, by the public budget does not constitute a service provided on the market which would be subject to competition rules.²³
- (30) However, the Court of Justice has stated that in certain circumstances, teaching offered by State schools may constitute an economic activity. *“It is undisputed that, in parallel with schools belonging to a public educational system whereby the State performs its task in the social, educational and cultural areas, the financing of which is essentially from public funds, there are schools in certain Member States which do not belong to such a system of public education and which are financed essentially from private funds. The education provided by such schools must be regarded as a service provided for remuneration”*.²⁴
- (31) The Court of Justice has later confirmed that *“courses given by educational establishments essentially financed by private funds, notably by students and their parents, constitute services within the meaning of Article 50 EC, since the aim of those establishments is to offer a service for remuneration”*.²⁵ (Emphasis added)
- (32) Furthermore, the Commission has examined the case of Italian training institutes which offered two types of training.²⁶ First, the institutes provided institutional, social targeted vocational training: they had been entrusted with training which was provided to individuals in the framework of public education, and which was paid for by the State or its regions. Second, the training institutes offered market training activities, which were addressed both to undertakings and their employees and to individuals, who paid a market price. The Commission considered that the institutes’ offers of training to undertakings and their employees and to individuals constituted an economic activity.
- (33) The Authority considers that when offering safety training courses to employees in the oil and maritime industries against remuneration, the county schools act as undertakings carrying out an economic activity. Indeed, as commercial course providers, they are not pursuing an educational role of general interest but rather conducting an activity characterised by the generation of profit.
- (34) Against this background, the Authority takes the view that the county schools, in so far as they offer services on the market, must be characterised as undertakings for the purpose of the state aid rules.

²¹ Case C-343/95 *Diego Cali & Figli SrL v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECR I-1547, paragraphs 16-18.

²² See Commission Decision in Case C-22/2003 (Italy) *Reform of the training institutions* (OJ L 81 18.3.2006 p. 25), at paragraph 43.

²³ Case 263/86 *Humbel* [1988] ECR 5365, Case C-109/92 *Wirth* [1993] ECR I-6447 and Case C-76/05 *Schwarz* [2007] ECR I-6849.

²⁴ Case C-318/05 *Commission v Federal Republic of Germany* [2007] ECR I-6957, paragraphs 71 and 72.

²⁵ Case C-76/05 *Schwarz*, cited above, footnote 23, paragraph 40.

²⁶ See Commission Decision in Case C-22/2003 (Italy) *Reform of the training institutions* (cited above, footnote 22), at paragraph 48.

1.3 Advantage

- (35) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement, the state measure must confer an economic advantage on the recipient.
- (36) An economic advantage may consist in a positive measure but also in relief from economic burdens that are normally borne by the recipient's budget, such as relief from having to pay an appropriate remuneration for using a publicly-financed infrastructure and/or workforce.
- (37) As noted above, the county schools' activities can be divided into commercial (economic) and public education (non-economic) activities. The public education activities are financed by the counties.
- (38) On the basis of the information with which it has been provided, the Authority takes the view that the current financing scheme of county schools does not prevent that State resources, allocated to these schools for the purpose of fulfilling their public education obligation, are being used to subsidise these schools' commercial activities (i.e. the provision of safety training courses on the market).
- (39) First, the Norwegian authorities have not properly ensured, by enacting legislation or by taking administrative action, that county schools keep separate accounts distinguishing between the two types of activities.
- (40) Second, despite the lack of legal or administrative requirements to do so, some schools keep separate accounts on their own initiative. However, in such cases, there is no objective and transparent cost allocation mechanism in place to ensure that the commercial activities cover all the costs related to their operations (including all variable costs and an appropriate share of the fixed costs).
- (41) Finally, in the cases where the schools' commercial activities are carried out by separate legal entities, there is no legislation, or any system in place, to ensure that these separate legal entities pay market prices for the use of the public schools' infrastructure and workforce, according to clear, predefined and objective price formulae.
- (42) The Authority takes the view that although individual schools might have taken measures to avoid such cross-subsidisation, this is not sufficient to compensate for the failures in the financing scheme as a whole. The Authority recalls in this regard that it is assessing the compatibility of the financing scheme as a whole with the state aid provisions of the EEA Agreement, and not the individual measures adopted under the scheme.
- (43) As the financing scheme for the schools does not ensure that county schools offering safety training courses on the market cover the costs of, or pay a market price for, the use of the publicly-financed school infrastructure and workforce, these county schools have a potential economic advantage in the form of a reduction in operating costs.

1.4 Selectivity

- (44) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement, the measure must confer an advantage on certain specific beneficiaries and thus be selective.
- (45) Only the schools under review in the present decision stand to benefit from this advantage. Privately-owned companies providing safety training courses do not receive a comparable

advantage. Accordingly, the share of the costs for carrying out a commercial activity which the schools do not pay therefore represents a selective advantage.

1.5 Distortion of competition and effect on trade between Contracting Parties

- (46) The measure must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement to be considered state aid within the meaning of Article 61(1) of the EEA Agreement.
- (47) Under settled case-law, it is not necessary to establish that an aid measure has a real effect on trade and that competition is actually distorted but it is sufficient to examine whether the aid measure is liable to affect such trade and distort competition.²⁷ Moreover, the mere fact that an aid strengthens an undertaking's position compared to that of other firms competing in intra-EEA trade, is enough to conclude that the measure is liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.²⁸
- (48) At the end of the safety training courses offered by the schools, certificates may be issued in compliance with internationally-recognised standards set by the International Maritime Organisation.²⁹ The fact that the courses are based on international standards means that these courses can be offered to anybody active in the oil and maritime industries. The county schools are therefore in direct competition with course providers, consisting of privately- or publicly-owned undertakings, which offer the same courses anywhere else in the EEA. Taking into account that the course content is standardised, the Authority takes the view that the price of the course will be a factor in determining which undertaking will obtain a contract for the provision of safety training to the employees of an operator in the oil and maritime industries.
- (49) Moreover, the clients of such course providers may be Norwegian or foreign companies, as the operators in the oil and maritime industries are generally large international companies competing on a global market.
- (50) On the basis of the above, the Authority concludes that, under the financing scheme, the county schools offering safety training courses on the market receive a potential economic advantage which may affect trade between the Contracting Parties and distort competition between undertakings within the EEA.

1.6 Conclusion

- (51) On the basis of the above, the Authority considers that the financing scheme allows for the provision of State resources to economic activities carried out by the county schools offering safety training courses on the market. The Authority thus concludes that state aid has been granted.

²⁷ Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44; Case C-66/02 *Italy v Commission* cited above, footnote 17, paragraph 111, Case C-222/04 *Cassa di Risparmio di Firenze* cited above, footnote 20, paragraph 140.

²⁸ See Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671, paragraphs 11-12 and Joined Cases E-5/04, E-6/04, E-7/04 *Fesil ASA and Finnjord Smelteverk AS v EFTA Surveillance Authority* [2005] EFTA Ct. Rep.117, paragraph 94.

²⁹ Letter from the Norwegian authorities dated 19.12. 2005 (Event No 355129).

2. Existing aid

2.1 General

- (52) Article 1(b)(i) of Part II of Protocol 3 provides that “existing aid”:
- “shall mean 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;*
- (53) Article 1(c) of Part II of Protocol 3 provides that “new aid”:
- “shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid”*
- (54) Article 4 of the Authority's Decision 195/04/COL provides that an alteration to existing aid is *“any change, other than modification of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market”*.
- (55) Regarding the legal assessment of whether aid is new or existing, the Court of Justice stated in *Namur-Les Assurances*³⁰ that: *“the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid, or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it”*. (Emphasis added)
- (56) There is little case-law from the European courts on the definition of what constitutes an “alteration to existing aid”, but several Advocates General at the Court of Justice have delivered Opinions in which they have suggested that negligible changes,³¹ or purely administrative changes,³² or aid which does not influence *“any of the basic features of the previous system of aid”*³³ would not lead to existing aid being re-classified as new aid.

2.2 Definition of an aid scheme

- (57) Article 1(d) of Part II of Protocol 3 provides that an “aid scheme”:
- “shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.”*
- (58) The Authority notes that the case-law of the European courts does not provide detailed guidance as regards the interpretation of this definition. The Authority has found that existing “aid schemes” have been held to encompass non-statutory customary law³⁴ and administrative practice related to the application of statutory³⁵ and non-statutory³⁶ law.³⁷

³⁰ Case C-44/93 *Namur-Les Assurances du Crédit SA* [1994] ECR I-3829, paragraphs 28-29.

³¹ Opinion of A.G. Warner in Case 177/78 *Pigs and Bacon* [1979] ECR 1129.

³² Opinion of A.G. Darmon in Joined Cases 166 and 220/86 *Irish cement* [1998] ECR 6473, paragraph 34.

³³ Opinion of A.G. Trabucchi in Case 51/74 *P.J Van der Hulst's Zonen v Produktschap voor Siergewassen* [1975] ECR 79.

³⁴ See the Authority's Decision No 405/08/COL HFF (OJ L 79, 25.3.2010, p. 40), Chapter II.2.3.1, p. 53: *“The State guarantee on all State institutions for all their obligations follows from general unwritten rules of Icelandic public law predating the entry into force of the EEA Agreement. The guarantee is*

2.3 The financing of the county schools

- (59) First, the Authority will assess whether the financing of county schools can be regarded as an aid scheme within the meaning of Article 1(d) of Part II of Protocol 3 to the EEA Agreement.
- (60) The legal basis for the financing of county schools is currently laid down in the 1998 Education Act, which sets out a framework under which the counties have a duty to provide upper secondary school education to their residents, without requiring further implementing measures, and to which they must commit the necessary financial resources in order to comply with this duty.
- (61) With regard to the criteria set out in Article 1(d) of Part II of Protocol 3, the Authority takes the view that the 1998 Education Act is an act which does not require that further implementing measures are taken and which allows individual aid awards to be made to undertakings that are defined in the act in a general and abstract manner (i.e. county schools). The Authority therefore concludes that the financing of county schools can be regarded as an aid scheme.
- (62) Second, the Authority must assess whether the aid scheme was put into effect before the entry into force of the EEA Agreement in Norway and whether its substance has not been substantially altered afterwards in order to determine whether the aid measure qualifies as existing aid.
- (63) The 1998 Education Act, which currently forms the legal basis for the financing of county schools, replaced the Primary Education Act and the Secondary Education Act, both of which were in force at the time at which the EEA Agreement entered into effect in Norway. However, the adoption of the 1998 Education Act did not change the legal provisions relating to the financing of the schools. These provisions remained materially unaltered, and thus the adoption of the 1998 Education Act cannot be considered to have altered the nature of the existing aid scheme.
- (64) It is the Authority's understanding that any advantages enjoyed by the county schools, as set out above in Chapter II.1.3, all have been financed on the basis of these provisions.

applicable to all State institutions, regardless of when they are established, or of their activities, or changes in those activities. This possible aid measure must be regarded as a scheme falling within the definition in Article 1(d) in part II of Protocol 3 to the Surveillance and Court Agreement”.

³⁵ See Commission Decision in Case E-45/2000 (Netherlands) *Fiscal exemption in favour of Schiphol Group* (OJ C 37 11.2.2004 p. 13).

³⁶ See the Authority's Decision No 491/09/COL *Norsk Film Group* (OJ C 174 1.7.2010 p. 3), Chapter II.2 p.8: “*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, 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 a 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. By Decision No 204/11/COL (OJ L 287, 18.10.2012, p. 14), the Authority closed the procedure on the grounds 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.

³⁷ In Commission Decision in Case E-10/2000 (Germany) *State guarantees for public banks in Germany* (OJ C 150 22.6.2002 p.6), the Commission found that an aid scheme relating to *Anstaltslast* and *Gewährträgerhaftung* was based on the combination of an unwritten old legal principle combined with widespread practice across Germany.

- (65) The schools have offered safety training courses to students since before the entry into force of the EEA Agreement. In addition, they have offered courses to an extended group, including professionals employed by the oil and maritime industries. The fact that the targeted group was extended does not in the view of the Authority have an impact on the existing aid character of the scheme. In *Namur-Les assurances*, the Court of Justice found that the widening of the scope of activities of a publicly financed insurance body did not amount to new aid as long as "*the aid is provided under earlier statutory provisions which remain unaltered.*"³⁸ Indeed, as mentioned above, the legal provisions regarding the financing of county schools have remained unchanged despite the adoption of the new 1998 Education Act.
- (66) The consistent financing of the schools by the counties must thus be regarded as an existing aid scheme.

3. Procedural requirements regarding the review of existing aid schemes

- (67) Article 1(1) of Part I of Protocol 3 provides that: "*(t)he EFTA Surveillance Authority shall, in cooperation 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*".
- (68) According to Article 17 of Part II of Protocol 3, the Authority must obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) of Part I of Protocol 3.
- (69) By letter dated 29 July 2010,³⁹ and in accordance with Article 1(1) of Part I of Protocol 3 and Article 17(1) of Part II of Protocol 3, the Authority initiated the review procedure for existing aid and requested information on the aid measures from the Norwegian authorities. The Norwegian authorities responded by letter dated 28 October 2010⁴⁰ and submitted further information by letter dated 22 November 2010.⁴¹
- (70) By letter dated 1 March 2012,⁴² the Authority initiated the procedure provided for in Article 17(2) of Part II of Protocol 3 in respect of the financing of safety training by county schools, thereby informing the Norwegian authorities of its preliminary view that the financing of the county school's safety training involved state aid that is incompatible with the functioning of the EEA Agreement. The Norwegian authorities responded by letter dated 4 June 2012.⁴³
- (71) The procedure regarding the review of existing aid was therefore carried out in accordance with Article 17 of Part II of Protocol 3.

4. Compatibility of the existing aid scheme

- (72) The Authority agrees with the Norwegian authorities that none of the county schools offering safety training courses on the market come within the scope of the Transparency Directive,⁴⁴ which would have otherwise obliged these schools to maintain separate

³⁸ Case C-44/93 *Namur-Les Assurances du Crédit SA*, cited above, footnote 30, paragraphs 28-29.

³⁹ Event No 562253.

⁴⁰ Event No 575101.

⁴¹ Event No 578341.

⁴² Event No 610263.

⁴³ Event No 611738.

⁴⁴ See footnote 15.

accounts. The reason that these schools do not fall within the scope of the Transparency Directive is that they do not meet the turnover thresholds laid down therein.

- (73) However, the Authority concludes that the current financing scheme of county schools in Norway does not prevent the use of State resources, granted to the schools for non-economic activities, from cross-subsidising the economic activities of those schools.
- (74) Because of the way the aid scheme is currently designed, such transfer or cross-subsidisation cannot be excluded, because the Norwegian authorities have not properly ensured, by enacting legislation or by taking administrative action, that schools are required to keep separate accounts distinguishing between courses offered to students and those offered on the market to employees of the offshore and maritime industries. In the cases where the schools do keep separate accounts on their own initiative, despite the absence of any legal or administrative requirement to that extent, the Authority has not been presented with information which would lead it to conclude that their cost allocation mechanisms are objective and transparent enough to verify that cross-subsidisation is not taking place. Finally, in instances where the schools have designated separate legal entities to carry out the commercial activities, the Authority has not been presented with information which could lead it to conclude that these separate legal entities pay market prices for the use of the public schools' infrastructure and workforce according to a clear, pre-defined and objective price formula.
- (75) 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 under Article 61(2) or (3) or Article 59(2) of the EEA Agreement.
- (76) The derogations set out in Article 61(2) EEA are not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor do Articles 61(3)(a) to (c) EEA apply to the case at hand. Furthermore, the aid under assessment in this case cannot be considered to qualify as compensation for the provision of a public service within the meaning of Article 59(2) EEA.
- (77) The Authority therefore finds that the existing aid scheme under assessment cannot be justified as compatible with the state aid provisions of the EEA Agreement.

5. Recommendation of appropriate measures

- (78) On the basis of the above, the Authority finds that the financing of the safety training courses offered by county schools on the market through State resources constitutes state aid which is not compatible with the EEA Agreement.
- (79) In order to comply with the state aid provisions of the EEA Agreement, the Authority agrees with the Norwegian authorities that measures introducing an organisational division of the county schools' different activities would be appropriate to ensure that no cross-subsidisation, or no further cross-subsidisation, takes place. In particular, the Authority considers that the following measures would be suitable to render the financing scheme compatible with the functioning of the EEA Agreement:
- (80) The Norwegian authorities should ensure that the following cumulative measures are taken:
- i. encourage county schools to incorporate their economic activities into separate legal entities;

- ii. ensure that these separate legal entities pay market prices for the use of the schools' infrastructure and workforce according to a clear, pre-defined and objective price formula; and
 - iii. introduce an adequate system of control, so as to enable the Norwegian authorities to monitor that these separate legal entities effectively pay such market prices.
- (81) *Alternatively*, in the event county schools do not wish to incorporate their economic activities into separate legal entities, the Norwegian authorities should introduce a legally binding obligation under the scheme in order to ensure that the following cumulative measures are taken:
- i. there is a proper, consistent and transparent separation of accounts between the non-economic activities (e.g. those coming within the ambit of the national education obligation) and the economic activities (e.g. those corresponding to the safety training courses offered on the market) of the county schools;
 - ii. there is a consistently applied, objectively justifiable and clearly defined cost allocation model in place to ensure that the economic activities of the schools cover all costs related to their operations, including all variable costs and an appropriate contribution to fixed costs; and
 - iii. there is an adequate system of control enabling the Norwegian authorities to monitor that cross-subsidisation between the two types of activities is not taking place.

HAS ADOPTED THIS DECISION

Article 1

The financing of the safety training courses offered by county schools on the market through State resources constitutes existing state aid which is incompatible with the functioning of the EEA Agreement.

Article 2

Pursuant to Article 1(1) of Part I and Article 18 of Part II of Protocol 3, the Norwegian authorities are recommended to take legislative, administrative and/or other measures, in accordance with the recommended appropriate measures set out in Chapter II.5 of this Decision, in order to eliminate with effect from 1 January 2015 any incompatible aid resulting from the measures covered by this Decision.

Article 3

The Norwegian authorities are invited to accept this proposal for appropriate measures, pursuant to Article 19(1) of Part II of Protocol 3, and to provide the answer by 26 July 2013.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English language version is authentic.

Decision taken in Brussels, 26 June 2013.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sabine Monauni-Tömördy
College Member