

Case No: 70337
Event No: 670256
Dec. No: 460/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 20 November 2013

to propose appropriate measures with regard to state aid granted to publicly owned hospital pharmacies in 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 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 to Article 24 thereof,

Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular Article 1(1) of Part I and Articles 18 and 19 of Part II,

WHEREAS:

I. FACTS

1. Procedure

- (1) Following a complaint by Apokjeden AS¹ dated 13 June 2008 (Event No 481693), the Authority initiated by letter dated 19 July 2011 (Event No 590439) the procedure provided for in Article 17(2) of Part II of Protocol 3 with respect to the financing of publicly owned hospital pharmacies in Norway (the “Article 17(2) letter”). The Authority informed the Norwegian authorities of its preliminary view that the financing of publicly owned hospital pharmacies involves state aid that is incompatible with the EEA Agreement.
- (2) By letter dated 28 October 2011 (Event No 613439), the Norwegian authorities responded to the Article 17(2) letter. The Authority and the Norwegian authorities discussed the case in a meeting on 29 November 2011. Following that meeting, the Norwegian authorities provided further comments to the Authority by letter of 12 March 2012 (Event No 627783).

¹ On 30.8.2013, the Norwegian Register of Business Enterprises (*Brønnøysundregistrene*) registered that Apokjeden AS changed name to Apotek 1 Gruppen AS.

- (3) By letters of 24 November 2011 (Event No 616510) and 27 April 2012 (Event No 632862), the complainant submitted additional observations to the Authority.

2. The complaint

- (4) The complainant alleges that the publicly owned hospital pharmacies in Norway may benefit from unlawful state aid under Article 61(1) of the EEA Agreement. The public hospital pharmacies' sale of products to the general public is in direct competition with privately owned pharmacies. Public hospital pharmacies are thus engaged in an economic activity and fall under the concept of an undertaking within the meaning of Article 61(1) of the EEA Agreement.
- (5) The complainant contends that the public hospital pharmacies are in receipt of financial measures granted by the State or through state resources which relieve these entities from costs which normally would have been borne by their budgets. The retail activities of the public hospital pharmacies should not benefit from any cross-subsidisation from other activities or any other advantage granted by the State. In this context, the complainant has drawn specific attention to three potential aid measures. First, the State foregoes profit through the non-profit orientation of the public hospital pharmacies. Second, the complainant questions whether the public hospital pharmacies pay a rent at a level lower than the market rent for the retail parts of their premises. Third, the public hospital pharmacies are in receipt of an unlawful advantage through a general tax exemption.
- (6) Following the Article 17(2) letter, the complainant has submitted that public hospital pharmacies take part in tenders for the provision of pharmacy services to municipalities and nursing homes in competition with private pharmacies (Event No 616510). This allegation was not part of the original complaint or the Authority's considerations in the Article 17(2) letter. The Authority considers this to be a separate issue than the subject matter of this Decision. The Authority will consider whether to open a separate investigation on this issue.
- (7) The subject matter of this Decision is the retail activities of the public hospital pharmacies to the general public 'over the counter'. The aid measures are described in Part I Section 5 below.

3. Background

3.1 The Norwegian National Health System

- (8) The Norwegian State has the overall responsibility for the Norwegian National Health System ("National Health System"). The National Health System consists of publicly owned entities through which the State provides specialist health care services for free to the Norwegian population. The State's overall responsibility for this sector, and the division of tasks between the publicly owned entities, is regulated by Norwegian law, in particular by the Specialist Health Service Act.²

² The Norwegian Act of 2.7.1999 No 61 (the "Specialist Health Service Act") (in Norwegian: "Lov om spesialisthelsetjenesten m.m."). The State's overall responsibility is laid down in Section 2-1 of the Act.

- (9) The main objective of the National Health System is to provide the population with equal access to public health care services of good quality.³ The services covered by the State relate to public hospital treatment, medical laboratory services and radiological services, acute medical emergency, ambulance services, etc (specialist health care services).⁴
- (10) The National Health System is funded by the State through the national budget by revenue generated from the tax system and the social security system.

3.2 The National Health Reforms

- (11) Since the entry into force of the EEA Agreement in 1994, there have been two main reforms of the National Health System. In 2001, the Norwegian Parliament adopted the Public Health Enterprises Act which changed the ownership structure in the public health care sector (the “2001 Reform”).⁵ In 2012, Norway implemented the Coordination Reform (the “2012 Reform”).⁶
- (12) The 2001 Reform comprised two main elements: The first element was the transfer of ownership and responsibilities within the specialist health care service sector from the counties to the State. The second element was the reorganisation of the publicly owned entities. The 2001 Reform established the Regional Health Authorities.⁷ In addition, it established new legal entities within the public health care sector named “Public Health Enterprises”.
- (13) Public Health Enterprises are fully owned by the State and for which the State has economic responsibility.⁸ Specialist health care service is funded by the State through a model in which it funds the Regional Health Authorities, which in turn fund the Public Health Enterprises within their region, including the public hospital pharmacies. The system is based upon a non-profit model: the State covers the costs of this sector without earning a profit.
- (14) The 2012 Reform had as its main objective to enhance coordination between the various administrative levels in the National Health System and to shift functions and resources from public hospitals to local health authorities (municipalities). Following this reform, hospitals are to provide specialist health care services aiming at a quick return of the patient to his/her municipality after the hospital treatment.⁹
- (15) The main elements of the national health reforms were to re-organise the responsibilities and the ownership structure of the public health care sector, shifting the legal and economic responsibility between different levels of the State, i.e., from the counties to the

³ The Norwegian Act of 2.7.1999 No 63 (the “Act on Patient- and User Rights”) (in Norwegian: “Lov om pasient- og brukerrettigheter”). This objective is laid down in Section 1-1 of the Act.

⁴ The specialist health care services are listed in Section 2-1a of the Specialist Health Services Act.

⁵ The Norwegian Act of 15.6.2001 (the “Health Enterprise Act”) (in Norwegian: “Lov om helseforetak m.m.”).

⁶ The 2012 Reform was *inter alia* implemented through the Act on Municipal Health Care Services of 24.6.2011 No 30 (in Norwegian: “Lov om kommunale helse- og omsorgstjenester m.m.”).

⁷ The Public Health Enterprises Act, Section 1. One Regional Health Authority is established in each dedicated health region. There are currently four Regional Health Authorities in Norway: Helse Sør-Øst RHF, Helse Vest RHF, Helse Midt-Norge RHF and Helse Nord RHF.

⁸ Reference is made to the Proposition on the Public Health Enterprises Act No 66 (2000-2001) to the Parliament (Ot.prp. No. 66 (2000-2001)), p. 2 and p. 83.

⁹ Reference is made to Report No 47 (2008-2009) to the Parliament (St.meld.nr 47 (2008-2009)), available at: http://www.regjeringen.no/upload/HOD/Samhandling%20engelsk_PDFS.pdf.

State by the 2001 Reform; and shifting functions from hospitals to local health authorities (municipalities) by the 2012 Reform. The reforms did not change the system as such, the services provided or the public funding of the public health sector.

4. Public hospital pharmacies – Private pharmacies

4.1 Public hospital pharmacies

- (16) As from 1950, the State, counties and municipalities could in special circumstances establish public hospital pharmacies.¹⁰ Public hospitals in Norway were then regulated by the Hospital Act of 1969.¹¹
- (17) Under the Hospital Act of 1969, the counties controlled the hospitals and the public hospital pharmacies in their respective regions. The State funded the public hospitals and thereby also the public hospital pharmacies. In addition, the Operation of Pharmacies Act of 1963¹² contained a separate section on hospital pharmacies. Under that Act, the main purpose of the hospital pharmacies was to supply pharmaceuticals to hospitals and other health institutions or public institutions only. The hospital pharmacies' sale of pharmaceuticals to the general public required a separate approval from the Ministry of Health and Care Service.¹³
- (18) As from 2001, the hospital pharmacies have been regulated by the Pharmacy Act.¹⁴ The Pharmacy Act defines a hospital pharmacy as “*a pharmacy connected to a public or private hospital which is part of the public health plans and which has as its primary objective to supply pharmaceuticals to the hospital*”.¹⁵ Also after 2001 the main objective of the hospital pharmacies is to supply pharmaceuticals to the hospitals. Under the Pharmacies Act, the supply of pharmaceuticals to the general public does no longer require a separate approval from the Ministry of Health and Care Service.¹⁶
- (19) A licence to operate a hospital pharmacy can be granted to the State, a municipality, a county, an entity owned by those State bodies¹⁷ or to a private company.¹⁸
- (20) The public hospital pharmacies are organised as four Public Health Enterprises, which operate the hospital pharmacies within their respective regions: Sykehusapotekene HF, Sjukehusapoteka Vest HF, Sykehusapotekene Midt-Norge HF and Sykehusapotek Nord HF. These four entities are owned by the Regional Health Authority in each respective region. In 2012, 32 hospital pharmacies were operated in Norway in total, of which 30 public hospital pharmacies were operated by the four Public Health Enterprises.¹⁹ There are two privately owned hospital pharmacies in Norway, which are linked to private hospitals owned and run by private non-profit foundations.

¹⁰ See Proposition No 29 (1998-1999) on the Pharmacy Act (Ot.prp.nr.29 (1998-1999), Section 9.1.1. However, one public hospital pharmacy was established already in 1856.

The Norwegian Act of 19.6.1969 No 57 (the “Hospital Act”) (in Norwegian: “Lov om sykehus m.v.”).

¹² The Norwegian Act of 21.6.1963 No 17 (the “Operation of Pharmacies Act”) (in Norwegian: “Lov om drift av apotek m.v.”).

¹³ The Operation of Pharmacies Act, Section 45.

¹⁴ The Norwegian Act of 2.6.2000 No 39 (the “Pharmacy Act”) (in Norwegian: “Lov om apotek”). The Pharmacy Act entered into force in 2001.

¹⁵ The Pharmacy Act Section 1-3(d) (unofficial translation from Norwegian to English by the Authority).

¹⁶ See the Pharmacy Act, Section 6-1.

¹⁷ This includes Public Health Enterprises.

¹⁸ The Pharmacy Act, Section 2-5.

¹⁹ Statistical information assembled by Apotekforeningen at: <http://www.apotek.no/Default.aspx?ID=2840>.

- (21) The activities of public hospital pharmacies can in general be divided into four main areas:²⁰
- 1) Supplying public hospitals with pharmaceutical products;
 - 2) Producing tailor-made specialist pharmaceutical products for public hospital patients;
 - 3) Providing advisory services on pharmaceuticals to public hospitals; and
 - 4) Retailing pharmaceutical products and non-pharmaceutical products on public hospital premises i.e., retail sale of products ‘over-the-counter’ to discharged patients and out-patients of the hospital and to the general public (the “retail activities”).
- (22) The three first activities are part of the public specialist health care system and do not involve sale to the general public. These activities are therefore not covered by this Decision. As assessed below (see paragraphs 57-64), the fourth activity is an economic activity involving sale to the general public which is conducted in competition with private pharmacies. It must thus be separated from the other activities of the public hospital pharmacies.

4.2 Private pharmacies

- (23) Traditionally pharmacies in Norway have been privately owned. Prior to the Pharmacy Act of 2000, pharmacies were regulated by the Operation of Pharmacies Act of 1963.²¹ The granting of licences was under that Act based on geographical considerations (the State decided where the pharmacies should be located, how many pharmacies etc).²² The licence to operate a private pharmacy was under the Act of 1963 granted to private persons holding a pharmaceutical degree.
- (24) Under the Pharmacy Act of 2000 a licence is still necessary in order to establish and operate a pharmacy. The licence is, however, no longer granted pursuant to the authorities’ discretion. If the conditions for operating a pharmacy are met, the applicant has a legal right to a pharmacy licence.²³ The Pharmacy Act of 2000 also abolished requirements regarding ownership and allowed the pharmacies to be organised in larger units. Furthermore, as opposed to the Operations of Pharmacies Act of 1963 where the licence was granted to private individuals, legal entities can under the Pharmacy Act of 2000 be granted a licence.
- (25) The Pharmacy Act of 2000 led to an increase in the number of private pharmacies in Norway. As per 1 October 1998 there were in total 381 pharmacies in Norway, of which 27 were public hospital pharmacies. As of 31 December 2012, there were in total 738 pharmacies in Norway, of which 30 are public hospital pharmacies.²⁴ There are four

²⁰ The list is non-exhaustive. The Norwegian authorities have in their letter of 12.3.2012 (Event No 627783) included activities such as providing proper medical devices to patients at home and cooperation with the Municipal Health Service with respect to the Coordination Reform.

²¹ See reference in footnote 12 above.

²² See Proposition No 29 (1998-1999) on the Pharmacy Act (Ot.prp.nr.29 (1998-1999)), Section 9.3 and 9.4.

²³ The conditions are given in Section 2-2 of the Pharmacy Act.

²⁴ See reference in footnote 19 above.

private pharmacy chains in the Norwegian market: Boots/Alliance Apotek, Apotek 1,²⁵ Vitusapotek and Ditt apotek.²⁶ Several independent pharmacies are also operating in the market.

- (26) The Pharmacy Act of 2000 did in effect not impact the competitive structure between private pharmacies and publicly owned hospital pharmacies. The number of publicly owned hospital pharmacies and privately owned pharmacies has mainly remained the same. As before, customers can use both private and public pharmacy hospitals for their prescriptions and other retail purchases.

5. Description of the potential aid measures

5.1 Introduction

- (27) The main tasks of the hospital pharmacies are to provide pharmaceutical products and advisory services to hospitals. The hospital pharmacies are, however, also active on the retail market for sale of pharmaceutical products and non-pharmaceutical products ‘over the counter’ to the general public.
- (28) The way in which the public hospital pharmacies are organised and publicly funded raises concerns about potential aid measures. The concerns relate to the fact that the State has not established a system which prevents public funding of non-commercial activities to be transferred to retail activities of the public hospital pharmacies.
- (29) The following potential aid measures are addressed in this Decision:
- (i) Cross-subsidisation of retail activities of public hospital pharmacies with funds meant for non-commercial activities of the public hospital pharmacies;
 - (ii) Profits foregone through the non-profit orientation of the commercial activities of the public hospital pharmacies; and
 - (iii) Exemption from income tax for public hospital pharmacies.
- (30) The complainant has also alleged that the public hospital pharmacies do not pay a market rent for the retail parts of their premises. Payment of rent for the retail premises is one of many cost elements in public hospital pharmacies’ provision of retail services and should be priced accordingly. The Authority has therefore decided to include this issue as part of the assessment of cross-subsidisation and cost-allocation.

5.2 Cross-subsidisation of retail activities of public hospital pharmacies with funds meant for non-commercial activities of the public hospital pharmacies

- (31) In its Article 17(2) letter, the Authority informed the Norwegian authorities that the system of separate accounting currently in place seems to fall short of the principles of the

²⁵ Apotek 1 is the brand of the complainant.

²⁶ The report in Norwegian “*Apotek og legemidler 2013*” (Pharmacies and pharmaceuticals 2013) of the Norwegian Pharmacy Association, at table 1.1.3, p. 16. The report is available at: <http://www.apotek.no/Default.aspx?ID=2833>.

Transparency Directive.²⁷ Reference was made to the principles that “*the granting of financial advantages by forgoing profits*” and “*the forgoing of a normal return on public funds used*”²⁸ should, as far as the financial relations between public authorities are concerned, be transparent.

5.3 Profits foregone through the non-profit orientation of public hospital pharmacies

- (32) The public hospital pharmacies are run on a non-profit basis in line with the State’s model for operating the Regional Health Authorities. This is based on a long-standing public policy.

5.4 Exemption from income tax for public hospital pharmacies

- (33) Section 2-30(1)(g)(5) of the Tax Act of 1999²⁹ contains a general tax exemption for the Regional Health Authorities and Public Health Enterprises. The tax exemption applies to all Public Health Enterprises. The tax exemption is general and covers all activities of the public hospital pharmacies, including income derived from the retail sale to the general public.
- (34) Section 2-30(1)(g)(5) of the Tax Act came into force in 2002.³⁰ However, the origin of the tax exemption is older, as the same exemption applied to the counties (the previous owners of the public health care services) under Section 2-30(1)(c) of the Tax Act and before that, under Section 26(c) of the Tax Act of 1911.

6. Comments by the Norwegian authorities

- (35) The Norwegian authorities have maintained their view that the financing and operation of publicly owned hospital pharmacies do not involve state aid within the meaning of Article 61(1) of the EEA Agreement.
- (36) The Norwegian authorities submit that public hospital pharmacies *are not undertakings operating in the market*.
- (37) The Regional Health Authorities have chosen to organise the public hospital pharmacies as Public Health Enterprises. Public hospital pharmacies are only carrying out activities on behalf of the Regional Health Authorities. They form part of the Norwegian specialist health care service.
- (38) The Norwegian authorities do not consider retail sales of pharmaceutical products from the public hospital pharmacies to patients (including sales to discharged patients and out-

²⁷ 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 (OJ L 318, 17.11.2006, p. 17) and incorporated into the EEA Agreement by Joint Committee Decision No 55/2007 (OJ L 266, 11.10.2007, p. 15 and EEA Supplement No 48, 11.10.2007, p. 12) (the “Transparency Directive”). The Directive might not apply directly to all publicly owned hospital pharmacies. For example, due to the annual turnover of the enterprise falling below the minimum thresholds set out in the Transparency Directive (see Article 5(1)(d)).

²⁸ See Articles 3(d) and 3(e) of the Transparency Directive.

²⁹ The Norwegian Act of 26.3.1999 No 14 (the “Tax Act”) (in Norwegian: “Lov om skatt av formue og inntekt”).

³⁰ This part of the Tax Act was amended as a consequence of the reorganisation of the specialist health care service in 2001.

patients) to be offering goods in a market. The purpose of operating public hospital pharmacies is not commercial. The purpose is to save costs and provide quality in the specialist health care sector. The Norwegian authorities maintain that retail activities to discharged patients is not an economic activity.

- (39) The Norwegian authorities submit that the Coordination Reform of 2012 makes it necessary to give the hospital pharmacies an even more important role than before. Patients shall to a larger extent receive treatment in their local municipality. Such local treatment shall in many cases be based upon close coordination between the local health authorities and the hospitals. In addition, the PHIS Hospital Pharma Report 2010³¹ clearly calls for an improved interface management between the in-patient and out-patient sectors regarding medication of the patients.
- (40) The Norwegian authorities also submit that retail activities only represent a limited share of the hospital pharmacies turnover, the end-users (patients) to a great extent do not themselves pay for prescribed drugs, and further, that the prices on prescribed drugs are fixed. Around 11% of the public hospital pharmacies' revenues stem from sale to the general public.
- (41) The Norwegian authorities maintain that the public hospital pharmacies *do not receive an economic advantage*.
- (42) As regards the issue of separate accounts, the Norwegian authorities have informed the Authority that Sykehusapotekene HF and Sjukehusapoteka Vest HF keep separate accounts for each department (sale to the hospitals, retail sale, production and consulting). The retail sale departments include retail sale of prescription drugs, medicines which the hospital pharmacies produce themselves, medical supplies (bandages), non-prescription drugs and commodities (shampoo etc) to discharged patients, out-patients and to the general public. Sykehusapotekene Midt-Norge HF and Sykehusapotek Nord HF do not maintain completely separate accounts for each department. It is, however, possible to implement separate accounts for these public hospital pharmacies.
- (43) As regards the non-profit orientation of the public hospital pharmacies, the Norwegian authorities submit that the hospital pharmacies are to be non-profit and self-financing entities within the group of each Regional Health Authority. They budget at a surplus of approximately 0.5% of their total turnover. A review of the hospital pharmacies result in the period 2002 – 2008 shows that during this period the hospital pharmacies generated profit in a range between -0.1% and 2.6%. A higher profit would be irrational, as it would only mean that the prices on the goods and services delivered to the hospitals were higher than necessary in order for the hospital pharmacy to be self-financed.
- (44) As regards the tax exemption, the Norwegian authorities submit that the hospital pharmacies are exempted from income tax, as they are run on a non-profit basis. The Public Health Enterprises are fully financed by the State to provide services of common interest to the population. The State should not be paying taxes to itself.

³¹ The Report is a deliverable under the “Pharmaceutical Health Information System” project, commissioned by the European Commission, Executive Agency for Health and Consumers and the Austrian Federal Ministry of Health. The Report is available at: http://ec.europa.eu/health/healthcare/docs/phis_hospital_pharma_report_en.pdf.

- (45) Furthermore, the Norwegian authorities are of the opinion that the aid to public hospital pharmacies *does not distort competition*.
- (46) The patients to a great extent do not themselves pay for the medical products. The costs are borne by a third party: the hospitals or the national insurance system. The public hospital pharmacies retail sales to discharged patients and to the general public will not distort competition among other pharmacies. Such competition is restricted in several respects, for example through a system of maximal prices. For prescribed products, the Norwegian Medicine Agency (“NoMA”) decides the maximum price a wholesaler can charge when selling a pharmaceutical product to pharmacies. NoMa also decides the maximum price the pharmacies can charge when selling a pharmaceutical product to the end-users. The different pharmacies may, however, decide to stock different generic versions of drug substances with corresponding different prices. There is no price regulation for sales of non-prescription products. The Norwegian authorities have also submitted that the public hospital pharmacies retail sale will not distort competition among other pharmacies due to absence of competition between the three largest suppliers.
- (47) The Norwegian authorities submit that all activities carried out by the public hospital pharmacies may be classified as *services of general economic interest*.
- (48) The public hospital pharmacies comply with the conditions in the *Altmark*-case.³² The public hospital pharmacies carry out services that are imposed on them by the State, through the Regional Health Authorities. The Regional Health Authorities oblige the public hospital pharmacies to provide patients with pharmaceutical advice and pharmaceutical treatment.
- (49) In the event that the *Altmark* criteria are not fulfilled the Norwegian authorities are of the opinion that the operations of the public hospital pharmacies fall within the scope of Article 59(2) of the EEA Agreement and could be exempted from notification under the EEA Agreement.

II. ASSESSMENT

1. The presence of state aid

- (50) Article 61(1) of the EEA Agreement provides 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.”
- (51) A measure constitutes state aid pursuant to Article 61(1) of the EEA Agreement if it fulfils four conditions. First, the measure must be funded by the State or through state resources. Second, the measure must confer an advantage on an undertaking. Third, the measure must favour selected undertakings or economic activities. Fourth, the measure must affect trade between Contracting Parties and distort or threaten to distort competition in the EEA. These conditions are assessed in the following.

³² Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747

1.1 Presence of state resources

- (52) The first condition requires that the aid is granted by the State or through state resources.
- (53) The public hospital pharmacies are funded by the Regional Health Authorities which in turn are funded by the State through the national budget. It is well established that public resources at the disposal of public undertakings owned or controlled by the State (whether national or regional or local), are considered to be state resources.³³
- (54) Foregoing profit is equivalent to granting a financial advantage. Foregoing of profits is *inter alia* mentioned in the Authority's Guidelines on State aid provisions to public enterprises in the manufacturing sector, which require transparency where the State foregoes profit.³⁴ By foregoing profit state resources is involved.
- (55) In addition, the public hospital pharmacies are exempted from income tax. As a general rule, the tax systems of the EFTA States are not covered by the EEA Agreement. However, a tax exemption may have specific characteristics which bring it within the scope of Article 61(1) of the EEA Agreement.³⁵ Loss of tax revenue is equivalent to the consumption of state resources in the form of fiscal expenditure.³⁶ The tax exemption therefore also involves state resources within the meaning of Article 61(1) of the EEA Agreement.
- (56) Thus, state resources are clearly involved in the financing and operations of the public hospital pharmacies.

1.2 Whether the public hospital pharmacies are “undertakings”

- (57) The second condition requires that the measure must confer an advantage upon an undertaking. Whether the public hospital pharmacies are deemed to be “undertakings” when they conduct retail activities is considered in this section.
- (58) It is well-established case law that undertakings are entities *engaged in an economic activity*, regardless of their legal status and the way in which they are financed.³⁷

³³ See for instance Article 2 of the Transparency Directive.

³⁴ See the Authority's Guidelines on application of State aid provisions to public enterprises in the manufacturing sector, paragraph 2 (OJ L 231, 3.9.1994, p. 1 and EEA Supplement No 32, 3.9.1994, p. 1) (the “Manufacturing Guidelines”). Section 1(3) of the Guidelines provides that “[t]his Chapter does not deal with the question of compatibility under one of the derogations provided for in the EEA Agreement and it is limited to the manufacturing sector. This does not, however, preclude the EFTA Surveillance Authority from using the approach in these rules in individual cases or sectors outside manufacturing to the extent these principles apply in these excluded sectors and where it feels that it is essential to determine if state aid is involved.” The Guidelines can be found at the Authority's website: <http://www.eftasurv.int/?1=1&showLinkID=16995&1=1>.

³⁵ See Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnffjord, PIL and others and the Kingdom of Norway v. EFTA Surveillance Authority* [2005] EFTA Ct. Rep. p.117 paragraphs 76-81 and section 1(3) of the Authority's Guidelines on the Application of state aid rules to measures relating to direct business taxation (OJ L 137, 8.6.2000, p. 20 and EEA Supplement No 26, 8.6.2000, p. 10). The Guidelines can also be found at the Authority's website: <http://www.eftasurv.int/?1=1&showLinkID=15141&1=1>.

³⁶ See Section 3(3) of the Authority's Guidelines on the Application of State aid rules to measures relating to direct business taxation (see reference in footnote 35 above).

³⁷ 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. p.61, paragraph 78.

Economic activities are activities consisting of offering goods or services on a market.³⁸ 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. Also offering goods and services on a market without a profit can constitute an economic activity.³⁹

- (59) The legal form of the entity is irrelevant when it comes to the assessment of what constitutes an undertaking.⁴⁰ Economic and non-economic activities can also co-exist within the same sector and sometimes be provided by the same organisation.⁴¹
- (60) In *FENIN*,⁴² the European Courts concluded that Spanish national health service bodies were not undertakings⁴³ as they were funded from social security contributions and other state funding and provided services free of charge on the basis of universal coverage.⁴⁴ The European Courts have also found that those that provide medical services for remuneration are engaged in economic activity. For example, in the case of *Pavlov*,⁴⁵ the Court of Justice of the European Union (“CJEU”) was of the opinion that consultant physicians, in their capacity as self-employed economic operators, are engaged in economic activities as they provide services for remuneration and assume the financial risks involved in pursuing their activity. Similarly, the CJEU held in *Ambulanz Glöckner*⁴⁶ that the medical emergency transport organisations concerned were undertakings because they provided services for economic considerations.
- (61) The Authority also refers to Section 2.1.4 of its Guidelines on compensation granted for the provision of services of general economic interest.⁴⁷ Public hospitals in Norway are an integral part of the National Health Service funded by State resources. Where such a structure exists, even activities that in themselves could be of an economic nature, but are carried out merely for the purpose of providing another non-economic service, are not of an economic nature. This would for instance be the case for the public hospital pharmacies’ provision of products to the public hospitals. On the other hand, when the public hospital pharmacies sell products to the general public, this is an economic activity on a market which generates income. The activity is conducted in competition with private pharmacies. Such activities are not an integral part of the activities that are entrusted to the public hospitals.

³⁸ Case C-222/04 *Ministero dell’Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, paragraph 108.

³⁹ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1978] ECR 2111, paragraph 21.

⁴⁰ Case C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECR I-1547, paragraphs 16-18.

⁴¹ See the European Commission Decision in Case C-22/2003 (Italy) *Reform of the training institutions* (OJ L 81, 18.3.2006, p. 25), paragraph 43.

⁴² Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [2003] ECR II-357, paragraphs 38-40; and Case C-205/03P, *FENIN* [2006] ECR I-6295.

⁴³ In that context within the meaning of Article 102 TFEU.

⁴⁴ See Case T-319/99 *FENIN* [2003] ECR II-357, paragraph 39.

⁴⁵ Joined Cases C-180—184/98 *Pavlov* [2000] ECR I-6451.

⁴⁶ Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089. In Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, the European Court refers to the setting up of new pharmacies as establishment of undertakings without discussing the issue of whether a pharmacy is an undertaking (paragraph 54).

⁴⁷ The Authority’s Guidelines on compensation granted for the provision of services of general economic interest (OJ L 161, 13.6.2013, p. 12 and EEA Supplement No 34, 13.6.2013, p. 1). The Guidelines can be found at 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>.

- (62) The Norwegian authorities submit that since the patients to a great extent do not pay for the prescribed pharmaceuticals, and the price of such products is fixed, the public hospital pharmacies' retail activities do not entail offering goods on a market. The Authority notes that patients have a free choice of pharmacy, also for prescribed pharmaceuticals. The fact that the prices are fixed at a maximum level and the patients to a great extent do not pay for the prescribed pharmaceuticals, does not mean that the retail activities do not involve offering goods in a market. The private pharmacies compete for the same patients and products as the public hospital pharmacies. Sale of prescribed pharmaceuticals against remuneration either from the patient or the State amounts to offering products on a market. Such sales lead to a higher volume of sales and thereby a higher turnover. Even if pharmacies do not compete on the maximum price set by NoMa, they compete on the profit element which is included in the maximum price, and other competitive factors such as service. The importance of the sale of prescribed pharmaceuticals is also evidenced by the fact that such sales represent a high percentage of the turnover of the pharmacies.⁴⁸ The Authority takes the view that discharged or out-patients, when leaving the public hospital, can very well use a local private pharmacy when purchasing prescribed pharmaceuticals.
- (63) The Authority moreover fails to see the relevance of the Coordination Reform in 2012 and the PHIS Pharma Report⁴⁹ as regards the issue of whether selling pharmaceutical products in a market constitutes an economic activity. The aim of the PHIS Pharma Report was to gain knowledge on medicines management in hospitals in Europe, i.e., medicines in the in-patient sector. Based on the above, the Authority concludes that the retail activities of the public hospital pharmacies in competition with private pharmacies constitute an economic activity.⁵⁰
- (64) Consequently, in so far as such activities are concerned, the public hospital pharmacies are undertakings within the meaning of Article 61(1) of the EEA Agreement.

1.3 The measure contains an “advantage” to an undertaking

- (65) The potential advantages conferred on the public hospital pharmacies are listed in paragraph (29) above. Each of these will be assessed below.
- 1.3.1 Cross-subsidisation of retail activities of public hospital pharmacies with funds meant for non-commercial activities of the public hospital pharmacies*
- (66) When an entity carries out both commercial and non-commercial activities, a cost-accounting system should be put in place to ensure that the commercial activities are not subsidised through state resources allocated to the non-commercial activities. This principle is also laid down in the Transparency Directive.⁵¹ The Directive might not apply directly to all publicly owned hospital pharmacies.⁵² However, the Authority is of the opinion that the principles of carrying out economic activities on commercial terms with separate accounts, and a clear establishment of the cost accounting principles according to

⁴⁸ In 2012, prescribed pharmaceuticals represented more than 86% of the total sale of pharmaceuticals in the Norwegian market (<http://www.apotek.no/Default.aspx?ID=2725>).

⁴⁹ See the Executive Summary of the Report, p. XIX (see reference in footnote 31 above).

⁵⁰ See for example Case C-438/02 *Criminal proceedings against Krister Hanner* [2005] ECR I-04551 concerning the former state monopoly in Swedish pharmacies.

⁵¹ See reference in footnote 27 above.

⁵² See footnote 27.

which separate accounts are maintained, still apply. The Authority also refers to its decisional practice on cost-allocation and separation of accounts.⁵³

- (67) The State can cover the costs for the non-commercial activities of the public hospital pharmacies, but not the costs for the commercial activities. Objective and transparent cost allocation mechanisms should be in place to ensure that the commercial activities cover all the costs related to these operations (including all variable costs and an appropriate share of the fixed costs). Without such mechanisms in place the retail activities of the public hospital pharmacies may gain advantages from the public funds to the non-commercial activities.
- (68) One example of such costs pertaining to the public hospitals' retail activities is the payment of rent for the premises related to the retail activities. The State can cover the rent for the premises related to non-commercial activities of the public hospital pharmacies. However, there must be mechanisms in place which ensures that the public hospital pharmacies pay a rent for premises used for the retail activities which is equivalent to the market value. A rent lower than the market value would create an advantage in favour of the public hospital pharmacies.
- (69) The Authority takes the view that the current method of financing the public hospital pharmacies does not prevent State resources, which are allocated to the pharmacies for the purpose of fulfilling their non-economic tasks, being used to subsidise the public hospital pharmacies' commercial activities. The exact extent to which the commercial activities of the public hospital pharmacies receive an advantage from funds to non-commercial activities is difficult to determine without separation of accounts. As mentioned in paragraph (42) above, Sykehusapotekene HF and Sjukehusapoteka Vest HF maintain separate accounts for each department, whereas Sykehusapotekene Midt-Norge HF and Sykehusapotek Nord HF have not implemented separate accounts.
- (70) On the basis of the above, the Authority finds that the Norwegian authorities have not sufficiently ensured that all public hospital pharmacies implement separate accounts in accordance with the principles of the Transparency Directive.

1.3.2 Profits foregone through the non-profit orientation of public hospital pharmacies

- (71) The public hospital pharmacies are run on a non-profit basis, which is the public policy of the Norwegian authorities for entities within the specialist health care sector. The non-profit orientation of the public hospital pharmacies also covers their retail activities (see paragraph 43 above). The public hospital pharmacies are thus not required to generate a normal rate of return of their retail activities, i.e. activities conducted in competition with private pharmacies.
- (72) Any business owner or investor will normally require a return on their investment in a commercial undertaking. Such a requirement represents a normal and expected business cost for the undertaking. However, in the case of the public hospital pharmacies, no return on the investment is expected from the owners (the Regional Health Authorities), neither in the long term or in the short term.

⁵³ See e.g. the Authority's Decision 142/03/COL *Regarding Reorganisation and Transfer of Public Funds to the Work Research Institute* (OJ C 248, 16.10.2003, p. 6), Decision 343/09/COL *on the property transactions engaged in by the Municipality of Time concerning property numbers 1/152, 1/301, 1/630, 4/165, 2/70, 2/32* (OJ L 123, 12.5.2011, p.72) and Decision 174/13/COL *Concerning the financing of municipal waste collectors* (OJ C 263, 12.9.2013, p. 5).

- (73) The Authority is therefore of the opinion that the activities carried out by the public hospital pharmacies in competition with other companies do not fulfil the market investor test: any business owner or investor will normally require a return on their investment in a commercial undertaking and such a requirement effectively represents an expense for the undertaking. The instruction not to make profit amounts to an advantage in itself. This principle is *inter alia* stated in the Authority's Manufacturing Guidelines, pursuant to which: “[i]f a public enterprise has an inadequate rate of return, the EFTA Surveillance Authority could consider that this situation contains elements of aid, which should be analysed with respect to Article 61. In these circumstances, the public enterprise is effectively getting its capital cheaper than the market rate, i.e equivalent to a subsidy”.⁵⁴
- (74) It can therefore be concluded that the market investor test is not met and that the public hospital pharmacies are indirectly benefiting from the non-profit orientation of their retail activities.
- (75) Thus, the Authority concludes that the non-profit orientation on the public hospital pharmacies' retail activities represents an advantage within the meaning of Article 61(1) of the EEA Agreement.

1.3.3 *The exemption from income tax for public hospital pharmacies*

- (76) It follows from Section 2-30(1)(g)(5) of the Tax Act that all activities of the public hospital pharmacies are exempted from income tax.
- (77) According to the Norwegian authorities the reason why the Public Health Enterprises do not pay taxes is because they are carrying out public sector activities financed by the State.
- (78) Article 61(1) of the EEA Agreement applies to measures granted by the State or through state resources in any form whatsoever. A measure, by which public authorities give certain undertakings a tax exemption, although not involving a cash transfer of state resources, places that undertaking in a more favourable financial situation than other undertakings.⁵⁵
- (79) The tax exemption reduces the charges that are normally included in the operating costs of an undertaking carrying out economic (commercial) activities. As previously noted, not all activities of the public hospital pharmacies are non-economic (non-commercial) in nature. The tax exemption for commercial activities involves an economic advantage to the public hospital pharmacies, thus favouring the public hospital pharmacies in comparison to privately owned pharmacies.
- (80) A tax exemption may be justified by the nature or general scheme of the system of which it takes part. The purpose of an income tax system is to tax income. Treating the public hospital pharmacies differently than privately owned pharmacies, when it concerns taxation of income received from economic activities, is not in line with this purpose. The

⁵⁴ Section 7.4(2) of the Manufacturing Guidelines. Also see Section 1(2) of the Manufacturing Guidelines, which provides that “[t]his Chapter firstly focuses on, the one hand, on the act referred to in point 1 of Annex XV to the EEA Agreement, hereinafter referred to as the Transparency Directive and, on the other hand, it develops the principle that where the State provides finances to a company in circumstances that would not be applicable to an investor operating under normal market economy conditions, it does this in contradiction to the Market economy investor principle, and state aid is involved” (see reference to the Manufacturing Guidelines in footnote 34 above).

⁵⁵ See Case C-387/92 *Banco Exterior de Españā* [1994] ECR I-877, paragraph 14.

Norwegian authorities have argued that the tax exemption is justified as in general no income tax is levied on non-profit organisations. This argument may be relevant as regards charitable work of non-profit organisations. The Authority does not, however, find this argument convincing when the public hospital pharmacies receive income from economic (commercial) activities for which they compete with private hospital pharmacies.

- (81) Thus, the Authority concludes that the tax exemption for economic (commercial) activities represents an advantage within the meaning of Article 61(1) of the EEA Agreement.

1.4 Advantage – assessed in light of *Altmark*

- (82) The Norwegian authorities have argued that the publicly owned hospital pharmacies provide services of general economic interest. The financing and operation of those pharmacies merely represent compensation for services rendered in accordance with the *Altmark* criteria,⁵⁶ and consequently do not constitute aid within the meaning of Article 61(1) of the EEA Agreement.

- (83) In the *Altmark* judgment, the CJEU held that compensation for public service obligations does not constitute state aid when four cumulative criteria are met:

- *First*, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined.
- *Second*, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- *Third*, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
- *Finally*, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

- (84) As mentioned above in paragraph (25), there are four pharmacy chains operating on the Norwegian market. The Authority has not been provided with information indicating that the services in question, the retail activities, are not already provided or cannot be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service by undertakings operating under normal market conditions.

- (85) On the basis of the information provided by the Norwegian authorities, the Authority does not consider that the activities of the public hospital pharmacies addressed by the present decision, i.e. the retail sale of pharmaceutical products, fulfil the *Altmark* criteria.

- (86) *First*, the Authority fails to see that public hospital pharmacies have been entrusted with clearly defined public service obligations, with regard to the retail activities. Reference is made to Section 2.1.4 of the Guidelines on compensation granted for the provision of

⁵⁶ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 89-93.

services of general economic interest. As concluded by the Authority in paragraph (63) above, the retail activities of the public hospital pharmacies in competition with private pharmacies is an economic activity. The Authority has not been provided with information substantiating that the services in question cannot be provided satisfactorily by undertakings operating under normal conditions. The Authority finds that to define the public hospital pharmacies' retail sale of pharmaceuticals and non-pharmaceutical products 'over the counter' as a service of general economic interest would amount to a manifest error.

- (87) *Second*, the parameters on the basis of which the compensation is calculated do not appear to have been established in advance in an objective and transparent manner. This is for example the situation when it concerns the potential cross-subsidisation of the commercial activities as well as setting the rental price for the retail premises.
- (88) *Third*, as regards the criterion that the compensation cannot exceed what is necessary to cover all or parts of the costs incurred in the discharge of the public service obligations, the Authority notes that there are no mechanisms to prevent overcompensation due to the lack of separate accounts and appropriate cost allocation.
- (89) *Finally*, the undertakings entrusted with the obligations, i.e. the public hospital pharmacies, were not chosen pursuant to a public procurement procedure. Furthermore, the Norwegian authorities have not provided the Authority with information enabling it to conclude that the public hospital pharmacies are "*well run and adequately equipped*" in accordance with the second alternative under the fourth *Altmark*-criterion.
- (90) Therefore, the Authority concludes that none of the four *Altmark* criteria is fulfilled concerning the retail activities of the publicly owned hospital pharmacies.

1.5 Selectivity

- (91) The third condition in order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement is that the measure must be selective.
- (92) Only the public hospital pharmacies benefit from the advantages considered above. Private pharmacies do not receive comparable advantages. Accordingly, the advantages under assessment in this Decision represent selective advantages as they only concern particular undertakings.

1.6 Distortion of competition and effect on trade between Contracting Parties

- (93) The fourth condition in order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement is that the measure must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement. It is sufficient to establish that the aid measure is liable to affect trade and distort competition.⁵⁷
- (94) Moreover, the mere fact that aid strengthens an undertaking's position compared to that of other undertakings competing in intra-EEA trade is enough to conclude that the measure is

⁵⁷ See for example Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44.

liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.⁵⁸

- (95) The Authority finds it clear that retail of pharmaceutical and non-pharmaceutical products is an economic activity. By not requiring reasonable profits from the economic activities of the public hospital pharmacies and by not ensuring that they pay income tax on such activities and maintain separate accounts, those undertakings are granted certain advantages compared to private pharmacies. Such aid distorts competition because it strengthens the position of public hospital pharmacies compared to private pharmacies. Advantages provided to undertakings engaged in such activities can affect trade between the EEA States and distort competition. This is for example evident by the fact that multinational pharmaceutical companies currently operate on the Norwegian market (outside publicly owned hospitals).⁵⁹
- (96) The argument by the Norwegian authorities that there is no distortion of competition due to the fact that the end-users to a great extent do not themselves pay for the medical products, and further, that competition in this market is restricted in several respects, is not relevant (see paragraph (62)). The pharmacy market has always been characterised by private operators and even more so since the entry into force of the Pharmacy Act in 2001. Since that time there have been an increasing number of privately owned pharmacies in the market. There are currently four private pharmacy chains in the Norwegian market in addition to several independent pharmacies. The private pharmacies compete for mainly the same customers as those of the public hospital pharmacies when they sell pharmaceuticals and non-pharmaceutical products ‘over the counter’.
- (97) The Authority thus concludes that the public hospital pharmacies receive economic advantages which may affect trade and distort competition between undertakings within the EEA.

1.7 Conclusion

- (98) On the basis of the above, the Authority considers that the measures described in this decision constitute state aid pursuant to Article 61(1) of the EEA Agreement.

2. Existing aid

2.1 General

- (99) According to Article 1(b)(i) of Part II of Protocol 3 “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”*.

⁵⁸ 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.

⁵⁹ Apotek 1 Gruppen AS is for instance controlled by the German PHOENIX Group (<http://www.apotek1.no/om-apotek1/om-selskapet>).

- (100) In Case E-14/10, the EFTA Court stated that: “[...]to qualify as an ‘existing aid measure’ under the EEA state aid rules, it must be part of an aid scheme that was put into effect before the entry into force of the EEA Agreement”.⁶⁰
- (101) Regarding the legal assessment of whether aid is new or existing, the CJEU held in *Namur-Les Assurances* 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”.⁶¹

2.2 Definition of an aid scheme

- (102) 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.”
- (103) Existing “aid schemes” have been held to encompass non-statutory customary law⁶² and administrative practice related to the application of statutory⁶³ and non-statutory law. In one case, the European 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.⁶⁴

2.3 The financing of the public hospital pharmacies

2.3.1 The existence of an aid scheme

- (104) The existence of an aid scheme relies on an examination of whether the legal framework for the financing of the public hospital pharmacies can be considered to be “an 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”.⁶⁵

⁶⁰ Case E-14/10 *Konkurrenten.no AS v EFTA Surveillance Authority* [2011] EFTA Ct Rep. p. 266, paragraph 53.

⁶¹ Case C-44/93 *Namur-Les Assurances du Crédit SA* [1994] ECR I-3829, paragraph 28.

⁶² See the Authority’s Decision No 405/08/COL closing the formal investigation procedure with regard to the Iceland Housing Financing Fund (OJ L 79, 25.3.2010, p. 40 and EEA Supplement No 14, 25.3.2010, p.20), 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 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”.

⁶³ See the European Commission Decision in Case E-45/2000 (Netherlands) *Fiscal exemption in favour of Schiphol Group* (OJ C 37, 11.2.2004, p. 13).

⁶⁴ See the European Commission Decision in Case E-10/2000 (Germany) *State guarantees for public banks in Germany* (OJ C 150 22.6.2002, p. 7).

⁶⁵ Article 1(d) of Part II of Protocol 3.

- (105) It is the financing of the public hospital pharmacies as Public Health Enterprises which gives rise to the potential state aid measures in the form of cross-subsidisation and foregone profit.
- (106) Since 1950, Norwegian law has allowed the State to establish and operate public hospital pharmacies. Ever since the establishment of the public hospital pharmacies, they have been publicly financed by the State. As mentioned in paragraph (13) above, the State funds the Regional Health Authorities, which in turn fund the public hospital pharmacies. The Hospital Act of 1969 had a clear provision on the State's obligation to fund the counties expenses for operating the health care services.⁶⁶ Today, the obligation to finance the Public Health Enterprises follows from the State's overall responsibility for the specialist health care sector. The actual public funding has always been made through the national budget. The consistent financing of the public hospital pharmacies by the State must be viewed as a long-term scheme based on legal provisions and the national budget.⁶⁷
- (107) The tax exemption for Public Health Enterprises is laid down in Section 2-30(1)(g)(5) of the Tax Act of 1999, which was effective as from January 2002. The same tax exemption applied to the previous owners of the public hospital pharmacies in Section 2-30(1)(c) of the Tax Act of 1999. The same tax exemption was laid down in Section 26(c) of the Tax Act of 1911. The tax exemption is part of the Norwegian general taxation scheme.
- (108) Consequently, the Authority concludes that financing of the public hospital pharmacies have a legal basis under which, without further implementation measures being required, individual aid awards are made in accordance with Article 1(d) of Part II of Protocol 3.

2.3.2 *New or existing aid*

- (109) As mentioned above in paragraphs (99)-(100), existing aid encompasses all aid which existed prior to the entry into force of the EEA Agreement. 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 in 1994.
- (110) It has been established by the CJEU that alterations, which have no bearing on the advantage that is conferred on the beneficiary of the aid, do not make existing aid new aid.⁶⁸ Furthermore, "*any change [...] which cannot affect the evaluation of the compatibility of the aid measure with the common market*" is not sufficiently substantial to require a reclassification of a measure as new aid.⁶⁹

⁶⁶ Section of 11 of the Hospital Act 1969.

⁶⁷ Reference is made to the Authority's decisional practice, see the Authority's Decision No 519/12/COL of 19.12.2012 *closing the formal investigation into potential aid to AS Oslo Sporveier and AS Sporveisbussene* (OJ L 276, 17.10.2013, p. 8 and EEA Supplement No 57, 17.10.2013 p. 1). The Decision has been appealed to the EFTA Court and is currently pending (Case E-19/13 *Konkurrenten.no AS v EFTA Surveillance Authority*). A combination of a legislative act, regulation and administrative practice was in this Decision regarded as one aid scheme.

⁶⁸ Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 29.

⁶⁹ The Authority's Decision No 195/04/COL of 14 July 2004 *on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice*, Article 4(1) (OJ L 139, 25.5.2006, p. 37 and EEA Supplement No 26, 25.5.2006, p. 1).

- (111) Whether aid must be classified as new aid or alterations of existing aid must be determined with reference to the provisions providing for it. Negligible changes,⁷⁰ or purely administrative changes,⁷¹ or aid which does not influence “*any of the basic features of the previous system of aid*”⁷² do not lead to existing aid being reclassified as new aid.
- (112) The public hospital pharmacies have been financed by the State since their establishment, as early as in 1856. The scheme clearly pre-dates the entry into force of the EEA Agreement.
- (113) The long-term practice of public funding for the public hospital pharmacies did not change following the entry into force of the Pharmacy Act in 2001. Neither did the State change its practice to provide pharmaceuticals/non-pharmaceutical products on hospital premises through publicly owned hospital pharmacies.
- (114) Under the Operation of Pharmacies Act of 1963, public hospital pharmacies could sell pharmaceuticals to the general public after having obtained a separate approval from the Ministry of Health and Care Services. Under the Pharmacy Act of 2000, the sale of pharmaceuticals to the general public is automatically covered by the licence to operate a pharmacy. This amendment of the Pharmacy Act of 2000 did in practice not lead to changes in the situation as regards retail activities. Before 2001, most public hospital pharmacies sold pharmaceuticals to hospital employees, discharged and out-patients of the hospital and also to the general public. In practice, there was no separation between the different groups of customers in relation to sale of pharmaceuticals ‘over the counter’ (employees, out-patients, discharged patients, the general public).⁷³ Thus, the fact that the amendment of Pharmacy Act of 2000 abolished the requirement for a separate approval to carry out sale to the general public had only a minor effect. This amendment of the Pharmacy Act is therefore negligible.
- (115) The fact that there have been changes in the way the Norwegian State has organised its internal ownership and administration of public health care services, has no bearing on the aid assessment. No additional aid element for the public hospital pharmacies was introduced by the 2001 Reform (the Public Health Enterprises Act) or the 2012 Reform. None of the reforms had any impact on the fundamental characteristics of the relationship between the State and the public hospital pharmacies, notably the public funding of their activities.
- (116) As regards the income tax exemption, and as mentioned above in paragraph (107), the same tax exemption which the hospital pharmacies benefit of from today, applied to the previous owners of the public hospital pharmacies in Section 2-30(1)(c) of the Tax Act of 1999. Prior to the entry into force of the EEA Agreement, the same tax exemption was laid down in Section 26(c) of the Tax Act of 1911. Consequently, the tax exemption clearly pre-dates the entry into force of the EEA Agreement.
- (117) Consequently, the Authority concludes that the aid scheme to finance public hospital aid and thus the measures in question, constitute existing aid within the meaning of Article 1(b)(i) of Part II of Protocol 3 to the Surveillance and Court Agreement.

⁷⁰ Opinion of A.G Warner in Case 177/78 *Pigs and Bacon* [1979] ECR 2161, p. 2204.

⁷¹ Opinion of A.G Darmon in Joined Cases 166 and 220/86 *Irish Cement* [1988] ECR 6473, paragraph 34.

⁷² Opinion of A.G. Trabucchi in Case 51/74 *P.J. Van der Hulst's Zonen v Produktschap voor Siergewassen*, [1975] ECR 79, p. 105.

⁷³ Proposition No 29 (1998-1999) on the Pharmacy Act (Ot.prp.nr.29 (1998-1999)), Section 11.1.1.

3. Procedural requirements regarding the review of existing aid schemes

- (118) 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”.
- (119) The Authority issued in 2009 a request for information to the Norwegian authorities under Article 10(2) in conjunction with Article 5(1) of Part II of Protocol 3 to the Surveillance and Court Agreement. Then several exchanges in writing were made between the Norwegian authorities and the Authority and the measures were discussed in meetings. By letter dated 19 July 2011 (Event No 590439), and in accordance with Article 17(2) of Part II of Protocol 3, the Authority informed the Norwegian authorities of its preliminary conclusion 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.
- (120) By letter dated 28 October 2011 (Event No 613439), the Norwegian authorities submitted their comments. The letter was followed by an exchange of views between the Authority and the Norwegian authorities and a meeting on 29 November 2011.
- (121) The Authority therefore concludes that the procedure regarding the review of existing aid was carried out in accordance with Article 17 of Part II of Protocol 3.

4. Compatibility of the existing aid measures

4.1 Introduction

- (122) The Norwegian authorities have argued that the financing of the public hospital pharmacies must be considered to be compatible with the EEA Agreement.
- (123) Aid 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.

4.2 Article 61(2) and Articles 61(3)(a) to (c) of the EEA Agreement

- (124) The derogations set out in Article 61(2) of the EEA Agreement 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) of the EEA Agreement apply to the case at hand.

4.3 Article 59(2) of the EEA Agreement

- (125) The Norwegian authorities are of the opinion that the operations of public hospital pharmacies are not economic in nature and in consequence, the system is based on the principle of compensation for a public service provided.
- (126) The Authority refers to its assessment in Part II Section 1.4 above and to the conclusion that the public hospital pharmacies’ retail sale of pharmaceuticals and non-pharmaceutical products ‘over the counter’ cannot be considered as a service of general economic interest. The main condition for applying Article 59(2) of the EEA Agreement does thus not apply.

- (127) Moreover, as stated in paragraph (28) above, it is the way in which the public hospital pharmacies are organised and publicly funded that raise potential aid measures. The State has not established a system which prevents public funding of non-commercial activities from being used for commercial activities (retail sale) of the hospital pharmacies. Cross-subsidisation of public funds allocated to non-commercial activities to commercial activities, cannot be considered compatible with the EEA Agreement, neither on the basis of service of a general economic interest or under other provisions of the EEA Agreement.
- (128) Thus, 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) of the EEA Agreement.

4.4 Conclusion

- (129) Based on the above, the Authority concludes that the existing aid measures under assessment cannot be held to be compatible with the EEA Agreement based on any of the derogations in Articles 61 and 59 of the EEA Agreement.

5. Proposal for appropriate measures

- (130) For the above mentioned reasons, the Authority considers that the measures assessed above constitute incompatible state aid and should accordingly be abolished by way of appropriate measures.
- (131) The Authority considers that the following measures would qualify as appropriate means to ensure that no aid is granted in the future to the retail activities of the public hospital pharmacies:
- In accordance with the Authority's practice, separate accounts should be kept for the retail activities of the public hospital pharmacies (retail sale of pharmaceutical products and non-pharmaceutical products 'over-the-counter' to discharged patients and out-patients of the hospital and to the general public).
 - The accounting principles according to which separate accounts are maintained shall be clearly established.
 - All costs, both direct and indirect, as well as an appropriate contribution to the common costs and revenues shall be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles. This shall also apply to the costs for rental of the retail premises.
 - The retail activities of public hospital pharmacies should be required to achieve profits comparable to what a private investor would expect from a similar undertaking.
 - The tax exemption for the activities of the public hospital pharmacies should be modified so that the tax exemption does not cover the retail activities of the public hospital pharmacies.
- (132) The Norwegian authorities shall implement the relevant measures and discontinue the aid as soon as possible and in any event not later than 1 January 2015.

HAS ADOPTED THIS DECISION:

Article 1

The cross-subsidisation of retail activities of the public hospital pharmacies, foregone profits and exemption from income tax for the retail activities of the public hospital pharmacies constitute 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 other measures, in accordance with paragraph (131) 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 their answer within one month of receipt of this proposal.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version is authentic.

Done at Brussels, 20 November 2013.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member