

Case No: 69978
Event No: 659000
Dec. No: 90/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 27 February 2013

to propose appropriate measures with regard to state aid granted to finance the fitness centre at Kippermoen Leisure Centre

(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) By letter dated 27 January 2009 (Event No 506341), the Norwegian authorities notified the financing of the fitness centre at Kippermoen Leisure Centre (“KLC”), pursuant to Article 1(3) in Part I of Protocol 3.
- (2) On 16 December 2009, by Decision No 537/09/COL,¹ the Authority initiated the procedure laid down in Article 1(2) of Part I of Protocol 3 with respect to the financing of the fitness centre at KLC.
- (3) On 1 June 2011, by Decision No 176/11/COL,² the Authority closed the formal investigation procedure on the grounds that the financing of the fitness centre at KLC, in so far as it represented state aid within the meaning of Article 61(1) of the EEA

¹ OJ C 184 8.7.2010 p. 5 and EEA Supplement No 35 8.7.2010 p. 1.

² OJ L 23 26.1.2012 p. 12 and EEA Supplement No 4 26.1.2012 p. 1.

Agreement, was granted on the basis of a system of existing aid within the meaning of Article 62 of the EEA Agreement.

- (4) By letter dated 15 July 2011 (Event No 587958), the Authority initiated the procedure provided for in Article 17(2) of Part II of Protocol 3 with respect to the financing of the fitness centre at KLC, thereby informing the Norwegian authorities of its preliminary view that the financing of the fitness centre involved state aid that was incompatible with the functioning of the EEA Agreement.
- (5) The Norwegian authorities responded to the Authority's Decision by letter dated 6 September 2011 (Event No 607896). On 28 November 2011 the Authority met with the Norwegian authorities in Oslo. The Norwegian authorities submitted a written follow-up on 9 February 2012 (Event No 624305). By letter dated 22 February 2012 (Event No 625779), the Authority requested further information which the Norwegian authorities submitted by letter dated 23 March 2012 (Event No 629021). The Authority sent another request for information by letter dated 3 April 2012 (Event No 629663) and received a reply from the Norwegian authorities on 30 May 2012 (Event No 636293). The Authority requested further information by letters dated 6 July 2012 (Event No 638174), 5 September 2012 (Event No 645626) and 3 December 2012 (Event No 654917). The Norwegian authorities submitted the requested information by letters dated 15 October 2012 (Event No 649771) and 11 January 2013 (Event No 658934).

2. Description of the measures

- (6) The measures assessed in this decision are constituted by the financing, by the municipality of Vefsn of the fitness centre at KLC, by way of its decisions on annual deficit coverage and ticket revenue allocation as well as the absence of a requirement from the municipality for the fitness centre to provide a return on invested capital.

3. KLC and its fitness centre

3.1.1 General

- (7) KLC was established in the 1970s. It is located in the town of Mosjøen, population approximately 10 000, in the municipality of Vefsn, total population of 13 300, which is located in the county of Nordland. The centre is owned by the municipality and is not organised as a separate legal entity.
- (8) Initially, KLC consisted of an indoor swimming pool with a solarium and a sports hall, in addition to a modestly equipped fitness centre. During the years 1997-1999 and again in 2006-2007, KLC and its fitness centre were expanded. The 2006-2007 expansion was partly financed through a bank loan. The fitness centre was intended to cover its share by servicing a proportionate part of the loan (approximately 80%). Nevertheless, KLC's annual accounts from 2008 show that the fitness centre has only partially serviced its part of the loan according to the cost-allocation plan. The Norwegian authorities have subsequently clarified that the fitness centre covered its share of the expansion cost of 2008 by allocating the annual surplus of its activities to the municipality. Additional renovations of the facilities at KLC are currently underway and are expected to be finalised in April or May 2013.

4. Financing of KLC

- (9) Since its establishment in the 1970s, KLC has been financed by its users and the municipal budget.

- (10) The users contribute to the financing by paying for access to the facilities. The municipality fully controls the prices, the types of tickets on offer and the allocation of the revenue. Under the current system, 70% of the revenue are generated by the sale of all-access season tickets and multi/single entry tickets are allocated to the fitness centre. The remaining 30% are allocated to the swimming pool which additionally gets the revenue stemming from the sale of other types of tickets. The Norwegian authorities have stated that this represents a correct allocation of revenue as an informal examination carried out in 2006 or 2007 indicated that about 70% of the adult visitors mainly use the fitness centre.
- (11) The municipality does not require the fitness centre to generate a profit.
- (12) Although the ticket prices have been subject to adjustments throughout the years, the contributions from the users do not cover the full cost of operations of KLC. The deficit is covered over the municipal budget in accordance with the budgetary decisions of the municipal council.
- (13) KLC has not kept separate accounts consistently for the fitness centre and its other activities. Common costs have not been consistently allocated in accordance with an appropriate allocation key.

5. Comments by the Norwegian authorities

- (14) The Norwegian authorities consider that no aid is currently granted to the fitness centre at KLC. During the existing aid procedure, the Norwegian authorities have nevertheless preliminarily agreed to take certain measures as described in the following.
- (15) The Norwegian authorities intend to continue to support the operation of the fitness centre at KLC with public funds. Their intention is to grant support in the form of *de minimis* aid for the provision of a service of general economic interest (“SGEI”) in line with Commission Regulation (EU) No 360/2012 of 25 April 2012.³ The Norwegian authorities proposed compensating the fitness centre for providing, as an SGEI, discounted access to; (i) groups perceived to have a low income,⁴ (ii) individuals actually living below the poverty line,⁵ and (iii) individuals in need of reconvalescent treatment.⁶
- (16) The Norwegian authorities have presented the Authority with a detailed cost allocation model.⁷ They have furthermore confirmed to the Authority that the fitness centre will be required to provide a reasonable return on the operations.⁸

³ OJ L 114 26.4.2012 p. 8. Incorporated into the EEA Agreement by Decision No 225/2012 of the EEA Joint Committee of 8.12.2012 at point 1ha of Annex XV of the EEA Agreement.

⁴ Youths aged 15-20, students and refugees.

⁵ *I.e.* with an income, after tax, of less than half of the average income in the region.

⁶ Patients with a so called “FYSAK prescription” (FYSAK is short for *fysisk aktivitet*. In English: physical activity).

⁷ The Norwegian authorities will require a separation of accounts between the fitness centre and the other activities at KLC. The cost allocation model is based on internal pricing were the fitness centre will for example have to pay market price for letting its users access the swimming pool and an allocation of common costs based on objective parameters.

⁸ The level of reasonable profit suggested by the Norwegian authorities is 5% of the total annual turnover of the fitness centre.

II. ASSESSMENT

1. The presence of state aid

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

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

1.1 Presence of state resources

(18) 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.

(19) The Authority notes that both local and regional authorities are considered to be equivalent to the State.⁹ Since the municipality of Vefsn covers the annual deficit of KLC as a whole (including the fitness centre), takes the decisions on the allocation of ticket revenue and decides not to require a return on its investment in the fitness centre at KLC, state resources are involved.

1.2 Undertaking

(20) 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.

(21) It is necessary to establish whether the fitness centre constitutes an undertaking within the meaning of Article 61 of the EEA Agreement. According to settled case law, an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.¹⁰ Offering services on a given market is an economic activity,¹¹ and entities carrying out such activities are undertakings. The fitness centre at KLC offers its services to the general population in competition with other undertakings operating on the same market. In light of this, it is the conclusion of the Authority that the fitness centre at KLC constitutes an undertaking within the meaning of Article 61 of the EEA Agreement.

1.3 Selectivity

(22) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement the measure must be selective.

(23) It is the conclusion of the Authority that the allocation of state resources is selective as it only concerns this particular undertaking (i.e. KLC).

⁹ 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.

¹⁰ Case C-41/90 *Höfner and Elsnér v Macrotron GmbH* [1991] ECR I-1979, paragraph 21.

¹¹ Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36.

1.4 Advantage

- (24) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement the measure must confer an economic advantage on the recipient.
- (25) The Norwegian authorities have explained that the municipality of Vefsn has intended to run the fitness centre at KLC on a commercial basis in the sense that (i) it should be fully financed by revenue generated by its own operations and (ii) should not receive an advantage stemming from state resources. However, several aspects of the financing of KLC as such (and consequently, the fitness centre) indicate that this goal is not attained. Already the fact that the fitness centre is not organised as a separate legal entity appears to constitute a problem in the sense that it cannot be excluded that the fitness centre is cross-subsidised by state resources stemming from the other activities of KLC. The Norwegian authorities have explained that this potential problem has been addressed by the system of keeping separate accounts for the various activities of KLC. However, as explained in the following, the current practice does not appear to prevent an economic advantage from being conferred on the fitness centre.
- (26) First of all, the Authority considers that practices with regard to (i) the allocation of ticket revenue and (ii) the costs related to the 2006-2007 expansion entail that the fitness centre in practice is cross-subsidised by municipal resources.
- (27) The criteria applied for the allocation of revenue generated by the sale of tickets granting admission to KLC is not particularly exact. Under the current system, 70% of the revenue generated by the sale of all-access season tickets and multi/single entry tickets are allocated to the fitness centre. The remaining 30% are allocated to the swimming pool which additionally gets the revenue stemming from the sale of other types of tickets. The Norwegian authorities have stated that this represents a correct allocation of revenue as an informal examination carried out in 2006 or 2007 indicated that about 70% of the adult visitors mainly use the fitness centre. However, in the absence of additional information and documentation, in the opinion of the Authority the current method of allocation of ticket revenues does not ensure that there is no cross-subsidisation involving state resources from other parts of KLC to the fitness centre.
- (28) Furthermore, the 2006-2007 expansion was partly financed through a bank loan. The fitness centre was intended to cover its share by servicing a proportionate part of the loan (approximately 80%). Nevertheless, KLC's annual accounts from 2008 show that the fitness centre has only partially serviced its part of the loan according to the cost-allocation plan. The Norwegian authorities have subsequently clarified that the fitness centre covered its share of the expansion cost of 2008 by allocating the annual surplus of its activities to the municipality. Within this context the Authority notes that in so far as the fitness centre would not be able to cover the future costs of the loan by transferring a surplus stemming from its activities, cost coverage over the municipal budget would involve a transfer of state resources to the fitness centre at KLC. Moreover, the practice of allocating profits to the municipality before the expenses of the fitness centre have been serviced does not represent a proper allocation of resources to the appropriate budgetary positions.
- (29) Additionally, an advantage is conferred on the fitness centre in the form of foregone profits when the municipality of Vefsn does not require a return on its investment in the fitness centre. 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. A municipally owned undertaking not required to generate a

normal rate of return for its owner will effectively benefit from an advantage whenever the owner foregoes that profit.¹²

- (30) On the basis of the above, it is the conclusion of the Authority that the current practice of financing KLC and its fitness centre entails that state resources are allocated to the fitness centre, and that this represents an advantage for the fitness centre

1.5 Advantage – assessed in light of *Altmark*

- (31) The Norwegian authorities have argued that the fitness centre is run as a part of the municipal health care service and provides a service of general economic interest within this context, and that the financing of the fitness centre at KLC merely represents compensation for services rendered in accordance with the *Altmark* criteria,¹³ and consequently does not constitute aid within the meaning of Article 61(1) of the EEA Agreement.
- (32) In the *Altmark* judgment the Court of Justice 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.
- (33) On the basis of the information available to the Authority, the fitness centre at KLC is not entrusted with a clearly defined public service obligation as required under the 1st *Altmark* criterion. Furthermore, the method of calculating the compensation has not been established in advance in an objective and transparent manner (the 2nd *Altmark* criterion). Moreover it cannot be determined at this stage on the basis of the information provided that it does not exceed what is necessary to cover the costs of discharging the public service obligations (the 3rd *Altmark* criterion). Finally, the Authority notes that the fitness centre at KLC has not been selected in a public procurement procedure and that the Norwegian authorities have not provided the Authority with information enabling a verification of whether the costs incurred by the fitness centre at KLC correspond to the costs of a typical undertaking, well run and adequately equipped as required by the 4th *Altmark* criterion.
- (34) Consequently, the Authority cannot exclude that the financing of the fitness centre at KLC gives it an advantage on this basis. Therefore, the Authority, in line with the *Altmark*

¹² Case C-234/84 *Belgium v Commission* [1986] ECR I-2263, paragraph 14.

¹³ Case C-280/00 *Altmark Trans and Regierungspräsident Magdeburg* [2003] ECR I-7747, paragraphs 89-93.

judgment,¹⁴ must conclude that the financing of the fitness centre constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

1.6 Distortion of competition and effect on trade between Contracting Parties

- (35) 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.
- (36) The state resources allocated to the fitness centre at KLC constitutes an advantage that strengthens the fitness centre's position compared to that of other undertakings competing in the same market. Therefore, the financing of the fitness centre threatens to distort competition between undertakings. The question is thus whether the financing of the fitness centre at KLC threatens to affect intra-EEA trade.
- (37) Whenever state aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid.¹⁵
- (38) There is no threshold or percentage below which it may be considered that trade between the Contracting Parties is not affected.¹⁶ According to settled case law, aid may also affect trade within the EEA even if the recipient undertaking does not itself participate in cross-border activities.¹⁷ The character of the aid does not depend on the local or regional character of the services supplied or on the scale of the field of activity concerned.¹⁸ The local character of the activities of the beneficiaries of a measure constitutes one of the features to be taken into account in the assessment of whether there is an effect on trade but it is not sufficient to prevent the aid from having an effect on trade.¹⁹ This is because the granting of state support to an undertaking may lead to the internal supply being maintained or increased, with the consequence that the opportunities for other undertakings to penetrate the market of the EEA State concerned are reduced.²⁰
- (39) The Authority has been provided with substantial information on the Norwegian fitness sector. From the information available it appears that undertakings active in intra-EEA trade have established fitness centres in Norwegian cities comparable to Mosjøen in terms of population size.²¹
- (40) On this basis, the conclusion of the Authority is that the financing of the fitness centre at KLC threatens to affect intra-EEA trade.

¹⁴ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 94.

¹⁵ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court page 76, paragraph 59; Case 730/79 *Philip Morris v Commission* [1980] ECR I-2671, paragraph 11.

¹⁶ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 81, Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 32.

¹⁷ Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 86.

¹⁸ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 77; Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 33; Case C-71/04 *Administración del Estado v Xunta de Galicia* [2005] ECR I-7419, paragraph 40.

¹⁹ Joined Cases T-298/97-T-312/97 e.a. *Alzetta a.o. v Commission* [2000] ECR II-2319, paragraph 91.

²⁰ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76, paragraph 59; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27; Joined cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 40, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 78.

²¹ For example the undertaking Gold's Gym (which is active in intra-EEA trade having operations in several EU Member States including the United Kingdom, Sweden and the Netherlands) is established in the town of Årdal which has less than 6 000 inhabitants.

2. Existing aid

2.1 General

- (41) 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;”

- (42) In its judgment in Case E-14/10 the EFTA Court further defined the parameters of existing and new aid, stating the following:

“[...]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.”²²

2.2 Definition of an aid scheme

- (43) 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;”

- (44) 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 thus reviewed its own case practice and that of the European Commission and found that existing “aid schemes” have been held to encompass non-statutory customary law²³ and administrative practice related to the application of statutory²⁴ and non-statutory law.²⁵ In one case, the European Commission found that an aid scheme relating to *Anstaltslast* and

²² Case E-14/10 *Konkurrenten.no AS v EFTA Surveillance Authority* [2011] Report of the EFTA Court page 266, paragraph 53.

²³ See the Authority’s Decision No 405/08/COL HFF (OJ L 79 25.3.2010 p. 40), Chapter II.2.3.1, p. 23: “*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.*”

²⁴ See Commission Decision in Case E-45/2000 (Netherlands) *Fiscal exemption in favour of Schiphol Group* (OJ C 37 11.2.2004 p. 13).

²⁵ From 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 the formal investigation into a payment of NOK 36 million that had been made in addition to the regular payments and an alleged preferential tax measure. With Decision No 204/11/COL (OJ L 287 18.10.2012 p. 14) the Authority closed the procedure on the basis that the NOK 36 million payment was made on the basis of the existing aid scheme and that the tax measure did not constitute state aid.

Gewährträgerhaftung was based on the combination of an unwritten old legal principle combined with widespread practice across Germany.²⁶

2.3 The financing of the fitness centre at KLC

- (45) KLC was founded in the 1970's and has been operating as a fitness centre and swimming hall ever since. From its foundation KLC has been financed by its users and the municipal budget. Furthermore the construction of KLC and its fitness centre and any subsequent expansions and renovations have been approved by the municipal council and are also reflected on the municipal budget.
- (46) The consistent financing of KLC, its fitness centre and subsequent expansions and renovations by the municipality must be viewed as a long term scheme based on provisions of the municipal budget (i.e. legal provisions). The scheme has, as previously noted, been ongoing since the founding of KLC in the 1970's.
- (47) The measures under assessment in this case, that is to say the municipality's consistent practice in financing the fitness centre at KLC, pre-dates the entry into force of the EEA Agreement. Therefore, the Authority considers that the measures qualify as existing aid measures within the meaning of Article 1(b)(i) of Part II of Protocol 3.

3. Procedural requirements regarding the review of existing aid schemes

- (48) Article 1(1) of Part I of Protocol 3 provides that: "*The EFTA Surveillance Authority shall, in co-operation with the EFTA States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement*".
- (49) According to Article 17 of Part II of Protocol 3, the Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with that State, of existing aid schemes pursuant to Article 1(1) of Part I of Protocol 3.
- (50) By letter dated 16 December 2009 (Event No 538177), and in accordance with Article 1(2) of Part I of Protocol 3, the Authority requested information on the aid measures from the Norwegian authorities.²⁷
- (51) By letter dated 15 July 2011 (Event No 587958), and in accordance with Article 17(2) of Part II of Protocol 3, the Authority informed the Norwegian authorities that it considered the existing aid scheme not to be compatible with the functioning of the EEA Agreement. It gave the Norwegian authorities an opportunity to submit comments.
- (52) By letter dated 6 September 2011 (Event No 607896), the Norwegian authorities submitted their comments. The letter was followed by an exchange of views between the Authority and the Norwegian authorities and several meetings.
- (53) 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.

²⁶ See Commission Decision in Case E-10/2000 (Germany) *State guarantees for public banks in Germany* (OJ C 150 22.6. 2002 p. 6).

²⁷ Prior to this the Authority had sent three requests for information to the Norwegian authorities, dated 23.3.2009 (Event No 511172), 29.7.2009 (Event No 525457) and 29.9.2009 (Event No 531832).

4. Compatibility of the existing aid

4.1 Introduction

- (54) The Norwegian authorities have argued that the financing of the fitness centre at KLC, as far as it is held to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, must be considered to be compatible. The Norwegian authorities have submitted the following arguments for the compatibility of the aid; *firstly* they claim that it constitutes compensation for providing a service of general economic interest on the basis of Article 59(2) of the EEA Agreement, and *secondly* they argue that it should be considered to be a cultural measure on the basis of Article 61(3)(c) of the EEA Agreement.

4.2 Service of general economic interest – Article 59(2) of the EEA Agreement

- (55) Article 59(2) of the EEA Agreement reads as follows:

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules do not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.”

- (56) According to the Authority’s Framework for state aid in the form of public service compensation (“the Framework on public service compensation”)²⁸ a series of cumulative criteria must be fulfilled in order for a state aid measure to be considered compatible with the functioning of the EEA Agreement on the basis of Article 59(2), including (but not limited to) the following three:

- the service must constitute a genuine service of general economic interest;
- the undertaking must be entrusted with the operation of the service by way of one or more official acts;
- the amount of compensation must not exceed what is necessary to cover the costs incurred in discharging the service.

- (57) The Norwegian authorities consider that operating the fitness centre at KLC, as such, constitutes a service of general economic interest. They state that the purpose of operating the fitness centre at KLC is to stimulate all the residents of the municipality of Vefsn to be more physically active and consequently improve the general health of the local population. However, there seems to be no specific mechanisms in place to ensure that the fitness centre at KLC is available to as many users as possible. The so-called FYSAK pass seems to be available to everyone above the age of 15 at the same price, there seems to be no specific means-tested discount available to those of lesser means, although some discounts are offered for the disabled, young people below the age of 20 and senior citizens. The Norwegian authorities seem to acknowledge this by stating that “(a) *very small number of groups are excluded due to price*”. In that sense, the fitness centre seems to function, at least partly, as a normal fitness centre.

²⁸ Not yet published in the OJ or the EEA Supplement. Available online: <http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Framework-for-state-aid-in-the-form-of-public-service-compensation.pdf>.

- (58) The Authority acknowledges that the Norwegian authorities have a margin of discretion regarding the nature of services that could be classified as constituting services of general economic interest.²⁹ However, in light of the above, on the basis of the information provided by the Norwegian authorities, the Authority cannot conclude that the operation of the fitness centre at KLC constitutes a genuine service of general economic interest within the meaning of Article 59(2) of the EEA Agreement.
- (59) Regardless of whether the fitness centre at KLC carries out certain services of general economic interest, the Authority has not received information substantiating that the provision of such services is entrusted to the fitness centre as required under Chapter 2.3 of the Framework on public service compensation. Moreover, the intransparent nature of the aid (the coverage of the annual deficit of the entire KLC, allocation of ticket revenue and the practice of not requiring a return on the capital invested in the fitness centre) can only lead the Authority to conclude that the current system cannot ensure that the compensation does not exceed what is necessary within the meaning of Chapter 2.8 of the aforementioned Framework.
- (60) On this basis, the Authority concludes that the financing of the fitness centre at KLC is not compatible with the functioning of the EEA within the meaning of Article 59(2).

4.3 Article 61(3)(c) of the EEA Agreement

- (61) Article 61(3) of the EEA Agreement reads as follows:
- “The following may be considered to be compatible with the functioning of this Agreement: [...] (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.”*
- (62) The Norwegian authorities hold that the aid granted to the fitness centre at KLC should be considered compatible with the functioning of the EEA Agreement on the basis of the exemption in Article 61(3)(c) of the EEA Agreement, and more specifically that the operation of the fitness centre must be regarded as a measure to promote culture within the meaning of the provision in Article 107(3)(d) of the Treaty on the Functioning of the European Union.
- (63) The EEA Agreement does not include a provision corresponding to Article 107(3)(d) of the Treaty on the Functioning of the European Union. The Authority nevertheless acknowledges that state aid measures may be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement.³⁰
- (64) When assessing the compatibility of an aid under that provision, the Authority applies the so-called balancing test:³¹
- (1) Is the aid measure aimed at a well-defined objective of common interest?
 - (2) Is the aid well designed to deliver the objective of common interest that is to say, does the proposed aid address the market failure or other objective?

²⁹ See the Framework for public service compensation, paragraph 56.

³⁰ See for example paragraph 7 (with further references) of the Authority’s Guidelines on state aid to cinematographic and other audiovisual work, available at the Authority’s webpage at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

³¹ See for example the Authority’s Decision No 329/09/COL (OJ L 70 17.3.2011 p. 49 and EEA Supplement No 14 17.3.2011 p. 1), Chapter II.3.2.2.

- a. Is state aid an appropriate policy instrument?
- b. Is there an incentive effect, namely does the aid change the behaviour of undertakings?
- c. Is the aid measure proportional, namely could the same change in behaviour be obtained with less aid?

(3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

- (65) Regarding whether the aid is aimed at a well-defined objective, reference must be made to the European Commission's White Paper on Sports,³² which acknowledges that sport is crucial to the well-being of European society. The vast majority of sporting activities take place in non-profit making structures, many of which depend on public support to provide access to sporting activities to all citizens.
- (66) However, based on the information available, the Authority considers that financing of the fitness centre at KLC as such cannot be held to constitute aid aimed at a sufficiently well-defined objective of common interest.
- (67) Furthermore, due to the intransparent nature of the aid (the coverage of the annual deficit of the entire KLC, allocation of ticket revenue and the practice of not requiring a return on the capital invested in the fitness centre), the Authority has to conclude that the design of the aid does not ensure that distortion of competition and effect on trade is sufficiently limited.
- (68) On this basis, the Authority concludes that the aid cannot be held to be compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c).

5. Abolishment of the aid

5.1 Separation of accounts and cost and income allocation

- (69) The Norwegian authorities have presented the Authority with a method for account separation, internal pricing, cost and income allocation as well a plan for the fitness centre at KLC to deliver a reasonable profit.
- (70) The cost allocation model is based on a model from the Ministry of Local Government and Regional development.³³ The aim of the model is to ensure that the fitness centre carries its own costs and does not receive a disproportionate share of the income generated by KLC. Common costs (i.a. costs related to the operation of locker areas and reception, salaries) will be allocated based on the number of customers and the opening hours of the various facilities. The model also covers the allocation of income. The fitness centre will receive the ticket revenue for tickets giving access to the fitness centre. The users of the fitness centre will have access to the swimming pool. For this, the fitness centre will pay an internal price (based on the number of users), comparable to prices observed on the market.³⁴

³² White paper on sport, COM (2007) 391 final, available online: http://ec.europa.eu/sport/documents/wp_on_sport_en.pdf.

³³ Circular H-2140 of January 2003 *Retningslinjer for beregning av selvkost for kommunale betalingstjenester*, available online: <http://www.regjeringen.no/upload/kilde/krd/bro/2003/0001/ddd/pdfv/168723-h2140.pdf>.

³⁴ The same offer will be given to other operators of local fitness centres.

- (71) The Norwegian authorities will require the fitness centre to generate a profit of approximately 5%.

5.2 *De minimis* aid for services of general economic interest

- (72) The Norwegian authorities have expressed their intention to amend the existing system of aid in order to grant support in the form of *de minimis* aid for the provision of an SGEI in line with Article 59(2) of the EEA Agreement and the European Commission's Regulation No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest ("Regulation No 360/2012").³⁵ The Norwegian authorities proposed compensating the fitness centre for providing, as an SGEI, discounted access to certain groups, namely; (i) groups perceived to have low income, (ii) individuals actually living below the poverty line and (iii) individuals with FYSAK prescription.
- (73) The Norwegian authorities, when invoking Article 59(2) of the EEA Agreement have to demonstrate that the conditions laid down by that provision are met.³⁶ The basic condition for the application of the exception is that the proposed measure is a genuine SGEI. The concept of SGEI is a concept of EEA law and not a concept of national law. The Authority is therefore empowered to check the definitions provided by EFTA states for manifest errors.³⁷
- (74) According to Article 2(1) of Regulation No 360/201 *de minimis* aid (maximum EUR 500 000 granted over any period of three fiscal years) granted to undertakings for the provision of a SGEI is not considered to constitute state aid within the meaning of Article 61(1) of the EEA Agreement.
- (75) The Norwegian authorities have proposed that certain groups shall be offered discounted access to the fitness centre because of their financial standing or medical condition. The full price for a year's access to the fitness centre is NOK 3 800 and for a one month's access the fee is NOK 317. The proposal entails that youths shall be charged NOK 1 500, patients with a FYSAK prescription will be offered 12 weeks of follow up training for NOK 200 as well an additional one year access for NOK 1 200 and full time students, refugees and individuals actually living below the poverty line will be charged NOK 1 900.
- (76) The *de minimis* aid will cover the difference between the full price and the discounted price. The fitness centre will be required to register and keep detailed records of all discounted tickets sold. The compensation will be disbursed *ex-post* twice a year by 30 June and 31 December. The Norwegian authorities will respect the threshold of maximum EUR 500 000 granted over any period of three fiscal years. Thus, even if the cost of the discounted tickets would exceed that threshold, no payments will be made in excess of it.

³⁵ OJ L 114 26.4.2012 p. 8. Incorporated into the EEA Agreement by Decision No 225/2012 of the EEA Joint Committee of 8.12.2012 at point 1ha of Annex XV of the EEA Agreement.

³⁶ That burden of proof is not so extensive as to require the Norwegian authorities, to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions, see C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para. 58 and C-158/94 *Commission v Italy* [1997] ECR I-5789, para. 54.

³⁷ Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, para. 216.

- (77) The Authority has in its decisional practice accepted that the provision of rebated access to students constitutes a genuine SGEI.³⁸ On a more general level, the Authority considers that the same considerations should apply with regard to the provision of rebated fitness centre services for groups perceived to have low income, as well as individuals actually living below the poverty line. Furthermore, the Authority concludes that the classification of the provision of rebated fitness centre services, as a part of the municipal public health policy to individuals with a FYSAK prescription as an SGEI does not constitute a manifest error.
- (78) In granting the *de minimis* aid, the Norwegian authorities have confirmed that they will comply with the requirements of Regulation No 360/2012.

6. Proposal for appropriate measures

- (79) The Authority considers that the Norwegian authorities should take certain appropriate measures to ensure that the financing of the fitness centre at KLC does not entail state aid. The Authority proposes the following appropriate measures:
- *First*, the Norwegian authorities should ensure that there is a proper, consistent and transparent separation of accounts, where the operation of the fitness centre is separated from the other operations at KLC. The fitness centre should therefore cover all costs related to its operations, including an appropriate contribution to fixed costs.
 - *Second*, the municipality of Vefsn should amend the existing system/allocation of user fees, in accordance with the method set out in Chapter II.5 of this Decision, in order to ensure that the revenue generated by user fees is distributed correctly between the fitness centre and other parts of KLC.
 - *Third*, the municipality of Vefsn should require a normal return on its investment in the fitness centre at KLC.
 - *Fourth*, the Norwegian authorities shall ensure that the system of subsidies for access to the fitness centre complies with the obligations set out in Regulation No 360/2012.
- (80) The Norwegian authorities shall communicate to the Authority the relevant measures it will take to discontinue the aid as soon as possible and in any event not later than 1 August 2013.

HAS ADOPTED THIS DECISION:

Article 1

The municipality of Vefsn's financing of the fitness centre at Kippermoen Leisure Centre by way of its decisions on annual deficit coverage and ticket revenue allocation as well as the absence of a requirement from the municipality for the fitness centre to provide a return on invested capital, constitutes existing state aid which is incompatible with the functioning of the EEA Agreement.

³⁸ The Authority's Decision No 378/09/COL, available on the Authority's website: <http://www.eftasurv.int/media/decisions/378-09-COL.pdf>.

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 Chapter II.6 of this Decision, in order to eliminate with effect from 27 May 2013 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 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, 27 February 2013

For the EFTA Surveillance Authority,

Oda Helen Sletnes
President

Sabine Monauni-Tömördy
College Member