

Case No: 69911
Event No: 657494
Dec. No: 91/13/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 27 February 2013

on the financing of municipal waste collectors

(Norway)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD TO:

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

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

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

Whereas:

I. FACTS

1. Procedure

- (1) By letter dated 12 May 2010 (Event No 552744), the Authority initiated the review procedure for existing aid according to Article 1(1) of Part I and Article 17(1) of Part II of Protocol 3 as regards the financing of municipal waste collectors in Norway. By letter dated 2 July 2010 (Event No 562863), the Norwegian authorities responded. The Authority and the Norwegian authorities exchanged further information by e-mail in the period between 5 and 22 November 2011 (Events No 576445, 577305 and 578344).
- (2) By letter dated 20 May 2011 (Event No 545914), the Authority sent a letter according to Article 17(2) of Part II of Protocol 3 in respect of the financing of the municipal waste collectors, thereby informing the Norwegian authorities of its preliminary view that the financing of the municipal waste collectors involves state aid that is incompatible with the functioning of the EEA Agreement.

- (3) The Norwegian authorities responded by letter dated 14 October 2011 (Event No 611738). The Authority met with the Norwegian authorities in Oslo to discuss the case on 29 November 2011. After that meeting, the Norwegian authorities provided further comments by letter 6 February 2012 (Event No 623937). The Authority responded by letter dated 3 April 2012 (Event No 625592). The Norwegian authorities responded by letter dated 10 May 2012 (Event No 633948). The Authority responded by letter dated 13 July 2012 (Event No 635658). The Norwegian authorities responded by letter dated 31 August 2012 (Event No 645331). The Authority responded by letter dated 19 October 2012 (Event No 649745). The Norwegian authorities responded by letter dated 30 November 2012 (Event No 655171). The Authority responded by letter dated 21 December 2012 (Event No 656867) and the Norwegian authorities responded by letter dated 21 January 2013 (Event No 660164).

2. Description of the measures

- (4) The measures assessed in this decision are:
- (i) the waste collection fee (“the waste collection fee”), charged by the municipality to its inhabitants in order to finance the costs associated with the waste sector pursuant to Section 34 of the Pollution Control Act of 13 March 1981 No 6 (“the Pollution Control Act”) and
 - (ii) the income tax exemption for municipal waste collectors that are part of the legal person of the municipality, as laid down in section 2-30(1)(b) of the Tax Act of 26 March 1999 No 14 (“the Tax Act”).

3. The organisation of waste collection services in Norway

- (5) In Norway, waste collection services are regulated by the Pollution Control Act.¹ Under Section 30(1) and (3) of the Pollution Control Act, Norwegian municipalities are under the obligation to collect “household waste”² within their respective regions. Private operators may not collect household waste without permission from the municipality. Hence, the municipalities enjoy a legal monopoly in the field of household waste collection. Although many municipalities have chosen to let their own waste collecting entities provide the service, many other municipalities arrange public tenders in order to procure waste collection services from private operators.

4. The waste collection fee

4.1 Currently applicable legal framework

- (6) Regardless of whether the municipality or any other operator carries out the actual service, the costs shall be covered through the levying of a waste collection fee in accordance with Section 34 of the Pollution Control Act. The fee is paid by the inhabitants of the relevant municipality. In case of non-payment, the fees are secured through a statutory charge pursuant to the Mortgages and Pledges Act, and interest, repayment and recovery follow the rules applicable to the municipal property tax.³

¹ Act of 13 March 1981 No 6 Concerning Protection Against Pollution and Concerning Waste, lastly amended on by Act of 19 June 2009 No 103, an unofficial English translation based the Act as of 20 June 2003 is available on <http://www.regjeringen.no/en/doc/Laws/Acts/Pollution-Control-Act.html?id=171893>.

² As the name implies, the term “household waste” only includes waste from private households, including voluminous objects such as furniture, etc. (section 27 of the Pollution Control Act).

³ The fifth paragraph of Section 34 of the Pollution Control Act.

- (7) All costs of the waste collectors, including operating costs and capital costs, shall be fully covered by the fee. The actual costs of the waste collectors are used to calculate the fees and, thus, the compensation for providing the service. In case the municipalities let their own waste collectors provide the service, the waste collection fee shall not exceed the costs, including capital costs and operational costs, incurred by the municipality. Where the municipalities opt to tender out the collection of household waste, the fee is calculated on the basis of the tender price. However the Pollution Control Act does not contain provisions on the allocation of common costs for those municipal waste collectors that carry out commercial activities in addition to their core business.
- (8) In 2004, the Norwegian Climate and Pollution Agency⁴ issued guidelines on the calculation of the fees (“the waste fee guidelines”).⁵ These guidelines set out the method for calculating fees based on the full cost principle. The guidelines also contain a chapter on cost allocation in case the municipal waste collectors carry out commercial activities in addition to their core business. Additionally, the Ministry of Local Government and Regional Development has issued a set of general guidelines for the calculation of full cost (“the full cost guidelines”).⁶ The Authority understands that neither guidance is legally binding on the municipalities.
- (9) By contrast, the collection of industrial waste⁷ is not subject to the municipalities’ exclusive right. Section 32 of the Pollution Control Act only prescribes that it must be brought to an authorised waste processing plant or recycled or re-used. Thus, private operators may collect and process industrial waste without an explicit permission from the municipality.
- (10) Municipal waste collectors operate in the market either by providing services related to industrial waste or by putting forward bids when municipalities choose to arrange tenders for the collection of household waste.
- (11) Under the currently applicable regulatory regime, the municipal waste collectors providing their services within the municipal monopoly as well as on the market, are not required to keep separate accounts for the two types of activities.
- (12) Furthermore, due to the non-binding nature of the waste fee guidelines and the full cost guidelines, the Norwegian municipalities are not required to ensure that the waste collection fee, in the municipalities where waste collection services are carried out by the municipality’s own municipal waste collector, is consistently calculated only on the basis of the costs directly related to the relevant waste collection service (i.e. direct costs and a proportionate share of fixed common costs).

⁴ In Norwegian: *Klima- og forurensningsdirektoratet*. Formerly known as the Pollution Control Authority (In Norwegian: *Statens forurensningstilsyn*).

⁵ Guidelines on the calculation of municipal waste management fees, available on: <http://www.klif.no/no/Publikasjoner/Publikasjoner/2004/Januar/Veileder-om-beregning-av-kommunale-avfallsgebyr/>.

⁶ Guidelines H-2140, available online: http://www.regjeringen.no/nb/dep/krd/dok/veiledninger_brosjyrer/2003/publikasjonsnummer-h-2140.html?id=87936.

⁷ According to section 27 of the Pollution Control Act, “industrial waste” represents all waste from public and private businesses and institutions.

4.2 Previously applicable legal framework

4.2.1 Introduction

- (13) Since the entry into force of the EEA Agreement in Norway on 1 January 1994, the relevant provisions of the Pollution Control Act have on two occasions been amended, in 1994 and in 2003. These changes are presented in the following.

4.2.2 1994 amendment

- (14) Section 34 of the Pollution Control Act was amended by Act No 107 of 11 June 1993, e.i.f. 1 February 1994. Prior to entry into force of the amendment, the municipalities were not obliged to collect a waste collection fee, and if they did, there was no obligation to ensure that the fee covered the costs of the service. However, the fees collected could not, in sum, exceed the costs.⁸ If the municipalities chose not to collect a fee, or to collect a fee which did not cover all costs, the cost of the waste collection would be covered over the general municipal budget.⁹ It was also expressly stated in the preparatory works (from 1981) that “*as a main rule, the costs should be fully covered through the waste collection fee. This would be consistent with the principle laid down in Section 2 of the Act [i.e. the polluter pays principle]*”.¹⁰ The preparatory works also make it clear that the proceeds from the fee would be included in the general municipal budget.
- (15) The obligation to cover the costs through the fee was introduced because subsidising the waste collection sector by means of other municipal resources was seen as “*leading to an economically undesirable allocation of resources to the waste sector. [...] The subsidisation of municipal waste processing results in, amongst others, the prices of depositing and burning waste being too low compared to other alternatives such as waste reduction and re-use.*”¹¹

4.2.3 2003 amendment

- (16) The scope of the funding through the waste collection fee was reduced by an amendment adopted on 13 March 2003. Following that amendment, the categories of waste subject to the waste collection fee and the municipal monopoly were redefined. The current distinction between household waste and industrial waste replaced the former categories “consumption waste” and “production waste”. “Consumption waste” was defined as normal waste from households, smaller shops etc. and offices and waste of a similar nature and quantity from other activities. “Production waste” was defined as waste produced by commercial activities and service production, which, by its nature or quantity, differs considerably from consumption waste. Under the new definitions, “household waste” only includes waste from private households, including voluminous objects such as furniture, etc. All waste from public and private businesses and institutions is defined as “industrial waste”.¹² In the bill for amendment, the Ministry stated that the new definitions were intended to “*give businesses more freedom of action and more responsibility in choosing waste management services within the limits defined by environmental policy. More freedom of action will provide an incentive to develop cost efficient solutions leading to the attainment of waste management policy objectives, while reducing the obligations*

⁸ Ref. the draft provisions attached to Ot.prp.nr. 11 (1979-1980) and the discussion of the 1993 amendment in Ot.prp.nr. 66 (1992-1993).

⁹ In the preparatory works for the amendments (Ot.prp.nr. 66 (1992-1993) Chapter 3.5.2, the situation prior to the amendment is described as follows: Deficient cost coverage implies that the waste collection sector must be subsidised by other municipal resources (translation by the Authority).

¹⁰ Ot.prp. nr. 11 (1979-1980), Chapter 7.3.3. Translation by the Authority.

¹¹ Ot.prp. nr. 66 (1992-1993), Chapter 3.5.2. Translation by the Authority.

¹² Section 27 of the Pollution Control Act.

incumbent on the municipalities. [...] The amendment is also intended to clarify the definitions of different waste categories.”¹³

5. Taxation of municipal waste collectors

- (17) The municipal waste collectors are not organised in a uniform manner. A fundamental distinction can be drawn between on the one hand, municipal waste collectors organised as legal entities separate from the municipality or municipalities owning them, and on the other hand, municipal waste collectors forming part of the legal person of the municipality.
- (18) The former are organised in various types of corporate bodies such as inter-municipal companies, or limited liability companies.¹⁴
- (19) The municipal waste collectors forming part of the legal person of the municipality include so-called municipal companies¹⁵ as well as departments of municipalities.
- (20) The municipal waste collectors are subject to different income tax regimes depending on how they are organised. The waste collectors organised as legal bodies separate from the municipality are subject to income tax. However, the waste collectors that form part of the legal body of the municipality, be it municipal companies or departments of the municipalities, are exempt from income tax as the activity of waste collection is not listed as a taxable municipal activity in accordance with section 2-5 of the Tax Act. Hence, the waste collectors forming part of the municipality are exempt from income tax in accordance with the general tax exemption applicable to municipalities in section 2-30(1)(b) of the Tax Act. This provision has not been materially altered since the entry into force of the EEA Agreement when the basis for the tax exemption was laid down in Section 26 c of the previously applicable Tax Act of 1911.¹⁶

6. Comments by the Norwegian authorities

- (21) The Norwegian authorities maintain their view that the financing of municipal waste collection companies through the waste collection fee and the tax exemption do not constitute state aid. However, the Norwegian authorities have presented the Authority with proposals for legislative amendments to ensure that any aid that might be present is in any event abolished. These proposals are presented in Chapter II.5 of this Decision.

¹³ Ot.prp.nr.87 (2001 – 2002), Chapter 2.1.1. Translation by the Authority.

¹⁴ In Norwegian: *Aksjeselskap (AS)*.

¹⁵ *Kommunale foretak (KF)*.

¹⁶ See Ot.prp. nr. 86 (1997-1998) section 7.2 under the comments to Section 2-5 of the 1999 Tax act.

II. ASSESSMENT

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

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

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

(23) In the following, the financing of the municipal waste collectors by the waste collection fee and the tax exemption laid down in section 2-30(1)(b) of the Tax Act is assessed with respect to these criteria.

1.1 State resources

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

(25) At the outset, the Authority notes that both local and regional authorities are considered to be equivalent to the State.¹⁷

(26) Within the area subject to the municipal monopoly, the municipal waste collectors are financed through the waste collection fees set by the municipalities in accordance with the principles laid down in Section 34 of the Pollution Control Act. The fees are collected by the municipalities and disbursed via the municipal budgets. In case of non-payment, the fees are secured through a statutory charge pursuant to the Mortgages and Pledges Act, and interest, repayment and recovery follow the rules applicable to the municipal property tax.¹⁸ Thus, in light of the legal basis for the fee, the way in which it is collected and the provisions applicable in case of non-payment, it is, notwithstanding the fact that the funds originate from private sources, under the permanent control of public authorities.¹⁹ It therefore constitutes state resources for the purposes of Article 61(1) EEA.

(27) The municipal waste collectors forming part of the legal body of the municipalities are exempt from income tax in accordance with the general tax exemption applicable to municipalities in section 2-30(1)(b). 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 bringing it within the scope of application of Article 61 of the EEA Agreement.²⁰ A loss of tax revenue is equivalent to consumption of state resources in the

¹⁷ 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.

¹⁸ The fifth paragraph of Section 34 of the Pollution Control Act.

¹⁹ Case C-206/06 *Essent Netwerk Noord BV* [2008] ECR I-5497 paragraph 70.

²⁰ See Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and the Kingdom of Norway v. EFTA Surveillance Authority* [2005] Ct. Rep. 121 paragraphs 76-81 and section 1(3) of the Authority's

form of fiscal expenditure.²¹ The tax exemption therefore involves state resources within the meaning of Article 61(1) EEA.

1.2 Undertaking

- (28) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement the measure must confer an advantage upon an undertaking. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.²² Economic activities are activities consisting of offering goods or services on a market.²³ 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.
- (29) The legal form of the entity is not decisive when it comes to the assessment of what constitutes an undertaking.²⁴ Even where municipal waste collection services are carried out by an entity forming an integral part of the municipal administration, the services would be deemed to be carried out by an undertaking provided that they are economic in nature.
- (30) The municipal waste collectors provide services related to industrial waste and compete for household waste contracts in public tenders. In those capacities they offer services on a market in competition with other operators. Hence, these activities represent economic activities, and the municipal waste collectors must be considered as undertakings for those purposes.
- (31) On the other hand, when providing household waste services within their own municipal monopoly, the municipal waste collectors cannot be held to offer services on a market in competition with others. Norwegian municipalities can on the basis of the Pollution Control Act directly award contracts for household waste collection to its own operators. Thus, the national law does not require the contracts to be concluded on the basis of a competitive procedure. The Authority has, in a separate case,²⁵ concluded that this practice is not contrary to the functioning of the EEA Agreement.²⁶ Where the municipality has elected to directly award the contract to its own in-house operator, no other provider is allowed to provide household waste services within that municipality. In these cases, there is neither competition for the market (the contract is legally directly awarded) nor competition in the market (the municipality's operator has the exclusive right).²⁷ It therefore cannot be considered as an economic activity. The municipal waste

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).

²¹ Section 3(4) of the Authority's guidelines on the Application of state aid rules to measures relating to direct business taxation.

²² Case C-41/90 *Höfner and Elser v. Macroton* [1991] ECR I-1979 paragraphs 21-23 and Case E-5/07 *Private Barnehagers Landsforbund v. EFTA Surveillance Authority* [2008] Ct. Rep. 61 paragraph 78.

²³ Case C-222/04 *Ministero dell'Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, paragraph 108.

²⁴ Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECR I-1547, paragraphs 16-18.

²⁵ Case No 68457.

²⁶ In Decision No 413/12/COL the Authority concluded that the award of exclusive rights to inter-municipal undertakings and the award of household waste contracts on the basis of these exclusive rights without any tendering competition is not contrary to Article 36 of the EEA Agreement and Directive 2004/18/EC of the European Parliament and of the Council of 31.3.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, incorporated at point 1 of Annex XVI to the EEA Agreement.

²⁷ For a similar line of reasoning, see the judgment of the Court of First Instance in the Case T-125/06 *Centro Studi Antonio Manieri* [2009] ECR p. II-69.

collectors do therefore not act as undertakings when they out activities related to household waste within their own municipalities.

- (32) Against that background, it is the conclusion of the Authority that the municipal waste collectors, in so far as they offer services on the market, must be characterized as undertakings for the purpose of the state aid rules.

1.3 Advantage

- (33) 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.
- (34) As noted, the services of the municipal waste collectors can be divided into economic and non-economic activities. The Norwegian authorities have not properly ensured, by either amending the current legislation or by taking administrative action, that those activities are duly separated. This situation may lead to cross-subsidisation between non-economic and economic activities. Hence municipal waste collectors engaging in economic activities have a potential advantage over their private competitors.
- (35) Furthermore, municipal waste collectors that form part of the legal body of the municipality are exempted from paying income tax. In so far as such municipal waste collectors engage in economic activity, they accordingly benefit from an economic advantage that their privately held competitors and those waste collectors that are organised as legal bodies separate from the municipality do not benefit from.

1.4 Selectivity

- (36) In order to constitute state aid within the meaning of Article 61 of the EEA Agreement the measure must be selective.
- (37) The waste collectors owned by the municipality for which they carry out their services related to household waste are, in practice, subject to a special system of compensation under which cross-subsidisation occurs. In contrast, operators performing similar tasks on the market are compensated on the basis of a tender procedure, which generally excludes the presence of an advantage.²⁸
- (38) In light of this, the waste collectors owned by the municipality for which they carry out their services related to household waste receive a selective advantage.
- (39) Only the waste collectors forming part of the legal person of the municipality are covered by a general income tax exemption. Other waste collectors not organised in such a manner do not receive a comparable advantage. The tax exemption therefore represents a selective advantage.

1.5 Distortion of competition and effect on trade between Contracting Parties

- (40) 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.

²⁸ See the Authority's Guidelines on the Application of the state aid rules to compensation granted for the provision of services of general economic interest (n.y.p.), available on 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>, paragraphs 65-67.

- (41) Under settled case law, the mere fact that an aid strengthens an undertaking's position compared with that of other firms competing in intra-EEA trade, is enough to conclude that the measure is liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.²⁹ As set out above, the municipal waste collectors benefit from economic advantages. Moreover, the practice of tendering out waste collection means that undertakings from other EEA States may compete for contracts with other municipalities.³⁰ Furthermore, in practice, waste collection and processing is increasingly an international industry.³¹ Thus, the measures are liable to distort competition and affect trade within the EEA.
- (42) The Norwegian authorities maintain that the award of the waste collection fee and the application of the taxation rules to the individual waste collector do not constitute state aid as they satisfy the requirements of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid ("Regulation 1998/2006").³²
- (43) According to Article 2(2) of Regulation 1998/2006 the total *de minimis* aid granted to one undertaking shall not exceed EUR 200 000 over any period of three fiscal years. Furthermore, according to its Article 2(4) Regulation 1998/2006 only applies to transparent aid. As described in Part I of this Decision the municipal system for organising waste collection services, constituting the aid measures under assessment, is not transparent and the amount of the total aid granted to individual waste collectors engaging in economic activity is unclear. Consequently, the Norwegian authorities have not shown that the condition of transparency laid down in Regulation 1998/2006 is met. The Authority is furthermore of the view that an intransparent system of cross-subsidisation stemming from the waste collection fee awarded to municipal waste collectors operating economic activities can never meet the fundamental transparency requirement of Regulation 1998/2006. The Authority furthermore notes that the Norwegian authorities have not provided any explanation for how the tax exemption measure meets the requirements of Regulation 1998/2006. The Authority fails to see how it can be ensured that such a tax exemption would not lead to an allocation of state resources in excess of EUR 200 000 over any period of three fiscal years. Furthermore, in light of the inherent uncertainty related to the future tax base of the municipal waste collectors, the Authority does not consider such a tax exemption to ensure the necessary *ex ante* transparency as required by Article 2(4). On this basis, the Authority considers that Regulation 1998/2006 on *de minimis* aid does not apply in this case.

2. Existing aid

2.1 Introduction

- (44) Article 1(b)(i) of Part II of Protocol 3 provides that "existing aid":

"shall mean all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

²⁹ See Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR p. 2671, paragraphs 11-12 and *Fesil and Finnjord* (cited above) paragraph 94.

³⁰ C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraphs 78 and 79.

³¹ For example, the Authority has been provided with information showing that the Municipality of Tromsø regularly ships its waste to processing plants in Finland and Sweden "*Hva skal vi gjøre med restavfallet?*", publication by the Municipality of Tromsø.

³² OJ L 379 28.12.2006 p. 5. As incorporated into Point 1ea of Annex XV to the EEA Agreement by Decision No 29/2007 (OJ L 209 9.8.2007 p. 52 and EEA Supplement No 38 9.8.2007 p. 34).

- (45) Article 1(c) of Part II of Protocol 3 provides that “new aid”

“shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;”

2.2 The waste collection fee

- (46) Since the financing mechanism for the waste collection fee is laid down in Section 34 of the Pollution Control Act, the question of whether the aid in question is new or existing must be assessed with respect to that provision.³³ The Pollution Control Act dates back to 1981. Although the provision in Section 34 has been amended since its adoption, the proceeds of the fee were part of the general municipal budget before the amendments were made, and have remained so after the entry into force of the amendments.

2.2.1 The amendment of 1993

- (47) Whether aid must be classified as new aid or as an alteration of existing aid must be determined with reference to the provisions providing for it.³⁴ Negligible changes,³⁵ or purely administrative changes,³⁶ or aid which does not influence “any of the basic features of the previous system of aids”,³⁷ would not lead to existing aid being re-classified as new aid. For example, in the field of public service broadcasting, the European Commission has found the replacement of the licence fee with general payments over the state budget, or technical changes in the calculation or the collection of the fee, not to affect the nature of the aid as existing aid.³⁸
- (48) That being the case, it should be noted that the provision on waste collection fees has pursued the same aim before and after the amendment of 1993, i.e. to ensure that polluters pay whilst at the same time capping the amount of the waste collection fee at the level of cost coverage. The amendment of 1993 may be seen as merely facilitating the attainment of the initial objective, since it had been observed that many municipalities did not ensure full cost coverage through the fee, although this had always been intended. Furthermore, as set out in the preparatory works, the proceeds of the fee would be part of the general municipal budget both before and after the amendment. Thus, the aid has always been disbursed from the municipal budget. Finally, the ceiling on the amount of the fee remained unaltered (i.e. the fees were not to exceed costs). Therefore, the amendment of 1993 introduced no additional aid element, and, thus, no new aid.³⁹
- (49) Against that background, the amendment of 1993 (e.i.f. 1 February 1994) cannot be held to have altered the existing aid nature of the scheme.

2.2.2 The amendment of 2003

- (50) In *Namur-Les assurances*, the ECJ found that the widening of the scope of activities of a publicly financed insurance body did not amount to new aid as long as “*the aid is provided under earlier statutory provisions which remain unaltered. Whether the aid may be classified as new aid or as alteration of existing aid must be determined with reference to the provisions providing for it.*”⁴⁰ In that case, the decision to widen the scope of

³³ Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829 paragraph 28.

³⁴ *Ibid.* paragraph 28.

³⁵ Opinion of A.G. Warner in Case 177/78 *Pigs and Bacon* [1979] ECR p. 1129.

³⁶ Opinion of A.G. Darmon in Joined Cases 166 and 220/86 *Irish Cement* [1988] ECR p. 6473 paragraph 34.

³⁷ Opinion of A.G. Trabucchi in Case 51/74 *P.J. Van der Hulst's Zonen v Produktschap voor Siergewassen* [1975] ECR p. 79.

³⁸ For example: Cases E 14/2005 (Portugal) *RTP* and E 8/2006 (Belgium) *VRT*.

³⁹ See Case E 14/2005 (Portugal) *RTP*, paragraph 68.

⁴⁰ Case C-44/93 *Namur-Les assurances* (cited above), paragraph 28.

activities was taken by the board of directors in agreement with the supervising ministers. However, the ECJ went on to state that “*even on the assumption that it is wholly attributable to the State, the decision [to widen the scope of activities] cannot be regarded as constituting the granting or alteration of aid*”.⁴¹

- (51) Similarly, it should be observed that the amendment of 2003 did not alter the provisions providing the method of financing the aid or change the purpose of the aid. It merely reduced the scope of activities financed by the public purse. In several instances, the Commission has found modifications of aid schemes intending to reduce their impact on competition to not affect their existing aid character.⁴²
- (52) The potential for misuse of aid through cross-subsidisation of activities open to competition was not new to the system introduced in 2003, as the collection of “production waste” was never subject to the municipal exclusive right. Thus, the amendment actually narrowed the scope of the public funding and did not create a possibility for cross-subsidisation which did not already exist.
- (53) Therefore, no additional aid element was introduced through the amendment. In conclusion, the amendment of 2003 cannot be deemed to have affected the nature of the scheme as existing aid.

2.3 The income tax exemption

- (54) The income tax exemption for municipal waste collectors that are part of the legal person of the municipality is based on Section 2-30(1)b of the Tax act of 1999 which entered into force on 1 January 2000. The provision has not been materially altered since the entry into force of the EEA Agreement when the basis for the tax exemption was laid down in Section 26 c of the previously applicable Tax Act of 1911. Consequently, the tax exemption constitutes existing aid.

3. Procedural requirements regarding the review of existing aid schemes

- (55) 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”.
- (56) According to Article 17 of Part II of Protocol 3, the Authority must obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) of Part I of Protocol 3.
- (57) By letter dated 12 May 2010 (Event No 552744), and in accordance with Article 1(2) of Part I of Protocol 3, the Authority initiated the review procedure for existing aid and requested information on the aid measures from the Norwegian authorities.
- (58) By letter dated 20 May 2011 (Event No 545914), and in accordance with Article 17(2) of Part II of Protocol 3, the Authority informed the Norwegian authorities that it considered

⁴¹ *Ibid.* paragraph 31.

⁴² See the Commission Decision in Case C 67/2002 (Germany) *Aid granted by Germany to grain brandy distilleries* (OJ L 88 25.3.2006 p. 50) and the Commission Decision in Cases E 2/2005 and N 642/2009 (The Netherlands) *Existing and special project aid to housing corporations* (under appeal to the General Court) the decision text is available online at: http://ec.europa.eu/competition/state_aid/register/ii/doc/N-642-2009-E2-2005-WLWL-en-14.01.2010.pdf.

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.

- (59) By letter dated 14 October 2011 (Event No 611738), 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.
- (60) 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

- (61) The Norwegian authorities have not put forward any arguments that the state aid involved in the financing of the municipal waste collection services could be considered as compatible state aid.
- (62) Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) or Article 59(2) of the EEA Agreement.
- (63) The derogation of Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor does Article 61(3)(a) to Article 61(3)(c) of the EEA Agreement apply to the case at hand. Further, the aid under assessment in this case cannot be considered to qualify as public service compensation within the meaning of Article 59(2) of the EEA Agreement.
- (64) The Authority therefore finds that the existing aid scheme under assessment cannot be justified as compatible under the state aid provisions of the EEA Agreement.

5. Abolition of the aid

- (65) The Norwegian authorities have presented preliminary proposals for legislative amendments which are meant to ensure that the aid is abolished. To that effect, the Norwegian authorities have submitted draft amendments to the Waste Regulation.⁴³ The amendments require that the municipal waste collectors engaged in both economic and non-economic activities keep separate accounts for the two types of activities, and that the costs of activities are allocated proportionately. According to the Norwegian authorities the measures proposed are appropriate and sufficient to prevent that any cross-subsidisation occurs. The draft amendments also contain rules requiring the municipalities to calculate the waste collection fee on the basis of the costs directly related to the non-economic activity as well as a proportional share of the fixed common costs. According to the draft regulation, the municipal council sets the waste collection fee. Furthermore, the Norwegian authorities have ensured the Authority that municipalities will from now require a reasonable return on capital from those waste collectors engaging in economic activity.
- (66) As for the tax exemption, the Norwegian authorities have proposed the amendment of the currently applicable tax legislation to ensure that the economic activities of the municipal waste collectors, regardless of how they are organised, are subject to income tax. When municipal waste collectors carry out both economic and non-economic activities they will only be subject to taxation for the economic activities. The Norwegian authorities have

⁴³ Regulation of 1 June 2004 No. 930 Relating to the recycling and treatment of waste (*Forskrift om gjenvinning og behandling av avfall*).

explained that changes to the tax legislation should normally enter into force with effect for a whole calendar year. However, in order to apply the tax legislation to the municipal waste collectors carrying out economic activities, the amendments to the Waste Regulation *i.a.* requiring the municipal waste collectors to keep separate accounts for economic and non-economic activities, must first have entered into force since without separate accounts the tax authorities cannot determine the income tax to be levied on municipal waste collectors engaging in economic activities. The tax amendments should thus enter into effect from 1 January 2014.

6. Recommendation of appropriate measures

6.1 The waste collection fee

- (67) On the basis of the above, the Authority finds that the system of financing municipal waste collectors offering services on the market put in place by the Pollution Control Act by way of the waste collection fee constitutes state aid which is not compatible with the EEA Agreement. The Authority proposes that the Norwegian Government take appropriate measures to comply with the state aid provisions of the EEA Agreement.
- (68) In light of the above, the Authority considers that the following measures taken cumulatively would be suitable to ensure that the award of the waste collection fee to the municipal waste collectors does not entail state aid:
- *First*, the Norwegian authorities should introduce a legally binding obligation requiring municipal waste collectors carrying out economic and non-economic activities to keep separate accounts for the two types of activities. The Norwegian authorities should ensure that the waste collection fee will be calculated on the basis of the costs directly related to the non-economic activity as well as a proportionate share of fixed common costs,
 - *Second*, the Norwegian authorities should introduce an adequate system of control that prevents any form of cross subsidisation between the non-economic and economic activities of the municipal waste collectors, and
 - *Third*, the Norwegian authorities should ensure that municipal waste collectors carrying out economic and non-economic activities are not empowered to set their own waste collection fees without approval by a state body (i.e. the municipality or central government).

6.2 The income tax exemption

- (69) On the basis of the above, the Authority considers that the tax exemption applicable to waste collectors that form part of the legal person of the municipality constitutes a form of state aid in so far as the exempted entities constitute “undertakings” that offer services on the market within the meaning of Article 61 of the EEA Agreement. It is the Authority’s view that such an aid is incompatible with the EEA Agreement. The Authority therefore proposes that the Norwegian Government subject any waste collector that offers services on the market, regardless of how it is organised, to the generally applicable income tax regime as an appropriate measure in order to comply with the state aid provisions of the EEA Agreement.
- (70) 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 financing of the municipal waste collectors by the waste collection fee and a tax exemption laid down in section 2-30(1)(b) of the Tax Act, in so far as they apply to the economic activities of the municipal waste collectors, constitutes existing state aid which is incompatible with the functioning of the EEA Agreement.

Article 2

Pursuant to Article 1(1) of Part I and Article 18 of Part II of Protocol 3, the Norwegian authorities are recommended to take legislative, administrative and other measures, in accordance with the recommended appropriate measures set out in Chapter II.6 of this Decision, in order to eliminate with effect from 1 January 2014 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 language version is authentic.

Decision taken in Brussels, 27 February 2013

For the EFTA Surveillance Authority,

Oda Helen Sletnes
President

Sabine Monauni-Tömördy
College Member