

Case No: 74070  
Event No: 701952  
Decision No: 300/14/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 16 July 2014

to initiate the formal investigation into the alleged aid granted to Innovation Norway for its activities within the market of web infrastructure and related services, as well as possible aid in favour of the Regional Tourist Boards and the Destination Management Organisations

(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 thereof,

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

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

Whereas:

### I. FACTS

#### 1 Procedure

- (1) By letter dated 5 July 2013 (Event No 678002 and Annexes at Events No 678003-678007, 678010-678013 and 678017), TellUs IT AS (now merged with New Mind,<sup>1</sup> and henceforth referred to as “New Mind | tellUs” or “the Complainant”), made a complaint to the Authority in which it alleged that Innovasjon Norge AS (“Innovation Norway” or “IN”) receives state aid for its commercial activities in the web infrastructure and related services market, within the tourism sector. The complaint was received and registered by the Authority on 8 July 2013.
- (2) By a letter dated 27 August 2013 (Event No 679974), the Authority requested the Norwegian authorities to provide their comments on the alleged state aid. On 24 and 25 September 2013, the Authority attended two meetings in Oslo. On 24 September 2013, the Authority received a presentation from New Mind | tellUs (Event No 684995). On

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<sup>1</sup> In October 2013, the original complainant tellUs IT AS merged with the company New Mind forming New Mind | tellUs. See [www.newmind.co.uk](http://www.newmind.co.uk).

25 September 2013, the Authority discussed the complaint with the Norwegian authorities. At this meeting, IN (on behalf of the Norwegian authorities) provided the Authority with a presentation on the case (Event No 684996).

- (3) By a letter dated 4 October 2013 (Event No 685187), the Authority sent an information request to the Norwegian authorities. The Norwegian authorities replied to this request by forwarding two letters from IN, dated 28 October 2013 (Events No 688213 and 688215, together with Annexes at Events No 688214 and 688216-25).
- (4) By an email dated 15 November 2013 (Event No 690346), the Complainant commented on the Norwegian authorities' replies. IN submitted its observations on the Complainant's comments by way of a letter dated 20 December 2012, which was forwarded by the Norwegian authorities (Event No 694258).
- (5) By an email dated 10 January 2014 (Event No 695364), the Norwegian authorities provided the Authority with additional information.
- (6) By emails dated 17 January 2013 and 3 March 2013 (Events No 696111 and 702175), New Mind | tellUs provided the Authority with additional information.

## 2 Background

### 2.1 The Complainant

- (7) The Complainant is an IT company which delivers online distribution solutions for the tourism industry. The company is active in several EEA countries and has a large portfolio of clients including several destination organisations<sup>2</sup> and travel agencies.

### 2.2 Innovation Norway (IN)

- (8) IN is a limited liability state-owned company, which was established in 2003 by the Norwegian Government through the Act on Innovation Norway ("*Lov om Innovasjon Norge*",<sup>3</sup> hereafter "Act on IN"). The Norwegian Ministry of Industry and Trade owns 51% of IN's shares, and the Norwegian counties own the remaining 49%.<sup>4</sup> IN enjoys a general exemption from Norwegian corporate income tax, pursuant to Section 2-30(1)(e)(5) of the Norwegian Tax Act of 1999.<sup>5</sup>
- (9) The company was established with the purpose of contributing to business innovation, the development of rural areas and increasing the competitiveness of Norwegian companies. Section 1 of the Act on IN explicitly entrusts IN with the task "*to promote corporate and social-economic development throughout the country, and trigger different regions industrial opportunities to contribute to innovation, internationalisation and promotion*".<sup>6</sup> IN manages and implements several Norwegian state aid schemes.
- (10) The tasks currently carried out by IN were previously accomplished by its four predecessor organisations: the Norwegian Industrial and Regional Development Fund

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<sup>2</sup> In the tourism sector, the term "destination organisation" or "destination company" generally means a local company that handles arrangements for tours, meetings, transportation, etc. for groups originating elsewhere. See <http://wsdmo.org/index.php/Educate/TourismAcronyms/>.

<sup>3</sup> LOV-2003-12-19-130 (in Norwegian "Lov om Innovasjon Norge"), available at: <http://lovdata.no/dokument/NL/lov/2003-12-19-130?q=lov+om+innovasjon+norge>.

<sup>4</sup> Section 2 of the Act on IN.

<sup>5</sup> LOV-1999-03-26-14, (in Norwegian "Skatteloven").

<sup>6</sup> Translation by the Authority.

(“SND”), the Government Consultative Office for Inventors (“SVO”), the Norwegian Tourist Council (“NTC”) and the Norwegian Export Council (“NEC”).<sup>7</sup> In 2004, those four entities were discontinued and merged into IN.

### 2.3 The Norwegian tourism structure and the new tourism strategy

- (11) Several different entities are involved in the promotion of Norway as a tourism destination at national, regional and local level.<sup>8</sup>
- (12) IN is intended to promote increased profitability within various segments of the tourism industry at a national level, continuing the tasks of its predecessors.<sup>9</sup> The Norwegian Government has been an active stakeholder within the tourism sector since 1903.<sup>10</sup>
- (13) At the regional and local levels, the tourism promotion is ensured by the Regional Tourist Boards (in Norwegian “*Regionalt selskap*”, here referred to as “RTBs”) and the Destination Management Organisations (in Norwegian “*Destinasjonsselskap*”, here referred to as “DMOs”).<sup>11</sup>
- (14) The RTBs are companies that serve the tourist industry in a regionally-defined geographical area.<sup>12</sup> Those entities normally have public and private shareholders. According to information provided by the Norwegian authorities, the RTBs’ tasks are international marketing; tourist information; regional marketing activities and knowledge; regional coordination of activities, and regional public relations activities.
- (15) The DMOs are companies that serve a defined number of destinations, products, attractions and tourist industry within a geographic region served by an RTB.<sup>13</sup> DMOs are normally local and their structure varies. Their shareholders are normally public bodies and private companies. Their tasks under the national tourism strategy are product development; booking and sales; tourist information; destination development; competence development; destination market knowledge, and destination public relations activities.
- (16) However, at the beginning of the 2010s, the Norwegian Government decided to adopt a new tourism strategy aimed at improving its national tourism structure. The objectives of

<sup>7</sup> In Norwegian: “*Statens nærings- og distriktsutviklingsfond*”, “*Statens Veiledningskontor for Oppfinnere*”, “*Norges Turistråd*” and “*Norges Eksportråd*”.

<sup>8</sup> Report entitled “*The Government’s tourism strategy. Destination Norway. National strategy for the tourism industry*”, dated April 2012 and sent to the Authority as Annex 4 to IN’s letter dated 28 October 2013 (Event No 688213). Available at:

[http://www.regjeringen.no/pages/37646196/Lenke\\_til\\_strategien-engelsk.pdf](http://www.regjeringen.no/pages/37646196/Lenke_til_strategien-engelsk.pdf).

<sup>9</sup> A description of IN’s task in the tourism sector can be found in the report quoted in footnote 8.

<sup>10</sup> IN’s letter dated 20 December 2013 (Event No 694258). The National Association of Tourism, which was the joint body for the State, municipal and private stakeholders in the tourism industry, was established in 1903 and continued until 1984. From that point, marketing efforts of the National Association of Tourism were continued by the foundation NORTRA, which in 1999 changed its name to the NTC. Since 2004, the NTC’s tasks have been carried out by IN, following the merger of these two entities. Further information on the entities that have traditionally been entrusted with the mandate to promote Norway as a holiday destination was also provided in IN’s letter dated 20 December 2013 (Event No 694258).

<sup>11</sup> For further information, see the project plan for a new national tourism structure by the Ministry of Trade, Industry and Fisheries (Version 1.2 dated 20.06.2013):

<http://www.regjeringen.no/upload/NHD/Temasider/Reiseliv/Riktigprosjektplan.pdf>

<sup>12</sup> In Norwegian: “*Regionalt selskap: Selskap som betjener reiselivsnæringen i et definert geografisk område*”.

<sup>13</sup> In Norwegian: “*Destinasjonsselskap: Selskap som skal betjene et definert antall reisemål, produkter, attraksjoner og reiselivs-næring innen et geografisk område innenfor det regionale selskapet*”.

the new strategy are to render the public support to the sector more efficient, reduce the number of actors and ensure more coordination among them.<sup>14</sup> Moreover, the Norwegian authorities have stated that they aim to avoid a diversification of websites dealing with tourism in Norway, with different layouts, booking engines, languages and so on, which are funded by various Government bodies, counties or municipalities.

- (17) With these objectives in mind, the Norwegian authorities proposed a new tourism structure aiming, *inter alia*, to reduce the number of RTBs and DMOs and to consolidate Norway's tourism promotion efforts around IN and its webpage *visitnorway.com*.
- (18) The Authority understands that the Norwegian authorities intend to change the existing structure of the tourism industry, by proposing a new one based *inter alia* on the promotion and development of the platform *visitnorway.com*, which is currently managed by IN. This implies changes in the way IN acts in the market and changes in the structure of *visitnorway.com*.<sup>15</sup>
- (19) As part of the Norwegian authorities' new tourism strategy, on 1 February 2013, the Ministry of Trade, Industry and Fisheries issued its 2013 State Budget for IN (hereafter "the 2013 Budget letter").<sup>16</sup> The 2013 Budget letter entrusted IN with the mandate of "*ensuring a good distribution of Norwegian travel experiences through visitnorway.com, and help to make the players in the tourist industry competent to enter their products into the national booking solution –linked to visitnorway.com*".<sup>17</sup>
- (20) The 2013 Budget letter also stated that: "*Innovation Norway shall not offer user-paid services that are in direct or indirect competition with private actors. To the extent that Innovation Norway offers services that could have been carried out by a private provider, the price that Innovation Norway asks must reflect the real accrued cost, including what is covered by the basic costs*".<sup>18</sup>

## 2.4 The market for web infrastructure and related services

- (21) The present case relates to IN's activities in the market for web infrastructure and related services.
- (22) Web infrastructure and related services in the tourism sector are provided through "Destination Management Systems" ("DMS"), which are defined as "[s]ystems that consolidate and distribute a comprehensive range of tourism products through a variety of channels and platforms, generally catering for a specific region, and supporting the activities of a destination management organisation within that region. DMS attempt to utilise a customer centric approach in order to manage and market the destination as a holistic entity, typically providing strong destination related information, real-time

<sup>14</sup> See report quoted in footnote 8.

<sup>15</sup> According to p.8 of IN's letter dated 28 October 2013 (Event No 688213), the "[o]bjective of IN's New Structure project is to streamline Visitnorway.com so that the tourist has one place to search and find information about all the destinations in Norway, in order for the tourist to choose Norway as a holiday destination".

<sup>16</sup> In Norwegian: "Statsbudsjett 2013 – oppdragsbrev Innovasjon Norge" of 1 February 2013 (Event No 688224). Available at: [http://www.regjeringen.no/upload/NHD/Vedlegg/Brev/2013\\_oppdragsbrev\\_innovasjon norge.pdf#search=OPPDRA GSBREV&regj\\_oss=1](http://www.regjeringen.no/upload/NHD/Vedlegg/Brev/2013_oppdragsbrev_innovasjon norge.pdf#search=OPPDRA GSBREV&regj_oss=1).

<sup>17</sup> Translation by the Authority.

<sup>18</sup> Translation by the Authority.

*reservations, destination management tools and paying particular attention to supporting small and independent tourism suppliers”.*<sup>19</sup>

- (23) Through its DMS, an IT company such as the Complainant will offer a database service where its clients (destination companies) can submit and regularly update information about tourist sites, hotels, restaurants, events and similar simultaneously on their own webpage and on other external channels such as *visitnorway.com*, Google Maps, tourist information kiosks, mobile portals, and in printed newspapers.
- (24) These services allow clients to insert input data into the database and this information is then automatically disseminated on a number of different websites (including *visitnorway.com*). The information is then used by visitors for booking or informational purposes. These services are defined as web infrastructure and related services. They include different functionalities: (i) the “*destinator*” functionality (the creation of points of interest or information flash to be published on the website); (ii) the “*distribution*” functionality (the information stored in a database is distributed to many different channels and platforms) or (iii) the “*search*” functionality (used on every website to search and present tourism products).
- (25) According to the Norwegian authorities,<sup>20</sup> the Complainant was alone on the Norwegian market offering those services for the last 17 years. However, in 2012-2013, a new international competitor, Citybreak, entered the Norwegian market offering the “*destinator*” functionality, i.e. allowing tourism providers to create their points of interest. A graphic illustration of the functioning of these services is included in paragraph (31) below.

## **2.5 IN’s entrance into the market for web infrastructure services and related services**

- (26) The promotion of Norway as a tourism destination is one of IN’s tasks. IN has developed and managed the platform *visitnorway.com* in order to fulfil its promotion task. Before 2013, IN only offered online marketing and promotion services on its *visitnorway.com* website. These services included web-advertising to the RTBs and the DMOs for an annual subscription fee, which represented a certain percentage of their turnover.
- (27) However, IN has developed its own system and functionalities<sup>21</sup> and it is offering them to the RTBs and the DMOs which have migrated their websites to *visitnorway.com*. These RTBs and DMOs were previously clients of the Complainant. The Authority understands, at this stage of the procedure, that the strategy of offering these services to the RTBs and DMOs is closely linked to the decision of the Norwegian authorities to promote *visitnorway.com* by making it the main Internet platform for tourism promotion in the country (see paragraphs (16) to (18), above).
- (28) In order to enter this new market, IN launched “Pilot Alfa” between 2012-2013 – running two pilot projects called *VisitSørlandet* and *VisitTrondheim*.
- (29) Once Visit Sørlandet AS (an RTB), and Visit Trondheim AS (a DMO) were selected to participate in Pilot Alfa, they signed a partnership agreement with IN, in order to use

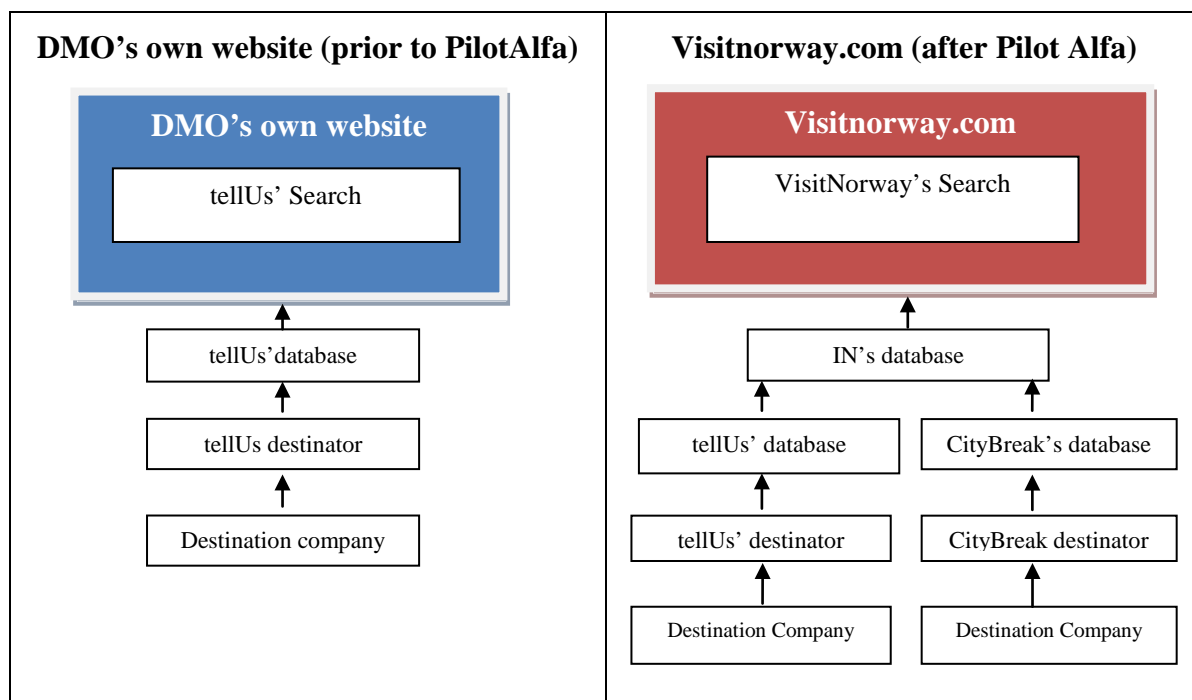
<sup>19</sup> Definition of “DMS” available at <http://www.newmind.co.uk/technology-platform/destination-management-system>.

<sup>20</sup> IN’s letter dated 28 October 2013 (Event No 688213).

<sup>21</sup> Until that moment, New Mind | tellUs provided the web infrastructure and related services for IN’s tourism website: [visitnorway.com](http://visitnorway.com). See Event No 678005. Annex 3 to the complaint.

*visitnorway.com* templates, functionalities and content. As a consequence of the agreement, both companies redirected their URL<sup>22</sup> to *visitnorway.com* and discontinued their own homepages. The information available on those pages was migrated to *visitnorway.com*.

- (30) When these two companies had their own website, they were clients of the Complainant. Accordingly, they used “*tellUs destinator*” and “*tellUs search*” functionalities, and paid a licence fee to the Complainant for this use. However, upon redirecting their URL to *visitnorway.com* and terminating their own website, these companies put to an end the contract for the search functionality, since within *visitnorway.com* only IN’s search functionality can be used. They still have to contract with the Complainant or CityBreak for the “*destinator*” functionality.
- (31) The uses of the different functionalities, before and after Pilot Alfa, are represented in the following graphic:



Source: the Authority, based on the information provided by the Norwegian authorities (Event No 688213).

- (32) The services that IN was previously offering to these two types of companies (online marketing and promotion services on the *visitnorway.com* website), were offered for a fee calculated on the basis of their annual turnover. This pricing system was also applied during Pilot Alfa, with no additional charge made for the additional services provided by IN (i.e. web infrastructure and related services).
- (33) The Norwegian authorities have explained that the reason behind not charging extra for these additional services relates to the fact that the new services were under development, and the two companies involved in the pilot project invested time and effort in giving feedback to finalise the development of IN’s functionalities; thereby “reimbursing” the (unfinished) new services with their inputs.
- (34) From July 2013 to November 2013, IN undertook a project called “Pilot Beta”. During this pilot project, IN studied new alternatives, new business models, and the possibility of

<sup>22</sup> URL stands for Uniform Resource Locator. A URL is a formatted text string used by web-browsers, email clients and other software to identify a network resource on the internet.

promoting new partnership agreements with the RTBs and the DMOs. The Authority understands that during the Pilot Beta phase no new partnership agreements were signed.

- (35) As from 1 January 2014, IN has offered partnership agreements (see paragraph (5)) to all interested DMOs and RTBs on a non-discriminatory basis. IN offers its services exclusively to the RTBs and the DMOs as part of the Norwegian tourism structure, but not to other interested private companies (e.g. individual hotels, shops, or museums).
- (36) The Authority understands that as from 1 January 2014, IN introduced a new pricing model for the new services it is providing, where the price charged is intended to reflect the costs of the services provided by IN, plus a reasonable profit margin of between 5 to 10% per year.

### 3 The complaint

- (37) The complaint submitted by New Mind | tellUs separates IN's business promotion activities (including tourism promotion) from its activity related to the provision of web infrastructure and related services.
- (38) The Complainant considers that IN's promotion activities and its tasks in relation to *visitnorway.com*, as a national tourism portal, can be considered to be a service of general economic interest ("SGEI") in line with the EEA state aid rules. However, since 2013, IN is entering a new market,<sup>23</sup> offering economic services. Those new services are not part of the mandate received by IN and are not provided in line with the *Altmark*<sup>24</sup> case-law. As a consequence, IN's behaviour in the market should be in line with the state aid rules.
- (39) The Complainant refers to three different forms of alleged state aid:
- a. the non-implementation of a separation of accounts for commercial activities within IN;
  - b. the profits foregone through the non-profit orientation of economic activity referred to above, and
  - c. the general exemption from the income tax granted to IN, also applicable to IN's economic activities.
- (40) According to the Complainant, IN is not required to generate any profit and the company does not maintain separate accounts for its economic and non-economic activities. This implies spill-over effects, allowing IN to finance its economic activities with the funds that should be devoted to non-economic activities. Therefore, the measures entail state aid pursuant to Article 61(1) of the EEA Agreement.
- (41) New Mind | tellUs also alleges that IN requests its clients to terminate their previous contracts with New Mind | tellUs. The Complainant takes the view that this is a tie-in condition in breach of antitrust law.<sup>25</sup>

<sup>23</sup> According to the Complainant: "to date, the offering of IT platform infrastructure services to the tourism industry has not been part of IN's activities". Complaint (Event No 678002), p. 8.

<sup>24</sup> According to Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, the compensation of services fulfilling the four criteria established in paras. 89-93 of the judgment does not entail state aid.

<sup>25</sup> Email dated 15 November 2013 (Event No 690346).

- (42) In New Mind | tellUs' view, the aid measures have to be considered as new state aid since the entrance into a new market (i.e. offering web infrastructure and related services to the RTBs and the DMOs) falls outside the mandate received by IN and its predecessors. The Complainant considers that IN's mandate was limited to a general promotion of the country.
- (43) New Mind | tellUs also states that the general tax exemption granted to IN should be considered to be state aid when it relates to income obtained by the performance of economic activities. This exemption would also be considered to be new state aid because it is related to the recent entrance of IN into economic activities.
- (44) Finally, the Complainant considers that as IN is not charging market prices for the services that it is providing to the RTBs and the DMOs, those companies are also beneficiaries of unlawful state aid.<sup>26</sup>

#### 4 Comments by the Norwegian authorities

- (45) The Norwegian authorities disagree with New Mind | tellUs' legal assessment.<sup>27</sup>
- (46) Firstly, the Norwegian authorities state that IN's purpose is to help to create profitable business in all parts of Norway, *inter alia* by promoting the country as a holiday destination. IN's core activity is to promote business in Norway and not to operate any business itself. In functional terms, IN is merely a tool for the Norwegian authorities to grant aid, but it does not offer goods or services in the market. As a consequence, IN cannot be regarded as an undertaking being a recipient of state aid.
- (47) In its view, since the core activities of IN are of a non-economic nature, the potential classification of secondary activities undertaken by IN as economic activities would not alter the fact that IN cannot be considered to constitute an undertaking.<sup>28</sup>
- (48) The Norwegian authorities accept that IN carries out some activities of a particular nature. In particular, IN is involved in market loans, seed capital and investment funds. However, in these areas, certain "mechanisms" have already been established to avoid any possible distortion of competition.
- (49) Regarding the web infrastructure and related services, the Norwegian authorities emphasise that IN does not provide services to the general tourism market as such, but only to the RTBs and the DMOs (see also paragraph (35)).
- (50) The Norwegian authorities point out that the 2013 Budget letter states that: "*Innovation Norway is to ensure a good distribution of Norwegian travel experiences through visitnorway.com, and help to make the players in the tourist industry competent to enter their products into the national booking solution –linked to visitnorway.com.*" Therefore, the web infrastructure and related services are part of this mandate to promote Norway as a tourism destination and support the tourism industry. In the opinion of the Norwegian authorities, *visitnorway.com* is a modern marketing and information tool and in order to make it operative, an IT platform infrastructure service is required. In other words, IN offers to the RTBs and the DMOs full web editorial services, through *visitnorway.com*, and not a stand-alone service, as offered by the Complainant.

<sup>26</sup> Email dated 3 March 2014 (Event No 702175).

<sup>27</sup> IN's letters dated 28 October 2013 (Events No 688213 and 688215).

<sup>28</sup> IN's letter dated 28 October 2013 (Event No 688213), p. 25.



- (51) The Norwegian authorities have also argued that those services are being offered to the RTBs and the DMOs as part of Norway's destination management tourism structure. All the entities involved in the tourism structure work closely together; they are all dependent on public funding, and they are closely integrated in the public sector. As a consequence, the Norwegian authorities take the view that IN is not acting on the market as such when providing internal services and coordinating the different levels of organisation within the national tourism structure. It is, rather, fulfilling its task as part of the body responsible for organising regional and local bodies within the management of Norwegian tourism.
- (52) The Norwegian authorities have, moreover, stated that IN does not impose a condition on the RTBs and DMOs to terminate its previous contract with the Complainant as alleged by the latter (see paragraph (41), above).
- (53) Moreover, if the web infrastructure and related services could be considered to be economic activities, the Norwegian authorities consider that the alleged measures would be granted on the basis of an existing aid scheme,<sup>29</sup> because the IN's financial system existed prior to the entry into force of the EEA Agreement in Norway. In the alternative, the Norwegian authorities have suggested that at the time the measure was put into effect, it did not constitute aid, and subsequently became aid as a consequence of the evolution of the European Economic Area without having been altered by the EFTA State.<sup>30</sup>
- (54) Concerning the alleged aid in favour of the RTBs and the DMOs, the Norwegian authorities recall that as of 2014, IN intends to promote partnership agreements with the RTBs and the DMOs. They nevertheless underline that, in the framework of these partnership agreements, the services provided by IN (i.e. the web infrastructure and related services) will be provided for an annual fee. The Norwegian authorities state that their intention is to adopt a fully transparent pricing policy and apply a price close to the market price.
- (55) Finally, the Norwegian authorities have stated that, in the event that the Authority finds any of the measures to constitute state aid, those should be considered compatible aid pursuant to Article 61(3)(c) of the EEA Agreement.

## 5 Material scope of the investigation

- (56) Based on the facts described above, the Authority considers it necessary to clarify the material scope of the investigation, as defined in the present opening Decision.
- (57) First, the present Decision refers to the activities of IN within the market of web infrastructure and related services. The Decision neither concerns the activities of IN regarding the general promotion of Norway as a tourist destination, nor the development of *visitnorway.com*. Nor does it refer to the role of IN as a vehicle of the Norwegian State to support business in Norway.
- (58) The present Decision only refers to the alleged state aid in favour of IN and/or the RTBs and the DMOs in the market of web infrastructure and related services.
- (59) Second, the potential aid measures are the following:
- (i) the alleged cross-subsidisation of IN's web infrastructure and related services with funds meant for non-commercial activities;

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<sup>29</sup> According to Article 1 (b)(i) of Part II of Protocol 3.

<sup>30</sup> See the definition of existing aid provided in Article 1(b)(v) of Part II of Protocol 3.

- (ii) the alleged foregoing of profits through the non-profit orientation of IN's economic activities, including the web infrastructure and related services;
  - (iii) the alleged aid granted by IN to the RTBs and the DMOs in the form of prices not sufficient to obtain a reasonable return on the investments;
  - (iv) the general exemption from income tax granted to IN.
- (60) The first three measures are linked to IN's entrance in the market of web infrastructure and related services. The legal assessment of those measures as possible state aid depends on the nature of such services, including whether they can be considered to be economic services.
- (61) Furthermore, the qualification of IN's activities as constituting possible new aid depends on the terms of the mandate received by IN and on the new activities allowed by the 2013 Budget letter. Taking into account that the legal assessment of those three measures depends on the result of a common analysis, the Authority considers that they can be assessed together within the scope of the present Decision.
- (62) On the contrary, the last measure (iv) relates to a general income tax exemption and is not tied to IN's activities within the market of web infrastructure and related services.<sup>31</sup> A legal assessment of this measure does not necessarily involve an analysis of IN's activities with regard to the tourism sector, or its tasks as manager of *visitnorway.com*.
- (63) Because of these differences, the Authority will not assess whether the income tax provisions related to IN constitute state aid in the present decision.

## II. ASSESSMENT

### 1 The presence of state aid

- (64) 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*".
- (65) 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 and imputable to the State. Second, the measure must confer an advantage. Third, the measure must favour selected undertakings or economic activities. Fourth, the measure must be liable to affect trade between Contracting Parties and liable to distort competition in the EEA.

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<sup>31</sup> Corporate entities in Norway are subject to corporate income tax according to Section 2-2 of the Tax Act. Taxable income is subject to corporate income tax at the general rate of 27%. Accordingly, limited liability companies ("AS" or "ASA"), savings banks and financial institutions, mutual insurance companies, cooperatives, state-owned enterprises, inter-municipal companies, foundations etc. are subject to corporate tax under the general regime, i.e. Section 2-2. However, State institutions, public authorities such as counties and municipalities, and a number of other entities listed exhaustively in Section 2-30(1) of the Tax Act, including IN, benefit from a corporate tax exemption.

- (66) The alleged foregoing of profits and the cross-subsidisation measures in favour of IN (measures (ii) and (i)) are assessed separately from the possible aid to the RTBs and the DMOs (measure (iii)), see paragraph (59) above.

### 1.1 Possible aid measures in favour of IN

- (67) It follows from Article 61(1) EEA that state aid rules only apply to advantages granted to undertakings. Prior to examining whether the conditions for state aid are met in this case, it is necessary first to examine whether IN qualifies as an undertaking.

#### 1.1.1 *Whether IN can be considered to be an “undertaking”*

- (68) It is settled case-law that undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>32</sup> Economic activities are those consisting of offering goods or services on a market.<sup>33</sup> Offering goods and services on a market without making a profit can also constitute an economic activity.<sup>34</sup> All entities that are legally distinct from the State and which engage in economic activities are considered to be “undertakings”, irrespective of whether these are public or private undertakings.<sup>35</sup>
- (69) If an entity is providing economic activities, it is to be considered as an undertaking in relation to those specific services alone, without reference to the way in which its other activities should be classified.<sup>36</sup>
- (70) As a consequence, the first step of the Authority’s legal assessment requires an analysis of whether IN can be defined as an undertaking for the purposes of state aid rules.
- (71) The Norwegian authorities have argued that IN is not an undertaking, but a mere vehicle used by the State to grant aid (see paragraph (46), above). They contend that IN is acting as an instrument of the State, and that it does not offer goods or services on a market.
- (72) Furthermore, the Norwegian authorities have argued that, within the scope of its task to promote businesses in Norway, IN is also entrusted with the mandate of promoting Norway as a tourist destination, which is the final goal of the platform *visitnorway.com*. As a consequence, since tourism promotion is a non-economic activity, IN is not offering web infrastructure and related services on the market.
- (73) The Complainant, on the contrary, defines IN’s task of promoting businesses in Norway as an SGEI, but an SGEI which is limited mere promotion activities, including tourism activities<sup>37</sup> (see paragraph (38), above).

<sup>32</sup> Case C-41/90 *Höfner and Elser v Macroton* [1991] ECR I-1979, paras. 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, para.78.

<sup>33</sup> Case C-222/04 *Ministero dell’Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, para. 108.

<sup>34</sup> Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1978] ECR 2111, paras. 18-21 and Case C-244/94 *FFSA and others* [1995] ECR I-4013, para. 21.

<sup>35</sup> Joined Cases T-443/08 *Freissart Sachen and Land Sachsen-Anhalt* and T-455/08, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* [2011] ECR II-1311, para. 128 et seq.

<sup>36</sup> Economic and non-economic activities can co-exist within the same sector and sometimes be provided by the same organisation. In this scenario, the entity is to be regarded as an undertaking only with regard to its economic activities. See, for example, European Commission Decision in State Aid C-22/2003 (Italy) *Reform of the training institutions* (OJ L 81, 18.3.2006, p. 25), para. 43.

<sup>37</sup> Para. 45 of the complaint.

- (74) The Authority's preliminary view, at this stage, is that IN's main purpose appears to be to provide support to Norwegian businesses on behalf of the State. The Authority agrees that when IN is acting as a mere instrument of the State, IN does not provide services or goods on the market and its activities fall outside the scope of the state aid rules.
- (75) The 2013 Budget letter establishes that IN should promote Norway as a tourism destination. In order to do so, the letter clarifies that IN should not provide services in competition with private operator and if it does, IN must apply market prices. The Authority understands that by the 2013 Budget letter the Norwegian authorities have allowed IN to provide economic services in competition with private operators, on condition that for those services IN must require an adequate remuneration. Thus, it is the Authority's preliminary understanding that such activities fall outside the scope of the mandate for IN regarding the use of public funds for the promotion of businesses in Norway. They are services which are economic in nature: neither an SGEI nor a non-economic activity.<sup>38</sup>
- (76) Furthermore, the Authority takes the preliminary view that since those services (outside IN's mandate) seem to qualify as economic services, IN might also be defined as an undertaking regarding the provision of those services.
- (77) The Authority notes that IN enjoys, pursuant to the text of the 2013 Budget letter, a certain discretion in determining its course of action when providing economic services and it therefore is not acting under a specific mandate. IN is not forced to provide economic services on the market: the 2013 Budget letter only allows it to do so. These discretionarily elements have been seen by the General Court as relevant in differentiating between economic and non-economic activities provided by a single entity.<sup>39</sup>
- (78) The Authority also underlines that IN's promotional activities are financed by the State (see paragraph (83), below) and that IN as such is not required to generate a return on capital.<sup>40</sup> However, the 2013 Budget letter underlines that for the provision of those services, IN must cover the actual costs it has incurred, so that those services are not financed by public funds. The different methods of financing IN's activities illustrates the different natures of those activities: non economic activities or SGEIs, *versus* economic services.
- (79) The Authority notes that the conclusion as to whether IN carries out an economic activity when providing web infrastructure and related services cannot be based on IN's objectives or on its general non-profitmaking orientation, but must be exclusively founded on an analysis of the services themselves.<sup>41</sup> The Authority further notes that whatever IN's objectives are while providing these services, IN requests a remuneration for those services. Accordingly, it seems to the Authority that the objective of promoting tourism coexists with an economic objective.<sup>42</sup> The Authority recalls in this respect that the definition of an entity as an undertaking depends on the nature of the specific activity under scrutiny.

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<sup>38</sup> See Case T-347/09, *Germany v Commission*, not yet published, p. 34 et seq., on how to differentiate between the nature of different activities provided by one single entity.

<sup>39</sup> Case T-347/09, *Germany v Commission*, not yet published.

<sup>40</sup> IN's letter dated 28 October 2013 (Event No 688213), p. 34.

<sup>41</sup> Commission Decision: State aid NN 8/2009. Germany. *Nature conservation areas*. OJ C 230, 24.9.2009, p. 1, para. 36.

<sup>42</sup> The Commission reached a similar conclusion in its decision in footnote 41, above (para. 40).

- (80) It is established case-law that in defining a service as economic, a significant factor is whether some kind of competition exists (i.e. if there are other entities offering the same or substitutable goods and services).<sup>43</sup> The Authority takes the preliminary view that this condition is met in the present case, since the services at hand are also provided by private operators, such as the Complainant.
- (81) Furthermore, the Court of Justice has also underlined that the economic activities are normally offered against remuneration.<sup>44</sup> The Authority notes that both the Complaint and IN provide for remuneration the services at issue in this Decision.
- (82) Consequently, insofar as web infrastructure and related services are concerned, the Authority draws the preliminary conclusion that it cannot be excluded that IN is an undertaking within the meaning of Article 61(1) of the EEA Agreement with regard to those services in question.

### ***1.1.2 Presence of state resources and imputability***

- (83) It is well-established case-law that public resources at the disposal of public undertakings owned or controlled by the State are considered to be state resources.<sup>45</sup> IN is mainly financed by public funds.<sup>46</sup>
- (84) Foregoing profits is equivalent to granting a financial advantage. This kind of measure is mentioned in the Authority's *Guidelines on State aid provisions to public enterprises in the manufacturing sector*, which require transparency where the State foregoes profits.<sup>47</sup> By foregoing profits, state resources are consumed.
- (85) Cross-subsidisation also consumes public resources, since the State is not only compensating for the cost of the non-economic activities with which an entity has been entrusted but also for some of the costs linked to the commercial activities of the same entity.
- (86) The measures are imputable to the State, since IN is mainly financed through the public budget (see paragraph (83)).

<sup>43</sup> AG Opinion in Case C-205/03 *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission*, [2006] ECR I-6295, para. 31.

<sup>44</sup> Joined Cases C-180/98 to C-184/98, *Pavel Pavlov and Others*, [2000] ECR I-6451, para. 76; C-475/99, *Ambulanz Glockner*, [2001] ECR 9089, para. 20

<sup>45</sup> See, for instance, Article 2 of the Transparency Directive. (Referred to at point 1a of Annex XV to the EEA Agreement, OJ L 266 11.10.2007 p. 15 and EEA Supplement No 48 11.10.2007 p. 12, as Commission Directive 2006/111/EC of 16 November 2006 *on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings*. Consolidated version - OJ L 318, 17.11.2006, p. 17 – 25). Implemented in Norwegian law by Regulation FOR-2006-09-07-1062, Section 9-1-1.

<sup>46</sup> According to Chapter 2, Articles 7-9 of the IN Act, IN is financed by capital provided by its owners (i.e. the Norwegian Government and the Counties (ref. Article 7, ref. Article 2) and grants and loans from the Government and the Counties. IN can also obtain funding from other sources (Article 8), and Government and Counties guarantee for all obligations (Article 9).

<sup>47</sup> 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 Manufacturing 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 Manufacturing Guidelines can be found at: <http://www.eftasurv.int/?1=1&showLinkID=16995&1=1>.

### 1.1.3 *The measure contains a potential advantage*

#### 1.1.3.1 *Cross-subsidisation of the web infrastructure and related services*

- (87) 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 of that entity.<sup>48</sup> Objective and transparent cost allocation mechanisms should be in place to ensure that the economic activities cover all the costs related to these operations (including all the costs related to that activity plus an appropriate share of the common costs). Without such mechanisms in place the commercial activities may gain advantages from the public funds granted to the non-commercial activities.
- (88) This rule is in line with the principles set out in the Transparency Directive<sup>49</sup> which requires financial transparency for public undertakings and separate accounts for companies enjoying special or exclusive rights granted by the State or entrusted with a service of general economic interest. The objective of those provisions is precisely to avoid advantages for public companies which are liable to distort free competition by means of state aid.<sup>50</sup>
- (89) The Norwegian authorities have informed the Authority about the separation of accounts within IN. IN's annual accounts contain a total account for the company. This consolidated account is further separated into eight accounts, one for each type of activities/schemes (for example loans and funding projects). As a consequence, there is also a separate account for *visitnorway.com*. However, following a preliminary analysis, it seems to the Authority that neither the *visitnorway.com* account nor other account of IN differentiate the figures related to the provision of web infrastructure and related services.
- (90) On the basis of the above, the Authority notes that the Norwegian authorities have not, at this stage of the procedure, provided sufficient evidence to demonstrate that IN implements separate accounts for its economic activities, thereby avoiding possible cross-subsidisation.

#### 1.1.3.2 *Profits foregone through the non-profit orientation of IN*

- (91) Any business owner or investor will normally require a return on its investment in a commercial undertaking. Such a requirement represents a normal and expected business cost for the undertaking. The Authority has already stated in its Manufacturing Guidelines that: “[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”.<sup>51</sup>

<sup>48</sup> See, for example, the Authority's Decision No 142/03/COL *Regarding Reorganisation and Transfer of Public Funds to the Work Research Institute* (OJ C 248, 16.10.2003, p. 6); Decision No 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 No 174/13/COL *Concerning the financing of municipal waste collectors* (OJ C 263, 12.9.2013, p. 5).

<sup>49</sup> See footnote 45.

<sup>50</sup> AG Opinion, Case C-295/05, *Asemfo* [2007] ECR I-2999, para. 116.

<sup>51</sup> 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

No state resources are involved only where a full-cost prices policy is adopted, so as to cover the total costs (variable and fixed costs) plus a mark-up to remunerate equity capital.<sup>52</sup>

- (92) In the case at hand, the Authority currently has doubts as to whether IN obtains profits - sufficient to generate a reasonable return on the investment - from its services to the RTBs and the DMOs.
- (93) The 2013 Budget letter states that if IN provides commercial services, it should act in line with the market conditions. This would imply, *inter alia*, requiring a reasonable profit margin. In the same line, according to the information provided to the Authority, in the framework of the partnership agreements with the RTBs and the DMOs, IN foresees obtaining a profit of between 5 and 7%. However, at the time being it is not clear to the Authority if IN is taking into account all relevant costs (including all the investment costs - not only operating costs - plus an appropriate share of the common costs) in calculating these margins. The Authority also has been given no information as to what is the average profit margin that a private operator would request for this type of investments. This is necessary for the purposes of determining whether a profit between 5 and 7% is enough.
- (94) The Authority therefore has doubts, at this stage of the investigation, as to whether it can be excluded that IN is benefiting from an advantage in the form of the general non-profit orientation of its commercial activities.

#### **1.1.4 Selectivity**

- (95) Only IN could benefit from the alleged advantages described above. Private operators competing with IN do not receive comparable possible advantages. Accordingly, the alleged advantages under assessment in this section of the Decision represent selective measures, as they only concern one particular undertaking.

#### **1.1.5 Distortion of competition and effect on trade between Contracting Parties**

- (96) According to the case-law of the Court of Justice, in order to assess whether a measure is liable to distort competition and liable to affect trade between the Contracting Parties to the EEA Agreement, a party in the position of the Authority “[i]s required, not to establish that such aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition”.<sup>53</sup> 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 liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.<sup>54</sup>
- (97) The Authority considers that IN’s shareholders should require it to generate a profit from its economic activities. Therefore, if the web infrastructure and related services were to be defined as economic activities, by not requiring a reasonable profit, IN would be obtaining certain advantages as compared to private operators active in the same market (such as the

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*conditions, it does this in contradiction to the market economy investor principle, and state aid is involved*”. See the reference to the Manufacturing Guidelines in footnote 47.

<sup>52</sup> Joined Cases C-83/01 P and C-94/01P *Chronopost SA v Commission* [2003] ECR I-6993.

<sup>53</sup> Case C-372/97 *Italy v Commission* [2004] ECR I-3679, para. 44.

<sup>54</sup> Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671, paras. 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, para. 94.

Complainant). The same can be said regarding the risk of cross-subsidisation, since IN could be funding its commercial activities with the funds intended for its non-economic activities.

- (98) The Authority also notes that the measures concerned, and the consequent advantage for IN, could create an obstacle for companies from the EEA wishing to offer their services in Norway and therefore trade between the Contracting Parties to the EEA Agreement is liable to be affected.<sup>55</sup>
- (99) Finally, the Authority underlines that the clients of the private operators competing with IN are private tourism entities as well as the RTBs and the DMOs. If the measures at issue in the present Decision allow IN to provide cheaper services to the RTBs and the DMOs and, as a consequence, they move to *visitnorway.com*, it seems to the Authority that an important part of the market could be excluded from fair competition. Accordingly the measures are liable to distort competition and affect trade.
- (100) The Authority therefore concludes at the current stage of the procedure that the measures at issue are liable to affect trade and distort competition between undertakings within the EEA.

## **1.2 Preliminary conclusion**

- (101) For the reasons set out above, and on the basis of the information available, the Authority has doubts as to whether it can be excluded that the measures at issue in the present section constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

## **1.3 Possible state aid in favour of the RTBs and the DMOs**

- (102) The existence of possible state aid in favour of the RTBs and the DMOs will depend on the conclusions reached by the Authority regarding the alleged state aid measures in favour of IN.
- (103) The Authority's assessment in this respect will depend on the conclusion which it reaches on the alleged foregoing of profits by IN (see paragraphs (91) to (94), above). If IN were to charge, for the services provided to its clients (exclusively the RTBs and the DMOs), a price sufficient to generate adequate profits, the existence of aid in favour of the RTBs and the DMOs would be excluded. On the contrary, if the prices are not sufficient to cover the costs, the Authority considers that, in this specific case, those companies might in turn be beneficiaries of state aid.
- (104) Taking into account that, at this stage of the procedure, the Authority has doubts as to whether the existence of a state aid measure by means of profit foregoing can be excluded, the Authority will therefore also assess, on a preliminary basis, the question of possible aid in favour of the RTBs and the DMOs.

### ***1.3.1 Presence of state resources and imputability***

- (105) It is established case-law that a measure is financed through state resources if it results in a burden on the budget of a public undertaking, provided that the measure is imputable to

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<sup>55</sup> Case T-301/02 *AEM v Commission* [2009] ECR II-01757, paras. 104 and 105.



the state.<sup>56</sup> The concept of state aid covers all the financial means by which the public authorities may actually support undertakings.<sup>57</sup>

- (106) On this basis, the Authority considers that offering services at prices lower than the price prevailing on the market, without recovering their total costs, implies a loss of revenue equivalent to a consumption of state resources. The Authority has doubts whether all costs (operating and investments costs) are taken into account while setting the final price for RTBs and DMOs.
- (107) Furthermore, the Authority takes the preliminary view that the measure is imputable to the Norwegian authorities.<sup>58</sup> The Authority notes that there is a close relationship between the State and IN. IN is normally used as an instrument to grant aid measures. Furthermore, IN is fully owned by public bodies, controlled by them and instructed by the Norwegian authorities.

### ***1.3.2 The measure contains an “advantage”***

- (108) It is established case-law that a state intervention favours an undertaking if it provides the undertaking with an economic advantage which it would not have obtained under normal market conditions.<sup>59</sup> This will be the case if the RTBs and the DMOs are being offered services below their real cost, without IN obtaining a sufficient return on its investment costs.
- (109) The fact that the RTBs and the DMOs are part of the national tourism structure (see paragraph (11), above) does not alter this conclusion. The Authority notes in particular that the shareholders of the RTBs and DMOs are not only public entities, but also private companies. Accordingly, it does not seem possible to qualify the measure as a mere cooperation amongst public entities.

### ***1.3.3 Selectivity***

- (110) According to the available information, IN only provides web infrastructure and related services to the RTBs and the DMOs (see paragraph (49), above). The Authority therefore takes the view that the measure is at least selective *de facto*.

### ***1.3.4 Distortion of competition and effect on trade between Contracting Parties***

- (111) It is established case-law that a measure distorts or threatens to distort competition in a way that affects trade between Contracting Parties if it strengthens the position of the recipient compared to other companies<sup>60</sup> and if the recipient is active in a sector in which trade between Contracting Parties takes place.<sup>61</sup>

<sup>56</sup> Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, para. 52.

<sup>57</sup> Case C-677/11 *Doux Elevage*, not yet published, para. 34, Case T-139/09 *France v Commission*, not yet published, para. 36.

<sup>58</sup> For listing of the relevant indicators of imputability, the Authority refers to Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, paras. 55-56.

<sup>59</sup> Case E- 17/10 and E-6/11 *Liechtenstein and VTM Fundmanagement v EFTA Surveillance Authority*, para. 50, and the case-law cited therein; Case C-301/87 *France v Commission* [1990] ECR I-307, para. 41; Case 30/59 *De Gezamenlijke Steenkolenmijnen v High Authority of the European Coal and Steel Community* [1961] ECR 50, para. 19; Case C-241/94 *France v Commission (Kimberly Clark)* [1996] ECR I-4551, para. 34; and Case T-109/01 *Fleuren Compost* [2004] ECR II-132, para. 53.

<sup>60</sup> Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR, 2671, para. 11.

<sup>61</sup> Case 102/87 *France v Commission (SEB)* [1988] ECR 4067; Case C-310/99 *Italian Republic v Commission* [2002] ECR I-289, para. 85; Case C-280/00 *Altmark Trans GmbH and*

- (112) According to the available information, the Authority considers, on a preliminary basis, that the RTBs and the DMOs are carrying out some economic activities, since they are marketing, booking and selling tourism products in competition with private companies from other parts of the EEA, *inter alia* tour-operators (see also paragraphs (14) and (15), above). As a consequence, if they are obtaining services at prices below the real value of the services, this will strengthen their position in the market to the detriment of their competitors (i.e. other destination and travel agencies).
- (113) The Authority takes the view that the fact that the RTBs and the DMOs are mainly regional or local operators is not decisive, and does not exclude the conclusion that the measure would be liable to affect trade between the contracting parties. According to settled case-law, intra-state trade is liable to be affected when undertakings established in a Contracting Party have less chance of providing their services in another Contracting Party (in the case at hand, in Norway).<sup>62</sup>

#### 1.4 Preliminary conclusion

- (114) Based on the foregoing, the Authority has doubts as to whether it can be excluded that the measure at stake constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

#### 2 Existing aid or new aid

- (115) The Norwegian authorities have submitted that in the event that the measures at issue in the present Decision were to be classified as state aid, they should be defined as existing aid. Following a preliminary analysis, and for the reasons set out below, the Authority considers at this stage of the procedure that if the measures at issue were to be classified as state aid, they would also be defined as new aid.
- (116) Article 1(b)(i) of Part II of Protocol 3 provides that “existing aid” is to 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*”.
- (117) In its judgment in Case E-14/10,<sup>63</sup> the EFTA Court stated that:
- “Whether the aid granted [...] constitutes existing aid” [...] depends upon the interpretation of the provisions of Protocol 3 SCA [...]*
- [...] 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”*
- (118) It follows that the definition of public measures as existing aid requires the existence of a previous aid scheme covering the activities of the public body under evaluation.
- (119) The Authority considers, at this point in time, that the measure at hand is not related to any of the schemes in force used by IN to grant state aid (see paragraph (9), above). The present Decision does not assess whether one of the schemes used by IN has been

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*Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* [2003] ECR I-7747, para. 77; and Case T-55/99, *Confederación Española de Transporte de Mercancías (CETM) v Commission* [2000] ECR II-3207, para. 86.

<sup>62</sup> Case T-301/02 *AEM v Commission*, [2009] ECR II-01757, para. 103.

<sup>63</sup> E-14/10 - *Konkurrenten.no AS v EFTA Surveillance Authority*, EFTA Ct. Rep [2011] p. 266.

modified in substance, as required by the case-law to identify a new aid.<sup>64</sup> Rather, the Authority takes the view that the case at hand relates to the entrance of IN on the market of web infrastructure and related services - which the Authority considers, at this stage of the procedure, to fall outside the mandate received by IN to promote business or to promote Norway as a tourism destination. The objective of this Decision is to assess IN's behaviour when it acts as an undertaking in the relevant market, if this qualification is confirmed during the formal procedure (see paragraphs (74) to (82), above).

- (120) The Authority understanding at this point in time is that the legal basis for IN's entrance into a new market, offering economic services, is the 2013 Budget letter. The 2013 Budget letter allows IN, for the first time,<sup>65</sup> to provide services in the tourism market in competition with private operators. Moreover, it allows IN to enter into economic activities, outside its general mandate to promote businesses in Norway, irrespective of whether this qualifies as a non-economic activity or a SGEI.
- (121) The Norwegian authorities have argued that IN's system of financing has not been substantially modified after the entrance into force of the EEA Agreement in the country. They take the view that if IN is obtaining state aid, the measure qualifies as existing aid.<sup>66</sup>
- (122) However, the Authority recalls that the financing system in force before 1994 relates to IN's core activities, and not to the provision of economic activities. In particular, the Act on IN establishes that: "*The company's resources may be used for: 1. Financing, hereunder subsidies, loans, guarantees and equity capital arrangements, 2. Advising and competence enhancing measures, 3. Network and infrastructure, and 4. Marketing of Norwegian industry abroad*". No reference is made to the possible financing of economic activities. The 2013 Budget letter departs from this system in stating that if IN provides services in competition with private operators it must apply market prices.
- (123) As a consequence, the Authority takes the preliminary view that if the alleged state aid measures (i.e. the absence of separate accounts between economic and non-economic activities and the forgoing of profit) are demonstrated, the measures should be defined as new state aid measures.
- (124) Concerning the alleged aid in favour of the RTBs and the DMOs, the Authority takes the preliminary view that if it is demonstrated during the formal state aid procedure that they

<sup>64</sup> It follows from Article 1(c) to the same Protocol that alterations to existing aid schemes constitute new aid. The case-law has also confirmed that measures to alter aid must be regarded as new aid. See Case 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paras. 17 and 18, and Case C-44/93 *Namur-Les Assurances du Crédit SA v Office Nationale du Ducroire* [1994] ECR I-3829, para. 13.

<sup>65</sup> The Authority notes that in White Paper no. 14 of 2003-2004 on the IN Act it is clearly stated that IN should "*not offer products in competition with the private market*" (In Norwegian: "*Ot. Prp. Nr. 14 (2003-2004) om Lov om Innovasjon Norge*"). Therefore, the Authority's current understanding is that, before 2013 and the adoption of the 2013 Budget letter, IN was not authorised to provide economic services in the tourism sector. In that regard, reference is made to Proposition No. 51 to the Norwegian Parliament, entitled "*measures for an innovative and business development*" (St.prp.no. 51 (2002-2003, in Norwegian: "*Virkemidler for et innovativt og nyskapende næringsliv*"), which states (in relation to the former entity NTC) that "*services paid by the user should, however, not be offered in areas where there is a well-developed offer from private consultants or where these services come into conflict with the priority areas of this new unit (i.e. IN)*". The original text reads: "*Brukerbetalte tjenester ikke bør tilbys på områder hvor det eksisterer et godt utviklet tilbud fra private aktører*". St.prp. no. 51 (2002-2003), p. 37, first column.

<sup>66</sup> The Norwegian authorities underline that "*[t]he system of financing IN and its predecessors has been more or less the same since the entry into force of the EEA Agreement in 1994. The changes made are not of a nature turning the existing financing system into new aid*". IN's letter dated 28 October 2013 (Event No 688213), p. 39.

are receiving services at a price below their real cost, the measure should likewise be considered to be new aid. The provision of these new services also finds its origin in the 2013 Budget letter - which, as described above, allows IN, for the first time, to provide services in competition with private operators, and to depart from the scope of its general task of businesses promotion.

- (125) Finally, at the time the measures at issue in the present Decision were put into effect, the market for web infrastructure and related services was open to competition. As a consequence, Article 1(b)(v) of Part II of Protocol 3 is not applicable.<sup>67</sup>
- (126) In conclusion, the Authority considers, on a preliminary basis, that in the event that the measures under the scope of this Decision are finally classified as aid, they should be classified as new aid.

### 3 Procedural requirements

- (127) Insofar as the measures at issue in the present Decision may constitute state aid within the meaning of Article 61 of the EEA Agreement, and that these measures constitute “new aid” within the meaning of Article 1(c) of Part II of Protocol 3, the Norwegian authorities should have notified the aid before putting it into effect, pursuant to Article 1(3) of Part I of Protocol 3.
- (128) It should be recalled that any new aid which is unlawfully implemented and which is finally not declared compatible with the functioning of the EEA Agreement is subject to recovery in accordance with Article 14 of Part II of Protocol 3.

### 4 Compatibility of the aid

- (129) In principle, state aid as defined by Article 61(1) of the EEA Agreement is prohibited. However, Article 61(3) of the EEA Agreement provides that certain types of aid can be declared compatible.
- (130) The Norwegian authorities have submitted that if the measures at issue in the present Decision were to be considered to be state aid, they would be compatible with Article 61(3)(c) of the EEA Agreement, as aid to promote tourism activities. However, at this point in time the Norwegian authorities have not provided sufficient evidence to support this statement.
- (131) Since at the present time there are no Guidelines on state aid to promote the tourism sector, the compatibility assessment will be carried out by way of direct reference to Article 61(3)(c) of the EEA Agreement.
- (132) In assessing whether an aid measure can be said to be compatible with the EEA Agreement, the Authority balances the positive impact of the aid measure in reaching an objective of common interest against its potentially negative side effects by distortion of trade and competition. The assessment is based on the following steps:

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<sup>67</sup> Article 1(b)(v) of Part II of Protocol 3 reads as follows: Existing aid shall mean: “[a]id which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation”.

- Is the aid measure aimed at a well-defined objective of common interest (e.g. growth, employment, cohesion, environment, etc.)?
- Is the aid well designed to deliver the objectives of common interest, i.e. does the proposed aid address the market failure or another objective?
  - Is state aid an appropriate instrument?
  - Is there an incentive effect, i.e. does the aid change the behaviour of the firms?
  - Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

- (133) The information provided by the Norwegian authorities to the Authority during its preliminary examination of the measures at issue does not enable the Authority to make a definitive assessment of this question. The Norwegian authorities are accordingly invited to provide additional information on this matter. The Authority recalls that according to established case-law the burden of proof of the compatibility of state aid measures rests on the State concerned, which must show that the conditions for the derogation from Article 61(1) of the EEA Agreement are satisfied.<sup>68</sup>
- (134) However, on a preliminary basis, the Authority notes that in order for the measure to be declared compatible a market failure regarding the web infrastructure and related services must be demonstrated. The mere fact that there are private operators providing these services suggests that there is no market failure and therefore no need for aid.
- (135) Furthermore, the balancing test for a measure of state aid, as described above, also requires the aid to be proportional and limited to the smallest possible amount. However, taking into account the nature of the measures, which cannot be described as transparent aid,<sup>69</sup> it will be difficult to calculate the intensity of aid granted.
- (136) The Authority finally recalls that, by analogy with settled case-law,<sup>70</sup> state aid incorporating conditions which contravene other provisions of the EEA Agreement cannot be approved as compatible. On this issue the Authority notes that if the tie-in clauses referred to in paragraph (41), above, exist and are imposed by IN, they might be contrary to Articles 53 or 54 of the EEA Agreement. In this event, the measures could not be declared compatible aid.
- (137) In conclusion, the Authority considers, at this stage of the procedure, that it cannot be excluded that the measure at issue in the present Decision may not comply with Article 61(3)(c) of the EEA Agreement, and may have to be considered to be incompatible aid.

<sup>68</sup> Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission* [2007] ECR II-2911, para. 34.

<sup>69</sup> Transparent aid is defined in Article 5.1 of Regulation 651/2014, General Block Exemption Regulation, of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1, incorporated as point 1j into Annex XV of the EEA Agreement by Decision No 152/2014 of 27 June 2014) as “aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid ex ante without any need to undertake a risk assessment”.

<sup>70</sup> Case C-225/91 *Matra v Commission* [1993] ECR I-3203, para. 41, and Case C-156/98 *Germany v Commission* [2000] I-6857, para. 78 and case-law cited.

## 5 Conclusion

- (138) Based on the information submitted by the Norwegian authorities, at this stage of the procedure the Authority cannot exclude the possibility that the measures at hand in this Decision constitute state aid within the meaning of Article 61(1) of the EEA Agreement.
- (139) The Authority currently takes the view that if those measures entail state aid, they would constitute “new aid”, which pursuant to Article 1(3) of Part I of Protocol 3 should have been notified to the Authority prior to its implementation.
- (140) The Authority has also doubts as to whether these measures comply with Article 61(3) of the EEA Agreement. The Authority, therefore, has doubts as to whether that the above measures are compatible with the functioning of the EEA Agreement.
- (141) Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open proceedings is without prejudice to the final Decision of the Authority, which may conclude that the measures in question do not constitute state aid, are to be classified as existing aid or are compatible with the functioning of the EEA Agreement.
- (142) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision.
- (143) In light of the foregoing considerations, the Authority requests the Norwegian authorities to provide within one month of receipt of this Decision all documents, information and data needed for the assessment of the nature and compatibility of the measure covered by this decision.
- (144) The Authority requests the Norwegian authorities to forward a copy of this Decision to the potential aid recipients of the aid immediately.
- (145) The Authority reminds the Norwegian authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted to the beneficiaries will have to be recovered, unless (exceptionally) this recovery would be contrary to a general principle of EEA law.

HAS ADOPTED THIS DECISION:

### *Article 1*

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the possible aid measures implemented by the Norwegian authorities.

The possible aid measures are:

- (i) the alleged foregoing of profit in favour of IN,
- (ii) the alleged lack of accounting separation among and a clear cost allocation methodology regarding IN’s economic and non economic activities and
- (iii) the alleged aid granted through IN to the RTBs and the DMOs in form of prices not sufficient to obtain a reasonable return on the investments.

The measures falling within the scope of this Decision relate to IN's activities in the market of web infrastructure and related services within the tourism sector.

*Article 2*

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure by 18 August 2014.

*Article 3*

The Norwegian authorities are requested to provide by 18 August 2014, all documents, information and data needed for the assessment of the compatibility of the aid measure.

*Article 4*

This Decision is addressed to the Kingdom of Norway.

*Article 5*

Only the English language version of this decision is authentic.

Decision made in Brussels, on 16 July 2014.

*For the EFTA Surveillance Authority*



Signed version!

Oda Helen Sletnes  
*President*

Helga Jónsdóttir  
*College Member*