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Ministry of Trade, Industries and Fisheries
PO BOX 8090 Dep
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Norway

Subject: Compensation for pension costs of non-profit organisations providing certain health and child welfare services

1 Summary

- (1) The EFTA Surveillance Authority (“the Authority”) wishes to inform Norway that, having assessed the notified planned measure in favour of non-profit organisations providing certain health and child welfare services (“NPOs”), it considers that the measure does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.¹ The Authority has based its decision on the following considerations.

2 Procedure

- (2) The Norwegian authorities notified the measure by letter of 11 December 2017.²

3 Description of the measure

3.1 Background

- (3) Since the 1960s NPOs have provided health and child welfare services in Norway through various agreements (such as verbal agreements or annual budget resolutions) with the Norwegian State. These services have, to a large extent, been integrated into the public healthcare and social welfare policies and in the national budgets. As a result, the wages and working conditions of the employees of NPOs and those of the public service providers have traditionally been the same. This also applied to pension schemes, meaning that NPOs were covered by a public sector occupational pension scheme, i.e. the municipal service pension scheme provider (“KLP”).³
- (4) During the last 10 to 15 years, as a result of administrative reforms within the health care and child welfare sectors, the relationship between NPOs and the Norwegian State has changed, given the introduction of competitive tendering in the provision of the services and the involvement of private commercial stakeholders. As a result, the contractor/supplier relationship is currently regulated through written agreements.
- (5) Despite the use of the competitive tendering for the provision of the services, certain NPOs remain fully integrated within the public sector and KLP.

¹ Reference is made to Article 4(2) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

² Documents Nos 887924 and 883229.

³ KLP stands for *Kommunal landspensjonskasse*.

- (6) KLP benefits include: retirement pension, contractual early retirement pension (“AFP”),⁴ disability pension and survivor’s pension to spouse and children. A full pension is earned after 30 years of service in a full-time position. Concerning, for example, the retirement pension, pensioners having worked full-time for 30 years will receive at least 66% of the pension basis, adjusted by the wage index increase, with a deduction of a factor of 0.75%.
- (7) The pension benefits from KLP are financed by an ordinary annual premium, an “adjustment premium” and a “special single premium” for benefits that cannot be determined in advance. The notified compensation scheme will apply to the latter two premiums, which finance costs related to previously accrued pension benefits for current employees, employees that have retired, but have not yet become pensioners, and for pensioners.
- (8) The adjustment premium relates to a payment covering the increase in the pension benefits as a result of an increase in future annual wage growth. Wage growth means that the value of previously earned pension rights increases. The single premium includes costs that accrue when the payment of the pension commences. This is the case when, at the time the pension payment commences, the scheme provides for higher pensions than what was taken into account in previously paid premiums. For example, the costs related to a contractual early pension cannot be calculated in advance, as those cost arise for the employers at the time the pensions are paid out.

3.2 Objective

- (9) Under the old regime (before 2000), adjustment costs of the pensions were mainly covered by the returns on the accumulated pension funds in KLP, through a concession agreement signed between the Norwegian State and KLP on 1 January 1974 to offer a public occupational pension scheme to private entities (i.e. the NPOs, as service providers) offering health services. Thus, there was no need for NPOs to pay a separate premium to cover the adjustment costs of the pensions, as they were already covered by the scheme through an agreement with the State.
- (10) However, after 2000, adjustment costs increased considerably alongside a drop in the interest rates in the financial markets, and a need for separating the payment covering the adjustment costs arose. The consequence of this separation meant that NPOs have since then been responsible for covering the adjustment premiums related to their employees.
- (11) With the introduction of competitive tendering in 2010 and the new principles for calculating the premiums for KLP, NPOs encountered high and unpredictable costs and are placed at a disadvantage, as their costs can increase in the future, considering the wage increases and/or any other regulatory changes in the scheme that are unknown during the period the pension benefits are accrued.
- (12) The objective of the proposed measure is to compensate NPOs for the future pension costs under KLP that have already been accrued, but are not yet due and which are related to services before 2010. These are services the Norwegian State would otherwise need to perform itself, as part of its statutory duty, to ensure that all citizens have access to health care and social services.
- (13) As from 2010, and the introduction of competitive tendering, the pension costs are not being compensated by the State. All the agreements signed with NPOs from 2010 onwards include a clause whereby the price paid for the service is intended to include pension

⁴ AFP stands for *avtalefestet pensjon*.

costs. Therefore, the State compensation for future pension costs that are not yet due covers the period from 1 January 1974 until the end of 2009.

- (14) Compensation will not be granted for pension costs related to services provided to municipalities or services carried out by private commercial operators that do not have an agreement with the Norwegian State and which are financed by user fees.

3.3 National legal basis

- (15) At present, there is no legal basis for the compensation of pension costs, as the Norwegian State plans for a bill of law to be presented to the Parliament in early April 2018.⁵ The planned measure is based on a consultation paper prepared by the Ministry of Health and Care Services in cooperation with the Ministry of Children and Equality. This consultation paper was made public in October 2012.⁶

3.4 Granting authority

- (16) The granting authority for the compensation of pension costs is the Ministry of Health and Care Services.

3.5 Form of compensation and scheme administration

- (17) The Norwegian authorities have submitted that the compensation will take the form of grants paid to KLP, however, directly benefiting NPOs.⁷
- (18) In this context, KLP will be the scheme administrator responsible to provide all data relevant for the introduction of the scheme and the setting of the compensation level benefitting each beneficiary NPO.
- (19) KLP will also be responsible for sending the invoices for the relevant part of the pension costs to the Norwegian State, whereas any invoices for pension costs that are not covered by the scheme will be sent to the NPOs.
- (20) The invoicing is based on the information provided by NPOs (self-declarations) when they apply for their pensions costs to be compensated. This information relates to the services that NPOs provide to the Norwegian State and its correctness is controlled by the relevant national authorities. Sanctions are also proposed to be imposed in case of false or misleading information that has an impact on the compensation paid.

⁵ The Ministry of Health and Care services plans, in addition, to adopt detailed regulations providing for the criteria to select the beneficiaries, the parameters for calculation of the compensation, the procedural rules related to the scheme application, etc.

⁶ <https://www.regjeringen.no/no/dokumenter/horing-av-forslag-til-lov-og-forskrift-om-tilskudd-til-virksomheter-med-offentlig-tjenestepensjonsordning-som-leverer-lovpalagte-spesialisthelsetjenester-og-statlige-barneverntjenester-oppfolging-av-nou/id2575349>

⁷ Another solution proposed by an Expert Committee that on 15 August 2015 presented the Norwegian Official Report (Green Paper) NOU 2016: 12 “*Ideell opprydding*”, evaluating the basis for a possible State compensation for pension costs related to prior services, incurred by NPOs, is the following: the compensation shall take place by transferring all the accrued pension benefits from KLP to the centralized pension provider, the Norwegian Service Pension Fund (“SPK” – *Statens pensjonskasse*), where pension costs related to prior service are covered at the same time as the pensions are paid out. Other solutions include: a yearly allocation from the national budget to KLP; a yearly allocation from a fund to KLP; or, a one-time sum comprising all future costs and paid out to KLP or directly to the NPOs. The Norwegian Government has not yet decided which solution will govern the scheme.

- (21) In the application for compensation, NPOs must provide a self-declaration, regarding the proportion of activities, which in the past, until 1 January 2010, were considered as economic activities.
- (22) If, at the time of granting the compensation, NPOs carry out both economic and non-economic activities, the granting is conditioned upon them keeping separate accounts and ensuring that the economic part is not cross-subsidized. However, if NPOs have carried out some economic activities in the past, no account separation is needed, if at the time of granting the compensation, NPOs no longer carry on any economic activities. In any case, the Norwegian authorities do not intend to cover pension costs related to past economic activities.

3.6 Beneficiaries

- (23) The compensation scheme provides, as explained above, that KLP will be receiving the compensation for the pension costs of NPOs directly from the Norwegian State.
- (24) The ultimate beneficiaries of the measure will be NPOs providing certain specialised health services or child welfare services to the State.⁸ The specialised health services include hospital services, rehabilitation services, alcohol and substance abuse treatment services and compulsory psychiatric health care (the relevant sectors are NACE level 86.10 - Hospital activities, and 86.22 - Specialist medical practice activities). The child welfare services include child welfare institutions and centres for parents and children (the relevant sector at NACE level is 87.90 - Other residential care activities).
- (25) The total number of beneficiaries under the scheme is estimated to be approximately one hundred entities.

3.7 Budget and duration

- (26) The costs of the measure is estimated to amount to approximately NOK 27 million in 2018, of which NOK 12 million concerns the set-up of the public administration and the purchase of services. The total costs are estimated to amount to approximately NOK 1.1 billion.
- (27) The scheme will be structured as a yearly coverage of costs which are due. The total duration of the measure equals the duration of these costs, which is approximately 100 years.

4 Presence of State aid

- (28) 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.”

- (29) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking;

⁸ It is expected that a few commercial private providers will probably also benefit from the compensation scheme.

(iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.

4.1 Do NPOs carry out economic activities?

- (30) In the present case, the Norwegian authorities argue that NPOs are not undertakings within the meaning of Article 61(1) of the EEA Agreement, as the services they provide, for which they receive compensation of their pension costs, do not constitute economic activities.
- (31) In accordance with Article 61(1) of the EEA Agreement, the state aid rules apply to ‘undertakings’. Undertakings are entities engaged in economic activities, regardless of their legal status, the way in which they are financed or whether they make profit or not.⁹ Any activity consisting in offering goods and/or services on a given market is an economic activity.¹⁰
- (32) However, Article 61(1) of the EEA Agreement does not apply where entities exercise public prerogatives or provide non-economic services of social general interest (SSGI) on the basis of the principle of national solidarity. It is essential therefore to examine how such services are organised, financed or structured within a particular national regime.¹¹
- (33) According to the EFTA Court’s jurisprudence, the specific circumstances under which an activity is performed must be taken into account, in order to assess, in this particular case, whether NPOs are providing economic services or whether they are fulfilling their duties towards the general public.¹²
- (34) In the present case, the ultimate beneficiaries of the scheme are NPOs, providing certain specialised health services or child welfare services to the State (see paragraph (24) above).¹³
- (35) As regards NPOs providing certain specialised health services, in Norway all the services in question constitute an integral part of the national health system that is directly funded by the social security contributions and other state resources. The services are provided either entirely free of charge to the patient or the patient may be required to pay just a marginal fee, which only covers a small fraction of the true costs of the services. For example, there are no fees charged to the patient for specialist in-patient treatment in hospitals, psychiatric institutions or institutions providing drug treatment programmes. Specialized privately owned somatic rehabilitation services offering in-patient treatment may charge patients a maximum of NOK 138 per day, capped at NOK 1 990 per year per patient. The fee for specialist outpatient treatment and radiology examination is NOK 345 per day and NOK 245 per day respectively. These fees are subject to a cap of NOK 2 205 per year per patient. NPOs offer these services to the population on behalf of the State and

⁹ Judgment in *Pavlov and Others*, C-180/98, EU:C:2000:428, paragraph 74. Judgment in *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 27 and 28.

¹⁰ Judgment in *Commission v Italy*, 118/85, EU:C:1987:283, paragraph 7.

¹¹ Judgment in *FENIN*, T-319/99, EU:C:2003:50, paragraph 39. See also judgment in *Cisal and INAIL*, C-218/00, EU:C:2002:36, paragraph 40 and judgment in *Poucet and Pistre*, C-159/91 and C-160/91, EU:C:1993:63, paragraph 14.

¹² Case E-5/07 *Private Barnehagers Landsforbund v ESA* [2008] EFTA Ct. Rep. 62, paragraphs 80 to 82.

¹³ It is expected that a few commercial private providers will probably also benefit from the compensation scheme. However, commercial private providers also do not constitute undertakings for these purposes in as far as they provide the services concerned, which are not economic in nature (see in this context, judgment in *Aéroports de Paris v Commission*, T-128/98, EU:T:2000:290, paragraph 108; Case E-5/07 *Private Barnehagers Landsforbund v ESA* [2008] EFTA Ct. Rep. 62, paragraphs 80 to 82).

they contribute to fulfilling the State's statutory obligations to provide such services of general interest. The services are therefore based exclusively on the principles of national solidarity and universal coverage and they are not economic in nature.

- (36) The same applies to NPOs providing child welfare services to the State. These are services provided free of charge ultimately by the State and form an integral part of the national health system. Moreover, pursuant to the Norwegian rules governing child welfare institutions, these institutions have coercive powers, which means that any child residing in the institution may be subject to coercive treatment under certain conditions laid down in the law. In light of the sensitive nature of the services provided by the child welfare institutions and the powers entrusted to them, they are subject to strict rules and supervision by the Norwegian State. Therefore, these services are also based exclusively on the principles of national solidarity and universal coverage and they are not of economic nature.
- (37) Finally, the fact that the services of NPOs are open to competition does not mean that the EEA rules on State aid come into play. According to the Court of Justice, the introduction of competition between service providers as a management tool designed to keep costs under control does not imply that the EU competition rules will be applicable.¹⁴

4.2 Aid assessment at the level of KLP

- (38) KLP, as a life insurance company, provides pension finance and insurance services to municipalities, counties and companies in both the public and private sectors. KLP therefore carries out economic activities and can be considered an undertaking within the meaning of Article 61(1) of the EEA Agreement.
- (39) However, in a structure where, as above explained, the health services provided by NPOs are covered by the principle of national solidarity, the pension and other services offered by KLP to the employees of NPOs are also governed by the same principle.
- (40) The Authority notes that the pension benefits that are laid down in the agreements with the Norwegian State are governed by the same rules that apply to pension benefits provided to state employees, i.e. the Act on the Norwegian Public Service Pension Fund.¹⁵ The NPOs cannot deviate from those rules, and neither can KLP. In addition, the amount of benefits paid is not necessarily proportionate to the insured person's earnings. Salaries that exceed NOK 1.1 million or overtime pay would not result in a higher pension, for example. It is also clear from the information provided that KLP and the municipal service pension scheme are supervised by the State. The rules determining the amount of contributions paid to KLP are set out in a law¹⁶ and KLP is supervised by the Financial Supervisory Authority of Norway.

¹⁴ Judgment in *AOK Bundesverband*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 56 and Case E-5/07 *Private Barnehagers Landsforbund v ESA* [2008] EFTA Ct. Rep. 62, paragraph 80. See also the Authority's preliminary view in its letter to the Norwegian authorities of 14.9.2015 concerning the compensation of pension costs of certain Norwegian child welfare institutions, available at: <http://www.eftasurv.int/media/uncategorized/Compensation-of-pension-costs-of-certain-Norwegian-child-welfare-institutions.pdf>.

¹⁵ Act of 28.7.1949 No 26.

¹⁶ *Lov om forsikringsvirksomhet* (Insurance Act) of 10.10.2005 No 44.

- (41) In view of the above, the Authority considers that KLP, by providing its pension services to the benefit of employees of NPOs, which have not engaged in economic activities, is not carrying out an economic activity.¹⁷
- (42) In addition, the Authority notes that the Norwegian State has, for administrative purposes, decided to cover NPOs' pension costs by providing the compensation grants directly to KLP, following the procedure explained above, instead of paying each NPO separately. This payment refers to pension contributions whose level, as mentioned above, is regulated by law. Therefore, it does not confer any economic advantage to KLP.
- (43) The Authority thus concludes that KLP does not receive State aid within the meaning of Article 61(1) of the EEA Agreement.

4.3 Conclusion concerning Article 61(1) of the EEA Agreement

- (44) The Authority concludes that NPOs providing certain health or child welfare services and KLP offering pension services to NPOs do not carry out economic activities and they are thus not considered 'undertakings' within the meaning of Article 61(1) of the EEA Agreement.

5 Final Conclusion

- (45) On the basis of the foregoing assessment, the Authority considers that the notified measure does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

For the EFTA Surveillance Authority, acting under Delegation Decision No 068/17/COL,

Yours faithfully,

Bente Angell-Hansen
President
Responsible College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.

¹⁷ See judgment in *Cisal and INAIL*, C-218/00, EU:C:2002:36, paragraphs 38 to 44.