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EFTA SURVEILLANCE AUTHORITY DECISION
OF 16 JULY 2003
REGARDING REORGANISATION AND TRANSFER OF PUBLIC FUNDS TO
THE WORK RESEARCH INSTITUTE

(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice², in particular to Article 24 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Authority's Guidelines³ on the application and interpretation of Article 61 and 62 of the EEA Agreement,

WHEREAS:

I. FACTS

1. The notification

By letter of 13 May 2002 from the Mission of Norway to the European Union, received and registered by the Authority on 14 May 2002 (Doc. No. 02-4019-A), the Norwegian authorities notified, pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, amendments to the existing aid scheme entitled: "Reorganisation and transfer of public funds to the Work Research Institute (WRI)" ("*Omorganisering av og basisbevilging til Arbeidsforskningsinstituttet (AFI)*").

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

³ Procedural and Substantive Rules in the Field of State Aid (State Aid Guidelines), adopted and issued by the EFTA Surveillance Authority on 19 January 1994. Published in Official Journal L 231, 03.09.1994. The Guidelines were last amended 18 December 2002 (not yet published).

By letter from the Mission of Norway to the European Union of 13 June 2002, received and registered by the Authority on 14 June 2002 (Doc. No. 02-4628-A), the Norwegian authorities informed the Authority that the Norwegian Parliament had approved the aid scheme.

By letter of 1 July 2002 (Doc. No. 02-4878-D), the EFTA Surveillance Authority acknowledged receipt of the notification and asked the Norwegian authorities for additional information and clarification.

The Norwegian Government responded by letter of 29 July 2002, received and registered by the Authority on 1 August 2002 (Doc. No. 02-5796-A).

By letter of 27 September 2002 (Doc. No. 02-6589-D), the Authority asked the Norwegian Government to submit additional information, *i.a.* about the core funding, the equity capital injection and the additional grant for the reimbursement of establishment expenses.

By telefax dated 25 October 2002 from the Ministry of Trade and Industry, received and registered by the Authority on 25 October 2002 (Doc. No. 02-7724-A), the Norwegian Government requested that the Authority accept an extension of the time limit for submitting the additional information. The Authority accepted this by letter of 29 October 2002 (Doc. No. 02-7774-D).

The Norwegian Government responded by letter from the Mission of Norway to the European Union dated 21 November 2002, received and registered by the Authority on 22 November 2002 (Doc. No. 02-8434-A).

By letter dated 24 January 2003 (Doc. No. 03-470-D), the Authority requested additional clarification from the Norwegian authorities.

By letter dated 24 February 2003 from the Mission of Norway to the European Union, received and registered by the Authority on 25 February 2003 (Doc. No. 03-1139-A), the Norwegian Government responded to the Authority's inquiry.

By letter of 9 April 2003 (Doc. No. 02-2048-D), the Authority acknowledged receipt of the letter, and asked the Norwegian authorities to submit additional information.

The Norwegian Government responded by letter dated 12 May 2003, received and registered by the Authority on 12 May 2003 (Doc. No. 03-3041-A).

By letter dated 2 June 2003 (Doc. No. 03-3086-D), the Authority acknowledged receipt of the letter and informed the Norwegian Government that it considered the notification to be complete.

2. The contents of the proposed aid measures

2.1 Background and legal basis

The Work Research Institute (WRI) was established in 1965 as a central administrative agency under the Ministry of Labour and Government Administration. The Norwegian Government proposed to the Parliament that the WRI be reorganised,

with effect from 1 July 2002, as a state owned limited liability company, incorporated pursuant to the Norwegian Limited Liability Company Act of 13 June 1997 No. 44 (“*Aksjeloven*”). The reorganisation was approved by the Parliament and came into force as from 1 July 2002.

The aid scheme “Reorganisation and transfer of public funds to the Work Research Institute (WRI)” (“*Omorganisering av og basisbevilging til Arbeidsforskningsinstituttet (AFI)*”) is a modification of an existing scheme for aid to the WRI which was not previously notified. The alteration implies a reorganisation from a public body being a part of the State administration to a state owned limited liability company. All the shares are held by the Norwegian State, represented by the Ministry of Labour and Government Administration. However, it is the expressed intention of the Government that the state ownership should be an interim arrangement and that the aim should be to sell the shareholding, fully or partly, to one or more owners who will be able to ensure a long-term, strategic and professional ownership with the focus on Research and Development (R&D). As with the existing aid scheme, the scheme will continue to support the institute’s fundamental research, which is a non-commercial activity. The modification will, however, imply an initial decrease of the annual net aid granted to the WRI, as well as a decrease and rearrangement of the aid to be implemented successively over the first five-year period.

In addition to the non-profit activities, the WRI also carries out, on a commercial basis, shorter-term industrial research projects commissioned by organisations, companies, government agencies and other public bodies.

The Ministry of Labour and Government Administration, represented by the Research Council of Norway (RCN), will administer the scheme. As from 1 January 2003, the core funding is transferred to the WRI through the RCN.

The legal basis for the scheme is a Resolution by the Parliament, pursuant to a proposal by the Government, St. prp. nr. 57 (2001-2002). The scheme will be administered in accordance with the Research Council’s general guidelines and terms of contract for financing contributions to research establishments in Norway and the Government Guidelines for public funding of research institutes.

The aid is partly granted by annual financial contributions allocated through the fiscal budget. This core funding is allocated to the non-profit part of the institute only and will not favour the commercial part of the WRI. The budget for 2002 was NOK 11 million (approximately EUR 1.3 million), including direct contributions of NOK 8.9 million (approximately EUR 1.1 million) and an additional approximately NOK 2 million (approximately EUR 244.000) as indirect contributions (pensions, insurance, audit etc.).

In addition to the annual aid, the WRI is granted a total of NOK 4 million (approximately EUR 488.000) for reimbursement of establishment expenses. This grant is to be distributed in two equal portions over the first two-year period. To ensure that the allocated restructuring means are used for reimbursement of establishment expenses only, the Ministry of Labour and Government Administration has presented the following conditions in its letter of financial award for 2002 to the institute:

“The additional grant of NOK 2 million shall only be used to cover establishment expenses related to the reorganisation of the institute from a central administrative agency to a state owned private limited liability company. The Ministry requires that the institute presents a detailed list of the expenses in the yearly report for 2002”.

If the establishment expenses are shown to be less than NOK 4 million (total for 2002 and 2003), the Ministry will either demand repayment or inject the remaining amount as additional core funding.

Finally, an additional NOK 4 million (approximately EUR 488.000) is granted as equity capital injection upon the incorporation of the company. Taking into consideration the non-profit, public benefit research objectives of the company, the equity capital will be contributed without requirements as regards rate of return on the capital concerning the non-profit part of the institute. The Norwegian Government will, however, demand a profit margin on the part related to that side of the institute that carries out commercial activities. To make this clear, the Norwegian Government has confirmed that they will add the following sentence to Article 4 of the WRI's articles of association:

“The company shall earn a normal rate of return on invested capital on its commercial activities.”

The amendment will be made retroactively as from the date of the reorganisation of the institute. Profits earned shall be allocated for the realisation of the company's non-profit purposes and thus not be paid out as dividends to the shareholder.

The aid scheme is not limited in time.

2.2 Objectives of the core-funding scheme

The overall objective of the core-funding scheme is to ensure the professional quality of research and to meet demands for research and long-term upgrading of scientific expertise in specific areas.

Pursuant to its objective, the non-commercial part of the WRI shall “contribute to the development of forms of organisations and leadership which promote the collective ability to learn, cooperate and adapt, as well as promote employee participation and a better working environment”. The WRI performs fundamental research on a multidisciplinary and action-oriented basis for the purposes of restructuring and bringing innovation to trade and industry, as well as promoting employee participation, by producing systematic information concerning management, organisation and working environment. The fundamental research projects are formed in collaboration with Norwegian industry as well as with other national and international research institutions, and the result of such research projects are made publicly available, *inter alia*, through the WRI review series, project reports, articles, lectures and seminars.

2.3 Eligible R&D activities

According to the notification, the stages of R&D benefiting from the core-funding scheme are the definition phase of feasibility studies, fundamental research and publication and dissemination.

According to the Research Council of Norway's Guidelines, eligible costs are:

- The institute's own initiated research within its core activities;
- Development of research relations and professional expertise;
- Quality assurance with respect to research results;
- Communication and dissemination of self-initiated research and results thereof;
- Development of new scientific expertise within the core activities of the institute, *inter alia* through counselling and doctorate educational programmes.

The scheme does not address any specific international aspects.

The WRI will own the results of fundamental research and will be free to use the knowledge in other non-commercial research activities. The main idea of the aid scheme is that the fundamental research projects are central to WRI's strategy and the institute is expected to use the results in its future non-commercial R&D activities. Communication and dissemination of the fundamental research and results thereof are ensured by the objectives of the grant.

The application of the Research Council's guidelines and terms of contract implies that the scheme for financial funding of the WRI will be subject to established control mechanisms.

The core funding is granted upon annual application, for a period of one calendar year and subject to the Research Council terms. The application is submitted for the review of the Research Council, together with the institute's annual report on the results and progress of ongoing research activities, as well as management and allocation of resources the foregoing calendar year. The WRI is also required to submit an annual report on standardised key figures for the purpose of control of research results.

During the aid period the institute's accounts and financial statements are submitted, on a consecutive basis, to the Research Council for audit review, and are also subject to frequent audit surveys, for the purpose of controlling the institute's allocation of resources. The management and use of resources is furthermore subject to review and informal discussions throughout the year in meetings between the Research Council and the WRI, giving the Research Council extensive knowledge with respect to the institute's research activities and the allocation of funds received. In addition, the Office of the Auditor General of Norway audits the Research Council's funding to research institutes.

The scheme does not include any specific repayment or penalty arrangements. General provisions on repayment in Section 3 of the Norwegian Act on Public Aid will apply. According to this act, aid granted before the Authority approves the aid

scheme, or Aid found to be incompatible by the Authority, may be reclaimed from the recipient.

The Research Council is furthermore entitled to cancel the contract with the WRI:

- in the event a person or undertaking outside the EEA takes over control of the aid beneficiary, either through a transfer of share capital, by acquiring the majority vote, by agreement or by other means;
- in the event the aid beneficiary is unwilling or unable to complete the project;
- in the event the aid beneficiary is engaged in activities that are not compatible with current legislation or with the Research Council's objects and guidelines.

In the event of cancellation, the Research Council has the right to claim reimbursement for disbursed allocations, provided that the cancellation is not due to a serious breach of contract on the part of the Research Council.

The fundamental research projects are to a wide extent established in collaboration with representatives of Norwegian industry in general, as well as with national and international research institutions. Apart from general control and report measures, the aid scheme does not provide specific mechanisms or terms for cooperation with other business or research entities.

2.4 Cross-subsidisation

The WRI performs both non-commercial and commercial research. When operating in the market, the WRI will contribute to a research project the way a commercial firm would do. In this respect, no cross-subsidisation between the non-profit activities and the market-exposed activities of the WRI shall take place. This is laid down in the Research Council's Guidelines.

To ensure that no cross-subsidisation takes place, the WRI has implemented a standard accounting system called Instidata. In addition to a general ledger, the accounting system also includes a project module used by the WRI. The different projects are defined by the WRI, and can be grouped by financing source as follows:

- Projects financed by core grants;
- Projects financed by strategic institute programmes;
- Projects financed by other external grants (i.e. RCN, EU, Nordic Council of Ministers);
- Projects carried out on commissioned basis ("commercial activities");
- Projects financed by profit from prior years.

For each project the WRI will prepare project accounts. Man-hours spent on each project will be allocated to the project, based on the time-reports filled in by the researchers. Each hour is given a price in the system. The WRI can use different price tables. One is called "standard" prices, which is the price that should normally be used for a project. In addition the WRI can use so-called "special" prices, defined for a specific project. It is also possible to change prices manually for a project, but the price cannot be lower than the "standard" price. The price for each researcher differs based on four different levels of knowledge and experience. The price shall cover all

expenses incurred by the WRI. In addition to payroll and payroll related expenses for the researchers, the price should cover rent, expenses related to administrative functions like accounting, information, library and Board of Directors fees. In addition, depreciation for use of equipment is included in the calculated price per hour. For commercial projects, a profit margin is also included. Payroll is allocated to each group of personnel based on salary level for each group, while the remaining expenses are allocated as a fixed amount per hour. The WRI has to estimate the number of chargeable hours each year and calculate a rate per hour based on budgeted expenses. The calculated rate will be the standard price for the WRI.

Expenses directly related to a project are also included in the project accounts. These expenses will be invoiced to the customer.

The objective of the aid scheme will be to provide a further incentive for the WRI, subsequent to the reorganisation, to continue to pursue and engage in innovative research projects, irrespective of whether such projects are realised on a strict commercial basis or not.

2.5 Tax position

The WRI's main purpose is to contribute to society by performing research activities relating to working environment and health issues. According to a preliminary statement from the local tax authorities, the institute is considered to be a non-profit establishment. According to the Norwegian General Tax Act, such establishments are not subject to general taxation. However, if the institute has income or property deriving from economic activities carried out by the institute, the income and property will be subject to taxation.

The core funding will be subject to income tax on part of the WRI. However, the research expenditure is tax deductible and the aggregated tax-effect of the core funding grant will thus be none.

2.6 Aid beneficiaries

The aid scheme is an individual scheme for the Work Research Institute.

II. APPRECIATION

1. Notification formalities

Article 61(1) of the EEA Agreement reads:

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

Furthermore, it is stated in Article 1(3) of Protocol 3 to the Surveillance and Court Agreement that:

“The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

The Norwegian authorities notified the Authority of the plans to alter the existing aid by letter dated 13 May 2002 (Doc. No. 02-4019-A), as required by Article 1(3) of Protocol 3 to the Surveillance and Court Agreement. However, the reorganisation of WRI was put into effect on 1 July 2002, *i.e.* before the Authority took a final decision to approve the modification. By subsequent letters, the Norwegian authorities amended the plans with retroactive effect from 1 July 2002 in order to facilitate a positive decision by the Authority.

The Authority is obliged to assess whether the notified measures imply state aid in the meaning of Article 61(1) of the EEA Agreement, and, if so, whether any of the derogations in Article 61(2) or (3) are applicable in order to exempt the aid measures from the general prohibition in Article 61(1) of the EEA Agreement.

2. Application of the relevant State aid rules

2.1 The core funding

As the beneficiary is a research institute carrying out R&D activities, Chapter 14, Aid for Research and Development, of the Authority’s State Aid Guidelines, is the appropriate provision for assessing the new scheme.

In Chapter 14.2.2 (1) of the State Aid Guidelines it is stated: *“Public financing of R&D activities by public non-profit-making higher-education or research establishments is normally not covered by Article 61(1) of the EEA Agreement”*.

Furthermore, in Chapter 14.2.2 (2) and (3) of the State Aid Guidelines it is stated:

“(2) Where the results of publicly financed R&D projects carried out by such establishments are made available to European industry on a non-discriminatory basis, the EFTA Surveillance Authority will assume that State aid within the meaning of Article 61(1) of the EEA Agreement is not normally involved.

(3) Where R&D is carried out by public non-profit-making, higher-education or research establishments on behalf of or in collaboration with industry, the EFTA Surveillance Authority will assume that State aid within the meaning of Article 61(1) of the EEA Agreement is not involved either:

(a) where the public non-profit-making higher-education or research establishments contribute to research projects as a commercial firm would, e.g. in return for payment at the market rate for the services they provide;

(b) or

- *where the industrial participants in the research bear the full cost of the project, or*
- *where the results which do not give rise to intellectual property rights may be widely disseminated and any intellectual property rights to the R&D results are fully allocated to the public non-profit-making establishments, or*
- *where the public non-profit-making establishments receive from the industrial participants compensation equivalent to the market price for the intellectual property rights which result from the research project and which are held by those industrial participants, and where the results which do not give rise to intellectual property rights may be widely disseminated to interested third parties.”*

The WRI is partly a non-profit making research establishment that carries out fundamental research in collaboration with industry as well as with other national and international research institutions. The intellectual property rights to the results, which originate from the fundamental research, are held by the WRI. The results from the research are made publicly available *i.a.* through the WRI review series, project reports, articles, lectures and seminars.

Based on this, the Authority concludes that the non-profit part of the WRI meets the conditions of the provisions of Chapter 14 of the Authority’s State Aid Guidelines cited above and that no State aid is involved as regards the core funding part of the aid scheme “Reorganisation and transfer of public funds to the Work Research Institute”.

A distinction between the non-profit part of the WRI and its market activities requires, however, that the institute has a cost-accounting system that ensures that the commercial activities are not financed through State resources allocated to the non-profit making activities.

Based on the information received from the Norwegian Government (see point I 2.4 above), the WRI has implemented an accounting system to ensure that the commercial activities will not receive any aid from the non-commercial part. Each project carried out by the WRI has its own project account, and man-hours spent on each project will be allocated to a project. Each hour spent is given a price in the system.

The Authority finds that the measures taken ensure that there will be no cross-subsidisation from the non-commercial part to the commercial part of WRI.

2.2 Additional grant for reimbursement of establishment expenses

The additional grant of NOK 4 million (approximately EUR 488.000) for reimbursement of establishment expenses will cover the institute as such, and therefore also entails an advantage for the commercial part of the Work Research Institute. Thus, the Authority has to assess whether this grant involves state aid in the meaning of Article 61(1) of the EEA Agreement.

In assessing whether State aid is involved in financial transactions between an EFTA State and a public enterprise, the Authority applies the so-called Market economy investor principle, which is established in Chapters 19 and 20 of the Authority’s State Aid Guidelines. This principle intends to ensure that public and private enterprises in similar sectors and in comparable economic and financial situations are treated

equally with respect to financial allocations and different forms of public intervention. If public funds to public enterprises are provided on terms more favourable than a private owner would provide them to a private enterprise in a comparable financial and competitive position, then the public enterprise would be receiving an advantage from their proprietors not available to private enterprises. Unless a more favourable provision of funds is treated as aid, and evaluated with respect to the derogations of the EEA Agreement, then the principle of neutrality of treatment between public and private enterprises is infringed⁴.

The Authority applies, in accordance with paragraph 20.3 (2) of the State Aid Guidelines, the Market economy investor principle “*as a benchmark to determine both whether aid is involved and if so, to quantify it*”.

The Authority accepts that a rational market economy investor guided by prospects of profitability in the longer term might set aside sums of money to protect the value of his investments without this constituting state aid in the meaning of Article 61(1) of the EEA Agreement.

The Norwegian Government has laid down rules for the use of the restructuring means to ensure that they will only be used to cover establishment expenses related to the reorganisation of the institute from a central administrative agency to a state owned limited liability company (see point I.2.1 above). The Authority finds that the Norwegian authorities have taken the necessary measures to ensure that the grant for reimbursement of establishment expenses is only used for this purpose. The establishment expenses are in the Authority’s view not funded on more favourable terms than a private investor would have accorded. The additional grant for reimbursement of establishment expenses is therefore considered not to involve state aid in the meaning of Article 61(1) of the EEA Agreement.

2.3 Equity capital

As for the additional grant for reimbursement of establishment expenses, the equity capital injection of NOK 4 million (approximately EUR 488.000) is granted to the institute as such, and therefore also covers the commercial part of the WRI. Thus, the Authority has to assess whether the grant of equity capital is to be considered to involve State aid in the meaning of Article 61(1) of the EEA Agreement.

The Market economy investor principle is applied as a benchmark to determine whether aid is involved. In Chapter 19(6)(b), Public authorities holdings, of the Authority’s State Aid Guidelines, it is stated *i.a.* that: “*Nor is State aid involved where fresh capital is contributed in circumstances that would be acceptable to a private investor operating under normal market economy conditions. This can be taken to apply: where a new company is set up with the public authorities holding the entire capital or a majority or minority interest, provided the authorities apply the same criteria as a provider of capital under normal market economy conditions*”.

By letter dated 12 May 2003, the Norwegian authorities confirmed that the institute’s articles of association will be amended by including the following sentence: “*The company shall earn a normal rate of return on invested capital on its commercial*

⁴ Ref. Article 125 of the EEA Agreement.

activities”. The amendment will be made with retroactive effect from the date of reorganisation of the institute.

As described above in point I 2.1 (and assessed in point II 2.1 above), has the Norwegian authorities taken measures to ensure that there will be no cross-subsidisation from the non-commercial part to the commercial part of WRI.

Profits earned shall be allocated for the realisation of the company’s non-profit purposes (see point I 2.1. above). The commercial part of the company will thus also not benefit from any retained earnings.

Against this background, the Authority finds that the grant of equity capital is not given on terms more favourable than a private investor would have accorded in a similar situation. Therefore, the grant does not imply State aid in the meaning of Article 61(1) of the EEA Agreement.

3. Conclusion

The reorganisation and the transfer of public funds to the Work Research Institute aid scheme does not constitute State aid in the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

1. The Authority has decided not to raise objections to the proposed amendments to the scheme “Reorganisation and transfer of public funds to the Work Research Institute”, as notified by letters from the Norwegian authorities dated 13 May 2002 (Doc. No. 02-4019-A), 29 July 2002 (Doc. No. 02-5796-A), 21 November 2002 (Doc. No. 02-8434-A), 24 February 2003 (Doc. No. 02-1139-A) and 12 May 2003 (Doc. No. 02-3041-A).
2. This decision is authentic in the English language.

Done at Brussels, 16 July 2003,

For the EFTA Surveillance Authority

Einar M. Bull
President

Hannes Hafstein
College Member