Case No: 56846
Event No: 318824
Dec. No: 181/05/COL

EFTA SURVEILLANCE AUTHORITY DECISION

OF 15 JULY 2005

REGARDING A NOTIFICATION OF A NEW RISK CAPITAL SCHEME:

NATIONWIDE SEED CAPITAL INVESTMENT COMPANIES

(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area,[1] 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 Justice,[2] in particular to Article 24 thereof and Article 1 (2) in Part I of Protocol 3 thereof,

HAVING REGARD TO the Authority's Guidelines[3] on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular Chapter 10A on State Aid and Risk Capital (hereinafter referred to as "the Risk Capital Guidelines"),

WHEREAS:

I. FACTS

1. Procedure

By letter dated 22 December 2004 from the Norwegian Mission to the European Union, forwarding letters from the Norwegian Ministry of Modernisation dated 21 December 2004 and the Ministry of Trade and Industry dated 21 December 2004, all received and registered by the EFTA Surveillance Authority (hereinafter "the Authority") on 23 December 2004 (Event No: 304156), Norway notified a new risk

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[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 OJ 1994 L 231. The State Aid Guidelines are available on the Authority's website: www.eftasurv.int .

capital scheme: Nationwide Seed Capital Investment Companies. The Authority acknowledged the receipt of the notification by letter dated 25 January 2005 (Event No: 305105).

By letter dated 23 February 2005, the Authority requested additional information concerning the notified measure (Event No: 308481).

By letter from the Norwegian Mission to the European Union dated 17 March 2005, forwarding a letter from the Ministry of Trade and Industry dated 15 March 2005, both received and registered by the Authority on 18 March 2005, the Norwegian authorities submitted further information (Event No: 313699).

By letter dated 18 May 2005, the Authority sent a second request for information (Event No: 317574).

By letter dated 9 June 2005 from the Mission of Norway to the European Union, forwarding a letter dated 6 June 2005 from the Ministry of Modernisation and a letter dated 3 June 2005 from the Ministry of Trade and Industry, all received and registered by the Authority on 10 June 2005, the Norwegian authorities requested an extension of the deadline for providing a reply until 15 July 2005 (Event No: 322458).

On 14 June 2005, a meeting between representatives from the Norwegian authorities and the Authority took place.

By letter dated 1 July 2005, the Authority agreed to an extension of the deadline for responding to the second request for information (Event No: 324644).

By letter dated 14 July 2005 from the Mission of Norway to the European Union, forwarding a letter dated 12 July 2005 from the Ministry of Modernisation and a letter dated 12 July 2005 from the Ministry of Trade and Industry, all received and registered by the Authority on 14 July 2005, the Norwegian authorities submitted an amended notification (Event No: 326585).

2. Description of the notified scheme

The primary objective of the new nationwide seed capital scheme is to increase the supply of seed capital[4]. A further aim for the Norwegian authorities, is to increase commercialisation of research-based projects from the universities.

Four seed capital investment companies in the cities of Oslo, Bergen, Trondheim and Stavanger will be set up. The Norwegian State will finance up to 50% of the four funds' total capital in the form of subordinated loans. The Norwegian Parliament has granted NOK 667 million (approximately EUR 81 million[5]) for this purpose. Private investors will finance a minimum of 50% of the funds total capital in the form of equity and/or subordinated loans. The funds will be 100% owned by the private investors.

[4] Seed capital is the small amount of initial capital required to fund the research and development necessary before a new company is set up.

[5] NOR/EUR = 8.25

In addition, the State has granted a loss-fund of NOK 167 million (approximately EUR 20 million) to cover losses on the subordinated loans provided by the State, which equals 25% of the subordinated loans. The loss-fund will never be more than 25% of the loans actually drawn upon by the investors. The loss-fund will be activated each time an investment company has a definitive loss on a single project. 50% of the loss on single investment projects will be written down on the State subordinated loan to the investment companies. In addition, the corresponding interest of the loan will be written down. The equity of the investment companies will be written down *pari passu*. The Norwegian authorities expect that the entire loss-fund will be utilized because of the high failure rate of seed enterprises. This means that the private investors only have to pay back 75% of the subordinated loan plus interest to the State.

The State demands an annual compound interest of 12 month NIBOR[6] plus 2 percentage points as a risk premium. NIBOR represents the rate offered to the largest banks in the inter bank market. According to the Norwegian authorities, this was chosen as basis for the interest rate as the notion is well known to the actors on the market. NIBOR is also suitable as it fluctuates in line with the market, making the investment companies liable to an adjusted interest rate. The interest rate starts running as from payment to the investment companies. Down-payment of loans and accumulated interest will be made only to the same extent as the investors receive dividends or down-payments. However, the loans must be repaid within 15 years after the investment companies became operational. According to the Norwegian authorities, the annual rate for 12 month NIBOR during the period 1993-2003 varied between 7.09% (2001) and 3.95% (2003), with a median of 6.02%. Before 1993 the rate was substantially higher. In 2004, the rate was 2.18%.

To substantiate that the risk premium is at a reasonable level, the Norwegian Authorities have referred to a study provided by Thomson Venture Economics on behalf of the European Venture Capital Association (EVCA)[7]. According to the study, the net rate of return for investors for early stage funds over a 10-year period was 5.5% p.a. According to the Norwegian authorities, this shows that the historical net rate of return from early-stage funds in Europe is on average lower than the interest on the State subordinated loans based on historical NIBOR levels for the same period.

The investment companies are restricted to make investments in Small and Medium-seized Enterprises (SMEs) in their start-up or other early stages, or located in assisted areas.

Enterprises in the former ECSC sector, shipbuilding sector, low-risk sectors including property, land, finance and investment companies as well as finance-type leasing companies, are not eligible for investments. Firms in difficulty, as defined by the State Aid Guidelines on Aid for rescuing and restructuring firms in difficulty (Chapter 16), are also excluded from investment.

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[6] Norway Inter-bank Offered Rate.

[7] 2003 Pan-European Investments Benchmarks Study by Thomson Venture Economics.

The investment companies will only be allowed to provide target enterprises with capital solely in the form of equity, mezzanine and subordinated loans. It is estimated in the notification that 200 individuals or enterprises will invest in the investment companies. An important aim of the scheme is to attract the competence of entrepreneurs and "business angels"[8] in establishing new companies. Individuals or companies deemed to possess these competences will therefore be given first priority to invest. Second priority will be given to all other privately or publicly held companies.

The legal basis of the scheme is *St.prp. nr.1 (2004-2005, Budsjett-innst. S.nr. 6 (2004-2005) and Budsjett-innst. S. nr. 8 (2004-2005).*

Innovation Norway[9] is responsible for administrating the State's participation and handling of the State loans. Innovation Norway shall ensure compliance with the Authority's State Aid Guidelines. Each investment company shall deliver an annual report and an audited accounting report during the loan period. If the losses exceed or threaten to exceed what is covered by the loss-fund, Innovation Norway will act as an ordinary creditor on behalf of the State.

Each of the funds will be administered by a professional fund manager who will be chosen after a public tender. The investment companies will be run strictly on a commercial basis. The State will not pay any management fees related to the investment companies.

The seed capital companies may invest nationwide and can invest up to EUR 500 000 per tranche[10] of finance. However, if the companies invest in regions qualifying for assistance under Article 61(3)(c) of the EEA Agreement, the maximum tranche of finance under the scheme is EUR 750 000. SMEs embarking on a new investment may be eligible for a further tranche of funding up to the same limits if:

- The investment is in a new product or development, which is wholly different from the original investment;
- The original investment has been deemed to have met its outputs and milestones as per the original business plan;

[8] "Business angels" (or "angel investors") are individuals who provide seed or start-up finance to entrepreneurs in return for equity. Business angels usually contribute more than pure cash - they often have industry knowledge and contacts that they can pass on to entrepreneurs.

[9] Innovation Norway was established as of 1 January 2004 replacing the following four organisations: The Norwegian Tourist Board, the Norwegian Trade Council, The Norwegian Industrial and Regional Development Fund (SND) and the Government Consultative Office for Inventors (SVO). Innovation Norway (IN) is the Norwegian government's most important financial tool in Norwegian business development. IN shall promote innovation, business development and turnaround operations in Norway. IN's financial tools are equity capital, low risk loans, venture capital loans, grants and guarantees. IN employs more than 700 people.

[10] In tranche funding, successive sums of money become available on a prearranged basis to a new company, often linked to the progress of the company and its ability to reach the targets set in its business plan.

- At least six months have passed from the original investment and compliance with footnote 22 to Chapter 10A of the Authority's State Aid Guidelines is ensured[11].

The Norwegian authorities have stated in the notification that the scheme will also lead to an increased supply of capital and that it will benefit target enterprises to a limited degree. Acceptance of finance from a seed capital company will not prevent an SME from receiving other State funds. Cumulation rules will be observed, however, such that no SME will receive more than EUR 500 000, or EUR 750 000 in Article 61(3)(c) areas, in a single trance, from a combination of all state aided venture capital funds. Furthermore, in the case of SMEs in which the seed capital funds have invested, the Norwegian authorities have committed themselves to reducing any further entitlement on the part of these SMEs to publicly funded grants, loans or other forms of investment aid to 80% of the aid intensity that would otherwise have been found compatible by the Authority.

The Norwegian authorities have submitted two reports[12] to demonstrate that there is evidence of market failure for early stage capital in Norway. The report from OECD states *i.a.* that: *"Although there is not a general lack of capital in Norway, there appears to be a dearth of competent risk capital as well as of new business ideas and opportunities".* Financial markets (primarily in Oslo) are, according to the report, working well for medium-large investments in traditional sectors, but venture markets for earlier-stage firms in other industrial sectors remain less perfect. OECD furthermore *i.a.* recommends that Norway should take action to stimulate both demand for risk capital and its supply through private venture markets. The second report recommends *i.a.* that State financing should be more focused on the seed phase of enterprises development.

II. APPRECIATION

1. Notification requirement

According to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, the EFTA States have an obligation to inform the Authority in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The EFTA State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

The Norwegian authorities have stated that the scheme will not be put into effect before the Authority has taken a decision to approve the scheme. The Authority

[11] Footnote 22 reads as follows: *"Separate injection of capital within six months of each other would be considered to be part of the same tranche, as would different injections, even over a longer period, to which a commitment is made as part of a single transaction".*

[12] Venture Capital Country Note: Norway. OECD, Directorate for Science, Technology and Industry, DSTI/IND(2003)17/REV1, 30 October 2003, and, *"Kapitalmarkedet for nyetablerte foretak, Rapport avlevert 1 November 2002 til Nærings- og handelsdepartementet av en prosjektgruppe".*

therefore considers that the Norwegian authorities have fulfilled their obligation according to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

2. Existence of state aid within the meaning of Article 61(1) of the EEA Agreement

The Authority has examined the scheme in the light of Article 61 of the EEA Agreement, and in particular on the basis of Chapter 10A, State Aid and Risk Capital, of the State Aid Guidelines.

Pursuant to point 10A.4.(3) of Chapter 10A of the State Aid Guidelines, in order for a risk capital measure to fall within the scope of Article 61(1) of the EEA Agreement, four cumulative criteria must be met:

- The measure must involve the use of State resources
- The measure must distort competition by conferring an advantage on the beneficiary
- The advantage must be selective in that it is limited to certain undertakings
- The measure must affect trade and competition between EEA States.

In line with point 10A.4.(2) of Chapter 10A of the State Aid Guidelines, in the assessment of whether state aid is present within the meaning of the EEA Agreement, the Authority will consider the possibility that the measure may confer aid on at least three different levels:

- Aid to investors
- Aid to any fund or other vehicle through which the measure operates
- Aid to the companies invested in.

2.1 Aid to investors

The involvement of State resources is demonstrated by the 50% state funding of the investment companies, the financing of the loss-fund and a rate of interest for the subordinated loans which probably is lower than what it would have been possible to obtain in the private market.

Point 10.A.4(5)(I) of Chapter 10A of the State Aid Guidelines states that where a measure allows investors to participate in the equity of a company or set of companies on terms more favourable than public investors, or if they had undertaken such investments in the absence of the measure, then the investors in question receive an advantage.

In the case of the notified scheme, the subordinated loans provided by the State would most likely be more expensive on the open market, taking the risk into consideration. The state will, through the loss fund, cover part of the risk connected with the investments by giving the investors a direct grant limited up to 25% of the State’s participation, or 12.5% of the funds’ total capital. Hence, advantages are conferred to the private investors as they will participate in the investment companies on more favourable terms than if they had undertaken such investments in the absence of the measure.

Even though the scheme in principle is open to all kinds of investors there is no guarantee that all potential investors will be accepted and only the limited number of investors taking part will benefit from the State's participation. The scheme is therefore considered to be of a selective nature.

Investment in capital is an activity which is subject to considerable trade between the EEA States. The scheme can therefore potentially affect trade between the EEA States and thereby distort competition.

At the level of investors, the Authority therefore considers that there is state aid within the meaning of Article 61(1) of the EEA Agreement.

2.2 Aid to the funds

Point 10.A.4.(3)(II) of Chapter 10A of the State Aid Guidelines states *i.a.* that the Authority in general considers a fund as being a vehicle for the transfer of aid to the investors and/or enterprises invested in, rather than being an aid beneficiary itself.

Under the notified measure, the investment companies will be set up as limited liability companies, which are not themselves retaining any profit. The management of the companies will be chosen in a transparent tendering procedure in accordance with point 10A.8.(3) of Chapter 10A of the State Aid Guidelines. As the funds represents separate legal entities with the sole purpose of channelling the funds to the beneficiary SMEs, the Authority therefore does not consider the funds to be separate aid beneficiaries and concludes that there is no state aid within the meaning of Article 61(1) of the EEA Agreement at the fund level.

2.3 Aid to the enterprises invested in

Point 10.A.4.(3)(III) of Chapter 10A of the State Aid Guidelines states that the fundamental question when analysing the existence of state aid at the level of the target companies is whether the companies have received an investment on terms that would be acceptable to a private investor in a market economy. This test can be met when the investment made through the risk capital measures is made *pari passu* with a private investor.

Under the notified scheme, the subordinated loans and especially the loss-funds provided by the Norwegian authorities reduces the risks that the private investors take when making an investment. These investors can no longer be said to operate as normal economic operators, and the investments are not made by the funds *pari passu* with other private investors not taking part in the funds. It cannot be concluded that the SMEs would be able to obtain equity funding at the same conditions or volume in a market economy. It is therefore a possibility that some of the advantages accorded to investors in the funds are passed on to the enterprises invested in.

As the scheme is limited to SMEs in their start-up or located in assisted areas, it is considered to be a selective measure.

Finally, the measure has at least the potential to affect trade between EEA States, as there is the possibility that the enterprises invested in are engaged or will get engaged in activities involving intra-EEA trade.

In the amended notification, the Norwegian authorities accept that the scheme also includes aid to enterprises to a limited degree, but that it is hard to calculate the exact figures.

Consequently, the nationwide scheme on seed capital investment funds constitutes state aid within the meaning of Article 61(1) of the EEA Agreement, both at the level of investors and at the level of companies invested in.

3. Assessment of the compatibility of the measure

As the measure involves state aid at the level of the investment companies and at the level of the target SMEs, the Authority must examine whether this state aid is compatible with the EEA Agreement.

3.1 Evidence of market failure

Point 10A.6.(5) of Chapter 10A of the State Aid Guidelines provides that the Authority will require evidence of market failure for risk capital measures. The Norwegian authorities have, as part of the notification, submitted two reports which indicate that there is to some extent market failure for early stage capital in Norway.

It should also be noted that the notified scheme applies to SMEs, and partly to enterprises located in areas qualifying for assistance under Article 61(3)(c) of the EEA Agreement. On the other hand, it is necessary to be cautious with respect to concluding whether there is market failure as capital markets in Norway and in the EEA States in general are rather developed.

However, the Authority may be prepared to accept the case for market failure when each tranche of finance for an enterprise from risk capital measures which are wholly or partially financed through state aid will contain a maximum of EUR 500 000, or EUR 750 000 in regions qualifying for assistance under Article 61(3)(c) of the EEA Agreement (see point 10A.6.(5) of Chapter 10A of the State Aid Guidelines). In the case at hand, the Authority considers that these conditions are satisfied as individual tranches of finance provided by the investment companies are limited to EUR 500 000 in non-assisted areas and to EUR 750 000 in regions qualifying for assistance under Article 61(3)(c) of the EEA Agreement.

3.2 Criteria for assessing the compatibility of the measure

Point 10A.8(3) of Chapter 10A of the State aid Guidelines outlines a set of positive and negative elements that the Authority will assess in order to evaluate the compatibility of a risk capital measure once market failure has been established.

- Restrictions of investments

The restriction of investments to small or micro enterprises and/or to medium-sized enterprises in their start-up or other early stages or in assisted areas will be regarded as a positive element.

The Norwegian authorities have confirmed that the investment companies will only provide funding to SMEs[13] and that investments will be within the tranches mentioned above in point 3.1. The eligible SMEs will be in their start-up or other early stages or in assisted areas. These elements can thus be regarded positively in the sense of Chapter 10A of the State Aid Guidelines.

- Focus on risk capital market failure

The deliveries of finance to the enterprises are only in the form of equity, mezzanine and subordinated loans. In accordance with the provisions of Chapter 10A of the State Aid Guidelines, this is to be regarded as positive.

- Profit-driven nature of the investment decisions

The Authority finds that the profit-driven character of the investments is demonstrated by *i.a.*:

  - At least 50% of the investment companies' capital is provided by private investors
  - The investment companies are owned 100% by the private investors
  - There is an agreement between a professional manager of the investment companies and the participants in the companies providing that the manager's remuneration is linked to the performance of the investment companies
  - Private investors are represented in decision-making as board members.

Pursuant to point 10A.8.(3) of Chapter 10A of the State Aid Guidelines, these factors are to be regarded as positive elements.

- Minimisation of the level of distortion between investors and investment funds

According to the notification, distortion of competition is minimised through a call for tender, which is publicly announced in accordance with point 10A.8.3 of Chapter 10A of the State Aid Guidelines. First priority will be given to individuals or companies possessing competence from the venture capital market (former entrepreneurs or business angels). Second priority is open for all public and private companies on a first come, first serve basis. The Authority considers this as a positive element in the sense of Chapter 10A of the State Aid Guidelines.

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[13] The definition of SMEs used is that incorporated into the EEA Agreement by EEA Joint Committee Decision No 131/2004.

- Sectoral focus

The scheme is neutral as regards sectors, but the investment companies will be allowed to have a sectoral focus which the companies decide upon themselves on a purely commercial basis. Enterprises in the former ECSC sector, shipbuilding sector, low-risk sectors including property, land, finance and investment companies as well as finance-type leasing companies, are not eligible for investments. Firms in difficulty, as defined by the State Aid Guidelines on Aid for rescuing and restructuring firms in difficulty (Chapter 16), are also excluded from investment. Pursuant to point 10A.8.(3) of Chapter 10A of the State aid Guidelines, these elements are positive.

- Investment on the basis of business plans

According to the notification, each investment will be based on the existence of a detailed business plan to establish the viability of the project. The Authority considers this as a positive element in the sense of Chapter 10A of the State Aid Guidelines.

- Avoidance of cumulation of aid measures to a single enterprise

According to point 10A.8.(3) of Chapter 10A of the State Aid Guidelines, if a measure provides aid to the undertakings invested in, the Authority may request commitments from an EFTA State to assess and to set limits to other forms of state aid to enterprises funded by the risk capital measure, including under authorised schemes.

Under the provisions of the scheme, the Norwegian authorities have undertaken that no SME will receive more than EUR 500 000, or EUR 750 000 in Article 61(3)(c) areas, in a single tranche, from a combination of all state aided venture capital funds. Furthermore, in the case of SMEs in which the seed capital funds have invested, the Norwegian authorities have committed themselves to reducing any further entitlement on the part of these SMEs to publicly funded grants, loans or other forms of investment aid to 80% of the aid intensity that would otherwise have been found compatible by the Authority. The Authority considers this as positive in the sense of Chapter 10A of the State Aid Guidelines.

- State participation in the form of subordinated loans and loss-fund

The State participation in the establishment of the seed capital funds consist of subordinated loans at an interest rate of NIBOR plus 2 percentage points and a loss fund of amounting to 25% of the subordinated loans. According to the Norwegian authorities, the annual rate for 12 month NIBOR during the period 1993-2003 varied between 7.09% (2001) and 3.95% (2003), with a median of 6.02%. Before 1993 the rate was substantially higher. In 2004, the rate was 2.18%.

The choice of NIBOR, plus a risk premium, means that the interest rate will fluctuate with the market rates. The Authority finds it positive in the sense of Chapter 10A of the State Aid Guidelines that the Norwegian authorities fix the interest rate for the subordinated loans on a market based rate (NIBOR), which will fluctuate with the market conditions.

To substantiate that the risk premium is at a reasonable level, the Norwegian authorities have referred to a study provided by Thomson Venture Economics (see footnote 7). The Authority notes that according to this study, the return on early stage funds in Europe has been lower than the NIBOR rate. In the view of the Authority, it is a further positive element that an extra risk premium is charged on the subordinated loans. However, as the study concerns the return on equity, and not on subordinated loans comparable to the ones in the case at hand, it is uncertain how much such a risk premium should amount to.

The functioning of the loss fund means that up to 25% of the subordinated loans from the State, or up to 12.5% of the total capital of the seed capital companies may be converted to a grant and that only 75% of the subordinated loans may have to be paid back to the State. This will happen if the loss fund is fully activated. Overall, the Authority finds that the possibility to convert up to 25% of the loans to grants implies a high aid intensity that is a negative element in the meaning of Chapter 10A of the State Aid Guidelines.

- No coverage of administrative costs

The Authority notes that the Norwegian State will not cover any of the administrative costs (management fees) of the seed capital companies. The Authority considers this as positive in the sense of Chapter 10A of the State Aid Guidelines.

4. Conclusion

The criteria used in Chapter 10A of the State Aid Guidelines for assessing compatibility of risk capital measures are expressed in positive and negative elements. Not all the elements have the same weight and no element can be regarded as sufficient on its own to ensure compatibility. The assessment of whether the notified measure is compatible with Article 61(3)(c) of the EEA Agreement, thus becomes a test of proportionality.

As described above, the notified scheme is characterized by a number of so-called positive elements. The possibility that only 75% of the subordinated loan were to be paid back was considered to be a negative element in the meaning of Chapter 10A of the State Aid Guidelines. In an overall assessment, the Authority is of the view that this negative element does not have a weight that offsets all the positive factors of the scheme, in particular because the private equity also will be written down. Therefore, the Authority finds that the notified measure fulfils the overall test of proportionality set out in Chapter 10A.8 of the State Aid Guidelines. The Authority therefore concludes that “Nationwide Seed Capital Investment Companies” is compatible with Article 61(3)(c) of the EEA Agreement.

The Authority reminds the Norwegian authorities that in view of the intended life-time of the notified measure, which exceeds the validity of the current Chapter 10A, State aid and Risk Capital, of the State Aid Guidelines, the measure will have to be subjected to any appropriate measure necessary to bring it in line with reviewed rules on State Aid and Risk Capital.

Additionally, the Authority reminds the Norwegian authorities that all plans to modify this scheme have to be notified to the Authority.

HAS ADOPTED THIS DECISION:

1. The Authority has decided not to raise objections to the notified new aid measure, Nationwide seed capital investment companies.

2. The Norwegian authorities are requested to submit an annual report on the implementation of the scheme.

3. This Decision is addressed to the Kingdom of Norway.

4. This Decision is authentic in the English language.

Done at Brussels, 15 July 2005.

For the EFTA Surveillance Authority,

Einar M. Bull Acting President	Kurt Jäger College Member