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**EFTA SURVEILLANCE AUTHORITY DECISION
OF 18 DECEMBER 2003**
regarding the establishment of private day-care facilities on public sites with
subsidised real estate leasehold fees in Oslo
(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 in Part I of Protocol 3 thereof,

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

WHEREAS:

I. FACTS

1. Procedure

By letter dated 21 October 2003 from the Ministry of Trade and Industry and by letter dated 20 October 2003 from the Municipality of Oslo, both forwarded by the Mission of Norway to the European Union on 23 October 2003, received and registered by the EFTA Surveillance Authority on 24 October 2003 (Doc. No 03-7363-A), the Norwegian Government notified to the Authority subsidies of real estate leasehold fees for the establishment of private day-care facilities on public sites.

By letter dated 28 October 2003 (Doc. No 03-7397-D) the Authority acknowledged receipt of the notification.

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 - Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No. 32, last amended by the Authority's Decision 198/03/COL of 5 November 2003, hereinafter referred to as the State Aid Guidelines.

By fax dated 15 December 2003 from the Minister of Trade and Industry, received and registered by the Authority 16 December 2003 (Doc. No 03-8856-A) the Norwegian Government submitted an OECD report on the day-care market in the Nordic countries.

2. Description of the proposed measure

2.1 Background and objective

Day-care facilities for children between 1-6 years old in Norway are provided through either private undertakings or by the local municipalities. The Municipality of Oslo has a responsibility under law⁴ to provide day-care facilities for children in the above-mentioned age within the city of Oslo.

Since 1962 the Municipality of Oslo has been practising subsidised real estate leasehold contracts to encourage private undertakings to establish and manage day-care facilities to meet the local market demand and to fulfil the Municipality's obligations.

Until 1 January 1994 there were 38 contracts with subsidised leasehold fees – today the number is 55. It is estimated that the discrepancy between the supply and demand of day-care facilities is as of today approximately 1700 day-care places. The Norwegian authorities observe that establishing and managing day-care facilities requires resources which the Municipality of Oslo finds difficult to provide within a reasonable time frame. In addition, the Norwegian authorities point out that private undertakings only see very limited profit in establishing private day care facilities and that this is believed to be a major cause of a shortage of day-care facilities.

In order to remedy the shortage of private day-care facilities, the City Council has decided to continue to offer subsidised real estate leaseholds to private undertakings to enable the establishment and management of day-care facilities. The Municipality of Oslo owns a considerable amount of property which it will rent out for this purpose, thereby subsidising the leasehold fee, since the rent will then be set below market value (see below 2.2).

The Municipality expects that with the notified support scheme, the shortage of day-care places will be eliminated by 2010. The Norwegian authorities state that the notified measure is a formalisation and extension of the current system.

2.2 National legal basis for the support measure

Paragraph 1 of the Act of Real Estate leasehold allows the landowner to charge a leasehold fee from the leaseholder. The market value and the leasehold fee are usually set at an estimated value by an independent appraiser. The Municipality of Oslo charges 6-8% percent of estimated market value of the site as leasehold fee, which, according to the Norwegian authorities, equals the leasehold fee at market value.

4 Law of 5 May 1995 nr 19 (Barnehageloven)

On 27 November 2002 the Municipality of Oslo passed guidelines in respect of subsidising the leasehold fee for establishment and management of day-care facilities.⁵ The City Council decided to set the leasehold fee to NOK 5000, - annually per site.

2.3 Recipients

All private undertakings, including undertakings from other EEA countries, are eligible to receive support under the scheme.

2.4 Form of support

The scheme will not consist of any monetary transactions to the undertakings, but the support will be given in the form of reduced annual leasehold fee. The grants will be tied to a contract of real estate leasehold on public sites including premises to fulfil the requirements of managing day-care facilities according to Norwegian legislation.

With the leasehold fee set below market value to NOK 5000 annually per site, the support will consequently consist of the discrepancy between the calculated leasehold fee at market value (6-8% of the value of the site) and the annual fee of NOK 5000, - for each individual site.

The undertakings have the full responsibility of the buildings on the leasehold site (i.e. economical expenses, maintenance and management). The duration of the leasehold stated in the contract will be set to 30 years or less.

2.5 Overlap with other schemes

In addition to the scheme in question, the recipients may receive support from the Municipality of Oslo under other local or governmental programs, given within their limitations and conditions.

2.6 Duration of support

The estimates given by the Municipality of Oslo foresee an increase of day-care facility contracts of 3-4 per year for the period of 2005-2008 and 1-2 per year for the period 2008-2010. This constitutes an increase of a total of 20-25 leaseholds by 2010. It is the intention of the Municipality of Oslo to meet the demand for day-care facilities by 2010.

Based on property value, the Municipality of Oslo has estimated the annual support per undertaking to be within the range of NOK 100.000 to NOK 140.000, i.e. approximately NOK 120.000 (Euro 14.785) in support per site. With leasehold contracts lasting up to 30 years, the scheme will continue beyond the year 2010.

5 Case 458. Before that, the Municipality of Oslo applied the guidelines regarding the “sale of property and buildings” of 5 June 1991 in case 264, by analogy.

II. APPRECIATION

1. Procedural requirements

Pursuant to Article 1 (3) in Part I of Protocol 3 to the Surveillance and Court Agreement, *“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 (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision”*.

The Authority notes that neither the original 38 leasehold contracts nor the additional 17 contracts granted after 1993 have been notified to the EFTA Surveillance Authority. However, since the Authority has arrived at the conclusion that neither these contracts nor the new contracts to be entered into under the notified scheme constitute aid within the meaning of Article 61 (1) of the EEA Agreement (see below point 2.3), Norway was not bound to notify the Authority.

2. The presence of State aid

State aid within the meaning of Article 61(1) of the EEA Agreement

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.”

This means that the following conditions must be fulfilled

2.1 Presence of State resources

The measure must be granted by the State or through State resources.

The measure at issue reduces the lease burden of the private day-care operators by granting them a reduced leasehold fee. The reduced leasehold results in a loss of resources for the Municipality of Oslo. A loss of revenue is equivalent to the consumption of resources.

Aid granted by local authorities is equally considered to be State resources.⁶ It can therefore be concluded that the support is granted from State resources.

2.2 Favouring certain undertakings or the production of certain goods

Firstly, the measure must confer on the day-care facility providers advantages that relieve it of charges that are normally borne from its budget. The support is given in the form of reduced annual leasehold and therefore gives the undertakings a financial advantage they would not have enjoyed in the normal course of business. The State

⁶ Judgment of the European Court of Justice of 14.10.1987, Case 248/84, *Germany v. Commission*, [1987] ECR 4013, paragraph 17.

support measure therefore strengthens the financial position of the day-care facility providers.

Secondly, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. The measure in question only applies to private undertakings, which provide day-care facilities for children between 1 and 6 years old and will be granted to three to four operators per year. The support is therefore selective within the meaning of Article 61 (1) of the EEA Agreement.

2.3 Distortion of competition and effect on trade between Contracting Parties

However, in order for the State aid measure to fall within the scope of Article 61(1) of the EEA Agreement, the measure in question must distort or threaten to distort competition and affect trade between the Contracting Parties to the Agreement.

It appears that the support at issue will not have any effect on trade between the Contracting Parties for the reasons set out below. It is therefore not necessary to further assess the effect on competition.

As to the effect on trade between the Contracting Parties, it is apparent from the information provided by the Norwegian authorities that the private day-care facilities are for a purely local use and will only serve the local market for the area of Oslo and the surrounding communities. Day-care centres are used on a daily basis and will therefore only attract people who live and/or work in Oslo or in the near surroundings. There is nothing in the information provided by the Norwegian authorities which indicates that this type of facility will attract people from outside the greater Oslo region. Due to the geographical situation of Oslo, it is even less likely that the day-care facilities will be used by parents living outside Norway. The private day facilities are in no way unique in their character⁷, which might attract consumers from abroad and the issue of language might create – apart from the geographical distance – another disincentive for consumers to cross the border in order to take advantage of the day-care service offered in Oslo.

Furthermore, the nature of the support measure as a reduced leasehold contract in a local market characterised by under-capacity⁸, which is closely linked to the location of the day-care centre on property and premises in Oslo, is not of a kind that it enables or induces the local recipients to establish themselves in other countries of the EEA and thus interfere with competition there.

On the basis of the present available information, it is further presumed that the support scheme will not be attractive for day-care providers outside Norway. A market assessment carried out by the Municipality of Oslo⁹ does not indicate that there are large complexes of child-care facilities, which are operated by international operators. As stated by the Private day-care association, PBL, the vast majority of

7 See also the argumentation in Commission Decision N 258/2000, Leisure pool Dorsten.

8 See in this respect also Commission Decision N 543/2001, Irish Hospitals.

9 The Oslo municipality in particular asked a government department, *Barne-og familiedepartementet* and two organisations dealing with day-care matters, *Private Barnehagers forbund* (PBL) and *PEDLEX NORSK Skoleinformasjon*, for their view of the market.

private day-care facilities are operated by local church-, welfare- and in general local non-profit organisations with only very limited commercial potential. As demonstrated by the Norwegian authorities, as of today, there exists no foreign privately owned or managed day-care facilities within Norway. Neither is there anything else that indicates that foreigners will establish themselves in the Oslo market for day-care facilities nor have they expressed any interest in this respect. It should be noted that the support scheme applies without discrimination to other EEA operators and would not create any entry barrier for these operators¹⁰.

The Norwegian authorities have also submitted an OECD report on the day-care market in the Nordic countries, which demonstrates that day-care facilities are largely operated or funded by local municipalities in all the countries, and without much involvement by private profit-oriented undertakings.

The Authority however notes that a re-assessment of the situation might become necessary whenever firms operate private day-care facilities across State borders.

Conclusion

In light of the foregoing specific characteristics of the notified measure and the market concerned, the Authority has consequently concluded that the notified measure does not constitute aid within the meaning of Article 61 (1) of the EEA Agreement

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority concludes that the support scheme regarding the establishment of private day-care facilities on public sites with subsidised real estate leasehold fee in Oslo does not constitute State aid within the meaning of Article 61 (1) of the EEA Agreement.
2. This Decision is addressed to Norway.

Done at Brussels, 18 December 2003

For the EFTA Surveillance Authority

Einar M. Bull
President

Hannes Hafstein
College Member

10 On the aspect of non-discrimination, see also Commission Decision N 543/2001, Irish Hospitals.