

Case No: 76897
Doc. No.: 752693
Dec. No: 178/15/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 7 May 2015

on the aid to the Municipality of Tromsø for the construction of a swimming and bathing facility called *Templarheimen* in the Municipality of Tromsø.

(Norway)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61(3)(c) and Protocol 26,

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

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

Whereas:

I. FACTS

1. Procedure

- (1) By letter of 14 March 2014 (Doc. No 702668), the Norwegian authorities pre-notified aid to the Municipality of Tromsø. The pre-notification was received and registered by the Authority on 17 March 2014.
- (2) By e-mail dated 4 April 2014 (Doc. No 704566), the Authority requested additional information from the Norwegian authorities.
- (3) By letter dated 8 May 2014 (Doc. No 707496), the Norwegian authorities replied to the information request.
- (4) By e-mail dated 4 August 2014 (Doc. No 718067) the Authority requested additional information from the Norwegian authorities.
- (5) By e-mails dated 11 (Doc. No 718067) and 15 August (Doc. No 718504) the Norwegian authorities replied to the information request.

- (6) By e-mail dated 8 September 2014 (Doc. No 721205), the Authority informed the Norwegian authorities that in case they wished to notify the project, it would be recommendable to provide additional information enabling the Authority to conduct a net present value assessment, as well as information on which entity would be the recipient of aid.
- (7) In the period of November–December 2014, informal exchanges were conducted with the Norwegian authorities regarding the net present value assessment.
- (8) On 10 February 2015, the Norwegian authorities notified the Authority of their intention of granting aid to facilitate the construction of a public swimming and bathing facility in the Municipality of Tromsø called *Templarheimen* (Doc. No 744674, the cover letter, and Doc. No 744675 the notification).
- (9) By letter of 19 February 2015 (Doc. No 745538), the Authority requested certain additional information.
- (10) By letter dated 16 March 2015 (Doc. No 750512), the Norwegian authorities responded to the information request.

2. The Project

2.1 Introduction

- (11) The facility is intended to be multifunctional with various areas for bathing, swimming, diving and recreation. There will be separate sections for families, youths and for people with special, medical and rehabilitation needs.
- (12) The objective is to provide Tromsø and the surrounding areas with a modern public bath. The bath will replace several public baths that are old and outdated. The facility is intended to cover the citizens' need for swimming training, physical education, exercise, sports, health, recreation and wellness. The main target is the population in general.
- (13) The construction costs are estimated to around 600 million NOK. That amount covers only the construction costs of the swimming and bathing facilities proper and does not include construction costs associated with a *potential* cafeteria, climbing hall, office space or gym facilities. The Municipality of Tromsø has applied for funding from the County of Troms through a regional development programme called RDA.¹ In addition, the municipality envisages that the project will be funded by the Norwegian Lottery fund and through VAT compensation. The Municipality will finance the rest through granting loans.² The notification covers all aid measures from public sources and the aid intensity will be 100%.³
- (14) No aid has been granted at the time of the notification, and the final decision as regards the investment in *Templarheimen* is pending the Authority's decision.⁴
- (15) The operational costs will be covered by entry fees. Undertakings that wish to make use of the facilities will have to pay market prices, while the prices for schools and public health care have not yet been decided.⁵

¹ The RDA is a programme that allocates aid for regional development of the city of Tromsø and surrounding districts. The programme is a business oriented fund and is financed over the State budget as a replacement for increased social security tax. For further information, see <http://www.rdatromso.no/>.

² Doc. No 744675, the notification on page 6.

³ Doc. No 744675, the notification on page 6.

⁴ Doc. No 744675, the notification on page 2.

⁵ Doc. No 744675, the notification on page 5.

2.2 Templarheimen

- (16) The facility will cover approximately 5400 m², of which 2100 m² will be water areas, and 1800 m² will be land areas including resting/staying areas, saunas and steam baths, and a climbing wall. The service areas will cover 1500 m², including vestibule, kitchen and serving areas, wardrobes, storage rooms etc. In addition, technical rooms will be placed in the basement.⁶
- (17) The facility will include a 50x25 meters swimming pool with diving facilities. The pool will be used for both exercise and sports. Minor sports events may take place at the facility.⁷ There will be a raising and lowering system, which will facilitate swimming training, including mandatory training for school pupils. In the family department, there will be areas for toddlers and children, serving areas and rest areas. There will be slides, playing areas, streams and variation in depths. There will also be a department for youths with diving facilities, a climbing wall, slides, waterfalls, streams and rest areas. The bath will further include a wellness and a health department and an outdoor swimming pool.
- (18) A cafeteria may possibly be included in the facility as well as a gym, which in case will have a size of 1200 m².⁸ Such possible additional facilities are not included in the estimated construction costs of 600 million NOK.

2.3 The notified measure

- (19) The Municipality of Tromsø will be responsible for the construction of the facility itself. It has already awarded project management and engineering contracts after having conducted tendering procedures according to EEA and national legislation, and preliminary engineering works have started.⁹
- (20) The Norwegian authorities have explained that all necessary procurements will be made through public tendering procedures. The procedures will be advertised in the DOFFIN and TED databases. The award criteria set out in the competitions will be based on non-discriminatory and transparent criteria, and will be in accordance with Norwegian and EEA procurement legislation.¹⁰
- (21) The Municipality of Tromsø intends to establish a company which will operate the facility. It has not yet been decided whether that company will be a wholly owned limited liability undertaking, or a municipal company.¹¹
- (22) The Norwegian authorities have confirmed that the intention is that any additional operations such as a cafeteria, climbing hall (or wall), gym or office space, will be operated by commercial actor(s) on market terms. In this scenario, the operator or operators will be chosen on the basis of a procurement process in accordance with applicable EEA and national procurement rules.¹²
- (23) However, the Norwegian authorities have not completely ruled out the possibility that the bath will operate some additional services internally. If the Norwegian authorities should consider this option, for example as regards the cafeteria, due mechanisms will be put in place in order to ensure that the state aid rules are complied with. In particular, separate accounts will be established and an obligation to operate the services on market terms will

⁶ Doc. No 744675, the notification on pages 3-4.

⁷ See Doc. No 707496, answer to question 4.

⁸ See Doc. No 707496.

⁹ Doc. No 744675, the notification on page 4.

¹⁰ Doc. No 744675, the notification on page 4.

¹¹ Doc. No 744675, the notification on page 4.

¹² Doc. No 744675, the notification on pages 4-5.

be imposed. Market rates will be charged for the use of designated areas and communal facilities. The construction costs of such additional facilities will be covered by the rent paid by the operator of the facility in question.¹³

2.4 Recipient

- (24) The Municipality of Tromsø itself, or alternatively the wholly owned company that will be established to operate the facility, will be the recipient of the grants.¹⁴

2.5 Operational budget and expected visitation numbers

- (25) The Norwegian Authorities have estimated that a realistic number of paying visitors each year would be around 200 000.¹⁵ Since the estimates are uncertain, the Norwegian authorities have presented an operational budget with one best case and one worst case scenario¹⁶:

Income		Lowest	Highest
Ticket Sales	MNOK	21	32
Cafeteria	MNOK	2.3	5.3
Rental income	MNOK	2	3
Sales	MNOK	0.7	1.6
Total	MNOK	26	41.9

Costs		Lowest	Highest
Personnel	MNOK	11.9	15.7
Energy	MNOK	2.4	4.4
Water and sewage fees	MNOK	0.6	1.3
Chemicals and consumables	MNOK	0.5	0.8
Insurance and other costs	MNOK	0.6	1.1
Maintenance	MNOK	1.5	3.0
Marketing	MNOK	0.6	0.8
Total	MNOK	18.1	27.1

- (26) The worst case scenario thus shows a deficit of NOK 1.1 million and the best case scenario a profit of NOK 23.8 million. Capital costs are not taken into account in these estimations.¹⁷
- (27) With an aid intensity of 100% and around 200 000 visitors, the net present value of the project will be zero.¹⁸

¹³ See Norway's reply of 16 March 2015 (Doc. No 750512).

¹⁴ Doc. No 744675, the notification on page 4 and page 10.

¹⁵ Doc. No 744675, the notification on pages 9 and 5.

¹⁶ Doc. No 744675, the notification on page 5.

¹⁷ Doc. No 744675, the notification on page 5.

¹⁸ Doc. No 744675, the notification on pages 6-9.

II. ASSESSMENT

3. The 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) Accordingly, a measure constitutes State aid within the meaning of Article 61(1) of the EEA Agreement if the following conditions are cumulatively fulfilled: the measure (i) is granted by the State or through State resources; (ii) confers an economic advantage on the beneficiary; (iii) is selective; (iv) is liable to affect trade between Contracting Parties and distort competition.

3.1 State resources

(30) First, in order to constitute state aid, the measure must be granted by the State or through state resources.

(31) The notion of state resources also includes financial assistance granted by regional and local authorities. The support to Templarheimen will be granted by the County Municipality of Troms, by the Norwegian state through the Norwegian Lottery Fund and VAT compensation,¹⁹ and through loans by the Municipality of Tromsø. It is thus clear that the measure involves state resources.

3.2 Selective advantage

(32) Next, the measure must confer an advantage on the beneficiary undertaking which reduces the costs it should normally bear from its own budget. By receiving direct grants and loans on terms it could not obtain on the market, Tromsø municipality's costs for the financing and construction of the project are reduced. Therefore, the municipality is granted an advantage within the meaning of Article 61(1) of the EEA Agreement.

(33) Moreover, the aid measure must be selective in that it favours “certain undertakings or the production of certain goods”.

(34) As was noted in Decision No 496/13/COL, the Authority is of the opinion that both the construction and operation of an infrastructure that will be used to provide goods or services on the market is considered to be an economic activity.²⁰ Thus in its capacity as builder of Templarheimen, the Municipality of Tromsø is an undertaking within the meaning of Article 61(1) EEA.

(35) Moreover, the Authority considers that the payment of NOK 600 million for the construction of Templarheimen will be selective as there is only one beneficiary, namely the Municipality of Tromsø.

(36) It is therefore clear that the measure is selective and confers an advantage on the beneficiary undertaking, the Municipality of Tromsø.

¹⁹ See <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2011-2012/inns-201112-370/15/> regarding VAT compensation in general.

²⁰ See paragraph 50 of that decision.

3.3 Distortion of competition and effect on trade between Contracting Parties

- (37) Finally, the aid measure must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.
- (38) Under settled case law, it is not necessary to establish that the aid has an actual effect on trade between the Contracting Parties to the EEA Agreement and that competition is actually being distorted, but only to examine whether the aid is liable to affect such trade and distort competition. Furthermore, it is not necessary that the aid beneficiary itself is involved in intra-EEA trade. Even a public subsidy granted to an undertaking that provides only local or regional services and does not provide any services outside its state of origin may nonetheless have an effect on trade if such internal activity can be increased or maintained as a result of the aid, with the consequence that the opportunities for undertakings established in other Contracting Parties are reduced.²¹
- (39) The Authority's Guidelines on a simplified procedure for the treatment of certain types of state aid²² recall in chapter 2, paragraph 5(b)(viii), that for measures to be considered as not having any effect on intra-EEA trade, regard must be had to the specificities of the case. In particular, Commission practice²³ requires, most prominently, a demonstration by the EFTA State of the following features: (i) that the aid does not lead to investments being attracted to the region concerned; (ii) that the goods/services produced by the beneficiary are purely local and/or have a geographically limited attraction zone; (iii) that there is no more than marginal effect on consumers from neighbouring EEA States; and (iv) that the market share of the beneficiary is minimal on any relevant market definition used and that the beneficiary does not belong to a wider group of undertakings.
- (40) As to the first feature, the Norwegian authorities have explained that Templarheimen will be wholly owned by the Municipality of Tromsø, and thus there will be no dividends paid to external shareholders. In the Authority's view, this choice of organisation makes it unlikely that the aid will attract any foreign investment to the facility itself.
- (41) As to the second feature, the question is whether the attraction zone of the service provided is so limited that it cannot affect trade between Member States. Trade in services can be affected if the demand for accepting the service at the location of the company receiving aid would be of a transboundary character i.e. would be created abroad.²⁴
- (42) In the Commission's case, Dorsten,²⁵ the facility was expected to have an annual number of visitors of at least 250 000, and was considered to be of a local character.
- (43) The estimated number of visitors at Templarheimen seems to be close to the number of visitors in the Dorsten case. In addition, Tromsø's more remote location could indicate that the attraction zone of Templarheimen is limited. Furthermore, Templarheimen, with its main purpose of serving the local population's needs for swimming education, rehabilitation and recreation, appears to be a facility of a different character than major leisure parks which

²¹ Joined Cases C-197/11 and C-203/11 *Libert*, EU:C:2013:288, paragraphs 76-78. See also Case 730/79 *Philip Morris Holland* [1980] ECR 2671 paragraphs 11-12.

²² OJ L75, 15.3.12, p. 26, EEA supplement No. 14, 15.3.12.

The guidelines are available at the Authority's web page at <http://www.eftasurv.int/media/state-aid-guidelines/Part-II---Guidelines-on-a-simplified-procedure-for-treatment-of-certain-types-of-state-aid.pdf>.

²³ See the Commission's Decisions in cases N 258/2000 Leisure pool Dorsten – Germany (JOCE C/172/2001), N 486/2002 Aid in favour of a congress hall in Visby – Sweden (JOCE C/075/2003), N 610/2001 Tourism infrastructure program Baden-Württemberg – Germany (JOCE C/164/2002), N 377/2007 Support to Bataviawerf – Reconstruction of a vessel from the 17th century – The Netherlands (JOCE C/35/2008).

²⁴ Case N 258/2000 Leisure pool Dorsten – Germany (JOCE C/172/2001).

²⁵ See the Commission's case no N 258/2000.

are aimed at a national or even an international market, and which are widely promoted outside of the region in which they are located.²⁶

- (44) As to the third feature, the question is whether there are more than marginal effects on consumers from neighbouring EEA States. It appears unlikely that tourists from other EEA countries will travel to Tromsø with the purpose of visiting the facilities at Templarheimen, as the main attractions for tourists appear to be the scenic nature and the possibilities of various outdoors activities.²⁷ Templarheimen will not be unique in any sense, since in the EEA there are already a number of larger bathing and swimming facilities. Even in Norway there are today a number of bathing and swimming facilities with 50 meter swimming pools.²⁸ Therefore it is questionable whether there is more than a marginal effect on consumers from neighbouring EEA states.
- (45) As to the fourth feature, Tromsø municipality does not belong to a wider group of undertakings, and Templarheimen is unlikely to have anything but a small share of any relevant market.²⁹
- (46) In light of the above, it may be questioned whether EEA trade may be affected by the proposed measure. However, the Authority finds that the measure due to its size and its location in Tromsø, which is the largest city in Northern Norway, could have at least a potential effect on EEA trade, and the Authority will thus proceed with an assessment of whether the notified measure in any event would be compatible with Article 61(3) of the EEA Agreement.

3.4 Compatibility assessment

- (47) The Norwegian authorities argue that any aid involved in the project would be compatible with the functioning of the EEA Agreement within the meaning of Article 61(3) EEA.
- (48) It should be noted that according to the General Block Exemption Regulation (GBER)³⁰, aid to sports and multifunctional recreational infrastructures is deemed to be compatible with the EEA Agreement and exempt from notification.³¹ However, the GBER does not apply to aid to sports and multifunctional recreational infrastructures which exceeds EUR 15 million.³² The aid in question exceeds that threshold, and must therefore be assessed directly under article 61(3)(c) of the EEA Agreement.

²⁶ Compare the Commission's case Dorsten leisure pool, N 258/2000, section 3. Compare also the features of large leisure parks such as Bø in Telemark, Norway, and Gustavsvik in Sweden, available at http://www.gustavsvik.se/?page_id=5 and <http://sommarland.no/>.

²⁷ Doc. No 744675, the notification on page 17.

²⁸ Doc. No 702668 on page 7. See also <http://adoarena.no/> regarding a new facility opened in Bergen in the Autumn of 2014.

²⁹ Compare the overview over large facilities in Norway provided by the Norwegian authorities in 2011: Table supplied by the Norwegian authorities, see Decision 459/12/COL, at footnote 27.:

	Visitors 2011	Turnover 2011
Drammensbadet, Drammen	387 360	NOK 39 700 000
Pirbadet, Trondheim	360 000	NOK 46 215 000
Ankerskogen, Hamar	250 000	NOK 13 616 000
Grottebadet, Harstad	203 000	NOK 20 081 000
Østfoldbadet, Askim	165 000	NOK 23 967 000

In addition a new large facility opened in Bergen in the autumn of 2014, see <http://adoarena.no/>

³⁰ See Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1, as referred to in annex XV to the EEA agreement.

³¹ See the GBER article 55.

³² See the GBER article 5(bb).

- (49) Pursuant to Article 61(3)(c) EEA, the following may be considered compatible with the functioning of the EEA Agreement: “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”.
- (50) In order to be compatible under Article 61(3)(c) of the EEA Agreement, the Authority will examine whether the measure pursues a policy objective of common interest, as well as whether it is necessary and proportional and does not cause undue distortion of competition (the “balancing test”).³³
- (51) With regard to the achievement of a policy objective of common interest, it is noted that the construction of venues for sport and different types of activities which benefit the general public can be considered as a state responsibility.³⁴ Sports and multifunctional recreational infrastructures are also by their nature deemed to be compatible through the GBER, as demonstrated above.
- (52) As Templarheimen will ensure the general public’s access and practice of sport, swimming education, rehabilitation and recreation, particularly considering the arena’s multifunctional character and the lack of capacity and/or adequate and up-to-date facilities for similar purposes in Tromsø, the Municipality will be fulfilling its responsibility to the general public by making such a facility available. The realisation of Templarheimen must therefore be regarded as satisfying policy objectives of common interest.
- (53) Concerning the necessity and proportionality of the proposed measure, Norway has demonstrated the need of additional capacity, as the existing similar facilities in Tromsø are small, outdated and do not meet the modern requirements of the public anymore.
- (54) There are no practicable alternatives to the construction of the new facility, since maintaining and upgrading the existing outdated facilities would in any event not be sufficient to provide similar services to the public as Templarheimen will.
- (55) Norway has further explained that the need of the facility cannot be met by private operators, since, given the economies of the project, it is unlikely that a private investor would invest in projects satisfying similar needs in Tromsø. With an aid intensity of 100% and around 200 000 visitors, the net present value of the project will be zero.³⁵
- (56) The construction of Templarheimen will thus be financed by public funding only, and any surplus on the operations will not be paid as dividends to the owner.³⁶
- (57) The selection of the construction company will be made through a public procurement procedure according to the EEA Agreement. The facility will be operated by the municipality, and no aid will be granted to operations. The Authority notes the clarifications of the Norwegian authorities that the intention is that any possible additional operations such as a cafeteria, climbing hall (or wall), gym or office space, will be operated by commercial actor(s) on market terms and that the operator(s) will be chosen on the basis of a procurement process in accordance with applicable EEA and national procurement rules. While the Norwegian authorities have not completely ruled out the possibility that the bath may operate some additional services internally, they have committed that should this option be considered, due mechanisms would be put in place in order to ensure that the state aid rules are complied with. In particular, it would in this scenario be ensured that separate accounts were established and that an obligation to operate the services on market terms was imposed. Market rates will be charged for the use of designated areas and communal

³³ Compare the Commission’s decision SA.33618 at paragraph 47.

³⁴ Compare the Commission’s decision SA.33618 at paragraph 48.

³⁵ Doc. No 744675, the notification on pages 6-9.

³⁶ Doc. No 744675, the notification on page 12.

facilities. The construction costs of such additional facilities would be covered by the rent paid by the operator of the facility in question.

- (58) For the above reasons, the Authority considers that the necessity and proportionality requirements are fulfilled.
- (59) In addition, considering the location of Templarheimen, and that most of the activities which are to be carried out in the facility are of local character, any effects on competition and trade between EEA States are likely to be limited.
- (60) Against this background, it has been demonstrated that public funding of Templarheimen is both necessary, proportionate and does not cause undue distortion of competition. The public funding of 100% of the construction costs as notified would therefore be compatible with the functioning of the EEA Agreement.

3.5 Conclusion

- (61) On the basis of the foregoing assessment, the Authority considers that the envisaged grant of 100% of the construction costs, approximately NOK 600 million, to Tromsø Municipality, or to the wholly owned company it may establish in order to construct the facility Templarheimen, is compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c).

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the grant of 100% of the construction costs, approximately NOK 600 million to Tromsø Municipality or to the wholly owned company it may establish in order to construct the facility Templarheimen, is compatible with the functioning of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English language version of this decision is authentic.

Decision made in Brussels, on 7 May

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Frank Büchel
College Member