

Case No: 68123
Event No: 596095
Dec. No: 311/11/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 12 October 2011

on alleged aid granted to Nasjonal digital læringsarena

(Norway)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to the Agreement on the European Economic Area (“EEA”), in particular to Article 61 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(2),

Whereas:

I. FACTS

1. Procedure

1. By letter dated 15 April 2010 Den Norske Forleggerforening, the Norwegian Publishers Association (“NPA”), sent a complaint alleging that illegal State aid has been granted to the Nasjonal digital læringsarena (“the NDLA”). The letter was received and registered by the Authority on 16 April 2010 (Event No. 553723). Following a telephone conference on 15 July 2011 the complainant provided additional information by email on the same day (Event No. 608593)
2. By letter dated 2 July 2010 (Event No. 558201), the Authority requested additional information from the Norwegian authorities. By letter dated 9 August 2010 (Event No. 566179), the Norwegian authorities requested an extension of the time limit for sending a response. The request for an extension was granted by the Authority by letter dated 12 August 2010 (Event No. 566397). By letter dated 9 September 2010 (Event No. 568942), the Norwegian authorities replied to the information request. Additional information from the Norwegian authorities was sent to the Authority by letter dated 1 December 2010 (Event No. 579405).

3. The Authority considered that further information was necessary and sent another request for information by letter dated 4 February 2011 (Event No. 574762). The Norwegian authorities replied to the information request by letter dated 7 March 2011 (Event No. 589528). Upon request the Norwegian authorities provided further clarifications by emails 2 May 2011 (Event No. 596402) and 12 August 2011 (Event No. 608596).
4. In addition, discussions between the Authority and the Norwegian authorities regarding the case took place at a meeting in Norway on 13-14 October 2010.

2. The Complaint

5. The complainant is the Norwegian Publishers Association, which represents i.a. companies which are or could be active in the development and distribution of digital learning material. The complaint concerns the Norwegian government's and the county municipalities granting of funds as well as the transfer of a content management system to the Nasjonal Digital Læringsarena (hereafter: NDLA). NDLA is an entity which has been founded as an inter-municipal cooperation by 18 Norwegian municipalities¹ in order to develop or purchase digital learning material with a view to publishing the material on the internet free of charge.
6. The complainant submits that NDLA has four main areas of activity: firstly, NDLA develops and supplies learning resources for the upper secondary school; secondly, NDLA procures learning resources from third party suppliers; thirdly, NDLA ensures the quality of learning resources; and fourthly, NDLA develops and manages the content management system which operates the website through which the digital learning material is published (these activities are hereafter also referred to as 'purchase, development and supply of digital learning materials').
7. The complainant submits that the granting of funds to NDLA for the purchase, development and supply of digital learning material constitute illegal State aid to NDLA. In that regard the complainant emphasises that – in his view – NDLA is not an integrated part of the public administration but rather an undertaking within the meaning of State aid rules. The complainant recalls, that according to established case law, an undertaking is an entity which is engaged in economic activities. The complainant suggests that according to the ECJ case law an economic activity is an activity, which could, at least in principle, be carried out by a private undertaking in order to make profits. Then, the complainant argues that any entity, which carries out an activity which could be carried out to make profits, is engaged in an economic activity. The complainant further submits that there was a market for digital learning material prior to the activities of NDLA and that NDLA competes at present with private undertakings offering digital learning resources. The complainant claims that on this basis the development and supply of digital learning resources constitutes an economic activity. The complainant further suggests that the other activities of NDLA are closely linked to the development and supply of digital learning resources and are therefore also to be considered as economic in nature. The complainant

¹ Norway is divided into 19 municipalities, all of which participate in the NDLA project with the exception of the county municipality of Oslo. Participants are therefore the municipalities of Akershus, Aust-Agder, Buskerud, Finnmark, Hedmark, Hordaland, Nordland, Nord-Trøndelag, Møre og Romsdal, Oppland, Rogaland, Sogn og Fjordane, Sør-Trøndelag, Telemark, Troms, Vest-Agder, Vestfold and Østfold.

concludes that NDLA constitutes an undertaking within the meaning of State aid rules.

8. Against this background the complainant further argues that funds offered by the State and the county municipalities to NDLA for the development and supply of own digital learning material constitute State aid. Furthermore, the complainant argues that the funds offered by the State and by the county municipalities to NDLA for the purchase of digital learning material from third party suppliers also constitute State aid. Finally, the complainant submits that the fact that the State also made its content management system available to NDLA free of charge – according to the complainant – also amounts to State aid.
9. The complainant notes that the measure has not been notified. He continues to argue that Article 59(2) EEA is not applicable and concludes that – in the absence of a notification - the Norwegian State has granted State aid contrary to State aid rules.

3. The Educational System in Norway

10. Education in Norway is mandatory for all children aged from 6 to 16 and is provided through a system of free public schools. This system is divided into a compulsory elementary school (age 6 to 13), a compulsory lower secondary school (age 13 to 16), and the upper secondary school (age 16 to 19).
11. In 2006 the Norwegian authorities decided in the course of the ‘Knowledge Promotion Initiative’ (Kunnskapsløftet) that all Norwegian schools were to emphasise certain basic skills in all subjects. One of these skills is the ability to learn a given subject by using information and communication technology. This requirement was introduced in the national curricula for pupils in the 10-year compulsory school (i.e. school for grades 1 to 9) and for pupils in the first year of upper secondary education (i.e. school for grades 10 to 12) and apprenticeships. Under the Norwegian Education Act² the county municipalities are responsible for meeting these requirements. Furthermore, in 2007 the Norwegian authorities amended the Education Act and obliged the county municipalities to provide the pupils with the necessary printed and digital learning materials free of charge.
12. It should be noted that until that time, pupils in Norwegian upper secondary school (grades 10 to 12) had to purchase their learning material themselves based on the choice of learning material designated by the schools in compliance with the national curricula³. Under the new Education Act, county municipalities are obliged to provide all learning material, i.e. digital learning material as well as physical learning material such as books, to pupils free of charge⁴.

² Act of 17 July 1998 no. 61 relating to Primary and Secondary Education and Training (The Education Act).

³ As the national curricula set out the objectives for the learning outcome of all classes, the content of the learning material must respect the objectives of the national curricula.

⁴ Section 3-1and 4A-3 of the Education Act states that the county municipality is responsible for providing pupils with the necessary printed and digital teaching material as well as digital equipment free of charge.

Provisions in the Revised State Budget

13. The obligation of providing digital and physical learning material for free constitutes a considerable financial burden for the Norwegian county municipalities. In view of these additional costs, the Norwegian government decided already in 2006 to provide additional funds. The provision of these funds is laid down in a revised State budget which was adopted in May 2006:

“The Government aims to introduce free teaching material for secondary education. At the same time, it is desirable to encourage the use of digital learning materials in secondary education. As part of the efforts to bring down the cost for each student through increased access to and use of digital teaching aids, the Government proposes to allocate 50 million NOK as a commitment to the development and use of digital learning resources.

Counties are invited to apply for funding for the development and use of digital learning resources. Applications from counties may include one, several, or all secondary schools in the county, and may include one or more subjects. The objective of the grant is to encourage the development and use of digital learning resources, and to help reduce students' expenses for teaching aids.

The funds can be used for the provision or for local development of digital learning resources. The funds shall not be used for the preparation of digital infrastructure for learning. The intention is to give priority to applications that involve inter-county cooperation.”⁵

Invitation to Submit an Application

14. In June 2006 the Ministry of Education submitted an invitation to the county municipalities to jointly apply for the available funds of 50 million NOK. The letter describes the objectives and the concept of the initiative as follows:

“The Ministry of Education has the following objectives for the initiative:

- To increase access to and use of digital learning materials in secondary education.*
- To develop secondary schools and school owners' competence as developers and/or purchasers of digital learning materials.*
- To Increase the volume and diversity of digital teaching materials aimed at secondary schools.*
- Over time to reduce students' expenses for teaching aids*

[...]

The funds can be used to purchase digital learning resources and to locally develop digital learning resources.”⁶

Creation of NDLA

15. In August 2006 the heads of education of the 19 Norwegian county municipalities met to discuss the possibility of a joint application for the funds in question based on the requested inter-municipal cooperation. While the municipality of Oslo decided

⁵ Translation made by the Authority.

⁶ Translation made by the Authority.

not to participate in a cooperative project, the other 18 municipalities decided to enter into the inter-municipal cooperation and to set up NDLA to manage the process. Each of these municipalities subsequently adopted the following resolution:

“The County Council passes a resolution for the following counties, Akershus, Aust-Agder, Buskerud, Finnmark, Hedmark, Hordaland, Nordland, Nord-Trondelag, More og Romsdal, Oppland, Rogaland, Sogn og Fjordane, Sor-Trondelag, Telemark, Troms, Vest-County, Vesold and Østfold, to establish an inter-municipal cooperation body, NDLA, with its own Board in accordance with §27 of the Local Government Act. The purpose of this collaboration is to facilitate the purchase, development, deployment and organisation of digital learning resources for all subjects in upper secondary education. The result shall be free digital learning material that facilitates active learning and sharing....”⁷

Conditional Funding from the Ministry of Education

16. Subsequently, an application for the State funds was submitted to the Ministry of Education, which in April 2007 granted the funds under a number of conditions:

“The Ministry requests further that the counties jointly identify a responsible legal entity that will take care of the counties’ responsibility for digital learning resources under this initiative. Such an entity can be e.g. a corporation, an inter (county) municipal corporation or a host (county) municipality but it cannot itself engage in economic activity.

[...]

The Ministry expects that the purchase of digital learning materials and development services are performed in accordance with the regulations for public procurement. The development of digital learning resources by county employees is to be regarded as an activity for its own account, provided that the counties do not gain any profits from this activity. The development by people who are not county employees must be regarded as the purchase of services and should be evaluated based on the rules and regulations for public procurement in the usual way.”⁸

17. Following the approval of the funds the Ministry of Education transferred over a period of three years 30.5 million NOK to the participating municipalities (17 million NOK in 2007, 9 million NOK in 2008 and 4.5 million NOK in 2009).

Additional Funding from the Municipalities

18. Following the amendment of the Education Act in 2007, the county municipalities were compensated for the obligations to provide (physical and digital) learning material through an increase in the county municipal grant scheme. This compensation was based on the estimated costs of providing learning materials in all subjects. The compensation amounted to 287 million NOK in 2007, 211 million NOK in 2008, 347 million NOK in 2009 and 308 million NOK in 2010. The participating municipalities decided to allocate part of these funds to the NDLA project. In 2008 and 2009 the municipalities allocated 10% of the abovementioned grant scheme to the NDLA project (21.1 million NOK in 2008, 34.7 million NOK in 2009) and in 2010 they allocated 20% of the abovementioned grants to the NDLA project (61.6 million NOK).

⁷ Translation made by the Authority.

⁸ Translation made by the Authority.

Related Projects

19. There are currently two other projects concerning digital learning in Norway. Firstly, the municipality of Oslo has applied for a similar grant for its own project (Real Digital). Secondly, the Ministry of Education itself is working on a similar project (Utdanning).

Real Digital by the Municipality of Oslo

20. The municipality of Oslo does not participate in the NDLA project and has submitted an application for funding for its own project called Real Digital. The Norwegian government accepted the application from Oslo and granted 13.5 million NOK to the municipality of Oslo over a period of two years (8 million NOK in 2007 and 5.5 million NOK in 2008). It should be noted that the funds provided to the municipality of Oslo are not subject to the complaint at hand.

Utdanning by the Ministry of Education

21. The Ministry of Education has decided to provide its own system for access to digital learning material. In that regard the Ministry can both develop digital learning material and/or acquire such learning material from third party suppliers. The Ministry acknowledges that there might be areas where the activities of the Ministry of Education might overlap with the activities of NDLA. In its letter stating the conditions of the grant the Ministry of Education reserved itself the right to reallocate funds originally earmarked for NDLA to the Ministry's own project. The relevant funds provided to the Ministry of Education are not subject to the complaint at hand.

3.1 National legal basis for the measure

22. The legal basis for the funds paid by the Ministry of Education to NDLA is the State budget resolution of the Stortinget in combination with the delegation of competence to the Ministry of Education to approve applications for grants. The legal basis for the grants from the county municipalities to the NDLA is budget resolution of the participating county municipalities.

3.2 Recipient

23. NDLA is organised as an inter-municipal cooperation body under Article 27 of the Local Government Act. According to the Norwegian authorities NDLA does not have its own employees. All personnel, including the editors and managers, engaged in NDLA are employees of the county municipalities and have no contractual employment relationship with NDLA. Certain work has been tendered out to external consultants on the basis of public procurement rules.

3.3 Amount

24. As indicated above, so far the Ministry of Education has granted 30.5 million NOK (17 million NOK in 2007, 9 million NOK in 2008 and 4.5 million NOK in 2009) while the participating county municipalities have contributed 117.4 million NOK (21.1 million NOK in 2008, 34.7 million NOK in 2009 and 61.6 million NOK in 2010) to the NDLA project.

3.4 Form of Aid and Means of Funding

25. According to the information submitted the funds were transferred to NDLA in the form of direct grants.

3.5 Duration

26. The NDLA project and its funding is not subject to a limited duration. It cannot be excluded that further funds will be made available for the NDLA project.

4. Comments by the Norwegian authorities

27. The Norwegian authorities submit that the NDLA should not be regarded as an “undertaking” in the meaning of Article 61 EEA.
28. The Norwegian authorities refer in particular to a case in which the EFTA Court assessed whether public funds for municipal kindergartens constituted State aid⁹. In its judgment the EFTA Court stated that “*the specific circumstances under which the activity is performed have to be taken into account in order to assess whether the Norwegian municipalities, when offering their kindergarten places, are providing a service as an economic activity or whether they are exercising their powers in order to fulfil their duties towards their population.*”¹⁰ The Court moreover stated that “*the Norwegian State is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields*”.¹¹
29. With regard to the case at hand the Norwegian authorities submitted that the county municipalities, through NDLA, are merely fulfilling their duties to the population by providing free learning materials as required by the law. The services of NDLA are free for all pupils and NDLA and thus non-profit making. NDLA is therefore not engaged in an economic activity and, thus, does not constitute an undertaking with the meaning of State aid rules. Consequently, the funds provided to NDLA do not constitute State aid.
30. The Norwegian authorities further submit that, if one were to view NDLA as an economic operator, then the activities of NDLA would have the character of a service of general economic interest covered by Article 59(2) EEA.

II. ASSESSMENT

5. The Presence of State Aid

31. According to Article 61(1) EEA “[s]ave 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.”

⁹ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64.

¹⁰ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64, para. 80.

¹¹ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64, para. 83.

5.1 Undertaking

32. It follows from the above that State aid rules only apply to undertakings. Prior to examining whether the conditions for State aid are met in this case, the fact that the county municipalities are part of or at least closely linked to the public administration makes it relevant, first, to examine whether NDLA qualifies as an undertaking within the meaning of Article 61(1) EEA. If this is not the case then the support to NDLA does not fall within the scope of Article 61(1) EEA. It is established case law that the concept of an undertakings comprises “... *any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed*”¹². The Authority notes that NDLA is to be viewed as a mere cooperation of municipalities. It could therefore be argued with regard to the State funds that the recipient of the State funds is not NDLA itself but rather the individual municipalities cooperating in the NDLA project. However, as indicated above, any entity can be an undertaking within the meaning of State aid rules *irrespective of its legal status and the way it is financed*. The decisive question is therefore whether the activity at hand, can be considered to be of an economic nature.

5.2 Economic Activity

33. NDLA purchases, develops and publishes digital learning material. The complainant submits that these activities are of economic nature. In that regard the complainant emphasises that until now private suppliers have developed and published digital learning material. The complainant argues that by developing and publishing digital learning material of its own, NDLA enters into direct competition with these private suppliers.
34. The Authority observes that an economic activity is any activity consisting in offering goods and services on a market¹³. The Authority recognises that a number of companies offer digital learning material on the market as part of their economic activities. However, it follows from the judgment of the EFTA Court in *Private Barnehagers Landforbund*¹⁴, that the fact that an activity can be offered by private operators as an economic activity does not exclude that it can also be offered by the State as a non-economic activity. In this judgment the EFTA Court had to assess, whether the operation of municipal kindergartens in Norway constituted an economic activity. The complainant in this case had argued that the only relevant question in that regard was “...*whether the municipalities are providing services on a given market which could, at least in principle, be carried out by private actors in order to make a profit*”. However, in its judgment the EFTA Court pointed out that “[w]hen the nature of an activity carried out by a public entity is assessed with regard to the State aid rules, it cannot matter whether the activity might, in principle, be pursued by a private operator. Such an interpretation would basically bring any activity of the State not consisting in an exercise of public authority under the notion of economic activity”¹⁵. Indeed, such an interpretation would unduly limit the discretion of States to provide certain services to their population. There is a number of cases in which it has been recognised that similar activities are carried out both as a non-economic activity as well as an economic activity and where only the latter are subject to State aid rules i.a. concerning the health system (e.g. private and

¹² Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para. 21; Case C-309/99 *Wouters* [2002] ECR I-1577, para. 46.

¹³ Case C-35/96 *Commission v. Italy (CNSD)* [1998] ECR I-3851, para. 36.

¹⁴ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64.

¹⁵ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64, para. 80.

public sickness insurances¹⁶), the pension fund system (e.g. private and public pension funds¹⁷) and the education sector (e.g. private and public kindergartens¹⁸).

35. In its judgment¹⁹ the EFTA Court further explained that – in order to establish whether a given activity is economic or non-economic – the reasoning of the ECJ in its *Humbel* judgment²⁰, which concerned the notion of “service” within the meaning of the fundamental freedoms, can be transposed to State aid cases. The qualification of a given activity as economic or non-economic therefore depends on its objective and the way in which it is carried out.
36. It follows from the existing case law and decision practice that activities can be considered not to constitute ‘offering of goods and services on a given market’ where the following cumulative conditions are fulfilled:
 1. Firstly, the State, in establishing and maintaining the entity in question, does not seek to engage in gainful activity but is rather seeking to fulfil its duties towards its population²¹.
 2. Secondly, the way in which the service is provided is based on the principle of national solidarity to the extent that the activity is funded by the public purse and not provided against remuneration, i.e. there is no connection between the actual costs of the service provided and the fee paid by those benefiting from the activity²².
 3. thirdly, in cases in which the activity is carried out by entities other than the State itself, it is necessary to establish that the entity in question merely applies the law and cannot influence the statutory conditions of the service (i.e. the amount of the contributions, the use of assets and the level of benefits)²³.
37. The question whether the development and publication of digital learning material constitutes a non-economic activity therefore depends on whether the conditions mentioned above are met.

Objective

38. The State, in establishing and maintaining the entity in question, must not seek to engage in gainful activity but must rather exercise its power in order to fulfil its duties towards its population²⁴. It is established case law and decision practice that in setting up and maintaining the national education system the State fulfills its duties

¹⁶ Case C-160/91 *Poucet* [1993] ECR I-637.

¹⁷ Case C-180/98 *Pavlov* [2000] ECR I-6497.

¹⁸ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64.

¹⁹ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64, para. 80.

²⁰ Case 263/86 *Humbel* [1988] ECR 5383, para. 14-21.

²¹ Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64, para. 83; Case 263/86 *Humbel*, [1988] ECR 5383, para. 18.

²² Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64, para. 80-82; Case 263/86 *Humbel*, [1988] ECR 5383, para. 18.

²³ Case C-160/91 *Poucet* [1993] ECR I-637, para. 15 and 18; Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para. 46 - 57; Case C-218/00 *Cisal die Battistello Venanzi*, [2002] ECR I-691, para. 31-46. These case concern health and social insurances. However, the fact that the Commission explicitly refers to these cases in the context of professional services indicates that the assessment can be generally applied (see Commission Communication “Report on Competition in Professional Services” of 9.2.2004 (COM(2004) 83 final, Fn. 22)

²⁴ Case 263/86 *Humbel* [1988] ECR 5383, para. 18.

towards its own population in the social, cultural and educational fields²⁵. In that regard, the Norwegian government decided in the course of the 2006 educational reform that it was the State's duty to provide learning material free of charge and the county municipalities decided to comply with this obligation by partly developing digital learning material themselves.

39. According to the complainant it follows from the judgments in *Humbel* and *Private Barnehagers Landsforbund*, that – while the activities dealt with in these judgments (i.e. giving courses and offering places in kindergartens) fall within the scope of the public education system – other activities (such as the purchase, development and supply of digital learning material) do not fall within the scope of the public education system, in particular, if there already existed a market for such activities prior to the State's activities. However, the Authority does not see any indications that the ECJ or the EFTA Court intended to limit the scope of activities falling within the scope of public education in such a manner as suggested by the complainant (i.e. to actual teaching and the provision of kindergarten services). On the contrary, the Authority notes that Member States generally have a wide margin of discretion when deciding which activities they intend to offer to their population in social, cultural and educational fields²⁶. As regards the case at hand, the Authority observes that the purchase development and supply of learning material is inextricably linked to the provision of teaching content and is thus an inherent part of the actual teaching itself. Indeed, the learning material forms both the basis and the framework for teaching. This is also underlined by the fact that the development of learning material is dependent on the curriculum which is set up by the public authorities. This assessment is not altered by the fact that the activities were left to the market prior to the State's activities, since it cannot matter whether the activity might be (or indeed was) pursued by a private operator²⁷.
40. The Authority therefore concludes that the purchase, development and supply of digital learning material by NDLA fall within the scope of activities, which the Norwegian State can consider its duty to provide to its population in the educational field.

Principle of Solidarity

41. Secondly, the way in which a given service is provided must be based on the principle of national solidarity to the extent that the activity is funded by the public purse and not through remuneration, i.e. there is no connection between the actual costs of the service provided and the fee paid by those benefiting from the activity²⁸.
42. In the present case NDLA is entirely funded by the State and distributes the developed or purchased learning material free of any charge. Neither the schools, nor the pupils nor any other third party which might profit from the freely available

²⁵ Case 263/86 *Humbel* [1988] ECR 5383, para. 18; Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64, para. 82; Commission decision N 118/2000 *France - Aide aux clubs sportifs professionnels*, OJ C 333, 28.11.2001, p.6.

²⁶ C-218/00 *Cisal die Battistello Venanzi* [2002] ECR I-691, para. 31; similarly, EU Member States have a wide margin of discretion when defining which services should be of general economic interest (see Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4, para. 9).

²⁷ See para. 34 above.

²⁸ Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para. 47; Case C-160/91 *Poucet* [1993] ECR I-637, para. 11 and 12.

learning material pay any contribution to NDLA. The Authority further notes, that there are no indications that NDLA engages in any other form of activity, which could be considered as being economic in nature.

43. It can be followed that the activities of NDLA are entirely non-profit making and exclusively governed by the principle of solidarity.

State Control

44. Thirdly, in cases in which the activity in question is carried out by entities other than the State itself, the recipient of the funds (public or private) must be subject to the control of the State to the extent that the recipient merely applies the law and cannot influence the statutory conditions of the service (i.e. the amount of the contributions, the use of assets and the fixing of the level of benefits)²⁹. If, on the contrary, the recipient would have significant discretion vis-a-vis the State as regards the commercial parameters of its activities (e.g. prices, costs, assets and employees), it would be more likely to constitute an undertaking.
45. The complainant indicated that NDLA should be considered as an undertaking different from the State or the county municipalities from which it received the funds in question. However, based on the information at hand NDLA seems to be an integrated part of the public administration and is – in any case – subject to strict State control. According to existing case law an entity is subject to the control of the public authorities (and thus not independent from the State) if it was given its task by statute and if the public authorities determine both the costs and the revenues of its activities³⁰. In that regard the Authority notes that the participating municipalities have – in view of a requirement laid down in the revised State budget for 2006 – established NDLA as an inter-municipal cooperation and have given it its task by way of adopting the resolution of August 2006. Furthermore, the county municipalities control the cost parameters of the activities since these costs are limited to the contributions unilaterally fixed by the county municipalities through the ordinary budget processes. Moreover, NDLA cannot decide on the costs of its employees or on its assets because the county municipalities decide on the secondment of the necessary staff and the provision of premises as well as technical equipment. Finally, NDLA cannot decide on charging fees to the end customers (i.e. pupils or schools) since the legal framework obliges NDLA to provide its services free of charge.
46. It follows that NDLA – in carrying out its activity – merely complies with the law and cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits in the way a commercial operator could do. On the contrary, the information at hand shows, that NDLA is an integrated part of the public administration of the county municipalities to which it provides its services.

²⁹ Case C-160/91 *Poucet* [1993] ECR I-637, para. 15 and 18; Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para. 46 - 57; Case C-218/00 *Cisal die Battistello Venanzi* [2002] ECR I-691, para. 31-46. These cases concern health and social insurances. However, the fact that the Commission explicitly refers to these cases in the context of professional services indicates that the assessment can be generally applied (see Commission Communication “Report on Competition in Professional Services” of 9.2.2004 (COM(2004) 83 final, Fn. 22)

³⁰ Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para. 52; Case C-160/91 *Poucet* [1993] ECR I-637, para. 11 and 12.

5.3 Conclusion

47. In view of the above, the Authority considers that the development and the distribution of the learning material by NDLA does not constitute an economic activity. Since NDLA does not engage in an economic activity it does not qualify as an undertaking within the meaning of Article 61(1) EEA. Hence, the funds and assets transferred to NDLA do not constitute state aid within the meaning of Article 61(1) EEA.

6. Decision

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the alleged aid to the NDLA does not constitute State aid within the meaning of Article 61 EEA.

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 12 October 2011

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member