

Invitation à présenter des observations, en application de l'article 1^{er}, paragraphe 2, de la partie I du protocole 3 de l'accord entre les États de l'AELE relatif à l'institution d'une Autorité de surveillance et d'une Cour de justice, concernant des questions relatives à des aides d'État afférentes à des versements potentiels en faveur du Nasjonal digital læringsarena (NDLA)

(2013/C 229/10)

Par décision n° 136/13/COL du 27 mars 2013 reproduite dans la langue faisant foi dans les pages qui suivent le présent résumé, l'Autorité de surveillance AELE a ouvert la procédure prévue à l'article 1^{er}, paragraphe 2, de la partie I du protocole 3 de l'accord entre les États de l'AELE relatif à l'institution d'une Autorité de surveillance et d'une Cour de justice. Les autorités norvégiennes ont reçu copie de la décision.

Par la présente, l'Autorité de surveillance AELE invite les États de l'AELE, les États membres de l'UE et les parties intéressées à soumettre leurs observations sur la mesure en cause dans un délai d'un mois à compter de la publication de la présente communication, à l'adresse suivante:

Autorité de surveillance AELE
Greffe
Rue Belliard 35
1040 Bruxelles
BELGIQUE

Ces observations seront communiquées aux autorités norvégiennes. L'identité des parties intéressées qui présentent des observations peut faire l'objet d'un traitement confidentiel sur demande écrite et motivée.

RÉSUMÉ

Historique

En Norvège, l'enseignement est obligatoire pour tous les enfants entre 6 et 16 ans et est dispensé par un réseau d'écoles publiques gratuites. En 2006, les autorités norvégiennes ont décidé, au titre de «l'initiative pour la promotion des connaissances» (Kunnskapsløftet), que toutes les écoles norvégiennes devaient mettre l'accent sur la capacité d'apprentissage de certaines matières au moyen des technologies de l'information et de la communication. Dans ce contexte, elles ont modifié la loi sur l'enseignement et ont contraint les comtés à fournir gratuitement aux élèves le matériel d'apprentissage nécessaire en format numérique et en version papier.

En mai 2006, le gouvernement norvégien a affecté 50 millions de NOK au développement et à l'utilisation de ces ressources d'apprentissage numériques. En juin 2006, le ministère de l'éducation a invité les comtés à solliciter conjointement les fonds disponibles. En août 2006, les responsables de l'enseignement de 18 des 19 comtés ont décidé de coopérer entre eux et de créer à cet effet le NDLA en vertu de l'article 27 de la loi sur les collectivités locales.

Les comtés participants ont ensuite introduit une demande de fonds au ministère de l'éducation, lequel a accordé 30,5 millions de NOK pour le projet, à condition que l'entité juridique responsable veille au respect de l'obligation des comtés dans le cadre de l'initiative, qu'elle n'exerce pas d'activités économiques et que l'achat du matériel d'apprentissage numérique et des services de développement soit exécuté conformément aux règles applicables aux marchés publics.

Les autorités des comtés ont ensuite alloué 21,1 millions de NOK (2008), 34,7 millions de NOK (2009), 58,8 millions de NOK (2010) et 57,7 millions de NOK (2011) au projet en question. Ce financement provenait en partie des ressources budgétaires municipales traditionnellement consacrées aux activités scolaires et en partie des fonds supplémentaires susmentionnés accordés par le ministère de l'éducation aux comtés dans le cadre du projet.

Décision et arrêt de la Cour

Le 12 octobre 2011, l'Autorité a adopté la décision n° 311/11/COL, en vertu de laquelle la mesure ne constituait pas une aide d'État au sens de l'article 61, paragraphe 1, de l'accord EEE (ci-après dénommée «la décision»). Le 9 janvier 2012, le demandeur a formé un recours contre la décision qui a été annulée, le 11 décembre 2012, par la Cour AELE ⁽¹⁾.

⁽¹⁾ Affaire E-1/12 *Den norske Forleggerforening* (non encore publiée).

Appréciation de la mesure

Existence d'une aide d'État

À la suite de l'arrêt, l'Autorité se pose la question de savoir si le NDLA exerce ou non une activité économique. Elle souhaiterait notamment en savoir plus sur la période entre le moment où l'initiative est passée du stade de projet à celui de la création officielle du NDLA comme organe chargé de la coopération entre les comtés en vertu de l'article 27 de la loi sur les collectivités locales.

L'Autorité a également besoin de plus amples informations concernant les effets du changement de statut juridique sur le processus de décision. Elle aimerait en particulier savoir dans quelle mesure le NDLA peut étendre son champ d'activités sans l'aval des municipalités participantes ou même contre leur gré, et si la situation diffère de celle ayant précédé la création officielle de cet organisme.

L'Autorité examinera par ailleurs plus en détail le financement du NDLA, tant au moment où il était encore au stade de projet qu'après sa mise en place officielle.

En outre, l'Autorité doit déterminer avec davantage de précision la manière dont sont fixés, dans le cadre des procédures de passation des marchés publics, les paramètres pour l'achat de biens et le recrutement de personnel par le NDLA.

Enfin, l'Autorité souhaiterait obtenir des informations complémentaires concernant les effets de la mesure sur la concurrence et les échanges.

Compatibilité de l'aide

Sur la base des informations disponibles, l'Autorité ne peut, à ce stade, conclure à la compatibilité de la mesure. Elle réclame donc des informations complémentaires.

Conclusion

À la lumière des considérations qui précèdent, l'Autorité a décidé d'ouvrir la procédure formelle d'examen conformément à l'article 1^{er}, paragraphe 2, de la partie I du protocole 3 de l'accord entre les États de l'AELE relatif à l'institution d'une Autorité de surveillance et d'une Cour de justice. Les parties intéressées sont invitées à présenter leurs observations dans un délai d'un mois à compter de la publication de la présente notification au *Journal officiel de l'Union européenne*.

EFTA SURVEILLANCE AUTHORITY DECISION

No 136/13/COL

of 27 March 2013

opening the formal investigation procedure into potential aid to the Nasjonal digital læringsarena (NDLA) (Norway)

THE EFTA SURVEILLANCE AUTHORITY ('THE AUTHORITY')

HAVING REGARD to:

The Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('SCA'), in particular to Article 24,

Protocol 3 to the SCA ('Protocol 3'), in particular to Article 1 of Part I and Articles 4(4) and 6 of Part II,

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 ('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. 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. 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) On 12 October 2011 the Authority adopted Decision No 311/11/COL deciding that the measure did not constitute State aid within the meaning of Article 61(1) EEA (hereafter: the Decision). On 9 January 2012 the applicant brought an action against the decision and by its judgment dated 11 December 2012 the EFTA Court annulled the decision (hereafter: the Judgment) ⁽²⁾.

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 NDLA. The NDLA is an entity which has been founded as an inter-county cooperation body by 18 Norwegian municipalities ⁽³⁾ 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 the NDLA has four main areas of activity: firstly, the NDLA develops and supplies learning resources for the upper secondary school; secondly, the NDLA procures learning resources from third party suppliers; thirdly, the NDLA ensures the quality of learning resources; and fourthly, the 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 the NDLA for the purchase, development and supply of digital learning material constitutes illegal State aid to the NDLA. In that regard the complainant emphasises that — in his view — the 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 the NDLA and that the 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 the NDLA are closely linked to the development and supply of digital learning resources and are therefore also to be considered as economic in nature.

⁽²⁾ See footnote 1.

⁽³⁾ 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.

- (8) Furthermore, the complainant argues that the funds offered by the Ministry of Education and from the county municipalities to the 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 the 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. Background

3.1. *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 Act ⁽⁴⁾ 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 curricula ⁽⁵⁾. 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 charge ⁽⁶⁾.

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 NOK 50 million 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.' ⁽⁷⁾

⁽⁴⁾ Act of 17 July 1998 No 61 relating to Primary and Secondary Education and Training (The Education Act).

⁽⁵⁾ 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.

⁽⁶⁾ Sections 3-1 and 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.

⁽⁷⁾ Translation made by the Authority.

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 NOK 50 million. 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.'⁽⁸⁾

Creation of the 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-county cooperation. While the municipality of Oslo decided not to participate in a cooperative project, the other 18 municipalities decided to enter into the inter-county cooperation and to set up the 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-Trøndelag, More og Romsdal, Oppland, Rogaland, Sogn og Fjordane, Sor-Trøndelag, Telemark, Troms, Vest-County, Vestfold and Østfold, to establish an inter-county cooperation body, the 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...'⁽⁹⁾

Funds for the county municipalities

- (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.'⁽¹⁰⁾

- (17) Following the approval of the funds the Ministry of Education transferred over a period of three years NOK 30,5 million (NOK 17 million in 2007, NOK 9 million in 2008 and NOK 4,5 million in 2009) to the participating municipalities for the NDLA project.

⁽⁸⁾ See footnote 7.

⁽⁹⁾ See footnote 7.

⁽¹⁰⁾ See footnote 7.

- (18) Besides, 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 NOK 287 million in 2007, NOK 211 million in 2008, NOK 347 million in 2009 and NOK 308 million in 2010.

Funding of NDLA by the municipalities

- (19) The participating municipalities decided to use part of these funds for the NDLA project. The county municipalities allocated NOK 21,1 million (2008), NOK 34,7 million (2009), NOK 58,8 million (2010) and NOK 57,7 million (2011) to the project.

Legal status

- (20) The EFTA Court emphasised that it is apparent from the case file that the NDLA was active as an ad hoc cooperation before it was formally established as an inter-county cooperation body pursuant Article 27 of the Norwegian Local Government Act ⁽¹¹⁾.

Related projects

- (21) 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).
- (22) 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 NOK 13,5 million to the municipality of Oslo over a period of two years (NOK 8 million in 2007 and NOK 5,5 million in 2008). It should be noted that the funds provided to the municipality of Oslo are not subject to the complaint at hand.
- (23) 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 the NDLA. In its letter stating the conditions of the grant the Ministry of Education reserved itself the right to reallocate funds originally earmarked for the NDLA to the Ministry's own project. The relevant funds provided to the Ministry of Education are not subject to the complaint at hand.

3.2. National legal basis for the measure

- (24) The legal basis for the funds paid by the Ministry of Education to the 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.

3.3. Recipient

- (25) The NDLA is organised as an inter-county cooperation body under Article 27 of the Local Government Act. This provision stipulates that municipalities or county municipalities may join forces to solve mutual tasks. The cooperation should take place through a board appointed by the relevant municipal or county municipal boards. The board may be empowered to adopt decisions concerning the operation and organisation of the inter municipal cooperation. Moreover, the provision stipulates that the articles of association of such cooperation shall determine the appointment and representation in the board, the area of activities, whether the participating municipalities shall make financial contributions, whether the board may enter into loan agreements or in other ways make the participating municipalities liable for financial obligations and, finally, how such cooperation shall be abolished.
- (26) Participation in such cooperation is only open for municipalities and county municipalities. Neither the State nor other State entities or private parties can participate. The cooperation must be sincere in the sense that the law prohibits that the competence to govern the cooperation is delegated to one municipality. This is so since municipal tasks and obligations shall remain the responsibility of each municipality ⁽¹²⁾.

⁽¹¹⁾ Case E-1/12 *Den norske Forleggerforening*, para. 117 (not yet published).

⁽¹²⁾ NOU 1996:5 pkt. 8.1.2.

3.4. Amount

- (27) As indicated above, so far the county municipalities have transferred NOK 21,1 million in 2008, NOK 34,7 million in 2009 and NOK 61,6 million in 2010 to the NDLA project. In 2010 the county municipalities allocated NOK 58,8 million to the project and in 2011 this amount was NOK 56,9 million.

3.5. Duration

- (28) The NDLA project is not subject to a limited duration.

4. The Decision

- (29) On 12 October 2011 the Authority adopted Decision No 311/11/COL holding that the measure did not constitute State aid within the meaning of Article 61(1) EEA. The Authority found that the NDLA was not to be considered as an undertaking because it did not carry out an economic activity.
- (30) In that regard the Authority, firstly, noted that, according to established case law and decision practice, in setting up and maintaining the national education system the State fulfils its duties towards its own population in the social, cultural and educational fields⁽¹³⁾. The Authority observed 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. In that regard it noted that the learning material forms both the basis and the framework for teaching and that the development of learning material is closely linked to the curriculum which is also established by the public authorities.
- (31) Secondly, the Authority pointed out that, for a service to be considered as non-economic, it must be provided based on the principle of national solidarity, which means that the activity must be funded by the public purse and not through remuneration. In other words, there should be no connection between the actual costs of the service provided and the fee paid by those benefiting from the activity⁽¹⁴⁾. In that regard the Authority concluded that this requirement was fulfilled because the NDLA is entirely funded by the State and distributes the developed or purchased learning material free of any charge.
- (32) Thirdly, the Authority noted that 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)⁽¹⁵⁾. In that regard the Authority noted that the participating municipalities have established the NDLA as an inter-county cooperation body in accordance with Article 27 of the local government act, referred to above. In view of the above, the Authority concluded in its Decision that the NDLA did not carry out an economic activity. Consequently, the NDLA did not act as an undertaking and the funds which the county municipalities transferred to it did not constitute State aid.

5. Judgment in Case E-1/12

- (33) On 11 December 2012 the EFTA Court annulled Decision No 311/11/COL. The EFTA Court concluded that the Authority did not carry out a sufficient examination into several issues and should have opened the formal investigation procedure.
- (34) Firstly, the EFTA Court noted that the NDLA was active as an ad hoc cooperation before it was formally established as an inter-county cooperation body pursuant to Article 27 of the Norwegian Local Government Act. According to the EFTA Court it remains unclear how this change in the legal and organisational status may have changed the decision-making process and the source of funding⁽¹⁶⁾.

⁽¹³⁾ 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 No 118/2000 *France — Aide aux clubs sportifs professionnels*, OJ C 333, 28.11.2001, p. 6.

⁽¹⁴⁾ 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, paras. 11 and 12.

⁽¹⁵⁾ 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, paras. 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).

⁽¹⁶⁾ See footnote 11.

- (35) Secondly, the EFTA Court stated that it remains unclear whether the legislation imposes the obligation to provide the services free of charge on the counties or on the NDLA⁽¹⁷⁾. According to the EFTA Court this circumstance raises serious difficulties with regard to the application of the principle of solidarity.
- (36) Thirdly, the EFTA Court stated that there are aspects related to the autonomy of the NDLA which remain unclear. First, the EFTA Court noted that it is unclear, how the decisions to expand the NDLA's activities were taken and by whom⁽¹⁸⁾. Furthermore, the EFTA Court pointed out that Article 8 of the Articles of Association of the NDLA states that 'the board (of the NDLA) has the competence to impose financial obligations on the participants⁽¹⁹⁾.' Moreover, it follows from the judgment that the annulled decision lacked information as regards the autonomy of the the NDLA to set the parameters for the public procurement procedure through which it purchases goods on the market and hires staff⁽²⁰⁾.

II. ASSESSMENT

1. The presence of State aid

- (37) 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.'

1.1. State resources

- (38) A measure is financed *by the State or through State resources*, if it results in a burden on the budget of a public authority or on a public or private undertaking provided that the measure is imputable to the State⁽²¹⁾. In the case at hand the financing of the project results in a burden on the budget of the counties and of the Ministry of Education and Research. Consequently, the measure is financed by the State within the meaning of Article 61(1) of the EEA.

1.2. Advantage to an undertaking

- (39) As mentioned above, the Authority concluded in its previous decision that the county municipalities' provision of free, and in this case digital learning material for pupils in the national elementary and secondary school system to be a part of the State's fulfilment of its duty in the educational field and hence a non-economic activity provided under the principle of solidarity as such material is fully funded by the State.
- (40) However, in its judgment the EFTA Court addressed several aspects relating not to the nature of the activity as such but rather to organisational aspects of the NDLA, its financing and autonomy, which should have led the Authority to open a formal investigation procedure.

The legal status of the NDLA

- (41) The EFTA Court noted that the Articles of Association of the NDLA foresaw that the formalised cooperation would enter into force on 1 July 2009⁽²²⁾. At the same time, the EFTA Court noted that the county municipalities resolutions of August 2006 foresaw that the inter-county cooperation would enter into force on 1 January 2010⁽²³⁾. In view of the above and taking into account that the NDLA was already active as an ad hoc cooperation before it was formally established, the EFTA Court found that the Authority should have investigated the effects of the organisational changes and legal status of the NDLA may have affected its decision making process and the sources of its funding and how it may have changed over time⁽²⁴⁾.
- (42) The Authority's Decision described the project phase of the NDLA; the Authority thus acknowledges that the information in the case file does indeed suggest that the NDLA entered into force on 1 July 2009 and thus six months earlier than originally foreseen in the resolutions which the county-municipalities had adopted several years earlier.

⁽¹⁷⁾ Case E-1/12 *Den norske Forleggerforening*, para. 123 (not yet published).

⁽¹⁸⁾ Case E-1/12 *Den norske Forleggerforening*, para. 127 (not yet published).

⁽¹⁹⁾ Case E-1/12 *Den norske Forleggerforening*, paras. 128-130 (not yet published).

⁽²⁰⁾ Case E-1/12 *Den norske Forleggerforening*, para. 131 (not yet published).

⁽²¹⁾ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, para. 52.

⁽²²⁾ Case E-1/12 *Den norske Forleggerforening*, para. 115 (not yet published).

⁽²³⁾ The EFTA Court refers to the submission from Norway dated 9 September 2010, p. 3.

⁽²⁴⁾ See footnote 11.

- (43) The complainant has not alleged that the NDLA in its project phase, i.e. before its entry into force as a inter municipal cooperation under Article 27 of the local government act, did engage in any other activities than what it has done after its formal establishment. Nevertheless, the EFTA Court points out that the lack of information about how the county municipalities organised their cooperation to comply with their obligations to provide learning material in the NDLA project phase may have an impact on the classification of the activities as non-economic. For that reason the Court emphasised that the Authority should have carried out an investigation on the effects of the change in legal status on the decision making process in the NDLA ⁽²⁵⁾.
- (44) In that regard it is the Authority's understanding that prior to the formal establishment the project was managed by the 'forum for the county municipalities Heads of Education' (hereafter: FFU) ⁽²⁶⁾, which appointed board members to carry out delegated tasks in the project phase.
- (45) After the NDLA had been formally established and according to §7(2) of the Articles of Association the forum of the counties' Heads of Education became the Supervisory Board which remains responsible for the overall management. The forum of the counties' Heads of Education appoints the Management Board management board. According to §7(1) of the Articles of Association the Management Board is composed of five members with one member of the FFU and at least one representative of the training regions (i.e. Northern Region, South Western Region and Eastern Region. According to §8 of the Articles of Association, the task of the Management Board is to ensure that the NDLA is able to perform its duties under §2 of the Articles of Association, namely to ensure that (1) that digital educational materials are available to users free of charge, (2) that secondary school is characterised by collaboration and sharing (3) that students and teacher actively participate in teaching and learning, (4) that academic institutions and networks across the country are a driving force in the development of excellent digital learning material and (5) that the market provides content and services for students and teachers needs. Furthermore, the Management Board has the authority to incur financial obligations on the participants in that regard. However, §7(2) of the Articles of Association explicitly states that the Management Board only exercises its authority on the basis of delegation decisions of the Supervisory Board and that the Supervisory Board may instruct the Management Board and overrule its decisions.
- (46) The Authority requests the Norwegian government and any interested third parties to explain whether they consider the NDLA to be an undertaking within the meaning of Article 61(1) EEA. In particular they are asked to explain in more detail how the counties cooperated in the NDLA project phase and, in particular, to clarify at what time the NDLA entered into force and whether this entry into force of the municipal cooperation affected the decision making process and the sources of the NDLA's funding. Moreover, the Norwegian authorities are invited to elaborate on the nature, practice and use of inter municipal cooperation under Article 27 of the local government act, including whether such cooperation is considered separate legal entities or not under Norwegian law.
- (47) The Authority moreover requests the Norwegian authorities to explain to what extent the change in legal status effected the decision making process, in particular, to what extent the NDLA can expand the scope of its activities without the consent of the participating municipalities or even against their will, and if the present situation differs from the situation prior to the formal establishment of the NDLA on 1 July 2009 ⁽²⁷⁾. The Authority also invites the Norwegian authorities to explain in more detail the funding of the NDLA, both in its project phase and after the formal entry into force up to and including 2012 ⁽²⁸⁾.

The principle of solidarity and the autonomy of the NDLA

- (48) The EFTA Court also found that it was unclear from the Decision whether the obligation to provide digital learning material free of charge falls upon the county municipalities or upon the NDLA ⁽²⁹⁾. The EFTA Court noted that in the annulled Decision, the Authority 'refers to the Norwegian legislation and states that it obliged the counties to provide the pupils with the necessary printed and digital learning materials free of charge' (emphasis added) ⁽³⁰⁾. The EFTA Court further noted that in the assessment on the autonomy of the NDLA, the annulled decision states that the NDLA cannot decide on charging fees to the end consumer '... since the legal framework obliges the NDLA to provide its services free of charge' (emphasis added) ⁽³¹⁾. The judgment also refers to that the

⁽²⁵⁾ See footnote 11.

⁽²⁶⁾ The Norwegian wording is: 'Forum for fylkesutdanningssefer'.

⁽²⁷⁾ See footnote 11.

⁽²⁸⁾ See footnote 11.

⁽²⁹⁾ Case E-1/12 *Den norske Forleggerforening*, paras. 121-123 (not yet published).

⁽³⁰⁾ The EFTA Court seems to refer to para. 12 and footnote 4 of the annulled decision according to which 'Section 3-1 and 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.'

⁽³¹⁾ The EFTA Court refers to para. 45 of the annulled decision in para. 121 of the Judgment.

Authority at the oral hearing explained that it is the counties which bear the statutory obligation to offer this service free of charge and that they had decided to offer this service jointly through the NDLA ⁽³²⁾.

- (49) In the view of that the EFTA Court considered the above mentioned statements in the decision to represent an implicit contradiction (as it was not clear who was the client of the NDLA), the Authority notes that the notion of 'legal framework' is wider than that of 'legislation'. The reference to the legal framework encompasses not only the statutory obligation in national law (such as the Education Act), but also resolutions (such as the resolutions passed by the county municipalities in August 2006), as well as administrative acts (such as the April 2007 award of funding by the Ministry of Education) and the Articles of Association of the NDLA. The Authority does therefore not consider the above mentioned statements to contain any implicit contradiction.
- (50) However, based on the EFTA Court's judgment the Authority invites the Norwegian authorities to explain in more details how the obligation to provide free learning material has been imposed on the county municipalities in the Public Education Act, and how the county municipalities involved in the NDLA have fulfilled this obligation through the NDLA cooperation as set out in the Articles of Association.
- (51) Finally, the Court found that the decision did not contain sufficient information on the possibility of the NDLA to set the parameters for the public procurement procedures through which it purchases goods and hires staff ⁽³³⁾.
- (52) The Authority therefore invites the Norwegian authorities to provide more detail on how the parameters for the public procurement procedures through which the NDLA purchases goods and hires staff are set.
- (53) Consequently the Authority expresses doubts as to whether the NDLA, wholly or partly, before or after its formal entry into force, may be considered as an undertaking under the EEA State aid rules.

1.3. *Selectivity*

- (54) It is established case law that a measure is selective if it derogates from the common regime inasmuch as it differentiates between economic operators who are otherwise in the same legal and factual situation ⁽³⁴⁾. In that regard the Authority notes that if the NDLA were to be considered as an undertaking, the funding of it would be selective since other operators would not benefit from a similar funding.

1.4. *Effect on competition and trade*

- (55) It is established case law that a measure distorts or threatens to distort competition in a way that affects trade between Contracting Parties if it strengthens the position of the recipient compared with other companies ⁽³⁵⁾ and if the recipient is active in a sector, in which trade between Contracting Parties takes place ⁽³⁶⁾. In that regard the Norwegian authorities noted that the relevant geographic market for provision of learning materials made to fit the national Norwegian curricula should to a great extent be limited to Norway, so that the effects on cross-border trade are not significant. The Authority cannot at this stage and based on the information at hand conclude on the effects of the measure on competition and trade. The Authority therefore invites Norway to provide further information in that regard.

2. *Compatibility*

- (56) The Norwegian authorities submitted that if one were to view the funding of the NDLA as State aid, then it would qualify as a compensation for a service of general economic interest under Article 59(2) EEA. However, based on the information at hand the Authority cannot at this stage conclude on the compatibility of the measure. The Authority therefore invites Norway to provide further information in that regard.

⁽³²⁾ See footnote 17.

⁽³³⁾ See footnote 20.

⁽³⁴⁾ Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para. 41; Cases C-106/09 P and C-107/09 P *Commission and Spain v Gibraltar and UK (Gibraltar corporate tax)* [2011] not yet published, para. 36.

⁽³⁵⁾ Case 730/79 *Philip Morris Holland BV v Commission*, [2005] ECR, 2671, para. 11.

⁽³⁶⁾ Case 102/87, *France v Commission (SEB)*, [1988], 4067. Case C-310/99, *Italian Republic v Commission*, [2002] EC R I-289, para. 85. Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)*, [2003] ECR, I-7747, para. 77; Case T-55/99, *Confederación Española de Transporte de Mercancías (CETM) v Commission*, [2000] ECR II-3207, para. 86.

3. Conclusion

- (57) Based on the information submitted by the complainant and by the Norwegian authorities, and taking into account the judgment of the EFTA Court, the Authority has doubts as to whether the grants to the NDLA constitute State aid within the meaning of Article 61(1) EEA. Furthermore, the Authority has doubts regarding the compatibility of the measure with the functioning of the EEA Agreement.
- (58) Given these doubts and the impact of potential State aid on the investments of private operators it appears necessary that the Authority opens the formal investigation procedure. Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority is obliged to initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3.
- (59) The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement or that they do not constitute State aid.
- (60) The opening of the procedure will also enable interested third parties to comment on the questions raised and on the impact of the measure on the relevant markets.
- (61) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, hereby invites the Norwegian authorities to submit their comments and to provide *all documents, information and data* needed for the assessment of the compatibility of the measures within one month from the date of receipt of this Decision.
- (62) Further, the Authority invites the Norwegian authorities to forward a copy of this Decision to the potential recipients of the aid immediately.
- (63) The Authority would like to remind the Norwegian authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully put at the disposal of the beneficiaries will have to be recovered, unless this recovery would be contrary to a general principle of EEA law. Moreover, according to Article 15 Part II of Protocol 3, the powers of the Authority to order the recovery of aid are subject to a limitation period of 10 years. This period begins on the day on which the unlawful aid is awarded. Any action taken by the Authority with regard to this unlawful aid shall interrupt the limitation period.
- (64) Attention is drawn to the fact that the Authority will inform interested parties by publishing this letter and a meaningful summary of it in the EEA Supplement of the *Official Journal of the European Union*. It will also inform interested parties, by publication of a notice in the EEA Supplement to the Official Journal of the European. All interested parties will be invited to submit their comments within one month of the date of such publication,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure, provided for in Article 1(2) of part I of Protocol 3 is initiated regarding the potential State aid to the NDLA.

Article 2

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month of the notification of this Decision.

Article 3

The Norwegian authorities are requested to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the nature and compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version of this Decision is authentic.

Done at Brussels, 27 March 2013.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sabine MONAUNI-TÖMÖRDY
College Member
