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⁽¹⁾ Text with EEA relevance

I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COMMISSION REGULATION (EC) No 902/2008**of 17 September 2008****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾,

Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector ⁽²⁾, and in particular Article 138(1) thereof,

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 138 of Regulation (EC) No 1580/2007 are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 18 September 2008.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 September 2008.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 350, 31.12.2007, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MK	31,4
	TR	68,0
	ZZ	49,7
0707 00 05	EG	162,5
	MK	43,3
	TR	83,8
	ZZ	96,5
0709 90 70	TR	89,1
	ZZ	89,1
0805 50 10	AR	73,5
	TR	104,3
	UY	64,9
	ZA	89,3
	ZZ	83,0
0806 10 10	IL	248,7
	TR	130,8
	US	196,0
	ZZ	191,8
0808 10 80	AR	92,1
	AU	195,4
	BR	74,2
	CL	91,9
	CN	78,4
	NZ	111,1
	US	100,8
	ZA	83,4
0808 20 50	ZZ	103,4
	AR	76,1
	CN	93,6
	TR	128,9
	ZA	75,1
	ZZ	93,4
0809 30	TR	136,6
	US	150,7
	ZZ	143,7
0809 40 05	IL	132,0
	TR	85,4
	XS	62,1
	ZZ	93,2

⁽¹⁾ Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 903/2008**of 17 September 2008****on special conditions for granting export refunds on certain pigmeat products****(Codified version)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾, and in particular Articles 170 and 192 in connection with Article 4 thereof,

Having regard to Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts ⁽²⁾, and in particular Article 6 thereof,

Whereas:

- (1) Commission Regulation (EC) No 2331/97 of 25 November 1997 on special conditions for granting export refunds on certain pigmeat products ⁽³⁾ has been substantially amended several times ⁽⁴⁾. In the interests of clarity and rationality the said Regulation should be codified.
- (2) Article 21 of Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products ⁽⁵⁾ provides that no refund is to be granted where the products are not of sound and fair marketable quality on the date on which the export declaration is accepted.
- (3) Such requirements have nevertheless proved insufficient to ensure that uniform conditions apply when refunds are paid on some of the products listed in Article 1(1)(q) of Regulation (EC) No 1234/2007.
- (4) Additional conditions relating to products of average quality and enabling the payment of refunds on products of inferior quality to be refused should consequently be laid down at Community level.
- (5) Provision should be made for an additional quality in the case of products falling within CN codes 1601 00 99 and 1602 49 19, not containing poultrymeat and for which

the quality criteria should be set high in order to limit any refunds granted to such products where the quantities covered by export licence applications exceed or are likely to exceed traditional quantities.

- (6) It is essential to make provision for checks to ensure compliance with this Regulation. Such checks are to be conducted pursuant to Commission Regulation (EC) No 2090/2002 of 26 November 2002 laying down detailed rules for applying Council Regulation (EEC) No 386/90 as regards physical checks carried out when agricultural products qualifying for refunds are exported ⁽⁶⁾, and must in particular include an organoleptic examination and physical and chemical analyses. Applications for refunds must accordingly be accompanied by a written declaration to the effect that the products in question meet the requirements laid down herein.

- (7) Provision must be made for certain clearly defined analyses with a view to ensuring standardisation of the physical and chemical checks.

- (8) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

1. Without prejudice to other Community provisions and in particular Regulation (EC) No 800/1999, export refunds shall only be granted on the products listed in Annex I hereto where:

- (a) they meet the conditions laid down in Annex I hereto; and
- (b) box 44 of the export declaration bears the words 'goods complying with Regulation (EC) No 903/2008'.

2. For the purposes of this Regulation, products manufactured for human consumption and suitable therefor by reason of the raw materials used, their preparation under satisfactory hygienic conditions and their packaging shall be deemed to be of sound and fair marketable quality within the meaning of Article 21 of Regulation (EC) No 800/1999.

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 42, 16.2.1990, p. 6.

⁽³⁾ OJ L 323, 26.11.1997, p. 19.

⁽⁴⁾ See Annex III.

⁽⁵⁾ OJ L 102, 17.4.1999, p. 11.

⁽⁶⁾ OJ L 322, 27.11.2002, p. 4.

Article 2

When the checks referred to in Article 5 of Regulation (EC) No 2090/2002 are conducted, the checks on the products covered by this Regulation shall entail:

- (a) an organoleptic examination; and
- (b) physical and chemical analyses using the methods laid down in Annex II hereto.

Article 3

Regulation (EC) No 2331/97 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex IV.

Article 4

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 September 2008.

For the Commission

The President

José Manuel BARROSO

ANNEX I

Special conditions for granting export refunds on certain pigmeat products

CN code	Description	Product code	Conditions
1601 00	Sausages and similar products, of meat, meat offal or blood; food preparations based on these products:		
	- Other:		
1601 00 91	-- Sausages, dry or for spreading, uncooked		
	--- Not containing poultrymeat or offal	1601 00 91 9120	(a) protein content by weight: minimum 16 % of net weight (b) no addition of extraneous water (c) proteins other than animal proteins are prohibited
	--- Other	1601 00 91 9190	(a) protein content by weight: minimum 12 % of net weight (b) no addition of extraneous water (c) proteins other than animal proteins are prohibited
1601 00 99	-- Other:		
	--- In containers which also contain preserving liquid, not containing poultrymeat or offal	1601 00 99 9110	(a) animal protein content by weight: minimum 10 % of net weight (b) collagen/protein ratio: maximum 0,30 (c) extraneous water content by weight: maximum 25 % of net weight
	--- In containers which also contain preserving liquid	1601 00 99 9190	(a) animal protein content by weight: minimum 8 % of net weight (b) collagen/protein ratio: maximum 0,45 (c) extraneous water content by weight: maximum 33 % of net weight
	--- Other, not containing poultrymeat or offal	1601 00 99 9110	(a) animal protein content by weight: minimum 10 % of net weight (b) collagen/protein ratio: maximum 0,30 (c) extraneous water content by weight: maximum 10 % of net weight
	--- Other:	1601 00 99 9190	(a) animal protein content by weight: minimum 8 % of net weight (b) collagen/protein ratio: maximum 0,45 (c) extraneous water content by weight: maximum 23 % of net weight
ex 1602	Other prepared or preserved meat, meat offal or blood:		
	- Of swine:		
ex 1602 41	-- Hams and cuts thereof:		

CN code	Description	Product code	Conditions
ex 1602 41 10	--- Of domestic swine: ---- Cooked, containing by weight 80 % or more of meat and fat: ----- In immediate packings with a net weight of 1 kg or more ----- In immediate packings with a net weight of less than 1 kg	1602 41 10 9110 1602 41 10 9130	Water/protein ratio in meat maximum 4,3 Water/protein ratio in meat maximum 4,3
ex 1602 42	-- Shoulders and cuts thereof:		
ex 1602 42 10	--- Of domestic swine: ---- Cooked, containing by weight 80 % or more of meat and fat: ----- In immediate packings with a net weight of 1 kg or more ----- In immediate packings with a net weight of less than 1 kg	1602 42 10 9110 1602 42 10 9130	Water/protein ratio in meat maximum 4,5 Water/protein ratio in meat maximum 4,5
ex 1602 49	-- Other, including mixtures: --- Of domestic swine: ---- Containing by weight 80 % or more of meat or meat offal, of any kind, including fats of any kind or origin:		
ex 1602 49 19	----- Other: ----- Cooked, containing by weight 80 % or more of meat and fat: ----- Not containing the meat or offal of poultry: ----- Containing a product composed of clearly recognisable pieces of muscular meat which, due to their size are not identifiable as having been obtained from hams, shoulders, loins or collars, together with small particles of visible fat and small quantities of jelly deposits	1602 49 19 9130	Water/protein ratio in meat maximum 4,5

ANNEX II

Methods of analysis ⁽¹⁾**1. Determination of protein content**

The protein content is taken to mean the nitrogen content multiplied by the factor 6.25. The nitrogen content must be determined according to ISO method 937-1978.

2. Determination of water content in products falling within CN codes 1601 and 1602

The water content must be determined according to ISO method 1442-1973.

3. Calculation of extraneous water content

The extraneous water content is given by the formula: $a - 4b$, in which:

a = water content,

b = protein content.

4. Determination of collagen content

The collagen content is taken to mean the hydroxyproline content multiplied by the factor 8. The hydroxyproline content must be determined according to ISO method 3496-1978.

⁽¹⁾ The methods of analysis referred to in this Annex are those applying on the date of entry into force of this Regulation, without prejudice to any subsequent amendment to such methods. They are published by the ISO Secretariat, 1 Rue de Varembe, Geneva, Switzerland.

ANNEX III

Repealed Regulation with list of its successive amendments

Commission Regulation (EC) No 2331/97	(OJ L 323, 26.11.1997, p. 19).
Commission Regulation (EC) No 739/98	(OJ L 102, 2.4.1998, p. 22).
Commission Regulation (EC) No 2882/2000	(OJ L 333, 29.12.2000, p. 72).
Commission Regulation (EC) No 507/2002	(OJ L 79, 22.3.2002, p. 12).

ANNEX IV

Correlation table

Regulation (EC) No 2331/97	This Regulation
Articles 1 and 2	Articles 1 and 2
Article 3	—
—	Article 3
Article 4	Article 4
Annexes I and II	Annexes I and II
—	Annex III
—	Annex IV

COMMISSION REGULATION (EC) No 904/2008

of 17 September 2008

laying down the methods of analysis and other technical provisions necessary for the application of the export procedure for goods not covered by Annex I to the Treaty

(Codified version)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff ⁽¹⁾, and in particular Article 9 thereof,

Whereas:

- (1) Commission Regulation (EEC) No 4056/87 of 22 December 1987 laying down the methods of analysis and other technical provisions necessary for the implementation of Regulation (EEC) No 3035/80 laying down general rules for granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds ⁽²⁾ has been substantially amended ⁽³⁾. In the interests of clarity and rationality the said Regulation should be codified.
- (2) In order to ensure uniform treatment of the exportation from the Community of goods covered by Council Regulation (EC) No 3448/93 of 6 December 1993 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products ⁽⁴⁾, it is important to define the analytical methods and other provisions of a technical nature.
- (3) The measures provided for in this Regulation are in accordance with the opinion of the Tariff and Statistical Nomenclature Section of the Customs Code Committee,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation lays down the methods of analysis necessary for the application of Regulation (EC) No 3448/93 as regards the export of goods not covered by Annex I to the Treaty or, in the absence of a method of analysis, the nature of the analytical operations to be carried out or the principle of a method to be applied.

⁽¹⁾ OJ L 256, 7.9.1987, p. 1.

⁽²⁾ OJ L 379, 31.12.1987, p. 29.

⁽³⁾ See Annex I.

⁽⁴⁾ OJ L 318, 20.12.1993, p. 18.

Article 2

In accordance with the notes to Annex IV to Commission Regulation (EC) No 1043/2005 ⁽⁵⁾ and for the purposes of applying that Annex, the 'Data obtained from the analysis of the goods' set out in column 3 shall be obtained using the methods, procedures and formulae referred to in this Article:

1. Sugars

High performance liquid chromatography (HPLC) shall be used for the individual determination of sugars.

A. The sucrose content mentioned in column 3 of Annex IV to Regulation (EC) No 1043/2005 shall be equal to:

$$(a) S + (2F) \times 0,95,$$

if the glucose content is not less than the fructose content,

or

$$(b) S + (G + F) \times 0,95,$$

if the glucose content is less than the fructose content

where:

S = is the sucrose content determined by HPLC,

F = is the fructose content determined by HPLC,

G = is the glucose content determined by HPLC,

Where the presence of a lactose hydrolysate is declared and/or quantities of lactose and galactose are detected, a glucose content, equivalent to the galactose content (determined by HPLC), shall be deducted from the glucose (G) content before any other calculation is made.

B. The glucose content mentioned in column 3 of Annex IV to Regulation (EC) No 1043/2005 shall be equal to:

$$(a) G - F,$$

where the glucose content is more than the fructose content

⁽⁵⁾ OJ L 172, 5.7.2005, p. 24.

(b) 0 (Zero),

where the glucose content is equal to or less than the fructose content.

Where the presence of a lactose hydrolysate is declared and/or quantities of lactose and galactose are detected, a glucose content, equivalent to the galactose content (determined by HPLC), shall be deducted from the glucose (G) content before any other calculation is made.

2. Starch (or dextrin)

(dextrin shall be expressed as starch)

A. For all CN codes other than CN codes 3505 10 10, 3505 10 90, 3505 20 10 to 3505 20 90 and 3809 10 10 to 3809 10 90, the starch (or dextrin) content referred to in column 3 of Annex IV to Regulation (EC) No 1043/2005 shall be calculated using the formula:

$$(Z - G) \times 0,9,$$

where

Z = is the glucose content determined by the method described in Annex I to Commission Regulation (EEC) No 4154/87 ⁽¹⁾;

G = is the glucose content determined by HPLC.

B. For CN codes 3505 10 10, 3505 10 90, 3505 20 10 to 3505 20 90 and 3809 10 10 to 3809 10 90, the starch (or dextrin) content shall be determined by the method set out in Annex II to Regulation (EEC) No 4154/87.

3. Milk fat content

For the purposes of determining the milk fat content, a method based on extraction with light petroleum, preceded by hydrolysis with hydrochloric acid and followed by gas chromatography of the methyl esters of the fatty acids, shall be used. If the presence of milk fats is detected, the

percentage proportion thereof shall be calculated by multiplying the percentage concentration of methyl butyrate by 25, multiplying the product by the total percentage fat content by weight of the goods and dividing by 100.

Article 3

For the purposes of applying Annex III to Regulation (EC) No 1043/2005, the percentage of mannitol and of D-glucitol (sorbitol) shall be determined by HPLC.

Article 4

1. A test report shall be drawn up.
2. The test report shall include the following particulars:
 - all the information necessary for identifying the sample,
 - the Community method used and precise reference to the legal instrument in which it is laid down, or, where appropriate, detailed reference to a method, specifying the nature of the analytical operations to be carried out or the principle of the method to be applied, as indicated in this Regulation,
 - any factors liable to have influenced the results,
 - the results of the analysis, with due regard to the way in which they are expressed in the method used and the means of expression dictated by the needs of the customs or administrative departments that requested the analysis.

Article 5

Regulation (EEC) No 4056/87 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

Article 6

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

⁽¹⁾ OJ L 392, 31.12.1987, p. 19.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 September 2008.

For the Commission
The President
José Manuel BARROSO

ANNEX I

Repealed Regulation with its amendment

Commission Regulation (EEC) No 4056/87	(OJ L 379, 31.12.1987, p. 29)
Commission Regulation (EC) No 202/98	(OJ L 21, 28.1.1998, p. 5)

ANNEX II

Correlation table

Regulation (EEC) No 4056/87	This Regulation
Articles 1 to 4	Articles 1 to 4
—	Article 5
Article 5	Article 6
—	Annex I
—	Annex II

COMMISSION REGULATION (EC) No 905/2008**of 17 September 2008****concerning the issue of import licences for raw cane sugar for refining, originating in the least-developed countries**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences ⁽¹⁾,

Having regard to Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector ⁽²⁾,

Having regard to Commission Regulation (EC) No 1100/2006 of 17 July 2006 laying down, for the marketing years 2006/07, 2007/08 and 2008/09, detailed rules for the opening and administration of tariff quotas for raw cane-sugar for refining, originating in least developed countries, as well as detailed rules applying to the importation of products of tariff heading 1701 originating in least developed countries ⁽³⁾, and in particular Article 7(3) thereof,

Whereas:

- (1) In accordance with Article 12(5) of Regulation (EC) No 980/2005, Article 3(1) of Regulation (EC) No 1100/2006 opens, for imports originating in the least-developed countries, tariff quotas at zero duty for products falling within CN code 1701 11 10, expressed as white sugar equivalent.

- (2) Applications for import licences have been submitted to the competent authorities in the week from 8 to 12 September 2008 in accordance with Article 5 of Regulation (EC) No 1100/2006. The weekly record referred to in Article 7(2) of that Regulation has revealed that, following these applications, the total quantity requested for the 2007/08 marketing year is equal to the limit of 178 030,75 tonnes laid down for this year for quota 09.4361.

- (3) In these circumstances, the Commission must inform the Member States that the limit concerned has been reached and that no further licence application is admissible,

HAS ADOPTED THIS REGULATION:

Article 1

Import licence applications submitted from 8 to 12 September 2008 under Article 5 of Regulation (EC) No 1100/2006 shall be issued for 100 % of the quantity requested.

Article 2

The limit of 178 030,75 tonnes for tariff quota 09.4361, as provided for in Article 3(1) of Regulation (EC) No 1100/2006, has been reached. Applications for import licences submitted after 12 September 2008 shall be inadmissible.

Article 3

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 September 2008.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 169, 30.6.2005, p. 1.

⁽²⁾ OJ L 58, 28.2.2006, p. 1.

⁽³⁾ OJ L 196, 18.7.2006, p. 3.

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COUNCIL

COUNCIL DECISION

of 15 September 2008

authorising the Italian Republic to apply a measure derogating from Article 285 of Directive 2006/112/EC on the common system of value added tax

(2008/737/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ⁽¹⁾, and in particular Article 395(1) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) The Italian Republic did not make use of the provisions of Article 14 of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax ⁽²⁾ which means that a scheme to exempt taxable persons could only be introduced in respect of taxable persons whose annual turnover was no higher than EUR 5 000.

(2) In a letter registered by the Commission's Secretariat-General on 15 November 2007 Italy requested authorisation from 1 January 2008 for a measure derogating from Article 285 of Directive 2006/112/EC in order to exempt taxable persons whose annual turnover is no higher than EUR 30 000. This measure will release

those taxable persons from certain or all of the value added tax (VAT) obligations referred to in Chapters 2 to 6 of Title XI of Directive 2006/112/EC, whilst the optional character of the measure will allow businesses to opt for the normal VAT arrangements.

(3) In accordance with Article 395(2) of Directive 2006/112/EC the Commission informed the other Member States by letter dated 6 May 2008 of the request made by Italy. By letter dated 8 May 2008, the Commission notified Italy that it had all the information necessary to consider the request.

(4) A special scheme for small enterprises is already available to Member States under Title XII of Directive 2006/112/EC. This measure derogates from Article 285 of Directive 2006/112/EC only in so far as the annual turnover threshold for the scheme is higher than that currently allowed for Italy.

(5) The threshold requested by Italy may significantly reduce the VAT obligations of the smallest businesses. It is in line with the thresholds that apply with respect to certain other Member States.

(6) The Commission is committed to establishing a common annual turnover threshold below which taxable persons may be exempt from VAT as a measure to help reduce the burdens on small businesses. In 2004 the Commission proposed to allow Member States the option of increasing the annual turnover threshold for small businesses to be exempt from VAT. The Italian request is in line with the Commission proposal.

⁽¹⁾ OJ L 347, 11.12.2006, p. 1.

⁽²⁾ OJ 71, 14.4.1967, p. 1303/67. Directive repealed by Directive 77/388/EEC (OJ L 145, 13.6.1977, p. 1).

- (7) Italy would also like the possibility to increase the ceiling to maintain its value in real terms, and so be able to apply a provision akin to that in Article 286 of Directive 2006/112/EC to this measure.
- (8) Considering that the tax period is annual and in order to allow taxable persons to benefit from the simplification measure as soon as possible, Italy should be allowed to make the optional scheme available as from 1 January 2008.
- (9) The derogation will have no impact on the European Communities' own resources accruing from value added tax.
- (10) From information provided by the Italian Republic, the measure will lead to a reduction of the overall amount of tax revenue collected at the final stage of consumption of some 0,15 % in the first year of implementation, rising to around 0,25 % in the following two years,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 285 of Directive 2006/112/EC, the Italian Republic is authorised, with respect

to tax periods falling between 1 January 2008 and 31 December 2010, to exempt from VAT taxable persons whose annual turnover is no higher than EUR 30 000. This scheme is optional for taxable persons.

Article 2

The Italian Republic may raise that ceiling in order to maintain the value of the exemption in real terms.

Article 3

This Decision shall expire on the date of entry into force of Community rules establishing a common annual turnover threshold below which taxable persons may be exempt from VAT, but on 31 December 2010 at the latest.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 15 September 2008.

For the Council

The President

B. KOUCHNER

COMMISSION

COMMISSION DECISION

of 4 June 2008

concerning the State aid scheme that France intends to implement in favour of the processing and marketing of fisheries and aquaculture products (Fonds d'Intervention Stratégique des Industries Agro-Alimentaires (agri-food industries strategic intervention fund))

(notified under document number C(2008) 2257)

(Only the French text is authentic)

(Text with EEA relevance)

(2008/738/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having called on interested parties to submit their comments pursuant to that Article ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) On 24 April 2007 France notified the Commission of its intention to implement an aid scheme to subsidise undertakings processing and marketing fisheries and aquaculture products. In the framework of the preliminary examination provided for in Article 4 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾, a request for additional information was sent to France on 7 June 2007, in order to obtain further information about the beneficiaries of the aid and the legal basis of the scheme. The French authorities replied on 11 July 2007. The Commission sent them a further request for additional information on 11 September 2007, to which France replied on 26 October 2007.
- (2) On the basis of the documents in its possession, the Commission considered that the aid scheme notified raised doubts as to its compatibility with the common market. It informed France, on 16 January 2008, of its decision to open the formal investigation procedure provided for in Article 88(2) of the Treaty and Article 6 of Regulation (EC) No 659/1999.

- (3) The decision of the Commission to open the formal investigation procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the measures in question within a month.

- (4) France submitted its comments in the form of a note sent in a letter dated 18 February 2008. The Commission did not receive any other comments from interested parties.

2. DESCRIPTION

- (5) According to the information contained in the notification, the aid scheme in question aims to subsidise, through the use of purely public funds, undertakings which process and market fisheries and aquaculture products.
- (6) The purpose of this scheme is to grant aid to undertakings other than small and medium-sized undertakings, so that they can enjoy the same support as that available to the SMEs under Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund ⁽⁴⁾.
- (7) The aid would come from the Fonds d'Intervention Stratégique des Industries Agro-Alimentaires (FISIAA) (*agri-food industries strategic intervention fund*). This fund set up by the French authorities consists of a budget entry in the State budget which is managed by the Ministry of Agriculture and Fisheries. All undertakings which process and market products included in Annex I to the Treaty may benefit from the subsidies granted from the FISIAA. Consequently, both undertakings in the agriculture sector and those in the fisheries and aquaculture sector could

⁽¹⁾ OJ C 61, 6.3.2008, p. 8.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ See footnote 1.

⁽⁴⁾ OJ L 223, 15.8.2006, p. 1.

be involved. It is foreseen that in 2007 aid will be reserved solely for undertakings with more than 750 employees or with a turnover of more than 200 million euro. According to the explanations submitted by France, it seems likely that this priority will be maintained in respect of aid granted after 2007. This hypothesis is supported by the text of a new call for projects launched in December 2007 (see recital 9).

- (8) The notification is accompanied by a call for projects which was launched on 2 March 2007 with a view to selecting the projects meeting the objectives of the FISIAA. According to the French authorities, this call for projects only involves undertakings in the agricultural sector and the specifications are only given 'as an example' of the conditions on which aid would be granted to undertakings in the fisheries and aquaculture sector.
- (9) A new call for projects was launched on 17 December 2007 for tenders which are eligible for selection for 2008. This call for projects does not explicitly mention undertakings processing and marketing fisheries and aquaculture products, but refers to all products included in Annex I to the Treaty (including fisheries and aquaculture products). It also mentions the new eligibility rules with a view to receiving support from the European Fisheries Fund (EFF).
- (10) The Commission only became aware of this new call for projects, which was announced on the Internet site of the French Ministry of Agriculture and Fisheries ⁽⁵⁾, after it had decided to open the formal investigation procedure. This new call for projects is not mentioned in the reply from the French authorities dated 18 February 2008. The latter merely observe that 'the delay in receiving approval has already prevented packaging undertakings from participating in the FISIAA 2007 call for projects [launched on 2 March 2007 but notified on 24 April 2007].'
- (11) According to the French authorities, the FISIAA is currently defined by its intervention framework, that is the aid scheme applicable to undertakings in the agricultural sector, registered under number N 553/2003 and approved by a Commission Decision of 28 July 2004 ⁽⁶⁾. The purpose of notifying the aid scheme which is the subject of this Decision is therefore to extend this framework of intervention to include undertakings in the fisheries and aquaculture sector.
- (12) The budget indicated for the FISIAA is 13 million euro for 2007 for all of the beneficiary sectors (both agriculture and fisheries and aquaculture). To the extent to which it is open to all of the undertakings engaged in

these two sectors, it is not possible at this stage, according to the French authorities, to predict the share of the sum which would actually be given to undertakings in the fisheries and aquaculture sector.

- (13) As for the spending which may be covered by the subsidy, the call for projects specifies that the aim of the FISIAA is to support projects from undertakings which can combine tangible and intangible investments and which have a 'highly structure-creating character' and/or a 'strong commercial positioning' and/or are 'innovative in nature'. All investments for the purpose of implementing storage, packaging, processing and/or marketing processes are potentially eligible. In particular, these investments may consist of spending on acquiring new equipment, the acquisition and fitting out of immovable property linked to the project, and on staff dedicated to the project or intangible services such as patents, studies and consulting. The intensity of the FISIAA aid is not to exceed 15 % of eligible spending on tangible investments and EUR 100 000 on intangible investments.

3. REASONS FOR OPENING THE PROCEDURE

- (14) The aim of this aid scheme is to grant aid to companies other than small and medium-sized undertakings, so that they can enjoy — from purely national funds — the same support as that available to SMEs under Regulation (EC) No 1198/2006. The aid would be financed by the FISIAA.
- (15) The examination of this aid scheme in the light of the guidelines for the examination of State aid to fisheries and aquaculture ⁽⁷⁾ (hereinafter referred to as the guidelines) was undertaken with reference to the criteria laid down in Regulation (EC) No 1198/2006. However, the measures eligible for support from the EFF as regards the processing and marketing of fisheries and aquaculture products only cover SMEs, while this aid scheme is geared specifically to undertakings other than SMEs.
- (16) Consequently, the Commission considered that there was some doubt as to the compatibility of the aid with the common market.

4. COMMENTS FROM FRANCE AND INTERESTED PARTIES

- (17) France puts forward two arguments in support of the compatibility with the common market of granting aid under the FISIAA to undertakings processing and marketing fisheries and aquaculture products.

⁽⁵⁾ <http://agriculture.gouv.fr/sections/presse/communiques/2eme-appel-projets-pour>

⁽⁶⁾ OJ C 214, 1.9.2005, p. 4.

⁽⁷⁾ OJ C 84, 3.4.2008, p. 10.

- (18) Firstly, France reiterates the observation it made in its reply of 26 October 2007, which is that, although processing undertakings in the fisheries or agricultural sector often carry out the same types of activities, the Commission did not conclude that granting aid to large undertakings in the agri-foods sector carried the risk of distorting competition and opened up the possibility for Member States to grant them State aid.
- (19) Moreover, France is asking the Commission to specify why it considers that aid can be granted to large-scale undertakings in 2007 and 2008 under the Financial Instrument for Fisheries Guidance (FIFG), whilst similar aid from purely national funds may not be granted.

5. ASSESSMENT

- (20) Firstly, the Commission notes that the call for projects under the FISIAA for 2007 was launched on 2 March 2007 with a deadline for responding of 2 May 2007, while the French authorities only notified the Commission of their intention to open this call for projects to undertakings in the fisheries and aquaculture sector on 24 April 2007. In other words, the call for projects was launched before the Commission was aware of an aid scheme for the benefit of undertakings processing and marketing fisheries and aquaculture products, and certainly before it was able to provide its opinion on the compatibility of such a scheme with the common market. This is why the Commission initially asked France whether the document attached to its notification (that is the text for the call for projects dated 2 March 2007) was addressed solely to undertakings in the agricultural sector, which France confirmed in its letter dated 11 July 2007 ('The first call for projects was limited to undertakings in the agricultural sector (...). Therefore the call for projects for the FISIAA will only mention processing and marketing undertakings in the fisheries and aquaculture sector once this aid scheme has been approved'). If this had not been the case, the aid scheme would have been reclassified as unlawful aid (unmodified) in the terms of Article 1(f) of Regulation (EC) No 659/1999.
- (21) A similar question is raised by the new call for projects launched on 17 December 2007, of which the Commission only became aware after the formal investigation procedure had been opened (see recital 9). This new call for projects includes exactly the same terms as the call for projects of 2007, and therefore does not explicitly mention processing and marketing undertakings in the fisheries and aquaculture sector, but, as for the previous call for projects, it refers to both Annex I to the Treaty (which covers fisheries and aquaculture products) and Regulation (EC) No 1198/2006.
- (22) The Commission stresses that the approval of a State aid scheme is not automatic and that a Member State cannot pre-empt the Commission's decision before the examination of the aid scheme has been completed. For these reasons the Commission cannot accept the claim that 'the delay in approval [of the aid scheme in question] has already prevented undertakings in the processing sector of the fisheries sector from participating in the call for projects for the FISIAA in 2007'. Neither can it accept that a second call for projects was launched without explicitly excluding the possibility for undertakings in the fisheries sector to benefit from FISIAA subsidies in 2008, or at least without stating that this possibility was subject to prior approval by the Commission.
- (23) Under Article 87(1) of the Treaty, 'any aid granted by a Member State 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, insofar as it affects trade between Member States, be incompatible with the common market'.
- (24) The aid in question, which consists of subsidies financed from the national budget (see recital 7), does indeed constitute aid granted by the State.
- (25) As the decision to grant these subsidies is taken at a national level after selection by the Ministry of Agriculture and Fisheries of the projects submitted as part of a call for projects, the aid is attributable to the State.
- (26) The measures notified are likely to affect the exchanges between Member States and risk distorting competition to the extent that they favour national production of processed fisheries products to the detriment of the production of other Member States.
- (27) Consequently, aid which is the subject of this Decision constitutes State aid in the terms of Article 87(1) of the Treaty.
- (28) Given that the aid is intended for the fisheries and aquaculture sector, it must be analysed in the light of the guidelines. Point 5.3 of the guidelines determines that they shall apply from 1 April 2008 'to any State aid notified or intended to be applied on or after that date'. As the French authorities stated that they were waiting to receive approval from the Commission before allowing undertakings in the fisheries and aquaculture sector to benefit from this aid scheme, the Commission considers that it has not been applied and that, consequently, it should be analysed in the light of the guidelines.

- (29) The guidelines refer, in point 3.2, to the criteria laid down by Regulation (EC) No 1198/2006. Consequently, it is in the light of this Regulation that compatibility of the aid scheme in question must be examined.
- (30) The Commission notes that the measures eligible for aid from the EFF for processing and marketing on the basis of Regulation (EC) No 1198/2006 only apply to SMEs. Therefore, the Commission considers that the aid scheme which is the subject of this Decision, which is only addressed to undertakings other than SMEs, does not meet the intervention criteria for the EFF.
- (31) The French authorities do not contest this analysis as they state that 'the call for projects No 2 would be addressed to large undertakings in the marine products processing and marketing sector, that is to undertakings with more than 750 employees and a turnover of more than 200 million euro, as such undertakings are excluded from the EFF, as is the case for undertakings processing agricultural products. (...) The French authorities are aware that reading the 2004 fisheries and aquaculture guidelines in conjunction with Article 104 of Regulation (EC) No 1198/2006 relating to the European Fisheries Fund leads the Commission to state that large undertakings may not benefit from public aid.'
- (32) This being the case, France justifies the aid scheme in question by saying it wishes to harmonise the situation of undertakings in the fisheries and aquaculture sector with regard to the granting of public aid with that of undertakings in the agricultural sector, for which a similar aid scheme was approved in 2004. However, given that the aid scheme is intended for the fisheries and aquaculture sector for which specific guidelines have been adopted, the Commission cannot accept the fact that an aid scheme of the same kind exists which has been approved for another sector of activity. Moreover, the Commission recalls that the scheme applicable to undertakings in the agricultural sector has been maintained until 31 December 2008 by way of derogation in accordance with point 196 of the Community guidelines for State aid in the agriculture and forestry sector 2007-2013⁽⁸⁾. However, this case involves a new aid scheme which applies to undertakings in the fisheries and aquaculture sector. It must therefore be examined with regard to the rules applicable to the sector, and not by analogy with an existing scheme in another sector of activity which has been approved on the basis of rules which differ from those applicable to

State aid in the fisheries and aquaculture sector. Therefore, this argument is not acceptable.

- (33) Similarly, the analogy with aid to large undertakings which may be granted in 2007 and 2008 within the framework of the FIFG cannot be accepted in order to justify implementing a new aid scheme, which is strictly national, for the benefit of these undertakings (see recital 19). Indeed the rules governing the administration of structural intervention programmes and aid granted within this framework and the rules governing State aid are independent of each other, unless explicit reference is made thereto (as is the case in the guidelines, which refer to criteria laid down in Regulation (EC) No 1198/2006). Consequently, the fact that, for reasons exclusively linked to budgetary constraints, aid may still be granted under the 1999-2006 EFF programming, has no effect on the rules which apply to this aid scheme.

6. CONCLUSION

- (34) On the basis of the analysis in part 5 above, it must be concluded that the scheme for aid allocated from the FISIAA to undertakings in the fisheries and aquaculture sector, as notified by France on 24 April 2007, is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme planned by France for subsidizing undertakings processing and marketing fisheries and aquaculture products from the Fonds d'Intervention Stratégique des Industries Agro-Alimentaires (*agri-food industries strategic intervention fund*) (FISIAA) is hereby judged incompatible with the common market.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 4 June 2008.

For the Commission

Joe BORG

Member of the Commission

⁽⁸⁾ OJ C 319, 27.12.2006, p. 1.

COMMISSION DECISION

of 11 September 2008

concerning a financial contribution by the Community towards the World Organization for Animal Health (OIE) for actions in the area of animal disease information

(2008/739/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Decision 90/424/EEC of 26 June 1990 on expenditure in the veterinary field ⁽¹⁾, and in particular Article 20 thereof,

Whereas:

(1) Pursuant to Decision 90/424/EEC, the Community may undertake, or assist the Member States or international organisations in undertaking, the technical and scientific measures necessary for the development of Community veterinary legislation and for the development of veterinary education or training.

(2) Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community ⁽²⁾ lays down a system for the notification of outbreaks of any of the diseases listed in Annex I thereto (the Community system for the notification of animal diseases).

(3) The World Organization for Animal Health (OIE) is a representative intergovernmental organisation responsible for improving animal health worldwide. In the field of disease information, OIE has the unique experience of developing the World Animal Health Information Database (WAHID), an interface that provides for a comprehensive range of information on animal diseases. WAHID is used by all OIE member countries, including all Member States of the European Union.

(4) The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a new Animal Health Strategy for the European Union (2007 to 2013) where 'Prevention is better than cure' ⁽³⁾ identifies animal-related threat prevention, surveillance and crisis preparedness as one of the pillars of the new animal health strategy. In particular, that Communication underlines the fact that the information generated by the veterinary monitoring, surveillance and control activities and programmes provides crucial scientific evidence for the Community institutions and governments to support decision on disease prevention and control measures.

(5) That Communication sets out the adaptation of the Community system for the notification of animal diseases as an expected outcome of the new animal health strategy. Another expected outcome set out in that Communication is to simplify the existing Community veterinary legislation, seeking convergence to international standards, including OIE standards.

(6) For the development of Community veterinary legislation, it is therefore appropriate to establish actions in partnership with the OIE, with a view to aligning the Community system for the notification of animal diseases with the WAHID, gathering epidemiological information and in particular designing the data sets, databases and protocols for exchange of data. It is therefore appropriate to make a Community financial contribution for the financing of the development of the animal disease information system for the period from 2008 to 2012 by the World Organisation for Animal Health (OIE). The maximum amount of that contribution should be specified.

(7) Gathering analysing and summarising information on animal health in the Balkans, the Caucasus and the Mediterranean areas, especially as regards diseases which are spread across borders, is of paramount importance for the Community, in order to prevent threats to animal health within its territory. That information is, however, not readily available in all cases.

⁽¹⁾ OJ L 224, 18.8.1990, p. 19.

⁽²⁾ OJ L 378, 31.12.1982, p. 58.

⁽³⁾ COM(2007) 539 final.

- (8) The OIE has developed a Tool for the Evaluation of Performance of Veterinary Services (OIE PVS Tool). That tool is designed to assist veterinary services of countries which are members of OIE to establish their current level of performance and to identify gaps and weaknesses regarding their ability to comply with OIE international standards. The OIE PVS Tool also generates information on animal health in OIE member countries. The Community should therefore analyse the activities and information generated by that tool with regard to the Balkans, the Caucasus and the Mediterranean areas.
- (9) It is therefore appropriate to make a Community financial contribution for the development and analysis of the animal health activities in the Balkans, the Caucasus and the Mediterranean areas by OIE. The maximum amount of that contribution should be specified.
- (10) Article 168(1)(c) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the financial regulation applicable to the general budget of the European Communities ⁽¹⁾ provides that grants may be awarded without a call for proposals to bodies with a *de jure* or *de facto* monopoly duly substantiated in the award decision.
- (11) The OIE has a *de facto* monopoly in its sector, since its creation through the international Agreement signed on 25 January 1924. The OIE is the intergovernmental organisation responsible for improving animal health worldwide and it is recognized as a reference organisation by the World Trade Organization (WTO). A call for proposals is therefore not necessary for the financial contributions awarded to that organisation, pursuant to this Decision.
- (12) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,
- HAS DECIDED AS FOLLOWS:
- Article 1*
- A Community financial contribution, as provided for in Article 19 of Decision 90/424/EEC, is hereby awarded for the financing of the development of the animal disease information system for the period from 2008 to 2012 by the World Organisation for Animal Health (OIE), up to a maximum amount of EUR 750 000.
- Article 2*
- A Community financial contribution, as provided for in Article 19 of Decision 90/424/EEC, is hereby awarded for the financing of the analysis of the animal health activities in the Balkans, the Caucasus and the Mediterranean areas by OIE, for the period from 2008 to 2012, up to a maximum amount of EUR 250 000.
- Article 3*
- The financial contributions provided for in Articles 1 and 2 shall be financed through the budget line 17 04 02 01 of the budget of the European Communities for 2008.
- Done at Brussels, 11 September 2008.
- For the Commission*
Androulla VASSILIOU
Member of the Commission

⁽¹⁾ OJ L 357, 31.12.2002, p. 1.

COMMISSION DECISION

of 12 September 2008

recognising in principle the completeness of the dossier submitted for detailed examination in view of the possible inclusion of spinetoram in Annex I to Council Directive 91/414/EEC

(notified under document number C(2008) 4965)

(Text with EEA relevance)

(2008/740/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant-protection on the market ⁽¹⁾, and in particular Article 6(3) thereof,

Whereas:

(1) Directive 91/414/EEC provides for the development of a Community list of active substances authorised for incorporation in plant protection products.

(2) A dossier for the active substance spinetoram was submitted by Dow Agrosiences to the authorities of the United Kingdom on 17 October 2007 with an application to obtain its inclusion in Annex I to Directive 91/414/EEC.

(3) The authorities of the United Kingdom have indicated to the Commission that, on preliminary examination, the dossier for the active substance concerned appears to satisfy the data and information requirements set out in Annex II to Directive 91/414/EEC. The dossier submitted appears also to satisfy the data and information requirements set out in Annex III to Directive 91/414/EEC in respect of one plant protection product containing the active substance concerned. In accordance with Article 6(2) of Directive 91/414/EEC, the dossier was subsequently forwarded by the applicant to the Commission and other Member States, and was referred to the Standing Committee on the Food Chain and Animal Health.

(4) By this Decision it should be formally confirmed at Community level that the dossier is considered as satisfying in principle the data and information

requirements set out in Annex II and, for at least one plant protection product containing the active substance concerned, the requirements set out in Annex III to Directive 91/414/EEC.

(5) This Decision should not prejudice the right of the Commission to request the applicant to submit further data or information in order to clarify certain points in the dossier.

(6) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS DECISION:

Article 1

Without prejudice to Article 6(4) of Directive 91/414/EEC, the dossier concerning the active substance identified in the Annex to this Decision, which was submitted to the Commission and the Member States with a view to obtaining the inclusion of that substance in Annex I to that Directive, satisfy in principle the data and information requirements set out in Annex II to that Directive.

The dossier also satisfies the data and information requirements set out in Annex III to that Directive in respect of one plant protection product containing the active substance, taking into account the uses proposed.

Article 2

The *rapporteur* Member State shall pursue the detailed examination for the dossier referred to in Article 1 and shall communicate to the Commission the conclusions of its examination accompanied by a recommendation on the inclusion or non-inclusion in Annex I to Directive 91/414/EEC of the active substance referred to in Article 1 and any conditions for that inclusion as soon as possible and at the latest within a period of one year from the date of publication of this Decision in the *Official Journal of the European Union*.

⁽¹⁾ OJ L 230, 19.8.1991, p. 1.

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 12 September 2008.

For the Commission
Androulla VASSILOU
Member of the Commission

*ANNEX***Active substance concerned by this Decision**

Common Name, CIPAC Identification Number	Applicant	Date of application	Rapporteur Member State
Spinetoram CIPAC-No: 802	Dow Agrosciences	17 October 2007	UK

IV

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

No 127/07/COL

of 18 April 2007

on Research and Development aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter (Norway)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 thereof,

HAVING REGARD to Article 1(2) and (3) in Part I and Articles 1, 4, 6, 7(3), 10, 13, 14, 16 and 20 in Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾,

HAVING REGARD to the Authority's Guidelines ⁽⁵⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular Chapter 14 thereof, 'Aid for Research and Development',

HAVING REGARD to the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 ⁽⁶⁾,

HAVING REGARD to the Authority's Decision No 217/94/COL of 1 December 1994 to propose appropriate measures to Norway on, amongst others, the aid scheme Industrial R&D Programmes,

HAVING REGARD to Norway's acceptance of the proposed appropriate measures by letter dated 19 December 1994,

HAVING REGARD to the Authority's Decision No 60/06/COL of 8 March 2006 to open the formal investigation procedure with regard to R&D aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter ⁽⁷⁾,

HAVING CALLED on interested parties to submit their comments to this Decision and having regard to their comments,

Whereas:

I. FACTS

1. Procedure

By letter dated 5 March 2002 (Doc. No 02-1733-A), the Authority received a complaint alleging that State aid had been granted by Norway through the Research Council of Norway (hereinafter the RCN) to various research projects in connection with the development of the software programme Turborouter.

⁽¹⁾ Hereinafter referred to as 'the Authority'.

⁽²⁾ Hereinafter referred to as 'the EEA Agreement'.

⁽³⁾ Hereinafter referred to as 'the Surveillance and Court Agreement'.

⁽⁴⁾ Hereinafter referred to as 'Protocol 3'.

⁽⁵⁾ Procedural and Substantive Rules in the Field of State Aid, Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, EEA Supplements, 3.9.1994, No 32. Hereinafter referred to as 'the Guidelines'.

⁽⁶⁾ Published in OJ L 139, 25.5.2006, p. 37 and the EEA Supplement No 26 of 25.5.2006, p. 1.

⁽⁷⁾ OJ C 258, 26.10.2006, p. 42.

The Authority requested information from the Norwegian authorities by letter dated 26 April 2002 (Doc. No 02-2605-D). The Ministry of Trade and Industry replied by letter dated 3 June 2002 (Doc. No 02-4177-A), which included RCN's comments on the Turborouter project.

After various exchanges of correspondence ⁽⁸⁾, by letter dated 8 March 2006 (Event No 363353), the Authority informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement in respect of R&D aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter.

By letter dated 7 April 2006, the Norwegian authorities submitted comments to the Authority's decision to open the formal investigation procedure.

The Authority's Decision No 60/06/COL to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereof ⁽⁹⁾. The Authority called on interested parties to submit their comments.

The Authority received comments from one interested party. By letter dated 1 December 2006 (Event No 400677) the Authority forwarded these comments to the Norwegian authorities. By letter from the Ministry for Government Administration and Reform dated 8 January 2007 (Event No 405517) forwarding a letter from the Ministry of Education and Research dated 5 January 2007, the Norwegian authorities submitted comments.

2. The four projects related to the software programme Turborouter supported with RCN funds

2.1. Description of the projects

In the following, the Authority will only provide a brief description of the projects under assessment. For a detailed description of each of them, reference is made to the Authority's Decision No 60/06/COL ⁽¹⁰⁾.

⁽⁸⁾ For more detailed information on the various correspondences between the Authority and the Norwegian authorities, reference is made to the Authority's Decision to open the formal investigation procedure, Decision No 60/06/COL, published in OJ C 258, 26.10.2006, p. 42 and EEA Supplement No 53 of 26.10.2006, p. 15.

⁽⁹⁾ See footnote 7.

⁽¹⁰⁾ See footnote 7.

2.1.1. Project 40049 — Strategic activities within maritime transport and logistics (the first version of the software programme Turborouter)

Turborouter is a tool ⁽¹¹⁾ for optimising vessel fleet scheduling, i.e. to decide which vessels to assign different cargoes to. It combines the knowledge and experience of the planners with the calculating capabilities of the computer. Turborouter is based on electronic sea charts where scheduling information can be displayed and includes a database for vessels, ports, cargoes, etc; automatic calculation of port-to-port distances; vessel position reports and automatic update of estimated time of arrival; sophisticated optimisation routines for fleet scheduling and schedule visualisation or schedule calculator for manual planning.

The first version of the pilot software Turborouter was developed in the first year of research of one of the sub-projects of Project 40049 'Strategic activities within maritime transport and logistics' called 'Methods and analytical tools for design and operation of integrated transport and logistics chains'.

2.1.2. Further development of the software programme Turborouter

According to the information provided by the Norwegian authorities, the RCN selected several projects related to the development of the software package Turborouter for R&D support.

2.1.2.1. Project 138811 — AlgOpt

The aim of this project ⁽¹²⁾ was to develop and carry out practical tests of algorithms to calculate the optimal utilisation of a fleet of ships, given the obligations to load cargoes for several customers, the requirements as to when cargoes must be loaded and discharged in the destination port, the possibility of carrying joint cargoes of a limited number of bulk goods on each voyage, as well as limitations that mean that not all the vessels involved are suitable for serving all customers or all ports. Algorithms should be integrated into a software concept that would offer users full control and the possibility of overriding the suggestions made by the algorithms.

According to the information submitted by the Norwegian authorities, the Project AlgOpt was only a pre-study defining the user requirements and investigation of the feasibility of using Turborouter for the contract partner, the company Beltship Management AS.

⁽¹¹⁾ The following information has been obtained from the brochure 'TurboRouter Vessel schedule optimizing software', available at the website of Marintek: <http://www.marintek.no>

⁽¹²⁾ Information obtained from Marintek's website: <http://www.marintek.no>

2.1.2.2. Project 144265 — Shiplog II

The Shiplog project mainly dealt with transport at sea. This project⁽¹³⁾ was supposed to use the results of a previous project called Shiplog (which did not involve the use of Turborouter) to focus on the requirements for door-to-door delivery of goods, when transport at sea is a key element. One of the main activities concerned the integration of Transport Chain Management System (TCMS) and Turborouter, which should specify the interface and demonstrate the exchange of information between Turborouter and the TCMS demonstrator. This project failed to achieve its objective mainly because TCMS and Turborouter could not be satisfactorily integrated.

2.1.2.3. Project 144214 — Library of optimisation routines for scheduling in shipping

The pre-competitive research project 'Library of optimisation routines for scheduling in shipping' was aimed at developing algorithms for advanced optimisation and scheduling of very complex shipping operations. The Norwegian authorities have explained that the library of algorithms is very trade and company specific and must thus be company owned and not part of the standard Turborouter 'tool kit'.

2.2. Description of the relationship between the four grants of aid and the Norwegian aid scheme for industrial R&D programmes

According to the information provided by the Norwegian authorities, the four grants of aid covered by the present Decision received aid within the framework of the aid scheme 'Industrial R&D Programmes' (*brukerstyrte forskningsprogrammer*).

The aid scheme called 'Industrial R&D Programmes' (*brukerstyrte forskningsprogrammer*) which was administered by the RCN was established prior to the entry into force of the EEA Agreement.

In December 1994, the Authority adopted a Decision on several aid schemes for research and development existing in Norway prior to the entry into force of the EEA Agreement, amongst others, the aid scheme Industrial R&D Programme (*brukerstyrte forskningsprogrammer*, Case No 93-183). In this Decision, the Authority proposed appropriate measures to bring the scheme in line with the State aid rules of the EEA Agreement⁽¹⁴⁾. In particular, the Authority proposed to Norway the introduction of detailed provisions which would ensure that awards of aid were granted in accordance with the principles laid down in Chapter 14 of the State Aid Guidelines.

Norway accepted the appropriate measures proposed by the Authority by letter dated 19 December 1994. The acceptance

of appropriate measures implied that the award of aid under the Industrial R&D Programme would be done in accordance with the provisions of the Authority's R&D Guidelines as they were adopted in 1994.

The aid was granted by the RCN to these projects within the R&D scheme Industrial R&D Programme.

3. Doubts of the Authority expressed in Decision No 60/06/COL

On 8 March 2006, the Authority decided to open the formal investigation procedure provided for in Article 1(2) in Part II of Protocol 3 to the Surveillance and Court Agreement on R&D aid granted by the RCN in connection with the development of the software programme Turborouter (Decision No 60/06/COL). In the opening decision, the Authority described the complaint, the four projects related to the software programme Turborouter supported with RCN funds and the relationship between the four grants of aid and the Norwegian scheme for Industrial R&D Programmes.

The Authority made a detailed assessment of the applicable legal framework to the assessment of the four projects concerned⁽¹⁵⁾. Following the acceptance of the appropriate measures suggested in the Authority's Decision No 217/94/COL, any grant of aid under the Industrial R&D Programme had to be done in accordance with the 1994 R&D Guidelines. Hence, by definition, any aid granted under the scheme Industrial R&D Programmes which does not comply with the provisions of the 1994 R&D Guidelines would fall outside the scope of application of the scheme. Accordingly, it would constitute new individual aid and should, as such, be notified to the Authority individually and be assessed on the basis of the R&D Guidelines applicable at the time the aid was granted.

As to the reasons for opening the formal investigation, the Authority expressed doubts on several points as to whether the four R&D projects concerned had received support within the framework of the aid scheme Industrial R&D Programmes.

The Authority had doubts as to whether these projects went beyond the stage of applied or pre-competitive research to constitute a commercial product. The borderline between a pilot project, which could not be used commercially, and a commercial final product seemed very diffuse in the case in hand because the software needs to be adapted anew for each new application specific to each final user. The Authority questioned to what extent the further development of the software programme Turborouter, for use in developing applications which serve concrete needs for the final users, can be covered by the definition of applied research.

⁽¹³⁾ Information obtained from Marintek's website: <http://www.marintek.no>

⁽¹⁴⁾ Decision of the EFTA Surveillance Authority No 217/94/COL of 1.12.1994. The schemes covered by this decision were: Industrial R&D Contracts (Case 93-147) and Public R&D Contracts (Case 93-182) granted by the SND and Industrial R&D Projects (Case 93-181) and Industrial R&D Programs (Case 93-183) granted by the RCN.

⁽¹⁵⁾ See Section II.1 of Decision No 60/06/COL, p. 11 ff.

On the basis of the information available at that stage of the procedure, the Authority was not in the position of ascertaining whether these projects were correctly classified as pre-competitive development activities or whether, on the contrary, they were already too close to the market to be eligible for state aid.

Furthermore, the Authority had doubts concerning the financing of the projects, in particular regarding the effective disbursement of the own-contributions, in kind, of the beneficiaries of the projects.

Following the arguments put forth by the complainant, the Authority had doubts as to whether the overall costs of the projects had been artificially increased to cover operational expenses of the beneficiary undertakings and whether the real research cost of the projects corresponded to the amounts granted by the RCN.

It seemed to the Authority that it was Marintek, the research institute that developed the first software programme Turborouter, which had the necessary know-how and technological competence to do the project. Therefore, it appeared rational to assume that most of the work would have been carried out by its own staff. This would imply, in principle, that the involvement of the staff of the participating undertakings would most probably have been related to the definition of the users needs and/or, to some degree, of testing. To the extent that the contribution in kind of the participating undertakings may not have corresponded to research costs, the overall costs of the research project would be lower and the aid intensities accordingly higher.

For these reasons, the Authority had doubts both as to whether the above mentioned projects had received aid in compliance with the applicable R&D Guidelines and as to whether the beneficiaries had used the aid in contravention of the accepted appropriate measures on the scheme Industrial R&D Programmes.

4. Comments from third parties

On 24 November 2006, the Authority received comments from an interested party which were more of a general nature than directly related to the doubts the Authority expressed in Decision No 60/06/COL to open the formal investigation procedure on R&D granted in connection with the development of the software programme Turborouter. This party alleged that the Norwegian Research Council had given substantial funds to a new project called OPTIMAR⁽¹⁶⁾. This project is entirely supported by the Norwegian Research Council for the years 2005-09. Ideally, this project is directed by the Department of Operative Research of the Norwegian University of Science and Technology (hereinafter NTNU) in Trondheim. The ultimate goal for this project is to further develop Turborouter into a commercial project, a process which is already under way.

This party added, 'Prof Marielle Christiansen (Head of OPTIMAR project) in Trondheim considers that it is very difficult for companies to participate and take advantage of results from this program which is said to be a public research programme with the view of broadening the base for all Norwegian companies, because they are already working closely with SINTEF and MARINTEK and had promised to share the research results with these commercial organisation (SINTEF and MARINTEK are both institutes located in Trondheim and has for a number of reasons close ties with the Technical University NTNU).'

In the opinion of this party, 'Turborouter is very much the common element in this issue as all personnel working at NTNU/Dept of Oper Res/Marintek/SINTEF see TURBOROUTER as their common goal'.

This party alleges that the companies working to develop TURBOROUTER are now getting even more state aid through the NTNU, covered as funds to basic research.

The final comment made was that Turborouter was not used by any of the companies that received funds to develop it, which lead this party to conclude that the funds received in the research project were merely subsidies to their daily operations.

5. Comments by the Norwegian authorities

5.1. *Comments to the Authority's decision to open a formal investigation procedure*

5.1.1. **Comments from the Ministry of Government Administration and Reform**

In the letter dated 7 April 2006, the Ministry of Government Administration and Reform referred to the description made in the Authority Decision No 60/06/COL of the formal correspondence with the Norwegian authorities. The Norwegian authorities made further reference to the meetings between the Authority and the Norwegian authorities in October 2002, and in September 2004 and added that a meeting had been held between the Authority and the Norwegian authorities in Brussels on 22 May 2003.

The Norwegian authorities pointed out that the Authority's Decision No 60/06/COL did not describe *how* the aid to the development of the Turborouter programme distorted competition in the EEA or in third markets. In their opinion, this question should be clarified because the Turborouter R&D programme failed to deliver the expected results. Although the Norwegian authorities acknowledged that the intangible know-how from the project had been disseminated into other R&D projects, they did not consider it evident that this had affected competition in the Internal Market, or in third country markets.

⁽¹⁶⁾ See <http://www.iot.ntnu.no/optimar/>

The Norwegian authorities questioned some of the facts in the complainant's allegations that were reiterated in the Authority's decision, in particular, the allegations in Section 3 on page 3 in Decision No 60/06/COL and the supporting quotes from the complainant.

The Norwegian authorities first of all questioned how the complainant had been able to classify the projects as being too close to the market. Further, they questioned how the complainant was able to allege that the R&D results had not been disseminated despite the fact that Marintek received the property rights to the programme. Finally, they questioned how the complainant was able to claim that the own-capital contributions from the participating companies were in reality lower than stated in the application form. According to the RCN, the complainant has had its request for access to the application forms and the R&D contracts denied for professional confidentiality reasons. On this background, the Norwegian authorities believed that the allegations from the complainant generally seem to be lacking in substantiation. The Norwegian authorities added, 'The allegations from the complainant that the own-capital contributions from the concerned companies were lower than stated in the application forms also implies that these firms are accused of misusing State aid. This also raises questions related to the legal certainty of the companies that participated in the Turborouter projects. These claims from the complainant should therefore clearly be substantiated.'

5.1.2. *Comments from the Research Council of Norway*

In a letter enclosed to the above mentioned letter from the Ministry of Administration and Reform, the Research Council of Norway (hereinafter the RCN) commented upon the Authority's Decision No 60/06/COL. The RCN pointed out that it had forwarded to the Authority all available information and clarification requested, including the submission of copies of all project documentation for the four projects related to the development of Turborouter supported with funds from RCN. According to the RCN, in the meetings and correspondence up to and including the letter from the Norwegian authorities of 20 June 2003, the only matter of discussion was the correct classification of the projects according to the Guidelines for aid for R&D.

Regarding the description of the projects, the RCN alleged that the tables given in the description of the funding of the projects in the Authority's Decision No 60/06/COL did not comply entirely with the figures given in the text. The funds granted by the RCN to the projects consisted of two parts. One part of funds from RCN was in fact private funds originating from the Norwegian Shipowners' Association, while the rest was public funds. The table below, which is the same as submitted to the Authority in the letter of 11 April 2003, describes the situation. Regarding Project 138811 AlgOpt, the table in Decision No 60/06/COL gives the figures as they were at the start of the project. During the execution, the project was given additional funding of NOK 100 000 of which NOK 25 000 was granted from RCN.

Table 1

Projects supported by RCN, involving development of Turborouter

	P 40049		P 144265		P 138811		P 144214	
	Strategic activities within maritime transport and logistics		Shiplog II		AlgOpt		Library of optimisation routines for scheduling in shipping	
	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%
Own Funds	4 500	43	800	13	625	61	1 950	28
Other private funds	0	0	3 250	52	75	7	2 750	39
Other public funds	0	0	0	0	0	0	0	0
RCN prgr. MARITIM	6 000	57	2 150	35	325	32	2 300	33
Of which NSA	1 380	13	750	12	120	12	805	12
Of which public	4 620	44	1 400	23	205	20	1 495	21
Total funds	10 500	100	6 200	100	1 025	100	7 000	100
Personnel and indirect	8 700	83	800	13	545	53	4 100	59
Purchase of R&D	600	6	2 150	35	380	37	2 900	41

	P 40049		P 144265		P 138811		P 144214	
	Strategic activities within maritime transport and logistics		Shiplog II		AlgOpt		Library of optimisation routines for scheduling in shipping	
	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%
Equipment	450	4	100	2	0	0	0	0
Other operating costs	750	7	3 150	51	100	10	0	0
Total cost	10 500	100	6 200	100	1 025	100	7 000	100
Contract partner	Marintek		UECC		Beltship Management AS		Beltship Management AS	
Participants	NTNU		Marintek		Marintek		Marintek	
			R.S. Platou Shipbrokers				Iver Ships AS	
			Iver Ships AS				Shipnet AS	
			LogIT AS				Laycon Solutions AS	
			Lorentsen & Stemoco AS					
			Astrup Fearnleys AS					
			DFDS Tollpost Globe					
			Shipnet AS					
			Wallenius Wilhelmsen					
			SINTEF Tele og data					
Project Period	Jan. 1996-Dec. 1998		Jan. 2001-Dec. 2002		Jan. 2000-Oct. 2000		Jan. 2001-Dec. 2002	

Regarding the Authority's comment in Decision No 60/06/COL that the RCN did not seem to control how the own contributions of the beneficiaries were distributed to various activities and whether they were effectively disbursed, the RCN considered that they had described how eligible costs were controlled before aid was paid to the contracting partner and how the different contributions were disbursed in previous correspondence with the Authority ⁽¹⁷⁾.

Regarding the classification of the Projects 138811 AlgOpt, 144265 Shiplog II and 144214 Library of optimisation routines for scheduling in shipping, the RCN restated that all three projects were classified as pre-competitive development based on a thorough assessment and evaluation of the project applications according to the RCN procedures and guidelines for project evaluation. These procedures and guidelines were put in place to make sure that aid granted under the aid

scheme Industrial R&D Programmes are in accordance with the principles laid down in Chapter 14 of the State Aid Guidelines.

The RCN explained that there is an internal system of quality assurance of RCN's activities. This system is called DOKSY. DOKSY comprises a broad documentation of the guidelines, procedures and practices that are followed in the RCN. One of these documents is the guidelines for determining aid intensity applied to retained projects. This internal document, DOKSY-5-6-1-4-IE, entitled 'Støtteandel etter EØS-bestemmelser' (aid intensities according to EEA rules) corresponds to the Authority's R&D Guidelines. The document applies definitions and corresponding aid intensities in compliance with the definition of the different R&D stages in the Authority's R&D Guidelines. The assessment and classification of all the projects that receive aid from the RCN is based on the DOKSY guidelines.

⁽¹⁷⁾ In particular, in their letter dated 31 January 2005, p. 4.

After 1999, in addition to DOKSY 5-6-1-4-IE, all projects have been evaluated using the computer-based system 'Provis'. Provis is described in Doksy No 5-6-1-2-EE '*Prosjektvurdering i Provis*'. In Provis, each project is evaluated according to 11 different aspects. The most important aspects in Provis related to the classification of research categories, are aspect No 3 '*Research Content*' and aspect No 9 '*Additionality*'. For each of the aspects, there are several criteria or characteristics that are applied in order to characterise to what extent the project is in compliance with the aspects.

In the description of the Guide for evaluation of aspect No 3 in Doksy No 5-6-1-2-IE, it is underlined that '*Research content indicates to what degree the project produces new knowledge*'. This criterion is directly linked to the description of Industrial Research in the R&D guidelines where the requirement is that the activity is '*aimed at the acquisition of new knowledge*'.

In the Guide for evaluation of aspect No 9 in Doksy No 5-6-1-2-EE, the description is, '*Additionality indicates to what degree support from the Research Council will trigger efforts, actions, results and effects that would not have been achieved had support not been granted*'. This criterion is linked to the R&D guidelines, point 14.7, Incentive effect of R&D aid.

On this basis, the RCN argued that since the evaluation of the projects was thoroughly carried out in accordance with the RCN procedures and guidelines for project evaluation, it should not be questionable that they were correctly classified. The RCN, after the complaint was raised and the Authority started their preliminary investigation, looked again at these projects and nevertheless reiterated its original position.

'In the meeting in Brussels 22 May 2003, the classification of certain activities in two of the Projects, No 40049 and No 144214, were discussed. In the letter of 20 June 2003, which was a response to this meeting, we advocated that the RCN's principal position was that, at a minimum, all activities in project No 40049 could be classified as industrial research, and all activities in Project No 144214 may at least be classified as pre-competitive development. We did however demonstrate to the Authority that the total amount of aid given to the projects was within the permissible limit of a weighted average as defined in the R&D guidelines Chapter 14.5.2(5). This is the case even when the disputed activities are not supported in the case of Project No 144214. Similar considerations and calculations may be done for the Projects 138811 and 144265. In this context we would also make reference to the fact that all these three Projects 138811, 144214 and 144265 involved effective cooperation between firms and public research bodies (in this case Marintek). According to point 14.5.3 (5)(b) of the R&D Guidelines these

activities, classified as pre-competitive development may be eligible for an aid intensity of 35 %. The Authority has also expressed their doubts concerning the financing of the projects and the aid intensities. Regarding the slight discrepancy between the figures related to Project 138811 AlgOpt in Tables 1 and 2 on page 17 of Decision 60/06/COL, this is explained in Section 1.3.a) above. The correct figures including the contribution from the Norwegian Shipowners' Association are given in the table in that section of this letter.'

In the case of Project 144265 Shiplog II, regarding the Authority's remark that the amount granted by the RCN equalled the sum necessary to purchase R&D, the RCN argued that this does not imply that the private means invested in Shiplog II were not used on R&D activities, 'In industry-driven projects, which can be applied for by private companies, we generally encourage cooperation between private companies and public R&D institutions. In order to promote such cooperation we may in some calls for proposals for industry-driven projects state that the application will be evaluated favourably if the external purchases of R&D from research institutions (institutes or universities) are at least as high as the support given by the RCN. The purpose of this approach is to provide the incentives for increased investments by private sector towards purchase of R&D from research institutions. This is the reason why the funds granted by the RCN correspond exactly to the amount necessary to purchase R&D services in several projects.'

In its Decision No 60/06/COL, the Authority stated that it was questionable whether this approach of the RCN led beneficiaries to include their normal operating cost in the R&D costs. Therefore it questioned whether the figures for the total project costs had been inflated to seemingly obtain more public financing. In the opinion of the RCN, it is not understandable how the RCN's approach with a built-in incentive structure to promote the purchase of R&D might lead to such results.

In its letter to the Authority dated 31 January 2005, the RCN explained the standard procedure for documentation of project costs valid at the time of these projects, 'For the involved projects, the contracting partner was required to submit a cost claim report (*regnskapsrapport*) three times a year detailing the cost of the project, including a verification of the persons involved (by name), the number of working hours spent by each person, and the cost per hour charged to the project account. The report is signed by the project responsible person. At the end of the year, the accounts for the year are also checked and signed by a certified accountant. The accountant is external to the contract partner. The RCN payment was contingent upon approval of the submitted accounts.'

The RCN informed the Authority that it had been in contact with United European Car Carriers (UECC) and with Jebsens (successor of Beltship Management) and requested further documentation on the costs related to these projects. The letter from Jebsens dated 17 March 2006 and the letter from UECC dated 29 March 2006 were forwarded to the Authority. The cost claim reports for Project 144265 Shiplog II provided in the letter from UECC include signed cost statements from the other participating partners. The companies did not have any general recording system for working hours, which means that the hours spent on the projects were only documented in the cost claim reports sent to the RCN three times a year. No further documentation exists. In the opinion of the RCN, this means that the costs of the projects have to be assessed by the available cost claim reports.

The RCN finally pointed out that these cost claim reports were in accordance with reporting procedures of the RCN, and that the beneficiaries had fulfilled all their obligations according to the contracts awarding the grants. In the opinion of the RCN, 'unless clear evidence of the contrary there is no reason to believe that any misuse of aid has taken place.'

5.2. *Comments to third party's comments*

By letter of the Ministry for Government Administration and Reform dated 8 January 2007 (Event No 405517) forwarding a letter from the Ministry of Education and Research dated 5 January 2007, the Norwegian authorities submitted observations to the third party comments.

In the opinion of the Norwegian authorities, the comments regarding the project OPTIMAR do not provide any information related to the four projects which are the subject of the Authority's decision 60/06/COL. 'Though it is not explicitly stated, it seems like the third party is of the opinion that illegal State aid has been granted to support a basic research project called Optimisation in Maritime Transportation and Logistics, OPTIMAR. We are of the opinion that this is not the case. In support of the OPTIMAR project, the Norwegian University of Science and Technology (NTNU) in Trondheim receives funds from the RCN under Project No 1666S6. The industrial partners that were participants in the four original projects do not take part in this basic research project.'

Regarding the third party's allegation that Turborouter is not used by any of the companies that received funds, the RCN is of the opinion that even if this should be the case, it is not an argument for any illegal use of State aid in the case of the four projects which are the subject of the Authority's Decision No 60/06/COL. It is one of the most typical features of research and development that there is a risk involved. Sometimes research results can be applied in operations or used in commercial products or services, sometimes they cannot.

II. APPRECIATION

1. The presence of state aid

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

According to Article 61(1) of the EEA Agreement,

'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.'

Thus, in order for a measure to be considered State aid, it must constitute a selective advantage in favour of certain undertakings, be granted through state resources, distort competition and affect trade between the Contracting Parties to the EEA Agreement.

The Authority already came to the conclusion that the grants given by the RCN to the projects related to the development of the software programme Turborouter under review constitute State aid in its assessment in Decision No 60/06/COL. In this respect, reference is made to point II.2 of this Decision. This assessment has not been disputed by the third party or the Norwegian authorities. The Authority therefore upholds its view that the grants constitute State aid.

1.2. *The applicable legal framework*

In Decision No 60/06/COL to open the formal investigation procedure on R&D aid granted by the RCN in connection with the development of the software programme Turborouter, the Authority explained in detail what would be the applicable legal framework for the assessment of the four projects concerned by this investigation. For the sake of understanding of the assessment hereinafter, the Authority briefly outlines the legal situation ⁽¹⁸⁾ below.

The four projects assessed in this Decision were granted R&D aid in the framework of the Industrial R&D Programme (*brukerstyrte forskningsprogrammer*, Case No 93-183). The Industrial R&D Programme was already in place before 1994. By way of Decision No 217/94/COL of December 1994, the Authority assessed the Industrial R&D Programme and proposed appropriate measures to require that the granting of aid be done in accordance with the principles laid down in Chapter 14 of the State Aid Guidelines.

⁽¹⁸⁾ For further details, reference is made to Decision No 60/06/COL, Section II.1, p. 11.

The acceptance by the Norwegian authorities of the proposed appropriate measures implied that, thereafter, any grant of aid under the Industrial R&D Programme had to be done in accordance with the R&D rules applicable at the time when the Authority adopted Decision No 217/94/COL, i.e. the 1994 R&D Guidelines ⁽¹⁹⁾.

1.3. *The assessment of the projects on the basis of the aid scheme Industrial R&D Programmes*

The Authority considered, by the opening of a formal investigation in Decision No 60/06/COL, that the four projects had been granted R&D aid in the framework of the Industrial R&D Programme. This program was already in place before 1994. Following the adoption of new R&D guidelines in 1994, thereafter any grant of aid under a R&D scheme had to be done in accordance with the new rules. Hence, the Authority considered that, by definition, any aid granted under the scheme Industrial R&D Programmes which does not comply with the provisions of the 1994 R&D Guidelines, would fall outside the scope of application of the scheme. Accordingly, the measure would constitute new individual aid and should, as such, be notified to the Authority individually.

In the following, the Authority will assess whether the application of the scheme Industrial R&D Programmes to the four concrete projects identified as relating to the development of the software programme Turborouter was done in line with Article 61(3)(c) of the EEA Agreement on the basis of the provisions of the 1994 R&D Guidelines.

1.3.1. **Project 40049 — Strategic Activities within maritime transport and logistics (The first version of the software programme Turborouter)**

One of the sub-projects covered by Project 40049 'Strategic activities within maritime transport and logistics as industrial research' led to the development of the first version of the software programme Turborouter. The RCN classified the whole Project 40049 Strategic activities within maritime transport and logistics as industrial research as a whole.

Basic industrial research was defined under Point 14.1.(2) of the 1994 R&D Guidelines as 'original theoretical or experimental work whose objective is to achieve new or better understanding of the laws of science and engineering as they might apply to an industrial sector or the activities of a particular enterprise.'

Although Turborouter has become a commercial software tool, the Authority considers that the RCN funds allocated to the

sub-project 'Methods and analytical tools for design and operation of integrated transport and logistics chains' of Project 40049 which led to the development of the first software programme Turborouter concerned a phase of R&D which qualified as industrial research within the meaning of the 1994 R&D Guidelines. As the Authority noted in Decision No 60/06/COL, since the first software was developed in the first phase of the sub-project back in early 1996, the software has been further improved and also marketed. However, it seems that the granting of aid to Project 40049 which resulted, amongst others, in the development of the first software Turborouter, cannot, by this fact, be considered in relation to market proximity to be beyond the stage of industrial research as it was classified by the RCN. The Authority has no reason to question the RCN's assessment that the sub-project 'Methods and analytical tools for design and operation of integrated transport and logistics chains' achieved a new or better understanding of the laws of science and engineering applicable to an industrial sector, which constitutes industrial research within the meaning of the 1994 R&D Guidelines.

As industrial research, Project 40049 was granted aid from the RCN for an amount corresponding to 43,8 % of the costs of the project. This intensity is below the maximum aid intensity allowed by the Guidelines according to which 'the level of aid for basic industrial research should not be more than 50 % of the gross costs of the project or programme.'

For the purpose of calculating the intensity of aid from R&D activities, Section 14.5.1 of 1994 R&D Guidelines foresaw the following eligible costs:

- personnel costs (researchers, technicians, other supporting staff) calculated as a sum of the total amount needed to carry out the project;
- other running costs calculated in the same way (costs of materials, supplies, etc.);
- instruments and equipment, land and buildings;
- consultancy and equivalent services including bought-in research, technical knowledge, patents, etc.;
- additional overhead costs incurred directly as a result of the R&D project or programme being promoted.'

⁽¹⁹⁾ In January 1994, the Authority adopted Decision No 4/94/COL on the adoption and issuing of the Procedural and Substantive Rules in the Field of State Aid (Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3). Chapter 14 thereof deals with Aid for research and development, which mainly corresponded to the Community framework for State aid for research and development. This Decision was published on the Official Journal L 231, 3.9.1994, p. 1-84 and EEA Supplement No 32, 3.9.1994, p. 1.

According to the information provided by the Norwegian authorities, the costs of the project taken into account in the determination of the granting of aid were covered by the definition of eligible costs provided in the 1994 R&D Guidelines. Section 3 to the *Retningslinjer for Norges Forskningsråds behandling av brukerstyrte og næringsrettede prosjekter* referred to the costs that could be considered eligible by the RCN when assessing the granting of R&D aid to a project. They covered personnel costs (salary and social costs for R&D personnel, i.e. researchers, technicians and assistants related to the project and necessary to carry it out), purchasing of R&D services (consultancy services and equivalent services), operating costs (including material costs and other operating costs directly related to the project and necessary to complete it) and equipment and instruments if used only for R&D. Thus, the Authority considers the description of the eligible costs to be in accordance with the definition provided for in the 1994 R&D Guidelines.

The project was exclusively carried out by the research institute Marintek without further participation of or collaboration with private undertakings at this stage of the R&D.

As already mentioned in the decision to open the formal investigation procedure, under the 1994 R&D Guidelines, and accordingly under the provisions of the aid scheme Industrial R&D Programmes, there was no written obligation to disseminate the results of research. Thus, even if the allegation brought forward by the complainant that the result of the research had not been disseminated and that the research institute Marintek had received the property rights to sell the programme were correct, it would not contravene the provisions of the R&D Guidelines applicable at the time of the granting of aid.

For these reasons, the Authority considers that the granting of aid to Project 40049 falls within the scheme Industrial R&D Programme as amended on the basis of Chapter 14 of the Authority's 1994 R&D Guidelines. The aid is therefore granted in accordance with Article 61(3)(c) EEA.

1.3.2. The projects relating to the further use of the software programme *Turborouter*

1.3.2.1. Doubts of the Authority expressed in Decision No 60/06/COL

In 2000, the RCN authorised the granting of R&D aid to three R&D projects which concerned the use and further development of the software programme *Turborouter*: Project 138811 'AlgOpt', Project 144265 'Shiplog II' and Project 144214 'Library of optimisation routines for scheduling in shipping'.

In Decision No 60/06/COL to open the formal investigation procedure, the Authority expressed doubts regarding the classification of the R&D projects as pre-competitive research and regarding the classification of the different parts of each project within each research category. Moreover, the Authority questioned whether the aid intensities were respected and whether the financing of the projects was done in accordance with the provisions of the 1994 R&D Guidelines and accordingly with Article 61(3)(c) of the EEA Agreement. The Authority had doubts as to whether the financial contributions of the private participants, mostly to be disbursed in kind, really corresponded to working hours related to the development of the R&D projects or whether, on the contrary, they covered operating costs of the concerned undertakings.

1.3.2.2. The applicable provisions of the R&D Guidelines

The RCN classified all three projects as pre-competitive development activity. Point 14.1.(2) of the R&D Guidelines of 1994 distinguished between three categories of research: fundamental, basic industrial and applied research and development. Applied research and development corresponded to the concept of pre-competitive research used from the adoption of the 1996 R&D Guidelines onwards. According to this provision, applied research 'covers investigation or experimental work based on the results of basic industrial research to acquire new knowledge to facilitate the attainment of specific practical objectives such as the creation of new products, production processes or services. It could normally be said to end with the creation of a first prototype.' Development is considered to cover 'work based on applied research aimed at establishing new or substantially improved products, production processes or services up to but not including industrial application and commercial exploitation.'

Section 14.4 of the 1994 R&D Guidelines sets out the aid intensities allowed. The intensity of aid that may be accepted is assessed by the EFTA Surveillance Authority on a case-by-case basis. The assessment takes into consideration the nature of the project or programme, the technical and financial risk involved, overall policy considerations related to the competitiveness of European industry, as well as the risk of distortion of competition and effect on trade between the Contracting parties to the EEA Agreement. A general evaluation of such risks leads the EFTA Surveillance Authority to consider that basic industrial research may qualify for higher levels of aid than those for applied research and development activities which are more closely related to the market introduction of R&D results and, there, if aided, could more easily lead to distortions of competition and trade'. Taking account of these factors, the 1994 R&D Guidelines state that the level of aid for basic industrial research should not be more than 50 % of the gross costs of the project and consider that, as the activity being aided gets nearer to the marketplace, the level of aid should be lower. It is only in the 1996 R&D Guidelines that the permissible gross aid intensity for pre-competitive development activities is fixed at 25 % of the eligible costs.

1.3.2.3. Assessment of whether the aid was granted in accordance with the R&D Guidelines and of whether the aid was misused

(a) Classification as pre-competitive development activity.

As mentioned above and explained in detail in the Decision No 60/06/COL, the Authority expressed doubts as regards the classification of Project 138811 'AlgOpt', Project 144265 'Shiplog II' and Project 144214 'Library of optimisation routines for scheduling in shipping' as pre-competitive development activities.

In its Decision No 60/06/COL, the Authority expressed doubts regarding the difference between the pre-competitive phase of a product and the final commercial product in respect of these kinds of IT projects. The Norwegian authorities have not made clear what this difference should be. However, they have stressed that the classification of the projects was based on a thorough assessment and evaluation of the projects according to the RCN procedures and guidelines for project evaluation. According to the information provided, these guidelines incorporate the provisions of the Authority's R&D Guidelines.

The RCN explained that there is an internal system of quality assurance of RCN's activities called DOKSY. DOKSY comprises a broad documentation of the guidelines, procedures and practices that are followed in the RCN. One of these documents is the guidelines for determining aid intensity applied to the selected projects. This internal document, DOKSY-5-6-1-4-IE entitled 'Støtteandel etter EØS-bestemmelser' (aid intensities according to EEA rules) corresponds to the Authority's R&D Guidelines. The document applies definitions and corresponding aid intensities in compliance with the definition of the different R&D stages in the Authority's R&D Guidelines. The assessment and classification of all the projects that receive aid from the RCN is based on the DOKSY guidelines.

After 1999, in addition to DOKSY 5-6-1-4-IE, all projects have been evaluated using the computer-based system 'Provis', which is described in Doksy No 5-6-1-2-EE 'Prosjektvurdering i Provis'. According to the provisions of Provis, each project is evaluated according to eleven different aspects ⁽²⁰⁾. For each aspect, Provis foresees the application of several criteria or characteristics to characterise to what extent the project is in compliance with the

aspects. One of the most important aspects related to the classification of research categories is the research content.

In the description of the Guide for evaluation of the research content of a project in Doksy No 5-6-1-2-IE, it is underlined that 'Research content indicates to what degree the project produces new knowledge'. According to the information provided by the RCN, this criterion is directly linked to the description of the R&D guidelines where the requirement is that the activity is 'aimed at the acquisition of new knowledge'.

The RCN has informed the Authority that the evaluation of the projects was thoroughly carried out in accordance with the RCN procedures and guidelines for project evaluation, more specifically, on the basis of the requirements laid down in the Doksy and Provis internal documents, in line with the R&D Guidelines.

On the basis of the information brought forward before and during the formal investigation procedure the Authority has not been able to conclude that there has been mismanagement or failed assessment of the projects. In lack of such conclusive evidence, and in light of the above described routines and the capacity of the professional staff working for the RCN, the Authority has no basis for concluding that they have made an incorrect assessment of the projects as pre-competitive research.

(b) The participation of the beneficiary undertakings and the aid intensities:

The Norwegian authorities have clarified the figures regarding the financing of the projects as mentioned above under Section 4.1.2 of this Decision.

The Authority raised doubts in its Decision No 60/06/COL to open the formal investigation procedure on the participation of the companies involved in the research project. In its opinion, it would seem rational to assume that most of the work would have been carried out by the own-staff of the research institute Marintek which would imply, in principle, that the participation of the staff of participating shipping companies as the final users of the software, would have most probably been related to the definition of the users needs and/or, to some degree, of testing. Therefore, the Authority questioned whether the figures for the total project costs had been inflated to seemingly obtain more financing.

⁽²⁰⁾ The Guidelines for project evaluation in Provis take account of several aspects: (i) the general quality of the project, (ii) an evaluation of the project based on significant criteria such as the innovation level, the research level and content, international orientation, business value, socio-economic effect, risk, (iii) the effect of the support, (iv) the relevance for the programme and for the field of competence as well as (v) eligibility.

The Norwegian authorities provided the Authority with copies of cost claim reports which the participating undertakings had to submit to the RCN three times a year detailing the costs of the project, including a verification of the persons involved, the number of working hours spent by each person and the cost per hour charged to the project account. According to the explanations given by the Norwegian authorities, these reports are signed by the project responsible person and verified and signed by a certified accountant at the end of the year. The Authority has no reason to question the truthfulness of these reports on the basis of which the beneficiary undertakings were granted the R&D aid amounts.

Although it could be argued in general that it might be desirable to introduce certain controls during the development of the research projects to verify the accuracy of these costs reports, the Authority considers that the RCN has properly applied the provisions of the 1994 R&D Guidelines which do not require the carrying out of any further checks.

1.4. Conclusion

On the basis of the foregoing assessment, the Authority considers that the granting of aid to the above mentioned R&D projects was done in compliance with the provisions of the existing aid scheme Industrial R&D Programmes, which was in line with the applicable R&D Guidelines. The Authority could not establish in the course of this formal investigation procedure that the beneficiaries of R&D aid for Project 40049 'Strategic activities within maritime transport and logistics', Project 138811 'AlgOpt', Project 144265 'Shiplog II' and Project 144214 'Library of optimisation routines for scheduling in shipping' used the aid in contravention with the scheme or of Article 61(3)(c) of the EEA Agreement.

Since the projects received State aid within the framework of the scheme Industrial R&D Programmes and not individual aid, there is no need to assess whether the aid would have been compatible if it was granted outside the scheme,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to close the formal investigation procedure pursuant to Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement regarding R&D aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter because it was granted in accordance with the existing aid scheme Industrial R&D Programmes in line with Article 61(3)(c) of the EEA Agreement and the State Aid Guidelines on Research and Development.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 18 April 2007.

For the EFTA Surveillance Authority

Bjørn T. GRYDELAND
President

Kurt JÄGER
College Member

THE EFTA SURVEILLANCE AUTHORITY DECISION**No 155/07/COL****of 3 May 2007****on State aid granted in connection with Article 3 of the Norwegian Act on compensation for value added tax (VAT) (Norway)**THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

Whereas:

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 thereof,

HAVING REGARD to Article 1(2) of Part I and Articles 4(4), 6, 7(5), 10 and 14 of Part II of Protocol 3 to the Surveillance and Court Agreement,

HAVING REGARD to the Authority's Guidelines ⁽⁴⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

HAVING REGARD to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 to the Surveillance and Court Agreement,

HAVING REGARD to the Authority's Decision No 225/06/COL of 19 July 2006 to open the formal investigation procedure with regard to Article 3 of the Norwegian Act on compensation for value added tax (VAT) ⁽⁵⁾,

HAVING CALLED on Norway and interested parties to submit their comments to this Decision and having regard to the Norwegian authorities' comments,

⁽¹⁾ Hereinafter referred to as the Authority.

⁽²⁾ Hereinafter referred to as the EEA Agreement.

⁽³⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽⁴⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 3.9.1994 No 32. The Guidelines were last amended on 7 February 2007. Hereinafter referred to as the State Aid Guidelines.

⁽⁵⁾ Published on the OJ C 305, 14.12.2006 and the EEA Supplement No 62, 14.12.2006, p. 1.

I. FACTS**1. Procedure**

By letter dated 16 October 2003, the Authority received a complaint in which it was alleged that a particular kind of schools, which provide specialised services to the off-shore sector in competition with the complainant, receive State aid through the application of input tax compensation provided for in Article 3 of the Value Added Tax Compensation Act ⁽⁶⁾. Municipal schools that provide certain educational services exempted from the application of VAT in competition with other undertakings receive a compensation for the input VAT paid on goods and services purchased in relation to the services they provide on a commercial basis, to which private competitors are not entitled. The letter was received and registered by the Authority on 20 October 2003 (*Doc. No 03-7325 A*).

After various exchanges of correspondence ⁽⁷⁾, by letter dated 19 July 2006 (Event No 363440), the Authority informed the Norwegian authorities that it had decided to open the formal investigation procedure foreseen under Article 4 in Part II of Protocol 3 to the Surveillance and Court agreement with regard to Article 3 of the Norwegian Act on compensation for value added tax (VAT) with Decision No 225/06/COL.

The Norwegian authorities submitted comments to this Decision by letter dated 18 September 2006 (Event No 388922).

The Authority's Decision No 225/06/COL was published in the Official Journal of the EU C 305 of 14 December 2006 and the EEA Supplement No 62 of the same date. No further comments from third parties were received after the publication.

2. Legal framework on VAT and VAT Compensation in Norway

The VAT Compensation Act entered into force on 1 January 2004 with the objective to mitigate distortion of competition resulting from the VAT Act.

⁽⁶⁾ Act No 108 of 12 December 2003 on VAT compensation to local and regional authorities (Lov om kompensasjon av merverdiavgift for kommuner, fylkeskommuner mv). Hereinafter referred to as the 'VAT Compensation Act'.

⁽⁷⁾ For further details see the Authority's Decision No 225/06/COL, published on the OJ C 305, 14.12.2006.

VAT is a consumption tax entailing the application of a tax exactly proportionate to the price of supplies of goods and services, independently from the number of transactions taking place in the production or distribution process before the stage at which the tax is eventually charged to an ultimate customer.

As a main rule, a person engaged in trade or business and liable to VAT registration (hereinafter 'taxable person'), shall calculate and pay tax on sales of goods and services covered by the VAT Act ⁽¹⁾ and may deduct input tax on goods and services for use in an enterprise from the output tax charged on sales ⁽²⁾. Thus, the VAT system taxes all supplies by all taxable persons equally. This neutrality is one of the main features of the VAT system.

However, Articles 5, 5a and 5b in Chapter I of the VAT Act exempt certain transactions from the scope of application of the VAT Act: sales by certain institutions, organisations etc. ⁽³⁾, the supply and letting of real estate or rights to real property, the supply of certain services, amongst others, the supply of health and health related services, social services, educational services, financial services, services related to the exercise of public authority, services in the form of entitlement to attend theatre, opera, ballet, cinema and circus performances, exhibitions in galleries and museums, lottery services, services connected with the serving of foodstuffs in school and student canteens, etc. ⁽⁴⁾.

It follows from the above that any taxable person carrying out the supply of goods and services which are exempt from the VAT Act pays input tax on its purchases of goods and services but cannot deduct the input tax from its tax liability because for such purchases the taxable person is the ultimate customer.

The consequence of the exemption is that the suppliers of the exempted goods and services have to pay input tax on the services and goods they purchase as any final consumer (without having the possibility to charge output tax to the ultimate consumer). This logical consequence of the VAT exemptions has, however, created a distortion at another level. Public entities, just as any integrated company which is tax

exempted, will have an incentive to procure 'in-house' ⁽⁵⁾ instead of acquiring services or goods in the market. In order to create a system without any particular incentive to produce goods or services with own resources compared to external acquisition, the Norwegian authorities adopted the VAT Compensation Act.

Article 2 of the VAT Compensation Act lists the entities covered by the Act exhaustively:

- (a) local and regional authorities carrying out local or regional activities in which the local council or county council or another council under the Local Government Act ⁽⁶⁾ or other special local governmental legislation is the supreme body;
- (b) intermunicipal companies established according to the Local Government Act or other special local governmental legislation;
- (c) private or non-profit undertakings in as far as they carry out health, educational or social services which are statutory obligations of local or regional authorities;
- (d) day care institutions as mentioned in Article 6 of the Day Care Act ⁽⁷⁾;
- (e) Joint Parish Council (Kirkelig fellesråd).

It follows from Article 3 read in conjunction with Article 4(2) of the VAT Compensation Act, that the Norwegian State compensates input tax paid by taxable persons covered by the VAT Compensation Act when buying goods and services from other taxable persons when they do not have the right to deduct input tax since they are tax exempted according to the VAT Act ⁽⁸⁾.

⁽¹⁾ Article 10(1) in Chapter III of the VAT Act. See in this respect Chapter IV in connection with Chapter I of the VAT Act.

⁽²⁾ Article 21 in Chapter VI of the VAT Act.

⁽³⁾ Reference is made to Article 5 of the VAT Act according to which sales by certain entities like museums, theatres, non profit associations, etc, exempted from the application of VAT. Article 5(2) of the VAT Act states that the Ministry of Finance may issue regulations delimiting and supplementing the provisions in the first subsection and may stipulate that businesses referred to in the first subsection, 1 f) shall nevertheless calculate and pay output tax if the exemption brings about a significant distortion of competition in relation to other, registered businesses that supply equivalent goods and services.

⁽⁴⁾ See Article 5b of the VAT Act.

⁽⁵⁾ 'In-house' procurement is not considered as a transaction liable for VAT purposes.

⁽⁶⁾ Act No 107 of 25 September 1992 on Local Government (Lov om kommuner og fylkeskommuner).

⁽⁷⁾ Act No 64 of 17 June 2005 on Day Care Institutions (Lov om barnehager).

⁽⁸⁾ For a more detailed explanation on the functioning of the VAT system in Norway, reference is made to Section I.2 'Legal framework on VAT and VAT compensation in Norway' of Decision No 225/06/COL, p. 2.

3. The doubts the Authority expressed in the Decision to open the formal investigation procedure

In Decision No 225/06/COL to open the formal investigation procedure with regard to Article 3 of the VAT Compensation Act, the Authority's preliminary consideration was that the input tax compensation as provided for in Article 3 of the VAT Compensation Act constituted State aid within the meaning of Article 61(1) of the EEA Agreement.

The Authority considered that the compensation granted under the VAT Compensation Act was granted by the State through state resources from the State Budget. In the Authority's view it was not relevant for this assessment whether or not the State's cost of the compensation at the central level is counterbalanced by reduced transfers to the local and regional authorities as such.

The Authority further considered that, to the extent that the Norwegian authorities compensate input tax on purchases of goods and services to undertakings not subject to VAT but falling within the scope of Article 2 of the VAT Compensation Act, they grant those undertakings an economic advantage.

In the assessment of selectivity, the Authority raised doubts as to whether the VAT compensation, which in its view constituted a materially selective measure, could be justified by the nature and logic of the VAT system, i.e., whether it met the objectives inherent in the VAT system itself, or whether it pursued other objectives, external to the VAT system. According to the explanations given by the Norwegian authorities, the objective pursued with the introduction of the VAT Compensation Act was to facilitate and encourage the choice by the taxable persons covered by the VAT Compensation Act between self supply and outsourcing of goods and services subject to VAT. The Authority had doubts as to whether this purpose could be said to be in the nature and logic of the VAT system itself which is a tax on consumption. In the Authority's preliminary view, the VAT compensation was not a part of the VAT system, established in 1970, as such but a separate measure, introduced later, to rectify some of the distortions created by the VAT system.

The Authority pointed out that while mitigating distortions for municipal acquisitions, the VAT compensation had created a distortion of competition between undertakings carrying out the same economic activities in sectors exempted from the application of VAT.

The Authority recalled that, in principle, the beneficiaries under the VAT compensation scheme can receive compensation for input VAT under the conditions of the scheme, regardless of whether aid to operators in these sectors would have an effect on trade. Some of the sectors covered by the VAT Compensation Act are partly or fully open for EEA-wide competition. Aid granted to undertakings in these sectors is thus capable of

affecting trade between the Contracting Parties to the EEA Agreement. The Authority had to assess the scheme as such and not its application to each individual sector covered. Based on jurisprudence, the Authority's preliminary conclusion was that, as a general nationwide scheme, the VAT Compensation Act was capable of affecting trade between the Contracting Parties.

Finally, the Authority expressed doubts that the input tax compensation could be considered compatible with the State aid rules of the EEA Agreement following the application of any of the exceptions foreseen under Articles 61(2) and (3) of the said agreement. Moreover, although aid could potentially, in some situations, be considered compatible under the derogation foreseen in Article 59(2) of the EEA Agreement, the Authority was of the preliminary view that this provision did not justify the compatibility of the VAT Compensation Act as a scheme.

4. Comments by the Norwegian authorities

By letter dated 18 September 2006 (Event No 388922), the Norwegian authorities submitted comments to the Authority's Decision to open the formal investigation procedure. The comments were divided into three sections:

4.1. *The framework of the VAT Compensation scheme*

The Norwegian authorities explained that VAT is a general tax that applies, in principle, to all commercial activities involving the production and distribution of goods and the provisions of services. VAT incurred on expenses is recoverable only to the extent that the tax payer provides services which are subject to VAT. Under the current VAT rules, most of the activities in the municipal sector are not subject to VAT:

'Municipal activity is generally outside the VAT system. Basic municipal activities such as health services, educational services and social services are not subject to VAT. Economic activities in which municipalities engage as a "public authority" are outside the scope of VAT. Thus, VAT incurred by the municipalities related to exempt or non-taxable activities is an unrecoverable cost. It may be referred to as a "hidden VAT cost". It may also be seen as an anomaly of the VAT system. Since the VAT system is supposed to be governed by a principle of neutrality, the VAT treatment of the municipalities may distort competition. Due to the fact that the municipalities may not claim back the VAT paid on inputs provided by the private sector, it may also introduce a bias for public authorities towards self-supply of services liable for VAT versus contracting out to the private sector.'

By compensating the municipalities for input tax on all goods and services, the Norwegian authorities argued that the purpose of the general VAT compensation scheme is to create a level playing field between self supply and outsourcing:

'The VAT will no longer distort the municipal authorities' incentives when choosing between "in-house" production of services and purchase of services liable for VAT from private service providers. [...] Neutrality can therefore be deemed as the objective assigned to the VAT compensation scheme.'

The Norwegian authorities stressed the view already expressed in the preliminary phase of the investigation that the VAT compensation scheme does not constitute an aid measure for the undertakings falling within the scope of Article 2 of the VAT Compensation Act. The reason for this statement is that when the general VAT compensation scheme was introduced in 2004, the municipal appropriations in the annual fiscal budget were reduced accordingly by the expected amount of input tax compensated. The VAT compensation scheme has therefore no revenue effects for the Government. Thus the system may be described as a self-funding system through allocation of a rebate/compensation cost to municipalities.

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

In the letter dated 18 September 2006, the Norwegian authorities expressed their disagreement with the assessment of the Authority that the VAT Compensation Act constitutes State aid for the following reasons:

Economic advantage

The Norwegian authorities believe that it is not correct to deem the VAT compensation as an 'advantage', which relieves undertakings of charges that are normally borne from their budgets. Because the municipalities fund the VAT compensation scheme themselves through a reduction of the general grants, no factual economic relief is granted. The VAT compensation scheme neither implies any reduction in the amount of tax nor any kind of tax deferment. Consequently, in the opinion of the Norwegian authorities, it is wrong to compare the VAT compensation scheme to measures which imply a genuine reduction in the recipient's tax burden.

Selectivity

The scope of the VAT Compensation Act is positively defined in that only legal persons falling within Article 2 of the Act can be compensated for input tax on purchases.

A selective tax measure can nevertheless be justified due to the nature or general scheme of the tax system in question. The Norwegian authorities considered that by stating that the VAT compensation is not a part of the VAT system, the Authority dismissed their argument that the VAT compensation can be deemed to be in line with the nature and logic of the VAT system itself. The Norwegian authorities objected to this approach referring to Chapter 17B.3.1 et seq. of the Authority's

State Aid Guidelines where various aspects of differential measures are looked into. They considered that VAT compensation is justified by the nature or general scheme of the tax system in question and referred to Chapter 17B.3.4 of the State Aid Guidelines 'Application of State aid rules to measures relating to direct business taxation'. It is a fundamental principle that the VAT system should be neutral and non-discriminatory. In the opinion of the Norwegian authorities, neutrality may therefore be seen as inherent in the VAT system itself. Neutrality, which is inherent to the VAT system, is also the objective assigned to the VAT compensation scheme. Therefore, the Norwegian authorities believed that it is fair to consider the VAT compensation scheme to be in line with the nature and logic of the VAT system itself.

Moreover, they noted that in case the VAT compensation scheme should be phased out, the distortion of competition resulting from the VAT system would be revived: 'The fact that the municipalities cannot recover VAT on inputs would distort the municipal authorities' incentives when choosing between "in-house" production of services and purchase of services liable for VAT from private service providers.'

The Norwegian authorities pointed out that, in order to mitigate distortion of competition resulting from the VAT system, the so-called Rattsø Committee assessed several possible measures before it decided that the VAT compensation scheme would be the most suitable⁽¹⁾. One of the possible measures the Committee assessed was to extend the municipalities' right to deduct input VAT. Another possible measure would be to make the municipalities subject to VAT in general. The Rattsø Committee did not choose to extend the municipalities' right to deduct input VAT because this measure would imply a disruption to VAT as a general tax. It was also taken into consideration that this measure could create pressure from other groups. Nor did the Rattsø Committee choose to make the municipalities subject to VAT in general. Among other factors, the Committee pointed out that because many municipal services are performed free of charge, there is a lack of calculation basis for the VAT:

'Extension of the municipalities rights to deduction and making the municipalities subject to VAT in general would both be solutions within the VAT system. The motive of these measures, to mitigate the distortion of competition resulting from the VAT system, would, however, be exactly the same as to that of the VAT compensation scheme. Moreover, there is in an economic sense no difference between the compensation scheme and extending the municipalities right to deduct input tax. Thus, the Ministry believes that in itself the framing of the VAT compensation scheme can be of no consequence.'

⁽¹⁾ Norges Offentlige Utredninger (NOU) 2003: 3, Merverdiavgiften og kommunene, Konkurransesvridninger mellom kommuner og private (hereinafter referred to as the 'Rattsø report').

Effect on trade

The Norwegian authorities criticised the Authority's assessment of the 'effect on trade' criteria.

'Through the VAT compensation scheme the municipalities are primarily granted refund of input tax on goods and services purchased for their mandatory activities. By law the municipalities are imposed to perform certain services. This is specially the case on the education, health and social area. For instance, in the health sector the municipalities, among other things, are instructed to provide for general practitioner services, nursing services, midwife services and nursing home services. In the social sector the municipalities are instructed to provide for practical and economic support to the receivers, e.g. social housing.'

'Pursuant to Article 2 and 3 of the VAT Compensation Act, VAT compensation may also be granted to municipalities which carry out non-mandatory activities. Besides the special training performed by the topical county municipal schools, the Ministry does, however, not know of any areas outside the scope of the VAT system where it is questioned whether the recipients of VAT compensation perform their services in competition with other undertakings within the EEA.'

The Norwegian authorities consequently believed that in sectors which are exempted from the scope of application of the VAT Act, very few undertakings established in neighbouring European countries would provide services in competition with Norwegian undertakings covered by the VAT Compensation Act. Moreover, circumstances such as physical distance to the service provider, language difficulties and other forms of cultural attachment are decisive when a service provider is chosen.

The Norwegian authorities considered that in order to perform a true assessment of the VAT compensation scheme in relation to the criteria set out in Article 61(1) of the EEA Agreement, it should be relevant that the competition between Norwegian undertakings and other undertakings in the EEA on sectors exempted from the application of VAT is quite marginal.

Thus, the Norwegian authorities believed that VAT compensation granted to undertakings in sectors exempted from the application of VAT cannot be deemed as capable of affecting trade between the Contracting Parties to the EEA Agreement.

4.3. General comments

The Norwegian authorities referred to several EU Member States which have introduced refund schemes for the VAT costs on non-taxable or tax-exempt activities for local governments. In Sweden, Denmark, Finland, the Netherlands and the United Kingdom different schemes which provide for refunds of VAT

to local governments have been established to eliminate distortions in the decision making of public authorities between public provision and contracting out of public services. Various VAT refund systems of a broadly similar nature are also established in France, Luxembourg, Austria and Portugal.

Further, the Norwegian authorities quoted former Commissioner Mr Bolkestein. In a letter of 1 February 2000 to Michel Hansenne (Belgium), who had asked the European Parliament whether the VAT compensation scheme in the United Kingdom was in compliance with the sixth VAT Directive, Mr Bolkestein stated that a VAT compensation scheme 'does not conflict with the sixth VAT Directive' since 'it entails a purely financial operation between different public bodies and is governed by the respective national policy for the financing of public authorities'.

Mr Bolkestein also commented on 'a possible scheme whereby the Irish Government would give a subsidy to Irish charities of an amount equivalent to the non-deductive VAT that they had incurred'. He stated that 'the granting of government subsidies is in itself not contrary to the European Union VAT law'.

The Norwegian authorities admitted that none of these quotations directly addressed the State aid rules. However, in their opinion, it appears from these quotations that the VAT compensation schemes are not deemed to be in conflict with the sixth VAT Directive. In their view, this reflects the fact that VAT compensation schemes are in line with the nature and logic of the VAT system itself.

II. APPRECIATION

1. The presence of State aid

1.1. Introduction

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.'

The Authority would like to make a preliminary remark regarding the scope of the current assessment. This Decision does not address the decision of the Norwegian authorities to exempt certain transactions from the scope of the application of the VAT Act. It only concerns the compensation for input tax paid by certain persons falling within the scope of the VAT Compensation Act.

Further, the Authority would also like to stress three remarks it already made in Decision No 225/06/COL:

Firstly, as a general rule, the tax system of an EFTA State is not covered by the EEA Agreement. It is for each EFTA State to design and apply a tax system according to its own choices of policy. However, application of a tax measure, such as the input tax compensation provided for in Article 3 of the VAT Compensation Act, may have consequences that would bring it within the scope of Article 61(1) of the EEA Agreement. According to the case-law⁽¹⁾, Article 61(1) does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.

Secondly, the question as to whether the measure at issue constitutes State aid arises only in so far as it concerns an economic activity, that is, an activity consisting of offering goods and services on a given market⁽²⁾. A measure constitutes State aid only if it benefits undertakings. For the purposes of application of the rules on competition, the concept of an undertaking encompasses entities 'engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'⁽³⁾. Although some of the entities which receive input tax refunds do not fulfil the condition of being an undertaking, the fact that some beneficiaries of the VAT Compensation Act are undertakings constitutes sufficient grounds to assess the scheme as such for State aid purposes⁽⁴⁾.

Thirdly, aid may be granted to public undertakings as well as to private undertakings⁽⁵⁾. A public undertaking, in order to be regarded as a recipient of State aid does not necessarily need to have a legal identity separate from the State. That an entity is governed by public law and is a non-profit making institution does not necessarily mean that it is not an 'undertaking' within the meaning of the State aid rules⁽⁶⁾.

Fourthly, regarding the general comments from the Norwegian authorities about the existence of similar schemes within the European Union, the Authority would like to note that these systems may be different from the VAT Compensation Act and

that it has informed the European Commission about the observations of the Norwegian authorities. Moreover, according to case law 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation'⁽⁷⁾

In the following, the Authority will assess whether the VAT Compensation Act as a scheme⁽⁸⁾ fulfils the criteria foreseen under Article 61(1) of the EEA Agreement to be considered State aid.

1.2. State resources

In order to constitute State aid within the meaning of Article 61(1) of the EEA Agreement, the aid must be granted by the State through state resources.

The compensation is granted by the State directly and is therefore granted by the State through state resources.

The Norwegian authorities have argued that the VAT compensation scheme does not constitute an aid measure because it is a self-funding system. In their opinion, municipalities fund the VAT Compensation scheme themselves through a reduction of the general transfers from the State budget to the municipalities. With the introduction of the VAT compensation scheme in 2004, the municipal appropriations in the annual fiscal budget were reduced in accordance with the expected amount of input tax compensated.

The Authority considers that for State aid purposes it is not relevant whether the amount of money received by the municipalities has been diminished or not. What is important is whether undertakings within the meaning of the competition rules have received financial support by the State through state resources. When a municipality acts as an undertaking it should be viewed for State aid purposes separately from the municipality as a public authority. Whether the State's cost of the compensation at the central level is counterbalanced by reduced transfers to the local and regional authorities as such does not alter this conclusion. The refund for input tax paid is financed from the state budget and therefore constitutes state resources.

Moreover, in the Authority's understanding, each municipality does not get a reduction in the state transfer exactly corresponding to the exact VAT compensation it receives.

⁽¹⁾ Case E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Court Report, p. 76, paragraph 34; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority* [2005] Report of the EFTA Court, p. 121, paragraph 76; Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; and Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

⁽²⁾ Joined Cases C-180/98 to C-184/98 *Pavlov and others* [2000] ECR I-6451, paragraph 75.

⁽³⁾ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

⁽⁴⁾ Case E-2/05 *EFTA Surveillance Authority v Iceland* [2005] Report of the EFTA Court, p. 202, paragraph 24.

⁽⁵⁾ Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 11.

⁽⁶⁾ Case C-244/94 *Fédération Française des Sociétés d'Assurance et a.* [1995] ECR I-4013, paragraph 21; and Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 1.

⁽⁷⁾ Case 78/76 *Steinike & Weinlig*, cited above paragraph 24, Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717, paragraph 54.

⁽⁸⁾ The Authority assessed in Section II.2.1 of Decision No 225/06/COL that the VAT Compensation Act constitutes an aid scheme. Reference is made to that assessment.

1.3. *Economic advantage*

A financial measure granted by the State or through state resources to an undertaking which would relieve it from costs which would normally have to be borne by its own budget constitutes an economic advantage ⁽¹⁾.

The Norwegian authorities have argued that the VAT compensation scheme does not constitute an advantage because the scheme neither entails a reduction in the amount of tax nor any tax deferment. The VAT compensation scheme does not imply any reduction in the recipient's tax burden.

The Authority does not share this approach. In its opinion the Norwegian authorities do not make the necessary differentiation between the various spheres of the State, i.e., in this case the State as tax authority, the municipalities as state bodies and municipal undertakings as separate entities for State aid purposes.

To determine whether an economic advantage has been granted, the Authority has to assess whether a measure relieves its beneficiaries of charges that they normally bear in the course of their business. The payment of input tax is an operating cost related to purchases in the normal course of an undertakings' economic activity, which is normally borne by the undertaking itself. To the extent that the Norwegian authorities compensate input tax on purchases of goods and services to undertakings falling within the scope of Article 2 of the VAT Compensation Act, they grant those undertakings an economic advantage. They are granted an advantage because the operating costs which those undertakings will have to put up with are reduced in accordance with the amount of input tax compensated.

The VAT Compensation Act therefore entails the granting of an economic advantage to the beneficiaries of the scheme.

1.4. *Selectivity*

Further, to constitute State aid within the meaning of Article 61(1) of the EEA Agreement, the aid measure must be selective in that it favours 'certain undertakings or the production of certain goods'.

In Decision No 225/06/COL, the Authority considered that the VAT Compensation Act constituted a materially selective measure. The scope of the VAT Compensation Act is positively defined in that only taxable persons falling within Article 2 of the VAT Compensation Act can be compensated for input tax on purchases. The advantage granted under the VAT Compen-

sation Act for undertakings refunded for their input tax implies a relief from the obligation that follows from the general VAT system applicable to all buyers of goods and services.

The Court's jurisprudence has established that a specific tax measure can nevertheless be justified by the internal logic of the tax system if it is consistent with it ⁽²⁾. Any measure intended partially or wholly to exempt firms in a particular sector from the charges arising from the normal application of the general system constitutes State aid if there is no justification for this exemption on the basis of the nature and logic of the general system ⁽³⁾.

The Authority will assess whether the input tax refund provided for in Article 3 of the VAT Compensation Act falls within the logic of the VAT system. For this assessment, the Authority must consider whether the input tax refund meets the objectives inherent in the VAT system itself, or whether it pursues other objectives not enshrined in the VAT system.

The primary objective of the VAT system is to tax certain supplies of goods or services. The VAT is an indirect tax on the consumption of goods and services. As a rule, VAT is calculated at all stages of the supply chain and on the import of goods and services from abroad. The ultimate consumer pays VAT as part of the purchase price, without the right to deduct the tax.

Although, in principle, all sales of goods and services are liable to VAT, some transactions may be exempt (and as a consequence without a credit for input tax) which means that such supplies are not taxable.

Articles 5, 5a and 5b in Chapter I of the Norwegian VAT Act exempt transactions such as supply and letting of real estate, supply of health and health-related services, social services, educational services, financial services, etc. The providers of these goods and services are treated as final consumers for VAT purposes since they have to pay input tax without being able to request output tax. The consequence of the logic of the system is that exempted supplies of goods and services and final consumers pay input tax without having the possibility to deduct it.

⁽¹⁾ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority*, cited above, paragraphs 76 and 78-79; Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

⁽²⁾ Case E-6/98 *Norway v EFTA Surveillance Authority*, cited above, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority*, cited above, paragraphs 84-85; Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Alava et al v Commission* [2002] ECR II-1275, paragraph 163, Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 42; Case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933 paragraph 42, Case C-172/03 *Wolfgang Heiser* [2005] ECR I-1627, paragraph 43.

⁽³⁾ Case E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Court Report, p. 76, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority*, cited above, paragraphs 76-89; Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 16.

This logical consequence of the VAT system had created, however, a distortion at another level, which the Norwegian authorities have tried to offset with the introduction of the VAT Compensation Act. Thus, it follows that the logic of the VAT Compensation Act is to counterbalance the natural logical consequence of the VAT system when exempting certain supplies. Hence, the logic of the VAT Compensation Act is not to tax end users, as it is in the general VAT system, but to alleviate a certain group of final consumers to avoid distortion of competition between 'in-house' and outsourcing for transactions subject to VAT.

The Norwegian authorities have explained that, according to Article 1 of the VAT Compensation Act, the objective of the input tax compensation was to create a level playing field between self-supply and outsourcing of goods and services subject to VAT.

The Authority considers that to compensate for paid input tax for other reasons than the ones set in the VAT system, is not justified by the objective of taxation of a given activity, which primarily inspires the VAT system. The objective pursued by the Norwegian authorities in creating a level playing field between self supply and outsourcing by public entities of goods and services subject to VAT should be seen as commendable as such but can hardly be said to be in the nature and logic of the VAT system itself. In this sense, the Authority refers in particular to the *Heiser*⁽¹⁾ jurisprudence according to which the mere fact that a measure has a laudable purpose does not suffice to exclude it from classification as aid within the meaning of Article 61(1) of the EEA Agreement. Article 61(1) of the EEA Agreement does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects⁽²⁾.

The Authority does not ignore that the aim pursued by the Norwegian authorities with the introduction of the VAT Compensation Act was to create neutrality in the procurement of goods and services subject to VAT for the public administration. This neutrality cannot be confused with the neutrality inherent in the VAT system.

Since the purpose of creating a level playing field between 'in-house' supply and outsourcing of supplies of goods and services for public authorities is not in line with the logic of the VAT system, this aim could only be taken into consideration in the assessment of compatibility of the measure in question.

For the above-mentioned reasons, the Authority concludes that the VAT compensation cannot be justified by the nature and logic of the VAT system. It therefore constitutes a selective measure.

⁽¹⁾ Case C-172/03 *Wolfgang Heiser*, cited above.

⁽²⁾ Case C-159/01 *Netherlands v Commission* [2004] ECR I-4461, paragraph 51.

1.5. Distortion of competition

A measure must distort or threaten to distort competition for it to fall within the scope of Article 61(1) of the EEA Agreement.

Only public and private entities falling within the scope of Article 2 of the VAT Compensation Act benefit from input tax compensation. However, when these entities provide services exempted from the application of VAT in competition with undertakings falling outside the scope of Article 2 of the VAT Compensation Act, the latter will have to put up with higher purchase costs even though they carry out similar services. Although the input tax compensation has been aimed at mitigating distortions for municipal acquisitions, it has created a distortion of competition between public authorities carrying out economic activities and private undertakings carrying out the same economic activities in sectors exempted from the application of VAT. Accordingly, due to the intervention of the State, the products offered by private operators would, all other factors being similar, be more expensive. Thus competition is distorted. In areas where both public and private operators are compensated, the aid would still threaten to distort competition between national and other EEA operators operating in the same market.

Thus, regarding compensation granted to undertakings producing goods or offering services exempted from the application of VAT, the Authority considers that there is a distortion of competition between undertakings.

1.6. Effect on trade

A State aid measure falls within the scope of Article 61(1) of the EEA Agreement only in so far as it affects trade between the Contracting Parties to the EEA Agreement.

In their comments to the Authority's Decision No 225/06/COL, the Norwegian authorities have contested the Authority's assessment of the effect on trade criterion which was, in their opinion, not based on a fair conception of the situation. In their view, through the VAT compensation scheme municipalities are primarily granted refunds of input tax on goods and services purchased for their mandatory activities. Regarding the non-mandatory activities which municipalities may carry out, the Norwegian authorities failed to see any areas exempted from the application of VAT where the recipients of VAT compensation perform their services in competition with other undertakings within the EEA, apart from the particular kind of schools addressed by the complainant. The Norwegian authorities believe that there are very few undertakings established in neighbouring European countries which compete with Norwegian undertakings covered by the VAT Compensation Act.

The Authority reiterates its position expressed in Decision No 225/06/COL regarding the assessment of the effect on trade. The Authority is required to examine whether an aid scheme is liable to affect trade within the EEA and not to determine its actual effect⁽¹⁾. In principle, all beneficiaries under the VAT compensation scheme can receive compensation for input VAT under the conditions of the scheme, regardless of whether aid to a concrete operator would have an effect on trade. Case law of the ECJ has established that 'in the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies.'⁽²⁾ The EFTA Court has also endorsed this interpretation⁽³⁾.

The criterion of the effect on trade has been traditionally interpreted to the effect that, in general terms, a measure is considered to be State aid if it is capable of affecting trade between the EEA States⁽⁴⁾. Even if the Norwegian authorities are correct in their estimation that only a few undertakings within the EEA compete with the beneficiaries of the VAT Compensation Act, the aid measure may nevertheless affect trade since neither the number of beneficiaries nor the number of competitors are significant elements for the assessment of the criterion effect on trade within the meaning of Article 61(1) of the EEA Agreement⁽⁵⁾.

The granting of state support to an undertaking may lead to the internal supply being maintained or increased, with the consequence being that the opportunities for other undertakings to penetrate the market of the EEA States concerned are reduced⁽⁶⁾. Therefore, the character of the aid does not

depend on the local or regional character of the services supplied or on the scale of the field of activity concerned⁽⁷⁾.

There is no threshold or percentage below which it may be considered that trade between the Contracting Parties is not affected⁽⁸⁾. Rather on the contrary, according to the jurisprudence⁽⁹⁾, whenever state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid.

Articles 5 and 5a in Chapter I of the VAT Act exempt certain transactions from the scope of application of the VAT Act. Furthermore, Article 5b of the same Act foresees that the supply of certain services, amongst others the supply of health and health related services, social services, educational services, financial services, services related to the exercise of public authority, services in the form of entitlement to attend theatre, opera, ballet, cinema and circus performances, exhibitions in galleries and museums, lottery services, services connected with the serving of foodstuffs in school and student canteens, etc., are not covered by the Act. All these services are hence exempted from the application of VAT but are, in principle, covered by the VAT Compensation Act⁽¹⁰⁾. Some of these sectors, such as, for example, financial services, services connected with the serving of foodstuffs in schools and students canteens, some dental services, some educational services provided for remuneration, some cinema services, are partly or fully open for EEA-wide competition. Aid granted to undertakings in sectors which are open to competition is thus capable of affecting trade between the Contracting Parties to the EEA Agreement.

For these reasons, and taking into account the Court's jurisprudence, the Authority considers that the VAT Compensation Act is a general nationwide compensation scheme which is capable of affecting trade between the Contracting Parties to the EEA Agreement.

1.7. Conclusion

For the above-mentioned reasons, the Authority concludes that the VAT Compensation Act constitutes a State aid scheme within the meaning of Article 61(1) of the EEA Agreement.

⁽¹⁾ Case C-298/00 *P Italy v Commission* [2004] ECR I-4087, paragraph 49, and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44.

⁽²⁾ Case T-171/02 *Regione autonoma della Sardegna v Commission* [2005] ECR II-2123, paragraph 102; Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 18; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 48; and Case C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraph 24.

⁽³⁾ Case E-6/98 *Norway v EFTA Surveillance Authority*, cited above, paragraph 57 and Case E-2/05 *EFTA Surveillance Authority v Iceland* [2005] Report of the EFTA Court, p. 202, paragraph 24.

⁽⁴⁾ Joined Cases T-298/97-T-312/97 *e.a. Alzetta a.o. v Commission* [2000] ECR II-2319, paragraphs 76-78.

⁽⁵⁾ Case C-71/04 *Administración del Estado v Xunta de Galicia* [2005] ECR I-7419, paragraph 41; Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 81; Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 28; Case C-142/87 *Belgium v Commission* ('Tubemeuse') [1990] ECR I-959, paragraph 43; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 42.

⁽⁶⁾ Case E-6/98 *Norway v EFTA Surveillance Authority*, cited above, paragraph 59; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 40, Case C-280/00 *Altmark Trans*, cited above, paragraph 78.

⁽⁷⁾ Case C-280/00 *Altmark Trans*, cited above, paragraph 77; Case C-172/03 *Wolfgang Heiser* [2005] ECR I-1627, paragraph 33; Case C-71/04 *Administración del Estado v Xunta de Galicia* [2005] ECR I-7419, paragraph 40.

⁽⁸⁾ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 81, Case C-172/03 *Wolfgang Heiser* [2005] ECR I-1627, paragraph 32.

⁽⁹⁾ Case E-6/98 *Norway v EFTA Surveillance Authority*, cited above, paragraph 59; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11.

⁽¹⁰⁾ Article 4 of the VAT Compensation Act introduces some limitation of the possibility to be compensated.

2. Procedural requirements

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

The Norwegian authorities did not notify the VAT Compensation Act to the Authority before it was put into effect. The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

3. Compatibility of the aid

The Authority considers that none of the derogations mentioned in Article 61(2) of the EEA Agreement can be applied to the case at hand.

As far as the application of Article 61(3) of the EEA Agreement is concerned, the input tax compensation cannot be considered within the framework of Article 61(3)(a) of the EEA Agreement since none of the Norwegian regions qualify for this provision, which requires an abnormally low standard of living or serious underemployment. This compensation does not seem to promote the execution of an important project of common European interest or remedy a serious disturbance in the economy of a State, as is requested for compatibility on the basis of Article 61(3)(b) of the EEA Agreement.

Concerning Article 61(3)(c) of the EEA Agreement, aid could be deemed compatible with the EEA Agreement if it facilitates the development of certain economic activities or of certain economic areas without adversely affecting trading conditions to an extent contrary to the common interest. The aid scheme at hand does not seem to facilitate the development of certain economic activities or areas but, as the Norwegian authorities have stated, it pursues the objective of establishing a level playing field for goods and services subject to VAT between 'in-house' provisions and outsourcing of services within municipalities.

The Authority considers that a reduction in the running costs of an undertaking, such as the input tax, constitutes operating aid. This type of aid is, in principle, prohibited. Therefore, the Authority considers that the VAT Compensation Act constitutes an aid scheme which, as it stands today, cannot be considered compatible with the State aid rules of the EEA Agreement.

This notwithstanding, the Authority recalls that, as mentioned above, the question as to whether the measure constitutes State aid only arises in so far as it concerns an economic activity, that is, an activity consisting of offering goods and services on a given market. This implies for the case at hand that in as far as the beneficiaries of the scheme carry out public administration tasks or statutory obligations which do not constitute an economic activity, the State aid assessment including the assessment of the compatibility of the measure is not applicable to them.

Furthermore, according to Article 59(2) of the EEA Agreement, the State aid rules are not applicable to undertakings entrusted with the operation of services of general economic interest in so far as the application of such rules would obstruct the performance of the particular tasks assigned to them and in so far that trade is not affected contrary to the interests of the Contracting Parties to the Agreement.

In general, the States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. In this regard, the Authority's task is to ensure that there is no manifest error as regards the definition of services of general economic interest. The Authority cannot, in the present context, carry out a detailed assessment of whether all suppliers in the sectors exempted from the application of VAT which benefit from the refund of input tax, i.e. which are covered by the aid scheme, comply with the conditions laid down in Article 59(2) of the EEA Agreement. The Authority can only limit itself to indicating that, in the case of the fulfilment of these conditions, the refund of input VAT granted to a given undertaking or to a specific group of undertakings might be considered to constitute compatible State aid within the meaning of Article 59(2) of the EEA Agreement. The VAT Compensation Act is not limited in such a way.

On 28 November 2005, the European Commission adopted a Decision on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest⁽¹⁾. This Decision was incorporated into the EEA Agreement in July 2006⁽²⁾.

According to this Decision⁽³⁾, hospitals and undertakings in charge of social housing which are entrusted with tasks involving services of general economic interest have specific characteristics that need to be taken into consideration. The intensity of distortion of competition in those sectors at the current stage of development of the internal market is not necessarily proportionate to the level of turnover and compensation. Therefore, hospitals providing medical care, including where applicable, emergency services and ancillary services directly related to the main activities, notably in the field of research, and undertakings in charge of social housing providing housing for disadvantaged citizens or socially less advantaged groups which, due to solvability constraints, are unable to obtain housing at market conditions, are exempted from notification.

⁽¹⁾ Published on the OJ L 312, 29.11.2005, p. 67.

⁽²⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, was incorporated into Annex XV to the EEA Agreement as point 1h by Decision No 91/2006 (OJ L 289, 19.10.2006, p. 31 and EEA Supplement No 52, 19.10.2006, p. 24), e.i.f. 8.7.2006.

⁽³⁾ Point 15.

However, any refund of input tax granted to an undertaking for the part of the economic activities it carries out which are not part of this public service obligation is not covered by this exception. As assessed above, this refund scheme constitutes State aid and cannot be considered compatible with the rules of the EEA Agreement. In this context, reference can be made to some of the sectors of activity concerned, i.e., to the sectors which are exempted from the application of VAT and regarding which it is clear from the existing case practice either from the European Commission, from the Authority or from existing jurisprudence that the activity constitutes an economic activity which is carried out in competition with others. This is in particular the case of dentists ⁽¹⁾ or ambulance services ⁽²⁾.

Moreover, some of the recipients of aid under the VAT compensation scheme can benefit from other exemptions such as *de minimis* aid, the application of the provisions of block exemption regulations such as the block exemption regulation on SMEs, etc.

However, the scheme as it stands now is not construed to address only public service obligations or any of the above-mentioned exemptions. The VAT Compensation Act is broad in its application and conception. It does not contain the required criteria which would ensure fulfilment of these exemptions. Therefore, the scheme as such cannot be considered compatible with the State aid rules of the EEA Agreement.

4. Conclusion

The Authority finds that the Norwegian authorities have unlawfully implemented the VAT Compensation Act in breach of Article 1(3) of Part I to Protocol 3 to the Surveillance and Court Agreement. The refund of input tax foreseen under this Act as it stands today is not compatible with the functioning of the EEA Agreement for the reasons set out above.

According to Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement, in cases of unlawful aid, should it be found incompatible, the Authority orders, as a rule, the EFTA State concerned to reclaim aid from the recipient.

The Authority is of the opinion that no general principles preclude recovery in the present case. According to settled case-law, abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted, for the

purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the EEA Agreement in regard to State aid. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored ⁽³⁾. It also follows from that function of repayment of aid that, as a general rule save in exceptional circumstances, the Authority will not exceed the bounds of its discretion, recognised by the case-law of the Court of Justice, if it asks the EFTA State concerned to recover the sums granted by way of unlawful aid since it is only restoring the previous situation ⁽⁴⁾.

Moreover, in view of the mandatory nature of the supervision of State aid by the Authority under Protocol 3 of the Surveillance and Court Agreement, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the provisions of that Protocol ⁽⁵⁾.

The statements made by Commissioner Bolkestein mentioned by the Norwegian authorities referred to the compliance of the concerned schemes with the VAT rules as such. Moreover, at least in one of the statements, Mr Bolkestein included the disclaimer 'provided that the State aid rules are observed'. Thus, the Authority considers that no legitimate expectations can be justified in these statements.

Furthermore, the Norwegian authorities have not referred to any similar State aid scheme which has been approved by either the European Commission or the Authority on the basis of which the existence of legitimate expectations regarding the VAT Compensation Act could be substantiated.

For these reasons, the Authority considers that there are no exceptional circumstances apparent in this case, which would have led to legitimate expectations on the side of the aid beneficiaries.

The recovery should include compound interests, in line with Article 14(2) in Part II of Protocol 3 to the Surveillance and Court Agreement and Article 9 and 11 of the Authority's Decision No 195/04/COL of 14 July 2004 ⁽⁶⁾.

⁽¹⁾ Case C-172/03 *Wolfgang Heiser*, cited above.

⁽²⁾ Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089.

⁽³⁾ Case C-350/93 *Commission v Italy* [1995] ECR I-699, paragraph 22.

⁽⁴⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 66, and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 99.

⁽⁵⁾ Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 51.

⁽⁶⁾ Published on the OJ L 139, 25.5.2006, p. 37 and the EEA Supplement No 26 of 25.5.2006, p. 1.

The Norwegian authorities are therefore requested to take the necessary measures to recover any incompatible aid granted on the basis of Article 3 of the VAT Compensation Act and inform the Authority thereof within two months.

The Norwegian authorities shall amend the VAT Compensation Act with immediate effect in order to exclude the granting of State aid. Within two months, they shall inform the Authority of the necessary legislative amendments undertaken,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted in connection with the VAT Compensation Act implemented by the Norwegian authorities is not compatible with the functioning of the EEA Agreement.

Article 2

Norway shall amend the VAT Compensation Act with immediate effect in order to exclude the granting of State aid.

Article 3

The Norwegian authorities shall take all necessary measures to recover from any beneficiary undertaking the aid referred to in Article 1.

Article 4

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the

immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 and 11 in the EFTA Surveillance Authority Decision No 195/04/COL.

Article 5

The Norwegian authorities shall inform the EFTA Surveillance Authority, within two months of notification of this Decision, of the measures taken to comply with it.

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version is authentic.

Done at Brussels, 3 May 2007.

For the EFTA Surveillance Authority

Bjørn T. GRYDELAND
President

Kurt JÄGER
College Member

CORRIGENDA**Corrigendum to Commission Decision 2008/649/EC of 3 July 2008 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of solutions of urea and ammonium nitrate originating in Russia**

(Official Journal of the European Union L 213 of 8 August 2008)

On page 41, in the table in Article 1:

for: 'Open Joint Stock Company (OJSC) Mineral and Chemical Company 'Eurochem', member of the Eurochem group of companies, Moscow, Russia, for goods produced by its related company OJSC NAK Azot, Novomoskovsk, Russia, or by its related company OJSC Nevinnomyssky Azot, Nevinnomyssk, Russia, either sold directly to the first independent customer in the Community or the same goods sold by Eurochem Trading GmbH, Zug, Switzerland to the first independent customer in the Community',

read: 'Produced by Open Joint Stock Company (OJSC) 'Azot', Novomoskovsk, Russia, or Open Joint Stock Company (OJSC) 'Nevinnomyssky Azot', Nevinnomyssk, Russia, and either sold directly to the first independent customer in the Community or by EuroChem Trading GmbH, Zug, Switzerland or via Open Joint Stock Company (OJSC) Mineral and Chemical Company 'EuroChem', Moscow, Russia and EuroChem Trading GmbH, Zug, Switzerland, to the first independent customer in the Community'.

NOTE TO THE READER

The institutions have decided no longer to quote in their texts the last amendment to cited acts.

Unless otherwise indicated, references to acts in the texts published here are to the version of those acts currently in force.