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⁽¹⁾ Text with EEA relevance

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

COUNCIL DECISION

of 24 September 2012

**on the signing, on behalf of the Union, of the Agreement between the European Union and Canada
on customs cooperation with respect to matters related to supply chain security**

(2012/643/EU)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4) first subparagraph, in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Union and Canada should expand their customs cooperation to cover matters of supply chain security and related risk management with a view to increasing end-to-end supply chain security and at the same time facilitating legitimate trade.
- (2) For this purpose, on 26 November 2009 the Council authorised the Commission to open negotiations with Canada. The Commission has negotiated, on behalf of the Union, an Agreement between the European Union and Canada on customs cooperation with respect to matters related to supply chain security (the 'Agreement').
- (3) The position to be adopted by the Union within the EU-Canada Joint Customs Cooperation Committee (JCCC), when called upon to adopt acts having legal effects, should be decided in accordance with the procedure set out in Article 218(9) of the Treaty on the Functioning of the European Union. Where necessary, other positions to

be taken by the Union within the JCCC should be established by the Council in accordance with Article 16 of the Treaty on European Union.

- (4) The Agreement should be signed on behalf of the Union, subject to its conclusion,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Agreement between the European Union and Canada on customs cooperation with respect to matters related to supply chain security is hereby authorised on behalf of the Union, subject to the conclusion of the said Agreement ⁽¹⁾.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Union.

Article 3

This Decision shall enter into force on the day of its adoption.

Done at Brussels, 24 September 2012.

For the Council
The President
S. ALETRARIS

⁽¹⁾ The text of the Agreement will be published together with the decision on its conclusion.

COUNCIL DECISION

of 24 September 2012

on the signing, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the United States of America pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union

(2012/644/EU)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 207(4), in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 29 January 2007 the Council authorised the Commission to open negotiations with certain other Members of the World Trade Organisation under Article XXIV:6 of the General Agreement on Tariffs and Trade (GATT) 1994, in the course of the accession to the European Union of the Republic of Bulgaria and Romania.
- (2) Negotiations have been conducted by the Commission within the framework of the negotiating directives adopted by the Council.
- (3) These negotiations have been concluded and the Agreement in the form of an Exchange of Letters between the European Union and the United States of America pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union ('the Agreement') was initialled by a representative of the European Union on 21 December 2011 and by a representative of the United States of America on 17 February 2012.

- (4) The Agreement should be signed,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Agreement in the form of an Exchange of Letters between the European Union and the United States of America pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union ('the Agreement') is hereby authorised on behalf of the Union, subject to the conclusion of the said Agreement ⁽¹⁾.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Union.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 24 September 2012.

For the Council

The President

A. D. MAVROYIANNIS

⁽¹⁾ The text of the Agreement will be published together with the decision on its conclusion.

COUNCIL DECISION**of 10 October 2012****on the conclusion of the Agreement between the European Union and the People's Democratic Republic of Algeria on scientific and technological cooperation**

(2012/645/EU)

THE COUNCIL OF THE EUROPEAN UNION,

HAS ADOPTED THIS DECISION:

Article 1

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 186 in conjunction with Article 218(6) and (7) thereof,

The Agreement between the European Union and the People's Democratic Republic of Algeria on scientific and technological cooperation is hereby approved on behalf of the Union ⁽¹⁾.

Article 2

Having regard to the proposal from the European Commission,

The President of the Council shall, on behalf of the Union, give the notification provided for in Article 7(2) of the Agreement ⁽²⁾.

Article 3

Whereas:

The European Commission shall adopt the position of the Union to be taken within the Joint Committee established by Article 4(2) of the Agreement with regard to technical amendments to that Agreement in accordance with Article 4(2)(a) thereof.

Article 4

- (1) On 16 November 2009, the Council authorised the Commission to negotiate, on behalf of the Union, an Agreement between the European Union and the People's Democratic Republic of Algeria on scientific and technological cooperation (the 'Agreement'). It was initialled on 14 October 2010.

This Decision shall enter into force on the day of its adoption.

- (2) The Agreement was signed on 19 March 2012, subject to its conclusion at a later date, and provisionally applied upon its signature pursuant to Article 218(5) of the Treaty.

Done at Luxembourg, 10 October 2012.

- (3) The Agreement should be approved,

For the Council
The President
S. MALAS

⁽¹⁾ The Agreement has been published in OJ L 99, 5.4.2012, p. 2, together with the decision on signing.

⁽²⁾ The date of entry into force of the Agreement will be published in the *Official Journal* by the General Secretariat of the Council.

COUNCIL DECISION**of 10 October 2012****concerning the renewal of the Agreement for scientific and technological cooperation between the European Community and the Federative Republic of Brazil**

(2012/646/EU)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 186 in conjunction with point (v) of Article 218(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) By its Decision 2005/781/EC ⁽¹⁾, the Council approved the conclusion of the Agreement for scientific and technological cooperation between the European Community and the Federative Republic of Brazil (the 'Agreement').
- (2) Article XII(2) of the Agreement provides as follows: 'This Agreement shall initially be valid for a period of five years and may be renewed by agreement between the Parties after evaluation during the penultimate year of each subsequent renewal period.'
- (3) At the fifth meeting of the Steering Committee established under Article VI(2) of the Agreement, held on 22 November 2011 in Brasilia, both Parties confirmed their interest in renewing the Agreement for another five years.
- (4) As a consequence of the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union has replaced and succeeded the European Community.
- (5) The renewal of the Agreement should be approved on behalf of the Union,

HAS ADOPTED THIS DECISION:

Article 1

The renewal of the Agreement for scientific and technological cooperation between the European Community and the

Federative Republic of Brazil, for an additional period of five years, is hereby approved on behalf of the Union.

Article 2

The President of the Council shall, on behalf of the Union, give the notification to the Government of the Federative Republic of Brazil that the Union has completed its internal procedures necessary for the renewal of the Agreement in accordance with Article XII(2) of the Agreement.

Article 3

The President of the Council shall, on behalf of the Union, make the following notification:

'As a consequence of the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union has replaced and succeeded the European Community and from that date exercises all rights and assumes all obligations of the European Community. Therefore, references to "the European Community" in the text of the Agreement are, where appropriate, to be read as to "the European Union".'

Article 4

This Decision shall enter into force on the date of its adoption.

Done at Luxembourg, 10 October 2012.

For the Council

The President

S. MALAS

⁽¹⁾ OJ L 295, 11.11.2005, p. 37.

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) No 957/2012

of 17 October 2012

amending Annex I to Regulation (EU) No 605/2010 as regards the deletion of the entry for the Netherlands Antilles in the list of third countries from which the introduction into the Union of consignments of raw milk and dairy products is authorised

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2002/99/EC of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption⁽¹⁾, and in particular the introductory phrase of Article 8, the first subparagraph of point (1) and point (4) of Article 8 thereof,

Having regard to Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption⁽²⁾, and in particular Article 11(1) thereof,

Whereas:

- (1) Regulation (EC) No 854/2004 lays down specific rules for the organisation of official controls on products of animal origin. In particular, it provides that products of animal origin are to be imported only from a third country or a part of a third country that appears on a list drawn up and updated in accordance with that Regulation.
- (2) Regulation (EC) No 854/2004 also provides that when drawing up and updating such lists, account is to be taken of Union controls in third countries and guarantees by the competent authorities of third countries as regards compliance or equivalence with Union feed and food law and animal health rules specified in Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules⁽³⁾.
- (3) Annex I to Commission Regulation (EU) No 605/2010 of 2 July 2010 laying down animal and public health and veterinary certification conditions for the introduction into the European Union of raw milk and

dairy products intended for human consumption⁽⁴⁾ sets out the list of third countries from which the introduction into the Union of consignments of raw milk and dairy products is authorised.

- (4) The autonomous country of the Netherlands Antilles is currently included in the list in Annex I to Regulation (EU) No 605/2010.
- (5) Following an internal reform in the Kingdom of the Netherlands, effective as of 10 October 2010, the Netherlands Antilles ceased to exist as an autonomous country within that Kingdom. On that same date, Curaçao and Sint Maarten gained the status of autonomous countries within the Kingdom of the Netherlands, while Bonaire, Sint Eustatius and Saba became special municipalities of the European part of the Kingdom of the Netherlands. It is therefore appropriate to delete the entry for the Netherlands Antilles from the list set out in Annex I to Regulation (EU) No 605/2010.
- (6) Curaçao and Sint Maarten have not expressed an interest to continue exports of raw milk and dairy products intended for human consumption to the Union. It is therefore not appropriate to include them in the list set out in Annex I to Regulation (EU) No 605/2010.
- (7) Regulation (EU) No 605/2010 should therefore be amended accordingly.
- (8) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

HAS ADOPTED THIS REGULATION:

Article 1

In Annex I to Regulation (EU) No 605/2010, the entry for the Netherlands Antilles is deleted.

Article 2

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

⁽¹⁾ OJ L 18, 23.1.2003, p. 11.

⁽²⁾ OJ L 139, 30.4.2004, p. 206.

⁽³⁾ OJ L 165, 30.4.2004, p. 1.

⁽⁴⁾ OJ L 175, 10.7.2010, p. 1.

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

Done at Brussels, 17 October 2012.

For the Commission

The President

José Manuel BARROSO

COMMISSION IMPLEMENTING REGULATION (EU) No 958/2012**of 17 October 2012****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ⁽²⁾, and in particular Article 136(1) thereof,

Whereas:

- (1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multi-lateral 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 XVI, Part A thereto.

- (2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

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 October 2012.

*For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 157, 15.6.2011, 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	MA	69,6
	MK	41,5
	TR	59,9
	ZZ	57,0
0707 00 05	MK	38,5
	TR	118,9
	ZZ	78,7
0709 93 10	TR	116,7
	ZZ	116,7
0805 50 10	AR	82,5
	CL	108,8
	TR	85,8
	UY	65,5
	ZA	91,1
	ZZ	86,7
0806 10 10	BR	274,0
	MK	59,9
	TR	153,1
	ZZ	162,3
0808 10 80	AR	216,9
	MK	29,8
	NZ	130,9
	US	143,5
	ZA	107,2
	ZZ	125,7
0808 30 90	CN	92,8
	TR	117,7
	ZZ	105,3

⁽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 IMPLEMENTING REGULATION (EU) No 959/2012**of 17 October 2012****on the issue of licences for the import of garlic in the subperiod from 1 December 2012 to 28 February 2013**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences ⁽²⁾, and in particular Article 7(2) thereof,

Whereas:

- (1) Commission Regulation (EC) No 341/2007 ⁽³⁾ opens and provides for the administration of tariff quotas and introduces a system of import licences and certificates of origin for garlic and other agricultural products imported from third countries.
- (2) The quantities for which 'A' licence applications have been lodged by traditional importers and by new importers during the first seven working days of October 2012, pursuant to Article 10(1) of Regulation (EC) No 341/2007 exceed the quantities available for

products originating in China, Argentina and all third countries other than China and Argentina.

- (3) Therefore, in accordance with Article 7(2) of Regulation (EC) No 1301/2006, it is now necessary to establish the extent to which the 'A' licence applications sent to the Commission by 14 October 2012 can be met in accordance with Article 12 of Regulation (EC) No 341/2007.
- (4) In order to ensure sound management of the procedure of issuing import licences, the present Regulation should enter into force immediately after its publication,

HAS ADOPTED THIS REGULATION:

Article 1

Applications for 'A' import licences lodged pursuant to Article 10(1) of Regulation (EC) No 341/2007 during the first seven working days of October 2012 and sent to the Commission by 14 October 2012 shall be met at a percentage rate of the quantities applied for as set out in the Annex to this Regulation.

Article 2

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 October 2012.

*For the Commission,
On behalf of the President,
José Manuel SILVA RODRÍGUEZ
Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 238, 1.9.2006, p. 13.

⁽³⁾ OJ L 90, 30.3.2007, p. 12.

ANNEX

Origin	Order number	Allocation coefficient
Argentina		
— Traditional importers	09.4104	92,505965 %
— New importers	09.4099	1,338084 %
China		
— Traditional importers	09.4105	42,208055 %
— New importers	09.4100	0,385076 %
Other third countries		
— Traditional importers	09.4106	100 %
— New importers	09.4102	3,949315 %

DECISIONS

COUNCIL DECISION

of 16 October 2012

appointing a German member of the Committee of the Regions

(2012/647/EU)

THE COUNCIL OF THE EUROPEAN UNION,

HAS ADOPTED THIS DECISION:

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

Having regard to the proposal of the German Government,

Whereas:

(1) On 22 December 2009 and on 18 January 2010, the Council adopted Decisions 2009/1014/EU ⁽¹⁾ and 2010/29/EU ⁽²⁾ appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2010 to 25 January 2015.

(2) A member's seat on the Committee of the Regions has become vacant following the end of the term of office of Ms Petra ROTH,

Article 1

The following is hereby appointed as member to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2015:

— Ms Dagmar MÜHLENFELD, *Oberbürgermeisterin der Stadt Mülheim an der Ruhr*.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Luxembourg, 16 October 2012.

For the Council

The President

A. D. MAVROYIANNIS

⁽¹⁾ OJ L 348, 29.12.2009, p. 22.

⁽²⁾ OJ L 12, 19.1.2010, p. 11.

COUNCIL DECISION**of 16 October 2012****appointing a Belgian member and a Belgian alternate member of the Committee of the Regions**

(2012/648/EU)

THE COUNCIL OF THE EUROPEAN UNION,

HAS ADOPTED THIS DECISION:

Article 1

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

The following are hereby appointed to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2015:

Having regard to the proposal of the Belgian Government,

(a) as member:

Whereas:

— Mr Marc HENDRICKX, *Vlaams Volksvertegenwoordiger*,

and

(1) On 22 December 2009 and on 18 January 2010, the Council adopted Decisions 2009/1014/EU ⁽¹⁾ and 2010/29/EU ⁽²⁾ appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2010 to 25 January 2015.

(b) as alternate member:

— Mr Karim VAN OVERMEIRE, *Vlaams Volksvertegenwoordiger*.

Article 2

(2) A member's seat on the Committee of the Regions has become vacant following the end of the term of office of Mr Paul FICHEROULLE.

This Decision shall enter into force on the day of its adoption.

Done at Luxembourg, 16 October 2012.

(3) An alternate member's seat will become vacant following the appointment of Mr Marc HENDRICKX as member of the Committee of the Regions,

For the Council
The President
A. D. MAVROYIANNIS

⁽¹⁾ OJ L 348, 29.12.2009, p. 22.

⁽²⁾ OJ L 12, 19.1.2010, p. 11.

ACTS ADOPTED BY BODIES CREATED BY INTERNATIONAL AGREEMENTS

RECOMMENDATION OF THE EU-JORDAN ASSOCIATION COUNCIL

of 3 October 2012

on the implementation of the EU-Jordan ENP Action Plan

THE EU-JORDAN ASSOCIATION COUNCIL,

Having regard to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part ⁽¹⁾ ('the Agreement'), and in particular Article 91 thereof,

Whereas:

- (1) Article 91 of the Agreement gives the EU-Jordan Association Council the power to make appropriate recommendations for the purposes of attaining the objectives of the Agreement.
- (2) Article 101 of the Agreement provides that the Parties to the Agreement are to take any general or specific measures required to fulfil their obligations under the Agreement and are to see to it that the objectives set out therein are attained.
- (3) The Parties to the Agreement have agreed on the text of the EU-Jordan European Neighbourhood Policy Action Plan ('the ENP Action Plan').
- (4) The ENP Action Plan will support the implementation of the Agreement through the elaboration and agreement

between the Parties of concrete steps which will provide practical guidance for such implementation.

- (5) The ENP Action Plan serves the dual purpose of setting out concrete steps for the Parties to fulfil their obligations under the Agreement, and of providing a broader framework for further strengthening EU-Jordan relations to involve a significant measure of economic integration and a deepening of political cooperation, in accordance with the overall objectives of the Agreement,

HAS ADOPTED THIS RECOMMENDATION:

Sole Article

The Association Council recommends that the Parties implement the ENP Action Plan ⁽²⁾, in so far as such implementation is directed towards attainment of the objectives of the Agreement.

Done at Brussels, 3 October 2012.

For the EU-Jordan Association Council

The President

C. ASHTON

⁽¹⁾ OJ L 129, 15.5.2002, p. 3.

⁽²⁾ See document 3302/12 on: <http://register.consilium.europa.eu>

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 204/11/COL

of 29 June 2011

on the alleged state aid granted to companies belonging to the Norsk Film group (Norway)

THE EFTA SURVEILLANCE AUTHORITY ("THE AUTHORITY"),

The Norwegian authorities submitted their observations by letter dated 2 February 2010 (Event No 545244).

HAVING REGARD to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Articles 61 and 62,

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

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1(2) of Part I and Articles 4(4) and 7(1) of Part II,

HAVING CALLED on interested parties to submit their comments pursuant to Article 6(1) of Part II of Protocol 3 ⁽¹⁾,

Whereas:

I. FACTS

1. Procedure

By letter dated 23 March 2006 (Event No 368163), several Norwegian film companies ⁽²⁾ complained that the Norwegian authorities had awarded annual grants to Norsk FilmStudio AS/Filmparken AS for the years 2000 - 2005.

After various exchanges of correspondence, the Authority adopted Decision No 491/09/COL to initiate the formal investigation procedure, published in the *Official Journal of the European Union* and in the EEA Supplement thereto ⁽³⁾. The Authority called on interested parties to submit their comments. The Authority did not receive any comments from third parties.

2. The Norsk Film group

Norsk Film AS was established in 1932 by the association of municipal cinemas. The company's film studio was opened in 1935. In the State budget for 1947, the Norwegian government decided to take greater responsibility for film production. During the 1950s and 1960s, Norsk Film AS was faced with financial difficulties which lead the government to allocate grants to it to guarantee its further existence. After the company was declared bankrupt in the late 1960s, the government decided to assume full responsibility for the future of the company. From 1974, the State kept an ownership of 77,6 % of the shares in the company. Norsk Film AS served two purposes: to provide Norwegian feature film production with the necessary facilities and to produce Norwegian films.

ScanCam AS was founded in 1986 by Norsk Film AS and the newspaper VG (Verdens Gang) on the basis of the existing camera department of Norsk Film AS. Later, Norsk Film AS and Schibsted ASA each owned 50 % of the shares in ScanCam AS. On 31 December 1998, Schibsted ASA sold its stake to Norsk Film AS and ScanCam AS continued as a 100 % owned subsidiary of Norsk FilmStudio AS as from 1999.

Norsk FilmStudio AS, which was founded in 1989, was a wholly-owned subsidiary of Norsk Film AS. Until 1989, the studio and technical facilities were an integral division of Norsk Film AS. Norsk FilmStudio AS was founded in order to establish a clear-cut distinction between the company's role as a producer and its role of maintaining the infrastructure for film production (studio and technical facilities).

In 2001, the Norwegian government reformed its film policy and a clearer distinction was made between the State's areas of responsibility and the responsibility of the private sector. Private production companies should have the responsibility for producing films. It was therefore proposed to sell the shares

⁽¹⁾ OJ C 174, 1.7.2010 and EEA Supplement No. 34, 1.7.2010.

⁽²⁾ The Chimney Pot Oslo AS, Dagslys AS, Egg & Bacon AS, Grip Teknikk AS, Bob Aas Carho ENK, Kamerautleien AS, Lydhodene AS, Megaphon AS and Krypton Film AS.

⁽³⁾ See footnote 1.

in Norsk Film AS. The State would maintain its responsibility for the studios as this part of the production process was considered not sustainable on market conditions. In 2001, Norsk Film AS was de-merged into two separate companies: a company for film production, named Norsk Film AS and a company for infrastructure, named Filmparken AS. The remaining assets of the company stayed in Filmparken AS. Norsk FilmStudio AS continued as a wholly-owned subsidiary of Filmparken AS. On 25 June 2001, Norsk FilmStudio AS merged into Filmparken AS. The State sold its shares in the production company Norsk Film AS to a private production company called Diopter AS on 4 January 2002.

In 2002, Filmparken AS was re-named Norsk FilmStudio AS again.

In 2004, ScanCam AS merged into Norsk FilmStudio AS.

In 2009, Norsk FilmStudio AS and The Chimney Pot AS merged to become Storyline Studios AS. After the merger Filmparken AS owns 60 % of the business with 40 % left to the shareholders of the prior Chimney Pot AS.

Storyline Studios AS is a full spectre supplier of equipment and services to the film industry, providing film studios, grip and light, camera, post production, costumes, financing, office facilities, line production and film catalogues.

3. Description of the measures investigated

The Authority investigated two different measures: the payment of the grant of NOK 36 million (see Section 3.1) and the preferential tax treatment some companies belonging to the Norsk Film group benefited from (see section 3.2).

3.1. Payment of the grant of NOK 36 million

Yearly grants were made to various entities belonging to the Norsk Film group since the 1970s and until 2006. Annual budgets for 1971–1972 refer to an “existing aid scheme”. The grants were paid by the Ministry of Culture and Church Affairs.

The Authority, in its Decision No 491/09/COL, has taken the view that the yearly payments made by the Norwegian State since the 1970s to various entities belonging to the Norsk Film group for the production of feature films and to maintain an infrastructure necessary for the production of films were based on an existing system of aid.

The Norwegian authorities have indicated that in 1997, the Norwegian Parliament decided to grant NOK 36 million to Norsk Film AS for the upgrading, modernisation and development of the production facilities called “Filmparken”. The grant was allocated over the national budget’s section for grants to national cultural buildings. The sum was allocated over a two-year period, NOK 10 million being paid in 1998 and the remaining NOK 26 million in 1999. The grant partly

covered the modernisation and upgrading of the studio facilities and partly the development of new administration facilities.

The Authority, in Decision No 491/09/COL, considered that as the payment of the grant of NOK 36 million was based on a different budget allocation and the specific amount was singled out for a special aim (renovation of the jar site), it could amount to new aid. The Authority had doubts as to whether this contribution formed part of the existing system of aid or whether it constituted a new aid measure.

3.2. Preferential tax treatment

Norsk Film AS and Norsk FilmStudio AS benefited from a tax exemption as from 1995. The exemption was based on Section 26, first paragraph, *litra k*, of the former Tax Act of 18 August 1911 No 8, replaced by the Tax Act of 26 March 1999 No 14 ⁽⁴⁾.

According to Section 2-32 of the Norwegian Tax Act, presently setting out the rules regarding this preferential tax regime, non-profit organisations, institutions and companies are exempt from corporate tax to the extent that they operate on a non-profit basis.

Whether an institution or a company is considered as non-profit according to Section 2-32 is determined on the basis of objective criteria, with the purpose of the company being the decisive factor. Thus, a charitable purpose indicates the presence of a non-profit body. In order to determine the purpose of the company, the tax authorities take into account *inter alia* its statutes including its statutory purpose and the activity actually carried out. Whether the body is engaged in activities that are exposed to competition is also taken into consideration. If the undertaking carries out economic or commercial activities and competes with taxable profit driven companies, this indicates the existence of a taxable status. Another element taken into account is the nature of the funding of the undertaking. If the company is funded by private gifts or other contributions, this indicates that the company has a non-profit purpose.

An organisation considered non-profit is exempt from corporate tax for profit resulting from the non-profit purpose of the company. Income derived from commercial activities is – under certain conditions – subject to corporate tax ⁽⁵⁾.

Whether Section 2-32 is applicable to a company or organisation is determined by the tax authorities as part of the normal annual assessment process. It is on the basis of the information provided by the tax payer in the tax return and other information available that the local tax authorities determine which tax regime is applicable.

⁽⁴⁾ This regime provides exemption from corporate tax for so-called “ideal organisations”.

⁽⁵⁾ Section 2-32(2) of the Norwegian Tax Act provides that revenue is subject to corporate tax where the annual turnover from the commercial activities amount to more than NOK 70 000 or NOK 140 000 as the case may be.

Norsk Film AS, Norsk FilmStudio AS and ScanCam AS were granted a tax exemption based on the fact that the purpose of the companies was non-profit. Until 1995, Norsk Film AS and Norsk FilmStudio AS did not apply for the special regime. Following their applications they benefited from such a regime from 1995 until 2001.

In 2001, Norsk Film AS was de-merged into two separate companies: a company for film production, named Norsk Film AS and a company for infrastructure, named Filmparken AS. As from 2002, the companies were no longer funded by government subsidies and they carried out normal business activities. They were therefore considered as normal profit-making companies and consequently subject to standard corporate tax.

Until 1998, Norsk Film AS and Schibsted ASA each owned 50% of the shares in ScanCam AS. ScanCam AS was therefore not considered an integrated part of Norsk Film AS' business. From December 1998, ScanCam AS was 100 % owned first by Norsk Film AS and then, from 1999, by Norsk FilmStudio AS (the wholly-owned subsidiary of Norsk Film AS). After this change, the tax authorities considered that ScanCam AS was an integrated part of Norsk Film AS' activity and could therefore benefit from the same tax regime for the years 1998–2000. ScanCam AS generated a profit in the years 1998, 1999, 2000 and 2001 ⁽⁶⁾.

In their evaluation, the tax authorities considered that the companies could benefit from the non-profit organisation status on the basis of the following elements: the statutes of Norsk Film AS which provided that its purpose was non-profit, the fact that 97,7 % of the shares were held by the State and local municipalities and the fact that the company was funded essentially through state subsidies.

The tax authorities furthermore indicated that the tax exemption was given under the proviso that a possible profit should be used in full to achieve the purpose of the company within the framework of being a non-profit undertaking. The subsidiary Norsk FilmStudio AS was regarded as an integrated part of Norsk Film AS' activity and covered by the same tax exemption. The Norwegian authorities have indicated that Norsk FilmStudio AS did not generate a profit in the years 1995–2001 and that consequently, the application of the favourable tax regime was without effect.

The companies are now all subject to standard corporate tax.

The Authority, in Decision No 491/09/COL, considered that it was doubtful whether the application of the exemption from corporate tax based on the logic of exemption for non-profit organisations may justify the tax exemption in the case of the companies belonging to the Norsk Film group.

The aid in the form of an exemption from corporate tax is operating aid. Such aid is only allowed under special circumstances, and, in particular, in situations where the criteria set out

in the Authority's Guidelines are met (e.g. for certain types of environmental or regional aid). The Authority therefore doubted that the special tax rules – as applied to some of the companies belonging to the Norsk Film group – could be justified under the state aid provisions of the EEA Agreement.

4. Comments by the Norwegian authorities

4.1. *Payment of the grant of NOK 36 million*

4.1.1. *The payment of the grant does not constitute state aid*

The Norwegian authorities argue that the payment of the NOK 36 million does not constitute state aid.

Adopting an effects based approach, the Norwegian authorities claim that the grant under review did not actually confer any economic advantage upon the recipient.

The Norwegian authorities consider that none of the companies gained any economic advantage as a result of the grant for upgrading and modernisation of Filmparken. Norsk FilmStudio AS was responsible for renting out the facilities to all production companies in Norway. There was a clear legal separation within the Norsk Film group of the activities of production of film and rental of production facilities. Access to the production facilities was open and given to all Norwegian production companies (including Norsk Film AS) on equal terms and conditions. The rental activities were not profitable and generated deficits for Norsk FilmStudio AS.

The Norwegian authorities argue that it cannot be said that the measure gave the Norsk Film group an economic advantage as this was clearly not the effect of the grant. The intent and the effect of the measure were rather to provide Norwegian film producers with access to production facilities. They stress that it was only due to a market failure that Norsk FilmStudio AS acted as the sole provider of rental studio facilities where films of a certain length and quality could be produced. The company did so to the benefit of all producers and did not receive an economic advantage.

4.1.2. *The measure would in any event constitute existing aid*

The Norwegian authorities argue that even if the grant of NOK 36 million amounted to state aid, it would, in any event, constitute existing aid.

Indeed, the Norwegian authorities consider that the payment of the NOK 36 million grant formed part of the existing system of aid in the form of the payment of the yearly grants.

The Norwegian authorities state that the fact that the grant was paid out from a different budget than that used for the yearly grants is not a sufficient indication that the grant itself constituted a severable and new measure. They explain that

⁽⁶⁾ See letter by Norwegian authorities dated 11.8.2006 (Event No 383774).

the fact that the grant in 1998–1999 was allocated over another budget post was “merely coincidental and a question of technicalities and the payment of the NOK 36 million might as well have been allocated over the budget section for film funding and spread out over a period of ten years and thus been “melted into” the yearly payments to Norsk Film AS comprising both operating and investment aid. The fact that the grant 1998–1999 was allocated over another budget post was a result of a new way of organising the [national] budget section for contributions to the construction of national buildings”. The Norwegian authorities furthermore argue that what is important is that the payment was part of a systematic and continuous chain of payments to the same recipient and that the nature of the aid is unchanged. The scheme is said to have always consisted of an investment part and an operating part.

The upgrading and modernising process had been ongoing for some time and the costs involved had, until 1998 – 1999, been estimated to NOK 13 million. This amount included contributions from the Norwegian State through the existing support scheme which was in place since the 1970s. In 1997, however, it became clear that NOK 13 million was not sufficient to complete the works and therefore it was decided to allocate an additional NOK 36 million to complete the upgrading.

The Norwegian authorities provided the Authority with data supporting that also in the past amounts had been allocated and earmarked for the upgrading and modernisation of infrastructures necessary for maintaining conditions for film production.

Finally, the Norwegian authorities argue that the fact that the amount of the grant was much higher than the yearly payments had been until then was no indication that it constituted new aid. They refer to the judgment of the European Court of Justice in the case *Namur-Les-Assurances* (7): “the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered”.

4.1.3. *New aid would in any event be compatible*

The Norwegian authorities argue that the measure, if the Authority concluded that it amounted to new aid, would, in any event, be compatible with the functioning of the EEA Agreement. Indeed, they consider that the measure would be compatible with Article 61(3)(c) EEA as the grant’s purpose was cultural conservation, and the measure was necessary and proportionate to achieve such an aim.

The Norwegian authorities state that the production of films constitutes an important cultural expression and forms part of the nation’s heritage. Without suitable production facilities, no film production would take place. Furthermore, the grant was a

necessary intervention because of a market failure. The Norwegian authorities also stress that the Authority has approved support measures for audiovisual schemes which would remain without effect if the necessary infrastructure to produce audiovisual works did not exist.

4.2. *Preferential tax treatment*

4.2.1. *The application of the preferential tax treatment does not constitute state aid*

Firstly, the Norwegian authorities stress that the Authority, in its Decision No 491/09/COL, did not raise any doubts regarding the actual tax regime exempting from corporate tax non-profit undertakings, but investigated the application of such regime to certain companies belonging to the Norsk Film group. It is therefore the actual application or misapplication of the tax regime to certain companies that is under review.

Secondly, the Norwegian authorities argue that they have not themselves considered whether section 2-32 of the Tax Act was correctly applied to the companies belonging to the Norsk Film group as they are not a tax assessment authority.

They have, however, indicated that “a possible misapplication by the tax authorities of a general tax provision to the advantage of a taxpayer, does not constitute state aid. (...) In the case of a misapplication of a national tax provision, this should primarily be corrected by the tax authorities or the courts under the relevant national law. (...) It would create an unworkable situation if any misapplication of national tax provisions resulting in an unjustified advantage to a particular tax payer would constitute state aid”.

The Norwegian authorities stress that since the consequences of wrongful taxation could vary, unless it is a question of persistent misapplication, remedial action ought to be taken under national law and not reviewed under EEA state aid rules.

4.2.2 *The application of the preferential tax treatment was in any event based on an existing system of aid*

The Norwegian authorities furthermore argue that the application of a tax provision pre-dating the entry into force of the EEA Agreement would not, in any event, constitute new aid but would be the mere application of an existing system of aid.

They consider that “an ordinary application of the general rule and the evaluation of whether or not it is applicable in a specific case cannot in any event constitute new aid, and did not as such require notification to the Authority. Indeed, if individual applications of an existing system of aid would constitute new aid, it would extend the scope of what could

(7) Case C-44/93 *Namur-Les Assurances du Crédit SA v Office National du Ducroire and Belgian State* [1994] ECR I-3829, para. 28.

be considered as new aid in an unreasonable manner, and it would water out the scope of compatible aid in terms of existing aid within the meaning of state aid rules”.

II. ASSESSMENT

1. The presence of state aid

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.”

1.1. *Presence of state resources*

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

1.1.1. *Payment of the NOK 36 million grant*

The grant of NOK 36 million was paid from the State's budget section for grants to national cultural buildings.

The Authority therefore considers that the condition that state resources must be involved is met.

1.1.2. *Preferential tax regime*

Norsk Film AS and its subsidiary Norsk FilmStudio AS were granted a tax exemption for the years 1995 to 2001. In a letter dated 18 March 1996, the Bærum Tax Office granted the tax exemption for the fiscal year 1995 on the proviso that a possible profit should be used in full to achieve the purpose of the company within the framework of being a non-profit company.

ScanCam AS (the subsidiary renting cameras) was given a tax exemption from 1998–2001 on the same grounds.

As a result of the favourable tax regime, the State renounced tax revenue which it would normally have received from the undertakings concerned. The absence of these funds represented a burden on state resources corresponding to charges that are normally borne from the budgets of the undertakings concerned ⁽⁸⁾.

The fact that the assessment was carried out by the local tax authorities does not have any effect on the finding that state resources were involved ⁽⁹⁾.

1.2. *Favouring certain undertakings or the production of certain goods*

1.2.1. *Payment of the NOK 36 million grant*

Firstly, the measure must have conferred on Norsk FilmStudio AS/Filmparken AS advantages that relieved them of charges that are normally borne from their budget. The grant of NOK 36 million gave the beneficiaries a financial benefit they would not have enjoyed in the normal course of business. It thus strengthened the financial position of Norsk FilmStudio AS/Filmparken AS compared with the other undertakings active in the production of films within the EEA.

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

The Authority considers the payment of the amount of NOK 36 million for the upgrading of the studio facilities to have been selective as the beneficiary was expressly designated.

1.2.2. *Preferential tax regime*

Some of the companies of the Norsk Film group were exempted from payment of the normally applicable corporate tax and thus relieved from charges normally borne from a company's budget. They would not have enjoyed this advantage in the normal course of business.

However, the Authority recognises that the European Court of Justice and the EFTA Court have consistently held that measures granting advantages to certain recipients are not selective if they can be justified by the nature and general scheme of the system of which they are part.

Furthermore, the Authority's Guidelines on the application of state aid rules to measures relating to direct business taxation provide specifically that “obviously, profit tax cannot be levied if no profit is earned. It may thus be justified by the nature of the tax system that non-profit-making undertakings, for example foundations or associations, are specifically exempt from the taxes on profits if they cannot actually earn any profits.”

The Authority did not in its Decision No 491/09/COL, challenge the fact that the preferential tax regime may as such be justified by the nature and logic of the system. It had doubts concerning the application of the regime to the undertakings in question. These undertakings were granted an exemption from the corporate tax in application of Section 26, first paragraph, litra k, of the former Tax Act of 18 August 1911 No 8, replaced by the Tax Act of 26 March 1999, No 14. Upon application, this regime provides exemption from corporate tax to organisations which fulfil certain criteria, mainly related to their non-profit purpose.

According to the information provided by the Norwegian authorities, Norsk Film AS, Norsk FilmStudio AS and ScanCam AS were granted a tax exemption based on the fact that the purpose of the companies was non-profit. The Authority, in

⁽⁸⁾ Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 26.

⁽⁹⁾ Case C 248/84 *Germany v Commission* [1987] ECR I-4013, paragraph 17.

its assessment, cannot substitute itself for the Norwegian local tax authorities. On the basis of the information it has been provided with, the Authority does not consider that it has sufficient evidence that the preferential regime has been misapplied to the three undertakings and that therefore the measure can be said to be of a selective nature.

The Authority for that reason cannot conclude that the application of the preferential tax treatment to Norsk FilmStudio AS/Filmparken AS/ScanCam AS based on the criteria originally established in the Tax Act 1911 entails any state aid.

1.3. *Distortion of competition and effect on trade between Contracting Parties*

State aid to specific undertakings is regarded as distorting competition and affecting trade between the Contracting Parties if the recipient carries out an economic activity involving trade between the Contracting Parties. Cinema films may be produced in alternative locations within the EEA. They are subsequently traded between the Contracting Parties to the EEA Agreement. Support to an undertaking producing feature films and providing studio services may therefore alter the competition existing between different locations for the realisation of films. Thus the measure under scrutiny may be considered as distorting competition and affecting trade between the Contracting Parties.

1.4. *Conclusion*

On the basis of the elements reviewed above, the Authority concludes that the payment of NOK 36 million constituted state aid and that the grant of the favourable tax treatment to Norsk FilmStudio AS/Filmparken AS/ScanCam AS did not entail any state aid.

The Authority will therefore only analyse the payment of the grant of NOK 36 million in the following.

2. Procedure

The procedure for new aid is laid down in Article 1(3) in Part I of Protocol 3. If the Authority is in doubt about the compatibility of such an aid measure, it shall open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 and in Article 4(4) of Part II of Protocol 3.

A separate procedure for existing aid is laid down in Article 1(1) in Part I of Protocol 3. Pursuant to that provision, the Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

Any assessment made in a decision to open the formal investigation procedure as to whether a potential aid measure constitutes new or existing aid is necessarily only of a preliminary nature. Even if the Authority, based on the information provided at the time, decided to open a formal investigation procedure on the basis of Article 1(3) and (2) of Part I of Protocol 3, it can still, in the decision concluding that procedure, find that the measure in fact constitutes existing aid⁽¹⁰⁾. Where existing aid is involved, the Authority must follow the procedure for existing aid⁽¹¹⁾. Accordingly, in such a case, the Authority would have to close the formal investigation procedure and, as the case may be, open the procedure for existing aid laid down in Articles 17–19 in Part II of Protocol 3⁽¹²⁾.

The information presented to the Authority at the time when it decided to initiate the formal investigation procedure was not such as to justify the provisional conclusion of any aid involved being existing aid, and the Authority therefore dealt with these measures in the framework of the rules pertaining to new aid.

The Authority will conclude on the existence and compatibility of new aid measures under the formal investigation procedure. If existing aid is involved, as the two measures under investigation have now ended, it will close the formal investigation procedure without opening the procedure for existing aid as such procedure would be without object.

3. Payment of the grant of NOK 36 million – existing aid

Pursuant to Article 1(b)(i) of Part II of Protocol 3, existing aid is: “all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement”. Alterations to such aid represent new aid according to Article 1(c).

The Norwegian authorities have submitted additional information in the context of their comments to Decision No 491/09/COL (see Section 4.1.2 above).

The Authority, as indicated in Decision No 491/09/COL, considers that the yearly payments made by the Norwegian State since the 1970s to Norsk FilmStudio AS/Filmparken AS for the production of feature films and to maintain the infrastructure necessary for the production of films were based on an existing system of aid.

⁽¹⁰⁾ Case C-400/99 *Italy v Commission* [2005] ECR I-3657, paragraphs 47, 54–55.

⁽¹¹⁾ Case T-190/00 *Regione Siciliana v Commission* [2003] ECR II-5015, paragraph 48.

⁽¹²⁾ Case C-312/90 *Spain v Commission* [1992] ECR I-4117, paragraphs 14–17 and Case C-47/91 *Italy v Commission* [1992] ECR I-4145, paragraphs 22–25.

The Authority considers that the payment of the NOK 36 million was made in the context of the existing system of aid.

Firstly, it appears that yearly grants made over the years had always included an investment aid part and an operating aid part⁽¹³⁾. Thus, the Norwegian authorities have indicated that the upgrading and modernisation process had already started and had until 1998–1999 been estimated to amount to NOK 13 million covered by the yearly grants. The Norwegian authorities provided extracts from budget proposals revealing that several considerable amounts had been allocated to Norsk Film AS for upgrading and modernising the infrastructure necessary to produce films⁽¹⁴⁾. The fact that the specific grant had been earmarked for the renovation works of the jar site should not therefore be held to constitute an alteration to the existing aid system.

Secondly, the fact that the payment of the grant had been made from a different budget than that used for the yearly grants is irrelevant under the circumstances of the present case. Indeed, this resulted from a purely budgetary technique and was the result of a new way to organise the budget.

Finally, the fact that the amount of the grant was much higher than the yearly payments had been is not an indication that the grant amounts to new aid. The European Court of Justice has held that: “the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered.”⁽¹⁵⁾.

The Authority therefore concludes in the light of the above that the payment of NOK 36 million was part of an existing system of aid which was terminated in 2006.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the grant of NOK 36 million was part of an existing system of aid. The formal investigation procedure applicable to new aid is therefore closed.

Article 2

The EFTA Surveillance Authority considers that the application of the preferential tax treatment to Norsk Film AS, Norsk Film-Studio AS and ScanCam AS does not constitute state aid within the meaning of Article 61(1) EEA.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English language version of this Decision is authentic.

Done at Brussels, 29 June 2011.

For the EFTA Surveillance Authority

Per SANDERUD
President

Sabine MONAUNI-TÖMÖRDY
College Member

⁽¹³⁾ See Comments from the Norwegian authorities on the decision of the EFTA Surveillance Authority to open a formal investigation procedure in Case No 67377 – Alleged state aid to companies belonging to the Norsk Film group (Event No 545244).

⁽¹⁴⁾ See St.prp. Nr. 1 (1976–77): NOK 1 313 000, St.prp. nr. 1 (1977–78): NOK 4 million, St.prp. nr. 1 (1978–79): NOK 3,9 million.

⁽¹⁵⁾ Case C-44/93 *Namur-Les-Assurances du Credit SA v Office National du Duroire and the Belgian State* [1994] ECR I-3829, para. 28.

EFTA SURVEILLANCE AUTHORITY DECISION

No 189/12/COL

of 22 May 2012

exempting the production and wholesale of electricity in Norway from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area,

Having regard to the Act referred to at point 4 of Annex XVI to the Agreement on the European Economic Area laying down the procedures for the award of public contracts in the utilities sector (Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ⁽¹⁾) ('Directive 2004/17/EC'), and in particular Article 30 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ('Surveillance and Court Agreement'), in particular Articles 1 and 3 of Protocol 1 thereto,

Having regard to the request submitted by *Akershus Energi Vannkraft AS*, *E-CO Energi AS*, *EB Kraftproduksjon AS* and *Østfold Energi AS* ('the applicants') to the Authority on 24 January 2012,

Having regard to the Decision of the EFTA Surveillance Authority ('the Authority') of 19 April 2012 empowering the Member with special responsibility for public procurement to take certain decisions in the field of public procurement (Decision No 138/12/COL),

After consulting the EFTA Public Procurement Committee Assisting the EFTA Surveillance Authority,

Whereas:

I. FACTS

(1) On 24 January 2012, the Authority received a request pursuant to Article 30(5) of Directive 2004/17 from *Akershus Energi Vannkraft AS*, *E-CO Energi AS*, *EB Kraftproduksjon AS* and *Østfold Energi AS* to approve the applicability of Article 30(1) of Directive 2004/17/EC to activities of production and wholesale of hydroelectric power in Norway. By letters of 17 February 2012, the Authority requested additional information from both

Norway (event No 624270) and the applicant (event No 624258). The Authority received a reply to this request from Norway by letter of 20 March 2012 and from the applicants by letter of 22 March 2012.

(2) The request by the applicants, which have to be considered as public undertakings within the meaning of Directive 2004/17/EC, concerns the production and wholesale supply of hydroelectric power, as described in the request.

II. LEGAL FRAMEWORK

(3) Article 30(1) of Directive 2004/17/EC provides that contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to Directive 2004/17 if, in the EFTA State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

(4) According to Article 30(5) of Directive 2004/17/EC, a request for applicability of Article 30(1) may be submitted by contracting authorities if the legislation of the EEA State concerned provides for it. It follows from Section 15-1, paragraph 2, of Regulation No 403 of 7 April 2006 on public procurement in the utilities sector (Forskrift nr. 403 av 7. April 2006 om innkjøp i forsyningssektorene) that contracting authorities may submit a request for application of Article 30(1) of Directive 2004/17/EC to the Authority, provided they have obtained an opinion from the Norwegian Competition Authority.

(5) The applicants obtained the opinion from the Norwegian Competition Authority on 16 March 2011, in which the Norwegian Competition Authority concluded that the relevant activities are directly exposed to competition on a market to which access is not restricted.

(6) Access to the market is deemed to be unrestricted if the State has implemented and applied the relevant EEA legislation opening a given sector or a part of it. This legislation is listed in Annex XI to Directive 2004/17/EC, which, for the electricity sector, refers to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity ⁽²⁾. Directive

⁽¹⁾ OJ L 134, 30.4.2004, p. 1.

⁽²⁾ OJ L 27, 30.1.1997, p. 20.

96/92/EC has been superseded by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC ⁽¹⁾ ('Directive 2003/54/EC'), which is incorporated in point 22 of Annex IV to the EEA Agreement. Thus, access to the market shall be deemed unrestricted if the Norwegian State has implemented and properly applied Directive 2003/54/EC.

- (7) The exposure to competition shall be evaluated on the basis of various indicators, none of which is, per se, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of concentration on those markets. Given the characteristics of the markets concerned, further criteria should also be taken into account such as the functioning of the balancing market, price competition and the degree of customer switching.

III. ASSESSMENT

Market definition

Product market

- (8) The relevant product market is production and wholesale supply of electricity ⁽²⁾. The market therefore covers the production of electricity at power stations and the import of electricity through interconnectors for the purpose of resale directly to large industrial customers or to retailers.

Geographic market

- (9) The Norwegian wholesale power market is highly integrated into the Nordic market (Denmark, Norway, Sweden and Finland). A major share of the production of electric power in the Nordic region is traded through the common Nordic exchange for contracts for physical delivery of electric power, operated by Nord Pool Spot AS (Nord Pool). Nord Pool's Nordic electricity exchange currently covers the wholesale power markets in Norway, Sweden, Denmark, Finland and Estonia.
- (10) Nord Pool operates two markets for physical wholesale trading of electric power: the day-ahead market Elspot

where hourly power contracts are traded daily for physical delivery in the next day's 24 hour period and Elbas which is a continuous cross-border intra-day market where adjustments to trades done in the day-ahead market are made until one hour prior to the delivery. Together these markets covered 74 % of the Nordic consumption of electricity in 2010 with a volume of 307 TWh. The remaining traded volume is negotiated bilaterally by supplier and customer.

- (11) The Nordic market is divided into several bidding areas which are coupled by interconnectors. The trading price on Elspot is based on the bids and offers from all participants in the market and is set to balance supply and demand in the market for each hour during the 24 hour period. The price mechanism in Elspot adjusts the flow of power across the interconnectors in the market to the available trading capacity given by the Nordic transmission system operators.
- (12) Transmission capacity constraints within the Nordic region may lead to temporary congestion separating the Nordic area geographically into smaller markets. At the interconnections between the Nordic countries and within Norway, price mechanisms are used to relieve grid congestion by introducing different Elspot area prices. There may thus be different prices in the price areas which balance supply and demand in the area.
- (13) Consequently, the relevant geographic market might vary from one hour to the next. In case of congestion, the relevant geographic market is narrower than the Nordic area and might coincide with domestic bidding areas.
- (14) There are currently five bidding areas in Norway ⁽³⁾.
- (15) The percentage of hours, however, in which there are price differences between the areas within the Nordic region are limited:

Price area	% hours isolated
NO 1 — Oslo	1,4 %
NO 2 — Kristiansand	16,4 %
NO 3 — Trondheim	6,2 %
NO 4 — Tromsø	6,6 %
NO 5 — Bergen	4,1 %
15.3.2010-11.3.2011	

⁽¹⁾ OJ L 176, 15.7.2003, p. 37. Directive 2003/54/EC was incorporated into the EEA Agreement by EEA Joint Committee Decision No 146/2005 of 2 December 2005 (OJ L 53, 23.2.2006, p. 43), and entered into force for the EFTA States on 1 June 2007.

⁽²⁾ See European Commission decisions of 26 January 2011 in Case COMP/M.5978 — GDF Suez/International Power, of 22 December 2008 in case COMP/M.5224 — EDF/British Energy, of 14 November 2006, Case COMP/M.4180 — Gaz de France/Suez, of 9 December 2004 Case M.3440 — EDP/ENI/GDP. See also the decisions adopted by the Commission exempting the production and sale of electricity in Sweden and in Finland from the application of Directive 2004/17/EC; Decision of 19 June 2006 establishing that Article 30(1) of Directive 2004/17/EC applies to the production and sale of electricity in Finland excluding the Åland Islands and decision of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of Directive 2004/17/EC.

⁽³⁾ Oslo — NO 1, Kristiansand — NO 2, Trondheim — NO 3, Tromsø — NO 4 and Bergen — NO 5. On 5 September 2011, the boundary between bidding area NO 2 and NO 5 was moved northbound due to a new connection being put into operation. The data provided in the application does not take into account this change.

Most of the time, price areas are connected:

Set of price areas	% hours connected
NO 1 — NO 2	77,7 %
NO 1 — NO 3	48,0 %
NO 1 — NO 5	94,9 %
NO 2 — NO 5	76,6 %
NO 3 — NO 4	89,9 %
NO 1 — NO 2 — NO 5	75,7 %
NO 3 — NO 4 — Sweden	76,3 %

15.3.2010-11.3.2011

Norwegian price areas are generally integrated with Sweden.

- (16) The possibility of the occurrence of congestions may raise concerns on the possible exploitation of temporary bottlenecks that could increase local market power. On this basis, Norwegian competition authorities have defined the relevant geographic market as Nordic in hours without congestions and smaller in hours of congestion ⁽¹⁾.
- (17) The issue of whether the market should be defined as covering the Nordic region or narrower in scope will be left open as the result of the analysis remains the same whether it is based on a narrow or broader definition.

Access to the market

- (18) In light of the information currently available to it, and for the present purposes, it appears that Norway has fully implemented and applied Directive 2003/54/EC. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted on the territory of Norway.

Exposure to competition

- (19) The Authority, in line with the European Commission ⁽²⁾, will analyse the market share of the three main producers, the degree of concentration in the market and the degree of market liquidity.

- (20) The European Commission considers that, in respect of electricity production, 'one indicator for the degree of competition on national markets is the total market share of the biggest three producers' ⁽³⁾.
- (21) The aggregate market share in terms of production capacity of the three largest producers in the Nordic region in 2010 was of 45,1 % (Vattenfall: 18,8 %, Statkraft: 13,3 % and Fortum: 13 %) which is an acceptable level.
- (22) The degree of concentration in Norway as measured by the Hirschman-Herfindahl Index (HHI) by capacity was 1 826 in 2008 ⁽⁴⁾.
- (23) The Nordic wholesale market for electric power must be regarded as competitive. The transition to an open market in the Nordic region has been very successful. Since the opening of a joint Norwegian-Swedish market in 1996, the other Nordic countries have later been integrated in the market; Finland in 1998, Denmark in 1999/2000 and Estonia in 2010. About 74 % of the consumption of electric energy in the Nordic region in 2010 was traded over the exchange. There are over 300 traders registered on the exchange.
- (24) As illustrated above, bottlenecks due to congestion are rare and temporary in nature. A constant competitive pressure deriving from the potential to obtain electricity from outside the Norwegian territory therefore exists. No transmission fee is charged between the Nordic countries. The frequently uncongested links between Norway and other price areas ensure that investment in the electricity sector inside the Norwegian territory cannot be made without taking into account other producers in the Nordic market. Furthermore, prices for wholesale electricity are set by Nord Pool, which operates a highly liquid trading platform.
- (25) Furthermore, the functioning of the balancing markets should also be considered as an indicator, not only in respect of production but also for the wholesale market. In fact, any market participant who cannot easily match its production portfolio to the characteristics of its customers may find himself exposed to the difference between the price at which the transmission system operator (TSO) will sell imbalance energy, and the price at which it will buy back excess production. These prices may either directly be imposed by the regulator on the TSO; or alternatively a market based mechanism will be used in which the price is determined by bids from other

⁽¹⁾ See decisions by the Ministry of Government Administration of 14 October 2002 *Statkraft — Agder Energi* and of 7 February 2003 *Statkraft — Trondheim Energiverk*.

⁽²⁾ Decision of 19 June 2006 establishing that Article 30(1) of Directive 2004/17/EC applies to the production and sale of electricity in Finland excluding the Åland Islands and decision of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of Directive 2004/17/EC, paragraphs 7-13.

⁽³⁾ See Report on progress in creating the internal gas and electricity market, COM(2005) 568 final of 15 November 2005, Decision of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of Directive 2004/17/EC.

⁽⁴⁾ See Commission staff working document, Technical Annex to the Communication from the Commission to the Council and the European Parliament report on progress in creating the internal gas and electricity market, COM(2010) 84 final, page 12.

producers to regulate their production upwards or downwards. There is an almost fully integrated balancing market in the Nordic region for supplying balancing energy and its main characteristics — market based pricing and a low spread between the buying price from the TSO and the selling price — are such that it should be taken as an indicator of direct exposure to competition.

- (26) These factors should therefore be taken as an indication of direct exposure to competition for the relevant market under review irrespective of whether the geographical scope of the market extends to the Nordic region as a whole or is narrower in scope.

IV. CONCLUSION

- (27) In view of the abovementioned indicators in Norway, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in respect of production and wholesale of electricity in Norway. Besides, as noted in recital 18, the condition of free access to the activity must be deemed to be met. Consequently, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable electricity production or the wholesale of electricity to be carried out in these geographical areas nor when they organise design contests for the pursuit of such an activity there.
- (28) This Decision is based on the legal and factual situation as of 24 January 2012 as it appears from the information submitted by the applicant. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met.
- (29) This Decision is made solely for the purpose of granting an exemption pursuant to Article 30 of Directive

2004/17/EC and is without prejudice to the application of the rules on competition.

- (30) This Decision applies to the production and wholesale of electricity in Norway and does not concern the activities of transmission, distribution and retail supply of electricity in Norway.
- (31) The measures provided for in this Decision are in accordance with the opinion of the EFTA Public Procurement Committee Assisting the EFTA Surveillance Authority,

HAS ADOPTED THIS DECISION:

Article 1

The Act referred to at point 4 of Annex XVI to the Agreement on the European Economic Area laying down the procedures for the award of public contracts in the utilities sector (Directive 2004/17/EC) shall not apply to contracts awarded by contracting entities and intended to enable the activities of production and wholesale of electricity in Norway.

Article 2

This Decision is addressed to the Kingdom of Norway.

Done at Brussels, 22 May 2012.

For the EFTA Surveillance Authority

Sverrir Haukur GUNNLAUGSSON
College Member

Xavier LEWIS
Director

CORRIGENDA**Corrigendum to Commission Regulation (EU) No 771/2012 of 23 August 2012 making imports of bioethanol originating in the United States of America subject to registration in application of Article 24(5) of Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community**

(Official Journal of the European Union L 229 of 24 August 2012)

On page 21, the first paragraph of Article 1(1) is replaced by the following:

‘1. The Customs authorities are hereby directed, pursuant to Article 24(5) of Regulation (EC) No 597/2009, to take the appropriate steps to register the imports into the Union of bioethanol, sometimes referred to as “fuel ethanol”, i.e. ethyl alcohol produced from agricultural products (as listed in Annex I to the Treaty on the Functioning of the European Union), denatured or undenatured, excluding products with a water content of more than 0,3 % (m/m) measured according to the standard EN 15376, as well as ethyl alcohol produced from agricultural products (as listed in Annex I to the Treaty on the Functioning of the European Union) contained in blends with gasoline with an ethyl alcohol content of more than 10 % (v/v) currently falling within CN codes ex 2207 10 00, ex 2207 20 00, ex 2208 90 99, ex 2710 12 11, ex 2710 12 15, ex 2710 12 21, ex 2710 12 25, ex 2710 12 31, ex 2710 12 41, ex 2710 12 45, ex 2710 12 49, ex 2710 12 51, ex 2710 12 59, ex 2710 12 70, ex 2710 12 90, ex 3814 00 10, ex 3814 00 90, ex 3820 00 00 and ex 3824 90 97 (TARIC codes 2207 10 00 11, 2207 20 00 11, 2208 90 99 11, 2710 12 11 10, 2710 12 15 10, 2710 12 21 10, 2710 12 25 91, 2710 12 31 10, 2710 12 41 10, 2710 12 45 10, 2710 12 49 10, 2710 12 51 10, 2710 12 59 10, 2710 12 70 10, 2710 12 90 10, 3814 00 10 10, 3814 00 90 70, 3820 00 00 10 and 3824 90 97 67) and originating in the United States of America. Registration shall expire nine months following the date of entry into force of this Regulation.’

★ EFTA Surveillance Authority Decision No 189/12/COL of 22 May 2012 exempting the production and wholesale of electricity in Norway from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors 21

Corrigenda

★ Corrigendum to Commission Regulation (EU) No 771/2012 of 23 August 2012 making imports of bioethanol originating in the United States of America subject to registration in application of Article 24(5) of Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community (OJ L 229, 24.8.2012) 25

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