

Invitation à présenter des observations en vertu de l'article 1^{er}, paragraphe 2, de la partie I du protocole 3 de l'accord Surveillance et Cour de justice concernant les aides accordées à la formation des pilotes de ligne dans le comté de Troms

(2007/C 77/11)

Par décision n° 389/06/COL du 13 décembre 2006, reproduite dans la langue faisant foi dans les pages qui suivent le présent résumé, l'Autorité de surveillance AELE a ouvert la procédure prévue à l'article 1^{er}, paragraphe 2, de la partie I du protocole 3 de l'accord entre les États de l'AELE relatif à l'institution d'une Autorité de surveillance et d'une Cour de justice («accord Surveillance et Cour de justice»). Une copie de la décision a été transmise au gouvernement norvégien pour information.

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

Autorité de Surveillance AELE
35, rue Belliard
B-1040 Bruxelles

Ces observations seront communiquées au gouvernement norvégien. L'identité de la partie intéressée qui présente des observations peut rester confidentielle sur demande écrite et motivée.

RÉSUMÉ

L'Autorité a été saisie d'une plainte dans laquelle il était allégué qu'une aide d'État avait été accordée à l'école supérieure d'aviation norvégienne sous la forme d'une subvention directe, au titre du budget national révisé, et de divers fonds provenant du comté de Troms et de la municipalité de Målselv.

Après avoir informé le gouvernement norvégien de la plainte dont elle avait été saisie et avoir reçu ses observations à ce sujet, l'Autorité a décidé, le 13 décembre 2006, d'ouvrir la procédure formelle d'examen au sujet des fonds accordés à la formation des pilotes de ligne dans le comté de Troms.

L'école supérieure d'aviation norvégienne est la propriété de la compagnie aérienne SAS (60 %), de la Norsk Luftfartshøgskole (29 %) et de divers autres petits actionnaires. Les pilotes de ligne y suivent un cursus de deux ans dans la région de Tromsø/Bardufoss, axé sur les règles communes européennes (licence d'équipage de conduite des autorités conjointes de l'aviation). Cette école reçoit divers subsides, tant de l'État que de l'administration locale. Le gouvernement norvégien souhaite ainsi maintenir une capacité de formation des pilotes de ligne dans le comté de Troms, malgré la diminution du financement accordé à l'école par la SAS.

Pour les autorités norvégiennes, la Norsk Luftfartshøgskole est une fondation créée par le comté de Troms, l'institut aérien de la SAS ainsi que les municipalités de Bardu et de Målselv, dans le but de faciliter la formation des pilotes dans le nord de la Norvège et de développer l'enseignement et la formation dans le domaine aéronautique. L'école a reçu des fonds du comté de Troms pour le financement de ses projets et attend des propositions pour décider de leur affectation finale.

L'Autorité a des doutes quant à la compatibilité de l'aide octroyée à la formation des pilotes de ligne dans le comté de Troms avec les règles de l'accord EEE en matière d'aides d'État. Par conséquent, elle se voit contrainte d'ouvrir la procédure formelle d'examen prévue à l'article 1^{er}, paragraphe 2, de la partie I du protocole 3 de l'accord Surveillance et Cour de justice.

EFTA SURVEILLANCE AUTHORITY DECISION**No 389/06/COL****of 13 December 2006****to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to aid granted in the airline pilot education sector in Troms County (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) in Part I and Articles 4(4) and 6 in 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,

Whereas:

I. FACTS**1. Procedure**

By letter dated 17 March 2006, North European Aviation Resources AS (hereinafter referred to as «NEAR» or «the complainant») filed a complaint against the granting of aid, through the Revised National Budget, to the Norwegian Aviation College (hereinafter referred to as «NAC»). The letter was received and registered by the Authority on 20 March 2006 (Event No 366921).

By letter dated 11 April 2006 (Event No 369763), the Authority informed the Norwegian authorities of the complaint and invited them to comment upon the same.

By letter dated 19 May 2006 from the Norwegian Mission to the European Union, forwarding a letter from the Ministry of Government Administration & Reform, together with a letter from the Ministry of Education & Research, both dated 12 May 2006, received and registered by the Authority on 19 May 2006 (Event No 374604), the Norwegian authorities replied to the Authority's invitation to comment.

By letter dated 25 August 2006, NEAR filed an extension to their complaint by which it drew the Authority's attention to various monies granted to NAC by Troms County and the Municipality of Målselv. The letter was received and registered by the Authority on 28 August 2006 (Event No 385471).

By letter dated 7 September 2006 (Event No 385794), the Authority informed the Norwegian authorities of the extension to the complaint and invited them to comment upon the same and to provide any information concerning the relationship, if any, between this alleged aid and the subject matter of the original complaint.

By letters dated 12 and 16 October 2006 from the Norwegian Mission to the European Union, forwarding letters dated 10 and 11 October 2006 from the Ministry of Government Administration & Reform, together with, respectively, a letter from Troms County dated 28 September 2006, and a letter from the Municipality of Målselv, dated 9 October 2006, received and registered by the Authority on 13 and 18 October 2006 (Event Nos 393257 and 394170), the Norwegian authorities replied to the Authority's invitation to comment.

⁽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 Authority on 19 January 1994, OJ L 231, 3.9.1994, p. 1, EEA Supplements 3.9.94 No 32, as last amended on 13 December 2006 (hereinafter referred to as «the State Aid Guidelines»).

2. Description of the contested funding

2.1. Measures under examination

a) Grant in favour of NAC

According to the Norwegian Government, Parliament introduced a grant of NOK 4,5 million for «airline pilot education located in Tromsø/Bardufoss» in June 2005. The Ministry of Education & Research allocated this grant directly to NAC.

A further NOK 4,5 million was written into the 2006 State Budget and is proposed again in the draft budget for 2007. However, according to the Norwegian Government, the Ministry of Education & Research will notify the Parliament of the complaint and will propose that further allocations to NAC are postponed pending resolution of the matter.

b) Project Funding for Norsk Luftfartshøgskole

Troms County confirmed that, by decision of 6 July 2006, it granted project funding of NOK 1,9 million to the Norsk Luftfartshøgskole, a body which the Norwegian authorities describe as a non-commercial foundation established for the purposes of facilitating pilot education in the north of Norway. The County Council specified that the foundation is awaiting submission of a project plan in order to authorise the end use of the funding and that, as yet, none of the funding has been disbursed to NAC.

c) Loan to NAC from Troms County and subsequent remission thereof

According to Troms County, it granted a loan of NOK 400 000 to NAC in 1999 in accordance with the Regional Loan Scheme notified to and authorised by the Authority. The original loan foresaw repayment at prevailing interest rates after an initial three-year period. Following extensions to the repayment period, Troms County granted remission of the loan by decision of 6 July 2006 on the condition that all other creditors participate in the sanitation of NAC debts.

d) Loan guarantee

Troms County confirmed that it has guaranteed NOK 500 000 of NAC debt for the period until 1 September 2012 without asking NAC to pay a guarantee premium.

The Norwegian Government should confirm when this guarantee was put in place.

e) Loan to NAC from the Municipality of Målselv

The Municipality of Målselv confirmed that, by decision of 19 July 2006, it granted a loan of NOK 1,3 million to NAC at an interest rate of 8,5 % per annum, the full amount plus interest falling due no later than end 2007.

2.2. The objective of the measures

a) Grant

According to the Norwegian Government, both the capacity of the Air Force to train pilots for service outwith the armed forces and the financial support for airline pilot education provided by the SAS airline has been declining in recent years. The contested funding may be seen as a consequence of these changes. The grant may be used only to ensure the continuance of existing airline pilot education at NAC, the concern being to maintain the existing capacity for educating airline pilots in Norway and to avoid a crisis in pilot recruitment.

b) Project Funding for Norsk Luftfartshøgskole

According to Troms County, the project funding aims to ensure that the existing aviation competence in the County is developed and strengthened.

c) Loan to NAC from Troms County and subsequent remission thereof

According to Troms County, the financial situation of NAC made it necessary to grant extensions to the deadline for repayment of the loan and eventually to write it off completely.

d) Loan guarantee

None specified.

e) Loan to NAC from the Municipality of Målselv

None specified.

2.3. National legal basis for the measures

The direct grant, amounting to NOK 4,5 million, is provided for in the context of the Revised National Budget for 2005 (Kap. 281, post 1). This budget line also includes NOK 574 000 for other purposes not related to the measures under examination.

The other measures are a result of decisions of the County Council and the Executive Committee of the Municipality, respectively.

2.4. Recipients

NAC is a limited liability company registered in Norway since 1993. It is owned by SAS (60 %), Norsk Luftfartshøgskole (29 %), and other smaller shareholders.

NAC, which runs the only airline pilot education in the Tromsø/Bardufoss region, was found to be the only possible beneficiary for the parliamentary grant.

NAC is also the specific beneficiary of the other measures, with the exception of the project funding granted to Norsk Luftfartshøgskole and not yet attributed to a particular project.

Norsk Luftfartshøgskole is a foundation registered in Norway since 1997. Its founding members are Troms fylkeskommune, SAS Flight Academy and the Municipalities of Bardu and Målselv. The purpose of this non profit-making foundation is registered as the renting of property.

If and to the extent that Norsk Luftfartshøgskole performs an economic activity, and independently of where the project funding is directed, the fact that it comes from Troms County could lead to the conclusion that Norsk Luftfartshøgskole is itself a recipient of aid.

3. Comments by the Norwegian authorities

The training of airline pilots, although regulated by the State through the provisions in the Aviation Act, is not integrated into the national education system. Citing geographic and demographic reasons, the Norwegian authorities highlight the importance of retaining in Norway a capacity to train airline pilots. Articles 149 and 150 EC are referred to as an indication that educational matters fall within the scope of national responsibility and the case law of the European Court of Justice ⁽⁵⁾ is invoked in support of the view that education falls outside the definition of «service».

Troms County does not consider the remission of the loan to be unlawful State aid and cites the participation of other creditors in the sanitation of the debt in support of this. It also argues that while it is true that no commercial guarantee commission has been levied for the loan guarantee, any such commission would, in any event, have fallen below the *de minimis* threshold.

The Municipality of Målselv considers the loan to have been granted at the appropriate rate in light of the reference rates set out in Chapter 34 of the State Aid Guidelines.

II. ASSESSMENT

1. The presence of State aid within the meaning of Article 61(1) EEA

Article 61(1) EEA 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.»

As demonstrated below, a initial examination of the contested funding would suggest that these elements are all present.

⁽⁵⁾ Case 263/86 *Humbel* [1988] ECR p. 5365 and Case C-109/92 *Wirth* [1993] ECR I-6447.

Before looking at these criteria in turn, a preliminary point should be made regarding the nature of the activity carried out by NAC, namely the provision of airline pilot education. It would appear that a competitive market exists for the provision of such services, the cost of which is not insubstantial. The fact that the service presents an educational aspect does not, of itself, alter the economic nature of the activity. On the contrary, the case law invoked by the Norwegian Government would appear to support the view that while courses provided under the national education system do not constitute services within the meaning of Article 50 EC ⁽⁶⁾, courses which are financed essentially from private funds, in particular by students or their parents, do fall within the scope of that article ⁽⁷⁾.

1.1. *Presence of State resources*

The contested funding consisting of a direct grant allocated in the context of the Revised National Budget, or of monies disbursed by the local authorities, these monies were granted by the State or through State resources.

1.2. *Favouring certain undertakings*

a) NAC

First, the measures, with the possible exception of the project funding, appear to concern NAC directly. To the extent that the monies confer an advantage on NAC, they must be considered as favouring that undertaking to the exclusion of others.

Second, with respect to the parliamentary grant, even if, rather than considering the funding to have been allocated directly to NAC, the more general statement that a grant be introduced for airline pilot education in the Tromsø/Bardufoss region is taken into account, the measure is nevertheless selective to the extent that regional selectivity also satisfies this condition.

With reference in particular to the loan from the Municipality of Målselv, it would appear that the interest rate does not necessarily reflect an appropriate level given the risks involved, particularly in light of the fact that the Municipality itself bases its assessment on an assumption that the previous loan from Troms County has been written off. Therefore, it cannot, without further investigation, be concluded that the private market investor principle applies to those funds such that no advantage was granted.

Finally, regarding the project funding to be distributed by Norsk Luftfartshøgskole, the Norwegian Government is asked to confirm whether any monies have now been disbursed and if so, to whom.

The Norwegian Government should also provide information regarding the relationship between Norsk Luftfartshøgskole and NAC and any actual or envisaged flow of monies between these two bodies.

b) Norsk Luftfartshøgskole

The fact that Norsk Luftfartshøgskole is registered as a non profit-making foundation does not preclude a conclusion that it is engaged in a economic activity and thus an undertaking for the purposes of the State aid rules ⁽⁸⁾. To the extent that the foundation does carry on an economic activity, the monies granted by Troms County confer an advantage on Norsk Luftfartshøgskole.

The Norwegian Government should provide information relating to the foundation, including but not limited to an explanation of the purpose of the foundation and its activities.

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

For the measures to constitute State aid, they must distort competition and affect trade between the Contracting Parties. To the extent that NAC, and possibly Norsk Luftfartshøgskole, is in direct competition with other institutions in Norway and around Europe which offer airline pilot education according to common European rules (Joint Aviation Authorities Flight Crew Licence, or JAA-FCL), it would appear that the funding strengthens the position of the recipient and thus has the potential to distort competition between these various schools and affect trade between the States in which they are established.

⁽⁶⁾ Article 37 EEA is framed in identical terms.

⁽⁷⁾ See Case C-109/92 *Wirth*, cited above at footnote 5, paragraphs 14-17.

⁽⁸⁾ See Case C-41/90 *Höffner and Elser* [1991] ECR I-1979, paragraph 21, and Case C-205/03 P *FENIN*, judgment of 11 July 2006 not yet reported, paragraph 25.

1.4. *De minimis aid*

The Authority notes that the funding referred to in the original complaint amounts to NOK 4,5 million (circa EUR 546 000) and is therefore already above the threshold of EUR 100 000 provided for in the Act referred to at point 1e of Annex XV to the EEA Agreement (*Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid*).

2. **Procedural requirements**

Pursuant to Article 1(3) in 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 have not notified any measure relating to the funding of airline pilot education to the Authority. In particular, while the loan from Troms County may have been granted in accordance with the duly authorised Regional Loan Scheme, writing off that loan cannot be considered to fall within the conditions of the authorisation. The Authority therefore concludes that, in the event that the contested funding does indeed constitute aid within the meaning of Article 61(1) EEA, the Norwegian authorities did not respect their obligations pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

3. **Compatibility of the aid**

Supposing that the contested funding constitutes aid within the meaning of Article 61(1) EEA, it must be assessed whether, as a result of the derogations in Article 61(2) and (3) EEA or other relevant rules, it can be declared compatible with the functioning of the EEA Agreement.

None of the situations foreseen in Article 61(2) EEA can be applied to the present case.

The region in question does not fall within the scope of Article 61(3)(a) EEA. Indeed, Decision No 327/99/COL on the map of assisted areas and levels of aid (Norway) notes that the Norwegian authorities have not claimed that Norway has any area eligible for regional aid under that paragraph. Moreover, the Authority notes that, while the contested funding is specifically intended to cover operational costs, the State Aid Guidelines, Chapter 25 relating to national regional aid, clearly that operating aid is normally prohibited. Such aid may only be granted in exceptional cases in regions eligible under the derogation in Article 61(3)(a) EEA or, for aid intended partly to offset additional transport costs, in Article 61(3)(c) EEA on the basis of a population density test.

Paragraph (b) of Article 61(3) EEA does not appear to apply to the present case.

The contested funding does not appear to promote horizontal Community objectives within the meaning of Article 61(3)(c) EEA directly, such as research and development, employment, the environment etc. Indeed, the Norwegian authorities have not invoked this derogation. The Authority therefore considers that it is not in possession of information which suggests that the contested funding could be considered to be compatible with the functioning of the EEA Agreement within the meaning of that paragraph.

To the extent that the Act referred to at point 1d of Annex XV to the EEA Agreement (*Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid*) appears not to apply in the present case and that, in any event, the Norwegian authorities have made no reference to that Act, the Authority considers that the contested funding is not covered by the exemption provided for by that Act.

The Authority is not in possession of any information which suggests that NAC has been entrusted with any public service obligations within the meaning of Article 59(2) EEA. It would therefore appear that the Act referred to at point 1h of Annex XV to the EEA Agreement, (*Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest*) does not apply in the present case. Furthermore, in the absence of any instrument specifying the public service obligations, it would appear that Chapter 18.C of the State Aid Guidelines is also inapplicable to the present situation.

4. **Conclusion**

Based on the information submitted by the Norwegian authorities, the Authority cannot exclude the possibility that the contested funding constitutes aid within the meaning of Article 61(1) EEA. Furthermore, the Authority has doubts that this funding can be regarded as complying with Article 61(3)(c) EEA. The Authority thus doubts that the said measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance Article 4(4) in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1(2) in Part I of that Protocol. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question do not constitute aid within the meaning of Article 61(1) EEA or, if they do, that they are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting in accordance with the procedure laid down in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement, requests that the Norwegian authorities submit their comments within one month of the date of receipt of this Decision.

Furthermore, the Authority requires that, within one month of receipt of this Decision, the Norwegian authorities provide all documents, information and data needed for the assessment of the nature of the contested funding and its compatibility with the functioning of the EEA Agreement, including, in particular, the specific questions raised at points I.2.1(d) and II.1.2(a) and (b). It requests that the Norwegian authorities forward a copy of this letter to the recipients of the funding immediately.

The Authority would also draw the attention of the Norwegian authorities to the fact that Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement constitutes a standstill obligation and that Article 14 in Part III of that Protocol provides that, in the event of a negative decision, all unlawful aid may be recovered from the beneficiary,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement against Norway regarding the various forms of contested funding described in the foregoing at point I.2.1.

Article 2

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

Article 3

The Norwegian authorities are required to provide, within one month from notification of this Decision, all documents, information and data needed for the assessment of the nature of the funding and its compatibility with the functioning of the EEA Agreement, including, in particular, the specific questions raised at points I.2.1(d) and II.1.2(a) and (b) of the foregoing.

Article 4

Other EFTA States, EC Member States, and interested parties shall be informed of the matter by the publication of this Decision in its authentic language version, accompanied by a meaningful summary in languages other than the authentic language version, in the EEA Section of the *Official Journal of the European Union* and the EEA Supplement thereto, inviting them to submit comments within one month from the date of publication.

Article 5

This Decision is addressed to the Kingdom of Norway.

Article 6

Only the English version is authentic.

Done at Brussels, 13 December 2006.

For the EFTA Surveillance Authority

Björn T. GRYDELAND
President

Kristján A. STEFÁNSSON
College Member