

IV

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

No 28/08/COL

of 23 January 2008

on the Wood Scheme (Verdiskapningsprogrammet for tre) (Norway)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

Agreement, in particular the sections on regional aid and research and development aid,

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

Having regard to the block exemption Regulations on aid for training and aid to small and medium-sized enterprises (SME) as well as the Regulation on *de minimis* aid ⁽⁵⁾,

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

Having regard to Decision No 147/06/COL of the Authority of 17 May 2006 to initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement,

Having regard to Article 1(2) of Part I and Articles 4(4), 6, 7(5), 13 and 14 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having called on interested parties to submit their comments pursuant to Article 6 of Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁶⁾,

Having regard to the Authority's State Aid Guidelines ⁽⁴⁾ on the application and interpretation of Articles 61 and 62 of the EEA

⁽⁵⁾ 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 (OJ L 10, 13.1.2001, p. 20); Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33); and Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5). This last Regulation replaces Commission Regulation (EC) No 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30) and Chapter 12 in the State Aid Guidelines (adopted by Decision No 54/96/COL of the Authority of 15 May 1996, OJ L 245, 26.9.1996, p. 28). All Regulations mentioned above have been incorporated into Annex 15 to the EEA Agreement (at point 1(d)-(f)).

⁽⁶⁾ OJ C 272, 9.11.2006, p. 19, and EEA Supplement No 55, 9.11.2006.

⁽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⁾ Procedural and Substantive Rules in the Field of State Aid — Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, and EEA Supplement No 32, 3.9.1994, p. 1. The Guidelines were last amended by Decision No 154/07/COL of the Authority of 3 May 2007. Hereinafter referred to as the 'State Aid Guidelines'.

Whereas:

I. FACTS

1. Procedure

By letter dated 1 February 2005 (Event No 307555) the Authority received a complaint (the 'Complaint') from a trade association for the Norwegian masonry and concrete industry, 'byggutengrenser.no' (the 'Complainant'). In the Complaint, which was both received and registered by the Authority on 3 February 2005, the Complainant alleges that the Norwegian State is granting State aid to the wood construction industry on the basis of 'Verdiskapningsprogrammet for tre', also referred to as 'Treprogrammet' (hereinafter referred to as the 'Wood Scheme').

By letter dated 17 May 2006 and following various exchanges of correspondence⁽⁷⁾, the Authority informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement in respect of the Wood Scheme.

By letter dated 3 July 2006 from the Mission of Norway to the European Union, forwarding letters from the Ministry of Government Administration and Reform and the Ministry of Agriculture and Food, both dated 26 June 2006, the Norwegian authorities submitted comments. The letters were received and registered by the Authority on 4 July 2006 (Event No 380386, hereinafter referred to as 'Comments by the Norwegian authorities on the Decision to open the formal investigation procedure').

Decision No 147/06/COL to initiate the formal investigation procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto⁽⁸⁾. The Authority called on interested parties to submit their comments. The Authority received no comments from interested parties.

Finally, during the autumn of 2007, the Authority and the Norwegian authorities had informal contact via both telephone and electronic mail regarding the Wood Scheme. Information received by the Authority in this context has been consolidated by the Norwegian authorities in a letter submitted electronically on 10 December 2007 by the Ministry of Government Administration and Reform (Event No 456845).

2. Description of the proposed measure

2.1. Objective and administration of the Wood Scheme described in preparatory legislative works

The White Paper of 1998-99

The aim of the Wood Scheme is set out in a White Paper from the Government to the Parliament on the creation of value and

opportunities within the forest sector (St. meld. nr. 17 (1998-99 'Verdiskapning og miljø — muligheter i skogssektoren') — hereinafter referred to as the 'White Paper').

The aim of the White Paper was to establish a general policy for a rational and sustainable utilisation of forest resources and to increase the forest sector's contribution to the national economy and the general development of Norwegian society. The White Paper proposed the introduction of various measures in order to achieve this goal — one of which was the Wood Scheme. In this respect the White Paper proposed the establishment of a 5-year scheme aimed at creating value within the sector of woodwork and the (wood) processing business. More specifically, the White Paper stipulated that the aim of the Wood Scheme should be to increase the creation of value in forestry and the (wood) processing business as well as to increase the contribution of the forest sector to achieving more sustainable production and consumption patterns⁽⁹⁾. In that respect, the focus of the Wood Scheme should be on (i) improving the processing of woodwork; (ii) increasing the use of woodwork; and (iii) improving relations on different levels of trade between the forest sector and the market⁽¹⁰⁾. The White Paper also stated that the new scheme should focus on identifying possibilities in the areas of product development and design and architecture and that the scheme should pave the way for enabling woodwork to be considered as an attractive building material with a wide range of uses⁽¹¹⁾. Finally, on a more general level, the White Paper pointed out that the aim of increasing value in the processing business for woodwork should be achieved domestically⁽¹²⁾.

Recommendation (1998-1999) and Working Group Report

The framework for the establishment of the Wood Scheme was laid down in further detail in a recommendation from a Parliamentary standing committee addressed to the Parliament (Innst. S. nr. 208 (1998-1999)), dated 3 June 1999 (hereinafter referred to as the 'Recommendation'). The Recommendation suggests that a working group be established in order to identify the strategies as well as the implementation and financing needs of the new scheme.

Shortly afterwards in July 1999 a 'Working Group' was established, composed, notably, of representatives from the Ministry of Agriculture, trade associations for forest owners and producers of timber, research and development institutions as well as representatives from the retail trade sector. The Working Group issued a report (the 'Working Group Report') on 14 April 2000 on the content, organisation and financing of the Wood Scheme.

⁽⁹⁾ Section 7.3.3 of the White Paper.

⁽¹⁰⁾ Section 7.3.3 of the White Paper.

⁽¹¹⁾ Section 2.4.1 of the White Paper.

⁽¹²⁾ Section 6.1.1 of the White Paper. Regarding the focus on Norwegian industry, Section 6.1.1 of the White Paper also states that (translated by the Authority): 'For the purposes of increasing the creation of value it is important to consider both the possibility of reducing costs at the level of processing and sales and that of increasing and improving the use/exploitation of woodwork produced in Norway.'

⁽⁷⁾ For more detailed information on such correspondence, reference is made to Decision No 147/06/COL to open the formal investigation procedure, a summary of which is published in OJ C 272, 9.11.2006, p. 19, and in EEA Supplement No 55, 9.11.2006. The full decision is published on the website of the Authority: www.eftasurv.int

⁽⁸⁾ Publication details are cited in footnote 7 above.

The Working Group Report recalls the aims and objectives of the Wood Scheme referred to in the White Paper. The Working Group Report further specifies that the scheme should be limited to the processing chain between the forest sector and the mechanical wood processing industry but should also include the supply of raw material to the wood processing industry (e.g. to improve quality, precision and steady deliveries)⁽¹³⁾. The Working Group Report also states that it is an objective that the Wood Scheme is focused on Norwegian wood resources and that improvements are achieved within the Norwegian (wood) processing business.

The Working Group Report proposes that the responsibility for administration and implementation of the Wood Scheme lie with (i) 'Statens nærings- og distriktsutviklingsfond', generally referred to as 'SND' (which was reorganised and renamed 'Innovasjon Norge' as of 1 January 2004); and (ii) a management group (the 'Management Group'), composed of representatives from various ministries and market operators, appointed by the Ministry of Agriculture⁽¹⁴⁾.

According to the Working Group Report, on a practical level, the tasks of the Management Group should focus on evaluating and developing the scheme (including ensuring engagement from the value chain and verifying that activities correspond to the aim and strategies of the scheme), whereas Innovasjon Norge should be the body responsible for implementing the scheme⁽¹⁵⁾. To that end, Innovasjon Norge was authorised to approve and allocate all funding under the scheme.

⁽¹³⁾ Section 1.4 of the Working Group Report states that the Wood Scheme does not cover forest culture, infrastructure, transport, fields, forest products for green decoration purposes and bio energy which are to be addressed via other measures by the Government. Section 2.1 of the Working Group Report defines the forest based value chain (or the forest sector) as all operators involved from the stump to the end-user. 'Forest' covers the supply side (forest owners and associations of such) and the commercial level (forest entrepreneurs, including terrain transport, timber measurement and turnover, forest culture work, operational planning etc.). 'Production' covers all processing of timber into products suitable for end-users but with a focus on the wood mechanical processing chain (covering traditional work in sawmills and carpentry and further processing into doors, windows, staircases and other building elements as well as the production of wooden furniture, wooden houses and manually produced goods). The 'market' covers the end-users but includes also different trading levels and other operators in the forest based production system, such as subcontractors of goods and services to forestry and the forest based industry.

⁽¹⁴⁾ Sections 1.5, 6.2 and 6.3 of the Working Group Report. As of May 2003 the composition of the group also included representatives from alternative funding sources and the County Governor's office.

⁽¹⁵⁾ Annual reports on the activities and development of the scheme must be submitted to the Ministry of Agriculture and constitute the basis for both the preparation of the budget and guidelines to Innovasjon Norge (previously SND); cf. Sections 1.5, 6.2 and 6.3 of the Working Group Report.

During the formal investigation procedure the Norwegian authorities made it clear that the principles underlying the general working routines of Innovasjon Norge (for purposes of administering other aid schemes) were applied in the context of implementing the Wood Scheme⁽¹⁶⁾. Innovasjon Norge therefore awarded grants under the Wood Scheme on the basis of (i) the 'Superior Policy' of Innovasjon Norge⁽¹⁷⁾; (ii) the Internal EEA Guidelines of Innovasjon Norge; (iii) the first annual letter of allocation from the Ministry of Agriculture⁽¹⁸⁾; (iv) general procedures in the Instruction Book for case handlers of Innovasjon Norge; and (v) the State Aid Guidelines of the Authority⁽¹⁹⁾. From a practical point of view the most important of these are the principles laid down in the Internal EEA Guidelines, which also form the basis for the vast majority of the comments forwarded by the Norwegian authorities.

The Internal EEA Guidelines have been developed by Innovasjon Norge on the basis of existing Norwegian aid schemes administered by it. They contain an explanation of the concept of State aid within the meaning of Article 61(1) of the EEA Agreement, extracts from the State Aid Guidelines and the rules on *de minimis* aid as well as a table setting out aid intensities for existing schemes⁽²⁰⁾. The Internal EEA Guidelines have been continuously updated and five different versions have therefore been submitted to the Authority⁽²¹⁾.

The Norwegian authorities have stated that while the Working Group Report does not contain conditions which must be met in order for projects to be eligible for support, such conditions were developed in the Internal EEA Guidelines. While there is no explicit reference in the Working Group Report to the Internal EEA Guidelines, the Norwegian authorities have stated that the reference in the Working Group Report to establishing 'principles and practices' (within the limits of EEA law) for the purposes of implementing the Wood Scheme is to be

⁽¹⁶⁾ See Comments by the Norwegian authorities on the Decision to open the formal investigation procedure.

⁽¹⁷⁾ The Superior Policy is a guidance document which sets out certain outer limits on the grant of funding by Innovasjon Norge (such as ruling out the grant of operating aid and export aid) and dictates that funding must be awarded within the limits set by international agreements to which Norway is a party.

⁽¹⁸⁾ The allocation letter dated 6 October 2000 contains information on the budget for implementing the Wood Scheme while referring to the objective, sector and target groups of the scheme.

⁽¹⁹⁾ The Norwegian authorities have also referred to the law governing Innovasjon Norge and its 'Standard Terms' for awarding development funding which contain administrative rules on, inter alia, time limits, documentation, control measures and recovery of funding.

⁽²⁰⁾ Also included are provisions on cumulation, reference rates and the calculation of aid.

⁽²¹⁾ The versions are dated January 2000; August 2001; June 2003; September 2004; and July 2005 and do not differ substantially one from the other. For the sake of simplicity, the use of the term 'Internal EEA Guidelines' refers in the following to the text of the latest version and only where relevant (due to deviations or additional text) comments on the text in previous versions are made.

understood as a reference to the Internal EEA Guidelines⁽²²⁾. According to the Norwegian authorities the Internal EEA Guidelines have, in this manner, been made an integral part of the Wood Scheme⁽²³⁾. Case handlers of Innovasjon Norge are instructed to assess applications on the basis of the specific set of rules in the EEA Internal Guidelines which they consider to be appropriate. If they consider that no State aid is involved at all, the project may be 100 % financed⁽²⁴⁾.

2.2. Legal basis and annual budgets

It appears from the State budget for the relevant years that the Wood Scheme is financed by the Ministry of Agriculture and Food via annual awards directly from the State budget. Financing for the Wood Scheme was provided for in the Government proposal to the Parliament containing the State budget for the year 2000 (St. prp. nr. 1 (1999-2000)), where funding for the Wood Scheme was included in Chapter 1142 as item 71⁽²⁵⁾. The State budgets for subsequent years each earmarked amounts for the Wood Scheme⁽²⁶⁾.

The first annual allocation letter from the Ministry of Agriculture to Innovasjon Norge allocates funding to Innovasjon Norge and authorises its disbursement in line with the objective, sector and target groups as laid down in the Working Group Report⁽²⁷⁾.

By letter dated 29 September 2005, updated by letter dated 3 July 2006, the Norwegian authorities informed the Authority that the budgets for the Wood Scheme for the financial years from 2000 to 2005 were as follows:

⁽²²⁾ Section 1.3 of the Working Group Report states that funding must be awarded in compliance with EEA rules and section 7.1 states that 'The EEA Agreement's legislation on State aid must be followed. The program must establish its own principles and practices within these regulations.' See also Comments by the Norwegian authorities on the Decision to open the formal investigation procedure.

⁽²³⁾ See Comments by the Norwegian authorities on the Decision to open the formal investigation procedure and e-mail dated 18 January 2008 from the Norwegian authorities (Event No 461470).

⁽²⁴⁾ See also subsection on co-financing and 100 % funding of project costs in section I-2.4 below.

⁽²⁵⁾ See also revised budget (St. prp. nr. 61 (1999-2000)). The Wood Scheme has been referred to in different manners including 'Treprogrammet' and 'Verdiskapningsprogrammet for tre' or by means of the original Recommendation from the Standing Committee to the Parliament (Innst. S. nr. 208 (1998-1999)).

⁽²⁶⁾ 2001: St. prp. nr. 1 (2000-2001) and revised budget (St. prp. nr. 84 (2000-2001)); 2002: St. prp. nr. 1 (2001-2002) and revised budget (St. prp. nr. 1 Tillegg nr. 4 (2001-2002)); 2003: St. prp. nr. 1 (2002-2003) and revised budget (St. prp. nr. 65 (2002-2003)); 2004: St. prp. nr. 1 (2003-2004) and revised budget (St. prp. nr. 63); 2005: St. prp. nr. 1 (2004-2005) and revised budget (St. prp. nr. 65 (2004-2005)). In the first 4 years (2000-2003, both inclusive) funding for the Wood Scheme was earmarked under item 71 in Chapter 1142 of the State budget, whereas in the last 2 years (2004 and 2005) funding for the Wood Scheme was earmarked under item 71 in Chapter 1149 of the State budget.

⁽²⁷⁾ Letter dated 6 October 2000 submitted to the Authority by the Norwegian authorities as attachment 3 to the Comments by the Norwegian authorities on the Decision to open the formal investigation procedure.

Annual budget

Year	Budget (mill. NOK)	Consents (mill. NOK)
2000	17	8,8
2001	25	25,7
2002	20	18,2
2003	36	39,3
2004	35	28,4
2005	33	39,5
Total	166	159,9

Grants were paid out within 3 years of the year in which a consent (*tilsagn*) was given and upon completion of the project by the recipient. If the budget for a particular year was not fully spent the remaining amount was carried over to the subsequent year. Hence the total value of consents in any given year may be higher than the budgeted amount for the same year.

2.3. Recipients of support under the Wood Scheme

The Working Group Report provides that the Wood Scheme should be aimed at companies and other operators with concrete projects falling within the strategies and work areas of the scheme and which contribute to increased value creation⁽²⁸⁾.

The Norwegian authorities have further specified that the Wood Scheme is open to all relevant industries (referred to as 'mechanical wood-based industries') and industries which can contribute to goal achievement under the Wood Scheme, such as industries exploring the use of wood in combination with other materials⁽²⁹⁾. Within these parameters the scheme is open to 'private persons, companies, authorities and unions, regardless of the company structure or organisation' as well as 'research and educational institutions', irrespective of their country of establishment⁽³⁰⁾.

2.4. Eligible costs and aid intensity

Eligible costs

The Norwegian authorities have stated that grants under the Wood Scheme are awarded to projects that '... contribute to goal achievement within the strategies and work areas of the program' and which trigger innovation. It appears from the Working Group Report that the following three strategies

⁽²⁸⁾ Section 4.6 of the Working Group Report.

⁽²⁹⁾ See letter dated 29 September 2005 from the Norwegian authorities to the Authority, enclosed in a letter dated 3 October 2005 from the Norwegian Mission to the EU (Event No 345465).

⁽³⁰⁾ See letter dated 29 September 2005, cited above at footnote 29 and Comments by the Norwegian authorities on the Decision to open the formal investigation procedure.

should be employed in order to achieve the objectives of the Wood Scheme. Each of the strategies should be implemented by means of the activities specified below each strategy⁽³¹⁾. The costs of such activities are therefore eligible for funding under the Wood Scheme.

- (i) Profile making and communication strategy (that is, to create engagement and willingness to develop the value chain, attract competence, people and capital, increase the visibility and active profiling of the forest and woodwork and focus on the advantages of wood as a material and disseminate information).

Measures to be used to implement this strategy include campaigns which represent the forest/wood business in a positive manner, information dissemination via design/architecture journals with wood as a profile and the provision of information to professional users, universities and teaching institutions and consumers. Other measures include the establishment of an Internet portal and a network for the purposes of channelling information throughout the value chain while also functioning as a general information resource as well as the establishment of meeting points both nationally and regionally to cater for research and development groups, architects, designers, IT oriented groups, trend researchers, innovators and investors etc.

- (ii) Product development and novelties strategy (covering the realisation of new possibilities, ideas and initiatives, contributing to innovation and new creations).

Measures to be used include structural development programmes, the establishment of business fora directed at small companies, innovation projects connected to different teaching institutions, design/architecture competitions, development of new products within new market segments (such as the recreation market; facilities/infrastructure for 'public areas'; wood products for health care etc.) and development projects which focus on generating profits in the value chain (such as raw materials, side products, wood trade and electronic trade). Other measures include the establishment of a forum and structures for developing novelties and innovation, student projects for innovation and architecture and design competitions to increase the use of specific wood materials.

- (iii) Cooperation and efficiency strategy (covering improvement in the channelling of goods and processes in the value chain and in cost efficiency, value creation and profitability as well as the optimal use of human resources and infrastructure).

Measures include the development of an integrated system of logistics to improve the timing for distribution of goods and the quality and price of products, information tech-

nology to save costs on the sale/distribution level and the development of IT systems for communicating throughout the value chain to improve quality. Other measures include competitions, preparatory studies on the development of an integrated IT system and the digitalisation of information on goods throughout the value chain, competence programmes on cost efficiency in value development and (measures for) the generation of profits in the field of forest, wood industry and trade.

The Internal EEA Guidelines specify eligible costs for SMEs, training activities and research and development, as well as for 'investments' (by SMEs and in regional areas). A translated version of the eligible cost descriptions in the Internal EEA Guidelines is attached hereto as Annex I⁽³²⁾.

Aid intensities

While the Internal EEA Guidelines specify aid intensities for SMEs⁽³³⁾, aid intensities for other types of aid are indicated only by reference to a table, entitled 'Maximum funding rates for schemes administered by Innovasjon Norge — size of undertaking and areas eligible for aid'. The table, which does not include a reference to the Wood Scheme, is reproduced in a translated version in Annex II hereto.

Since the table refers to two different aid intensities with respect to preparatory studies for research and development under the schemes entitled 'OFU/IFU' and 'Omstilling og nyskaping', the authorities have explained that it is the aid intensity set out for the 'OFU/IFU' scheme which has been applied to the Wood Scheme. The difference between the aid intensities is that the aid intensity for technical feasibility studies carried out by large undertakings in the context of pre-competitive research (for large undertakings) may amount to 55 % under the 'Omstilling og nyskaping' scheme while the corresponding aid intensity under the 'OFU/IFU' scheme is only 50 %.

Aid intensities in the context of co-financing and 100 % funding of costs

Grants under the Wood Scheme are, in principle, conditional upon contributions by the recipients in the form of financing and work force⁽³⁴⁾. However, there is no minimum requirement for co-financing; rather the share of it differs depending on the objectives and character of the project. In this context the Norwegian authorities have stated that aid under the Wood Scheme is granted in accordance with the aid intensities set forth in the Internal EEA Guidelines, such that, de facto, there is always some co-financing.

⁽³²⁾ Translation by the Authority.

⁽³³⁾ In case of investment, maximum intensity is 7,5 % for medium-sized companies and 15 % for small companies while for consultancy services and trade fairs the level is fixed at 50 %.

⁽³⁴⁾ Sections 1.4 and 7.1 of the Working Group Report.

⁽³¹⁾ Sections 4.1-4.4 and 5 of the Working Group Report.

Nonetheless, the authorities have also explained that they implement a practice under the Wood Scheme whereby certain projects receive funding for 100 % of the costs — in which case there is no co-financing. In this regard the authorities have referred to the Working Group Report which provides that: 'The share of funding under the scheme vary according to the objective and character of the projects. The scheme may finance the entire project [costs] in case it is difficult to identify anyone who can benefit directly from the project, for example, in pure study projects or preparatory studies. The share of financing under the scheme may be correspondingly low in case of projects which are expected to be of important and direct use for the project participants. The EEA State aid rules must be applied. Within the limits set by such rules principles and administrative practices are to be developed for the scheme.'⁽³⁵⁾

The authorities have further explained that the practice of awarding 100 % funding has been used in cases where it has been difficult to identify stakeholders that would benefit directly from the projects (or where individual undertakings are considered to receive a modest benefit only) such as in the case of preliminary studies and reports in special target areas. An example of this, which has been referred to by the authorities, is the grant of NOK 125 000 to Norsk Treteknisk Institutt to a project for the product development of planed panels for internal use⁽³⁶⁾. The Norwegian authorities stated that the results (of the project) are accessible for its member companies, and that, in any event, much of Norsk Treteknisk Institutt's information is generally accessible via its library.

2.5. *De minimis* aid

The Norwegian authorities have submitted that grants awarded on the basis of specific provisions under the Wood Scheme fulfil the conditions for qualifying as *de minimis* aid. The authorities have explained that when *de minimis* aid has been granted, the 'consent letter' sent to the aid recipient contains a reference to the *de minimis* threshold and time frame as well as to the obligation of the aid recipient to inform the authorities of aid received from other sources within 3 years from the point in time at which the consent to be granted aid was given⁽³⁷⁾.

In addition, the authorities have explained the existence of an administrative practice whereby aid granted for, for example, research and development, may be 'topped up' with *de minimis* aid. This practice is specifically provided for in the Internal EEA Guidelines in the versions dated September 2004 and July 2005⁽³⁸⁾.

⁽³⁵⁾ Section 7.1 of the Working Group Report.

⁽³⁶⁾ Although this amount would qualify as *de minimis*, Norsk Treteknisk Institutt had also received other aid.

⁽³⁷⁾ This information request is phrased in the following manner: 'EØS-regelverket — opplysningsplikt Tildelingen av tilskuddet skjer i henhold til reglene for bagatellmessig støtte. Ved eventuelle nye søknader om offentlig støtte (uansett støttekilde) har støttemottaker plikt til å opplyse om dette tilskuddet. Opplysningsplikten gjelder i 3 år fra tilsagnstidspunktet. Støttemottakeren må ikke motta mer enn til sammen 100 000 Euro (ca. kr 815 000,-) i støtte etter reglene for bagatellmessig støtte over et tidsrom på 3 år.'

⁽³⁸⁾ Section 4.2 thereof.

2.6. *Duration*

The Norwegian authorities have stated that the Wood Scheme was operational as of 1 July 2000 (i.e. the date as of which applications for support could be made) and remained in force for 5 years, until the end of 2005 (the last consent was given on 30 December 2005)⁽³⁹⁾.

2.7. *Trade in wood products*

It appears from the White Paper from the Government to the Parliament on the creation of value and opportunities within the forest sector that Norway exports its wood products to the EU. In this regard it is specifically stated in Section 4.3 of the White Paper that 'Norway exports approximately 85-90 % of the wholesale production of wood and paper products and approximately 35 % of the timber production. Supplies to EU countries amount to 70 % and 90 % respectively of total exports. Any strategies or political interventions within the EU which can affect the EU's import of forest industry products could have significant consequences for the Norwegian forest sector'⁽⁴⁰⁾. Moreover, it appears from Eurostat statistics that wood products are extensively traded in the EU⁽⁴¹⁾. Finally, it appears from statistics produced by 'Statistics Norway' (*Statistisk sentralbyrå*) that Norway also imports substantial amounts of timber, processed wood and wood products (*Tømmer, trelast og kork ...*) from the EU⁽⁴²⁾.

2.8. *Scope of EEA Agreement*

Article 8(3) of the EEA Agreement provides that:

'Unless otherwise specified, the provisions of this Agreement shall apply only to:

- (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;

⁽³⁹⁾ This is confirmed by the comments to the proposal for the State budget in St. prp. nr. 1 (2000-2001) and the Working Group Report.

⁽⁴⁰⁾ Translation by the Authority of the following quote: 'Norge eksporterer ca 85-90 % av produksjonen av tremasse og papirprodukter og ca 35 % av trelast-produksjonen. Leveransene til EU-land utgjør henholdsvis 70 % og 90 % av eksporten. Eventuelle strategier eller politiske vedtak innen EU som kan påvirke EUs import av skogindustriprodukter vil kunne få store konsekvenser for den norske skogsektoren.'

⁽⁴¹⁾ Statistics produced by Eurostat for the years between 1999 and 2004 (covering both imports and exports of various varieties of refined wood and timber within the EU where value is expressed either in thousands of cubic metres or tons) show that there is extensive trade within the EU of wood products. The relevant statistics are (i) intra EU-25 imports and exports of round wood; 'table fores51'; (ii) intra EU-25 imports of wood pulp and paper and paperboard; 'table fores62'; (iii) intra EU-25 exports of woodpulp 'table fores62'; (iv) intra EU-25 imports of sawn wood and wood based panels; 'table fores61'; and (v) intra EU-25 exports of sawn wood 'table fores61'. All available at <http://europa.eu.int/comm/eurostat> or by contacting Eurostat via their website.

⁽⁴²⁾ See the webpage: <http://www.ssb.no/muh/tab15-01.shtml> which shows table 15, entitled, 'Trade with selected countries by two-digit SITC. Jan-mar 2006. Million kroner'.

(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.'

Wood and articles of wood are covered by Chapter 44.

2.9. Grounds for initiating the procedure

The Authority opened the formal investigation procedure on the basis of the preliminary finding that the Wood Scheme involves State aid which would not qualify for any of the exemptions provided for in the EEA Agreement. Consequently the Authority had doubts that the Wood Scheme could be considered to be compatible with the functioning of the EEA Agreement. Reference was made to the fact that the documents submitted by the Norwegian authorities on the Wood Scheme did not contain specific definitions of the eligible projects, eligible costs or ceilings on the maximum amount of aid which could be granted.

The Norwegian authorities were invited to submit information on the existence of any internal instructions dictating that the scheme should be implemented in compliance with the State Aid Guidelines and/or the block exemption Regulations. The Authority pointed out, however, that even if such an administrative practice could be demonstrated, the Authority might still consider the scheme not to be compatible with the functioning of the EEA Agreement in view of the existence of the practice under the Wood Scheme of granting 100 % support to projects where the grant is assumed by the administering authority not to qualify as aid because the activity cannot be attributed to individual undertakings and is considered to result in a modest benefit only.

With respect to whether grants awarded on the basis of specific provisions on *de minimis* aid under the Wood Scheme fulfil the conditions for qualifying as *de minimis* aid under the State Aid Guidelines or the subsequent *de minimis* Regulation (which replaced the State Aid Guidelines in this respect as of 1 February 2003)⁽⁴³⁾ the Authority took the view that the relevant provisions did not appear to comply with the rules on the grant of *de minimis* aid.

3. Comments by the Norwegian authorities

3.1. Procedure

The Norwegian authorities acknowledge that the scheme should have been formally notified to the Authority but argue that the mere fact that the Wood Scheme has not been notified does not mean that the Authority can conclude, on that basis alone, that it is incompatible with the functioning of the EEA Agreement.

⁽⁴³⁾ The previous Chapter 12 of the State Aid Guidelines was deleted by Decision No 198/03/COL of the Authority of 5 November 2003. However, as of 1 February 2003, Chapter 12 was already superseded by Regulation (EC) No 69/2001, hereinafter referred to as the '*de minimis* Regulation'.

3.2. Substance

Existence of internal instructions or authoritative orders

The Norwegian authorities argue that the material State aid rules of the EEA Agreement have been complied with in practice. First, the Superior Policy of Innovasjon Norge dictates that all financing should be granted within the limits set by international agreements to which Norway is a party. Secondly, case handlers of Innovasjon Norge have (via the Working Group Report) been instructed to implement the Wood Scheme in compliance with the EEA Agreement. The Internal EEA Guidelines were developed with a view to facilitating compliance with the EEA Agreement. Thirdly, the case handlers are experienced with the State Aid Guidelines and participate in courses on the subject. If in doubt they can seek advice from the legal department of Innovasjon Norge.

Cases of no aid

As regards the practice of financing 100 % of project costs, the Norwegian authorities have argued that this practice involves projects not falling within the scope of the EEA Agreement either because there is no State aid involved within the meaning of Article 61(1) of the EEA Agreement or because aid has been granted as *de minimis* aid. The authorities have provided a table setting out how all funding awarded under the Wood Scheme has been allocated.

The authorities argue that in eight cases (represented by two examples) aid has been granted to projects involving products (such as 'standing timber') which are not listed in Chapters 25-97 Harmonised Commodity Description and Coding System and hence do not come within the scope of the EEA Agreement.

The authorities further state that 114 beneficiaries under the Wood Scheme do not qualify as 'undertakings' within the meaning of Article 61(1) of the EEA Agreement because the beneficiaries are not pursuing an economic activity. 15 cases are considered to be 'Education and Research Establishments'; 25 cases of 'Public entities' involve support to municipalities; and 74 cases concern support to 'Branch organisations'.

As regards the 'Education and Research Establishment' cases (represented by two examples, one of which involves a not-for-profit organisation) the authorities consider that they fall outside the scope of Article 61(1) of the EEA Agreement on the basis of section 2.2 in the previous Chapter 14 of the State Aid Guidelines on research and development according to which 'non-profit-making higher education research establishment is normally not covered by Article 61(1) of the EEA Agreement' and which states that 'where the results of publicly financed R&D projects carried out by such establishments are made available to European industry on a non-discriminatory basis, the EFTA Surveillance Authority will assume that State aid within the meaning of Article 61(1) of the EEA Agreement is not normally involved'.

The Norwegian authorities argue that aid to 'Branch organisations' (consisting of not-for-profit interest organisations involved in information dissemination) does not involve State aid because the funding is not directed (directly) to undertakings but is channelled via the branch organisations which are not considered to be undertakings. Reference is made to the Commission's decision regarding *Asetra* which, according to the Norwegian authorities, was cleared because *Asetra* was not an undertaking within the meaning of Article 87(1) of the EC Treaty⁽⁴⁴⁾. It is also argued that the Court of Justice has interpreted 'the concept of "economic advantage"' in several cases and that in Case C-143/99 *Adria Wien* the reasoning of the Court indicates that a line must be drawn between abstract advantages (i.e. costs that would normally not be 'included in the budget' of the undertaking) and those that would⁽⁴⁵⁾.

The authorities also argue that in a further 31 cases (of which several examples are given) the beneficiaries did not receive an economic advantage as they provided a service in return and hence the cases are not within the scope of Article 61(1) of the EEA Agreement.

De minimis aid

The Norwegian authorities refer to the consent letter which states that the recipient must provide information 'on aid received on the basis of potentially new applications for public aid ... This obligation has a duration of three years from the time of the letter of consent. The receiver of aid cannot receive *de minimis* aid exceeding a total of EUR 100 000 (approximately NOK 815 000) over any period of three years'.

The authorities argue that the reference to 'any period of three years' makes it clear that the receiver of aid is not in a position to receive *de minimis* aid during any period of 3 years whether prior to or after the letter of consent. The obligation to submit information on aid received 3 years counted from the time of the letter of consent must be read in context with the text regarding the obligation not to receive aid over 'any' period of 3 years. According to the authorities this ensures compliance with the *de minimis* Regulation. The authorities state, moreover, that in any event, most aid awards are below the *de minimis* limit.

The authorities have, however, also explained that 'the [procedural] framework of *de minimis* aid has, however, in [certain] cases not been complied with as the aid [was] deemed to comply with the substantial rules and block exemptions on aid to SMEs, R&D and training aid'. The authorities have subsequently explained that the reference to a lack of compliance with 'procedural rules' means that in 10 cases aid was awarded up to the permitted aid intensity but topped up with *de minimis* aid without informing the recipient of the *de minimis* element of the aid.

Compatibility of the aid

The Norwegian authorities argue that the Authority has not paid sufficient attention to the practices and procedures followed by Innovasjon Norge in assessing the compatibility of the aid.

The authorities basically state that no aid has been granted as regional aid under the Wood Scheme and that the overview (attached to Internal EEA Guidelines), setting out maximum aid intensities (including on regional aid) may have led to this misunderstanding. Immediately afterwards the authorities state that there are, however, examples in which aid has been granted up to the maximum aid intensities permitted for research and development aid but topped up with a 5 % regional aid bonus. Aid to *Trysil Skog AS* is referred to as an example.

As regards 78 cases of research and development (of which three examples are mentioned) the authorities argue that aid has been granted in compliance with the material principles in the State Aid Guidelines. Account has been taken of the extent to which a project foresees the development of new technology, knowledge or methods and priority has been given to the most innovative projects. Account has also been taken of whether the project is eligible for funding from other sources, such as under the 'Skattefunn' scheme.

The authorities argue that although the title and publication reference to the block exemption Regulations on SMEs and training aid are not cited in the Internal EEA Guidelines, the regulations are, 'to a large extent, incorporated'.

II. ASSESSMENT

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

Article 61(1) of the EEA Agreement provides that:

'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.'

To constitute State aid within the meaning of Article 61(1) of the EEA Agreement, a measure must meet the following four cumulative criteria: the measure must (i) confer on recipients an economic advantage which is not received in the normal course of business; (ii) the advantage must be granted by the State or through State resources; (iii) the measure must be selective by favouring certain undertakings or the production of certain goods; and (iv) it must distort competition and affect trade between the Contracting Parties.

1.1. Economic advantage

The measure must confer on recipients an economic advantage which is not received in the normal course of business.

Under the Wood Scheme the Norwegian authorities award financial grants to companies, authorities, business associations, unions, etc. which can contribute to the objectives of the scheme. The undertakings benefiting from such grants receive an economic advantage, i.e. the grant, which they would not have received in their normal course of business.

⁽⁴⁴⁾ Commission Decision of 31 March 2000 concerning State aid N 673/99 (OJ C 184, 1.7.2000, p. 25).

⁽⁴⁵⁾ Case C-143/99 *Adria Wien* [2001] ECR I-8365.

1.2. Presence of State resources

The advantage must be granted by the State or through State resources.

The grants awarded under the Wood Scheme are financed by the Ministry of Agriculture and Food and come directly from the State budget.

1.3. Favouring certain undertakings or the production of certain goods

The measure must favour certain undertakings or the production of certain goods.

It appears from various legislative preparatory works (such as the White Paper, the Recommendation and the Working Group Report) leading up to the establishment of the Wood Scheme, that the scheme is aimed at improving (i) value in the wood processing business, and (ii) the relations on different levels of trade between the forest and the market (which includes the supply of raw material to the wood processing industry), along with a general aim of increasing the actual use of woodwork.

Thus grants under the Wood Scheme are awarded only where it is considered that they may benefit the wood processing sector and related wood industries as well as the supply of raw material to such industries. The Wood Scheme therefore favours undertakings within the wood industry sector to the exclusion of other sectors and is hence selective in nature. In this respect the EFTA Court has held that a measure may be selective even if it covers (undertakings in) an entire sector⁽⁴⁶⁾.

It should be noted that although grants under the Wood Scheme may also be awarded to undertakings in other industries (for example where industries explore the use of wood in combination with other materials), this option is open only for industries which can contribute to the overall aim of the Wood Scheme of generally improving value in the wood processing business. The Authority therefore considers that even this option is ultimately aimed at favouring undertakings in the wood processing industries and related wood industries.

1.4. Distortion of competition and effect on trade between Contracting Parties

The measures must distort competition and affect trade between the Contracting Parties.

Under the Wood Scheme the Norwegian authorities award grants to undertakings in the wood processing (and related) industries. Norwegian industry exports a large share of its wholesale timber and refined wood products (up to 90 %) to other EEA countries where wood products are extensively

traded. In addition, Norway also imports timber, processed wood and wood products from the EU. In such circumstances, the grant of support to undertakings under the Wood Scheme will strengthen the position of recipients compared to other undertakings which are located in Norway or in other EEA countries and competing in the wood processing (and related) businesses. Moreover, since wood is merely one of the raw materials used in the construction business, grants received by construction companies under the Wood Scheme will strengthen their position compared to other undertakings competing in the construction business⁽⁴⁷⁾.

On this basis, the Authority considers that the grant of financial support to undertakings under the Wood Scheme will distort competition and affect trade.

1.5. Conclusion and existence of an aid scheme

In the light of the above, the conclusion of the Authority is that the Wood Scheme satisfies the test in Article 61(1) of the EEA Agreement and hence constitutes State aid. However, the Norwegian authorities have argued that certain of the individual grants awarded under the Wood Scheme do not fall within the scope of the EEA Agreement or do not qualify as State aid.

The Authority has taken the view (which is not disputed by the Norwegian authorities) that the Wood Scheme is an act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner. The Scheme therefore qualifies as an aid scheme within the meaning of Article 1(d) of Part II of Protocol 3 to the Surveillance and Court Agreement. In this regard the Authority recalls that in Case C-310/99, the European Court of Justice stated that: 'There was no need for the contested decision to include an analysis of the aid granted in individual cases on the basis of the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned.'⁽⁴⁸⁾ In line with that case law, the Authority has assessed the Wood Scheme on the basis of the characteristics of the scheme (as opposed to the specifics of the individual awards under the scheme). The arguments of the Norwegian authorities cannot affect that assessment but will only come into play if and when recovery is discussed. The conclusion as to the compatibility or not of the scheme with the functioning of the EEA Agreement does not prejudice the question of recovery in individual instances of aid having been granted. As noted in the judgment quoted above, that is a second step and recovery will only be ordered in those instances in which the substantive provisions on State aid have in fact been breached.

⁽⁴⁶⁾ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnford* [2005] EFTA Court Report p. 117, paragraph 77. This judgment confirms the case law of the European Court of Justice as laid down in Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 33. See also Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 95.

⁽⁴⁷⁾ See in this respect Case 730/79 *Philip Morris v Commission* [1989] ECR p. 2671, paragraph 11, where it is stated that 'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.'

⁽⁴⁸⁾ Case C-310/99 *Italy v Commission* [2002] ECR p. I-2289, paragraph 91. In Case C-66/02 *Italy v Commission* [2005] ECR p. I-10901, paragraph 91, the Court stated 'In the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies [...] in order to establish whether the scheme involves elements of aid.'. See also Case E-2/05 *ESA v Iceland* [2005] EFTA Court Report p. 202, paragraph 24.

The Authority observes that the Norwegian authorities have not disputed that the Wood Scheme enables the grant of funding to recipients in respect of products covered by the EEA Agreement, such as wood. Nor have the Norwegian authorities disputed that the Wood Scheme includes the possibility to fund entities which qualify as undertakings within the meaning of Article 61(1) of the EEA Agreement. Finally, it is undisputed that the Wood Scheme did not exclusively fund beneficiaries which provided a service in return.

In other words, the scheme itself envisaged the granting of State aid. The possibility that certain recipients under the Wood Scheme may not come within the scope of the EEA Agreement (by reference to the fact that their products are not covered by the Agreement, or that they themselves are not undertakings within the meaning of Article 61(1) of the EEA Agreement) does not change the qualification of the Wood Scheme as an aid scheme within the meaning of Article 61(1) of the EEA Agreement.

2. Procedural requirements

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

The Authority first observes that in view of the fact that Chapter 44 of the Harmonized Commodity Description and Coding System (on wood and articles of wood) is covered by the EEA Agreement, the Wood Scheme must be assessed on the basis of the Agreement. The Norwegian authorities did not notify the Wood Scheme prior to its implementation and have therefore not respected their obligation pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement. State aid granted under the Wood Scheme therefore constitutes 'unlawful aid' within the meaning of Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement.

3. Compatibility of the aid

As a preliminary point, the Authority notes that while the Wood Scheme contained details on, for example, objectives and eligible costs, it did not appear to contain any conditions according to which aid was to be granted. A scheme without any specific limitations on the granting of aid (e.g. as regards aid intensity) is not something that could be authorised by the Authority as compatible with the functioning of the EEA Agreement. The fact that, in practice, the Authority's State Aid Guidelines may have been respected in individual instances does not alter this position but, as noted above at point I-1.5, merely has an effect on whether recovery is necessary.

However, the Authority observes, in this context, that the Norwegian authorities have stated that the reference in the

Working Group Report to implementing the scheme on the basis of 'principles and practices' within the limits of EEA law is an implicit reference to the Internal EEA Guidelines. The Authority understands the argument to be that those Guidelines, which set out, for example, maximum aid intensities allowed under EEA law in various situations, were to be regarded as the rules of the Scheme and the conditions on which aid under the Wood Scheme would be granted. In other words, the Scheme did contain an identifiable set of rules limiting the granting of aid thereunder.

To the extent that the Norwegian authorities note that 'the guidelines are continuously revised' it is recalled that the compatibility of unlawful State aid with the functioning of the EEA Agreement shall be assessed in accordance with the substantive criteria set out in the instrument in force at the time when the aid was granted or, in the case of a scheme, when the scheme was established. In addition, each revision of the rules of a scheme must be assessed in order to determine whether it constitutes an alteration to the scheme within the meaning of Decision 195/04/COL⁽⁴⁹⁾. The assessment below therefore analyses whether the Internal EEA Guidelines of Innovasjon Norge, including subsequent changes thereto, could, as the rules of the Wood Scheme, have been considered compatible with the functioning of the EEA Agreement and in particular with the Authority's State Aid Guidelines and the block exemption Regulations as they were applicable at each of those points in time.

3.1. Compatibility with Article 61(2) of the EEA Agreement

None of the exceptions in Article 61(2) of the EEA Agreement apply in this case as the Wood Scheme is not aimed at the objectives listed in those provisions.

3.2. Compatibility with Article 61(3) of the EEA Agreement

A State aid measure is considered to be compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(a) of the EEA Agreement when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. However, as there are no such areas defined by the Norwegian regional aid map, this provision is not relevant⁽⁵⁰⁾.

Moreover, the exception in Article 61(3)(b) of the EEA Agreement does not apply since the State aid granted under the Wood Scheme is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Norway.

⁽⁴⁹⁾ Decision No 195/04/COL of the Authority of 14 July 2004 (OJ L 139, 25.5.2006, p. 37), as amended by Decision No 319/05/COL of the Authority of 14 December 2005 (OJ C 286, 23.11.2006, p. 9). See also Case T-195/01 *Gibraltar v Commission* [2001] ECR II-3915. It should be noted that since the initial establishment of the scheme was 'unlawful' in terms of procedure, all subsequent modifications of that scheme must also be treated as unlawful aid.

⁽⁵⁰⁾ See Decision No 327/99/COL of the Authority of 16 December 1999 on the map of assisted areas and levels of aid (Norway).

However, the exception laid down in Article 61(3)(c) of the EEA Agreement which provides that State aid may be considered compatible with the common market where it facilitates the development of certain economic activities or of certain economic areas and does not adversely affect trading conditions to an extent contrary to the common interest, may be applicable. This is so if the measure complies with the State Aid Guidelines or any applicable block exemption Regulations.

Regional aid

Undertakings become eligible for regional aid when they are established in certain regions defined by reference to the Norwegian regional aid map, mentioned above, and when the conditions set out in the State Aid Guidelines on regional aid are met ⁽⁵¹⁾.

The Norwegian authorities have argued that aid under the Wood Scheme has not been granted in the form of regional aid. However, the Authority observes that the Wood Scheme has been implemented on the basis of the Internal EEA Guidelines which provide for the possibility to grant regional (investment) aid ⁽⁵²⁾. Moreover, the authorities have referred to cases in which research and development aid has been topped up with a 5 % regional aid bonus (Trysil Skog AS being one example).

The Authority observes that the conditions set out in the State Aid Guidelines on the grant of regional aid must be fulfilled also in cases where the regional aid bonus is granted. However, neither the Working Group Report nor the Internal EEA Guidelines refer to the conditions which must be met for regional aid to be granted, such as the identification of regional benefits (in the form of productive investment or job creation), nor do they include a reference to the regional aid map of Norway. In such circumstances the Authority cannot reassure itself that the provisions on regional aid under the Wood Scheme are in accordance with the State Aid Guidelines on regional aid.

Aid for research and development

State aid for research and development may be regarded as compatible with the functioning of the EEA Agreement when the relevant conditions in the State Aid Guidelines are met ⁽⁵³⁾.

⁽⁵¹⁾ The previous Chapter 25 of the State Aid Guidelines on regional aid was replaced by new guidelines on 6 April 2006 and Commission Regulation (EC) No 1628/2006 (incorporated by Joint Committee Decision No 157/2006, published in OJ L 89, 29.3.2007, p. 33, and EEA Supplement No 15, 29.3.2007, p. 24). The Regulation entered into force 9 December 2006.

⁽⁵²⁾ See the (regional aid) ceilings referred to in the table attached to the Internal EEA Guidelines and the explanatory part on investment aid (section 4.6).

⁽⁵³⁾ The previous guidelines on research and development were replaced by new guidelines on 7 February 2007.

The State Aid Guidelines set out the definitions of different types of research and development, namely 'fundamental research', 'industrial research' and 'pre-competitive development activity' and the respective aid intensities which apply to each of these categories.

The Authority observes that the eligible research, eligible costs and aid intensities set out in the Internal EEA Guidelines correspond to those set out in the State Aid Guidelines on research and development except with respect to technical preparatory studies. While the table on aid intensities in the Internal EEA Guidelines refer to two different aid intensities for technical preparatory studies carried out by large undertakings in the context of pre-competitive research, namely 50 % and 55 % ⁽⁵⁴⁾, the State Aid Guidelines explicitly provide that the combination of bonuses may not result in an aid intensity exceeding 50 % for pre-competitive research ⁽⁵⁵⁾.

Given that one of the aid intensities set forth in the Internal EEA Guidelines is not in line with the State Aid Guidelines and that there is no evidence of the existence of an instruction on case handlers to apply the aid intensity for the OFU/IFU scheme, which is in line with the State Aid Guidelines, it would appear that the rules of the Wood Scheme envisage a possible aid intensity in excess of the maximum set forth in the State Aid Guidelines. Moreover, the Authority has not received any arguments for accepting a higher aid intensity than the one set forth in the State Aid Guidelines.

Aid for SMEs and training aid

Aid granted in compliance with the block exemption Regulations on SMEs and/or on training aid is considered compatible with the functioning of the EEA Agreement provided that the scheme fulfils all the conditions of the relevant block exemption Regulation and contains an express reference to it (by citing its title and publication reference in the *Official Journal of the European Union*) ⁽⁵⁶⁾. However, neither the State budgets nor the Working Group Report or any of the other legislative preparatory works regarding the Wood Scheme include a reference to the application of the block exemption Regulation on SMEs or to the block exemption Regulation on training aid. Moreover, the Authority has not received any information from the Norwegian authorities on the application of any of the block exemption Regulations for publication in the *Official Journal of the European Union*. The Norwegian authorities have therefore not complied with the requirements in the block exemption Regulations and the Wood Scheme therefore cannot be considered to be in compliance with the block exemptions.

⁽⁵⁴⁾ The 2000 and 2001 versions appear not to fix a specific aid intensity for technical preparatory studies at all.

⁽⁵⁵⁾ Section 5.3(7) of the then Chapter 14 of the State Aid Guidelines on research and development aid.

⁽⁵⁶⁾ See Article 3(3) in the block exemption Regulations on SMEs and on training aid, respectively. Compliance with the formal conditions of the block exemption exempts the aid measure from the notification requirement.

Nonetheless the Wood Scheme may be considered to be compatible with the functioning of the EEA Agreement on the basis of Article 61(3)(c) of the EEA Agreement in the light of the material principles established in the block exemption Regulations on SMEs and training aid. In this regard the Authority observes that all definitions, eligible costs and aid intensities on training aid in the Internal EEA Guidelines⁽⁵⁷⁾ correspond to the block exemption Regulation on training aid. Moreover, the definitions, eligible costs and applicable aid intensity for consultancy services and fairs for SMEs in the Internal EEA Guidelines⁽⁵⁸⁾ correspond to the block exemption Regulation on SMEs.

However, according to section 4.3.2 of the Internal EEA Guidelines, aid for SMEs may be granted for 'network and cooperation' which is a purpose clearly falling outside the scope of the material provisions in the block exemption Regulation on SMEs. The question is therefore whether funding for such purposes may be considered compatible on the basis of the State Aid Guidelines on SMEs or on the basis of the material principles established therein directly pursuant to Article 61(3)(c) of the EEA Agreement⁽⁵⁹⁾.

The State Aid Guidelines state that funding for 'cooperation' to SMEs may be granted provided competition is not affected to an extent contrary to the common interest. On this basis the Authority considers that the possibility in the Internal EEA Guidelines to fund SMEs for the 'identification of work partners, strategies and formalisation of cooperation during the establishment phase' could be acceptable.

By contrast, the Authority considers that the possibility to fund unidentified 'extraordinary joint actions'⁽⁶⁰⁾ during the 'operational phase' opens up for the possibility to fund a wide range of measures, at any time, which would not necessarily be within the scope of cooperation between SMEs and may therefore affect competition to an extent contrary to the common interest. Upon questioning the Norwegian authorities on this matter the authorities argued that funding under this provision is aimed only at consultancy services. However, in the same context the authorities stated that the provision also opened up for the possibility to fund 'related services' in the context of network assistance.

The Authority considers that on the basis of such vague and open-ended provisions it cannot reassure itself that the rules of the scheme in respect of funding for SMEs are in accordance with the State Aid Guidelines on SMEs or the material principles therein and therefore cannot be approved pursuant to Article 61(3)(c) of the EEA Agreement as compatible with the functioning of the EEA Agreement.

⁽⁵⁷⁾ Section 4.4 thereof.

⁽⁵⁸⁾ Sections 4.3 and 4.3.1 thereof.

⁽⁵⁹⁾ The previous chapter in the State Aid Guidelines on aid for SMEs was superseded by the block exemption Regulation on SMEs as of 26 June 2002.

⁽⁶⁰⁾ Such measures include measures similar to performance improvement (*kompetanseheving*).

Practice of funding 100 % of project costs

The Working Group Report provides that the scheme may finance the entire project costs in case it is difficult to identify anyone who can benefit directly from the project. The authorities have explained that 100 % funding of project costs takes place, for example, in cases where it is difficult to identify direct beneficiaries, or recipients are considered to receive a modest benefit only (i.e. preliminary studies and reports in special target areas), on the basis that no aid is present in these cases⁽⁶¹⁾.

With regard to this practice, the following two comments must be made: 1) although the Norwegian authorities refer to preliminary studies and reports as examples of cases in which no aid is involved, the State Aid Guidelines on research and development set out maximum aid intensities for technical feasibility studies showing that funding for studies (even of a preparatory character) may involve State aid⁽⁶²⁾; and 2) unless the amount of aid involved is below the *de minimis* threshold the receipt of a modest benefit does not, in and of itself, exclude the presence of State aid.

On this basis the Authority considers that the practice of funding 100 % of the costs of a project is not based on criteria which would ensure that the presence of State aid is excluded and since 100 % funding is not acceptable under any section of the State Aid Guidelines, nor has it been argued in this case that such an aid intensity is justified directly pursuant to Article 61(3)(c) of the EEA Agreement, the Authority considers that a scheme which allows such a practice is not compatible with the functioning of the EEA Agreement.

Conclusions

As appears from the above, on several accounts the Wood Scheme is not in compliance with the State Aid Guidelines and does not qualify for the exception directly pursuant to Article 61(3)(c) of the EEA Agreement. The Authority therefore considers that the Wood Scheme cannot be considered compatible with the functioning of the EEA Agreement.

3.3. *De minimis aid*

According to the Norwegian authorities the Wood Scheme contains provisions setting out conditions which, when they are met, ensure that grants qualify as *de minimis* aid. The Authority considers that the relevant provisions under the Wood Scheme do not comply with the *de minimis* rules.

⁽⁶¹⁾ The practice of funding 100 % of project costs raises both an issue of the presence of State aid and one of compatibility. Given the reference in the Working Group Report to this possibility, it is assumed that the Scheme envisages such a practice and that the compatibility of the provisions governing that practice must be assessed for compatibility (this section). The issue concerning the presence (or absence) of State aid will be relevant only to the matter of recovery.

⁽⁶²⁾ Section 5.3(7) of the then Chapter 14 on research and development aid.

The grant of aid may qualify as *de minimis* under the State Aid Guidelines or the subsequent *de minimis* Regulation with the consequence that the measure does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement and that there is no obligation to notify. As the Wood Scheme was implemented between 1 July 2000 and the end of 2005 both sets of *de minimis* rules are relevant for the assessment of the scheme⁽⁶³⁾.

Both the *de minimis* Regulation and the State Aid Guidelines provide that the national authorities can only grant *de minimis* aid after first having verified that the total amount of *de minimis* aid received by the company is not raised by virtue of other *de minimis* aid having been received during the previous 3 years. Under both the *de minimis* Regulation and the State Aid Guidelines an acceptable manner of verifying the *de minimis* threshold is by obtaining information from the recipient on this matter⁽⁶⁴⁾.

When *de minimis* aid is granted under the Wood Scheme, reference is made to the *de minimis* rules and recipients are informed of an obligation to inform the authorities of other *de minimis* aid received 3 years after the consent to receive *de minimis* aid was given.

In the decision opening the formal investigation procedure the Authority took the view that since this information obligation only concerns *de minimis* aid received *after* aid has been received under the Wood Scheme recipients have not been required to submit information on whether any *de minimis* aid has been received *prior* to receiving *de minimis* aid under the Wood Scheme. However, the Norwegian authorities have argued that the consent letter also refers to the rule that aid received over 'any period of three years' may not exceed the *de minimis* threshold.

The Authority observes that the requirement on the recipient to inform of aid granted 'from the time of the letter of consent' contradicts the reference to the rule that aid received during 'any period of three years' may not exceed the *de minimis* threshold. In such circumstances the Authority cannot reassure itself that a recipient would clearly perceive this message as an obligation to inform of aid received during 'any period of three years'. The Authority therefore maintains its initial position that, in so far as the provisions in question are to be viewed as part of the rules of the scheme, it cannot be

⁽⁶³⁾ As stated by the Norwegian authorities it is the date that the Norwegian authorities gave their consent (*tilsagn*) which determines whether the previous Chapter 12 of the State Aid Guidelines or the subsequent *de minimis* Regulation is applicable to the grant in question.

⁽⁶⁴⁾ See in this regard the reference to 'control modality' in the State Aid Guidelines.

concluded that they ensure *ex ante* that the provisions on *de minimis* aid are complied with⁽⁶⁵⁾.

Aside from this the Authority observes that, at least in the versions of the Internal EEA Guidelines dated September 2004 and July 2005, the Wood Scheme has provided for a practice whereby State aid approved for, for example, research and development, could be topped up with further aid granted as *de minimis* aid⁽⁶⁶⁾. In line with the Commission Decision in *Kahla Porzellan GmbH*, the Authority considers that if aid exceeds the *de minimis* threshold — as a result of total funding granted to the same undertaking within 3 years — the total amount must be considered as State aid⁽⁶⁷⁾. On this basis the Authority considers that a practice whereby the *de minimis* threshold is respected only for a part of the aid granted to an undertaking implies, by definition, that the total amount granted may exceed the *de minimis* threshold⁽⁶⁸⁾.

In view of the above the Authority considers that the relevant provisions under the Wood Scheme do not comply with the *de minimis* rules and that the Scheme therefore cannot be approved as compatible with the functioning of the EEA Agreement.

4. Conclusion

Based on the information submitted by the Norwegian authorities, the Authority takes the view that the Wood Scheme involves the grant of State aid within the meaning of Article 61(1) of the EEA Agreement that is not compatible with the Agreement. However, in line with the Commission's practice in this regard, the Authority considers that although the Wood Scheme, viewed as a scheme, is incompatible with the functioning of the EEA Agreement, individual aid grants awarded under the Wood Scheme which fulfil the criteria laid down in the State Aid Guidelines on SMEs and/or research and development, or with the material rules in the block exemption Regulations on aid to SMEs and training can be declared compatible with the functioning of the EEA Agreement⁽⁶⁹⁾.

⁽⁶⁵⁾ The fact that many consents may be below the *de minimis* threshold is not relevant since the Authority is, for purposes of analysing whether State aid is compatible, limited to considering the terms of the Wood Scheme. The factual situation will be relevant for the question of recovery.

⁽⁶⁶⁾ See section I-2.5 above for a description of the practice.

⁽⁶⁷⁾ Commission Decision 2003/643/EC of 13 May 2003 on the State aid implemented by Germany for Kahla Porzellan GmbH and Kahla/Thüringen Porzellan GmbH (OJ L 227, 11.9.2003, p. 12). In a similar vein, when assessing whether the relevant aid intensities set out in the State Aid Guidelines have been complied with, the total amount of aid granted to the same undertaking must be taken into account.

⁽⁶⁸⁾ It should be noted that the relevant aid intensities must also be respected. Where *de minimis* aid is granted in combination with other aid, the total amount of aid may not exceed the maximum aid intensities for the various categories of aid. This is, of course, only relevant where total aid does not qualify as *de minimis* aid.

⁽⁶⁹⁾ See, for example, Commission Decision 2004/343/EC of 16 December 2003 on the aid scheme implemented by France for the takeover of firms in difficulty (OJ L 108, 16.4.2004, p. 38), and Commission Decision 2003/86/EC of 20 December 2001 on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Vizcaya (Spain) (OJ L 40, 14.2.2003, p. 11).

As the Wood Scheme has not been notified to the Authority, any aid within the meaning of Article 61(1) of the EEA Agreement granted under the Wood Scheme constitutes unlawful aid within the meaning of Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement. It follows from Article 14 of Part II of Protocol 3 to the Surveillance and Court Agreement that the Authority shall decide that unlawful aid which is incompatible with the State aid rules under the EEA Agreement must be recovered from the beneficiaries. This is, however, without prejudice to (i) individual aid awards fulfilling the conditions for *de minimis* aid pursuant to the State Aid Guidelines or the *de minimis* Regulation; and (ii) individual awards being found to be compatible on the basis of compliance with the State Aid Guidelines on SMEs and/or research and development, or with the material rules in the block exemption Regulations on aid to SMEs and training, and which fulfil the relevant aid intensities set forth therein,

HAS ADOPTED THIS DECISION:

Article 1

The Wood Scheme is not compatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

Article 2

Individual aid awards granted under the Wood Scheme do not constitute state aid if they fulfil the conditions on *de minimis* aid laid down in the State Aid Guidelines or the *de minimis* Regulation, whichever was applicable at the time of the grant.

Article 3

Individual aid awards granted under the Wood Scheme which fulfil the criteria in the State Aid Guidelines on SMEs and/or research and development, or with the material rules in the block exemption Regulations on aid to SMEs and training, are compatible with the functioning of the EEA Agreement up to the amount of the admissible aid intensities.

Article 4

The Norwegian authorities shall take all necessary measures to recover the aid referred to in Article 1 other than that referred to in Articles 2 and 3.

Article 5

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of Article 9 in Decision No 195/04/COL⁽⁷⁰⁾.

Article 6

The Norwegian authorities shall inform the EFTA Surveillance Authority, within 2 months of notification of this Decision, of the measures taken to comply with it.

Article 7

This Decision is addressed to the Kingdom of Norway.

Article 8

Only the English text is authentic.

Done at Brussels, 23 January 2008.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kurt JAEGER
College Member

⁽⁷⁰⁾ See footnote 49.

ANNEX I

ELIGIBLE COSTS SET OUT IN THE INTERNAL EEA GUIDELINES

With respect to aid for small and medium-sized enterprises (SMEs) ⁽¹⁾ eligible costs are (i) consultancy services provided by outside consultants (excluding those of a continuous or periodic character and those relating to usual operating expenditure); (ii) participation, for the first time, in fairs and exhibitions; and (iii) networking and cooperation in both the establishment and start-up phase. The establishment phase covers funding for identifying work partners, developing strategies, structuring and formalising the cooperation etc. The start-up phase covers administration costs for administering the cooperation during the first 3 years (progressively decreasing) and 'extraordinary joint actions'. An example of the latter is 'competence improvement' but funding under the heading of 'extraordinary joint actions' may also be granted to other similar measures during both the establishment phase and later on during the operational phase.

For the purposes of granting aid for training a distinction is drawn between specific training and general training. The latter covers tuition directly and principally applicable to the employee's present or future position and providing qualifications which are not (or only to a limited extent) transferable to other firms or fields of work. General training is training involving tuition, not applicable only to the employee's present or future position, but providing qualifications that are largely transferable to other entities and substantially improve employability of the employee.

Eligible costs for training are trainers' personnel costs; trainers' and trainees' travel expenses; other current expenses (such as materials and supplies); depreciation of tools and equipment (to the extent that they are used exclusively for the training project); cost of guidance and counselling services with regard to the training project; trainees' personnel costs up to the amount of the total of the other eligible costs referred to. Only the hours during which the trainees actually participate in the training after deduction of any productive hours or of their equivalent may be taken into account. The eligible costs shall be supported by documentary evidence which shall be transparent and itemised.

As regards research and development the Internal EEA Guidelines provide that eligible costs are personnel costs (researchers, technicians and assistance personnel, exclusively used for the research and development activity), instruments, equipment, working space and buildings (permanently and exclusively used for the research and development activity); consultancy assistance and corresponding services (exclusively used in the context of the research and development activity) and administration directly related to the research and development activity. Other eligible costs could be operating expenses such as materials, supplies and similar products which are directly related to the research and development activity.

With respect to 'investments' (by SMEs and in the context of regional aid) eligible costs are buildings, plants, machines, fundamental investments as well as expenses in relation to patents and the acquisition of patents, licenses and technical knowledge. Special rules apply to projects in which investment costs exceed EUR 50 million.

Operating aid (defined as routine tasks or expenses for distribution, marketing and accounting) cannot be granted.

⁽¹⁾ Only the main terms of the definition of SME's are stated in the Internal EEA Guidelines. Reference is otherwise made to the original definition in the State Aid Guidelines.

ANNEX II

MAXIMUM FUNDING RATES FOR VARIOUS SCHEMES ADMINISTERED BY INNOVASJON NORGE — SIZE OF UNDERTAKINGS AND AREAS ELIGIBLE FOR AID

— () indicates that the scheme is only exceptionally relevant for the stated purposes and/or type of undertakings.

— Up to EUR 100 000 may be granted under all schemes on the basis of the rules on *de minimis* aid.

Measure — Scheme	Objective	SMEs (< 250 employees and two other criteria)		Large undertakings
		Small enterprises (< 50 employees and two other criteria)	Medium-sized enterprises (< 250 employees and two other criteria)	
'Landsdekkende innovasjonsordning'	Investments	15 %	7,5 %	0
	Soft aid	50 %		0
	Training aid (shall not be given from LI for the moment)	(Specific/general — 35 %/70 %)		(Specific/general — 25 %/50 %)
	R&D:			
	— Development activities for commercialisation	35 %		25 %
	Technical preparatory studies	75 %		50 %
	— (Individual Research, Technical preparatory studies)	(60 % 75 %)		(50 % 75 %)
'OFU/IFU'	R&D:			
	— Development activities for commercialisation	35 % (regional area + 5 %)		25 % (regional area + 5 %)
	Technical preparatory studies	75 %		50 %
	— (Individual research, Technical preparatory studies)	(60 % 75 %)		(50 % 75 %)
'Tilskudd til fylkeskommunene for regional utvikling'	Investments:			
	Zone A	30 %		25 %
	B	25 %		20 %
	C	20 % (25 %) (*)		10 % (15 %)
	Soft aid	50 %		0
	Training aid	Specific/general — 40 %/75 %		Specific/general — 30 %/55 %
	R&D:			
	— Development activities for commercialisation	40 %		30 %
	Technical preparatory studies	75 %		55 %
	— (Individual Research, Technical preparatory studies)	(65 % 75 %)		(55 % 75 %)

Measure — Scheme	Objective	SMEs (< 250 employees and two other criteria)		Large undertakings
		Small enterprises (< 50 employees and two other criteria)	Medium-sized enterprises (< 250 employees and two other criteria)	
'Omstilling og nyskapning'	Investments:			
	— Outside reg. area	15 %	7,5 %	0
	— Within reg. area	Zone A: 30 %, B: 25 % and C: 20 % (25 %) (**)		Zone A: 25 %, B: 20 % and C: 10 % (15 %)
	Soft aid:			
	— Outside reg. area	50 %		
— Within reg. area	50 %			
Training aid:	— Outside reg. area	Specific/general — 35 %/70 %		Specific/general — 25 %/50 %
	— Within reg. area	Specific/general — 40 %/75 %		Specific/general — 30 %/55 %
R&D:	<i>Outside reg. area:</i>			
	— Development activities for commercialisation	35 %		25 %
	Technical preparatory studies	75 %		50 %
	— (Individual research, Technical preparatory studies)	(60 % 75 %)		(50 % 75 %)
	<i>Within reg. area:</i>			
	— Development activities for commercialisation	40 %		30 %
Technical preparatory studies	75 %		55 %	
— (Individual research, Technical preparatory studies)	(65 % 75 %)		(55 % 75 %)	
'Etablererstipend'	<i>De minimis</i> aid	Max. NOK 400 000 (in spec. cases more but not over EUR 100 000)		

(*) Up to 25 %/15 % may be used for measures which can be expected to have a strong effect from a district policy point of view. In the counties of Vest-Agder, Rogaland and Hordaland the aid threshold may not be in excess of 20 %/10 %.

(**) Up to 25 %/15 % may be used for measures which can be expected to have a strong regional effect. In the counties of Vest-Agder, Rogaland and Hordaland the thresholds may not be in excess of 20 %/10 %.