

## III

(Other acts)

## EUROPEAN ECONOMIC AREA

## EFTA SURVEILLANCE AUTHORITY DECISION

No 244/14/COL

of 26 June 2014

concerning potential aid to the Nasjonal digital læringsarena (NDLA) [2015/1902]

(Norway)

The EFTA Surveillance Authority ('the Authority'),

HAVING REGARD to:

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

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

Protocol 3 to the SCA ('Protocol 3'), in particular to Article 7(2) of Part II,

HAVING called on interested parties to submit their comments according to those provisions <sup>(1)</sup>,

Whereas:

## I. FACTS

## 1. PROCEDURE

- (1) By letter dated 15 April 2010 (Event No 553725), Den Norske Forleggerforening, the Norwegian Publishers Association ('NPA'), sent the Authority a complaint alleging that unlawful state aid has been granted to the Nasjonal digital læringsarena ('NDLA'). By e-mail of 15 July 2011 (Event No 608593) the complainant provided additional information.
- (2) By letter dated 2 July 2010 (Event No 558201), the Authority requested additional information. By letter dated 9 September 2010 (Event No 568942), the Norwegian authorities replied to the information request. In addition, discussions between the Authority and the Norwegian authorities regarding the case took place at a meeting in Norway on 13-14 October 2010. Additional information from the Norwegian authorities was sent to the Authority by letter dated 1 December 2010 (Event No 579405).
- (3) The Authority requested additional information by letter dated 4 February 2011 (Event No 574762). The Norwegian authorities responded by letter dated 7 March 2011 (Event No 589528). The Norwegian authorities provided further clarifications by emails of 2 May 2011 and 12 August 2011 (Event Nos 596402 and 608596).

<sup>(1)</sup> OJ C 229, 8.8.2013, p. 31, and EEA Supplement No 44, 8.8.2013, p. 19.

- (4) On 12 October 2011 the Authority adopted Decision No 311/11/COL deciding that the measure did not constitute state aid within the meaning of Article 61(1) of the EEA Agreement ('the Decision') <sup>(1)</sup>. On 9 January 2012 the applicant brought an action against the Decision and, by its judgment in Case E-1/12 *Den norske Forleggerforening v EFTA Surveillance Authority* dated 11 December 2012, the EFTA Court annulled the Decision ('the Judgment') <sup>(2)</sup>.
- (5) Following the Judgment, the Authority adopted Decision No 136/13/COL on 27 March 2013 initiating a formal investigation <sup>(3)</sup>. The Norwegian authorities submitted their comments to the decision on 6 May 2013 (Event No 672024). The NPA submitted its observations on 31 July 2013 (Event No 679681). A number of comments were submitted from third parties between 2 September and 15 September 2013. These third party comments were forwarded to the Norwegian authorities by emails dated 4 October 2013 (Event Nos 685793, 685794, 685795, and 685797) and 7 October 2013 (Event Nos 685884, 685885, 685886, 685887, 685889) and by letter dated 29 October 2013 (Event No 688133).
- (6) Further to a request from the NPA, a meeting was held in Brussels on 16 October 2013 during which the NPA gave a presentation outlining further comments regarding the case. On 27 October 2013, the NPA sent a copy of its presentation material together with additional written comments (Event No 688135), which were forwarded to the Norwegian authorities on 29 October 2013. The Norwegian authorities submitted their comments on 29 November 2013 (Event No 691769).
- (7) The Authority requested further information by a letter dated 17 February 2014 (Event No 694424). The Norwegian authorities answered by letter dated 31 March 2014 (Event Nos 703980 and 703991, Annexes 1-28 in Event No 703987).

## 2. THE NDLA

- (8) The NDLA is an entity established by Norwegian county authorities on the basis of Section 27 of the Local Government Act <sup>(4)</sup>. It does not have legal personality.
- (9) Section 27 of the Local Government Act stipulates that municipalities or county authorities may join forces to undertake common tasks. The cooperation should take place through a board appointed by the relevant municipality or county authority. The board may be empowered to adopt decisions concerning the operation and organisation of the inter-municipal cooperation. Moreover, the provision stipulates that the articles of association of such cooperation should determine the appointment and representation in the board, the area of activities, whether the participating municipalities/county authorities should make financial contributions, whether the board may enter into loan agreements or in other ways make the participating municipalities/county authorities liable for financial obligations and, finally, how such cooperation should be terminated. Only municipalities and county authorities are allowed to participate in an inter-municipal cooperation. Neither the State, other state entities nor private parties can participate in such cooperations. Furthermore, the cooperation must be genuine in the sense that the law prohibits the management of the cooperation to be delegated to one county authority.
- (10) The establishment of the NDLA is described in section I.4.4.
- (11) The objective of the NDLA is to develop and purchase digital learning material with a view to publish the material on the internet free of charge for teachers and students to use. This is done by publishing the material on an open website. It has four main areas of activity: first, the development and supply of digital learning material for the upper secondary school; second, the procurement of digital learning material from third party suppliers; third, the quality control of learning material; and fourth, the operation of the website through which the digital learning material is published (these activities are hereafter also referred to as the 'purchase, development and supply of digital learning materials').

## 3. THE COMPLAINANT — THE NORWEGIAN PUBLISHERS ASSOCIATION ('THE NPA')

- (12) The NPA represents companies which are or could be active in the development and distribution of digital learning material.

<sup>(1)</sup> OJ C 92, 29.3.2012, p. 3, and EEA Supplement No 18, 29.3.2012, p. 3.

<sup>(2)</sup> Case E-1/12 *Den norske Forleggerforening v EFTA Surveillance Authority* EFTA Ct. Rep [2012], p. 1040.

<sup>(3)</sup> OJ C 229, 8.8.2013, p. 31, and EEA Supplement No 44, 8.8.2013, p. 19.

<sup>(4)</sup> LOV-1992-09-25-107 (Lov om kommuner og fylkeskommuner (kommuneloven)).

- (13) The complainant submits that the granting of funds to the NDLA for the purchase, development and supply of digital learning material constitutes unlawful state aid to the NDLA. In that regard the complainant emphasises that — in its view — the NDLA is not an integrated part of the public administration, but rather an undertaking within the meaning of the state aid rules. The complainant recalls that, according to established case law, an undertaking is an entity which is engaged in economic activity. The complainant suggests that according to the case law of the Court of Justice of the European Union ('Court of Justice'), an economic activity is an activity, which could, at least in principle, be carried out by a private undertaking in order to make a profit. As such, any entity carrying out an activity which could be carried out for profit, is engaged in an economic activity.
- (14) The complainant further submits that there was a market for digital learning material prior to the activities of the NDLA and that the NDLA now competes with established private undertakings offering digital learning resources. The complainant claims that on this basis the development and supply of digital learning resources constitutes an economic activity. The complainant further suggests that the other activities of the NDLA are closely linked to the development and supply of digital learning resources and are therefore also to be considered as economic in nature.
- (15) The complainant also argues that Article 59(2) of the EEA Agreement is not applicable and concludes that — in the absence of a notification — the Norwegian State has granted state aid contrary to the state aid rules.

#### 4. BACKGROUND

##### 4.1. THE EDUCATIONAL SYSTEM IN NORWAY

- (16) Education in Norway is provided through a system of free public schools. This system is divided into a compulsory elementary school (age 6 to 13), a compulsory lower secondary school (age 13 to 16), and a non-compulsory upper secondary school (age 16 to 19).
- (17) In 2006 the Norwegian authorities decided, in the course of the 'Knowledge Promotion Initiative' <sup>(1)</sup>, that all Norwegian schools were to emphasise certain basic skills in all subjects. One of these skills is the ability to learn a given subject by using digital information and communication technology. This requirement was introduced in the national curriculum for pupils in the 10-year compulsory school (i.e. school for grades 1 to 10) and for pupils in the first year of upper secondary education (i.e. school for grades 11 to 13) and apprenticeships. Under the Norwegian Education Act <sup>(2)</sup>, the county authorities are responsible for meeting these requirements.
- (18) Furthermore, in 2007, the Norwegian authorities amended the Education Act and obliged the county authorities to provide pupils with the necessary printed and digital learning materials free of charge. It should be noted that until that time, pupils in Norwegian upper secondary school (grades 11 to 13) had to purchase their learning material based on the choice of learning material designated by the schools in compliance with the national curriculum. The change was implemented after the Norwegian government examined possible modes for, and the economic consequence of, implementing free learning material in the upper secondary schooling system <sup>(3)</sup>.
- (19) According to a white paper <sup>(4)</sup>, the principle of providing free teaching material is not novel as it was already implicitly provided for in the prohibition on charging tuition fees, which could be interpreted as meaning that teaching material should also be free. However, the white paper recognised that the principle of free teaching material was not expressly regulated, by stating that:

'[T]he rule is new but is not intended to change the current law. The principle of free education is derived from Section 35 of the Secondary School Act <sup>(5)</sup> on education, third paragraph, which prohibits tuition fees being charged. The current system whereby students and apprentices have to buy their own learning materials and tools is not regulated by law.' <sup>(6)</sup> (unofficial translation)

<sup>(1)</sup> In Norwegian: 'Kunnskapsløftet'.

<sup>(2)</sup> LOV-2008-07-17-61 (Lov om grunnskolen og den vidaregåande opplæringa (Opplæringslova)).

<sup>(3)</sup> St. prp. No 1 Addition No 1 to the parliament (2005-2006) regarding amendments to the proposed State budget 2006 (In Norwegian: 'For budsjettåret 2006 Om endring av St. prp. nr. 1 om statsbudsjettet 2006').

<sup>(4)</sup> Proposition No 36 to the Odelsting (1996-1997), see p. 171.

<sup>(5)</sup> Now repealed LOV-1974-06-21-55 (Lov om vidaregåande opplæring), see Section 35, sub-section 3.

<sup>(6)</sup> See Proposition No 36 to the Odelsting (1996-1997) p. 171 (In Norwegian: 'Regelen er ny, men tek ikkje sikte på å endre gjeldande rett. Prinsippet om gratis opplæring går fram av lvgo. §35 tredje leddet om forbod mot å ta skolepengar. Ordninga med å påleggje elevar eller lærlingar å halde seg med undervisningsmateriell og utstyr til eige bruk er i dag ikkje særleg lovregulert.') and also the Norwegian government's letter 19 June 2006 which sets out the conditions and reasons behind the grant of NOK 50 million to digital learning equipment: [http://www.regjeringen.no/nb/dep/kd/dok/andre/brev/-utvalgte\\_brev/2006/digitale-laremidler-i-videregaende-oppla.html?id=91754](http://www.regjeringen.no/nb/dep/kd/dok/andre/brev/-utvalgte_brev/2006/digitale-laremidler-i-videregaende-oppla.html?id=91754).

- (20) Indeed, the new sub-section 9 of the Education Act, Section 3-1, now explicitly states that:

'Education and training provided at publicly-maintained upper secondary schools or training establishments are free of charge. The county authority is responsible for providing the pupils with the necessary printed and digital teaching tool and digital equipment. The pupils cannot be required to pay any of the costs for such materials and equipment in excess of that which is decided in the regulation. (...)' <sup>(1)</sup> (unofficial translation)

#### 4.2. PROVISIONS IN THE REVISED STATE BUDGET

- (21) The obligation to provide free digital and physical learning material constitutes a considerable financial burden on the Norwegian county authorities. In view of these additional costs, the Norwegian government decided in 2006 to provide additional funds. The provision of these funds was included in a revised State budget which was adopted on 12 May 2006:

'The government's goal is to introduce learning materials in secondary schools free of charge. At the same time the government wants to stimulate the use of digital learning materials in secondary schools. As an element in the work for reduced costs for the single pupil through extended access to and use of digital learning materials, the Government suggests that NOK 50 000 000,- should be used for the development and use of digital learning material.

The applications from counties can include one, several or all secondary schools in the county and it can include one or several topics. The goal with this contribution is to stimulate the development and use of digital learning material and to contribute to the reduction of the pupils costs related to learning materials.

The funds may be used for the procuring of or the local development of digital learning material. The funds shall not be used for developing digital infrastructure. The plan is to give (sic.) [priority] to applications based on cooperation between counties.' <sup>(2)</sup> (unofficial translation by the Norwegian authorities)

##### 4.2.1. Invitation to Submit an Application

- (22) In a letter dated 19 June 2006 the Ministry of Education and Research submitted an invitation to the county authorities to apply separately or jointly for the NOK 50 million that had been made available by 15 August 2006. The letter describes the objectives and the concept of the initiative as follows:

- 'To increase access to digital learning material in upper secondary education, as well as implementing widespread use of it.
- To enhance competence within upper secondary education and amongst school owners in purchasing and/or developing digital learning materials.
- Increase the volume and diversity of digital teaching material intended for upper secondary education.
- A reduction of student expenditure related to the acquisition of teaching material.' (unofficial translation by the Norwegian authorities)

(...) In the [revised State budget] for 2006 the government states the following:

'The funds can be used to purchase digital learning resources and to develop locally digital learning resources.' <sup>(3)</sup> (unofficial translation)

##### 4.2.2. Creation of the NDLA

- (23) In August 2006, the heads of education of the 19 Norwegian county authorities met to discuss the possibility of a joint application for the funds. While the county authority of Oslo decided not to participate in a cooperative

<sup>(1)</sup> LOV-1998-07-17-61 (Lov om grunnskolen og den videregående opplæringa (opplæringslova)), the Norwegian authorities' unofficial translation provided in its letter of 2.5.2013 (Event No 691771) of the Education Act, Section 3-1, sub-section 9 which in Norwegian states 'Opplæringa i offentleg videregående skole eller i lærebedrift er gratis. Fylkeskommunen har ansvaret for å halde elevane med nødvendige trykte og digitale læremiddel og digitalt utstyr. Elevane kan ikkje påleggjast å dekkje nokon del av utgiftene til dette utover det som følgjer av forskrift. (...)'.  
<sup>(2)</sup> See Annex 2 to the Complaint, Addition to the State budget (St. prp. No 66 (2005-2006)), p. 21, chapter 225, item 62 (Event No 553728).  
<sup>(3)</sup> See Annex 3 (Event No 553729): Letter from the Ministry of Education and Research dated 19 June 2006, with a deadline for the grant application on 15 August 2006.

project, the other 18 county authorities decided to enter into an inter-municipal cooperation and to set up the NDLA to manage the process for an indefinite period. Each of these county authorities subsequently adopted the following resolution:

'The County Council passes a resolution for the following counties, Akershus, Aust-Agder, Buskerud, Finnmark, Hedmark, Hordaland, Nordland, Nord-Trøndelag, Møre og Romsdal, Oppland, Rogaland, Sogn og Fjordane, Sør-Trøndelag, Telemark, Troms, Vest-Agder, Vestfold and Østfold, to establish an inter-municipal cooperation, the NDLA, with its own Board in accordance with §27 of the Local Government Act. The purpose of this collaboration is to facilitate the purchase, development, deployment and organisation of digital learning resources for all subjects in upper secondary education. The result shall be free digital learning material that facilitates active learning and sharing (...)' <sup>(1)</sup> (unofficial translation by the Norwegian authorities)

- (24) On 1 December 2012, Akershus decided to leave the NDLA, but then decided to rejoin the NDLA as of 1 January 2014. According to the preface to the 2012 NDLA annual report 'Akershus county authority resigned its membership due to low visitor numbers from their own schools (...)' <sup>(2)</sup> (unofficial translation). According to the information on the NDLA website, Akershus' reason for rejoining was that '[s]ince its withdrawal from the NDLA, the use of the subjects at ndla.no has increased enormously.' (unofficial translation), meaning that the NDLA, as of today, consists of 18 county authorities.

#### 4.3. FUNDS FOR THE COUNTY AUTHORITIES

- (25) The application for the State funds was submitted jointly by the 18 county authorities to the Ministry of Education and Research on 15 October 2006, which gave its preliminary approval with a grant of NOK 2 million for the project planning and another NOK 15 million for the development and purchasing of content (i.e. a total of NOK 17 million). The grant for NOK 15 million was not to be awarded before the project plan was approved <sup>(3)</sup>. The project plan, which was received on 16 February 2007, was approved on 20 April 2007 and the additional NOK 15 million was granted subject to a number of conditions:

'The funds shall be used for the purchasing, development and/or adaptation of digital learning tools in the subjects Norwegian, and natural sciences, for VGI <sup>(4)</sup>, from fall 2007

(...)

The Ministry requests further that the county authorities jointly identify a responsible legal entity that will take care of the county authorities' responsibility for digital learning resources under this initiative. Such an entity can be e.g. a corporation, an inter-municipal cooperation or a host county authority but it cannot itself engage in economic activity.

(...)

The Ministry expects that the purchase of digital learning materials and development services are performed in accordance with the regulations for public procurement. The development of digital learning resources by county authority employees is to be regarded as an activity for its own account, provided that the county authorities do not gain any profits from this activity. The development by people who are not county authority employees must be regarded as the purchase of services and should be evaluated based on the rules and regulations for public procurement in the usual way.' <sup>(5)</sup> (unofficial translation)

<sup>(1)</sup> See Annex 15 (Event No 553808) to the complaint: Memo from the administrative head in the Department of Education and Training in Sogn og Fjordane county authority, see link [http://www.sjf.no/sff/K2PUB.nsf/viewAttachments/C1256B3B0048DA1DC12576320029B7D6/\\$FILE/09039906.pdf](http://www.sjf.no/sff/K2PUB.nsf/viewAttachments/C1256B3B0048DA1DC12576320029B7D6/$FILE/09039906.pdf)

<sup>(2)</sup> See annual report of NDLA 2012 (Event No 672038), p. 5, attached to the submission of the Norwegian authorities 6 May 2013. Original text in Norwegian 'Akershus fylkeskommune meldte seg ut med bakgrunn i lave besøkstall fra egne skoler, (...)'.  
<sup>(3)</sup> See Annex 11 to the Complaint: NDLA Project plan dated 16 February 2007 (Event No 553952), p. 3.

<sup>(4)</sup> VGI stands for 'Videregående No 1' and relates to the first of the three secondary education school years according to the new 'Kunnskapsløftet' reform of 2006, see information on the website of the Norwegian Directorate for Education and Training [http://www.udir.no/Vurdering/Vitnemal-og-kompetansebevis/Artikler\\_vitnemal/Foring-av-vitnemal-og-kompetansebevis-for-videregaende-opplaring-i-Kunnskapsloftet-2014/12-Dispensasjoner-og-forsok-innvilget-av-Utdanningsdirektoratet-1/](http://www.udir.no/Vurdering/Vitnemal-og-kompetansebevis/Artikler_vitnemal/Foring-av-vitnemal-og-kompetansebevis-for-videregaende-opplaring-i-Kunnskapsloftet-2014/12-Dispensasjoner-og-forsok-innvilget-av-Utdanningsdirektoratet-1/).

<sup>(5)</sup> See Annex 4 to the Complaint, letter to the county authorities from the Ministry of Education and Research dated 20 April 2007 (Event No 553730), see third paragraph on p. 1 and fourth paragraph on p. 2.

- (26) Following the approval of the funds the Ministry of Education and Research transferred NOK 30,5 million over a period of three years (NOK 2 million and 15 million in 2006-2007, NOK 9 million in 2008 for the development of (digital) learning material and NOK 4,5 million in 2009 for infrastructure and technical support) to the NDLA project (see summary in table below in paragraph 27) <sup>(1)</sup>.
- (27) In addition to this, following the amendment of the Education Act in 2007, the county authorities were compensated for the obligations to provide (physical and digital) learning material through an increase in the county authority grant scheme from the Ministry of Local Governments and Regional Development, which was renamed the Ministry of Local Governments and Modernisation as of 1 January 2014 <sup>(2)</sup>. This compensation was based on the estimated costs of providing learning materials in all subjects. The compensation amounts are summarised below <sup>(3)</sup>:

Year	2006-2007	2008	2009	2010
State grant to the county authorities in order for them to provide free learning material (general)	NOK 287 million	NOK 211 million	NOK 347 million	NOK 308 million
Grant from Ministry of Education and Research to NDLA (specific)	NOK 17 million	NOK 9 million	NOK 4,5 million <sup>(1)</sup>	—

<sup>(1)</sup> See paragraph 31 below.

#### 4.3.1. Funding of the NDLA by the County Authorities

- (28) The participating county authorities decided to use part of the funds from the general grant scheme, referred to in paragraph 27 above, for the NDLA project. The county authorities' budget allocation is summarised below <sup>(4)</sup>:

Year	2008	2009	2010	2011	2012
Grant from the county authorities <sup>(1)</sup> to the NDLA	NOK 21,1 million	NOK 34,7 million	NOK 58,8 million <sup>(2)</sup>	NOK 57,7 million <sup>(3)</sup>	NOK 64,9 million <sup>(4)</sup>
Percentage/amount of the county authorities budget for free learning materials to the NDLA	10 %	10 %	20 %	NOK 355 per student	NOK 400 per student

<sup>(1)</sup> Numbers are provided by the Norwegian government 9.9.2010 (Event No 568942), p. 8.

<sup>(2)</sup> See Annual report 2011, item 5.4.1 (Event No 672037).

<sup>(3)</sup> Ibid.

<sup>(4)</sup> See Annual report 2012, item 6.1 (Event No 672038).

- (29) Whilst the manner in which the funds were funnelled to the NDLA changed over time, the ultimate source of the funding remained the same, namely grants from the State, through the Ministry of Education and Research and the Ministry of Local Governments and Modernisation.
- (30) Indeed, in its first year of operation, the NDLA was granted funds directly from the Ministry of Education and Research (NOK 17 million in 2007). Then in its second and third year, the NDLA was financed both directly from the State, as well as from the county authorities, which allocated part of their grants from the State to the NDLA.

<sup>(1)</sup> See submission from the Norwegian authorities dated 9 September 2010 (Event No 568942), p. 6-8, see especially table provided on p. 6.

<sup>(2)</sup> See the division of the budget St. prp. No 1 (2006-2007) 'yellow book' at link: <http://www.regjeringen.no/nb/dep/fin/dok/regpubl/stprp/20062007/stprp-nr-1-2006-2007-/10/4.html?id=298021>

<sup>(3)</sup> See submission from the Norwegian authorities dated 9.9.2010 (Event No 568942), p. 6-8, see especially the table provided on p. 6.

<sup>(4)</sup> The Authority understands that the allocation method has remained unchanged with regard to the years 2013 and 2014.

- (31) The Ministry of Education and Research only covered the cost of the technical support and infrastructure to the NDLA, i.e. up-scaling and moving of the content management system, of NOK 4.5 million in 2009, as the financial responsibility for free teaching materials was transferred to the county authorities as of 1 July 2009 <sup>(1)</sup>.
- (32) From 2010 until now, the NDLA has been financed solely from the county authorities' budgets, which in turn use the funds they receive from the general grant scheme administered by the Ministry of Local Governments and Modernisation.

#### 4.3.2. *Legal Basis for the Funding*

- (33) The legal basis for the funds paid by the Ministry of Education and Research to the NDLA is the State budget resolution of the Parliament in combination with the delegation of competence to the Ministry of Education and Research to approve applications for grants.
- (34) The legal basis for the grants from the county authorities to the NDLA is to be found in the budget resolutions of the participating county authorities <sup>(2)</sup>.

#### 4.4. ESTABLISHMENT OF THE NDLA <sup>(3)</sup>

##### 4.4.1. *Ad hoc Cooperation: 15 October 2006 — 1 July 2009*

- (35) From 15 October 2006 <sup>(4)</sup> until 1 July 2009, the NDLA was active as an *ad hoc* cooperation, before it was formally established as an inter-municipal cooperation pursuant Article 27 of the Local Government Act.
- (36) From 15 October until 15 February 2007, the county authorities participating in the NDLA focused on putting together a project plan to submit to the Ministry of Education and Research with a view to obtaining approval and funding for the NDLA. The project plan was received by the Ministry on 16 February 2007 and was approved in April 2007 <sup>(5)</sup>. At that time, the strategic decisions related to the project were taken by the 'forum for the county authorities Heads of Education' (FFU) <sup>(6)</sup>. The day-to-day management of the project was led by a board of directors, appointed by the FFU, composed of five members; these five members were also directors of education at county authority level. According to the information provided by the Norwegian authorities the board consisted of at least one representative from the three training regions (i.e. Northern Region, South Western Region and Eastern Region) and the leader of the FFU <sup>(7)</sup>.
- (37) In addition to these five board members, four employees from different county authorities worked on the project <sup>(8)</sup>. The NDLA's board of directors followed an agreed mandate established by the participating county authorities, which included two specific goals <sup>(9)</sup>:
- (i) Establishing an organisation that could offer free accessible digital learning material with the long term goal of covering the need of every topic and topic-area in upper secondary schools; and
  - (ii) Offering digital learning material covering two specific topics, namely Norwegian language and science (second grade), in upper secondary schools before the autumn of 2007.

<sup>(1)</sup> See Annex 15 to the Complaint (Event No 553808); memo from the administrative head in the Department of Education and Training in Sogn og Fjordane county authority, see under heading Financing and expansion on p. 7.

<sup>(2)</sup> See the response from the Norwegian authorities dated 31 March 2014 (Event No 703980 and 703991) and the attachments 5-22 (Event No 703987).

<sup>(3)</sup> The EFTA Court noted that, in the Articles of Association of the NDLA, the entry into force of the formalised cooperation was set for 1 July 2009 (Case E-1/12 *Den norske Forleggerforening*, paragraph 115 (cited above)). At the same time, the EFTA Court noted that a letter from the Norwegian authorities referred to 1 January 2010 as the entry into force of the inter-municipal cooperation (The EFTA Court refers to the submission from Norway dated 9 September 2010, p. 3). In view of the above, and taking into account that the NDLA was already active as an *ad hoc* cooperation before it was formally established, the EFTA Court found that the Authority should have investigated the effects of the organisational changes and legal status of the NDLA on its decision-making process and sources of funding. Further, the EFTA Court found that the Authority should have investigated how the organisational and legal status of NDLA had changed over time (Case E-1/12 *Den norske Forleggerforening*, paragraph 117 (cited above)).

<sup>(4)</sup> The date of the application for the grant by the 18 county authorities.

<sup>(5)</sup> See Annex 11 to the Complaint, NDLA Project plan dated 16 February 2007 (Event No 553952) p. 14.

<sup>(6)</sup> The Norwegian wording is: 'Forum for fylkesutdanningsjefer'.

<sup>(7)</sup> See letter from the Norwegian authorities dated 31.3.2014 (Event No 703991), p. 7.

<sup>(8)</sup> Submission by Norwegian authorities dated 6.5.2013 (Event No 672024).

<sup>(9)</sup> NDLA Project plan, bullet points one and two under sub heading 2.2.

- (38) In order to benefit from state funding, the Ministry of Education and Research required that a legal entity be responsible for the project. As a result of this request, the county authority of Hordaland was appointed as the responsible legal entity. This was confirmed by way of a decision by the Hordaland county authority on 16 October 2007 <sup>(1)</sup> and consented to by the other participating county authorities through their own boards.
- (39) During the course of 2008 and 2009, the participating county authorities discussed how the NDLA should be organised for the future. The objective was to formalise the arrangement whilst minimising the changes needed to the existing cooperation <sup>(2)</sup>. Eventually, the boards of all the county authorities passed identical resolutions authorising the county authorities to participate in an inter-municipal cooperation in accordance with Section 27 of the Local Government Act. The resolutions stated that the goal of the NDLA was to buy, develop and distribute digital learning material in all subjects that are taught in upper secondary schools in Norway. The county authorities decided that the collaboration should not be a separate legal entity and this was reflected in the NDLA Articles of Association <sup>(3)</sup>. The NDLA was formally established as an inter-municipal cooperation on 1 July 2009, which is the date stated in the Articles of Association. This date has been confirmed by the Norwegian authorities as the correct date of establishment <sup>(4)</sup>. According to the information provided by the Norwegian authorities, the Articles of Association were slightly amended in 2012 <sup>(5)</sup>. This amendment did not change the NDLA's competence, as set out below in paragraph 52.

#### 4.4.2. *Inter-municipal cooperation — Supervisory Board and Management Board*

- (40) According to the Articles of Association, the FFU assumes the role of Supervisory Board <sup>(6)</sup> and thus remains responsible for the overall management, as was the case under the ad hoc cooperation phase. In the amended text of the 2012 Articles of Association, the reference to the FFU was removed, but the composition and function of the Supervisory Board remains unchanged. This reflects the purpose and structure of an inter-municipal cooperation where all the participating county authorities must be represented in the upper most decision-making body <sup>(7)</sup>.
- (41) According to the Articles of Association, the Management Board is composed of at least five members including at least one representative for each of the training regions (i.e. Northern Region, South Western Region and Eastern Region), i.e. the same set-up as in the ad hoc cooperation phase <sup>(8)</sup>.
- (42) According to the Articles of Association <sup>(9)</sup>, the task of the Management Board is to ensure that the NDLA is able to perform its duties under the Articles of Association, namely to ensure (1) that digital educational materials are available to users free of charge, (2) that upper secondary school is characterised by collaboration and sharing, (3) that students and teacher actively participate in teaching and learning, (4) that academic institutions and networks across the country are a driving force in the development of excellent digital learning material and (5) that suitable content and services are available for student and teacher needs.
- (43) Although the Management Board has the authority to incur financial obligations on behalf of the participants, the Articles of Association explicitly state that the Management Board only exercises its authority on the basis of delegation decisions of the Supervisory Board which may also instruct the Management Board and overrule its decisions. In the amended text of the 2012 Articles of Association, the power to incur financial obligations on the NDLA's participating members is implicit, but the functioning of the Management Board remains unchanged. In any case, any such financial obligations are limited by the budget that the participating county authorities have agreed upon for the NDLA. In that respect, it should be noted that all financial dealings of the NDLA are carried out by Hordaland county authority and the county purchasing unit BTV (see paragraph 54 below for further details). In addition, the Articles of Association states that neither the Management Board, nor the Supervisory Board, may enter into a credit arrangement or issue guarantees on behalf of the inter-municipal cooperation. In this regard the Norwegian authorities have explained that, in practice, neither the Supervisory Board, the Management Board nor the administration impose new financial obligations on the county authorities.

<sup>(1)</sup> The adopted decision stated the following: *'The county authority of Hordaland is legally responsible for NDLA, on behalf of the other county authorities that take part in the project'* (unofficial translation).

<sup>(2)</sup> Letter from the Norwegian authorities dated 6.5.2013 (Event No 672024), p. 6, second to last para.

<sup>(3)</sup> Articles of Association, see Annex 10 to the complaint (Event No 553953), which confirm that entry into force was 1.7.2009

<sup>(4)</sup> See letter from the Norwegian authorities dated 31.3.2014 (Event No 703991).

<sup>(5)</sup> Amended Articles of Association from 2012 (see Event Nos 703991 and 709565). Hordaland was the first county authority to adopt the amended Articles of Association on 16.1.2012 and Østfold the last having adopted the amendments on 25.10.2012; see e-mail from the Norwegian authorities 2.6.2014 (Event No 709742).

<sup>(6)</sup> In Norwegian 'representantskapet' (or 'Styret' in the 2012 version of the Articles of Association).

<sup>(7)</sup> See note 327 of the legal commentary to the Local Government Act Section 27, Gyldendals rettsdata, by Jan Fridthjof Bern, written 8.3.2012.

<sup>(8)</sup> In Norwegian: 'Driftsstyret' (or 'Arbeidsutvalg' in the 2012 version of the Articles of Association).

<sup>(9)</sup> See paragraph 51 below for further details regarding the NDLA's financial and budgetary matters.



#### 4.4.3. County Authority Decisions Accepting the inter-municipal cooperation

- (44) During the course of 2009, the 18 different county authorities adopted decisions to accept the agreement and the statutes establishing the NDLA as an inter-municipal cooperation. These decisions were taken at different times by the county authorities, but the vast majority did so before 1 July 2009, the date on which the county authorities had decided that the cooperation should take effect <sup>(1)</sup>.
- (45) The Norwegian authorities have stated that all of the 18 county authorities have been part of the NDLA cooperation since the ad hoc cooperation phase (with the exception of Akershus, which left and rejoined, see paragraph 24 above) and, further, that the formal cooperation began on 1 July 2009.
- (46) The first board meeting of the NDLA took place on 11 August 2009 <sup>(2)</sup>.

#### 4.5. NDLA BUDGET AND PURCHASING

- (47) The NDLA's level of funding in any given year is ultimately decided by the participating county authorities. The decision is based on a recommendation from the Management Board of the NDLA setting out the board's view on the level of funding, but the county authorities are not legally bound by such recommendation. The primary purpose of the funding <sup>(3)</sup> is to enable the NDLA to meet its stated goals, namely to buy, develop and distribute digital learning material for all topics that are taught in secondary schools covered by the legal obligation in the Education Act in Norway.
- (48) It should also be noted that the NDLA has no discretion in charging the county authorities, the State or any private customers for its services. In particular, the contributions to the NDLA are unilaterally fixed by the county authorities and the NDLA does not have any bargaining power as regards the amount of those contributions. If the Management Board wants to develop the activities of the NDLA, and therefore wants to increase the budget, the matter has to be presented to the Supervisory Board for approval. If the Supervisory Board decides to support an increase in the budget, the matter is then transferred to the county councils <sup>(4)</sup> for final approval.
- (49) In order to ensure that the NDLA carries out its public tenders in full compliance with the Public Procurement Act <sup>(5)</sup>, the NDLA has set out a public tender strategy <sup>(6)</sup>. According to the information received from the Norwegian authorities, one of the NDLA's main tasks is to manage the development of new digital learning material through public procurement. The decision to use public procurement is limited by the general objectives of the NDLA and its budget. Within these limitations, the NDLA has the freedom to decide on the content of the tenders <sup>(7)</sup>.
- (50) Since 2007, the NDLA has carried out nine major public tenders, with the assistance of Hordaland county authority <sup>(8)</sup>. These are related to digital learning materials, and range from the purchase of final products and elements, to access to images, videos and related support services.
- (51) As mentioned above, the management of the NDLA has the competence to impose financial obligations on the participating county authorities. According to the Norwegian authorities, the intention behind this provision was to make it clear that the board of the NDLA was competent to enter into agreements with other parties. To do so, the Management Board had to be able to impose obligations on the county authorities participating in the cooperation, since it would oblige the county authorities to use the funds made available for the NDLA according to the objectives of the NDLA <sup>(9)</sup>.

<sup>(1)</sup> See reply from the Norwegian authorities dated 31.3.2014 (Event No 703980 and 703991) and the attachments 5-22 (Event No 703987). In the reply from Norway dated 31.3.2014 (Event No 703991), it is specified that the two county authorities Sogn og Fjordane and Telemark mistakenly refer to the date 1.1.2010 in their respective resolutions. The Norwegian authorities also state that even though Troms county authority, for practical reasons, states in its decision that the entry into force of the cooperation was 1.1.2010, the correct date should have been 1.7.2009.

<sup>(2)</sup> Submission by Norwegian authorities dated 6.5.2013 (Event No 672024).

<sup>(3)</sup> The source of the NDLA's funding has been set out in detail in section 4.3 above.

<sup>(4)</sup> In Norwegian: 'fylkestinget'.

<sup>(5)</sup> LOV-1999-07-16-69 (Lov om offentlige anskaffelser (anskaffelsesloven)).

<sup>(6)</sup> See submission of the Norwegian authorities 7 March 2011 (Event No 589528), p. 54.

<sup>(7)</sup> This limited autonomy related to day-to-day activities of the NDLA is analysed in more detail in the assessment section below.

<sup>(8)</sup> Hordaland county authority acts, on behalf of all participating county authorities, as the legal entity responsible for contract signings.

<sup>(9)</sup> See the response from Norway dated 31.3.2014 (Event No 703991).

- (52) As mentioned above in paragraph 39, the Articles of Association were amended in 2012. However, the only significant change relates to the role of the CEO, which has been more clearly defined, in particular the restrictions which apply to his/her mandate. Overall though, the amendments to the Articles of Association do not change the Authority's assessment with regard to the NDLA's autonomy as the amendments have not changed the NDLA's mandate in any significant way. The Norwegian authorities have further expressed that the amendments made to the Articles of Association give a more accurate description of the NDLA's competence <sup>(1)</sup>.

#### 4.6. NDLA PERSONNEL AND ADMINISTRATION

- (53) The NDLA does not have any employees. In most cases, the personnel doing work for the NDLA are in a contractual employment relationship with one of the participating county authorities. In other cases, work is performed by external consultants, who, according to the information submitted by the Norwegian authorities, are employed by the companies who have won public tenders. Editorial staff members are either hired from the county authorities or are employed by contractors providing services to the NDLA. Editorial staff members from the county authorities are hired for a number of years on a part-time basis. This means they are still employed by the county authority, but the payment for the time they work for the NDLA comes from the NDLA's budget. The cost of the other editorial staff members is included in the fees that are paid to the contractors providing services that have been tendered out by the NDLA. The management team is hired from the county authorities for an indefinite period of time and thus do not have contractual employment relationship with the NDLA.
- (54) In practice, the county authorities are reimbursed three times per year by the NDLA for the use of their resources (i.e. to cover salaries, travel expenses etc.). Reimbursements are organised by Hordaland county authority. Furthermore, the NDLA has since the project phase used the county purchasing unit BTV <sup>(2)</sup> to carry out all its public procurement activities in respect of services to be bought on the market. In terms of services that the NDLA has procured, these include all technical administration, application management, service desk and development services of the NDLA Digital Learning Website <sup>(3)</sup>. There is no evidence that the NDLA's purchasing has exceeded its budget nor that the NDLA has procured any services or goods outside of the remit of its mandate.

### 5. COMMENTS TO THE OPENING DECISION

#### 5.1. THE COMPLAINANT

- (55) The NPA's comments can be summarised as follows:
- First, the scope of NDLA's service obligations are not properly defined.
  - Second, the financing system and structure of the NDLA is vague, which in turn leads to cross subsidisation from the county authorities that are not reflected in the accounts of the NDLA.
  - Third, the NDLA has already caused severe and irreparable harm to publishers operating in Norway, mainly due to the earmarking of public state resources from the county authorities to the NDLA, which allegedly limits the schools' ability to buy high quality learning materials from publishers.
  - Fourth, it is stated that county authorities not participating in the NDLA (Oslo and Akershus) <sup>(4)</sup> are at risk of getting poorer quality learning materials from the publishing houses due to the weakening of the publishing houses' ability to compete. The NPA refers to research on Open Educational Resources (OER) which has found that 'government-funded OER programmes can restrict choice for teachers and learners, because they undermine the ability of private sector providers to compete and thus to have the confidence to invest, so that these providers progressively withdraw from the market' (see third party observation from the International Publisher Association)
- (56) The NPA objects to the preliminary assessment and findings in the Authority's Decision 136/13/COL in which the Authority indicated that the NDLA did not qualify as an undertaking and would thus not be subject to the state aid rules.

<sup>(1)</sup> According to the information provided by Norwegian authorities the Articles of Association were slightly amended in 2012 (Event Nos 703991 and 709565).

<sup>(2)</sup> In Norwegian: 'Buskerud, Telemark, og Vestfold'-innkjøp.

<sup>(3)</sup> See the submission from Norwegian authorities dated 4.3.2011 (Event No 672032) which was attached to the comment to the opening decision.

<sup>(4)</sup> At the time of the submission, Akershus had not rejoined the NDLA yet.

- (57) The NPA alleges that the reduction in the county authorities' procurement budgets for learning materials is directly linked to the creation of the NDLA. In the NPA's view, this reduction accounts for the reduction in the market size as evidenced by the drop of gross turnover relating to books sold to upper secondary schools (NOK 392 million in 2008, and NOK 255 to 264 million in the years 2010 to 2012). NPA alleges that these numbers prove that there was a market at least prior to the creation of the NDLA. The NPA also refers to paragraph 13 of the Authority's guidelines on the application of the state aid rules to compensation granted for the provision of services of general economic interest ('SGEI') <sup>(1)</sup> in order to argue that despite 'the market closure [in-house production] an economic activity can exist where other operators would be willing and able to provide the service' and that the non-profit nature of the NDLA does not alter the assessment of it as an undertaking, as long as that 'offer exists in competition with that of other operators which do seek to make profit' <sup>(2)</sup>.
- (58) With regard to the assessment of the *Altmark* <sup>(3)</sup> criteria, the NPA alleges that they are not met as the NDLA is alleged to be highly inefficient.
- (59) It is also alleged that the NDLA does not produce a product only in the case of market failure, but also where such product is already available on the market. The NPA refers to the Authority's guidelines on SGEI paragraph 13 where it is stated that the 'EFTA States cannot attach specific public service obligations to services that are already provided [...] by undertakings operating under normal market conditions.'
- (60) Finally, with regard to the assessment of the NDLA as an SGEI provider, the lack of transparency is criticised. In that respect, the NPA refers to the conditions in the Transparency Directive 2006/111/EC <sup>(4)</sup> which is stated not to have been met by NDLA.

#### 5.2. OTHER THIRD PARTIES

- (61) The Authority has received comments from 11 interested third parties, namely: Associacao Portuguesa de Editores e Livreros (APEL), the Federation of European Publishers (FEP), the Polish Chamber of Books, the French Publisher Association, the Chamber of Commerce and Industry of Slovenia, the Danish Publisher Association, the Publisher Association (UK), the International Publisher Association (IPA), the Association of the Belgian Publishers (ADEB), the Publisher and Booksellers Association of Serbia and the Swedish Association of Educational Publishers.
- (62) The third parties all submit that the production and provision of free digital resources by a state-run entity such as the NDLA is unfair state-subsidised competition and should be found to be unlawful aid.
- (63) The FEP and the IPA submitted more extensive comments, which are summarised below:
- Unfair competition arising from the aid granted to the NDLA will substantially undermine the ability of private sector publishers to continue to provide high-quality resources for this market. Such unfair competition will negatively affect education in Norway and have a harmful effect on both teacher and student performance; and
  - The most effective strategy for allocating state funding is to focus on the demand (school budget) side and not to implement a supply-side subsidy of free material that is not subject to competition (as is the case for the NDLA). In the former case, teachers have the funds to choose freely from a range of high-quality resources including OER and professionally published material.

<sup>(1)</sup> OJ L 161, 13.6.2013, p. 12, and EEA Supplement No 34, 13.6.2013, p. 1.

<sup>(2)</sup> Case C-49/07 *MOTOË* [2008] ECR I-4863, paragraph 27.

<sup>(3)</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

<sup>(4)</sup> Transparency Directive (Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17), incorporated in the EEA Agreement Annex XV, point 1a (OJ L 266, 11.10.2007, p. 15); and EEA Supplement No 48, 11.10.2007, p. 12, e.i.f. 9.6.2007).

## 6. COMMENTS OF THE NORWEGIAN AUTHORITIES

- (64) The Norwegian authorities' position is that that the financing of the provision of free public upper secondary school may not be considered as state aid within the meaning of Article 61 of the EEA Agreement. The Norwegian authorities underline the fact that the NDLA primarily purchases learning materials via public procurement procedures in the market. It is only when the NDLA is unable to procure material of sufficient quality that it develops these materials in collaboration with teachers and the county authorities.

### II. ASSESSMENT

#### 1. THE PRESENCE OF STATE AID

- (65) According to Article 61(1) EEA '[s]ave as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

##### 1.1. ECONOMIC ACTIVITY

- (66) It follows from the above that state aid rules only apply to advantages granted to undertakings. Prior to examining whether the conditions for state aid are met in this case, it is necessary first to examine whether the NDLA qualifies as an undertaking within the meaning of Article 61(1) EEA. If this is not the case, then the support to the NDLA does not fall within the scope of Article 61(1) EEA.
- (67) It is established case law that the concept of an undertaking comprises '(...) any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed' <sup>(1)</sup>.
- (68) The Authority notes that the NDLA is essentially a cooperation between different county authorities. Thus the recipient of the state funds is not the NDLA itself but rather the individual county authorities cooperating in the NDLA project. However, as indicated above, any entity can be an undertaking within the meaning of the state aid rules irrespective of its legal status and the way it is financed. The decisive question is therefore whether the activity in question, can be considered to be of an economic nature. As detailed below in section II.1.1.2, the Authority has considered whether the NDLA's change in status, going from an ad hoc cooperation at its inception to a formal inter-municipal cooperation starting on 1 July 2009, had any impact on the classification of the NDLA's activities. The Authority has concluded that the change in status had no impact, since there were no material differences in the decision-making, the financing or the autonomy of the NDLA when it changed its status.
- (69) The NDLA purchases, develops and publishes digital learning material. The complainant submits that these activities are of an economic nature. In that regard the complainant emphasises that, until now, private suppliers have developed and published digital learning material. The complainant argues that by developing and publishing digital learning material of its own, the NDLA has entered into direct competition with these private suppliers.
- (70) The Authority observes that an economic activity is any activity consisting in offering goods and services on a market <sup>(2)</sup>. Whether a market exists or not may be dependent upon the way it is organised in the State concerned <sup>(3)</sup> and the classification of a particular activity as economic or not may thus change over time. The Authority recognises that a number of companies offer digital learning material as part of their economic activities.
- (71) However, it follows from the judgment of the EFTA Court in *Private Barnehagers Landsforbund* <sup>(4)</sup>, that the fact that an activity can be offered by private operators as an economic activity does not exclude the fact that it can also be offered by the State as a non-economic activity. In the *Private Barnehagers Landsforbund* case, the EFTA Court had to assess whether the operation of municipal kindergartens in Norway constituted an economic activity. The

<sup>(1)</sup> Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

<sup>(2)</sup> Case C-35/96 *Commission v Italy (CNSD)* [1998] ECR I-3851, paragraph 36.

<sup>(3)</sup> Joined cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

<sup>(4)</sup> Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct.Rep. 64.

complainant in this case had argued that the only relevant question in that regard was ‘(...) whether the municipalities are providing services on a given market which could, at least in principle, be carried out by private actors in order to make a profit’.

- (72) However, in its judgment the EFTA Court pointed out that ‘[w]hen the nature of an activity carried out by a public entity is assessed with regard to the State aid rules, it cannot matter whether the activity might, in principle, be pursued by a private operator. Such an interpretation would basically bring any activity of the State not consisting in an exercise of public authority under the notion of economic activity’<sup>(1)</sup>. Indeed, such an interpretation would unduly limit the discretion of states to provide certain services to their population. There are a number of cases in which it has been recognised that similar activities can be carried out both as non-economic as well as economic activities and where only the latter are subject to state aid rules. This has been accepted by the European courts in cases concerning health systems (e.g. private and public sickness insurances<sup>(2)</sup>), pension fund systems (e.g. private and public pension funds<sup>(3)</sup>) and the education sector (e.g. private and public kindergartens<sup>(4)</sup>).
- (73) In *Private Barnehegers Landsforbund*<sup>(5)</sup>, the EFTA Court further explained that, in order to establish whether a given activity is economic or not, the reasoning of the Court of Justice in its *Humbel* judgment<sup>(6)</sup>, which concerned the notion of ‘service’ within the meaning of the fundamental freedoms, could be applied to state aid cases.
- (74) In the field of education and research specifically, the European courts have held that the provision of certain services by establishments forming part of a system of public education and financed by the public purse did not qualify as the provision of services under Article 50 EC (now Article 57 TFEU). The Court of Justice held in *Commission v Germany*<sup>(6)</sup>, relying on the *Humbel* judgment in particular, that ‘by establishing and maintaining such a system of public education, normally financed from the public purse [...], the State does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas’<sup>(7)</sup>.
- (75) Further to the amendment of the Education Act (see paragraph 20 above), the Norwegian State has decided that the provision of learning materials, including digital learning materials, will be provided free of charge to students. This new provision forms an integral part of the system of public education. The question then to be answered relates to the implementation of this provision in practice, thus the qualification of the activity in question as economic or non-economic will depend on (i) its objective and (ii) the way it is carried out.

#### 1.1.1. Objective

- (76) The State, in establishing and maintaining the entity in question, must not seek to engage in gainful activity, but must rather exercise its power in order to fulfil its duties towards its population<sup>(8)</sup>. It is established case law, which is also reflected in the European Commission’s decisional practice, that in setting up and maintaining the national education system the State fulfils its duties towards its own population in the social, cultural and educational fields<sup>(9)</sup>. In that regard, the Norwegian government decided in the course of the 2006 educational reform that the State would provide learning material free of charge and all the county authorities except Oslo decided to comply with this obligation by pooling their resources through the setting up of the NDLA. As stated by the Norwegian authorities, the NDLA’s objective is to provide digital learning materials. In order to fulfil this duty, the NDLA primarily seeks to purchase the learning materials through public procurement procedures in the market. When the NDLA is unable to procure suitable material, it will develop this in close collaboration with the teachers and the participating county authorities<sup>(10)</sup>.

<sup>(1)</sup> Ibid., paragraph 80.

<sup>(2)</sup> Case C-160/91 *Poucet* [1993] ECR I-637.

<sup>(3)</sup> Case C-180/98 *Pavlov* [2000] ECR I-6497.

<sup>(4)</sup> Case E-5/07 *Private Barnehegers Landsforbund* (cited above).

<sup>(5)</sup> Case 263/86 *Humbel* [1988] ECR 5383, paragraphs 14-21.

<sup>(6)</sup> Case C-318/05 *Commission v Germany* [2007] ECR I-6957.

<sup>(7)</sup> Ibid., para. 68.

<sup>(8)</sup> Case 263/86 *Humbel* (cited above), para. 18.

<sup>(9)</sup> Ibid., para. 18; Case E-5/07 *Private Barnehegers Landsforbund* [2008] EFTA Ct. Rep. 64, para. 82; Commission decision N 118/2000 *France — Aide aux clubs sportifs professionnels* (OJ C 333, 28.11.2001, p. 6).

<sup>(10)</sup> See the Norwegian authorities’ letter of 29 November 2013 (Event No 691769).

- (77) According to the complainant, it follows from the judgments in *Humbel* and *Private Barnehagers Landsforbund*, that, while the activities dealt with in these judgments (i.e. giving courses and offering places in kindergartens) fall within the scope of the public education system, other activities (such as the purchase, development and supply of digital learning material) do not fall within the scope of the public education system, in particular, if a market for such activities was already in existence prior to the State's activities.
- (78) The Authority, however, does not see any indications that the Court of Justice or the EFTA Court intended to limit the scope of activities falling within the scope of public education in such a manner as suggested by the complainant (i.e. to actual teaching and the provision of kindergarten services). On the contrary, the Authority notes that EFTA States generally have a wide margin of discretion when choosing the activities they intend to offer to their population in matters of social, cultural and educational policy <sup>(1)</sup>.
- (79) The Authority observes that the purchase, development and supply of learning material is linked to the provision of teaching content and is thus closely linked to the actual teaching itself. The Authority finds that the activities that are being carried out by the NDLA in order for the county authorities to fulfil their educational functions are intertwined with social obligations, which are not comparable to an offer of a commercial character, and that subsidies are only granted in order to fulfil a very specific educational function. Indeed, the material being bought and produced by the NDLA is specifically tailored to meet the needs of the national curriculum of secondary school students and teachers. The complainant has, however, argued that it is important to distinguish between activities that are necessary for the provision of public education and those that are not — the complainant illustrates this point by stating that the NDLA could start producing furniture for schools, which the complainant submits would not be part of the public education remit. In that respect, the complainant states that the production of digital teaching material is not an inherent part of the public service obligation and thus should be considered as an economic activity <sup>(2)</sup>.
- (80) The Authority finds, contrary to the view of the complainant, that the production of furniture cannot be compared to the production of teaching materials designed to support a national curriculum. Indeed, the production of teaching materials is closely linked to the teaching activities of the public educational system, whilst that is unlikely to be the case with the production of furniture.

#### 1.1.2. *Open nature of the website*

- (81) With regard to the open nature of the website the complainant and third parties have argued that this is a problematic element by stating that: '[i]ronically, government-funded OER programmes can restrict choice for teachers and learners, because they undermine the ability of private sector providers to compete and thus to have the confidence to invest, so that these providers progressively withdraw from the market' <sup>(3)</sup>. As detailed below, the open nature does not change the Authority's assessment of the website material as non-economic.
- (82) The Authority notes that within the field of education, the Contracting Parties do not only have a considerable degree of discretion in deciding on the objective of their tasks, but also in determining how to fulfil that objective. The Norwegian authorities have opted to keep the NDLA website open. The effect of that decision is that the distribution of the digital learning materials is not limited to the pupils enrolled at the relevant schools in the relevant counties. However, the spread of knowledge beyond the immediate circle of indented addressees is a common practice in European teaching traditions. Indeed, lectures at European public universities are commonly open to the general public and universities regularly provide audio and audiovisual representations of lectures online. These practices can be seen as an extension of the education mission that do not automatically entail that the activities are economic in nature. In fact, in this particular case, the learning material forms the basis and the framework for teaching. This is also underlined by the fact that the development of learning material is dependent upon the curriculum which is determined by the public authorities. This point is also reflected in the scope of the NDLA's activities in the Articles of Association which refer to the objective of providing digital learning material tailored to the needs of pupils and teachers. This assessment is not altered by the fact that the activities were left to the market prior to the State's activities, since it cannot matter whether the activity might be (or indeed was) pursued by a private operator <sup>(4)</sup>.
- (83) The Authority therefore concludes that the open nature of the website does not entail that the activities of NDLA are economic in nature.

<sup>(1)</sup> C-218/00 *Cisal die Battistello Venanzi* [2002] ECR I-691, para. 31.

<sup>(2)</sup> See complainant's observation to the opening decision, paragraph 46 (Event No 679680).

<sup>(3)</sup> See complainant's observation to the opening decision, paragraph 8 (Event No 679680).

<sup>(4)</sup> See paragraph 70 above.

**1.1.3. The legal status from ad hoc- to inter-municipal cooperation had no effect on the decision making process and cannot have an impact on the classification of the activities as non-economic**

- (84) In its judgment annulling the Decision the EFTA Court addressed several aspects relating not to the nature of the activity as such but rather to the organisational aspects of the NDLA, its financing and its autonomy. These aspects relate to the practical implementation of the requirement to provide free learning materials and are addressed below.
- (85) The change of legal status from ad hoc cooperation to a formal inter-municipal cooperation according to the Local Government Act Section 27 had no effect on the decision making process (nor did the change in the funding have any implications on the organisation of the NDLA).
- (86) The complainant has not alleged that the scope of the NDLA's activities changed from its ad hoc cooperation phase to its formal establishment as an inter-municipal cooperation. Nevertheless, the EFTA Court points out that the lack of information about how the county authorities organised their cooperation to comply with their obligations to provide learning material in the NDLA ad hoc cooperation phase may have an impact on the classification of the activities as non-economic. For that reason the Court emphasised that the Authority should have carried out an investigation on the effects of the change in legal status on the decision making process within the NDLA <sup>(1)</sup>.
- (87) The management structure of the NDLA entity did not change when it was converted into an inter-municipal cooperation under the Local Government Act <sup>(2)</sup>. Furthermore, the scope of the NDLA's powers and the decision making processes did not change. As such, the scope of the NDLA's decisional making powers did not change.
- (88) The Authority has compared the structure of the NDLA in its ad hoc cooperation phase <sup>(3)</sup> with the structure in the inter-municipal cooperation phase <sup>(4)</sup> and found that there are no material differences. The goal of the NDLA in both phases has been to develop and offer free digital learning material that covers all subjects in the upper secondary school <sup>(5)</sup>. Furthermore, in both phases, the NDLA consisted of a similar trio of decision making bodies. The FFU became the Supervisory Board of the cooperation under the Local Government Act and its Management Board, composed of five members, was appointed by the Supervisory Board as it had been in the ad hoc cooperation phase, when the management board was appointed by the FFU. Also the composition of the management group/board has consisted of the same members in both phases, i.e. the leader of the FFU, and at least one representative for each of the training regions (i.e. Northern Region, South Western Region and Eastern Region) <sup>(6)</sup>. Finally, the NDLA has had a team responsible for the day-to-day management in both phases <sup>(7)</sup>.
- (89) As confirmed by the Norwegian authorities, the change of legal status from the ad hoc cooperation phase to an inter-municipal cooperation phase according to the Local Government Act section 27 had no effect on the decision making process, which is also illustrated and confirmed by the information summarized above <sup>(8)</sup>.
- (90) The ultimate source of the NDLA funding has not changed over time (i.e. funds from the State); rather the manner in which the funds were channelled to the NDLA changed. Indeed, in the early stages of the NDLA, funds were received directly from the Ministry of Education and Research, whilst later on, the NDLA was funded from the participating county authorities' budgets (those budgets being funded by the general grant scheme). The fact remains that the NDLA has been and is fully funded by public authorities and distributes the learning material free of charge. Neither the schools nor the pupils pay any contribution to the NDLA. The Authority further notes, that there are no indications that the NDLA engages in any other form of activity, which could be considered as being economic in nature. There is no connection between the actual costs of the service provided and the fee paid by those benefiting from the activity. Further, the NDLA's activities are funded entirely by the public purse and not through remuneration <sup>(9)</sup>.

<sup>(1)</sup> Case E-1/12 *Den norske Forleggerforening* (cited above), paragraph 117.

<sup>(2)</sup> This is confirmed in the Norwegian authorities' submission of 2.5.2013 (Event No 672024) at p. 6.

<sup>(3)</sup> See the NDLA Project Plan; Annex 11 to the Complaint (Event No 553952), p. 2.

<sup>(4)</sup> Articles of Association, see Annex 10 to the Complaint (Event No 553953).

<sup>(5)</sup> See Project Plan; Annex 11 to the Complaint (Event No 553952), item 2.2 'result goal' bullet No 1, p. 4.

<sup>(6)</sup> Letter by the Norwegian authorities dated 31.3.2014 (Event No 703991), p. 7-8; this has been confirmed.

<sup>(7)</sup> See Project Plan Annex 11 to the Complaint (Event No 553952), item 3.1 'task related to the project management', p. 5 and the Articles of Association.

<sup>(8)</sup> Norwegian authorities' letter dated 31.3.2014 (Event No 703991), p. 11.

<sup>(9)</sup> Case E-05/07 *Private Barnehagers Landsforbund* (cited above), paragraphs 80-83.

**1.1.4. The county authorities pooling of State resources in order to fulfil their obligation to provide digital learning materials into an inter-municipal cooperation is non-economic in nature**

- (91) The Authority has concluded that the activities of the NDLA relating to the provision of digital learning materials is closely linked to the broader teaching mission of the county authorities and that it is non-economic in nature. In the following, the Authority assesses an issue raised by the EFTA Court.
- (92) The EFTA Court found that it was unclear from the Decision whether the obligation to provide digital learning material free of charge falls upon the county authorities or upon the NDLA <sup>(1)</sup>. The EFTA Court noted that in the Decision, the Authority *'refers to the Norwegian legislation and states that it obliged the counties to provide the pupils with the necessary printed and digital learning materials free of charge'* <sup>(2)</sup>. The EFTA Court further noted that in the assessment on the autonomy of the NDLA, the Decision states that the NDLA cannot decide on charging fees to the end consumer *'(...) since the legal framework obliges the NDLA to provide its services free of charge'* <sup>(3)</sup>. The judgment also refers to the Authority's statement at the oral hearing that it is the county authorities which bear the statutory obligation to offer this service free of charge and that they had decided to offer this service jointly through the NDLA <sup>(4)</sup>.
- (93) In light of this, the EFTA Court considered the above mentioned statements in the Decision to represent an implicit contradiction as it was not clear who the NDLA's client was.
- (94) The legal framework in which the NDLA operates consists of a number of different elements. First, there are statutory obligations under national law (such as the Education Act), which are imposed upon the county authorities. The 2007 amendment to the Education Act, for instance, (see paragraph 20 above) imposed an obligation on the county authorities to provide school children with digital material free of charge. Second, there were various administrative acts which were adopted in order for the county authorities to discharge this statutory obligation. These included resolutions (such as the resolutions passed by the county authorities), as well as other administrative acts such as the April 2007 award of funding by the Ministry of Education and Research. Finally, the Articles of Association of the NDLA, and the mandate before that, implemented the county authorities' statutory obligation into a legal obligation on NDLA to provide digital materials free of charge.
- (95) This framework was also described in the Norwegian authorities' submission of 2 May 2013 in which they confirmed (i) the county authorities' statutory obligation (see Section 1 of the submission), (ii) the obligation imposed on the NDLA's board of directors, in the ad hoc cooperation phase, to work towards offering free digital learning materials (see first bullet point under result goals of the Mandate <sup>(5)</sup>), and (iii) that the resolutions adopted by the county authorities establishing the NDLA stated that the ultimate goal of the NDLA was to offer free digital material (see p. 6 of the submission).
- (96) As such, the participating county authorities have chosen to address their statutory obligation to provide free digital material to the pupils by setting up the NDLA inter-municipal cooperation, which in turn operates within a legal framework (including the county authority resolutions and the Articles of Association) that has been established to enable the county authorities to discharge their statutory obligation.
- (97) In summary, the NDLA can be described as a cooperation between the participating county authorities that has been created to enable the county authorities to pool their resources. So rather than purchasing and developing digital materials on a county authority-by-county authority basis, the vast majority of the county authorities have decided to combine their resources in order to address their statutory obligation (this type of cooperation between the county authorities was envisaged by the Ministry of Education and Research itself when it invited the county authorities to apply for funding in 2006) <sup>(6)</sup>. The county authorities are therefore, though this cooperation, *'exercising their powers in order to fulfil their duties towards their population'* <sup>(7)</sup>.

<sup>(1)</sup> Case E-1/12 *Den norske Forleggerforening* (cited above), paragraphs 121-123.

<sup>(2)</sup> The EFTA Court seems to refer to para. 12 and footnote 4 of the annulled decision according to which *'Section 3-1 and 4A-3 of the Education Act states that the county authority is responsible for providing pupils with the necessary printed and digital teaching material as well as digital equipment free of charge.'*

<sup>(3)</sup> The EFTA Court refers to para. 45 of the annulled decision in paragraph 121 of the Judgment.

<sup>(4)</sup> Case E-1/12 *Den norske Forleggerforening* (cited above), paragraph 123.

<sup>(5)</sup> Attachment 24 (Event No 703987), p. 93.

<sup>(6)</sup> See Annex 3 (Event No 553729); letter from the Ministry of Education and Research dated 19 June 2006.

<sup>(7)</sup> Case E-05/07 *Private Barnehagers Landsforbund* (cited above), paragraph 80.



- (98) This has been confirmed by the Norwegian authorities in their submission of 31 March 2014 where it is reiterated that the collaboration between the county authorities is an integral part of the county authorities' efforts to provide free public upper secondary education in Norway.
- (99) As regards budget issues, the NDLA has no decisional power. Although its Management Board recommends a level of funding for the following budget, it is only a recommendation which the participating county authorities take into account when determining the NDLA's budget. In terms of procurement and purchasing, the NDLA follows a public tender strategy which was adopted in order to ensure that the NDLA's public tenders are in full compliance with the Public Procurement Act <sup>(1)</sup>.
- (100) For purchasing more generally, the NDLA's powers are set out in the Articles of Association, which limit the scope of the NDLA's purchasing activities to the objectives that have been set for the NDLA, namely the purchasing and development of digital learning material <sup>(2)</sup>. Clearly, the NDLA needs to be able to carry out its tasks in an effective manner and it would make little sense for the participating county authorities or the Supervisory Board to get involved with every single purchase of digital learning material for instance. Hence, the Articles of Association provide for some autonomy for the NDLA's day-to-day activities, specifically in terms of purchasing, but this autonomy is limited by the NDLA's stated tasks and its budget (i.e. it goes no further than what is necessary ultimately to fulfil the statutory requirements imposed by the State on the county authorities) <sup>(3)</sup>.
- (101) Finally, it is worth noting that the case law of the Court of Justice makes clear that there is no need to dissociate the purchasing activities 'from the subsequent use to which they are put in order to determine the nature of that purchasing activity' <sup>(4)</sup>. Thus, to the extent that the NDLA's activities in terms of providing free digital learning material is considered to be non-economic in nature, it follows that any related purchasing activities will also be considered non-economic. Since the Articles of Association makes clear that the NDLA may only purchase goods or services that are necessary for the fulfilment of its goal (i.e. the provision of free digital learning material), such purchasing activities will necessarily be related to the non-economic activity.
- (102) From the facts set out in Section I.4.6 above, it is apparent that the NDLA does not have any employees nor does it have its own premises or infrastructure. Most of its workforce consists of county authority employees who are seconded (either part-time or full-time) to the NDLA for a certain period of time. The NDLA then simply reimburses the relevant county authority for the time its employee has spent working on NDLA projects. The rest of the workforce consists of external consultants which have won bids in public procurement procedures that the NDLA finances through its budget. On the one hand therefore, the NDLA has no control over the costs of the bulk of its staff and, on the other, the NDLA has limited decisional-making power in respect of the services it puts out for tender, as it is bound by its public tender strategy and its decisions are ultimately subject to the county authorities' control through the Supervisory Board. Consequently, in matters of infrastructure and personnel, the NDLA has very little autonomy.
- (103) In cases in which the activity in question is carried out by entities other than the State itself, one of the issues to be determined is whether the recipient of the funds (public or private) is subject to the control of the State and in particular whether the recipient merely applies the law and cannot influence the statutory conditions of the service (i.e. the amount of the contributions, the use of assets and the fixing of the level of benefits) <sup>(5)</sup>. If, on the contrary, the recipient has significant discretion vis-a-vis the State as regards the commercial parameters of its activities (e.g. prices, costs, assets and employees), it would be more likely to constitute an undertaking.

<sup>(1)</sup> LOV-1999-07-16-69 (Lov om offentlig anskaffelse (anskaffelsesloven)).

<sup>(2)</sup> The NDLA's purchasing is also limited by the availability of funds within the budget, since the Articles of Association prevent the NDLA from entering into loan or financing arrangements.

<sup>(3)</sup> Norwegian authorities' letter dated 31.3.2014 (Event No 703991), p. 13. Furthermore, these limitations are also partially reflected in the Local Government Act. In the white paper Ot. prp. No 42 (1991-92), p. 112, it is stated that 'the board may only be delegated functions that are related to the actual activity that the cooperation has been tasked to carry out'. It is also clear that the limitation in the delegation power is prescribed by the Local Government Act for certain decisions, as for example decisions concerning an economic plan (Section 44 No 6) and the annual budget (Section 45 No 2); these provisions are also applicable to inter county authority relations.

<sup>(4)</sup> Case C-205/03P *FENIN v Commission*, ECR [2006] II-6295, paragraph 26.

<sup>(5)</sup> Case C-160/91 *Poucet* (cited above), paras. 15 and 18; Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraphs 46-57; Case C-218/00 *Cisal die Battistello Venanzi* [2002] ECR I-691, paragraphs 31-46. These cases concern health and social insurances. However, the fact that the Commission explicitly refers to these cases in the context of professional services indicates that the assessment can be generally applied (see Commission Communication 'Report on Competition in Professional Services' of 9.2.2004 (COM(2004) 83 final, footnote 22).

- (104) The complainant indicated that NDLA should be considered as an undertaking distinct from the State or the county authorities from which it received the funds in question. However, based on the information provided to the Authority, it is clear that NDLA is an integrated part of the public administration and is — in any case — subject to strict State control. According to existing case law, an entity is subject to the control of the public authorities (and thus not independent from the State) if it was given its task by statute and if the public authorities determine both the costs and the revenues of its activities <sup>(1)</sup>. In that regard the Authority notes that the participating county authorities have — in view of a requirement laid down in the revised State budget for 2006 — established the NDLA as an inter-municipal cooperation and have given it its task by each adopting identical resolutions.
- (105) Furthermore, the county authorities control the cost parameters of the activities since these costs are limited to the contributions unilaterally fixed by the county authorities through the ordinary budget processes. Moreover, the NDLA cannot take decisions regarding the costs of its employees or its assets since it is the county authorities that (i) decide on the secondment of the necessary staff and (ii) provide the premises as well as technical equipment. Finally, the NDLA does not have any powers to set fees to the end customers (i.e. pupils or schools) since the legal framework obliges the NDLA to provide its services free of charge.
- (106) Thus, the NDLA — in carrying out its activity — merely complies with the law and cannot influence the amount of the contributions, the use of assets or the fixing of the level of benefits in the way a commercial operator could do. On the contrary, the NDLA is an integrated part of the public administration of the county authorities and thus can be said to be subject to state control.
- (107) As illustrated above, the NDLA cannot expand the scope of its activities on its own. The county authorities are ultimately responsible for this and they decide what the NDLA does either through resolutions or through the Supervisory Board <sup>(2)</sup>. The budget is determined by the county authorities (following a recommendation from the Management Board) and the NDLA can only incur costs by following the public procurement procedure for services or goods which are necessary for the carrying out of its activities. Finally, the county authorities may always overrule the Management Board, i.e. the NDLA has no discretion to expand the scope of its activities and no possibility financially to bind the county authorities beyond the agreed scope of its activities.

## 2. CONCLUSION

- (108) On the basis of the above the Authority has concluded that the NDLA does not engage in economic activities and that the financing of it therefore does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

### *Article 1*

The financing of the NDLA does not involve state aid within the meaning of Article 61(1) of the EEA Agreement. The formal investigation into this matter is hereby closed.

### *Article 2*

This Decision is addressed to the Kingdom of Norway.

<sup>(1)</sup> Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para. 52; Case C-160/91 *Poucet* (cited above), paragraphs 11 and 12.

<sup>(2)</sup> See Norwegian authorities' letter dated 31.3.2014 (Event No 703991), p. 10, where it is stated the following: '[a]s a consequence the management board will have no authority to expand NDLAs scope [o]f (*sic*) activities without the support of the supervisory board.'

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*Article 3*

Only the English language version of this Decision is authentic.

Done at Brussels, 26 June 2014.

*For the EFTA Surveillance Authority*

Oda Helen SLETNES

*President*

Frank BÜCHEL

*College Member*

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