

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 176/11/COL

of 1 June 2011

to close the formal investigation procedure with regard to the financing of the fitness centre at the Kippermoen Leisure Centre (Norway)

THE EFTA SURVEILLANCE AUTHORITY (the Authority),

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

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

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (Protocol 3) and in particular Article 1(2) of Part I and Article 4(4), Article 6 and Article 7(3) of Part II thereof,

HAVING called on interested parties to submit their comments pursuant to those provisions⁽¹⁾ and having regard to their comments,

Whereas:

I. FACTS**1. Procedure**

By letter of 27 January 2009 (Event No 506341), the Norwegian authorities notified the financing of the fitness centre at the Kippermoen Leisure Centre (the KLC), pursuant to Article 1(3) of Part I of Protocol 3.

After various exchanges of correspondence, by letter dated 16 December 2009 (Event No 538177) 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 in respect of the financing of the fitness centre at the KLC.

By letter dated 23 February 2010 (Event No 547864), the Norwegian authorities submitted comments to the opening decision.

The Authority's Decision No 537/09/COL to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto⁽²⁾. The Authority called on interested parties to submit their comments thereon.

The Authority received comments from the Norwegian Association for Fitness (the NAF) (*Treningsforbundet*)⁽³⁾ and the European Health & Fitness Association (the EHFA). On 2 November 2010, the Authority held a meeting with the NAF. By letters dated 20 September 2010 (Event No 567099) and 9 November 2010 (Event No 576711) the Authority forwarded the comments and the information provided in the meeting to the Norwegian authorities, which submitted comments by letter dated 10 January 2011 (Event No 582713).

The Norwegian authorities submitted further comments by letters dated 14 March 2011 (Event No 590193) and 22 March 2011 (Event No 591454), and e-mail dated 28 March 2011 (Event No 592463).

2. The Kippermoen Leisure Centre (the KLC) and its fitness centre

As stated in Decision No 537/09/COL, the KLC was established in the 1970s. It is located in the municipality of Vefsn, in the county of Nordland. The centre is owned by the municipality and is not organised as a separate legal entity.

Initially, the KLC consisted of an indoor swimming pool with a solarium and a sports hall, in addition to a modestly equipped fitness centre. During the years 1997-1999 and again in 2006-2007, the KLC and its fitness centre were expanded.

⁽¹⁾ OJ C 184, 8.7.2010, p. 5 and EEA Supplement No 35, 8.7.2010, p. 1.

⁽²⁾ See footnote 1.

⁽³⁾ Formerly the Norwegian Association for Fitness Centres (NAFC) (*Norsk Treningscenterforbund*).

2.1. The financing of the KLC and its fitness centre

Since its establishment in the 1970s, the KLC has been financed by its users and the municipal budget. The users contribute to the financing by paying for access to the facilities. The municipality fully controls the prices, the types of tickets on offer and the allocation of the revenue. Although the ticket prices have been subject to adjustments throughout the years, the contributions from the users do not cover the full cost of operations of the KLC. The deficit is covered over the municipal budget in accordance with the budgetary decisions of the municipal council.

2.2. New information submitted by the Norwegian authorities

2.2.1. Charging fees from the users of the fitness centre

In Decision No 537/09/COL, the Authority noted that the KLC, since its foundation in the 1970s, has been financed by fees levied on its users and over the municipal budget⁽⁴⁾. In the context of the formal investigation procedure, the Norwegian authorities have clarified that users were only charged for accessing some of the facilities of the KLC (i.a. the swimming pool) but anyone could access the fitness centre free of charge until 1996 when the municipality started charging the users⁽⁵⁾.

2.2.2. Expansions in 1997-1999

In Decision No 537/09/COL, the Authority noted that the KLC as a whole was expanded in 1997 and that this expansion was financed i.a. by a NOK 10 million loan. The Authority had not received detailed information about the loan and to what extent, if any, the fitness centre at the KLC benefited from the loan⁽⁶⁾. During the formal investigation procedure, the Norwegian authorities clarified that the loan amounted to NOK 5,8 million instead of NOK 10 million as mentioned in the opening decision⁽⁷⁾. Furthermore, the Norwegian authorities clarified that the municipality did not obtain the loan in order to finance the expansions of the fitness centre, but in order to i.a. construct a new football arena known as *Mosjøhallen* at the total cost of NOK 14 million⁽⁸⁾.

In 1997-1999, the fitness centre was expanded and the KLC bought new equipment (weight-lifting equipment, stationary bicycles and various other fitness machines) for a total amount of approximately NOK 870 000 (approximately EUR 109 000)⁽⁹⁾.

2.2.3. Expansions in 2006-2007

The Norwegian authorities have furthermore submitted new information about the expansion of the KLC undertaken in 2006-2007.

⁽⁴⁾ Chapter I.2.2 of the Decision.

⁽⁵⁾ See e-mail from the Norwegian authorities dated 28.3.2011 (Event No 592463).

⁽⁶⁾ Chapters I.2.2 and II.1.3 of Decision No 537/09/COL.

⁽⁷⁾ See letter from the Norwegian authorities dated 23.2.2010 (Event No 547864), p. 6.

⁽⁸⁾ *Ibid.* pp. 2, 6 and 8.

⁽⁹⁾ *Ibid.* pp. 7-9.

In 2005, the municipality decided to expand the fitness centre, by constructing a new annex linking the existing buildings of the KLC. The intention was to make the centre more user-friendly in terms of access. The municipality furthermore decided to upgrade the existing facilities in the process⁽¹⁰⁾. The linking and upgrading of the existing buildings was undertaken in order to ensure that the standard of the facilities of the KLC would be on par with comparable centres⁽¹¹⁾.

In 2006-2007, the KLC and the fitness centre were consequently upgraded and expanded into a new annex (*Mellombygningen*). The total cost of the expansion was approximately NOK 14,2 million. A cost allocation plan was drawn up to in order to ensure that the fitness centre would carry its proportionate share (approximately 80%)⁽¹²⁾ of the expansion costs. The remaining share (approximately 20%) was to be covered by other means as these costs were not related to the fitness centre, but to other facilities at the KLC. In the decision to open the formal investigation procedure, the Authority noted that the fitness centre had not carried its full share of the loan cost for 2008 according to the cost allocation plan. The Norwegian authorities have subsequently clarified that the fitness centre did indeed cover the full cost of the loan in 2008 by allocating the annual profit to the municipality⁽¹³⁾.

2.2.4. No funding from the county municipality of Nordland

Based on the information available at the time of the decision to initiate the formal investigation procedure, the Authority was not able to exclude that the fitness centre at the KLC had received funding from the county municipality of Nordland⁽¹⁴⁾. The Norwegian authorities were therefore asked to provide information on this matter. The Norwegian authorities have clarified that the fitness centre at the KLC has not been funded by the county municipality of Nordland⁽¹⁵⁾.

3. Grounds for initiating the procedure

The Authority opened the formal investigation procedure, as it had doubts as to whether the financing of the fitness centre at the KLC constituted State aid within the meaning of Article 61 of the EEA Agreement. Furthermore, the Authority had doubts as to whether the financing of the fitness centre, if it were to be considered as State aid, could be held to be compatible with the EEA Agreement on the basis of either Article 59(2) as aid for a service of general economic interest or alternatively compatible on the basis of Article 61(3)(c) as aid to facilitate cultural or regional activities.

⁽¹⁰⁾ See Decisions 10/05 and 152/05 of the local council of Vefsn Municipality, Annex 2 to Event No 547864.

⁽¹¹⁾ See letter from the Norwegian authorities dated 23.2.2010 (Event No 547864), p. 10.

⁽¹²⁾ See letter from the Norwegian authorities dated 9.9.2009 (Event No 529846), pp. 2-4.

⁽¹³⁾ See letter from the Norwegian authorities dated 23.2.2010 (Event No 547864), p. 12.

⁽¹⁴⁾ Chapter II.1.1 of Decision No 537/09/COL.

⁽¹⁵⁾ See letter from the Norwegian authorities dated 23.2.2010 (Event No 547864), pp. 19-20.

The Norwegian authorities had notified the financing of the fitness centre in January 2009 and had not provided any information to justify the provisional conclusion that the financing of the fitness centre, if it were to be considered as State aid, constituted a system of existing aid within the meaning of Article 1(1) of Part I of Protocol 3. Consequently, in view of the doubts it had, the Authority initiated the formal investigation procedure provided for in Article 1(3) and (2).

4. Comments from third parties

The Authority received comments from two third parties, the EHFA and the NAF.

4.1. Comments from the European Health & Fitness Association (the EHFA)

The EHFA is an independent not-for-profit organisation representing the interests of the European health and fitness industry. It submits that fitness centres should be treated on equal terms regardless of whether they are privately or publicly owned, and that publicly owned fitness centres should not be granted advantages contrary to Article 59 of the EEA Agreement.

4.2. Comments from the Norwegian Association for Fitness (the NAF)

The NAF is a Norwegian organisation for commercial fitness centres. The NAF submits that State resources selectively benefiting fitness centres in the Norwegian market in general constitute State aid within the meaning of Article 61(1) of the EEA Agreement since such financing distorts competition and affects intra-EEA trade. To substantiate this, the NAF provided the Authority with general information on the Norwegian fitness centre market⁽¹⁶⁾.

The NAF furthermore argues that State aid to publicly owned fitness centres cannot be considered compatible with the functioning of the EEA Agreement on the basis of Article 59(2) as public service compensation or Article 61(3)(c) as aid to cultural or regional activities when the same aid is not offered to privately owned fitness centres on equal terms.

5. Comments by the Norwegian authorities

The Norwegian authorities consider that the financing of the fitness centre at the KLC does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement for the following reasons: (i) the fitness centre does not receive a selective advantage stemming from state resources; (ii) the centre does not constitute an undertaking; and (iii) the financing of the fitness centre does not affect trade between the contracting parties of the EEA Agreement.

Additionally, the Norwegian authorities state that any municipal resources allocated to the fitness centre satisfies the

requirements of the *de minimis* regulation⁽¹⁷⁾ and does therefore not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

In the event that the Authority should find that the financing involves State aid, the Norwegian authorities consider such aid as existing aid since the KLC has been financed over the municipal budget and user fees since before the entry into force of the EEA Agreement and that this method of financing has remained unaltered since then.

Regardless of the above, the Norwegian authorities consider any potential aid to be compatible with the EEA Agreement on the basis of either Article 59(2) as aid for a service of general economic interest or alternatively compatible on the basis of Article 61(3)(c) as aid to facilitate cultural activities. Finally, the Norwegian authorities hold that the financing of the expansion of the fitness centre in 2006-2007 constitutes a form of regional aid compatible on the basis of Article 61(3)(c) and with reference to the Authority's Guidelines on National Regional Aid (2007-2013)⁽¹⁸⁾.

II. ASSESSMENT

1. The funding from the municipality of Vefsn

The Norwegian authorities notified the financing of the fitness centre to the Authority in January 2009. In the notification, the Norwegian authorities did not put forward any arguments to the effect that the financing of the fitness centre constituted existing aid, despite the fact that the notification included a copy of the writ of summons from the proceedings before the Norwegian courts wherein the applicant argued, at some length, that the financing of the fitness centre constituted new aid⁽¹⁹⁾.

In the Decision to open the formal investigation procedure, the Authority referred to the fact that the method of financing the fitness centre (covering the total deficit of the KLC over the municipal budget and allocation of revenue generated by ticket sales) was in place prior to the entry into force of the EEA Agreement, and could on this basis appear to constitute existing aid within the meaning of Article 1(b)(i) of Part II of Protocol 3⁽²⁰⁾. However, alterations to existing aid represent new aid, in line with Article 1(c) of the same Protocol.

⁽¹⁷⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5), incorporated into the EEA Agreement in paragraph 1ea of Annex 15 to the Agreement.

⁽¹⁸⁾ The Guidelines are available online at: <http://www.efitasurv.int/?1=1&showLinkID=15125&1=1>

⁽¹⁹⁾ See letter from the Norwegian authorities dated 27.1.2009 (Event No 506341), p. 40.

⁽²⁰⁾ Pursuant to Article 1(b)(i) of Part II of Protocol 3, existing aid is: 'all aid which existed prior to the entry into force of the EEA Agreement in the respective EEA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement.'

⁽¹⁶⁾ See letter from the Authority dated 9.11.2010 (Event No 576711).

In its Decision the Authority indicated that it had not received sufficiently specific information on the two expansions of the fitness centre and the changes to the system of allocation of ticketing revenue, and noted that these factors could have altered the existing system of aid into new aid within the meaning of Article 1(c) of the same Protocol ⁽²¹⁾.

In line with the principles laid down in the case law of the ECJ ⁽²²⁾, the Authority dealt with the measures within the framework of the rules pertaining to new aid.

Any assessment made in a decision to open the formal investigation procedure as to whether a potential aid measure constitutes new or existing aid is necessarily only of a preliminary nature. Even if the Authority, based on the information provided at the time, decided to open a formal investigation procedure on the basis of Article 1(2) of Part I of Protocol 3, it can still, in the decision concluding that procedure, find that the measure, if aid is involved, in fact constitutes existing aid ⁽²³⁾. Where existing aid is involved, the Authority has to follow the procedure for existing aid ⁽²⁴⁾. Accordingly, in such a case, the Authority would have to close the formal investigation procedure and open the different procedure for existing aid laid down in Articles 17-19 of Part II of Protocol 3 ⁽²⁵⁾. Under this latter procedure, and only under that, the Authority would assess whether a measure constitutes aid and if so, whether it is compatible with the functioning of the EEA Agreement.

As explained above in Chapter I.2 of this Decision, the Norwegian authorities have submitted additional factual information about the financing and expansions of the fitness centre at the KLC.

As the fitness centre has not been financed as a separate operation, its financing cannot be assessed independently of the financing of the KLC as such. Since its foundation in the 1970s, the KLC has been financed by fees levied on its users and over the municipal budget. Although the municipality did not introduce user fees for access to the fitness centre until 1996, since the 1970s it required such a fee from the users of parts of the KLC, in particular the swimming pool. On this basis, the Authority notes that the system of financing the KLC as such has not been changed.

The expansion of the fitness centre in 1997-1999 was of a smaller scale than what the information initially provided to the Authority indicated. The Norwegian authorities have

explained in the formal investigation that the municipality took a loan for NOK 5,8 million (instead of NOK 10 million) which was not used for the renovation of the fitness centre. On the contrary, a relatively modest expansion and re-furnishing of the fitness centre at a total cost of approximately NOK 870 000 that was carried out during this time was financed by the revenue stemming from fees levied on the users.

Although more substantial in scope, the 2006-2007 expansion only ensured that the service on offer would be on par with comparable fitness centres. Consequently, the type of activity carried out by the fitness centre, both before and after the expansions, remains the same and it is just adjusted to meet the evolution in the sector and the demands of the users. With the fitness centre at the KLC, the municipality has been active on the fitness centre market both before and after the entry into force of the EEA Agreement; it has occasionally expanded the fitness studio only to be able to provide a service to the population in line with what can be expected from a fitness centre. The system of financing (users fees and allocations from the municipal budget) and the aim pursued (providing fitness centre facilities to the population) have not changed ⁽²⁶⁾. Moreover, these expansions have not enabled the municipality to enter new markets. In that respect, the case at hand differs from the Commission Decision on the BBC Digital Curriculum ⁽²⁷⁾. That case concerned changes made to the existing system of aid benefiting the British public broadcaster, the BBC. In that case, the Commission found that changes made to the existing aid scheme involved new aid as they enabled the broadcaster to carry out activities that lacked a 'close association' to the existing scheme, and enabled the BBC to enter developed markets where the commercial players had little or no exposure to the BBC as a competitor ⁽²⁸⁾.

On the basis of the above, the Authority concludes that the financing of the fitness centre at the Kippermoen Leisure Centre with resources from the Municipality of Vefsn, in so far as it involves State aid, constitutes a system of existing aid. A separate procedure for existing aid is laid down in Article 1(1) of Part I of Protocol 3. Pursuant to that provision, the Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

2. The funding from the County Municipality of Nordland

As noted above, the Norwegian authorities have clarified that the fitness centre at the KLC has not received funding from the county municipality of Nordland. Accordingly, there was no transfer of State resources from the county municipality of Nordland, which is the first of the four cumulative criteria

⁽²¹⁾ Chapter II.1.3 of Decision No 537/09/COL.

⁽²²⁾ Case C-400/99 *Italy v Commission* [2005] ECR I-3657.

⁽²³⁾ *Ibid.* paragraphs 47 and 54-55.

⁽²⁴⁾ Case T-190/00 *Regione Siciliana v Commission* [2003] ECR II-5015, paragraph 48.

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

⁽²⁶⁾ See Opinion of AG Trabucchi in Case 51/74 *Hulst* [1975] ECR 79.

⁽²⁷⁾ Case N 37/2003 (UK), available online: http://ec.europa.eu/eu_law/state_aids/comp-2003/n037-03.pdf

⁽²⁸⁾ *Ibid.* paragraph 36.

to be fulfilled for a measure to constitute State aid within the meaning of Article 61(1) of the EEA Agreement. On the basis of the information newly provided by the Norwegian authorities, the Authority concludes that the fitness centre at the KLC, within this context, has not received any State aid within the meaning of Article 61(1) of the EEA Agreement in the form of advantages stemming from state resources (the county municipality of Nordland).

3. Conclusion

According to the new information provided by the Norwegian authorities, the county municipality of Nordland did not grant economic advantages to the fitness centre at the KLC in the period covered by the current formal investigation procedure. On this basis the Authority concludes that the fitness centre at the KLC has not received State aid stemming from the county municipality of Nordland in the relevant period.

The Authority has furthermore concluded that, in so far as resources stemming from the municipality of Vefsn have contributed to the financing of the fitness centre at the KLC and these resources constitute State aid, such aid has been granted under a system of existing aid. On the basis of the above assessment, the Authority has decided to close the formal investigation procedure and will initiate the procedure for the review of existing aid provided for in Article 1(1) and (2) of Part I of Protocol 3,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure with regard to the financing of the fitness centre at the Kippermoen Leisure Centre with funds stemming from the county municipality of Nordland during the period under assessment is without object and therefore closed.

Article 2

The formal investigation procedure with regard to the financing of the fitness centre at the Kippermoen Leisure Centre with funds stemming from the municipality of Vefsn is closed.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 1 June 2011.

For the EFTA Surveillance Authority

Per SANDERUD
President

Sabine MONAUNI-TÖMÖRDY
College Member