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[1] Text with EEA relevance

(Continued overleaf)

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II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Invitation to submit comments on the draft Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid

(2013/C 229/01)

Interested parties may submit their comments within one month of the date of publication of this draft Regulation to:

European Commission
Directorate-General for Competition
State aid Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

E-mail: stateaidgreffe@ec.europa.eu

Ref.: HT.3572 — SAM — *de minimis* review

The text is also available on the following website:

http://ec.europa.eu/competition/consultations/2013_second_de_minimis/index_en.html

DRAFT COMMISSION REGULATION (EU) No .../...

of 17 July 2013

on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid

(Text with EEA relevance)

(2013/C 229/02)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(4) thereof,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [1],

Having published a draft of this Regulation [2],

After consulting the Advisory Committee on State aid,

Whereas:

(1) State funding meeting the criteria in Article 107(1) of the Treaty on the Functioning of the European Union (the Treaty) constitutes State aid and requires notification to the Commission by virtue of Article 108(3) of the Treaty. However, according to Article 109 of the Treaty, the Council may determine categories of aid that are

[1] OJ L 142, 14.5.1998, p. 1.
[2] OJ C 229, 8.8.2013, p. 1.

exempted from this notification requirement. In accordance with Article 108(4) of the Treaty the Commission may adopt regulations relating to these categories of State aid. By virtue of Regulation (EC) No 994/98 the Council decided, in accordance with Article 109 of the Treaty, that *de minimis* aid could constitute one such category. On that basis, *de minimis* aid, being aid granted to the same undertaking over a given period of time that does not exceed a certain fixed amount, is deemed not to meet all the criteria laid down in Article 107(1) of the Treaty and is therefore not subject to the notification procedure.

(2) The Commission has, in numerous decisions, clarified the notion of aid within the meaning of Article 107(1) of the Treaty. The Commission has also stated its policy with regard to a *de minimis* ceiling, below which Article 107(1) of the Treaty can be considered not to apply, initially in its notice on the *de minimis* rule for State aid [1] and subsequently in Commission Regulation (EC) No 69/2001 [2] and Commission Regulation (EC) No 1998/2006 [3]. In the light of the experience gained in applying Regulation (EC) No 1998/2006, it appears appropriate to revise some of the conditions laid down in that Regulation and to replace it.

(3) It is appropriate to maintain the ceiling of EUR 200 000 for the amount of *de minimis* aid that a single undertaking may receive per Member State over any period of 3 years. That ceiling remains necessary to ensure that any measure falling under this Regulation does not have any effect on trade between Member States and/or does not distort or threaten to distort competition.

(4) For the purposes of the rules on competition laid down in the Treaty an undertaking is any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed [4]. The Court of Justice has ruled that all entities which are controlled (on a legal or on a de facto basis) by the same entity should be considered as a single undertaking [5]. For the sake of legal certainty and to reduce the administrative burden, this Regulation should provide an exhaustive list of clear criteria for determining when two or more entities shall be considered as a single undertaking. The Commission has selected from the well-established criteria for defining 'linked enterprises' in the definition of SME in Annex I to Regulation (EC) No 800/2008) [6] those criteria that are appropriate for the purpose of this Regulation. Those criteria are already familiar to public authorities and should be applicable, given the scope of this Regulation, to SMEs as well as large undertakings.

(5) In order to take account of the small average size of undertakings active in the road freight transport sector, it is appropriate to set the ceiling at EUR 100 000 for undertakings performing road freight transport for hire or reward. The provision of an integrated service where the actual transportation is only one element, such as moving services, postal or courier services or waste collection and processing services, should not be considered a transport service. In view of the over-capacity in the road freight transport sector and the objectives of transport policy as regards road congestion and freight transport aid for the acquisition of road freight transport vehicles by undertakings performing road freight transport for hire or reward should be excluded from the scope of application of this Regulation. In view of the development of the road passenger transport sector, it is no longer appropriate to apply a lower ceiling to this sector.

(6) In view of the special rules which apply in the sectors of primary production of agricultural products, fisheries and aquaculture and of the risk that amounts of aid below the ceiling laid down in this Regulation could nonetheless fulfil the criteria of Article 107(1) of the Treaty in those sectors, this Regulation should not apply to those sectors.

(7) Considering the similarities between the processing and marketing of agricultural products and of non-agricultural products, this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met. Neither on-farm activities necessary for preparing a product for the first sale, such as harvesting, cutting and threshing of cereals, or packing of eggs, nor the first sale to resellers or processors should be considered as processing or marketing in this respect. The Court of Justice has established [7] that, once the Union has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions

[1] OJ C 68, 6.3.1996, p. 9.
[2] Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).
[3] 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).
[4] Case C-222/04 *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze SpA et al.* [2006] ECR I-289.
[5] Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163.
[6] Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ L 214, 9.8.2008, p. 3).
[7] Case C-456/00 *France* v *Commission* [2002] ECR I-11949.

to it. For this reason, this Regulation should not apply to aid the amount of which is set on the basis of the price or quantity of products purchased or put on the market. Nor should it apply to support which is linked to an obligation to share the aid with primary producers.

(8) This Regulation should not apply to export aid or aid favouring domestic over imported products. In particular, it should not apply to aid financing the establishment and operation of a distribution network in other Member States or third countries. Aid towards the cost of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market does not normally constitute export aid.

(9) This Regulation should not apply to undertakings in difficulty since it is not appropriate to grant financial support to undertakings in difficulty outside of a restructuring plan. Furthermore, there are difficulties linked to determining the gross grant equivalent of aid granted to undertakings of this type. In order to provide legal certainty, it is appropriate to establish clear criteria that do not require an assessment of all the particular characteristics of the situation of an undertaking to determine whether an undertaking is considered to be in difficulty for the purposes of this Regulation.

(10) The period of 3 years to be taken into account for the purposes of this Regulation should be assessed on a rolling basis so that, for each new grant of *de minimis* aid, the total amount of *de minimis* aid granted in the fiscal year concerned as well as during the previous two fiscal years needs to be taken into account.

(11) Where undertakings are active in sectors excluded from the scope of this Regulation as well as in other sectors or activities, this Regulation should apply to those other sectors or activities provided that Member States ensure, by appropriate means such as separation of activities or distinction of costs, that the activities in the excluded sectors do not benefit from the *de minimis* aid. The same principle should apply where undertakings are active in sectors to which lower *de minimis* ceilings apply. If it cannot be ensured that the activities in sectors to which lower *de minimis* ceilings apply benefit from *de minimis* aid only up to those lower ceilings, the lowest ceiling should apply to all activities of the undertaking.

(12) This Regulation should lay down rules to ensure that it is not possible to circumvent maximum aid intensities laid down in specific regulations or Commission decisions. It should also provide for clear rules on cumulation that are easy to apply.

(13) This Regulation does not exclude the possibility that a measure might be considered not to be State aid within the meaning of Article 107(1) of the Treaty on the basis of other grounds than those set out in this Regulation, for instance because the measure complies with the market economy operator principle or because the measure does not involve a transfer of State resources.

(14) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to *de minimis* aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without any need to undertake a risk assessment (transparent aid). Such a precise calculation can, for instance, be made for grants, interest rate subsidies, capped tax exemptions or other instruments that provide for a cap ensuring that the applicable ceiling is not exceeded. Providing for a cap means that as long as the precise amount of aid is not or not yet known, the Member State has to assume that the amount equals the cap in order to ensure that several aid measures together do not exceed the ceiling set out in this Regulation and to apply the rules on cumulation.

(15) For the purposes of transparency, equal treatment and the correct application of the *de minimis* ceiling, all Member States should apply the same method of calculation. In order to facilitate such calculation, aid amounts not taking the form of a cash grant should be converted into their gross grant equivalent. Calculation of the gross grant equivalent of transparent types of aid other than grants and of aid payable in several instalments requires the use of market rates prevailing at the time such aid is granted. With a view to uniform, transparent and simple application of the State aid rules, the market rates applicable for the purposes of this Regulation should be the reference rates, as set out in the Communication from the Commission on the revision of the method for setting the reference and discount rates [1].

(16) Aid comprised in loans should be considered transparent *de minimis* aid if the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time the aid is granted. In order to simplify the treatment of small loans of short duration, this Regulation should provide for a clear rule that is easy to apply and takes into account both the amount of the loan and its duration. Based on the Commission's experience, loans that are secured by collateral covering at least 50 % of the loan and that do not exceed either

[1] OJ C 14, 19.1.2008, p. 6.

EUR 1 000 000 and a duration of 5 years or EUR 500 000 and a duration of 10 years can be considered as having a gross grant equivalent equal to the *de minimis* ceiling.

(17) Aid comprised in capital injections should not be considered as transparent *de minimis* aid, unless the total amount of the public injection does not exceed the *de minimis* ceiling. Aid comprised in risk finance measures taking the form of equity or quasi-equity investments, as referred to in (*the new guidelines on risk finance*), should not be considered as transparent *de minimis* aid unless the measure concerned provides capital not exceeding the *de minimis* ceiling to each target undertaking.

(18) Aid comprised in guarantees should be considered as transparent if the gross grant equivalent has been calculated on the basis of safe-harbour premiums laid down in a Commission notice for the type of undertaking concerned. For instance, for small and medium-sized enterprises, the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees [1] indicates levels of annual premium above which a State guarantee would be deemed not to constitute aid. In order to simplify the treatment of guarantees of short duration securing up to 80 % of a relatively small loan, this Regulation should provide for a clear rule that is easy to apply and takes into account both the amount of the underlying loan and the duration of the guarantee. This rule should not apply to guarantees on underlying transactions not constituting a loan, such as guarantees on equity transactions. Where the guarantee does not exceed 80 % of the underlying loan, the amount guaranteed does not exceed EUR 1 500 000 and the duration of the guarantee does not exceed 5 years the guarantee can be considered as having a gross grant equivalent equal to the *de minimis* ceiling. The same applies where the guarantee does not exceed 80 % of the underlying loan, the amount guaranteed does not exceed EUR 750 000 and the duration of the guarantee does not exceed 10 years.

(19) Where the loan or guarantee is for a smaller amount or a shorter duration than those specified in recitals 16 and 18, the gross grant equivalent should be calculated by multiplying the ratio between the actual amount and the maximum amount indicated in recitals 16 and 18 by the ratio between the actual duration and 5 years by EUR 200 000. Thus, for instance, a loan of EUR 500 000 for 2,5 years would be deemed to have a gross grant equivalent of EUR 50 000.

(20) Upon notification by a Member State, the Commission may examine whether a measure which does not consist of a grant, loan, guarantee, capital injection or risk finance measure taking the form of an equity or quasi-equity investment leads to a gross grant equivalent that does not exceed the *de minimis* ceiling and could therefore fall within the scope of this Regulation.

(21) The Commission has a duty to ensure that State aid rules are complied with and in accordance with the cooperation principle laid down in Article 4(3) of the Treaty on European Union, Member States should facilitate the fulfilment of this task by establishing the necessary tools in order to ensure that the total amount of *de minimis* aid granted to a single undertaking under the *de minimis* rule does not exceed the overall permissible ceiling.

(22) Before granting any *de minimis* aid Member States should verify for their Member State that the *de minimis* ceiling will not be exceeded by the new *de minimis* aid and that the other conditions of this Regulation are complied with.

(23) In order to ensure that Member States have accurate, reliable and complete data to ensure that by granting new *de minimis* aid the ceiling which applies in respect of the undertaking concerned is not exceeded, Member States should be required to set up a central register of *de minimis* aid containing information on all *de minimis* aid granted in accordance with this Regulation by any authority within that Member State. Member States should be free to design their register and decide on the appropriate mechanism to establish it in accordance with their constitutional and administrative structure provided they ensure that the register allows all public authorities in the Member State to check the amount of *de minimis* aid received by each undertaking. Member States should be given sufficient time to establish such a register.

(24) Until a Member State has set up a central register and the register covers a period of 3 years, the Member State should inform the undertaking concerned of the amount of *de minimis* aid granted and of its *de minimis* character and should make express reference to this Regulation. In addition, before granting such aid the Member State concerned should obtain from the undertaking a declaration about other *de minimis* aid covered

[1] OJ C 155, 20.6.2008, p. 10.

by this Regulation or by other *de minimis* regulations received during the fiscal year concerned and the previous two fiscal years.

(25) In order to allow the Commission to monitor the application of this Regulation and to identify potential distortions of competition, Member States should be required to provide basic information on the amounts granted in accordance with this Regulation on a yearly basis. If the Member State has informed the Commission where all data required in the reports are made publicly available, the Member State should not be required to provide a report to the Commission.

(26) Having regard to the Commission's experience and in particular the frequency with which it is generally necessary to revise State aid policy, the period of application of this Regulation should be limited. If this Regulation were to expire without being extended, Member States should have an adjustment period of 6 months with regard to *de minimis* aid covered by this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. This Regulation applies to aid granted to undertakings in all sectors, with the exception of:

(a) aid granted to undertakings active in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000 [1];

(b) aid granted to undertakings active in the primary production of agricultural products;

(c) aid granted to undertakings active in the processing and marketing of agricultural products, in the following cases:

(i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned;

(ii) when the aid is conditional on being partly or entirely passed on to primary producers;

(d) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(e) aid contingent upon the use of domestic over imported goods;

(f) aid granted to undertakings in difficulty as defined in Article 2(e).

[1] Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products (OJ L 17, 21.1.2000, p. 22).

2. Where an undertaking is active in the sectors referred to in points (a), (b) or (c) of paragraph 1 and in sectors which fall within the scope of this Regulation, this Regulation applies to aid granted in respect of the latter sectors or activities, provided that Member States ensure by appropriate means such as separation of activities or distinction of costs that the activities in the excluded sectors do not benefit from the *de minimis* aid granted in accordance with this Regulation.

Article 2

Definitions

For the purposes of this Regulation:

(a) 'agricultural products' means products listed in Annex I to the Treaty, with the exception of fishery and aquaculture products listed in Annex I to Regulation (EU) No (not yet adopted; see Commission proposal COM(2011) 416) on the common organisation of the markets in fishery and aquaculture products;

(b) 'processing of agricultural products' means any operation on an agricultural product resulting in a product which is also an agricultural product, except on-farm activities necessary for preparing an animal or plant product for the first sale;

(c) 'marketing of agricultural products' means holding or displaying with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose;

(d) 'a single undertaking' for the purpose of this Regulation means all entities which have at least one of the following relationships with each other:

(i) one entity has a majority of the shareholders' or members' voting rights in another entity;

(ii) one entity has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another entity;

(iii) one entity has the right to exercise a dominant influence over another entity pursuant to a contract entered into with that entity or to a provision in its memorandum or articles of association;

(iv) one entity, which is a shareholder in or member of another entity, controls alone, pursuant to an agreement with other shareholders in or members of that entity, a majority of shareholders' or members' voting rights in that entity;

(Entities having any of the relationships described above through one or more other entities are also considered to be a single undertaking).

(e) 'undertaking in difficulty' means an undertaking that fulfils at least one of the following conditions:

(i) in the case of a limited liability company, more than half of its subscribed share capital has disappeared due to accumulated losses; this is the case when deducting accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative result that exceeds half of the subscribed share capital;

(ii) in the case of a company in which at least some members have unlimited liability for the debt of the company, more than half of its capital as shown in the company accounts has disappeared due to accumulated losses;

(iii) the undertaking is in collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors;

(iv) the undertaking's book debt to equity ratio is greater than 7,5;

(v) the undertaking's earnings before interest and taxes (EBIT) to interest coverage ratio has been below 1,0 for the past two years;

(vi) the undertaking is rated the equivalent of CCC+ (payment capacity is dependent upon sustained favourable conditions) or below by at least one credit rating agency registered in accordance with Regulation (EC) No 1060/2009 [1].

For the purposes of point (e) of the first subparagraph, a SME which has been in existence for less than 3 years shall not be considered to be in difficulty unless it meets the condition set out in point (iii) of that point.

Article 3

***De minimis* aid**

1. Aid measures shall be deemed not to meet all the criteria of Article 107(1) of the Treaty, and shall therefore be exempt from the notification requirement of Article 108(3) of the Treaty, if they fulfil the conditions laid down in paragraphs 2 to 8 of this Article and in Articles 4 and 5.

2. The total amount of *de minimis* aid granted per Member State to a single undertaking as defined in Article 2(d) shall not exceed EUR 200 000 over any period of 3 fiscal years.

The total amount of *de minimis* aid granted per Member State to a single undertaking as defined in Article 2(d) performing road freight transport for hire or reward shall not exceed EUR 100 000 over any period of 3 fiscal years. *De minimis* aid shall not be used for the acquisition of road freight transport vehicles.

3. If an undertaking performs road freight transport for hire or reward as well as other activities to which the ceiling of EUR 200 000 applies, the ceiling of EUR 200 000 shall apply to the undertaking, provided that Member States ensure by appropriate means such as separation of activities or distinction of costs that the benefit to the road freight transport activity does not exceed EUR 100 000 and that no *de minimis* aid is used for the acquisition of road freight transport vehicles.

4. *De minimis* aid is granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime.

5. The ceilings laid down in paragraph 2 shall apply irrespective of the form of the *de minimis* aid or the objective pursued and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of Union origin. The period of 3 fiscal years shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.

6. The ceilings laid down in paragraph 2 shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Aid payable in several instalments shall be discounted to its value at the moment it is granted. The interest rate to be used for discounting purposes shall be the discount rate applicable at the time the aid is granted.

7. Where the *de minimis* ceiling laid down in paragraph 2 would be exceeded by the grant of new *de minimis* aid, none of that new aid may benefit from this Regulation.

8. In the case of mergers or acquisitions, all prior *de minimis* aid granted to any of the merging undertakings shall be taken into account in determining whether any new *de minimis* aid to the new or the acquiring undertaking exceeds the ceiling, without calling into question *de minimis* aid lawfully granted before the merger or acquisition.

[1] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1).

If one undertaking splits into two or more separate undertakings, *de minimis* aid granted prior to the split shall be allocated to the undertaking that benefited from it, which is in principle the undertaking taking over the activities for which the *de minimis* aid was used. If such an allocation is not possible, the *de minimis* aid shall be allocated proportionately on the basis of the book value of the equity capital of the new undertakings.

Article 4

Calculation of gross grant equivalent

1. This Regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante* without any need to undertake a risk assessment (transparent aid). In particular the aid measures referred to in paragraphs 2 to 6 shall be considered as transparent aid.

2. Aid comprised in loans shall be considered as transparent *de minimis* aid if:

(a) the loan is secured by collateral covering at least 50 % of the loan and the loan does not exceed either EUR 1 000 000 (or EUR 500 000 for undertakings performing road freight transport) and a duration of 5 years or EUR 500 000 (or EUR 250 000 for undertakings performing road freight transport) and a duration of 10 years. If a loan is for less than those amounts and/or is granted for a period of less than 5 or 10 years respectively, the gross grant equivalent of that loan shall be calculated as a corresponding proportion of the applicable ceiling laid down in Article 3(2); or

(b) the gross grant equivalent has been calculated on the basis of the reference rate applicable at the time of the grant.

3. Aid comprised in capital injections shall only be considered as transparent *de minimis* aid if the total amount of the public injection does not exceed the *de minimis* ceiling.

4. Aid comprised in risk finance measures taking the form of equity or quasi-equity investments shall as regards the target undertaking only be considered as transparent *de minimis* aid if the measure concerned provides capital not exceeding the *de minimis* ceiling to each target undertaking.

5. Aid comprised in guarantees shall be treated as transparent *de minimis* aid if:

(a) the guarantee does not exceed 80 % of the underlying loan and either the amount guaranteed does not exceed EUR 1 500 000 (or EUR 750 000 for undertakings performing road freight transport) and the duration of the guarantee does not exceed 5 years or the amount guaranteed does not exceed EUR 750 000 (or EUR 375 000 for undertakings performing road freight transport) and the duration of the guarantee does not exceed 10 years. If the amount guaranteed is lower than these amounts and/or the guarantee is for a period of less than 5 or 10 years respectively, the gross grant equivalent of that guarantee shall be calculated as a corresponding proportion of the applicable ceiling laid down in Article 3(2); or

(b) the gross grant equivalent has been calculated on the basis of safe-harbour premiums laid down in a Commission notice [1]; or

(c) before being implemented, the methodology to calculate the gross grant equivalent of the guarantee has been accepted following notification of this methodology to the Commission under any regulation adopted by the Commission in the State aid area applicable at the time, and the approved methodology explicitly addresses the type of guarantee and the type of underlying transaction at stake in the context of the application of this Regulation.

6. Aid comprised in other instruments shall be considered as transparent *de minimis* aid if the instrument provides for a cap ensuring that the applicable ceiling is not exceeded.

Article 5

Cumulation

1. *De minimis* aid granted in accordance with this Regulation may be cumulated with *de minimis* aid granted in accordance with Commission Regulation (EU) No 360/2012 [2] up to the ceilings laid down in that Regulation. It may be cumulated with *de minimis* aid granted in accordance with other *de minimis* regulations up to the ceiling laid down in Article 3(2).

2. *De minimis* aid shall not be cumulated with State aid in relation to the same eligible costs or with State aid for the same risk finance measure, if such cumulation would exceed the highest aid intensity or aid amount fixed in the specific circumstances of each case by a block exemption regulation or decision adopted by the Commission.

Article 6

Monitoring and reporting

1. Member States shall set up a central register of *de minimis* aid by 31 December 2015. The central register shall contain information on each beneficiary (including whether it is a small, medium-sized or large enterprise and the economic sector

[1] Currently, Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

[2] Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

(NACE code at Division level [1]) of its main activity), the date of granting and the gross grant equivalent of each *de minimis* aid measure granted in accordance with this Regulation by any authority within that Member State. The register shall include all *de minimis* measures granted in accordance with this Regulation from 1 January 2016 onwards.

2. Paragraph 3 shall apply until a Member State has set up a central register and the register covers a period of 3 years.

3. Where a Member State intends to grant *de minimis* aid in accordance with this Regulation to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid expressed as gross grant equivalent and of its *de minimis* character, making express reference to this Regulation and citing its title and publication reference in the *Official Journal of the European Union*. Where *de minimis* aid is granted in accordance with this Regulation to different undertakings on the basis of a scheme and different amounts of individual aid are granted to those undertakings under that scheme, the Member State concerned may choose to fulfil that obligation by informing the undertakings of a fixed sum corresponding to the maximum aid amount to be granted under that scheme. In such case, the fixed sum shall be used for determining whether the ceiling laid down in Article 3(2) is met. Before granting the aid, the Member State shall obtain a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid received to which this Regulation or other *de minimis* regulations apply during the previous two fiscal years and the current fiscal year.

4. A Member State shall grant new *de minimis* aid in accordance with this Regulation only after having checked that this will not raise the total amount of *de minimis* aid granted to the undertaking concerned to a level above the ceilings laid down in Article 3(2) and that all the conditions of Articles 1 to 5 are complied with.

5. Member States shall record and compile all the information regarding the application of this Regulation. Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been complied with. Records regarding individual *de minimis* aid shall be maintained for 10 fiscal years from the date on which the aid was granted. Records regarding a *de minimis* aid scheme shall be maintained for 10 years from the date on which the last individual aid was granted under such a scheme. On written request, the Member State concerned shall provide the Commission, within a period of 20 working days or such longer period as may be fixed in the request, with all the information that the Commission considers necessary for assessing whether the conditions of this Regulation have been complied with, and in particular the total amount of *de minimis* aid in accordance with this Regulation and with other *de minimis* regulations received by any undertaking.

6. Member States shall report to the Commission on the application of this Regulation on a yearly basis. The reports shall include:

(a) the total amount of *de minimis* aid granted in the Member State concerned in accordance with this Regulation during the previous calendar year, broken down by economic sector and by size (small, medium-sized or large enterprise) of the beneficiaries;

(b) the total number of beneficiaries of *de minimis* aid granted in the Member State concerned in accordance with this Regulation during the previous calendar year, broken down by economic sector and by size (small, medium-sized or large enterprise) of the beneficiaries;

(c) any other information concerning the application of this Regulation required by the Commission and specified in due time before the report is submitted.

The first report shall be submitted by 30 June 2017 and shall cover the calendar year 2016. If all data required in the reports are made publicly available by the Member State, the Member State shall not be required to provide a report to the Commission. Each year, the Commission shall publish a synthesis of the information contained in the annual reports, including the total amount of *de minimis* aid granted by each Member State in accordance with this Regulation.

Article 7

Transitional provisions

1. Any individual *de minimis* aid which was granted between 2 February 2001 and 30 June 2007 and fulfils the conditions of Regulation (EC) No 69/2001 shall be deemed not to meet all the criteria of Article 107(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 108(3) of the Treaty.

2. Any individual *de minimis* aid which is granted between 1 January 2007 and 30 June 2014 and fulfils the conditions of Regulation (EC) No 1998/2006 shall be deemed not to meet all the criteria of Article 107(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 108(3) of the Treaty.

3. At the end of the period of validity of this Regulation, any *de minimis* aid which fulfils the conditions of this Regulation may be validly implemented for a further period of 6 months.

[1] In accordance with Article 2(1)(b) and Annex I of Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains Text with EEA relevance (OJ L 393, 30.12.2006, p. 1),

Article 8

Entry into force and period of validity

This Regulation shall enter into force on 1 January 2014 and shall apply from 1 January 2014 until 31 December 2020.

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

Done at Brussels, 17 July 2013.

For the Commission
The President
[…] […]

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Euro exchange rates [1]

7 August 2013

(2013/C 229/03)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,3305	AUD	Australian dollar	1,4878
JPY	Japanese yen	129,21	CAD	Canadian dollar	1,3868
DKK	Danish krone	7,4571	HKD	Hong Kong dollar	10,3197
GBP	Pound sterling	0,85955	NZD	New Zealand dollar	1,6826
SEK	Swedish krona	8,7261	SGD	Singapore dollar	1,6868
CHF	Swiss franc	1,2321	KRW	South Korean won	1 486,17
ISK	Iceland króna		ZAR	South African rand	13,2109
NOK	Norwegian krone	7,8995	CNY	Chinese yuan renminbi	8,1416
BGN	Bulgarian lev	1,9558	HRK	Croatian kuna	7,4975
CZK	Czech koruna	25,978	IDR	Indonesian rupiah	13 683,68
HUF	Hungarian forint	299,52	MYR	Malaysian ringgit	4,3301
LTL	Lithuanian litas	3,4528	PHP	Philippine peso	58,258
LVL	Latvian lats	0,7025	RUB	Russian rouble	43,9480
PLN	Polish zloty	4,2170	THB	Thai baht	41,831
RON	Romanian leu	4,4330	BRL	Brazilian real	3,0641
TRY	Turkish lira	2,5713	MXN	Mexican peso	16,8685
			INR	Indian rupee	81,4960

[1] *Source*: reference exchange rate published by the ECB.

NOTICES FROM MEMBER STATES

Information communicated by Member States regarding closure of fisheries

(2013/C 229/04)

In accordance with Article 35(3) of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [1], a decision has been taken to close the fishery as set down in the following table:

Date and time of closure	4.7.2013
Duration	4.7.2013-31.12.2013
Member State	Portugal
Stock or group of stocks	BFT/AE45WM
Species	Bluefin tuna (*Thunnus thynnus*)
Zone	Atlantic Ocean, east of 45° W, and Mediterranean
Type(s) of fishing vessels	—
Reference number	16/TQ40

[1] OJ L 343, 22.12.2009, p. 1.

Information communicated by Member States regarding closure of fisheries

(2013/C 229/05)

In accordance with Article 35(3) of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [1], a decision has been taken to close the fishery as set down in the following table:

Date and time of closure	4.7.2013
Duration	4.7.2013-31.12.2013
Member State	United Kingdom
Stock or group of stocks	SAN/2A3A4. and management areas SAN/123_1, _2, _3, _4, _6
Species	Sandeel and associated by-catches (*Ammodytes* spp.)
Zone	EU waters of IIa, IIIa and IV and EU waters of sandeel management areas 1, 2, 3, 4 and 6 (excluding waters within six nautical miles of UK baselines at Shetland, Fair Isle and Foula)
Type(s) of fishing vessels	—
Reference number	17/TQ40

[1] OJ L 343, 22.12.2009, p. 1.

NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

Information communicated by the EFTA States regarding State aid granted under the Act referred to in point 1j of Annex XV of the EEA Agreement (Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation))

(2013/C 229/06)

PART I

Aid No	GBER 8/13/REG	
EFTA State	Norway	
Region	All regions in Romania	Regional aid status
Granting authority	Name	Innovation Norway
	Address	PO Box 448 Sentrum 0104 Oslo NORWAY
	Webpage	http://www.innovationnorway.no
Title of the aid measure	Norwegian Financial Mechanism 2009-2014. Green Industry Innovation Programme ROMANIA	
National legal basis (Reference to the relevant national official publication)	Prop. 1 S (2012-2013) 'The Ministry of Foreign Affairs' pages 85-95 http://www.regjeringen.no/nb/dep/ud/dok/regpubl/prop/2012-2013/prop-1-s-20122013.html?id=703276	
Web link to the full text of the aid measure	http://www.norwaygrants-greeninnovation.no	
Type of measure	Scheme	Yes
	Ad hoc aid	n/a
Duration	Scheme	12.3.2013 to 30.4.2016
Economic sector(s) concerned	All economic sectors eligible to receive aid	All economic sectors
Type of beneficiary	SME	Yes
	Large enterprises	Yes
	Micro enterprises	Yes
	NGO's	Yes

Budget	Annual overall amount of the budget planned under the scheme	Total amount (2013-2016) EUR 21 768 200
Aid instrument (Article 5)	Grant	Yes

PART II

General Objectives (list)	Objectives (list)	Maximum aid intensity in % or maximum aid amount in NOK	SME — bonuses in %
Regional investment and employment aid (Article 13)	Scheme	The aid intensity in present gross grant equivalent shall not exceed the regional aid threshold which is in force at the time the aid is granted in the assisted region concerned in Romania.	20 % for small enterprises 10 % for medium-sized enterprises
SME investment and employment aid (Article 15)		20 % for small enterprises 10 % for medium-sized enterprises	
Aid for Environmental protection (Articles 17-25)	Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards (Article 18) Please provide a specific reference to the relevant standard	35 %	20 % for small enterprises 10 % for medium-sized enterprises
	Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards (Article 19)	35 %	20 % for small enterprises 10 % for medium-sized enterprises
	Aid for early adaptation to future Community standards for SMEs (Article 20)	15 % for small enterprises and 10 % for medium-sized enterprises, if the implementation and finalisation takes place more than three years before the date of entry into force of the standard (10 % for small enterprises if less than three years)	
	Environmental investment aid for energy saving measures (Article 21)	60 %	20 % for small enterprises 10 % for medium-sized enterprises

General Objectives (list)	Objectives (list)		Maximum aid intensity in % or maximum aid amount in NOK	SME — bonuses in %
	Environmental investment aid for high efficiency cogeneration (Article 22)		45 %	20 % for small enterprises 10 % for medium-sized enterprises
	Environmental investment aid for the promotion of energy from renewable energy sources (Article 23)		45 %	20 % for small enterprises 10 % for medium-sized enterprises
	Aid for environmental studies (Article 24)		50 %	20 % for small enterprises 10 % for medium-sized enterprises
Aid for consultancy in favour of SMEs and SME participation in fairs (Articles 26-27)	Aid for consultancy in favour of SMEs (Article 26)		50 %	
	Aid for SME participation in fairs (Article 27)		50 %	
Aid for research, development and innovation (Articles 30-37)	Aid for research and development projects (Article 31)	Fundamental research (Article 31(2)(a))	100 %	
		Industrial research (Article 31(2)(b))	50 %	10 % for medium-sized enterprises 20 % for small enterprises A bonus of 15 % may be added up to a maximum aid intensity of 80 % if conditions in Article 31(4)(b) are fulfilled.
		Experimental development (Article 31(2)(c))	25 %	10 % for medium-sized enterprises 20 % for small enterprises A bonus of 15 % may be added up to a maximum aid intensity of 80 % if conditions in Article 31(4)(b) are fulfilled.

General Objectives (list)	Objectives (list)	Maximum aid intensity in % or maximum aid amount in NOK	SME — bonuses in %
	Aid for technical feasibility studies (Article 32)	75 % (industrial research) and 50 % (experimental development) for SMEs 65 % (industrial research) and 40 % (experimental development) for large enterprises	
	Aid for industrial property rights costs for SMEs (Article 33)	Aid intensity shall not exceed the intensity for research and development project aid (Article 31(3-4))	
	Aid to young innovative enterprises (Article 35)	EUR 1 million	
	Aid for innovation advisory services and for innovation support services (Article 36)	EUR 200 000 per beneficiary within any three year period	
	Aid for the loan of highly qualified personnel (Article 37)		
Training aid (Articles 38-39)	Specific training (Article 38(1))	25 %	10 % for medium-sized enterprises 20 % for small enterprises
	General training (Article 38(2))	60 %	10 % for medium-sized enterprises 20 % for small enterprises

No State aid within the meaning of Article 61(1) of the EEA Agreement

(2013/C 229/07)

The EFTA Surveillance Authority considers that the following measure does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement:

Date of adoption of the decision:	10 April 2013
Case number:	69933
Decision number:	144/13/COL
EFTA State:	Norway
Title (and/or name of the beneficiary):	Bergen Kirkelige Fellesråd
Type of measure:	No aid
Name and address of the granting authority:	Bergen Kirkelige Fellesråd Bjørns gate 1 5008 Bergen NORWAY

The authentic text of the decision, from which all confidential information has been removed, can be found on the EFTA Surveillance Authority's website:

http://www.eftasurv.int/state-aid/state-aid-register/

No State aid within the meaning of Article 61(1) of the EEA Agreement

(2013/C 229/08)

The EFTA Surveillance Authority considers that the following measure does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement:

Date of adoption of the decision:	10 April 2013
Case number:	70521
Decision number:	145/13/COL
EFTA State:	Iceland
Title (and/or name of the beneficiary):	Alleged State aid to Landsbankinn through the forgoing of an expected return on public funds
Legal basis:	Article 61(1) EEA
Type of measure:	No aid
Economic sectors:	Financial services

The authentic text of the decision, from which all confidential information has been removed, can be found on the EFTA Surveillance Authority's website:

http://www.eftasurv.int/state-aid/state-aid-register/

Invitation to submit comments pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice on State aid concerning the financing of Harpa Concert Hall and Conference Centre

(2013/C 229/09)

By means of Decision No 128/13/COL of 20 March 2013, reproduced in the authentic language on the pages following this summary, the EFTA Surveillance Authority initiated proceedings pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice. The Icelandic authorities have been informed by means of a copy of the Decision.

By means of this notice, the EFTA Surveillance Authority invites the EFTA States, EU Member States and interested parties to submit their comments on the measure in question within one month of the date of publication to:

EFTA Surveillance Authority
Registry
Rue Belliard/Belliardstraat 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

The comments will be communicated to the Icelandic authorities. The identity of the interested party submitting the comments may be withheld following a request in writing stating the reasons for the request.

SUMMARY

Procedure

In September 2011, the EFTA Surveillance Authority ('the Authority') received a complaint concerning the alleged subsidising by the Icelandic State and the City of Reykjavík of conference services and restaurant/catering services in Harpa Concert Hall and Conference Centre ('Harpa'). The Authority subsequently sent two requests for information to which the Icelandic authorities have replied.

Description of the measure

In 2004, the Icelandic State and the City of Reykjavík initiated a public-private partnership bid concerning the construction, design and operation of a 28 000 square metre concert hall and conference centre. On 12 January 2007, after the most favourable offer had been determined, the construction of Harpa Concert Hall and Conference Centre began. Due to the financial collapse in Iceland, the construction of Harpa was put on hold in 2008. Shortly afterwards, the Mayor of Reykjavík and the Minister for Education reached an agreement which entailed that the State and the City would continue with the construction of the project without the private partner. The building was formally opened on 20 August 2011.

Harpa is meant to accommodate various services and operations. Both the Icelandic Symphony Orchestra and the Icelandic Opera have entered into long-term contracts for the use of certain facilities within Harpa. Moreover, Harpa accommodates conferences and there are four conference halls of different sizes. Harpa also houses various other art events such as pop and rock concerts from both Icelandic and foreign artists. Other activities in Harpa such as catering, restaurants, a music shop and a furniture shop are operated by private companies who rent facilities in Harpa. These facilities are leased to the private operators on market terms and were subject to public tenders where the most favourable offers were accepted.

Harpa is fully owned by the Icelandic State (54 %) and the City of Reykjavík (46 %) which provide substantial annual contributions in accordance with the participation in the project. Since its opening, Harpa has been operated at a considerable annual deficit that has been covered through the budgets of the Icelandic State and the City of Reykjavík.

Comments by the Icelandic authorities

According to the Icelandic authorities, the financing of Harpa does not involve State aid since they have properly ensured that there are separate accounts for the different activities within the concert hall and conference centre. To support this claim the Icelandic authorities submitted reports by two accounting firms concerning the separation of accounts of the companies involved in the operation of Harpa. The Icelandic authorities also submitted a pricing analysis where they compared the prices of comparable conference facilities in Reykjavik, based on size and capacity. Furthermore, the Icelandic authorities maintain that the conference business positively contributes to other activities in Harpa and without the conference business, the costs other activities would have to carry would be considerably higher.

The presence of State aid

Advantages involving State resources granted to an undertaking

Since the Icelandic State and the City of Reykjavík together cover the annual deficit of the operation of Harpa by annually contributing a certain amount from their budgets, State resources within the meaning of Article 61 of the EEA Agreement are involved.

The Authority is of the opinion that both the construction and operation of an infrastructure constitute an economic activity in itself if that infrastructure is, or will be, used to provide goods or services on the market ([1]). Some of the activities taking place in Harpa, notably conferences, theatre performances, popular music concerts etc., can attract significant number of customers while they are in competition with private conference centres, theatres or other music venues. Therefore, the Authority takes the preliminary view that the companies involved in the operation of Harpa, in so far as they engage in commercial activities, qualify as undertakings.

Furthermore, the Authority considers that the public financing of the construction of Harpa would constitute an economic advantage and thus aid, since the project would admittedly not have been realised in the absence of such funding. Additionally, an advantage is conferred on the companies involved in the operation of Harpa in the form of foregone profits when the State and the City do not require a return on their investment in the concert hall and conference centre, in so far as those companies engage in commercial activities, such as the hosting of conferences or other art events. The preliminary assessment of the Authority thus shows that a selective economic advantage cannot be excluded at any level (construction, operation and use).

Distortion of competition and effect on trade between Contracting Parties

As the market for organising international events such as conferences and events is open to competition between venue providers and event organisers, which generally engage in activities which are subject to trade between EEA States, the effect on trade can be assumed. In this case, the effect on trade between certain neighbouring EEA States is even more likely due to the nature of the conference industry ([2]). Therefore, in the preliminary view of the Authority, the measure threatens to distort competition and affect trade within the EEA.

Compatibility of the aid

According to Article 61(3)(c) of the EEA Agreement, as interpreted by the Authority and developed by the European Commission under former Article 87(3)(d) TEC now Article 107(3)(d) TFEU, aid to promote culture and heritage conservation may be considered compatible with the functioning of the EEA Agreement, where such as aid does not affect trading conditions and competition in the EEA to the extent that is contrary to the common interest. The Icelandic authorities have stated that the primary objective of the measure in question was to promote culture through the construction of a concert hall that could house both the Icelandic Symphony Orchestra and the Icelandic Opera. The Authority has accepted that, given its cultural purpose, the construction and operation of a Symphony and Opera facility could qualify as aid to promote culture.

([1]) See the Commission Decision in Case SA.33618 (Sweden) *Financing of the Uppsala arena* (OJ C 152, 30.5.2012, p. 18), paragraph 19.

([2]) See case T-90/09 *Mojo Concerts BV and Amsterdam Music Dome Exploitatie BV* v *The European Commission*, Order of the General Court of 26 January 2012, paragraph 45, published in OJ C 89, 24.3.2012, p. 22.

The Authority accepts that an infrastructure such as the Harpa could also be used to house various commercial activities such as restaurants, coffee shops, stores, conferences and popular concerts. However, in order not to distort competition, safeguards must be put in place to ensure that there is no cross subsidisation between the commercial activities and the subsidised cultural activities. The Authority cannot see that the Icelandic authorities have put the necessary safeguards in place to ensure that such cross subsidisation doesn't occur. Consequently, following its preliminary assessment, the Authority has doubts whether the construction and operation of Harpa could be deemed compatible under Article 61(3)(c) of the EEA Agreement.

Conclusion

In light of the foregoing considerations, the Authority decided to open the formal investigation procedure in accordance with Article 1(2) of Part I of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice with regard to the financing of Harpa Concert Hall and Conference Centre. Interested parties are invited to submit their comments within one month from publication of this notice in the *Official Journal of the European Union*.

In accordance with Article 14 of Protocol 3, all unlawful aid can be subject to recovery from the recipients.

EFTA SURVEILLANCE AUTHORITY DECISION

No 128/13/COL

of 20 March 2013

to initiate the formal investigation procedure into potential State aid involved in the financing of the Harpa Concert Hall and Conference Centre

(Iceland)

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 ('the Surveillance and Court Agreement'), in particular to Article 24,

Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 1 of Part I and Article 4(4) and Articles 6 and 13 of Part II,

Whereas:

I. FACTS

1. Procedure

(1) On 19 September 2011, the Authority received a complaint, dated 13 September 2011 (Event No 608967), concerning the alleged subsidising by the Icelandic State and the City of Reykjavík ('the City') of conference services and restaurant/catering services in the Harpa Concert Hall and Conference Centre ('Harpa') ([3]).

(2) By letter dated 14 October 2011, the Authority requested additional information from the Icelandic authorities (Event No 609736). By a letter dated 30 November 2011 (Event No 617042), the Icelandic authorities replied to the request and provided the Authority with the relevant information.

(3) The case was the subject of discussions between the Authority and the Icelandic authorities as well as the lawyer representing the holding company responsible for Harpa's operations, at the package meeting in Reykjavík on 5 June 2012. Shortly after the meeting, the Authority sent a follow up letter, dated 9 July 2012 (Event No 637627), to the Icelandic authorities inviting them to provide information on certain outstanding issues.

([3]) For the purposes of this Decision, 'Harpa' will refer to the building itself and its facilities.

(4) By letter dated 21 August 2012 (Event No 644771), the Icelandic authorities submitted additional information. By letter dated 27 September 2012 (Event No 648320), the Icelandic authorities submitted a memorandum concerning the separation of accounts as well as a statement from the accounting firm PWC.

(5) Finally, the Icelandic authorities submitted information by e-mail dated 11 February 2013 (Event No 662444) and by letter dated 7 March 2013 (Event No 665434).

2. **The complaint**

(6) The complainant has alleged that unlawful State aid is being provided by the Icelandic State and the City to the companies involved in the operation of Harpa. The complainant referred to the State budget for the year 2011 where the Ministry of Finance allocated ISK 419 400 000 to the operation of Harpa and additional ISK 44 200 000 for building costs and maintenance. The Municipality's budget foresaw a substantial allocation of funds to the Harpa project for the year 2011 amounting to a total of ISK 391 526 000. Furthermore, the Municipality contributed a substantial amount to the project in the years 2009-2010.

(7) The complainant claims that the contribution from both the Icelandic Government and the City is partly being used to subsidise the conference service and the restaurant/catering services in the music hall and conference centre. The contributions in question are fairly high and according to the complainant, there is no transparency in how they are being used. The complainant maintains that this State aid affects the market for the conference business in the European Economic Area ('EEA') as a whole and is not limited to competitors on the Icelandic market. It therefore constitutes an infringement of Article 61 of the EEA Agreement.

(8) The complainant provided the Authority with extracts from the Icelandic State budget for the year 2011 as well as an extract from the City's budget for the same year. Furthermore, the complainant provided a purchase agreement for Harpa and general information on the conference market in Iceland. However, the complainant noted that due to the lack of transparency it was difficult to gather detailed information on the obligations of the Icelandic State and the City to contribute funds to the companies involved in the operation of Harpa as well as information on Harpa's business model and on the separation of accounts.

3. **Harpa Concert Hall and Conference Centre**

3.1. *Background*

(9) In 1999, the Mayor of Reykjavík along with representatives of the Icelandic Government announced that a concert and conference centre would be constructed in the centre of Reykjavík. In late 2002, the Icelandic State and the City signed an agreement regarding the project and the following year the company Austurhöfn-TR ehf. was founded with the purpose of overseeing the project.

(10) In 2004, the Icelandic State and the City initiated a public-private partnership ('PPP') bid concerning the construction, design and operation of the concert hall and conference centre. There were four companies that bid for the contract. In 2005, the evaluation committee of Austurhöfn-TR ehf. concluded that the offer from Portus ehf. was the most favourable one and subsequently the Icelandic State and the City entered into a contract with Portus ehf. for the construction and operation of a concert and conference centre ([4]). The construction of Harpa began on 12 January 2007.

(11) Due to the financial collapse in Iceland in October 2008, the construction of Harpa was put on hold. However, shortly after the collapse, the Mayor of Reykjavík and the Minister for Education reached an agreement which entailed that the State and the City would continue with the construction of Harpa without the private partner. After an amended and restated project agreement was concluded, the construction project continued (hereinafter referred to as 'the project agreement') ([5]). On 20 August 2011, Harpa was formally opened. The building is 28 000 square meters and is located at Austurbakki 2, 101 Reykjavík.

(12) Harpa is meant to accommodate various services and operations. Both the Icelandic Symphony Orchestra and the Icelandic Opera have entered into long-term contracts for the use of certain facilities within Harpa. Moreover, Harpa accommodates conferences and there are four conference halls of different sizes. Harpa also houses various other events such as pop and rock concerts with both Icelandic and foreign artists.

([4]) Project agreement between Austurhofn-TR ehf. and Eignarhaldsfelagid Portus ehf, signed on 9 March 2006.
([5]) Amended and restated project agreement between Austurhofn-TR ehf. and Eignarhaldsfelagid Portus ehf, signed on 19 January 2010.

(13) Other activities in Harpa such as catering, restaurants, a music shop and a furniture shop are operated by private companies who rent the facilities. According to the Icelandic authorities, these facilities are leased on market terms and were subject to public tenders, where the most favourable offers were accepted.

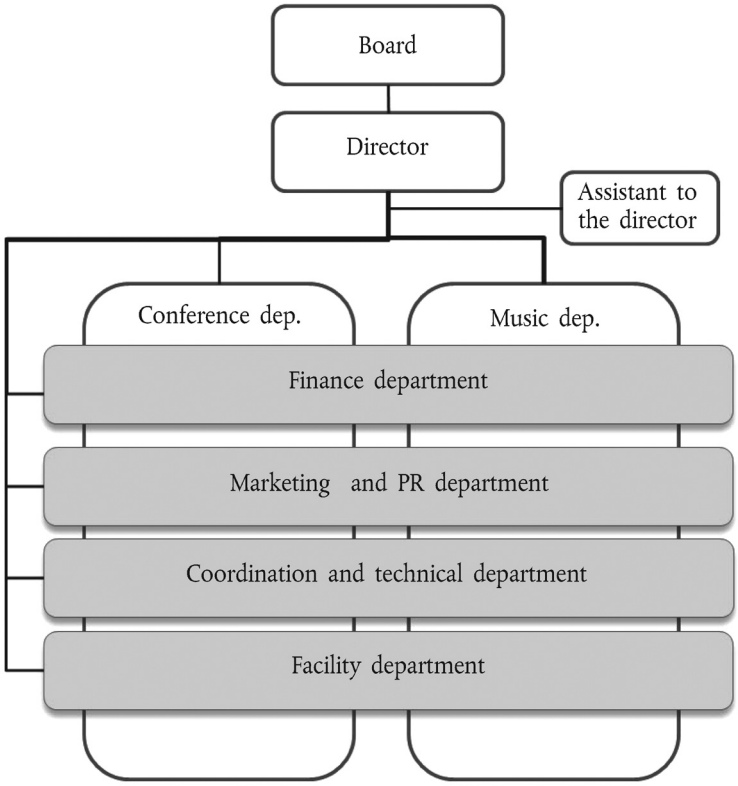
3.2. *The ownership and corporate structure of Harpa*

(14) Harpa Concert Hall and Conference Centre is owned by the Icelandic State (54 %) and Reykjavík City (46 %) and therefore constitutes a public undertaking. The entire Harpa project has been overseen by Austurhöfn-TR ehf. which is a limited liability company, established by the Ministry of Finance on behalf of the Icelandic State and the City in order to take over the construction and running of the Harpa project ([6]).

(15) Until recently there were several limited liability companies involved in Harpa's operations, namely: Portus ehf., which was responsible for Harpa real estate and operations, and Situs ehf., which was responsible for other buildings planned in the same area. Portus had two subsidiaries: Totus ehf., which owned the real estate itself, and Ago ehf., which was responsible for all operations in Harpa and leased the property from Totus. Situs also had two subsidies: Hospes ehf., which would have owned and operated a hotel which is to be constructed in the area, and Custos ehf., which was to own and operate any other buildings in the area.

(16) However, in order to minimise operational costs and increase efficiency, the board of Austurhöfn-TR ehf. decided in December 2012 to simplify the operational structure of Harpa by merging most of the limited liability companies involved in its operations into one company. The State and the City therefore founded the company Harpa — tónlistar- og ráðstefnuhús ehf. which is to oversee all of Harpa's operations. Simplifying the infrastructure of Harpa is a part of a long-term plan to make Harpa's operations sustainable.

(17) The following chart explains in broad terms the organisational structure of Harpa after the changes to its corporate structure entered into effect ([7]):



([6]) Further information on Austurhöfn-TR ehf. can be found on their website: http://www.austurhofn.is/
([7]) Information available online at: http://en.harpa.is/media/english/skipur-1.jpg

3.3. *The financing of Harpa's operations*

(18) As previously noted, Harpa is fully owned by the Icelandic State and the City through Austurhöfn-TR ehf. The obligations of the State and the City are regulated by Article 13 of the project agreement from 2006 ([8]). The annual payments of the State and the City are covered by their respective budgets. According to the State budget for 2011, the annual State contribution was expected to amount to ISK 424,4 million. For the year 2012, the expected amount to be contributed by the State was ISK 553,6 million. In the year 2013, there is expected to be an increase in the public funding of Harpa as the City and the State have approved an additional ISK 160 million contribution. All public contributions to Harpa are borne in accordance with the participation in the project, i.e. the State pays 54 % and the City 46 %. The contributions are also indexed with the consumer price index.

(19) In addition to the contribution provided for in the State and the City's budgets, the Government and the City have undertaken an obligation to grant a short-term loan for the operation of Harpa until long-term financing necessary to fully cover the cost of the project is completed. As from 2013, the total amount of the loan was ISK 794 million with an interest rate of 5 % and a 200 bp premium. The Icelandic authorities have however announced their intention to convert the loan into share capital in the companies operating Harpa ([9]).

(20) The State and the City allocate funds on a monthly basis in order pay off loan obligations in connection with Harpa. Since the project is meant to be self-sustainable, the profits must cover all operational costs. The funds from the owners are therefore, according to the Icelandic authorities, only meant to cover outstanding loans ([10]).

(21) According to the project agreement, there is to be a financial separation between the different companies involved in the operation of Harpa and between the different operations and activities:

(22) **13.11.1** *The private partner will at all times ensure that there is financial separation between the real estate company, the operation company, Hringur and the private partner. Each entity shall be managed and operated separately with regards to finances.*

(23) **13.11.2** *The private partner will at all times ensure that there is sufficient financial separation, i.e. separation in book-keeping, between the paid for work and other operations and activities within the CC. The private partner shall at all times during the term be able to demonstrate, upon request from the client, that such financial separation exists.*

(24) The operations of Harpa are divided into several categories: 1. the Icelandic Symphony Orchestra; 2. the Icelandic Opera; 3. other art events; 4. conference department; 5. operations; 6. ticket sales; 7. operating of facilities; 8. management cost. All these cost categories now fall under Harpa — tónlistar- og ráðstefnuhús ehf. and the revenue and costs attributed to each of these categories are included in the budget under the relevant category. Common operational costs such as salary, housing (heating and electricity) and administrative costs are divided among the categories according to a cost allocation model ([11]).

(25) According to the projected annual account of Austurhöfn-TR ehf. for the year 2012, the company was expected to sustain a significant operating loss corresponding to a total negative EBITDA of ISK 406,5 million. The conference part of Harpa's operation was run at a negative EBITDA of ISK 120 million in 2012 and the same goes for 'other art events' (negative EBITDA of ISK 131 million). The projected annual accounts and earning analysis for the year 2013 also foresee a considerable operating loss, a total negative EBITDA of around ISK 348 million, with both the conference activities and 'other art events' operating at a loss ([12]).

(26) As previously noted, the operation in Harpa is now overseen by a single company, Harpa — tónlistar- og ráðstefnuhús ehf., which is devoted to making the Harpa project as profitable as possible. According to the Icelandic authorities, the overall aim is to make the operations gradually sustainable. Nevertheless, Harpa has since its opening been operated with an annual

([8]) As amended and restated in 2010.
([9]) The Icelandic authorities have not yet outlined the particulars of this arrangement.
([10]) See memorandum issued by the Director of Harpa, dated 24 September 2012 (Event No 648320).
([11]) See report by KPMG, dated 7 February 2013 (Event No 662444).
([12]) Ibid.

deficit that has been covered over the budgets of the Icelandic State and Reykjavík City ([13]). According to projections submitted by the Icelandic authorities, the conference activities in Harpa are expected to become gradually sustainable and by the year 2016 the authorities project that Harpa's conference operations will run at a positive EBITDA of ISK 3,5 million ([14]). However, by the year 2016 the 'other art events' are still expected to run at a negative EBITDA of around ISK 93 million.

4. **Comments by the Icelandic authorities**

(27) The Icelandic authorities argue that the financing of the companies involved in the operation of Harpa does not involve State aid since they have properly ensured that the companies keep separate accounts for the different activities within the concert hall and the conference centre.

(28) The Icelandic authorities have claimed that revenues from conference and concert activities have been accounted for separately from other activities, while costs had not been accounted for separately up until now. The Icelandic authorities have acknowledged the need for accounting for conference activities separately from concert activities, as well as costs associated with these activities, and they aimed at having such a separation functional in January 2012.

(29) Furthermore, the Icelandic authorities claim that there is now a sufficient separation of accounts. In order to validate this claim, they have put forward statements from two accounting firms, PWC and KPMG. According to PWC, the separation of accounts for the companies involved in the operation of Harpa is sufficient. The profits are attributed to the relevant operational category and the common operational costs are divided between all operational categories. According to the report from KPMG, the property management team of Harpa has divided the building's square meters based on function and usage and the related costs are allocated accordingly.

(30) With regard to the conference operations, according to the Icelandic authorities, Harpa — tónlistar- og ráðstefnuhús ehf. is not itself active on the conference market. The company however leases conference rooms either to one-off conference organisers or to specialised conference businesses. Furthermore, the Icelandic authorities have noted that that there are no competing conference centres in Iceland capable of hosting large-scale conferences like Harpa. According to the Icelandic authorities, the conference business positively contributes to other activities in Harpa. If Harpa — tónlistar- og ráðstefnuhús ehf. would not operate the conference business, the costs other activities would have to carry would be considerably higher. In order to show that the conference aspect of Harpa is not being subsidised, the Icelandic authorities submitted a pricing analysis from KPMG where they compared the prices of comparable conference facilities, based on size and capacity. According to KPMG's analysis, the price for a full day, the price per guest and the price per square meter are on average much higher for the facilities in Harpa than for comparable facilities offered in competing conference facilities.

(31) Lastly, the Icelandic authorities maintain that the financial contributions from the State and the City are fully allocated for payment of outstanding loans and are not used in order to subsidise the conference hosting aspect.

II. **ASSESSMENT**

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

(32) Article 61(1) of the EEA Agreement reads as follows:

(33) 'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between contracting parties, be incompatible with the functioning of this Agreement.'

([13]) According to the Icelandic authorities, Harpa's losses mostly stem from high real estate taxes.
([14]) The key factor in this revenue growth is the expected increase in the conference business.

(34) In the following chapters the financing of the companies involved in the operation of Harpa Concert Hall and Conference Centre will be assessed with respect to these criteria.

1.1. *State resources*

(35) According to Article 61(1) of the EEA Agreement, a measure must be granted by the State or through State resources in order to constitute State aid.

(36) At the outset, the Authority notes that both local and regional authorities are considered to be equivalent to the State ([15]). Consequently, the state for the purpose of Article 61(1) covers all bodies of the State administration, from the central government to the City level or the lowest administrative level as well as public undertakings and bodies. Furthermore, municipal resources are considered to be State resources within the meaning of Article 61 of the EEA Agreement ([16]).

(37) Since the Icelandic State and the City of Reykjavík cover jointly the annual deficit of the companies involved in the operation of Harpa by annually contributing a certain amount from their budgets, State resources are involved. Furthermore, the converting of loans into share capital also entails a transfer of State resources since the State and the City would forgo their entitlement to receive a full repayment of the outstanding loans. Therefore, the first criterion of Article 61(1) of the EEA Agreement is fulfilled.

1.2. *Undertaking*

(38) In order to constitute State aid within the meaning of Article 61 of the EEA Agreement, the measure must confer an advantage upon an undertaking. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ([17]). Economic activities are activities consisting of offering goods or services on a market ([18]). Conversely, entities that are not commercially active in the sense that they are not offering goods and services on a given market do not constitute undertakings.

(39) The Authority is of the opinion that both the construction and operation of an infrastructure constitute an economic activity in itself (and are thus subject to State aid rules) if that infrastructure is, or will be used, to provide goods or services on the market ([19]). In this case, the conference hall and concert centre is intended for e.g. hosting conferences as well as music, culture and 'other art events' on a commercial basis, i.e. for the provision of services on the market. This view has been confirmed by the Court of Justice of the European Union in the *Leipzig/Halle* case ([20]). Consequently, in infrastructure cases, aid may be granted at several levels: construction, operation and use of the facilities ([21]).

(40) As previously noted, Harpa Concert Hall and Conference Centre hosts concerts by the Icelandic Symphony Orchestra, the Icelandic Opera, various other art events as well as conferences. In the view of the Icelandic authorities, only the conference aspect of Harpa's operation constitutes an economic activity. All other activities should therefore be classified as non-economic. However, the Authority has certain doubts in this regard.

(41) Some of the activities taking place in Harpa, notably conferences, theatre performances, popular music concerts etc., can attract significant numbers of customers while they are in competition with private conference centres, theatres or other music venues. Therefore, the Authority takes the view

([15]) See Article 2 of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings (OJ L 318, 17.11.2006, p. 17), incorporated at point 1a of Annex XV to the EEA Agreement.

([16]) See the Authority's Decision No 55/05/COL, Section II.3, p. 19 with further references, published in OJ L 324, 23.11.2006, p. 11 and EEA Supplement No 56, 23.11.2006, p. 1.

([17]) Case C-41/90 *Höfner and Elser* v *Macroton* [1991] ECR I-1979, paragraphs 21-23 and Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] Ct. Rep. 61, paragraph 78.

([18]) Case C-222/04 *Ministero dell'Economica e delle Finanze* v *Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, paragraph 108.

([19]) See the Commission Decision in Case SA.33618 (Sweden) *Financing of the Uppsala arena* (OJ C 152, 30.5.2012, p. 18), paragraph 19.

([20]) Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *The European Commission*, 19 December 2012, paragraphs 40-43, not yet published.

([21]) See the Commission Decision in Case SA.33728 (Denmark) *Financing of a new multiarena in Copenhagen* (OJ C 152, 30.5.2012, p. 6), paragraph 24.

that the Harpa Concert Hall and Conference Centre and the companies involved in its operation, in so far as they engage in commercial activities, qualify as an undertaking ([22]). The companies involved in the operation of Harpa must be regarded as vehicles for pursuing the common interest of its owners, that is to support cultural activities in Iceland.

1.3. *Advantage*

(42) In order to constitute State aid within the meaning of Article 61 of the EEA Agreement, the measure must confer an economic advantage on the recipient.

(43) Regarding the financing of the construction of Harpa, State aid can only be excluded if it is in conformity with the market economy investor principle ('MEIP') ([23]). According to the Icelandic authorities, the State and the City had initially hoped that a private investor would finance the realisation of the project. However, due to the financial crisis, it became impossible to carry out the project without public funding. The direct grant by the State and the City is thus claimed to be necessary, as without it there were not enough funds to finance the project. The Authority therefore considers, at this stage, that the public financing of the construction of Harpa would constitute an economic advantage and thus aid, since the project would admittedly not have been realised in the absence of public funding and the participation by the State and the City was essential to the Harpa project as a whole.

(44) It follows from the Authority's decisional practice that when an entity carries out both commercial and non-commercial activities, a cost-accounting system that ensures that the commercial activities are not financed through State resources allocated to the non-profit making activities must be in place ([24]). This principle is also laid down in the Transparency Directive ([25]). The Directive does not apply directly to the case at hand. However, the Authority is of the opinion that the principles of operating economic activities on commercial terms with separate accounts, and a clear establishment of the cost accounting principles according to which separate accounts are maintained, still apply.

(45) As described in Section I.3 above, the operations of Harpa are divided into several categories, e.g. hosting the Icelandic Symphony Orchestra and the Icelandic Opera as well as other art events and conferences, which can be divided into economic and non-economic activities (i.e. cultural activities). The Icelandic authorities have however not properly ensured, through either amending the organisational structure of Harpa or by other administrative action, that there is a clear and consistent separation of the accounts for the different activities of the concert hall and conference centre. Simply dividing the losses associated with the operation of the building and common administrative costs between the different activities of Harpa, both the economic and non-economic, based on estimated usage and other criteria cannot be seen as a clear separation of accounts under EEA law. This situation therefore may lead to cross-subsidisation between non-economic and economic activities.

(46) Additionally, an advantage is conferred on the companies involved in the operation of Harpa in the form of foregone profits when the State and the City do not require a return on their investment in the concert hall and conference centre, in so far as those companies engage in commercial activities, such as the hosting of conferences or 'other art events'. Any business owner or investor will normally require a return on its investment in a commercial undertaking. Such a requirement effectively represents an expense for the undertaking. If a State- and municipally-owned undertaking is not required to generate a normal rate of return for its owner this effectively means that the undertaking benefits from an advantage whenever the owner foregoes that profit ([26]).

(47) The Authority considers that the announced conversion of loans, in the amount of ISK 904 million, could also constitute an advantage, should the conversion not be concluded on market terms. However, since the Authority has not received a detailed description of the loan conversion agreement it is not in the position to assess whether an advantage is present or not.

([22]) See the Commission Decision in Case N 293/08 (Hungary) *Cultural aid for multifunctional community cultural centres, museums, public libraries* (OJ C 66, 20.3.2009, p. 22), paragraph 19.

([23]) See the Commission Decision in Case SA.33728 (Denmark) *Financing of a new multiarena in Copenhagen* (OJ C 152, 30.5.2012, p. 6), paragraph 25.

([24]) ESA Decision No 142/03/COL regarding reorganisation and transfer of public funds to the Work Research Institute (OJ C 248, 16.10.2003, p. 6, EEA Supplement No 52, 16.10.2003, p. 3), ESA Decision No 343/09/COL on the property transactions engaged in by the Municipality of Time concerning property numbers 1/152, 1/301, 1/630, 4/165, 2/70, 2/32 (OJ L 123, 12.5.2011, p. 72, EEA Supplement No 27, 12.5.2011, p. 1).

([25]) 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 at point 1a of Annex XV to the EEA Agreement.

([26]) Case C-234/84 *Belgium* v *Commission* [1986] ECR I-2263, paragraph 14.

(48) The preliminary assessment of the Authority thus shows that an economic advantage cannot be excluded at any level (construction, operation and use).

1.4. *Selectivity*

(49) In order to constitute State aid within the meaning of Article 6l of the EEA Agreement, the measure must be selective.

(50) The Icelandic authorities provide funding to the companies involved in the operation of Harpa. The funding is used to cover the losses stemming from the different activities within Harpa, including economic activities such as the hosting of conferences. This system of compensation, under which cross-subsidisation may occur, is not available to other companies that are active on the conference market in Iceland or elsewhere.

(51) In light of the above, it is the Authority's preliminary view that the companies involved in the operation of Harpa receive a selective economic advantage compared to their competitors on the market.

1.5. *Distortion of competition and effect on trade between contracting parties*

(52) The measure must be liable to distort competition and affect trade between the contracting parties to the EEA Agreement to be considered State aid within the meaning of Article 61(1) of the EEA Agreement.

(53) According to settled case law, the mere fact that a measure strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade is considered to be sufficient in order to conclude that the measure is likely to affect trade between contracting parties and distort competition between undertakings established in other EEA States ([27]). The State resources allocated to the companies involved in the operation of Harpa, in order to cover their losses, constitute an advantage that strengthens Harpa's position compared to that of other undertakings competing in the same market.

(54) As the market for organising international events is open to competition between venue providers and event organisers, which generally engage in activities which are subject to trade between EEA States, the effect on trade can be assumed. In this case, the effect on trade between certain neighbouring EEA States is even more likely due to the nature of the conference industry. Moreover, the General Court has recently, in its Order concerning the Ahoy complex in the Netherlands, held that there was no reason to limit the market to the territory of that Member State ([28]).

(55) Therefore, in the preliminary view of the Authority, the measure threatens to distort competition and affect trade within the EEA.

1.6. *Conclusion with regard to the presence of State aid*

(56) With reference to the above considerations the Authority cannot, at this stage and based on its preliminary assessment, exclude that the measure under assessment includes elements of State aid within the meaning of Article 61(1) of the EEA Agreement. Under the conditions referred to above, it is thus necessary to consider whether the measure can be found to be compatible with the internal market.

2. **Compatibility assessment**

(57) The Icelandic authorities have not put forward any arguments demonstrating that the State aid involved in the financing of the companies involved in the operation of Harpa could be considered as compatible State aid.

([27]) Case E-6/98 *The Government of Norway* v *EFTA Surveillance Authority* [1999] Report of the EFTA Court p. 76, paragraph 59; Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11.

([28]) Case T-90/09 *Mojo Concerts BV and Amsterdam Music Dome Exploitatie BV* v *The European Commission*, Order of the General Court of 26 January 2012, paragraph 45, published in OJ C 89, 24.3.2012, p. 36.

(58) Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation under Article 61(2) or (3) or Article 59(2) of the EEA Agreement and are necessary, proportional and do not cause undue distortion of competition.

(59) The derogation in Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Further, the aid under assessment in this case cannot be considered to qualify as public service compensation within the meaning of Article 59(2) of the EEA Agreement.

(60) The EEA Agreement does not include a provision corresponding to Article 107(3)(d) of the Treaty on the Functioning of the European Union. The Authority nevertheless acknowledges that State aid measures may be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement ([29]).

(61) On the basis of Article 61(3)(c) of the EEA Agreement, aid to promote culture and heritage conservation may be considered compatible with the functioning of the EEA Agreement, where such aid does not affect trading conditions and competition in the EEA to the extent that is considered to be contrary to the common interest. The Authority must therefore assess whether granting aid to the various activities in Harpa can be justified as aid to promote culture on the grounds of Article 61(3)(c) of the EEA Agreement.

(62) It should be noted that the principles laid down in Article 61(3)(c) of the EEA Agreement have been applied to cases somewhat similar to the case at stake ([30]). The Icelandic authorities have stated that the primary objective of the measure in question was to promote culture through the construction of a concert hall that could house both the Icelandic Symphony Orchestra and the Icelandic Opera. Similar multipurpose cultural centres already exist in most other European cities. Harpa is to be Iceland's national concert hall, providing a necessary cultural infrastructure that was missing in Iceland and it will act as the focal point for the development and advancement of those performance arts in Iceland. The concert centre will therefore contribute to the development of cultural knowledge and bring access to cultural educational and recreational values to the public ([31]).

(63) In view of the above, the Authority considers that, given its cultural purpose, the construction and operation of a Symphony and Opera facility would qualify as aid to promote culture within the meaning of Article 61(3)(c) of the EEA Agreement. However, the Authority has doubts as to whether aid granted to subsidise conference and other art events, on a commercial basis, can be justified under Article 61(3)(c) and this aid must therefore be assessed separately.

(64) Concerning necessity, proportionality and whether the measure is likely to distort competition, the Authority has the following observations. As previously noted the main reason for constructing Harpa was the apparent need for a suitable concert hall to accommodate both the Icelandic Symphony Orchestra and the Icelandic Opera. Given the scale of the project it is understandable that an infrastructure such as Harpa would also be used to house various commercial activities such as restaurants, coffee shops, stores, conferences and popular concerts. However, in order not to distort competition, safeguards must be put in place to ensure that there is no cross subsidisation between the commercial activities and the heavily subsidised cultural activities. This can be achieved by either tendering out facilities for the commercial activities, thereby ensuring that the economic operator pays market price for the facilities and does not benefit from cross subsidisation, or by sufficiently separating the economic activities from the non-commercial activities by establishing a separate legal entity or a sufficient system of cost allocation and separate accounts that ensures a reasonable return on investment. The Icelandic authorities have already taken the former approach with regard to the restaurants, catering services and shops within Harpa. The same approach has however not been taken with regard to the hosting of conference and 'other art events' which are currently overseen by a company owned by the State and the City, Harpa — tónlistar- og ráðstefnuhús ehf., and run at a considerable negative EBITDA. The Authority therefore cannot see that the Icelandic authorities have put the necessary safeguards in place to ensure that cross subsidisation does not occur between the cultural and the purely commercial activities within Harpa.

([29]) See for example paragraph 7 (with further references) of the Authority's Guidelines on State aid to cinematographic and other audiovisual work, available at the Authority's webpage at: http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/

([30]) See Commission Decision in Case N 122/10 (Hungary) *State aid to Danube Cultural Palace* (OJ C 147, 18.5.2011, p. 3) and Commission Decision in Case N 293/08 (Hungary) *Cultural aid for multifunctional community cultural centres, museums, public libraries* (OJ C 66, 20.3.2009, p. 22).

([31]) See Commission Decision in Case SA.33241 (Cyprus) *State support to the Cyprus Cultural Centre* (OJ C 377, 23.12.2011, p. 11), paragraphs 36-39.

(65) Consequently, following its preliminary assessment, the Authority has doubts whether the proposed project could be deemed compatible under Article 61(3)(c) of the EEA Agreement, at this stage at all three levels of possible aid (construction, operation and use) in accordance with the above.

(66) At this stage, the Authority has not carried out an assessment with respect to other possible derogations, under which the measure could be found compatible with the functioning of the EEA Agreement. In this respect, the Icelandic authorities have not brought forward any further specific arguments.

3. **Procedural requirements**

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

(68) The Icelandic authorities did not notify the aid measures to the Authority. Moreover, the Icelandic authorities have, by constructing and operating Harpa, put those measures into effect before the Authority has adopted a final decision. The Authority therefore concludes that the Icelandic authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3. The granting of any aid involved is therefore unlawful.

4. **Opening of the formal investigation procedure**

(69) Based on the information submitted by the complainant and the Icelandic authorities, the Authority, after carrying out the preliminarily assessment, is of the opinion that the financing of the companies involved in the operation of the Harpa Concert Hall and Conference Centre — within the context of the project as outlined above — might constitute State aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, as outlined above, the Authority has doubts as regards the compatibility of the potential State aid with the functioning of the EEA Agreement.

(70) Given these doubts and the impact of potential State aid on the investments of private operators it appears necessary that the Authority opens the formal investigation procedure.

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

(72) The opening of the procedure will also enable interested third parties to comment on the questions raised and on the impact of the Harpa project on relevant markets.

(73) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, hereby invites the Icelandic authorities to submit their comments and to provide *all documents, information and data* needed for the assessment of the compatibility of the measures within one month from the date of receipt of this Decision.

(74) The Authority must remind the Icelandic authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted already to the beneficiaries will have to be recovered, unless (exceptionally) this recovery would be contrary to a general principle of EEA law.

(75) Attention is drawn to the fact that the Authority will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties, by publication of a notice in the EEA Supplement to the *Official Journal of the European*. All interested parties will be invited to submit their comments within one month of the date of such publication,

HAS ADOPTED THIS DECISION:

Article 1

The financing and operation of the Harpa Concert Hall and Conference Centre constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. The Authority has doubts as regards the compatibility of the State aid with the functioning of the EEA Agreement.

Article 2

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is initiated regarding the aid referred to in Article 1.

Article 3

The Icelandic authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 4

The Icelandic authorities are requested to provide, within one month from notification of this Decision, all documents, information and data needed for assessment of the measures under the State aid rules of the EEA Agreement.

Article 5

This Decision is addressed to Iceland.

Article 6

Only the English language version of this Decision is authentic.

Done at Brussels, 20 March 2013.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sabine MONAUNI-TÖMÖRDY
College Member

Invitation to submit comments pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on State aid issues concerning potential aid to the Nasjonal digital læringsarena (NDLA)

(2013/C 229/10)

By means of Decision No 136/13/COL of 27 March 2013, reproduced in the authentic language on the pages following this summary, the EFTA Surveillance Authority initiated proceedings pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. The Norwegian authorities have been informed by means of a copy of the decision.

By means of this notice the EFTA Surveillance Authority gives the EFTA States, EU Member States and interested parties notice to submit their comments on the measure in question within one month of the date of publication to:

EFTA Surveillance Authority
Registry
Rue Belliard/Belliardstraat 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

The comments will be communicated to the Norwegian authorities. The identity of the interested party submitting the comments may be withheld following a request in writing stating the reasons for the request.

SUMMARY

Background

Education in Norway is mandatory for all children aged from 6 to 16 and is provided through a system of free public schools. In 2006 the Norwegian authorities decided in the course of the 'Knowledge Promotion Initiative' (Kunnskapsløftet) that all Norwegian schools were to emphasise the ability to learn a given subject by using information and communication technology. Against this background, the Norwegian authorities amended the Education Act and obliged the county municipalities to provide the pupils with the necessary printed and digital learning materials free of charge.

In May 2006 the Norwegian government made NOK 50 million available for the development and use of such digital learning resources. In June 2006 the Ministry of Education submitted an invitation to the county municipalities to jointly apply for the available funds. In August 2006 the heads of education of the 18 of the 19 county municipalities decided to enter into the inter-municipal cooperation and to set up the NDLA as an inter-county cooperation body under §27 of the Local Government Act.

The participating county municipalities then submitted an application for the funds to the Ministry of Education, which granted NOK 30,5 million for the project under the condition that the responsible legal entity will take care of the counties' obligation under the initiative, that the entity does not engage in economic activity and that the purchase of digital learning materials and development services are performed in accordance with the regulations for public procurement.

Subsequently, the county municipalities allocated NOK 21,1 million (2008), NOK 34,7 million (2009), NOK 58,8 million (2010) and NOK 57,7 million (2011) to the project. These funds were partly financed from regular municipal funding of schooling activities and partly through the above mentioned additional funds, which the Ministry of Education had made available to the county municipalities for this specific project.

Decision and Court judgment

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) EEA (hereafter: the Decision). On 9 January 2012 the applicant brought an action against the decision and by its judgment dated 11 December 2012 the EFTA Court annulled the decision ([1]).

([1]) Case E-1/12 *Den norske Forleggerforening* (not yet published).

Assessment of the measure

The presence of State aid

Following the judgment the Authority has doubts as to whether the NDLA engages in an economic activity. In particular, the Authority requires more details regarding the transition of the initiative from the project phase to its formal establishment of NDLA as an inter-county cooperation body under §27 of the Local Government Act.

Furthermore, the Authority requires more information as to what extent the change in legal status effected the decision making process. In particular, the Authority needs to establish to what extent the NDLA can expand the scope of its activities without the consent of the participating municipalities or even against their will, and if the present situation differs from the situation prior to the formal establishment.

Moreover, the Authority will investigate in more detail the funding of the NDLA, both in its project phase and after the formal entry into force.

Also, the Authority needs to establish in more detail how the parameters for the public procurement procedures through which the NDLA purchases goods and hires staff are set.

Finally, the Authority requires more information on the effects of the measure on competition and trade.

Compatibility of the aid

Based on the information at hand the Authority cannot at this stage conclude on the compatibility of the measure. The Authority therefore requires additional information in that regard.

Conclusion

In light of the above considerations, the Authority decided to open the formal investigation procedure in accordance with Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Interested parties are invited to submit their comments within one month from publication of this notice in the *Official Journal of the European Union*.

EFTA SURVEILLANCE AUTHORITY DECISION

No 136/13/COL

of 27 March 2013

opening the formal investigation procedure into potential aid to the Nasjonal digital læringsarena (NDLA)

(Norway)

THE EFTA SURVEILLANCE AUTHORITY ('THE AUTHORITY')

HAVING REGARD to:

The Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 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 1 of Part I and Articles 4(4) and 6 of Part II,

Whereas:

I. FACTS

1. Procedure

(1) By letter dated 15 April 2010 Den Norske Forleggerforening, the Norwegian Publishers Association ('NPA'), sent a complaint alleging that illegal State aid has been granted to the Nasjonal digital

læringsarena ('NDLA'). The letter was received and registered by the Authority on 16 April 2010 (Event No 553723). Following a telephone conference on 15 July 2011 the complainant provided additional information by email on the same day (Event No 608593).

(2) By letter dated 2 July 2010 (Event No 558201), the Authority requested additional information from the Norwegian authorities. By letter dated 9 August 2010 (Event No 566179), the Norwegian authorities requested an extension of the time limit for sending a response. The request for an extension was granted by the Authority by letter dated 12 August 2010 (Event No 566397). 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 considered that further information was necessary and sent another request for information by letter dated 4 February 2011 (Event No 574762). The Norwegian authorities replied to the information request by letter dated 7 March 2011 (Event No 589528). Upon request the Norwegian authorities provided further clarifications by emails 2 May 2011 (Event No 596402) and 12 August 2011 (Event No 608596).

(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) EEA (hereafter: the Decision). On 9 January 2012 the applicant brought an action against the decision and by its judgment dated 11 December 2012 the EFTA Court annulled the decision (hereafter: the Judgment) ([2]).

2. **The complaint**

(5) The complainant is the Norwegian Publishers Association, which represents i.a. companies which are or could be active in the development and distribution of digital learning material. The complaint concerns the Norwegian government's and the county municipalities granting of funds as well as the transfer of a content management system to the NDLA. The NDLA is an entity which has been founded as an inter-county cooperation body by 18 Norwegian municipalities ([3]) in order to develop or purchase digital learning material with a view to publishing the material on the internet free of charge.

(6) The complainant submits that the NDLA has four main areas of activity: firstly, the NDLA develops and supplies learning resources for the upper secondary school; secondly, the NDLA procures learning resources from third party suppliers; thirdly, the NDLA ensures the quality of learning resources; and fourthly, the NDLA develops and manages the content management system which operates the website through which the digital learning material is published (these activities are hereafter also referred to as 'purchase, development and supply of digital learning materials').

(7) The complainant submits that the granting of funds to the NDLA for the purchase, development and supply of digital learning material constitutes illegal State aid to the NDLA. In that regard the complainant emphasises that — in his view — the NDLA is not an integrated part of the public administration but rather an undertaking within the meaning of State aid rules. The complainant recalls that according to established case law an undertaking is an entity which is engaged in economic activities. The complainant suggests that according to the ECJ case law an economic activity is an activity, which could, at least in principle, be carried out by a private undertaking in order to make profits. Then, the complainant argues that any entity, which carries out an activity which could be carried out to make profits, is engaged in an economic activity. The complainant further submits that there was a market for digital learning material prior to the activities of the NDLA and that the NDLA competes at present with 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.

([2]) See footnote 1.

([3]) Norway is divided into 19 municipalities, all of which participate in the NDLA project with the exception of the county municipality of Oslo. Participants are therefore the municipalities of 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.

(8) Furthermore, the complainant argues that the funds offered by the Ministry of Education and from the county municipalities to the NDLA for the purchase of digital learning material from third party suppliers also constitute State aid. Finally, the complainant submits that the fact that the State also made its content management system available to the NDLA free of charge — according to the complainant — also amounts to State aid.

(9) The complainant notes that the measure has not been notified. He continues to argue that Article 59(2) EEA is not applicable and concludes that — in the absence of a notification — the Norwegian State has granted State aid contrary to State aid rules.

3. **Background**

3.1. ***The educational system in Norway***

(10) Education in Norway is mandatory for all children aged from 6 to 16 and 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 the upper secondary school (age 16 to 19).

(11) In 2006 the Norwegian authorities decided in the course of the 'Knowledge Promotion Initiative' (Kunnskapsløftet) 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 information and communication technology. This requirement was introduced in the national curricula for pupils in the 10-year compulsory school (i.e. school for grades 1 to 9) and for pupils in the first year of upper secondary education (i.e. school for grades 10 to 12) and apprenticeships. Under the Norwegian Education Act [4] the county municipalities are responsible for meeting these requirements. Furthermore, in 2007 the Norwegian authorities amended the Education Act and obliged the county municipalities to provide the pupils with the necessary printed and digital learning materials free of charge.

(12) It should be noted that until that time, pupils in Norwegian upper secondary school (grades 10 to 12) had to purchase their learning material themselves based on the choice of learning material designated by the schools in compliance with the national curricula [5]. Under the new Education Act, county municipalities are obliged to provide all learning material, i.e. digital learning material as well as physical learning material such as books, to pupils free of charge [6].

Provisions in the revised State budget

(13) The obligation of providing digital and physical learning material for free constitutes a considerable financial burden for the Norwegian county municipalities. In view of these additional costs, the Norwegian government decided already in 2006 to provide additional funds. The provision of these funds is laid down in a revised State budget which was adopted in May 2006:

'The Government aims to introduce free teaching material for secondary education. At the same time, it is desirable to encourage the use of digital learning materials in secondary education. As part of the efforts to bring down the cost for each student through increased access to and use of digital teaching aids, the Government proposes to allocate NOK 50 million as a commitment to the development and use of digital learning resources.

Counties are invited to apply for funding for the development and use of digital learning resources. Applications from counties may include one, several, or all secondary schools in the county, and may include one or more subjects. The objective of the grant is to encourage the development and use of digital learning resources, and to help reduce students' expenses for teaching aids.

The funds can be used for the provision or for local development of digital learning resources. The funds shall not be used for the preparation of digital infrastructure for learning. The intention is to give priority to applications that involve inter-county cooperation.' [7]

[4] Act of 17 July 1998 No 61 relating to Primary and Secondary Education and Training (The Education Act).
[5] As the national curricula set out the objectives for the learning outcome of all classes, the content of the learning material must respect the objectives of the national curricula.
[6] Sections 3-l and 4A-3 of the Education Act states that the county municipality is responsible for providing pupils with the necessary printed and digital teaching material as well as digital equipment free of charge.
[7] Translation made by the Authority.

Invitation to submit an application

(14) In June 2006 the Ministry of Education submitted an invitation to the county municipalities to jointly apply for the available funds of NOK 50 million. The letter describes the objectives and the concept of the initiative as follows:

'The Ministry of Education has the following objectives for the initiative:

— To increase access to and use of digital learning materials in secondary education.

— To develop secondary schools and school owners' competence as developers and/or purchasers of digital learning materials.

— To Increase the volume and diversity of digital teaching materials aimed at secondary schools.

— Over time to reduce students' expenses for teaching aids.

[…]

The funds can be used to purchase digital learning resources and to locally develop digital learning resources.' ([8])

Creation of the NDLA

(15) In August 2006 the heads of education of the 19 Norwegian county municipalities met to discuss the possibility of a joint application for the funds in question based on the requested inter-county cooperation. While the municipality of Oslo decided not to participate in a cooperative project, the other 18 municipalities decided to enter into the inter-county cooperation and to set up the NDLA to manage the process. Each of these municipalities subsequently adopted the following resolution:

'The County Council passes a resolution for the following counties, Akershus, Aust-Agder, Buskerud, Finnmark, Hedmark, Hordaland, Nordland, Nord-Trondelag, More og Romsdal, Oppland, Rogaland, Sogn og Fjordane, Sor-Trondelag, Telemark, Troms, Vest-College, Vesold and Østfold, to establish an inter-county cooperation body, 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…' ([9])

Funds for the county municipalities

(16) Subsequently, an application for the State funds was submitted to the Ministry of Education, which in April 2007 granted the funds under a number of conditions:

'The Ministry requests further that the counties jointly identify a responsible legal entity that will take care of the counties' responsibility for digital learning resources under this initiative. Such an entity can be e.g. a corporation, an inter (county) municipal corporation or a host (county) municipality 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 employees is to be regarded as an activity for its own account, provided that the counties do not gain any profits from this activity. The development by people who are not county 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.' ([10])

(17) Following the approval of the funds the Ministry of Education transferred over a period of three years NOK 30,5 million (NOK 17 million in 2007, NOK 9 million in 2008 and NOK 4,5 million in 2009) to the participating municipalities for the NDLA project.

([8]) See footnote 7.
([9]) See footnote 7.
([10]) See footnote 7.

(18) Besides, following the amendment of the Education Act in 2007, the county municipalities were compensated for the obligations to provide (physical and digital) learning material through an increase in the county municipal grant scheme. This compensation was based on the estimated costs of providing learning materials in all subjects. The compensation amounted to NOK 287 million in 2007, NOK 211 million in 2008, NOK 347 million in 2009 and NOK 308 million in 2010.

Funding of NDLA by the municipalities

(19) The participating municipalities decided to use part of these funds for the NDLA project. The county municipalities allocated NOK 21,1 million (2008), NOK 34,7 million (2009), NOK 58,8 million (2010) and NOK 57,7 million (2011) to the project.

Legal status

(20) The EFTA Court emphasised that it is apparent from the case file that the NDLA was active as an ad hoc cooperation before it was formally established as an inter-county cooperation body pursuant Article 27 of the Norwegian Local Government Act ([11]).

Related projects

(21) There are currently two other projects concerning digital learning in Norway. Firstly, the municipality of Oslo has applied for a similar grant for its own project (Real Digital). Secondly, the Ministry of Education itself is working on a similar project (Utdanning).

(22) The municipality of Oslo does not participate in the NDLA project and has submitted an application for funding for its own project called Real Digital. The Norwegian government accepted the application from Oslo and granted NOK 13,5 million to the municipality of Oslo over a period of two years (NOK 8 million in 2007 and NOK 5,5 million in 2008). It should be noted that the funds provided to the municipality of Oslo are not subject to the complaint at hand.

(23) The Ministry of Education has decided to provide its own system for access to digital learning material. In that regard the Ministry can both develop digital learning material and/or acquire such learning material from third party suppliers. The Ministry acknowledges that there might be areas where the activities of the Ministry of Education might overlap with the activities of the NDLA. In its letter stating the conditions of the grant the Ministry of Education reserved itself the right to reallocate funds originally earmarked for the NDLA to the Ministry's own project. The relevant funds provided to the Ministry of Education are not subject to the complaint at hand.

3.2. ***National legal basis for the measure***

(24) The legal basis for the funds paid by the Ministry of Education to the NDLA is the State budget resolution of the Stortinget in combination with the delegation of competence to the Ministry of Education to approve applications for grants. The legal basis for the grants from the county municipalities to the NDLA is budget resolution of the participating county municipalities.

3.3. ***Recipient***

(25) The NDLA is organised as an inter-county cooperation body under Article 27 of the Local Government Act. This provision stipulates that municipalities or county municipalities may join forces to solve mutual tasks. The cooperation should take place through a board appointed by the relevant municipal or county municipal boards. 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 shall determine the appointment and representation in the board, the area of activities, whether the participating municipalities shall make financial contributions, whether the board may enter into loan agreements or in other ways make the participating municipalities liable for financial obligations and, finally, how such cooperation shall be abolished.

(26) Participation in such cooperation is only open for municipalities and county municipalities. Neither the State nor other State entities or private parties can participate. The cooperation must be sincere in the sense that the law prohibits that the competence to govern the cooperation is delegated to one municipality. This is so since municipal tasks and obligations shall remain the responsibility of each municipality ([12]).

([11]) Case E-1/12 *Den norske Forleggerforening*, para. 117 (not yet published).
([12]) NOU 1996:5 pkt. 8.1.2.

3.4. ***Amount***

(27) As indicated above, so far the county municipalities have transferred NOK 21,1 million in 2008, NOK 34,7 million in 2009 and NOK 61,6 million in 2010 to the NDLA project. In 2010 the county municipalities allocated NOK 58,8 million to the project and in 2011 this amount was NOK 56,9 million.

3.5. ***Duration***

(28) The NDLA project is not subject to a limited duration.

4. **The Decision**

(29) On 12 October 2011 the Authority adopted Decision No 311/11/COL holding that the measure did not constitute State aid within the meaning of Article 61(1) EEA. The Authority found that the NDLA was not to be considered as an undertaking because it did not carry out an economic activity.

(30) In that regard the Authority, firstly, noted that, according to established case law and decision practice, 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 ([13]). The Authority observed that the purchase, development and supply of learning material is inextricably linked to the provision of teaching content and is thus an inherent part of the actual teaching itself. In that regard it noted that the learning material forms both the basis and the framework for teaching and that the development of learning material is closely linked to the curriculum which is also established by the public authorities.

(31) Secondly, the Authority pointed out that, for a service to be considered as non-economic, it must be provided based on the principle of national solidarity, which means that the activity must be funded by the public purse and not through remuneration. In other words, there should be no connection between the actual costs of the service provided and the fee paid by those benefiting from the activity ([14]). In that regard the Authority concluded that this requirement was fulfilled because the NDLA is entirely funded by the State and distributes the developed or purchased learning material free of any charge.

(32) Thirdly, the Authority noted that in cases in which the activity in question is carried out by entities other than the State itself, the recipient of the funds (public or private) must be subject to the control of the State to the extent that 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) ([15]). In that regard the Authority noted that the participating municipalities have established the NDLA as an inter-county cooperation body in accordance with Article 27 of the local government act, referred to above. In view of the above, the Authority concluded in its Decision that the NDLA did not carry out an economic activity. Consequently, the NDLA did not act as an undertaking and the funds which the county municipalities transferred to it did not constitute State aid.

5. **Judgment in Case E-1/12**

(33) On 11 December 2012 the EFTA Court annulled Decision No 311/11/COL. The EFTA Court concluded that the Authority did not carry out a sufficient examination into several issues and should have opened the formal investigation procedure.

(34) Firstly, the EFTA Court noted that the NDLA was active as an ad hoc cooperation before it was formally established as an inter-county cooperation body pursuant to Article 27 of the Norwegian Local Government Act. According to the EFTA Court it remains unclear how this change in the legal and organisational status may have changed the decision-making process and the source of funding ([16]).

([13]) Case 263/86 *Humbel* [1988] ECR 5383, para. 18; Case E-05/7 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 64, para. 82; Commission decision No 118/2000 *France — Aide aux clubs sportifs professionels*, OJ C 333, 28.11.2001, p. 6.

([14]) Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para. 47; Case C-160/91 Poucet [1993] ECR I-637, paras. 11 and 12.

([15]) Case C-160/91 *Poucet* [1993] ECR I-637, para. 15 and 18; Joined Cases C-264/01, C-306/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paras. 46-57; Case C-218/00 *Cisal die Battistello Venanzi* [2002] ECR I-691, para. 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, Fn. 22).

([16]) See footnote 11.

(35) Secondly, the EFTA Court stated that it remains unclear whether the legislation imposes the obligation to provide the services free of charge on the counties or on the NDLA ([17]). According to the EFTA Court this circumstance raises serious difficulties with regard to the application of the principle of solidarity.

(36) Thirdly, the EFTA Court stated that there are aspects related to the autonomy of the NDLA which remain unclear. First, the EFTA Court noted that it is unclear, how the decisions to expand the NDLA's activities were taken and by whom ([18]). Furthermore, the EFTA Court pointed out that Article 8 of the Articles of Association of the NDLA states that 'the board (of the NDLA) has the competence to impose financial obligations on the participants ([19]).' Moreover, it follows from the judgment that the annulled decision lacked information as regards the autonomy of the the NDLA to set the parameters for the public procurement procedure through which it purchases goods on the market and hires staff ([20]).

II. **ASSESSMENT**

1. **The presence of State aid**

(37) 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. ***State resources***

(38) A measure is financed *by the State or through State resources*, if it results in a burden on the budget of a public authority or on a public or private undertaking provided that the measure is imputable to the State ([21]). In the case at hand the financing of the project results in a burden on the budget of the counties and of the Ministry of Education and Research. Consequently, the measure is financed by the State within the meaning of Article 61(1) of the EEA.

1.2. ***Advantage to an undertaking***

(39) As mentioned above, the Authority concluded in its previous decision that the county municipalities' provision of free, and in this case digital learning material for pupils in the national elementary and secondary school system to be a part of the State's fulfilment of its duty in the educational field and hence a non-economic activity provided under the principle of solidarity as such material is fully funded by the State.

(40) However, in its judgment the EFTA Court addressed several aspects relating not to the nature of the activity as such but rather to organisational aspects of the NDLA, its financing and autonomy, which should have led the Authority to open a formal investigation procedure.

The legal status of the NDLA

(41) The EFTA Court noted that the Articles of Association of the NDLA foresaw that the formalised cooperation would enter into force on 1 July 2009 ([22]). At the same time, the EFTA Court noted that the county municipalities resolutions of August 2006 foresaw that the inter-county cooperation would enter into force on 1 January 2010 ([23]). 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 may have affected its decision making process and the sources of its funding and how it may have changed over time ([24]).

(42) The Authority's Decision described the project phase of the NDLA; the Authority thus acknowledges that the information in the case file does indeed suggest that the NDLA entered into force on 1 July 2009 and thus six months earlier than originally foreseen in the resolutions which the county-municipalities had adopted several years earlier.

([17]) Case E-1/12 *Den norske Forleggerforening*, para. 123 (not yet published).
([18]) Case E-1/12 *Den norske Forleggerforening*, para. 127 (not yet published).
([19]) Case E-1/12 *Den norske Forleggerforening*, paras. 128-130 (not yet published).
([20]) Case E-1/12 *Den norske Forleggerforening*, para. 131 (not yet published).
([21]) Case C-482/99 *France* v *Commission (Stardust)* [2002] ECR I-4397, para. 52.
([22]) Case E-1/12 *Den norske Forleggerforening*, para. 115 (not yet published).
([23]) The EFTA Court refers to the submission from Norway dated 9 September 2010, p. 3.
([24]) See footnote 11.

(43) The complainant has not alleged that the NDLA in its project phase, i.e. before its entry into force as a inter municipal cooperation under Article 27 of the local government act, did engage in any other activities than what it has done after its formal establishment Nevertheless, the EFTA Court points out that the lack of information about how the county municipalities organised their cooperation to comply with their obligations to provide learning material in the NDLA project 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 in the NDLA ([25]).

(44) In that regard it is the Authority's understanding that prior to the formal establishment the project was managed by the 'forum for the county municipalities Heads of Education' (hereafter: FFU) ([26]), which appointed board members to carry out delegated tasks in the project phase.

(45) After the NDLA had been formally established and according to §7(2) of the Articles of Association the forum of the counties' Heads of Education became the Supervisory Board which remains responsible for the overall management. The forum of the counties' Heads of Education appoints the Management Board management board. According to §7(1) of the Articles of Association the Management Board is composed of five members with one member of the FFU and at least one representative of the training regions (i.e. Northern Region, South Western Region and Eastern Region. According to §8 of the Articles of Association, the task of the Management Board is to ensure that the NDLA is able to perform its duties under §2 of the Articles of Association, namely to ensure that (1) that digital educational materials are available to users free of charge, (2) that 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 the market provides content and services for students and teachers needs. Furthermore, the Management Board has the authority to incur financial obligations on the participants in that regard. However, §7(2) of the Articles of Association explicitly states that the Management Board only exercises its authority on the basis of delegation decisions of the Supervisory Board and that the Supervisory Board may instruct the Management Board and overrule its decisions.

(46) The Authority requests the Norwegian government and any interested third parties to explain whether they consider the NDLA to be an undertaking within the meaning of Article 61(1) EEA. In particular they are asked to explain in more detail how the counties cooperated in the NDLA project phase and, in particular, to clarify at what time the NDLA entered into force and whether this entry into force of the municipal cooperation affected the decision making process and the sources of the NDLA's funding. Moreover, the Norwegian authorities are invited to elaborate on the nature, practice and use of inter municipal cooperation under Article 27 of the local government act, including whether such cooperation is considered separate legal entities or not under Norwegian law.

(47) The Authority moreover requests the Norwegian authorities to explain to what extent the change in legal status effected the decision making process, in particular, to what extent the NDLA can expand the scope of its activities without the consent of the participating municipalities or even against their will, and if the present situation differs from the situation prior to the formal establishment of the NDLA on 1 July 2009 ([27]). The Authority also invites the Norwegian authorities to explain in more detail the funding of the NDLA, both in its project phase and after the formal entry into force up to and including 2012 ([28]).

The principle of solidarity and the autonomy of the NDLA

(48) The EFTA Court also found that it was unclear from the Decision whether the obligation to provide digital learning material free of charge falls upon the county municipalities or upon the NDLA ([29]). The EFTA Court noted that in the annulled 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' (emphasis added) ([30]). The EFTA Court further noted that in the assessment on the autonomy of the NDLA, the annulled 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' (emphasis added) ([31]). The judgment also refers to that the

([25]) See footnote 11.
([26]) The Norwegian wording is: 'Forum for fylkesutdanningssjefer'.
([27]) See footnote 11.
([28]) See footnote 11.
([29]) Case E-1/12 *Den norske Forleggerforening*, paras. 121-123 (not yet published).
([30]) 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 municipality is responsible for providing pupils with the necessary printed and digital teaching material as well as digital equipment free of charge.'
([31]) The EFTA Court refers to para. 45 of the annulled decision in para. 121 of the Judgment.

Authority at the oral hearing explained that it is the counties 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 ([32]).

(49) In the view of that the EFTA Court considered the above mentioned statements in the decision to represent an implicit contradiction (as it was not clear who was the client of the NDLA), the Authority notes that the notion of 'legal framework' is wider than that of 'legislation'. The reference to the legal framework encompasses not only the statutory obligation in national law (such as the Education Act), but also resolutions (such as the resolutions passed by the county municipalities in August 2006), as well as administrative acts (such as the April 2007 award of funding by the Ministry of Education) and the Articles of Association of the NDLA. The Authority does therefore not consider the above mentioned statements to contain any implicit contradiction.

(50) However, based on the EFTA Court's judgment the Authority invites the Norwegian authorities to explain in more details how the obligation to provide free learning material has been imposed on the county municipalities in the Public Education Act, and how the county municipalities involved in the NDLA have fulfilled this obligation through the NDLA cooperation as set out in the Articles of Association.

(51) Finally, the Court found that the decision did not contain sufficient information on the possibility of the NDLA to set the parameters for the public procurement procedures through which it purchases goods and hires staff ([33]).

(52) The Authority therefore invites the Norwegian authorities to provide more detail on how the parameters for the public procurement procedures through which the NDLA purchases goods and hires staff are set.

(53) Consequently the Authority expresses doubts as to whether the NDLA, wholly or partly, before or after its formal entry into force, may be considered as an undertaking under the EEA State aid rules.

1.3. ***Selectivity***

(54) It is established case law that a measure is selective if it derogates from the common regime inasmuch as it differentiates between economic operators who are otherwise in the same legal and factual situation ([34]). In that regard the Authority notes that if the NDLA were to be considered as an undertaking, the funding of it would be selective since other operators would not benefit from a similar funding.

1.4. ***Effect on competition and trade***

(55) It is established case law that a measure distorts or threatens to distort competition in a way that affects trade between Contracting Parties if it strengthens the position of the recipient compared with other companies ([35]) and if the recipient is active in a sector, in which trade between Contracting Parties takes place ([36]). In that regard the Norwegian authorities noted that the relevant geographic market for provision of learning materials made to fit the national Norwegian curricula should to a great extent be limited to Norway, so that the effects on cross-border trade are not significant. The Authority cannot at this stage and based on the information at hand conclude on the effects of the measure on competition and trade. The Authority therefore invites Norway to provide further information in that regard.

2. **Compatibility**

(56) The Norwegian authorities submitted that if one were to view the funding of the NDLA as State aid, then it would qualify as a compensation for a service of general economic interest under Article 59(2) EEA. However, based on the information at hand the Authority cannot at this stage conclude on the compatibility of the measure. The Authority therefore invites Norway to provide further information in that regard.

([32]) See footnote 17.
([33]) See footnote 20.
([34]) Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para. 41; Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Gibraltar and UK (Gibraltar corporate tax)* [2011] not yet published, para. 36.
([35]) Case 730/79 Philip Morris *Holland* BV v Commission, [2005] ECR, 2671, para. 11.
([36]) Case 102/87, *France* v *Commission* (SEB), [1988], 4067, Case C-310/99, Italian Republic v Commission, [2002] EC R I-289, para. 85, Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH (Altmark)*, [2003] ECR, I-7747, para. 77; Case T-55/99, *Confederación Espanola de Tranporte de Mercancias (CETM)* v *Commission*, [2000] ECR II-3207, para. 86.

3. **Conclusion**

(57) Based on the information submitted by the complainant and by the Norwegian authorities, and taking into account the judgment of the EFTA Court, the Authority has doubts as to whether the grants to the NDLA constitute State aid within the meaning of Article 61(1) EEA. Furthermore, the Authority has doubts regarding the compatibility of the measure with the functioning of the EEA Agreement.

(58) Given these doubts and the impact of potential State aid on the investments of private operators it appears necessary that the Authority opens the formal investigation procedure. Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority is obliged to initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3.

(59) The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement or that they do not constitute State aid.

(60) The opening of the procedure will also enable interested third parties to comment on the questions raised and on the impact of the measure on the relevant markets.

(61) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, hereby invites the Norwegian authorities to submit their comments and to provide *all documents, information and data* needed for the assessment of the compatibility of the measures within one month from the date of receipt of this Decision.

(62) Further, the Authority invites the Norwegian authorities to forward a copy of this Decision to the potential recipients of the aid immediately.

(63) The Authority would like to remind the Norwegian authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully put at the disposal of the beneficiaries will have to be recovered, unless this recovery would be contrary to a general principle of EEA law. Moreover, according to Article 15 Part II of Protocol 3, the powers of the Authority to order the recovery of aid are subject to a limitation period of 10 years. This period begins on the day on which the unlawful aid is awarded. Any action taken by the Authority with regard to this unlawful aid shall interrupt the limitation period.

(64) Attention is drawn to the fact that the Authority will inform interested parties by publishing this letter and a meaningful summary of it in the EEA Supplement of the *Official Journal of the European Union*. It will also inform interested parties, by publication of a notice in the EEA Supplement to the Official Journal of the European. All interested parties will be invited to submit their comments within one month of the date of such publication,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure, provided for in Article 1(2) of part I of Protocol 3 is initiated regarding the potential State aid to the NDLA.

Article 2

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

Article 3

The Norwegian authorities are requested to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the nature and compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version of this Decision is authentic.

Done at Brussels, 27 March 2013.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sabine MONAUNI-TÖMÖRDY
College Member

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(Announcements)

OTHER ACTS

EUROPEAN COMMISSION

Publication of an application pursuant to Article 50(2)(a) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs

(2013/C 229/11)

This publication confers the right to oppose the application pursuant to Article 51 of Regulation (EU) No 1151/2012 of the European Parliament and of the Council [1].

SINGLE DOCUMENT

COUNCIL REGULATION (EC) No 510/2006

on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2]

'ANTEP BAKLAVASI'/'GAZİANTEP BAKLAVASI'

EC No: TR-PGI-0005-0781-10.07.2009

PGI (X) PDO ( )

1. **Name**

'Antep Baklavası'/'Gaziantep Baklavası'

2. **Member State or third country**

Turkey

3. **Description of the agricultural product or foodstuff**

3.1. *Type of product*

Class 2.4. Bread, pastry, cakes, confectionery, biscuits, and other baker's wares

3.2. *Description of product to which the name in point 1 applies*

'Antep Baklavası'/'Gaziantep Baklavası' is a sweet pastry made of layers of filo pastry filled with semolina cream and Antep pistachio and sweetened with syrup.

Depending on the commercial type (dry or fresh), the average percentage of basic raw materials must be as follows (with ± 3 % tolerance):

	Normal (fresh)	Dry
Dough	25 %	30 %
Antep pistachio (*Antep fıstığı*)	10-11 %	10-11 %

[1] OJ L 343, 14.12.2012, p. 1.
[2] Replaced by Regulation (EU) No 1151/2012.

	Normal (fresh)	Dry
Semolina cream	12-13 %	—
Plain butter	15-20 %	20-25 %
Syrup	35-36 %	35-36 %

The difference between dry and fresh baklava is that the former does not include semolina cream.

Characteristics of 'Antep Baklavası'/'Gaziantep Baklavası':

aroma: this comes from Antep pistachio (*Antep fıstığı*) and plain butter;

colour: the surface of 'Antep Baklavası'/'Gaziantep Baklavası' is golden yellow and the lower part is dark green because of the Antep pistachio (*Antep fıstığı*);

texture: the upper part is semi-crunchy because of the pastry layers. The lower part is syrupy;

shape: the product should be cut before baking. The pieces can be in various shapes, but are mostly in equal, short rectangular shapes, shuttle (diamond), amulet (triangular) or square shapes, or carrot-like shapes (long triangular slices from the centre to the edges of a circular tray).

3.3. *Raw materials (for processed products only)*

Ingredients of 'Antep Baklavası'/'Gaziantep Baklavası':

— Antep pistachio (*Antep fıstığı*): the use of the Antep pistachio is compulsory for 'Antep Baklavası'/'Gaziantep Baklavası'. Indigenous to Gaziantep province, Antep pistachio is a registered agricultural product in Turkey. It is dark green with a dense aroma. According to the product specifications, there are five types and the pistachio is long, oval or circular in shape and dark green in colour. It has a protein rate of between 21,77 % and 23,77 % and a fat rate between 56,27 % and 59,89 %. The Antep pistachio can be coarsely or finely chopped,

— plain butter: 99,9 % pure butter made from milk and free of salt and any other additives,

— semolina cream (used only for the 'normal' (fresh) product): milk is boiled to 105-108 °C and semolina is added (100 g semolina to 1 kg milk). The mixture is heated to 100 °C until it solidifies and is then left to chill,

— flour: made from durum wheat,

— starch: wheat starch,

— syrup: made with sugar or sweetener (for diabetics). Nearly 350-360 g syrup is added to 1 kg of the baklava mixture. Honey should not be used,

— eggs: three eggs to 1 kg flour (for preparation dough),

— salt: 10 g rock salt to 1 kg flour (for preparation dough).

3.4. *Feed (for products of animal origin only)*

—

3.5. *Specific steps in production that must take place in the identified geographical area*

Preparation of the dough, making of the baklava and baking.

3.6. *Specific rules concerning slicing, grating, packaging, etc.*

'Antep Baklavası'/'Gaziantep Baklavası' can be marketed by weight or by portion in trays or packages. If it is packaged, cardboard boxes can be used but these must be lined with tin foil or a similarly waterproof material. A note with the serving suggestion 'Isıtarak servis yapınız' ('heat before serving') can be put in the box.

3.7. *Specific rules concerning labelling*

If 'Antep Baklavası'/'Gaziantep Baklavası' is sold in dry form, the term *kuru* ('dry') must appear on the package.

Labels featuring the terms 'PGI' and 'Antep Baklavası' or 'Gaziantep Baklavası' must be affixed to the visible face of the packaging, as well as the following logo:

4. **Concise definition of the geographical area**

The production area covers the whole of the province of Gaziantep, in south-east Anatolia. The province has borders with Syria to the south, Birecik and Halfeti to the east, Adiyaman to the north-east, Kahramanmaras to the north, Osmaniye to the west and Hatay to the south-west.

5. **Link with the geographical area**

5.1. *Specificity of the geographical area*

Gaziantep province is the centre of pistachio cultivation in Turkey. Pistachios are referred to as *antep fıstığı* ('Antep pistachio') in Turkey as the city of Gaziantep has lent its name to the Turkish word for 'pistachio'.

Products made from Antep pistachio have been prepared and consumed in Gaziantep for centuries.

Craftsmen's experience:

Preparing the baklava dough, rolling it out and thinning it, sprinkling starch between the layers, placing the layers on the tray, spreading on the cream and Antep pistachio, cutting the baklava into equal slices, oiling it with plain butter, baking and adding syrup — all this requires great skill. 'Antep Baklavası'/'Gaziantep Baklavası' should be prepared and baked by craftsmen who have acquired these skills in the Gaziantep area.

5.2. *Specificity of the product*

'Antep Baklavası'/'Gaziantep Baklavası' can be distinguished from other baklava by its bright golden yellow colour, its texture, its structure and the dark green lower part. The main difference, however, lies in the taste and aroma of Antep pistachios and plain butter.

Preparation of the 'Antep Baklavası'/'Gaziantep Baklavası' requires great skill.

The reputation of 'Antep Baklavası'/'Gaziantep Baklavası' comes from the combination of the wealth of ingredients and the method of hand-made baking used by experienced craftsmen. Before eating, the pure butter smell predominates. A well-prepared baklava immediately melts in the mouth. These are the most important specific characteristics of 'Antep Baklavası'/'Gaziantep Baklavası'.

5.3. *Causal link between the geographical area and the quality or characteristics of the product (for PDO) or a specific quality, the reputation or other characteristic of the product (for PGI)*

'Antep Baklavası'/'Gaziantep Baklavası' from Gaziantep has been held in high esteem since the 19th century for its distinctive production style, the special characteristics of the ingredients and the hand-made baking method of the experienced craftsmen. Several famous families have traditionally produced 'Antep Baklavası'/'Gaziantep Baklavası' through several generations since the 1870s.

The most important raw material is Antep pistachio (*Antep fıstığı*), a registered agricultural product in Turkey. Its dense taste and aroma are preserved in the final product and it gives its dark green colour to the lower part of 'Antep Baklavası'/'Gaziantep Baklavası'.

'Antep Baklavası'/'Gaziantep Baklavası' features in books about Gaziantep and Turkish cuisine, and in Ministry of Culture and Tourism brochures about Gaziantep.

Gaziantep Folklorundan Notlar ('Notes from Gaziantep Folklore'), a book written in 1959 by Cemil Cahit Güzelbey, a research specialist from Gaziantep, mentions (p. 86) that 'pistachios are used by manufacturers of baklava'. The book also tells the story (p. 87) of a trip to Gaziantep by the Turkish Health Minister. At dinner, after being served soup with pistachio, rice with pistachio, baklava with pistachio and finally ice cream with pistachio, he jokes, 'Can I please have a glass of water without pistachio?'.

A 2001 edition of the *Frommer's Turkey* travel guide (Lynn A. Levine, 2001; John Wiley & Sons) states that 'Gaziantep's main claim to fame is its magnificent baklava. With more than 500 baklava bakeries in the city, a "baklava crawl", especially during the pistachio harvest in September, is a must-do.'

Also, *Cooking the Turkish Way* (Kari Cornell, 2004) mentions (p. 14) that 'the eastern Anatolian city of Gaziantep is known for its pistachios and for its syrupy sweet baklava'.

Reference to publication of the specification

(Article 5(7) of Regulation (EC) No 510/2006 ([3]))

The Turkish Government launched the national objection procedure with the publication of the registration for recognition of 'Antep Baklavası'/'Gaziantep Baklavası' as a PGI in *Official Gazette of the Turkish Republic* No 26505 of 27 April 2007.

The full text of the product specification is available on the Turkish Patent Institute's website:

http://www.turkpatent.gov.tr/portal/default_en.jsp?sayfa=172 (click on 'Antep Baklavası'/'Gaziantep Baklavası').

([3]) See footnote 2.

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