JUDGMENT OF THE COURT
11 December 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Alleged aid granted to Nasjonal digital læringsarena (NDLA) – Decision not to open the formal investigation procedure – Notion of economic activity – Notion of doubts – Obligation to state reasons)

In Case E-1/12,

Den norske Forleggerforening, Oslo, Norway, represented by Jan Magne Juuhl-Langseth, advocate,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Maria Moustakali, Officer, Legal and Executive Affairs, acting as Agents,

defendant,

APPLICATION for the annulment of Decision No 311/11/COL of 12 October 2011 on alleged aid granted to Nasjonal digital læringsarena,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties and the written observations of the Norwegian Government, represented by Pål Wennerås and Beate Gabrielsen, acting as Agents, and the European Commission ("the Commission"), represented by Leo Flynn, Legal Adviser, and Petra Nemeckova, member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the EFTA Surveillance Authority ("ESA"), represented by Maria Moustakali, and the Commission, represented by Leo Flynn, at the hearing on 17 October 2012,

gives the following

Judgment

I Legal context

1 Article 61(1) EEA provides as follows:

> *Save as otherwise provided in this Agreement, any aid granted by [EU] 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 the Contracting Parties, be incompatible with the functioning of this Agreement.*

2 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

3 Article 1 of Part I of Protocol 3 to the SCA ("Protocol 3 SCA"), as amended by the Agreements amending Protocol 3 thereto, signed in Brussels on 21 March 1994, 6 March 1998 and 10 December 2001, reads as follows:

> *1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.*

2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

…

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4 Article 10(1) of Part II of Protocol 3 SCA reads as follows:

Where the EFTA Surveillance Authority has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

5 Article 13 of Part II of Protocol 3 SCA reads as follows:

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4) of this Chapter. In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7 of this Chapter. If an EFTA State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

2. In cases of possible unlawful aid and without prejudice to Article 11(2), the EFTA Surveillance Authority shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7) of this Chapter.

3. Article 9 of this Chapter shall apply mutatis mutandis.

6 Article 4(2) to 4(4) of Part II of Protocol 3 SCA reads as follows:

2. Where the EFTA Surveillance Authority, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the EFTA Surveillance Authority, after a preliminary examination, finds that no doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, in so far as it falls within the scope of Article 61(1) of the EEA Agreement, it shall decide that the measure is compatible with the functioning of the EEA Agreement (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the EEA Agreement has been applied.

> *4. Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a "decision to initiate the formal investigation procedure").*

7 Pursuant to Article 4(5) of Part II of Protocol 3 SCA, in cases of notified aid, the decisions referred to in Article 4(2) to 4(4) of the same Part of Protocol 3 SCA shall be taken within two months.

II Facts

Background

8 The NDLA is organised as an inter-county cooperation body under Article 27 of the Norwegian Local Government Act (*lov 25. september 1992 nr. 107 om kommuner og fylkeskommuner*). According to the Norwegian authorities, the NDLA does not have any employees of its own, but has its own Board in accordance with the Local Government Act. All personnel, including the editors and managers, engaged in the activities of the NDLA are employees of county authorities and have no contractual relationship of employment with the NDLA. Certain work has been tendered out to external consultants on the basis of public procurement rules.

9 In 2007, the Norwegian authorities amended the Norwegian Education Act, obliging the counties to provide pupils with the necessary printed and digital learning materials free of charge. This obligation covers all learning material, i.e. digital as well as printed learning materials such as books.

10 Until that time, pupils in Norwegian upper secondary school (grades 10 to 12) had to purchase their learning materials themselves based on the choice designated by schools in compliance with the national curriculum.

11 The obligation to provide digital and printed learning materials free of charge constitutes a financial burden on the counties. To compensate the counties for these additional costs, the Norwegian Government decided as early as 2006 to provide additional funds.

12 In June 2006, the Ministry of Education submitted an invitation to the counties to jointly apply for the funds made available. The amount to be distributed was NOK 50 million.

13 In August 2006, the heads of education of the counties met to discuss the possibility of a joint application for the funds in question. Eighteen counties decided to cooperate while the county of Oslo decided to remain independent.

14 In April 2007, the Ministry of Education granted the funds, subject to a number of conditions. In the contested decision, two of these conditions are mentioned. First, the Ministry required the entity taking care of the counties' responsibility

for digital learning resources under the initiative not to engage in economic activity. Second, it specified that the purchase of learning materials and development services should be subject to the rules on public procurement. In that context, development services provided by employees of county authorities were to be regarded as an activity for the account of the county, provided that the county did not gain any profits from this activity.

15 In the letter granting the support, the Ministry reserved the right to reallocate funds originally earmarked for the NDLA to the Ministry's own digital learning material project.

16 Under the scheme, the Ministry transferred a total of NOK 30.5 million to the participating counties over a three-year period.

17 Moreover, the counties decided to provide additional funds to the NDLA project from the resources granted by the Norwegian Government to compensate for their new obligation to provide learning materials free of charge (NOK 287 million in 2007, NOK 211 million in 2008, NOK 347 million in 2009 and NOK 308 million in 2010).

18 In 2008 and 2009, the participating counties allocated 10% of those grants to the NDLA. In 2010, they allocated 20% of the grants to the NDLA.

Preliminary investigation procedure

19 By letter of 15 April 2010, the applicant lodged a complaint with ESA alleging that illegal State aid had been granted to the NDLA.

20 By letter of 2 July 2010, ESA requested additional information from the Norwegian authorities. By letter of 9 August 2010, the authorities requested an extension of the time limit for sending a response. The request for an extension was granted by ESA by letter of 12 August 2010. By letter of 9 September 2010, the Norwegian authorities replied to the information request.

21 Discussions between ESA and the Norwegian authorities regarding the case took place at a meeting held in Norway on 13 and 14 October 2010.

22 Additional information from the Norwegian authorities was sent to ESA by letter of 1 December 2010.

23 ESA considered that further information was necessary and sent another request for information by letter of 4 February 2011. The Norwegian authorities replied to the request by letter of 7 March 2011. Upon request, the Norwegian authorities provided further clarifications by email of 2 May 2011.

24 Following a telephone conference on 15 July 2011, the complainant provided additional information by email on the same day.

25 Upon request, the Norwegian authorities provided further clarifications by email of 12 August 2011.

The contested decision

26 By Decision No 311/11/COL of 12 October 2011 ("the contested decision"), ESA concluded that the payments to the NDLA did not constitute State aid.

27 At the outset, ESA recognised that a number of companies offer digital learning materials on the market as part of their economic activities.

28 ESA referred to the judgment of the Court in Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, in which it was held that the fact that an activity can be offered by private operators as an economic activity does not preclude the possibility that it can be offered also by the State as a non-economic activity.

29 In order to assess whether the NDLA exercises an economic activity, ESA applied three criteria derived from case law and practice.

30 First, it considered whether the State in establishing and maintaining the entity in question sought to fulfil its duties towards its population and not to engage in gainful activities.

31 ESA found that the purchase, development and supply of digital learning materials by the NDLA falls within the scope of activities which the Norwegian State may consider its duty to provide to its population in the educational field.

32 Second, ESA examined whether the service is provided on the basis of national solidarity to the extent that the activity is funded by the public purse and not provided against remuneration, i.e. that there is no connection between the actual costs of the service provided and the fee paid by those benefiting from the activity.

33 ESA found that the activities of the NDLA are entirely non-profit making and exclusively governed by the principle of solidarity.

34 Third, given that the activity is carried out by an entity other than the State itself, ESA sought to establish that the entity in question 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 level of benefits).

35 Paragraphs 44 to 46 of the contested decision are worded as follows (footnotes omitted):

State control

44 Thirdly, 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). If, on the contrary, the recipient would have significant discretion vis-à-vis the State as regards the commercial parameters of its activities (e.g. prices, costs, assets and employees), it would be more likely to constitute an undertaking.

45 The complainant indicated that NDLA should be considered as an undertaking different from the State or the county municipalities from which it received the funds in question. However, based on the information at hand NDLA seems to be an integrated part of the public administration and is – in any case – subject to strict State control. According to existing case law an entity is subject to the control of the public authorities (and thus not independent from the State) if it was given its task by statute and if the public authorities determine both the costs and the revenues of its activities. In that regard the Authority notes that the participating municipalities have – in view of a requirement laid down in the revised State budget for 2006 – established NDLA as an inter-municipal cooperation and have given it its task by way of adopting the resolution of August 2006. Furthermore, the county municipalities control the cost parameters of the activities since these costs are limited to the contributions unilaterally fixed by the county municipalities through the ordinary budget processes. Moreover, NDLA cannot decide on the costs of its employees or on its assets because the county municipalities decide on the secondment of the necessary staff and the provision of premises as well as technical equipment. Finally, NDLA cannot decide on charging fees to the end customers (i.e. pupils or schools) since the legal framework obliges NDLA to provide its services free of charge.

46 It follows that NDLA – in carrying out its activity – merely complies with the law and cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits in the way a commercial operator could do. On the contrary, the information at hand shows that NDLA is an integrated part of the public administration of the county municipalities to which it provides its services.

36 In the light of those considerations, ESA concluded that the development and distribution of the learning materials by the NDLA did not constitute an economic activity. Since the NDLA does not engage in an economic activity it does not qualify as an undertaking within the meaning of Article 61(1) EEA. Hence, the funds and assets transferred to the NDLA did not constitute State aid within the meaning of Article 61(1) EEA.

III Procedure and forms of order sought by the parties

37 On 9 January 2012, the applicant brought an action under the second paragraph of Article 36 SCA for annulment of the contested decision.

38 ESA submitted a Statement of Defence which was registered at the Court on 19 March 2012. The Reply from the applicant was registered at the Court on 18 April 2012. Subsequently, ESA declined to submit a rejoinder.

39 Pursuant to Article 20 of the Statute of the Court, the Commission submitted observations registered at the Court on 18 May 2012. Under the same provision, the Kingdom of Norway ("Norway") submitted observations registered at the Court on 21 May 2012.

40 The applicant claims that the Court should:

(1) Declare the contested decision void; and

(2) order ESA to bear the costs.

41 ESA contends that the Court should:

(1) Dismiss the application; and

(2) order the applicant to bear the costs.

42 The Commission submits that the application should be dismissed in part as inadmissible and, in any event, as unfounded.

43 Norway submits that the application should be dismissed as unfounded and that the applicant should bear the costs of the proceedings.

44 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

IV Law

Admissibility of certain documents

45 At the hearing, ESA claimed that all documents submitted by the applicant in a language other than English should be declared inadmissible.

46 According to Article 25(2) of the Rules of Procedure ("RoP"), English shall be used in the written and oral part of the procedure, unless otherwise provided in those rules. According to Article 25(3) RoP, all supporting documents submitted to the Court shall be in English or be accompanied by a translation into English, unless the Court decides otherwise. According to the second subparagraph of that provision, in the case of lengthy documents, translations may be confined to extracts.

47 In the present proceedings, the applicant contests a decision of ESA not to open the formal investigation procedure following a complaint by the applicant concerning alleged illegal State aid to the NDLA.

48 Annexed to the application to the Court is the complaint to ESA, which in large parts was submitted in Norwegian only. In the application, the applicant expressly refers to Annex 10 of the complaint to ESA.

49 Annexed to the defence is a document, B2, which contains observations submitted by the Norwegian Government to ESA during the preliminary investigation procedure which are partly in Norwegian.

50 Both parties have referred to these documents during the written procedure.

51 The Court notes that, pursuant to Article 20 SCA, individuals and economic operators shall be entitled to address and be addressed by the EFTA Surveillance Authority in any official language of the EFTA States and the European Union as regards notifications, applications and complaints. This shall also cover all instances of a proceeding, whether it be opened on notification, application or complaint or *ex officio* by the EFTA Surveillance Authority.

52 Having regard to the specific circumstances of the case at hand and the nature of the documents, pursuant to its discretion under the first subparagraph of Article 25(3) of the RoP, the Court has decided to accept the following documents and to have them translated by the Court.

53 The Norwegian text on page 3 of Annex B2 of the defence of ESA has been translated and accepted.

54 Annexes 10, 11, 12, 15, 17, 19 and 23 of the complaint to ESA, submitted by the applicant, have been translated and accepted.

55 The other documents submitted in Norwegian only are inadmissible (see Case E-15/10 *Posten Norge* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 115).

Admissibility

56 The present case concerns a direct action challenging the contested decision in which ESA declined to open the formal investigation procedure concerning alleged State aid to the NDLA. The applicant, an organisation representing undertakings active in the same market as the alleged beneficiary, lodged the complaint with ESA which led to the contested decision.

57 At the hearing, ESA invited the Court to assess the admissibility of the present action, whereas the Commission withdrew the remarks on inadmissibility put forward in its written observations. Reference was made to recent case law of the General Court of the European Union, in particular the judgment in Case T-123/09 *Ryanair* v *Commission*, judgment of 28 March 2012, not yet reported.

58 For the sake of good order and in the interest of the proper administration of justice, the Court will assess the admissibility of the present action and in so doing reiterate the rules on standing in situations such as the present case where an undertaking or an association representing undertakings files a complaint regarding alleged State aid to ESA and subsequently seeks redress before the Court alleging fault in the assessment carried out by ESA.

59 Under the second paragraph of Article 36 SCA, a natural or legal person may institute proceedings against a decision addressed to another person only if the decision is of "direct and individual" concern to them.

60 According to settled case law, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the second paragraph of Article 36 SCA only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by such a decision (*Private Barnehagers Landsforbund*, cited above, paragraph 48).

61 It should be recalled at the outset that the preliminary examination phase for notified aid measures under Article 4 of Part II of Protocol 3 SCA is equally applicable to the situation where ESA is informed about alleged unlawful aid. The purpose of this phase is to enable ESA to form a first opinion on the compatibility of the aid in question with the functioning of the EEA Agreement. At the conclusion of that phase, ESA finds that that measure either does not constitute aid or falls within the scope of Article 61(1) EEA. In the latter case, it may be that the measure does not raise doubts as to its compatibility with the functioning of the EEA Agreement; on the other hand, it is also possible that the measure may raise such doubts (see, for comparison, Case C-83/09 P *Commission* v *Kronoply and Kronotex*, judgment of 24 May 2011, not yet reported, paragraph 43).

62 If, following the preliminary examination, ESA finds that the allegedly unlawful aid does not constitute aid so that it does not fall within the scope of Article 61(1) EEA, it shall record that finding by way of a decision under Article 4(2) of Part II of Protocol 3 SCA.

63 If, following the preliminary examination, ESA finds that, notwithstanding the fact that the alleged unlawful aid falls within the scope of Article 61(1) EEA, it does not raise any doubts as to its compatibility with the functioning of the EEA Agreement, ESA is to adopt a decision not to raise objections under Article 4(3) of Part II of Protocol 3 SCA (see, for comparison, *Commission* v *Kronoply and Kronotex*, cited above, paragraph 44).

64 Where ESA adopts a decision that a measure does not constitute aid or a decision not to raise objections, it declares not only that the measure is compatible with the functioning of the EEA Agreement, but also – by implication – that it refuses to initiate the formal investigation procedure laid down in Article 1(2) of Part I of

Protocol 3 SCA and Article 6(1) of Part II of Protocol 3 SCA (see, for comparison, *Commission* v *Kronoply and Kronotex*, cited above, paragraph 45).

65 If ESA finds, after the preliminary examination, that the alleged unlawful aid raises doubts as to its compatibility with the functioning of the EEA Agreement, it is required to adopt, on the basis of Article 4(4) of Part II of Protocol 3 SCA, a decision to open the formal investigation procedure provided for under Article 1(2) of Part I of Protocol 3 SCA and Article 6(1) of Part II of Protocol 3 SCA. Under the latter provision, such a decision is to call upon the EFTA State concerned and upon other interested parties to submit comments within a prescribed period which must not as a rule exceed one month (see, for comparison, *Commission* v *Kronoply and Kronotex*, cited above, paragraph 46).

66 The lawfulness of a decision adopted under Article 4(2) of Part II of Protocol 3 SCA finding that allegedly unlawful aid does not constitute aid depends on whether there are doubts as to the compatibility of the aid with the functioning of the EEA Agreement. Since such doubts must trigger the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Part II of Protocol 3 SCA can participate, it must be held that any interested party within the meaning of the latter provision is directly and individually concerned by such a decision. If the beneficiaries of the procedural guarantees provided for in Article 1(2) of Part I of Protocol 3 SCA and Article 6(1) of Part II of Protocol 3 SCA are to be able to ensure that those guarantees are respected, it must be possible for them to challenge before the Court the decision that the measure in question does not constitute aid (see, for comparison, *Commission* v *Kronoply and Kronotex*, cited above, paragraph 47).

67 Accordingly, the specific status of "interested party" within the meaning of Article 1(h) of Part II of Protocol 3 SCA, in conjunction with the specific subject-matter of the action, is sufficient to distinguish individually, for the purposes of the second paragraph of Article 36 SCA, the applicant contesting a decision that allegedly unlawful aid does not constitute aid (see, for comparison, *Commission* v *Kronoply and Kronotex*, cited above, paragraph 48).

68 Under Article 1(h) of Part II of Protocol 3 SCA, "interested party" means *inter alia* any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, that is to say, in particular competing undertakings of the beneficiary of that aid. In other words, it means an indeterminate group of addressees (see, for comparison, *Commission* v *Kronoply and Kronotex*, cited above, paragraph 63, and case law cited).

69 Where an applicant seeks the annulment of a decision finding that allegedly unlawful aid does not constitute aid, it essentially contests the fact that ESA adopted the decision in relation to the measure at issue without initiating the formal investigation procedure, thereby infringing the applicant's procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea to show that the assessment of the information and evidence which ESA had at its disposal during the preliminary examination phase of the measure

notified should have raised doubts as to the compatibility of that measure with the functioning of the EEA Agreement. The use of such arguments does nothing, however, to bring about a change in the subject-matter of the action or in the conditions for its admissibility (see, to that effect, Case C-319/07 *3F* v *Commission* [2009] ECR I-5963, paragraph 35). On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in order to show that ESA was required to initiate the formal investigation procedure under Article 1(2) of Part I of Protocol 3 SCA and Article 6(1) of Part II of Protocol 3 SCA (see, for comparison, *Commission* v *Kronoply and Kronotex*, cited above, paragraph 59).

70 It is in the light of those considerations that the question whether the applicant has the capacity to bring an action for annulment challenging the contested decision must be assessed.

71 In this case, it should be noted that the contested decision is a decision adopted at the conclusion of the preliminary examination phase, under Article 4(2) of Part II of Protocol 3 SCA, whereby ESA held that the alleged unlawful aid did not fall within the scope of Article 61(1) EEA and did not therefore constitute aid. In the light of paragraphs 64 to 67 and 69 above, it must be held that any interested party must be regarded as being directly and individually concerned by such a decision. In such a case, the beneficiaries of the procedural guarantees provided for in Article 1(2) of Part I of Protocol 3 SCA and Article 6(1) of Part II of Protocol 3 SCA can secure compliance with them only if they have the possibility of challenging the decision finding the absence of aid at the conclusion of the preliminary examination phase. Moreover, as regards decisions leading to the formal investigation procedure not being opened, capacity to bring an action for annulment cannot depend on the legal basis on which those decisions were adopted (see, for comparison, *Ryanair* v *Commission*, cited above, paragraph 68).

72 It is therefore necessary to examine whether the applicant has established to a sufficient legal standard that it is, in this case, an interested party.

73 The applicant, an association representing undertakings active in the market for traditional and digital learning materials, lodged the initial complaint to ESA which initiated the procedure leading to the contested decision. In the complaint, as well as in the application before the Court, the applicant claimed that the setting up of the NDLA had the effect of forcing its members out of the market for digital learning material.

74 Even though ESA has invited the Court to assess the admissibility of the application it does not contest the fact that the members of the applicant association are active on the same market as the NDLA, nor does it contest the fact that the position of those members on the market has worsened due to the establishment of the NDLA.

75 As a matter of fact, in light of the applicant's argument that the NDLA is engaged in an economic activity, ESA has emphasised that its decision did not contest the fact that the position of the members of the applicant association on the market has worsened due to the establishment of the NDLA.

76 In light of the above, it must be held that the applicant is an interested party since it lodged the original complaint and its members are competitor undertakings of the beneficiary of the alleged State aid whose interests have been affected by the granting of that alleged unlawful aid.

77 That particular capacity as a party concerned combined with the specific subject-matter of the action described in paragraph 68 above is sufficient to distinguish it, in accordance with the case law cited in paragraph 64 above.

78 Therefore, the present action is admissible.

Substance

Arguments of the parties and the other participants in the proceedings

- The applicant

79 The applicant puts forward two pleas in law. It contends, first, that ESA failed to initiate the formal investigation procedure, and second, that, in any case, it failed to provide sufficient reasoning for its findings.

80 In relation to the first plea, that is, the failure to open the formal investigation procedure, the applicant maintains that ESA should have entertained doubts about the aid. In the applicant's view, the contested decision rests upon an inadequate assessment of the facts, lack of understanding of the market and a misapplication of the relevant case law.

81 The applicant contests the findings of ESA, arrived at in reliance on the three criteria established in *Private Barnehagers Landsforbund*, cited above, that the activities of the NDLA must be regarded as non-economic.

82 According to the applicant, the mere fact that the actual service is provided without charge is not decisive for determining the presence of economic activity. As regards ESA's analysis of the objective pursued by Norway, the applicant submits three arguments.

83 First, the applicant argues that ESA misread the case law inasmuch as it presumes that, in declaring a service to fall within its duties to the population, a State can unilaterally decide on the scope of EEA law. Second, ESA confuses an obligation to provide learning material free of charge with an open ended licence or authorisation for public authorities to start producing such material unfettered by the rules on undistorted competition. Third, ESA is incorrect to claim that the production of learning material is inherently linked to the content of teaching

itself. According to the applicant, there is no inherent link between teaching content and the production of the material.

84 As regards the issue of solidarity, the applicant submits that the rulings on which the contested decision is based can be distinguished from the case at hand. None of these rulings concern a tax-funded measure such as that at issue in the present case. Moreover, if tax-funded measures were in general an expression of national solidarity, most State aid measures would fall outside the scope of the EEA Agreement on that basis.

85 As regards the question of State control, the applicant submits that the NDLA has the autonomy to decide on the learning material it wishes to publish. Offering goods or services in the market does not cease to qualify as such simply because there is public control of the undertaking engaged in the activity.

- The defendant

86 As regards the alleged failure to open the formal investigation procedure, ESA submits that it did reach a firm view and had no doubts that the NDLA could not be characterised as an undertaking according to the State aid rules of the EEA Agreement.

87 ESA claims that, prior to the contested decision, it took all information available into account and all arguments from all interested parties were heard and all relevant information was taken into consideration while at the same time no difficulties of any kind or doubts remained which would have obliged ESA to initiate the formal investigation procedure. ESA observes that it contacted both the applicant and the Norwegian authorities several times.

88 ESA notes that the applicant does not contest the facts set out in the contested decision but the legal assessment of those facts. However, in ESA's view, the information obtained allowed it to reach a good understanding of the Norwegian education system, its structure, its function, the main service providers, the ways of financing and the terms and conditions under which the NDLA was established and how it operates.

89 According to ESA, the NDLA fulfils the three cumulative criteria established in *Private Barnehagers Landsforbund* and, hence, does not exercise an economic activity. Private or commercial supplies of services may co-exist with State-supplied services. There is no remuneration involved. The fact that the measure is tax-funded is an expression of national solidarity. In addition, the NDLA is firmly under State control.

90 Finally, ESA refutes the argument that the contested decision is not sufficiently reasoned.

- The Norwegian Government

91 The Norwegian Government supports the conclusion reached by ESA, to the effect that the application should be dismissed as unfounded.

92 The Norwegian Government notes, however, that the contested decision imposes an additional requirement by analogy from case law concerning health and social insurances that entities other than the State itself must merely apply the law and may not influence the statutory conditions of the service. As a matter of principle, the Norwegian Government cautions against accepting this requirement in the field of education, even though it is fulfilled in the present case. It observes that the case law on education and public health has evolved differently.

93 In the view of the Norwegian Government, an organisation such as the NDLA, which purchases goods – even in great quantity – not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a non-economic activity – such as one of a purely social nature – is not acting as an undertaking for the purposes of EEA competition law.

- The European Commission

94 The Commission observes that the applicant does not appear to contest the factual findings in the contested decision but rather the legal assessment of ESA. The main difference between ESA and the applicant seems to be found in the issue whether the activity of the NDLA should be considered an economic activity.

95 The Commission considers the case law on economic activity to be dynamic in nature. As such, the status of a given activity under the competition rules and the State aid discipline can fluctuate over time. Also, an activity's status cannot be established without reference to the conditions in the State where it is carried out. In that regard, ESA did not make an error of law in the way it assessed the conditions in Norway for the provision of learning materials prior to 2007.

96 The Commission submits that in many areas, but in particular in the field of education, private or commercial supplies of services may co-exist with State-supplied services. Thus, the Commission supports the defence of ESA in its conclusions concerning economic activities co-existing alongside non-economic activities.

Findings of the Court

- General rules relating to the procedure laid down in Article 1 of Part I of Protocol 3 SCA and the scope of review by the Court

97 It is appropriate at the outset to recall the general rules of the system established by the Agreement for monitoring State aid.

98 Under Article 1(3) of Part I of Protocol 3 SCA, ESA is required to carry out an examination of alleged unlawful aid intended to enable it to form a *prima facie* opinion as to whether the aid in question is aid and whether it is partially or entirely compatible with the functioning of the EEA Agreement. The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 SCA, on the other hand, seeks to protect the rights of third parties who are potentially concerned (*Private Barnehagers Landsforbund*, cited above, paragraph 74) and must, moreover, enable ESA to be fully informed of all the facts of the case before taking its decision, in particular by receiving the observations of interested third parties and EFTA States (compare Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13).

99 According to settled case law, the procedure under Article 1(2) of Part I of Protocol 3 SCA is essential whenever ESA has serious difficulties in determining whether aid is compatible with the common market. It follows that ESA may restrict itself to the preliminary examination under Article 1(3) of Part I of Protocol 3 SCA when taking a decision in favour of aid only if it is in a position to reach the firm view after an initial examination that the measure cannot be classified as aid within the meaning of Article 61(1) EEA or that the measure, whilst constituting aid, is compatible with the common market. If, on the other hand, the initial examination should have led ESA to the opposite conclusion or if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the common market, ESA is under a duty to carry out all the requisite consultations and for that purpose to initiate the formal investigation procedure under Article 1(2) of Part I of Protocol 3 SCA (see *Private Barnehagers Landsforbund*, cited above, and, for comparison, Case C-47/10 P *Austria and Others* v *Commission*, judgment of 27 October 2011, not yet reported, paragraph 70, and case law cited).

100 It follows that the lawfulness of a decision based on Article 4(2) of Part II of Protocol 3 SCA to the effect that a measure such as the alleged aid to the NDLA does not constitute aid depends on the question whether the assessment of the information and evidence which ESA had at its disposal during the preliminary examination phase should objectively have raised doubts as to the compatibility of the measure with the functioning of the EEA Agreement, given that such doubts must lead to the initiation of the formal investigation procedure in which the parties referred to in Article 1(h) of Part II of Protocol 3 SCA may participate.

101 It is for ESA to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid require the initiation of the formal investigation procedure. That decision must satisfy three requirements (see, for comparison, Case T-304/08 *Smurfit Kappa Group* v *Commission*, judgment of 10 July 2012, not yet reported, paragraph 77).

102 First, under Article 1 of Part I of Protocol 3 SCA, ESA's power to find aid to be compatible with the functioning of the EEA Agreement upon the conclusion of the preliminary examination procedure is restricted to aid measures that raise no

serious difficulties. That criterion is thus an exclusive one. Therefore, ESA may not decline to initiate the formal investigation procedure in reliance upon other circumstances, such as third-party interests, considerations of economy of procedure or any other ground of administrative or political convenience (see, for comparison, *Smurfit Kappa Group* v *Commission*, cited above, paragraph 78).

103 Second, where it encounters serious difficulties, ESA must initiate the formal investigation procedure, having no discretion in this regard (see, for comparison, *Smurfit Kappa Group* v *Commission*, cited above, paragraph 79).

104 Whilst its powers are circumscribed as far as the decision to initiate the formal procedure is concerned, ESA nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether they present serious difficulties. In accordance with the objective of Article 1(3) of Part I of Protocol 3 SCA and its duty of good administration, ESA may, amongst other things, engage in talks with a complainant, the notifying State or with third parties in an endeavour to overcome, during the preliminary examination procedure, any difficulties encountered (see, for comparison, Case T-388/03 *Deutsche Post and Others* v *Commission* [2009] ECR II-199, paragraph 87).

105 Third, the concept of doubts referred to in Article 4(4) of Part II of Protocol 3 SCA is an objective one and their existence must be sought not only in the circumstances in which the contested measure was adopted but also in the assessments upon which ESA relied (see, for comparison, Case C-148/09 P *Belgium* v *Deutsche Post and Others*, judgment of 22 September 2011, not yet reported, paragraph 79, and case law cited).

106 Therefore, the Court's investigation into the existence of serious difficulties must be conducted objectively, comparing the grounds of the decision with the information available to ESA when it took a decision that the alleged unlawful aid did not constitute State aid. It follows that judicial review by the Court of the existence of serious difficulties will, by nature, go beyond consideration of whether or not there has been a manifest error of assessment (*Private Barnehagers Landsforbund*, cited above, paragraph 76, and, for comparison, *Smurfit Kappa Group* v *Commission*, cited above, paragraph 80).

107 If the examination carried out by ESA during the preliminary examination procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see, for comparison, *Smurfit Kappa Group* v *Commission*, cited above, paragraph 81).

108 The applicant bears the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence, concerning, first, the circumstances and the length of the preliminary examination procedure and, second, the content of the contested decision (see, for comparison, *Deutsche Post and Others* v *Commission*, cited above, paragraph 93).

109 The fact that the time spent considerably exceeded the time usually required for a preliminary examination under Article 1(3) of Part I of Protocol 3 SCA may, with other factors, justify the conclusion that ESA encountered serious difficulties of assessment necessitating initiation of the procedure under Article 1(2) of Part I of Protocol 3 SCA. It may be evidence, but not proof, of the existence of serious difficulties (Case E-9/04 *The Bankers' and Securities' Dealers Association of Iceland* v *ESA* [2006] EFTA Ct. Rep. 42, paragraph 83).

110 As regards the particular circumstances of the preliminary procedure, it must be pointed out that, in accordance with the purpose of Article 1(3) of Part I of Protocol 3 SCA and ESA's duty of good administration, that institution may, in the course of the preliminary examination procedure, find it necessary to request supplementary information from the EFTA State concerned (see, for comparison, *Deutsche Post and Others* v *Commission*, cited above, paragraph 99). Whilst such requests are not proof of the existence of serious difficulties, they may, in conjunction with the duration of the preliminary examination, be evidence thereof.

111 In the present case, the applicant has not put forward any plea concerning the length of the preliminary investigation procedure. It is, therefore, only necessary to examine whether matters concerning the content of the contested decision may constitute evidence showing that ESA experienced serious difficulties in the examination of the measures at issue.

- Whether the examination of the legal status of the NDLA in the contested decision was insufficient

112 The information contained in the case file is contradictory as regards the date on which the NDLA entered into force as an inter-county cooperation. The date set out in paragraph 45 of the contested decision does not correspond to the information provided by the applicant in the complaint or the information provided by the Norwegian Government.

113 In the contested decision as well as in the case file and in the documents submitted to the Court, the NDLA is described as an inter-county undertaking established under Article 27 of the Norwegian Local Government Act.

114 In the contested decision, ESA notes that the participating counties have established the NDLA as an inter-county cooperation – under Article 27 of the Local Government Act – and have given it its task "by way of adopting the resolution of August 2006".

115 However, in the Articles of Association of the NDLA, to which the applicant refers in the application, the entry into force of the cooperation is set for 1 July 2009. Moreover, in the letter from the Norwegian Government to ESA of 9 September 2010, which has been submitted by ESA as Annex B2 to the defence, the date of entry into force of the inter-county cooperation is set for 1 January 2010.

116 When asked by the Court during the hearing which of these dates should be considered the actual date on which the inter-county cooperation entered into force, ESA claimed that it was not aware of the exact date of the establishment of the NDLA, and that the date of establishment and the legal status of the NDLA is a "point of obscurity" in the investigation, as the answers provided by the Norwegian Government were never entirely clear on exactly what were the implications of the entry into force of the Articles of Association. However, according to ESA, the NDLA received funds in 2008 and must have been active then.

117 It is apparent from the case file that the NDLA was indeed 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. The answers of ESA thus have to be taken to mean that it took the contested decision without investigating the organisational and legal status of the NDLA and the implications thereof, such as its decision-making process and the source of the funding, and how it may have changed over time. However, ESA should have carried out an investigation of the effects of the change in legal status before ruling that the measures did not fall under Article 61(1) EEA because the NDLA could not be considered to exercise an economic activity.

118 Finally, the case file contains an email sent on 28 April 2011 from ESA to the Norwegian Government and the subsequent reply of 2 May 2011. The email from ESA appears to have been sent when it was drafting the final decision. It shows that ESA was still unclear at this late stage as regards the organisation of the NDLA and even whether it had any employees of its own.

119 Consequently, since the grounds of the decision are in conflict with the information available to ESA when it took the contested decision and in the light of the case law cited above, at paragraph 106, there is evidence of the existence of serious difficulties.

- Whether the examination was insufficient as regards the principle of solidarity and the autonomy of the NDLA

120 The applicant has argued that ESA misunderstood the principle of solidarity with regard to the activities of the NDLA. Even though the applicant only refers directly to the funding in relation to that argument, it is clear from the application that the argument also covers the finding of ESA in the contested decision that the NDLA provides its services free of charge as part of the finding that the NDLA does not exercise an economic activity.

121 In the contested decision, ESA 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. In the assessment, under the heading "solidarity", the contested decision states that "NDLA is entirely funded by the State and distributes the developed or purchased learning material free of any charge".

122 However, in the assessment on the autonomy of the NDLA, the contested decision puts the obligation to provide the services free of charge on the NDLA and not the counties and states that "NDLA cannot decide on charging fees to the end consumer … since the legal framework obliges NDLA to provide its services free of charge".

123 In order to determine whether the NDLA exercises an economic activity, it is important to know whether the legislation imposes the obligation to provide the services free of charge on the counties or on the NDLA. If the obligation falls on the counties, it will be necessary to make an assessment on the funding and possible reimbursement for services rendered to the NDLA, as well as its impact on the market. On a question from the Court concerning the implicit contradiction in the findings as to who bears the statutory obligation to provide the services free of charge, ESA specified that it is the counties which bear this obligation. The recipients of the service of the NDLA are the students and the counties offer this service through the NDLA. However, ESA was unable to explain the implicit contradiction in the contested decision.

124 The fact that ESA, during the preliminary examination procedure, was not able to come to a final conclusion as to who was the client of the NDLA constitutes further evidence of the existence of serious difficulties.

125 Further, the applicant has argued that ESA misunderstood the autonomy of the NDLA, because the NDLA could decide of its own volition to expand its activities.

126 There are many aspects related to the autonomy of the NDLA which remain unclear, even though the Court has had access to the very voluminous complaint submitted by the applicant and had only a small number of those documents translated.

127 First, it is clear from the case file that the NDLA successively expanded the scope of its activities. However, there is no information in the contested decision as to how decisions are taken, nor what body would have been competent to do so. The argument of the applicant to the effect that the NDLA enjoys sufficient autonomy to determine the scope of expansion of its own volition has not been contested by ESA.

128 Second, as regards the organisational autonomy of the NDLA, the Court at the oral hearing referred to the text of Article 8 of the Articles of Association of the NDLA, which states that "the board [of the NDLA] has the competence to impose financial obligations on the participants". In the explanations provided in an explanatory memorandum established by the county of Sogn og Fjordane, this is specified as meaning that a county which participates in the project is obliged to cover those costs which arise after a decision of the board of the NDLA.

129 On a question from the Court, seeking to establish how this corresponds to the findings in the contested decision, in particular paragraph 45 concerning the

autonomy of the NDLA, ESA explained that, on its understanding of the clause, the scope of this obligation is determined by the conditions set by the Norwegian central authorities in 2006, namely, that the NDLA may not exercise any economic activity and that the counties may not gain any profits from the activity. Moreover, according to ESA, the clause is most likely intended to regulate the financial relations between the counties in the sense that one county cannot bear the costs of another county.

130 It is clear from the case file that the Articles of Association of the NDLA were adopted when the NDLA became an inter-county cooperation under Article 27 of the Local Government Act. ESA has been unable to explain when the Articles of Association of the NDLA entered into force and what their legal implications for the activities of the organisation are. As a result, the explanations of ESA with regard to Article 8 of the Articles of Association and the implications of that clause must be considered as pure conjecture, in particular since ESA has not been able to substantiate its answers by information available to it at the time when it adopted the contested decision.

131 Third, on a question from the Court concerning the autonomy of the NDLA to set the parameters for the public procurement procedures through which it purchases goods on the market and hires staff, ESA claims that these parameters were controlled by the board of the NDLA subject to the general rules applicable to the Norwegian administration. In this regard, it suffices to note that, although this might serve as an indicator that the NDLA enjoys a certain level of autonomy, the wording of the contested decision does not take any such ambiguities into account.

132 On the basis of those factors, it must be concluded that ESA did not carry out a sufficient examination of the autonomy of the NDLA, an appraisal which might have enabled it to find that the measures examined did not constitute State aid or that the measures were compatible with the EEA Agreement.

133 The fact that ESA during the preliminary examination procedure did not manage to conclude its examination on the principle of solidarity and, in particular, the autonomy of the NDLA constitutes further evidence of the existence of serious difficulties.

134 It follows from the examination of the main plea of the applicant that there exists a body of objective and consistent evidence – deriving from the difficulty of ESA to explain the legal situation with regard to the NDLA and from the partially insufficient and incomplete content of the contested decision – which shows that ESA adopted the contested decision notwithstanding the existence of serious difficulties. The Court therefore concludes that the assessment of whether the measure in question constitutes State aid and whether it might be compatible with the functioning of the EEA Agreement raised serious difficulties which should have led ESA to initiate the procedure referred to in Article 1(2) of Part I of Protocol 3 SCA.

135 The contested decision must therefore be annulled.

136 In light of these findings, it is not necessary to address further the concerns expressed by the Norwegian Government based on the argument that an analogy between the case law on education and that of public health should be avoided because it has evolved differently. These arguments concern the substantive legality of the contested decision and not the alleged failure to open the formal investigation procedure.

137 Since the contested decision must be annulled on formal grounds, there is no need to address the issue of its substantial legality, nor is it necessary to examine the second plea concerning the alleged lack of reasoning.

V Costs

138 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The applicant has asked for ESA to be ordered to pay the costs. Since the latter has been unsuccessful, it must be ordered to do so. The costs incurred by the Norwegian Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. Annuls ESA's Decision No 311/11/COL of 12 October 2011 on alleged aid granted to Nasjonal digital læringsarena.

2. Orders ESA to pay the costs of the proceedings.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 11 December 2012.

Gunnar Selvik
Registrar

Carl Baudenbacher
President