**REPORT FOR THE HEARING**
in Case E-5/07[1]

APPLICATION to the Court pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

**Private Barnehagers Landsforbund**

and

**EFTA Surveillance Authority**

supported by **the Kingdom of Norway**, as intervener,

seeking the annulment of the EFTA Surveillance Authority's Decision No 39/07/COL of 27 February 2007.

## I Introduction

1. The case concerns the Decision by the EFTA Surveillance Authority of 27 February 2007, in which it declared that the system of financing municipal day care institutions in Norway (hereinafter "the financing system") does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement (hereinafter "the Decision").

2. Kindergartens (*barnehager*) for children under compulsory school age (i.e. between 0 and 6 years) have been available in Norway for decades. Public kindergartens are run either by the municipalities (hereinafter "municipal kindergartens") or, to a very limited extent, by public institutions (e.g. hospitals). Private kindergartens are run by companies or organisations or as family day care institutions (hereinafter "private kindergartens"). Out of 235 000 children enrolled at kindergartens, 108 000 children attend private kindergartens, whereof

[1] Revised in paragraphs 57, 97, 107, 110 and 112.

80 000 are enrolled at kindergartens represented by the Applicant, Private Barnehagers Landsforbund.[2]

3. The application from Private Barnehagers Landsforbund (hereinafter "the Applicant" or "PBL") is based on four pleas in law: that the EFTA Surveillance Authority (hereinafter "the Defendant" or "ESA") failed to open formal investigation proceedings; interpreted and applied wrongfully Article 61(1) of the Agreement on the European Economic Area (hereinafter "EEA"); interpreted and applied wrongfully Article 59(2) EEA; and violated Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA") and the principles of good administration, in particular the obligation to conduct an impartial and diligent examination of the case.

## II Factual and legal background

*EEA law*

4. Article 59(2) EEA reads:

> *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.*

5. Article 61(1) EEA reads:

> *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.*

6. Article 1 of Part I of Protocol 3 SCA reads:

> *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*

[2] According to the data furnished in the Application, paragraph 3, without an indication of the year to which the numbers apply. According to the Decision, 45% of children attending kindergartens were enrolled at non-municipal kindergartens in 2005.

*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.*

7. Under Section I of Part II of Protocol 3 SCA *General*, Article 1 *Definitions* reads:

*[…]*

*(c) 'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;*

*[…]*

8. Under Section II of Part II of Protocol 3 SCA *Procedure regarding notified aid*, Article 4 *Preliminary examination of the notification and decisions of the EFTA Surveillance Authority* reads:

*[…]*

*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').*

9. Under Section III of Part II of Protocol 3 SCA *Procedures regarding unlawful aid*, Article 13(1) *Decisions of the EFTA Surveillance Authority* reads:

*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.*

10. Under Section V of Part II of Protocol 3 SCA *Procedure regarding existing aid schemes*, Article 18 *Proposal for appropriate measures* reads:

*Where the EFTA Surveillance Authority, in the light of the information submitted by the EFTA State pursuant to Article 17 of this Chapter, concludes that the existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendation may propose, in particular:*

*(a) substantive amendment of the aid scheme,*

*or*

*(b) introduction of procedural requirements,*

*or*

*(c) abolition of the aid scheme.*

11. Under Section V of Part II of Protocol 3 SCA *Procedure regarding existing aid schemes*, Article 19 *Legal consequences of a proposal for appropriate measures* reads:

*1. Where the EFTA State concerned accepts the proposed measures and informs the EFTA Surveillance Authority thereof, the EFTA Surveillance Authority shall record that finding and inform the EFTA State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.*

*2. Where the EFTA State concerned does not accept the proposed measures and the EFTA Surveillance Authority, having taken into account the arguments of the EFTA State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4) of this Chapter. Articles 6, 7 and 9 of this Chapter shall apply mutatis mutandis.*

12. Article 16 SCA reads:

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

13. Article 36(2) SCA reads:

*Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.*

*National law*

14. According to Section 1 of Act No 64 of 17 June 2005 on Day Care Institutions ("the Kindergarten Act"), a kindergarten shall give children under compulsory school age good possibilities for development and activities. It must also, unless otherwise decided, assist in giving the child an upbringing in accordance with the basic values of Christianity.

15. Pursuant to Section 2 of the Kindergarten Act, a kindergarten shall be a pedagogic undertaking that should support parents in their roles of bringing up and taking care of the children, thereby creating a good foundation for the development of the child, lifelong learning and active participation in a democratic society. It shall also promote human dignity, provide the child with basic knowledge of central and topical subjects and support his/her curiosity, creativity and quest for knowledge.

16. Section 8 of the Kindergarten Act establishes that the municipality is the local kindergarten authority, charged with the supervision of kindergartens' compliance with the applicable rules. Section 8, second paragraph, maintains that the municipality shall see to that there is a sufficient number of kindergarten places.

17. Section 14 of the Kindergarten Act reads:

> *Approved day care centres shall be given equivalent treatment as regards public contributions. The King may adopt regulations with further provisions on what is meant by equivalent treatment.*[3]

18. The Regulation No 539 of 19 March 2004 (hereinafter "the Regulation") relating to equivalent treatment of child care institutions in relation to public subsidies, as amended in 2005, provides the applicable rules on the public financing of the kindergarten sector. Articles 1 and 2 of the Regulation establish the principle of equivalent treatment, independent of ownership, as subjected to the principles laid down in the Regulation.

19. Section 3 of the Regulation *Responsibility of the municipalities* reads:[4]

> *The municipality is the authority responsible for ensuring that all approved kindergartens in the municipality receive public subsidies in an overall equal manner.*
>
> *The municipality shall pay the costs*[5] *of ordinary operation of kindergartens which are not paid by other public subsidies and parental contributions. If parental contributions in non-municipal kindergartens are lower than parental contributions in the municipality's own kindergartens, the municipal is not liable to pay the difference.*

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3 As translated by ESA.

4 As translated by PBL.

5 A "reasonable profit" may be part of the "costs" in the meaning of this regulation.

*The municipality is under an obligation to grant subsidies such that the overall public subsidies amount to at least 85% of what equivalent kindergartens owned by the municipalities on average receive in public subsidies.*[6]

*The municipality is not obliged to pay subsidies such that the overall public financing of the kindergartens exceeds public subsidies received on average by an equivalent kindergarten owned by the municipality.*

*The municipality is not obliged to pay the cost increases which exceed normal price and cost increases for the municipal sector.*

20. Section 4 of the Regulation *Reduction of municipal subsidies* reads:[7]

*The municipality may reduce the subsidies allowed by it if the kindergarten carries substantial lower staffing or salary costs per man-labour year than that regarded as normal for an equivalent municipal kindergarten and the owner of the kindergarten sets up a budget with unreasonable profit or salary for own or close family's work in the kindergarten.*

*By unreasonable profit and salary is meant that the normal compensation for work and capital input in the kindergarten is exceeded.*[8]

*The reduction in the municipal subsidies shall be proportionate to the cost savings the kindergarten has, cf. paragraph one.*

21. According to the explanatory remarks accompanying the Regulation, the municipalities have under Section 3, second and the fourth paragraphs, the choice between establishing the subsidy either in accordance with the cost coverage principle (second paragraph) or as an equal nominal subsidy amount based on unit costs (fourth paragraph). The choice must be the same for all non-municipal kindergartens in the municipality.

*Financing of kindergartens and the reform of 2003*

22. Since the start of funding of the kindergarten sector by the state in 1963, there have been three sources of finance for kindergartens in Norway: the State, the municipalities and the parents. Activity-based State subsidies are granted equally to the municipalities and to private kindergartens. The scale of these grants is set by Parliament annually, with a present target of on average 50% coverage of the operational costs of day care centres. With regard to parental fees, there were no limitations on municipal and private kindergartens before 2003. Furthermore, some municipalities granted additional aids to private kindergartens on a voluntary basis.

23. Municipal kindergartens in general have been and are still organised like other municipal activities. As such, the financing of the municipal kindergartens is a part of the general budget of the municipality. It is subject to the general rules of public budgeting, i.e. that the municipal budget has to be complete,

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6 Paragraph 3 was introduced in 2005 and took effect on 1 August 2005.

7 As translated by PBL.

8 Guidelines from the Ministry for Research and Education specify that a profit of 10% can be seen as reasonable (Rundskriv F-07/2007).

meaning that all expected costs connected with an activity have to be budgeted in full.

24. The reform of 2003 originates from a political agreement between political parties in June 2002, the so-called "Kindergarten Agreement". The political goal was to ensure equal treatment for private and public kindergartens, affordable prices for parents and full coverage of high quality kindergarten places for all children whose parents so wish. From the outset, it was recognised that a system where the majority of the costs should be borne by the central State budget had to take into account the important cost deviations with regard to kindergartens amongst the different municipalities. Later in the legislative procedure, it became clear that the municipalities had much higher costs than the private kindergartens. Therefore, the purpose of the legislation was adjusted insofar that the aim to provide equal treatment became the aim to provide equivalent treatment for municipal and private kindergartens.

25. The major change was the introduction of a maximum price ceiling on parental fees, to obtain the goal of capping parents' fees at 20% of the costs of the services. As of 1 January 2006, the applicable rate was fixed at NOK 2 250 per month with an intention of reducing it to approximately NOK 1 800.[9] The second main change was the new obligation of the municipalities to cover operational costs of non-municipal kindergartens, as established by the Regulation.

26. In order to compensate for the new obligations of the municipalities (i.e. the loss of revenue of both municipal and non-municipal kindergartens through the introduction of the price ceiling which had to be covered by the municipalities), so-called "discretionary funds" were introduced. These earmarked subsidies are paid to the municipalities from the State budget and may be used to compensate for the loss of revenue of existing kindergartens (non-municipal or municipal) or for running costs of new kindergarten places. The system came into effect on 1 May 2004 and for the year 2004, NOK 485 million was allocated in the State budget to this regard.

27. Figures furnished by the Norwegian Government in its statement of intervention show that the annual contributions to the kindergarten sector from the State budget were relatively stable from 1997 to 2002 at approximately NOK 6 billion (at 2007 rates) and have increased ever since until they reached NOK 18 billion in 2007. The annual contributions by the municipalities to the sector remained mostly unchanged from 2002 to 2006 at a rate of NOK 3.35 billion on average. All in all, the Norwegian State now pays around 80% of the total costs of kindergarten places.

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[9] According to Section 4 of the Kindergarten Act, this limit may be increased with the consent of the parents' council (the parents' council consists of the parents of all the children in the kindergarten).

28. In 2003, the costs per child per hour of the private kindergartens were on average at 85% of the costs of the municipal kindergartens. 28% of the private kindergartens incurred an operating loss and had to cover their costs by consuming their equity capital. The average profit of private kindergartens amounted to approximately 1.4%.

29. Since 2003, the general price increase in the municipal sector has been the following: 3.25% in 2004, 3.4% in 2005 and 2.8% in 2006. The average cost per child per hour in the municipal kindergartens rose by 4.08% in 2004, 0.97% in 2005 and 5.9% in 2006. The corresponding costs of the private kindergartens were on average at 84.1% in 2004 and 86.7% in 2005, after having risen by 3.01% in 2004 and 3.97% in 2005, when the new third paragraph of Section 3 of the Regulation was introduced.[10]

## III Procedure

*Pre-litigation procedure*

30. In August 2004, PBL contacted ESA with a view to filing a complaint considering public subsidising of municipal kindergartens in Norway. Some informal exchanges of views between ESA and PBL took place in the course of 2004, *inter alia* in a meeting on 16 September 2004.

31. By letter dated 23 February 2005, PBL submitted a formal complaint alleging that the system for public contributions to the operation of municipally owned day care centres contained elements of State aid.

32. By e-mail dated 25 April 2005 and by letters dated 17 January 2006, 4 May 2006 and 6 June 2006, PBL submitted further information on the case. Representatives of ESA held meetings with PBL on 5 April 2005 and 16 February 2006.

33. By letter dated 13 July 2006, ESA requested clarifications from the Norwegian authorities. The Norwegian Government replied to the request by letter dated 25 September 2006, forwarded by the Norwegian Mission to the European Union by letter dated 29 September 2006.

34. By letters dated 2 October 2006 and 11 October 2006, PBL provided further comments to ESA.

35. On 13 December 2006, ESA officials held a meeting with PBL, which formally called upon ESA to act under Article 37 SCA.

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[10] In 2003, cost increases were: general municipal costs: 3.7%, municipal kindergartens: 0%, non-municipal kindergartens: 5.64%.

36. By letter dated 5 January 2007, PBL supplied further information to ESA. On 26 January 2007, ESA officials held a further meeting with PBL. By e-mail dated 9 February 2007, PBL informed ESA that it maintained its complaint and submitted further information by fax dated 12 February 2007.

37. On 27 February 2007, ESA adopted Decision 39/07/COL addressed to the Kingdom of Norway, and notified the Decision to PBL by a letter dated the same day.

38. The operative part of the Decision reads as follows:

> *The EFTA Surveillance Authority concludes that the system of financing day care institutions in Norway does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.*

39. ESA based its conclusion on three separate grounds: first, that municipal kindergartens are not undertakings in the meaning of Article 61(1) EEA; second, that the measure does not affect trade between Member States as required by Article 61(1) EEA; and third, that even if the measure would be considered State aid, the activity concerned constitutes a service of general economic interest, and the contested measure an appropriate and not manifestly discriminatory compensation thereof, the measure thus being justified on the grounds of Article 59(2) EEA.

40. By application registered at the EFTA Court on 5 April 2007, Private Barnehagers Landsforbund requested the EFTA Court to annul the contested Decision.

## IV Forms of order sought by the parties

41. The Applicant claims that the Court should:

*(i) Annul Decision No. 39/07/COL, of 27 February 2007, of the EFTA Surveillance Authority; and*

*(ii) Order the EFTA Surveillance Authority to pay the costs of the proceedings.*

42. The Defendant claims that the Court should:

*(i) Dismiss the Application as inadmissible; in the alternative*

*(ii) Dismiss the Application as unfounded; and*

*(iii) Order the Applicant to pay the costs.*

43. The Kingdom of Norway, as intervener, contends that the Court should:

*(i) Dismiss the Application as inadmissible; in the alternative,*

*(ii) Dismiss the Application as unfounded; and*

*(ii) Order the Applicant to pay the costs.*

## V Written procedure

44. Pleadings have been received from the parties:

- the EFTA Surveillance Authority represented by Niels Fenger, Director, and Bjørnar Alterskjær, Senior Officer, Department of Legal & Executive Affairs, acting as agents,

- Private Barnehagers Landsforbund, represented by advokat Peter Dyrberg and advokat Ingvald Falch, with the law firm of Schjødt.

45. Pursuant to Article 36 of the Statute of the EFTA Court, a statement in intervention has been received from:

- the Government of Norway, represented by Thomas G. Naalsund, advocate, Office of the Attorney General (Civil Affairs) and Siri Veseth, legal adviser, Ministry of Foreign Affairs, acting as agents.

46. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Republic of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry of Foreign Affairs, acting as agent,

- the Commission of the European Communities, represented by Christophe Giolito and Bernd Martenczuk, members of its Legal Service, acting as agents.

## VI Admissibility

47. In its application, the Applicant simply states that the action is admissible.[11] The Defendant however, followed by the Government of Norway

[11] Reference is made to Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority*, [1994–1995] EFTA Court Report 59, at paragraph 20-23; Case E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1998] EFTA Court Report 38, at paragraphs 14–27; Joined Cases E-5 to E-7/04 *Fesil and Finnfjord and others* v *EFTA Surveillance Authority*

and the Government of Iceland, raises the objection of inadmissibility with regard to the different pleas of the application for two different reasons: according to the Defendant, the first plea – the failure to open formal investigation proceedings – is inadmissible as the financing system would even under the assumption of being State aid constitute not new, but existing aid. With regard to the second, third and fourth plea, the Defendant maintains that the Applicant is not individually concerned by the Decision. The European Commission considers the action to be inadmissible to the extent that the Applicant challenges the Decision on substantive grounds.

*The first plea – failure to open formal investigations*

48. The Defendant recalls that under Article 1(3) of Protocol 3 SCA, its obligation to open formal investigation proceedings may arise only if the measure is to be regarded, at least from a preliminary assessment, as new aid. This is so because only then may a person enjoy the procedural rights under Article 1(2) of Protocol 3 SCA, and therefore ask for the annulment of the decision not to open formal investigation proceedings in order to safeguard her procedural rights.[12] With regard to the procedure for existing aid, no similar role for "parties concerned" exists, and consequently a decision with regard to existing aid is not challengeable before the Court.[13]

49. The Defendant expresses the view that the financing system, even if it were considered State aid, has to be assessed as existing aid. The Defendant points out that long before the entry into force of the EEA Agreement, the funding of municipal kindergarten services was based on a cost coverage model, and that municipal kindergartens have been established and run by municipalities before and after that date at the expense of the municipal treasury. To the Defendant, the only change was the introduction to finance the non-municipal kindergartens in 2003. However, this cannot lead to a classification of the unchanged, separate system for the municipal kindergartens as new aid.[14]

50. The Defendant therefore submits that the Court should examine whether the financing system would, under the assumption that it constitutes aid, constitute new aid. It is submitted that the Court should deny this and, accordingly, declare the Application inadmissible in its totality.

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[2005] EFTA Court Report 117, at paragraphs 55–60; and Case E-9/04 *The Bankers' and Securities' Dealers Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Court Report 42, at paragraphs 51–53.

12 Reference is made to Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation* v *EFTA Surveillance Authority* [2003] EFTA Court Report 52, at paragraph 46.

13 Reference is made to Case T-330/94 *Salt Union Ltd* v *Commission* [1996] ECR II-1475, at paragraphs 33–38.

14 Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, at paragraphs 111–115.

51. The Defendant's submissions are supported in their entirety by the Government of Norway and the Government of Iceland. The Government of Norway claims that the system for the municipalities' financing of their municipal kindergartens has remained completely unchanged. The European Commission simply states that this plea of the Application is admissible if the Applicant is a "party concerned" under Article 1(2) of Protocol 3 SCA.

52. In its reply to the Defendant, the Applicant points out that the Court has not considered the question of whether an aid scheme constitutes new or existing aid in its case law, even in cases related to existing aid.[15] Reference is also made to similar case law of the Community Courts.[16] Furthermore, the Applicant considers the financing system introduced in 2003 *prima facie* as new aid, as it entails *inter alia* new forms of financing, maximum prices on parental payments and transfers at an unprecedented scale.

53. The Applicant points out that the approach put forward by the Defendant is different from the approach so far conducted in the case law. According to the Applicant, the relevant test has been to examine firstly, on the question of admissibility, whether the applicant could be an interested party under a formal investigation procedure, and secondly, on the merits, whether the assessment of the aid scheme raised serious difficulties of a nature such as to warrant the opening of a formal investigation procedure.[17] The Applicant finds that the approach submitted by the Defendant would require the Court to investigate deeply into the substance of the case in order to rule on the admissibility.

54. Finally, the Applicant expresses the view that the Defendant's stand would lead to a situation where there would be no judicial review open to the Applicant, a situation which would be at odds with the fundamentals of the EEA legal order.

55. In its reply to the Government of Norway, the Applicant maintains that the changes introduced in 2003 were of both qualitative and of quantitative nature such as to qualify the present financing system as new aid.[18] It is noted that the Defendant did not assess the qualification of the financing system as new or existing aid in the Decision, and that the question is thus outside the scope of the present action.

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15 Reference is made to Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority*, [1994–1995] EFTA Court Report 59, at paragraphs 20–23; Case E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1998] EFTA Court Report 38, at paragraphs 30–35 and [1999] EFTA Court Report 2.

16 Reference is made to Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, at paragraph 53; Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757, at paragraph 31; and Case T-95/96 *Gestevision Telecinco SA* v *Commission* [1998] ECR II-3407, at paragraphs 64–66.

17 Reference is made to Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, at paragraphs 70–73, 85 and 91–96; and Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II-743.

18 Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309; and Case C-44/93 *Namur-Les Assurances du Crédit SA* [1994] ECR I-3829.

56. In its rejoinder, the Defendant further outlines the differences between the procedures on new and the procedures on existing aid. It is maintained that only with respect to new aid do private parties enjoy the procedural rights conferred to them by Article 1(2) of Protocol 3 SCA,[19] whereas it is illegal for ESA to open the formal investigation procedure with regard to existing aid.[20] It is submitted that the procedure for the review of existing aid is solely between ESA and the EFTA State concerned. None of the measures taken according to Article 18 of Part II of Protocol 3 SCA entails any legal effect and hence, they are not challengeable acts.[21] It is only if ESA, after having taken into account the comments of the EFTA State concerned, still considers that the measures are necessary that it can initiate the formal investigation procedure.[22] In the opinion of the Defendant, the cases cited by the Applicant rather support its own view.[23]

57. The Defendant maintains that its approach does not confuse the issues of admissibility and substance, but is a logical step in the assessment of admissibility to verify that the procedural rights of the alleged "party concerned" actually exist. To the Defendant, there is no reason to accept standing in relation to judicial scrutiny of existing aid measures, as this would entail the possibility of the annulment of the contested decision based on a non-existent obligation. It adds that the question of whether or not the financing system would constitute new or existing aid would not go into the substance of the case, as this assessment would assume that the measure is aid in the first place, and that it would not be of particular difficulty, as all the relevant Norwegian rules have been presented to the Court.

58. With regard to the Applicant's claim that it would be contrary to the fundamental principles of EEA law if there were no judicial review open to it, the Defendant submits that the Community Courts have refused standing in several cases, even though no national remedies were available to the applicants concerned.[24] However, the Defendant points out that in the present case, an action relating to the financing system, brought by one of the Applicant's members and supported by the Applicant, has already been heard by the Norwegian courts. After Tinn og Heddal tingrett (District Court) and Agder lagmansrett (Appellate

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19 Reference is made to Case T-395/04 *Air One SpA* v *Commission* [2006] ECR II-1343, at paragraphs 30–31.

20 Reference is made to Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, at paragraphs 14–17; Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, at paragraphs 22–25; Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, at paragraph 115.

21 Reference is made to Case T-330/94 *Salt Union Ltd* v *Commission* [1996] ECR II-1475, at paragraph 36.

22 Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, at paragraph 115.

23 Reference is made to Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125; and Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II-743; and Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, at paragraph 49.

24 Reference is made to Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft and others* v *Commission* [2001] ECR II-1037, at paragraph 51; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen* v *Commission* [1999] ECR II-179, at paragraph 52; and Case T-212/00 *Nuove Industrie Molisane Srl* v *Commission* [2002] ECR II-347, at paragraph 48.

Court) declined to ask the EFTA Court for an advisory opinion, the case was voluntarily withdrawn. Under these circumstances, ESA sees no compelling policy reason to deviate from generally applicable case law under Article 36 SCA.[25]

*The second, third and fourth plea – pleas on substantive grounds*

59. The Defendant, supported by the Government of Iceland, submits that for the Applicant to have *locus standi* under Article 36(2) SCA for pleas based on substantive grounds, the Decision must be of direct and individual concern to the Applicant.

60. With reference to the so-called *Plaumann* test in the case law of the Community Courts, it is claimed that in the field of State aid, an association of undertakings can be individually concerned in two different ways: first, if one or more of its members are in a position to be individually concerned, or second, if it is able to rely on a particular interest in acting, especially because its negotiating position is affected by the measure which it seeks to have annulled.[26] It is argued that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned by a measure affecting the general interests of that category.[27]

61. The Defendant claims that none of the Applicant's members are individually concerned, and that the Applicant had no particular negotiating role in the proceedings leading to the Decision. With regard to the latter, reference is made to case law of the Court of First Instance of the European Communities (hereinafter "CFI"), whereas the mere fact that the applicant made a complaint to and had correspondence and meetings with the Commission, cannot constitute sufficient circumstances which distinguish the Applicant individually from all other persons, and thus confer on it standing to bring proceedings against a general aid scheme.[28] It is submitted that in order to be individually concerned

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25 Reference is made to Case *Salt Union Ltd* v *Commission* [1996] ECR II-1475, at paragraph 39.

26 Reference is made to Case T-188/95 *Waterleiding Maatschappij "Noord-West Brabant" NV* v *Commission* [1998] ECR II-3713, at paragraph 54; Case T-117/04 *Vereniging Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others* v *Commission* [2006] ECR II-3861, at paragraph 65; T-95/03 *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, judgment of 12 December 2006, not yet reported, at paragraphs 42–43; Case 282/85 *DEFI* v *Commission* [1993] 2469, at paragraph 16; Case C-6/92 *Federmineraria and others* v *Commission* [1993] ECR II-6357, at paragraphs 17–18; Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft and others* v *Commission* [2001] ECR II-1037, at paragraph 49; and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, at paragraph 23.

27 Reference is made to Case T-585/93 *Greenpeace* v *Commission* [1995] ECR II-2205, at paragraph 59; Case T-350/03 *Wirtschaftskammer Kärnten and best connect Ampere Strompool GmbH* v *Commission* [2006] ECR II-68.

28 Case T-398/94 *Kahn Scheppvaart BV* v *Commission* [1996] ECR II-477, at paragraph 42; Case T-41/01 *Rafael Pérez Escolar* v *Commission* [2003] ECR II-2157, at paragraphs 39–40.

with regard to pleas on substantive grounds, it is not enough to qualify as a "party concerned" under Article 1(2) of Protocol 3 SCA.[29]

62. The Government of Norway supports the Defendant's position, and adds that the financing system must be considered as a scheme of general character for the purposes of the requirements of *locus standi*. It is claimed that a mere reference to the fact that certain of the Applicant's members may be affected by that general measure by virtue of their capacity of kindergarten operators in Norway cannot be sufficient in this respect, as such a wide interpretation would imply that any (alleged) competitor in a sector where a general measure is implemented would be entitled to challenge the legality of the general scheme.

63. To the Government of Norway, the *Plaumann* test requires that at least one of the members of the Applicant must be directly and individually concerned for the Applicant to have *locus standi*. The Government of Norway further notes that in *House Financing Fund*, the EFTA Court did not address whether the applicant had legal standing to challenge ESA's decision on the merits.[30]

64. The European Commission also refers to the *Plaumann* test, and points out that where an applicant challenges a decision on the merits, it is not sufficient for the applicant to be a "party concerned" in the meaning of Article 1(2) of Protocol 3 SCA. Rather, it is required that the applicant's market position be significantly affected by the aid which is the subject of the contested decision.[31] The Commission further contends that the European Court of Justice of the European Communities (hereinafter "ECJ") appears to impose a stricter test for establishing an effect on the applicant's competitive position when the aid scheme is of a general character.[32]

65. The Commission claims that the Applicant has made no effort in its application to demonstrate in which way its members are affected by the financing system, that the system is general in nature, that it affects a large and in

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29 Reference is made to Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paragraph 35–37; Case T-30/03 *SID* v *Commission*, judgment of 23 April 2007, not yet reported, at paragraphs 24–27.

30 Case E-9/04 *The Bankers' and Securities' Dealers Association of Iceland* v *the Authority* [2006] EFTA Court Report 41, at paragraph 52.

31 Reference is made to Case T-266/94 *Skibsværftsforeningen and others* v *Commission* [1996] ECR II-1399, at paragraph 50; Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 (English special edition), Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] I-6677, at paragraph 36; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, at paragraph 23; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, at paragraph 17; Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, at paragraph 25; Case T-188/95 *Waterleiding Maatschappij "Noord-West Brabant" NV* v *Commission* [1998] ECR II-3713, at paragraph 54;

32 Reference is made to Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737 ("*Aktionsgemeinschaft Recht und Eigentum*"), Conclusions of AG Jacobs, at paragraph 110; Case C-67, 68 and 70/85 *van der Kooy and others* v *Commission* [1988] ECR I-219, at paragraph 15; Case C-41/99 P *Sadam Zuccherifici and others* v *Council* [2001] ECR I-4239, at paragraph 30; Case T-398/94 *Kahn Scheppvaart BV* v *Commission* [1996] ECR II-477, at paragraphs 39–41; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen* v *Commission* [1999] ECR II-179, at paragraph 45.

principle unlimited number of undertakings and that under these circumstances, neither the Applicant nor its members would fulfil the conditions to be individually concerned under the case law of the European courts.[33]

66. In its reply to the Defendant, the Applicant elaborates on why in its view the application is admissible under the case law of the EFTA Court. In several cases, the EFTA Court held applications for actions for annulment to be admissible where the applicants were associations of undertakings representing the general interests of their members. In *Scottish Salmon Growers*, *locus standi* had been granted to an association on the grounds that it had been negotiating with the Commission and with ESA on behalf of the interests of its members who had been centrally concerned by the outcome of the case.[34] In *Husbanken I*, it was sufficient for the association whose complaint had been at the origin of the case to show that the legitimate interests of its members were affected by the decision, by affecting their position on the market; and that in this case, where the decision was a decision not to object to State aid, *locus standi* could even arise alone from the facts that the association was, as a representative of its members, at the origin of the complaint, that it was heard in the procedure and that information was gathered from the State in question.[35] In *Fesil and Finnfjord*, the application of an association representing the overwhelming majority of undertakings benefiting from an aid scheme which had been declared illegal by ESA was considered admissible, as its members were individually concerned as beneficiaries of the aid scheme in question.[36]

67. In its analysis of the case law, the Applicant points out that the Court has not examined whether the individual members of the association would be more concerned than any other competitor;[37] that it held admissible pleas both in relation to an alleged failure to open the formal investigation procedure as well as to challenging the contested decision on the merits;[38] and that the high number of members of the association did not keep the Court away from finding them individually concerned by the decision at issue.[39]

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33 Reference is made to Case T-213/02 *SNF* v *Commision* [2004] ECR II-3047, at paragraph 60.

34 Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority*, [1994–1995] EFTA Court Report 59, at paragraphs 20–23.

35 Case E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1998] EFTA Court Report 38, at paragraphs 30–35.

36 Joined Cases E-5 to E-7/04 *Fesil and Finnfjord and others* v *EFTA Surveillance Authority* [2005] EFTA Court Report 117, at paragraphs 58–60.

37 Reference is made to Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority*, [1994–1995] EFTA Court Report 59, at paragraphs 20–23. Further reference is made to Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, at paragraph 53.

38 Reference is made to Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Court Report 42, at paragraph 51; and Case E-4/97 *The Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1999] EFTA Court Report 2.

39 Reference is made to Joined Cases E-5 to E-7/04 *Fesil and Finnfjord and others* v *EFTA Surveillance Authority* [2005] EFTA Court Report 117, at paragraphs 58–60.

68. The Applicant recalls that it represents the overwhelming part of the private kindergarten sector in Norway; that it was at the origin of the complaint and was active in the procedure leading to the contested act; and that the core of the complaint is the distortion of competition to the detriment of the private kindergartens which its members are exposed to on a daily basis and which, according to the Applicant, in some cases threatens their economic survival.[40]

69. Furthermore, the Applicant claims to be the established caretaker of the interests of private kindergartens in Norway vis-à-vis the Norwegian Government, and that assisting its members by dealing with the financing system and doing away with the distortion of competition is at the forefront of the Applicant's work.

70. The Applicant also outlines that the case law of the Court in *Scottish Salmon Growers* and *Husbanken I* is rooted in the case law of the ECJ in *Matra* and *Cook*,[41] and that these cases have been confirmed by the ruling of the ECJ in *Aktionsgemeinschaft Recht und Eigentum*, although the Advocate General invited the ECJ to overrule these judgements.[42]

71. In its rejoinder, the Defendant maintains that the Applicant did not provide any factual information with regard to admissibility in its application, and that even in its reply, the Applicant has still not adduced evidence to fulfil the condition of individual concern. The Defendant argues that the applicability of each legal plea put forward by the Applicant must be assessed separately.[43] According to settled case law relating to general aid schemes, if a plea is based on substantive grounds, it is necessary to examine whether the Applicant is merely affected by the alleged aid measure in the same way as other operators in the sector concerned, or whether it is affected in a way that distinguishes it from these operators.[44]

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40 In its description of the facts, the Applicant elaborates on how the Regulation distorts the competition between municipal and private kindergartens. Firstly, the financing system perpetuates the cost differences between municipal and private kindergartens as existing in 2003 to the detriment of the latter. Secondly, the municipalities are free to change the cost levels of their kindergartens, whereas the private kindergartens are limited to the general rise of municipal costs. This especially impairs the private kindergartens in the competition for qualified workforce, if the salaries offered by the municipalities rise faster than the general cost level in the municipalities as it was the case in 2006. Taken all together, these factors will lead to a lower service level offered by the private kindergartens compared to the municipal kindergartens, and accordingly damage their ability to take on more children, which will be an increasing problem as full coverage of kindergarten places is supposed to be in place shortly in Norway.

41 Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487.

42 Reference is made to Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, and to the Opinion of the Advocate General, at paragraphs 138–139.

43 Reference is made to Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737; and Case T-254/05 *Fachvereinigung Mineralfaserindustrie* v *Commission*, judgment of 20 September 2007, not yet reported, at paragraphs 30–35.

44 Reference is made to Joined Cases E-5 to E-7/04 *Fesil and Finnfjord and others* v *EFTA Surveillance Authority* [2005] EFTA Court Report 117, at paragraphs 55–56, 60. Further

72. The Defendant finds that the Court's case law in *Husbanken I* and *House Financing Fund* is of no relevance in this case, as the former judgment was related to an individual aid scheme, whereas the Court did not rule on the pleas on substantive grounds in the latter. The Defendant explains that in *Fesil and Finnfjord*, the members of the association had been found to be individually concerned because they were faced with recovery claims, which is not the case for the Applicant or its members. To the Defendant, the case law of the ECJ shows that it is not sufficient for the members of the association to be direct competitors of the beneficiaries of the aid in order to be individually concerned.[45]

73. The Defendant maintains that the Applicant cannot gain standing by pooling the general interests of its members, as this would amount to a circumvention of the requirements of Article 36 SCA.[46] Nor are the Applicant's complaints, meetings and correspondence, or its relationship to the Norwegian Government, sufficient to establish circumstances peculiar to the Applicant by which it can be distinguished individually from all other persons.[47]

## VII Substance

*Private Barnehagers Landsforbund*

Article 61(1) EEA – The notion of undertaking

74. The Applicant submits that the Defendant's view according to which municipal kindergartens are not undertakings under Article 61(1) EEA is wrong

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reference is made to Case T-228/00 *Gruppo ormeggiatori del porto di Venezia Soc. coop. rl and others* v *Commission* [2005] ECR II-787, at paragraph 34.

45 Reference is made specifically to Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paragraph 72; and Case *Comité d'entreprise de la Société française de production and others* v *Commission* [2000] ECR I-3659, at paragraph 41. Further reference is made to Case T-358/02 *Deutsche Post AG and DHL International Srl* v *Commission* [2004] ECR II-1565, at paragraphs 37–43; confirmed by Case C-367/04 P *Deutsche Post AG and DHL Express (Italy) Srl* v *Commission* [2006] ECR I-26, at paragraphs 40–43; Case C-6/92 *Federazione Sindacale Italiana dell'Industria Estrattiva and others* v *Commission* [1993] ECR I-6357, at paragraphs 11–15; Case T-11/95 *BP Chemicals Limited* v *Commission* [1998] ECR II-3235, at paragraphs 76–83; Case T-398/94 *Kahn Scheppvaart BV* v *Commission* [1996] ECR II-477, at paragraphs 39–41, 49.

46 Reference is made to Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft and others* v *Commission* [2001] ECR II-1037, at paragraph 49; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen* v *Commission* [1999] ECR II-179, at paragraphs 55–57, 60, 65; and Case T-117/04 *Vereniging Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others* v *Commission* [2006] ECR II-3861, at paragraph 66.

47 Reference is made to Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at paragraphs 53–57; Case T-254/05 *Fachvereinigung Mineralfaserindustrie* v *Commission*, judgment of 20 September 2007, not yet reported, at paragraphs 38–40; Case T-117/04 *Vereniging Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others* v *Commission* [2006] ECR II-3861, at paragraphs 68–73; Case T-30/03 *SID* v *Commission*, judgment of 23 April 2007, not yet reported, at paragraphs 38–42; and Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen* v *Commission* [1999] ECR II-179, at paragraph 61.

in substance; that in any case, the matter is such that the Defendant should have entertained serious doubts, leading it to open a formal investigation procedure; and that the findings are borne out of an insufficient examination that translates into an absence of appropriate reasoning.

75. The Applicant first points out that the Defendant erred when it concluded that the municipalities, when providing kindergarten services, are acting as a public authority. The Applicant purports that the Defendant should have distinguished between the municipality's roles as authority and as operator. Some of the duties referred to by the Defendant apply to any operator of a kindergarten, whilst the duties the municipalities have in their role as kindergarten authority do not require them to actually operate any kindergarten themselves. It is recalled that under the relevant case law, an entity's exercise of regulatory functions does not impede a finding that the entity is engaged in economic activity.[48]

76. To the Applicant, it follows from the case law that such elements as an entity's public-law status, its non-profit character and its pursuit of social objectives cannot be taken into account when assessing whether it pursues an economic activity.[49] It submits that these aspects are only relevant for the assessment of the compatibility of the aid and that the rulings upon which the Defendant relied were either irrelevant or misapplied by the Defendant.[50]

77. The Applicant contests the Defendant's position that kindergartens are educational institutions. It is of the opinion that most of the references where the Defendant translates Norwegian sources as "educational" should rather be translated as "pedagogic"[51] and that in reality the tasks of the kindergartens are

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48 Reference is made to Case C-69/91 *Decoster* [1993] ECR I-5335, at paragraph 15; and the opinion of Advocate General Jacobs in Case C-218/00 *Cisal* [2002] ECR I-691.

49 Reference is made to Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, at paragraph 21 *et seq*.; Case C-218/00 *Cisal* [2002] ECR I-691 and especially to the opinion of the Advocate General, at paragraph 46; Joined cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, at paragraphs 8–19; Case T-106/95 *Fédération française des sociétés d'assurances (FFSA) and others* v *Commission* [1997] ECR II-229, at paragraphs 14–21; Case C-67/96 *Albany* [1999] ECR I-5751, at paragraphs 77–86; Case C-219/97 *Drivjende Bokken* [1999] ECR I-6121, at paragraphs 77–86; Joined cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, at paragraphs 114–118; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, at paragraphs 19–22; Case E-8/00 *Landsorganisasjonen i Norge* v *Kommunenes Sentralforbund and Others* [2002] EFTA Court Report 114, at paragraphs 62–67; the Commission's Communication "Implementing the Community Lisbon programme – Social services of general interest in the European Union", COM(2006)117 final; and the Staff Working Document annexed to COM(2006)516 "Social services of general interest in the European Union".

50 Reference is made to Case T-14/96 *Bretagne Angleterre Irlande (BAI)* v *Commission* [1999] ECR II-139, at paragraph 81; Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473 and the Commission Decision 2005/842 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation to certain undertakings entrusted with the operation for services of general economic interest; and more generally for the relevance of the case law relied upon by the Defendant *Richard Plender QC*, Definition of Aid, in: *A. Biondi*, *P. Eckhout* and *J. Flynn* (Eds.), The Law of State Aid in the European Union, Oxford University Press 2003, at p. 15. The reference to Case C-199/06 *Livre Francais*, request for advisory opinion of 1 July 2006, not yet decided, seems to erroneous.

51 The Norwegian term is "*pedagogisk*".

"care, upbringing and learning"[52], because "pedagogy" and "learning" are distinct concepts from "education" and "teaching" in Norway.[53] It is argued that the pedagogical aspects of kindergartens are pre-educational and not different from what an upbringing by parents in a good home would entail. To the Applicant, the borderline between upbringing and care on the one hand and education on the other is defined by the threshold of compulsory education.[54]

78. In any event, the Applicant does not agree with the Defendant that the case law in *Humbel* and *Wirth*[55] is applicable to the case. It points out that these cases dealt with the rights of the receiver of educational services under the rules on the freedom to provide services, whereas in the present case the status of the service provider has to be assessed under the competition rules. The Applicant claims that in cases concerning the notion of undertaking in competition law, the ECJ has not had recourse to its case law on the four freedoms.[56] The Applicant further adds that even with regard to the rules on free movement, *Humbel* and *Wirth* constitute narrow exceptions, on which the ECJ has not relied outside the ambit of education proper.[57]

79. The Applicant further submits that under the competition rules, an activity may in principle either qualify as public regulatory power[58] or as economic activity. If public interests are at stake with regard to the latter, Article 86 EC (Article 59 EEA) provides the legal basis for these interests. It is only with regard to certain compulsory social security schemes that the ECJ has made exceptions to this basic test. In these cases, the ECJ referred in particular to the principle of solidarity as that of a compulsory monopoly.[59] It is noted that there is no obligation of parents to enrol their children in kindergartens and that the ECJ never applied this principle because an activity is funded through taxation. The

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52 Reference is made to Section 2, third paragraph of the Kindergarten Act; further reference is made to the Regulation No XXX of 1 March 2006 on a framework plan for the content and tasks of a kindergarten ("the Framework plan"): "Kindergartens are pedagogic institutions that comprise care, upbringing, play and learning."

53 Reference is made to the OECD Report "Equity in Education. Thematic Review – Norway Country Note" of 2004 ("the OECD Report").

54 The Applicant further points to the fact that kindergarten services are considered "social services" under the Norwegian VAT Act, although this act makes also provisions for educational services.

55 Case 263/86 *Humbel* [1988] ECR 5365 and Case C-109/92 *Wirth* [1993] ECR I-6447.

56 In its reply to the Statement of Intervention by the Norwegian government, the Applicant outlines the case law referred to in footnote 48 as well as the judgments in Case C-218/00 *Cisal* [2002] ECR I-691, at paragraphs 37–45; Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, at paragraphs 75–78, 82; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* [2004] ECR I-2493, at paragraphs 47–63; Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, upholding Case T-319/99 *FENIN* v *Commission* [2003] ECR II-357. Specific reference is made to Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; and Case C-55/96 *Job Centre* [1997] ECR I-7119.

57 Reference is made to Case C-159/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, at paragraphs 47–59; Case C-385/99 *Müller-Fauré* [2003] ECR I-4509

58 The Applicant refers to Case C-343/95 *Cali and Figli* [1997] ECR I-1547 and Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43 as examples of such case law.

59 The Applicant seems to refer to the Case law in, *inter alia*, Case C-218/00 *Cisal* [2002] ECR I-691; and Joined cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

Applicant adds that if one would do so, practically all State aid would involve a manifestation of the principle of solidarity.

80. To the Applicant, the only relevant question required to assess the notion of undertaking is whether the municipalities are providing services on a given market which could, at least in principle, be carried out by a private actor in order to make a profit.[60] In that regard, the Applicant points out that childcare services have traditionally been provided on the market by private actors, that the Norwegian State never attempted to establish an entirely public system and that notwithstanding the limitations to pricing competition introduced by the reform of 2003, there is competition amongst the providers of the service. It is considered irrelevant that there might have been a different assessment in the practice of the Commission.

81. Although it is admitted that the aid granted to operational costs is very important, the Applicant explains that the recent aid increases have largely become necessary due to the caps on parental payments and new requirements imposed by regulation. It is argued that nonetheless, private kindergartens are operating according to market principles with regard to investment, capital costs, return of invested capital and risks related to loss and bankruptcy. To the Applicant, parents' fees are income attributable to the service providing kindergarten, whether private or municipal. It is added that the existence of certain socially motivated graduated fees is common in many sectors and cannot lead to the conclusion that the entity would not be engaged in an economic activity. Also, it is pointed out that private kindergartens are subject to the same regulatory regime in terms of social functions as the municipal kindergartens. The Applicant notes that heavy public regulation of a sector does not mean that the remaining competition is not protected, and that this parameter has never been included in the ECJ's test of what qualifies as an undertaking.[61] Furthermore, the Applicant claims that when national authorities intervene in order to ensure the existence of a market that would not otherwise exist, the activities in question become economic in nature.[62]

82. Finally, reference is made to decisions of the Defendant and statements of the Norwegian government where the Defendant, respectively the Norwegian government, considered kindergartens in Norway to be undertakings acting on a competitive market.[63]

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60 Reference is made to Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; and Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297.

61 Reference is made to Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851; Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* v *Commission* [2000] ECR II-1807; and Case C-309/99 *Wouters* [2002] ECR I-1577.

62 Reference is made to Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; and Commission Decision 2006/225/EC of 2 March 2005 on the aid scheme implemented by Italy for the reform of the training institutions, OJ 2006 L 81/25, at paragraphs 50–57.

63 Reference is made to Decision of the EFTA Surveillance Authority 291/03/COL of 18 December 2003 regarding the establishment of private day care facilities on public sites with subsidised

Article 61(1) EEA – Existence of cross-border effect

83. The Applicant submits that the Defendant has examined the question of effect on trade inappropriately.[64] It is recalled that there is no threshold or percentage below which it may be considered that trade between Member States is not affected.[65]

84. It is highlighted that the test for cross-border effect is met if the aid scheme at issue is likely to affect trade.[66] The Applicant points out that the system involves substantial amounts of money, which alone would be sufficient to establish effect on trade.[67] The economic importance of the kindergarten sector in Norway and in Europe is emphasised, as well as the growing importance of private operators in the sector throughout the EEA. The Applicant's finds the system to be discriminatory and ESA's assertion that cross-border trade is not affected to be erroneous, because the national regulation deters foreign investment. Furthermore, the Applicant maintains that ESA's statements in the Decision that 'the presence of foreign kindergartens is non-existent or marginal' and that 'this situation is not likely to change in the future' are wrong and that the latter statement lacks foundation. The Applicant criticises that the Decision failed to include a market analysis of the European kindergarten sector, its developments and the potential effects thereof on the Norwegian market.

85. It is pointed out that the Defendant established in the Decision that there are a number of Norwegian Foreign Undertakings (hereinafter "NUF")[68] providing kindergarten services in Norway, but concluded that they are not 'truly' foreign, as they have no business in their country of incorporation and appear to be run by Norwegians. The Applicant submits that the Defendant cannot deem a foreign registered company to be not 'truly foreign'.[69] Nor do

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real estate leasehold fees in Oslo; Decision of the EFTA Surveillance Authority 155/07/COL of 3 May 2007 on state aid granted in connection with Article 3 of the Norwegian Act on compensation for value added tax (VAT), page 17; Decision of the EFTA Surveillance Authority 225/06/COL of 19 July 2006 to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to Article 3 of the Norwegian Act on compensation for value added tax (VAT) ("Decision VAT I"), page 15; St.meld. No 28 (2003–2004); St.meld. No 24 (2002–2003); and NOU 2003: 3, VAT and the Municipalities – distortions of competition between municipalities and private operators.

64 Reference is made to *Husbanken II*, at paragraph 70; and Commission Decision of 21 March 2007 C(2007) 856 final on State aid N 49/07 – Spain, Subventions pour le développement de l'usage de la langue basque dans la vie sociale.

65 Reference is made to Case C-280/00 *Altmark* [2003] ECR I-7747, at paragraph 81, with further references; Case C-172/03 *Heiser* [2005] ECR I-1627, at paragraph 32; Decisions VAT I, page 14, and Decision of the EFTA Surveillance Authority 298/05/COL of 22 November 2005 on the proposal for regionally differentiated rates of social security contributions for certain economic sectors, pages 27, 28.

66 Reference is made to Case T-288/97 *Regione Autonoma Friuli Venezia Giulia* v *Commission* [2001] ECR II-1169, at paragraphs 49–50; and Case T-35/99, *Keller SpA* v *Commission* [2002] ECR II-261, at paragraph 85.

67 Reference is made to Case C-451/03 *Calafiori* [2006] ECR I-2941, at paragraph 58.

68 NUF is an abbreviation for *Norsk Utenlandsk Foretak.*

69 Reference is made to Case C-212/97 *Centros* [1999] ECR I-1459; Case C-208/00 *Überseering* [2002] ECR I-9919; and Case C-167/01 *Inspire Art* [2003] ECR I-10155.

these undertakings need to be "actually engaged in cross-border activities" in order to have an effect on trade. It is claimed that the legal standard to assess effects on trade is the same as when assessing a restriction on free movement. To the Applicant, the existence of NUFs further demonstrates that there is nothing at the regulatory level which hinders a foreign undertaking from investing in the kindergarten market in Norway.

86. With regard to the Defendant's assessment of the *de minimis* case rules in the Defence, the Applicant notes that first, these ECJ cases did not rule that small amounts of aid would not affect trade, and second, that the Norwegian kindergarten sector receives unusually large amounts of public support. The Defendant's analysis is therefore rejected.

87. In the Applicant's view, the local character of the activities of the beneficiaries is not sufficient to prevent the aid from having effect on trade.[70] It is claimed that this could only be so if the services provided were not unique and not readily sought for by people outside the local area, in combination with small amounts of aid or strict time limitations. The Applicant finds that none of these characteristics are present in the system at hand: the system is not of local character, as it encompasses the entire country, it involves massive transfers of resources and it is not defined in time. It is argued that even small amounts of individual aid can have an impact on trade between Member States, if made potentially available to all or a very large number of undertakings in a sector with a large number of small companies.[71]

Article 59(2) EEA – Compatibility

88. The Applicant submits that the State aid scheme cannot be accepted under Article 59(2) EEA; that it infringes fundamental provisions of primary law; that it infringes the principle of neutrality towards private and public undertakings; and that the distortion of competition is disproportionate. The Applicant further submits that the scheme's compliance with Article 59(2) EEA is doubtful to the point that ESA should have entertained serious doubts in that respect; and that the Decision is vitiated by insufficient reasoning and examination.

89. First of all, the Applicant specifically submits that the Decision is based on an erroneous conclusion due to insufficient examination, by making neither reference to the *Altmark* ruling of the ECJ nor examining whether the criteria laid down therein are fulfilled.[72]

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70 Reference is made to Decision VAT I, page 14, with further references.

71 Reference is made to Decision of the EFTA Surveillance Authority 298/05/COL of 22 November 2005 on the proposal for regionally differentiated rates of social security contributions for certain economic sectors, pages 27, 28, with further references.

72 Case C-280/00 *Altmark* [2003] ECR I-7747.

90. Secondly, the Applicant claims that the financing scheme cannot be considered compatible with the EEA Agreement, as it would entail discrimination on grounds of nationality or a restriction to free movement.[73] The existence of discrimination is deduced from the fact that the entitlement to the preferential scheme depends solely on the municipal ownership of the kindergarten, a condition which can never be fulfilled by a foreign operator.[74] It is maintained that the relevant question under EEA law is not whether foreign operators are singled out as being unprivileged, but whether they are barred from the privileged group, and that the Defendant, faced with such a discrimination or restriction, could not have founded its reasoning on an alleged lack of manifest discrimination.[75] The Applicant finds the case law on which the Decision is based to be of no relevance, not least because it was delivered under the Treaty establishing the European Coal and Steel Community. Under the case law which the Applicant considers relevant, ESA cannot approve any State aid measure which is unnecessarily discriminatory.[76] In any case, the Applicant finds that the discrimination is manifest, as the unequal treatment has already been admitted by the Government.[77]

91. It is claimed that the discrimination is entirely unnecessary, as private kindergartens are performing public service as much as municipal ones, and that the Defendant did not assess to which degree the advantages received are necessary to discharge the public service obligation. The Applicant claims that the Defendant did not apply the market economy investor test, nor did it assess: what the effect of the financing system on the municipalities was, whether there is overcompensation,[78] how a control system avoiding a discriminatory treatment could be implemented or whether the system is proportionate. At least, the Applicant cannot find any indication in the Decision that the Defendant has assessed these issues; thus, the Applicant finds that the principle of transparency

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73 Reference is made to Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, at paragraph 78, with further references; and Case C-438/02 *Hanner* [2005] ECR I-4551, at paragraph 48.

74 Reference is made to Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding, OJ 2003 L 77/21, at paragraphs 121–122. See footnote 39 as to how the Applicant considers the financial scheme to be detrimental to the private kindergartens.

75 Reference is made to Case E-2/06 *EFTA Surveillance Authority* v *Norway*, judgment of 26 June 2007, not yet reported; and Case C-3/88 *Commission* v *Italy* [1989] ECR 4035.

76 Reference is made to Case T-371/94 *British Airways plc and others* v *Commission* [1998] ECR II-2405, at paragraph 285 *et seq*; Case T-204/97 *EPAC* v *Commission* [2000] ECR II-2267, at paragraph 122 *et seq*.; Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, at paragraph 16 *et seq*; Cases 80/77 to 81/77 *Ramel* [1978] ECR 927; Case C-63/89 *Les Assurances du Crédit SA* v *Council and Commission* [1991] ECR I-1799, at paragraph 23; Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding, OJ 2003 L 77/21, at paragraph 112.

77 Reference is made to government statements that equal treatment of municipal and private kindergartens is "phased in" etc., *inter alia* St.meld. No 28 (2003–2004).

78 The Applicant claims in his reply that many municipalities actually do receive more earmarked grants from the State than what they are spending on kindergartens. It is purported that out of 130 million NOK in discretionary funds distributed to 25 investigated municipalities, only 73 million NOK were spent on kindergartens. Reference is made to a letter from the Ministry to all municipalities of 29 June 2007 (Annex A.24).

is infringed.[79] Furthermore, the Applicant submits that the Defendant did not fulfil its duty of diligent and impartial examination when it simply concluded that no manifest discrimination could be assessed no matter what would be the result of the cost coverage principle in practice.[80]

92. The Applicant contests the Defendant's notion of cost coverage and points to the fourth *Altmark* criterion, which in the Applicant's view demands that the service must be performed at the least cost to the community, or at the cost level of a well run and adequately provided enterprise.

Other submissions regarding serious doubts

93. The Applicant submits that the time taken in deciding on the complaint, together with the fact that supplementary information had been requested from the Member State, testifies to the serious doubts that the Defendant must have had.[81] Finally, the Applicant takes the position that when non-notified aid is at issue, a condition for not opening the formal investigation procedure is that ESA has arrived at the firm conviction that no aid is at issue.[82]

*The EFTA Surveillance Authority*

Article 61(1) EEA – The notion of undertaking

94. The Defendant recalls that in competition law, an undertaking is any entity engaged in economic activity, defined as any activity consisting in offering goods and services on a given market.[83] In the Decision, the Defendant came to the conclusion that this was not the case, as the municipal kindergartens were not engaged in economic activities, but rather fulfilled the duties of the municipalities towards their own population in the social, cultural and educational fields.

95. The Defendant refutes the Applicant's submission that considerations relating to cultural and social welfare are immaterial to the assessment of whether a recipient of support constitutes an undertaking. It points out that in the *BAI* case referred to by the Applicant,[84] it was undisputed that the recipient of the support was an undertaking and that the question was solely whether the aim from the grantor of the aid to an undertaking could be relevant when assessing whether the

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79 Reference is made to Case 238/82 Duphar BV and others [1984] ECR 523, at paragraph 21 *et seq*.; and Case C-231/03 Coname [2005] ECR I-7287, at paragraph 17.

80 Reference is made to Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II-743, at paragraph 56, with further references.

81 Reference is made to Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, at paragraph 98.

82 Reference is made to T-46/97 *SIC* v *Commission* [2000] ECR II-2125, at paragraph 91; and Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, at paragraph 33.

83 Reference is made to Case C-218/00 *Cisal* [2002] ECR I-691, at paragraph 23; Case 118/85 *Commission* v *Italy* [1987] ECR 2599, at paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, at paragraph 36; and Case C-180/98 *Pavlov* [2000] ECR I-6451, at paragraph 75.

84 Case T-14/96 *BAI* v *Commission* [1999] ECR II-139.

measure was State aid. The Defendant further contests the submissions of the Applicant that the notion of service is to be interpreted differently depending on whether the case applies to the receiver or the provider of a service[85] and that case law concerning educational activities in the field of services would be irrelevant for the purposes of an assessment under the State aid rules.[86]

96. The Defendant maintains its view that the municipal kindergartens are not undertakings under Article 61(1) EEA.[87] It explains that in *Humbel*, the ECJ ruled that only paid services are to be considered as 'services' within the meaning of the Treaty, and that courses provided by a national education system do not qualify. The reasoning was that first, the State is not seeking to engage in a gainful activity but is fulfilling its duties towards its own population. Second, the system was, as a general rule, funded from the public purse and not by pupils or their parents. That finding was not changed by the fact that pupils or their parents must sometimes pay fees in order to make a contribution to the operating expenses of the system.[88] In *Wirth*, the ECJ held that those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.

97. The Defendant concludes that institutions which form part of the national education system at any level and which are essentially funded by the public purse are not to be regarded as providers of a service. Reference is made to measures of Community institutions dealing with educational institutions and their relationship to the internal market, in particular the State aid and competition rules.[89]

98. The Defendant submits that whether or not the municipal kindergartens are part of the national education system, the underlying considerations in *Humbel* and *Wirth* apply. First, the Norwegian State and the Norwegian municipalities have no commercial or other economic interest in attracting as many children as possible to municipal kindergartens, as they spend money every time they accept a child into a municipal kindergarten. Nor do they have an

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85 Reference is made to Case C-76/05 *Schwarz*, judgment of 11 September 2007, not yet reported.

86 Reference is made to Case C-218/00 *Cisal* [2002] ECR I-691, at paragraphs 22–23.

87 Reference is made *to* Case 263/86 *Humbel* [1988] ECR 5365; Case C-109/92 *Wirth* [1993] ECR I-6447; and Case C-76/05 *Schwarz*, judgment of 11 September 2007, not yet reported.

88 Reference is made to Case 263/86 *Humbel* [1988] ECR 5365, at paragraphs 18–19.

89 Reference is made to the Commission Communication "Services of general economic interest in Europe", OJ 2001 C 17/4 of 19.01.2001, at paragraph 29; the preamble of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 367/36, consideration 34; Commission decision of 25.04.2001 SG(2001) D/288165 on State aid N 118/00 – France, Subventions publiques aux clubs sportifs professionnels, at paragraphs 11–13, 16; Commission decision of 23.11.2005 C(2005) 4439 on State aid N 465/2005 – The Netherlands, school support services; Commission decision of 8.11.2006 C(2006) 5228 on State aid NN 54/2006 – Czech Republic, Prerov logistics College, at paragraphs 14–18. The Defendant further notes that the Commission's Communication entitled "Implementing the Community Lisbon programme: Social services of general interest in the European Union", to which PBL refers in its application, does not cover services for education and training, reference being made to footnote 7 of the Communication.

economic interest in making the parents choose a municipal kindergarten instead of a private kindergarten. Second, the municipalities are fulfilling their duties towards their inhabitants in the social, cultural and educational fields when offering kindergartens to their inhabitants. Third, the vast majority of the funding for the municipal kindergartens comes from the public purse.

99. For the Defendant, the existence of parental fees does not change the finding that kindergartens in Norway are essentially financed by the public purse. Such a fee is just a "contribution" like the fee ruled on by the ECJ in *Humbel*, not the consideration for a service. In the Defendant's view, the argument that the parents' fees are not a consideration for a service is fostered by the fact that the fees are disconnected from the actual costs, as they do not increase for children with special needs and that fee reductions for social reasons exist.

100. In any case, the Defendant finds that kindergartens in Norway do form part of the larger Norwegian national education system. It is argued that a Norwegian kindergarten provides much more than "just" childcare and is an important part of the concept of preschool education in Norway. This is illustrated with, amongst others, references to the tasks of a kindergarten.[90] The Defendant recognises that there are some differences between a kindergarten and a school especially in the first years of kindergarten, but points out that there is a sliding scale of emphasis on education, with no abrupt change in the way children are educated in the last year of kindergarten and the first year at primary school.

101. The Defendant argues that the fact that attendance at kindergarten is not compulsory does not alter its character of social and educational service and cannot be used to distinguish this case from *Humbel* and *Wirth*. It points out that these judgments both concerned courses which were beyond obligatory school age. Neither can the assessment of an activity of a public educational institution, which is not a service if viewed in isolation, be changed by the fact that a similar activity is performed by other entities as an economic activity.[91]

Article 61(1) EEA – Existence of cross-border effect

102. The Defendant identifies three possible ways in which trade could theoretically be affected by governmental support of municipal kindergartens:

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90 Reference is made to Section 2 of the Kindergarten Act; the Framework plan; a white paper on life-long learning published by the Norwegian Government in 2006 (St.meld. No 16 (2006–2007)); the requirements set out for the staff in a kindergarten set out in Sections 17 and 18 of the Kindergarten Act; chapter 3.1 of the communication from the Commission to the Council and the European Parliament on efficiency and equity in European education and training systems, COM(2006) 481 final; the "glossary on European education institutions" published by the information network on education in Europe – Eurydice in 2000, where the Norwegian "*barnehage*" is classified as ISCED 0 ("Non-school education-oriented institution offering full- or part-time pre-primary education and care for children from as early as their first year up to the age of 5"); the OECD Report; and chapter 4.2 of the preparatory works of the Norwegian Kindergarten Act, Ot.pr. No 72 (2004–2005).

91 Reference is made to Case C-109/92 *Wirth* [1993] ECR I-6447, at paragraphs 16–19.

first, that families from other EEA States could be inclined to use Norwegian municipal kindergartens rather than kindergartens in other EEA States; second, that municipal kindergartens would be enabled to engage in offering kindergarten facilities abroad and third, that foreign operators would be affected in their actual or potential operations in Norway. The Defendant does not find trade affected in any of these ways and notes that it is only on the third point that the Applicant does come to a different conclusion.

103. The Defendant submits that the amount of aid and the size of the undertakings are relevant when assessing whether an aid measure affects intra EEA trade.[92] The Defendant emphasises the need to look at the characteristics of the sector concerned when assessing whether the condition concerning trade effect is fulfilled,[93] including the exposure to competition,[94] any structural overcapacity[95] or other "specific difficulties" on the market,[96] or whether the sector has been subject to liberalisation on Community level.[97] To the Defendant, the local character of the activities of the aid beneficiaries also constitutes one of the factors to take into account in an overall assessment of whether there is an effect on trade.[98]

104. The Defendant first finds little competition in the kindergarten sector in Norway, as the area is highly regulated including a parental fee ceiling and characterised by a dependency on State support. Second, the sector is characterised by a very high demand and a shortage of supply. Third, there has been no liberalisation of kindergartens at the Community level. Fourth, a large majority of kindergartens are run exclusively on a local level, a conclusion that is not altered by the fact that the support system is nationwide. The Defendant does

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92 Reference is made to Joined Cases T-304/04 and T-316/04 *Italy and Wam SpA* v *Commission*, judgment of 6 September 2006, not yet reported, at paragraph 63.

93 Reference is made to Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, at paragraph 51; and Case T-288/97 *Regione Friuli Venezia Giulia* v *Commission* [2002] ECR II-1169, at paragraph 46.

94 Reference is made to Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, at paragraph 30; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, at paragraph 298; Case 259/85 *France* v *Commission* [1987] ECR 4393, at paragraph 24; Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava* v *Commission* [2002] ECR II-1275, at paragraph 219; Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, at paragraph 49; and Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, at paragraph 76.

95 Reference is made to Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, at paragraphs 33–44; Case T-152/99 *Hijos de Andrés Molina* v *Commission* [2002] ECR II-3049, at paragraphs 220–222; and Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, at paragraph 77.

96 Reference is made to Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, at paragraphs 40–43.

97 Reference is made to Case C-148/04 *Unicredito* [2005] ECR I-11137, at at paragraph 57; Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, at paragraph 75; and Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, at paragraph 51.

98 Reference is made to the Decision VAT I, p. 14.

not agree with the Applicant's opinion that it has used a different standard in the present case than in other cases.[99]

105. The Defendant contests the Applicant's assertion that the Norwegian scheme discriminates on the basis of nationality, and holds that even if all kindergartens, private and municipal, were to be treated in the same manner as municipal kindergartens, this would still not be likely to affect trade, as municipal kindergartens are barred by law from making a profit on their services to the public. In the Defendant's view, a similar system applied to private kindergartens would probably be an even bigger deterrent for foreign entry. It clarifies, however, that it is not arguing that because the rules are non-discriminatory, trade is not affected.

106. The Defendant contests the Applicant's assertion that it stated that the compensation rules in the Regulation pertaining to municipal kindergartens have the effect of deterring foreign investment. Rather, it argues that it would be unlikely for foreign providers of kindergartens to consider establishing themselves in Norway because of the parental payment cap and the municipal grant limits on non-municipal kindergartens. To the Defendant, it is thus not the existence of the aid scheme, but the fact that it is not more generous to non-municipal kindergartens that has this effect.

107. The Defendant submits that it has not generally refuted that a company registered as a NUF might be an indication of trade effect, but that upon examination of the list provided by the Applicant, it found that all companies were run by Norwegian residents, that only one of the companies did business in its country of registration and that this company was not active in the Norwegian kindergarten sector. Therefore, although the Defendant agrees with the Applicant that these companies are indeed foreign undertakings, it concludes that they could not constitute proof of cross-border elements.[100] The Defendant contests that the ECJ´s case law in *Centros*, *Überseering* and *Inspire Art*[101] is relevant for the case at hand. It points out that these decisions ruled on whether a company registered in one EEA State may legally conduct business in another EEA State, whereas the question of whether effects on trade are present is not whether circumvention has taken place, but whether the aid affects trade between EEA States, and that this trade has to be real and more than marginal.

108. Finally, the Defendant notes that the judgment of the EFTA Court in *Husbanken II* referred to by the Applicant relates exclusively to the so-called

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99 Including Decision No 298/05/COL, as cited by the Applicant.

100 Reference is made to Joined Cases C-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, at paragraph 299; Case 730/79 *Philip Morris* v *Commission* [1980] ECR-2671, at paragraph 11; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, at paragraph 40; and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, at paragraph 47.

101 Case C-212/97 *Centros* [1999] ECR I-1459; Case C-208/00 *Überseering* [2002] ECR I-9919; and Case C-167/01 *Inspire Art* [2003] ECR I-10155.

balancing test under Article 59(2) EEA, which is only relevant to the extent that a trade effect already has been established.

Article 59(2) EEA – Compatibility

109. The Defendant maintains that even if the financing system would constitute State aid, it would be compatible with the EEA Agreement as it would only constitute appropriate compensation for the provision of services of general economic interest.

110. It is clear to the Defendant that all the costs incurred by municipal kindergartens are related to a clearly defined service of general economic interest and that it accordingly held in the Decision that the principle of cost coverage did not lead to overcompensation. The Defendant submits that the Applicant never questioned this prior to its application. In any event, the Defendant considers possible excess grants received by the municipalities to be irrelevant, as they are granted to the municipality in its capacity as public body and not as kindergarten operator, and that in any event overcompensation would only be relevant if the funds had been redirected to entities performing an economic activity. Furthermore, the Applicant's submission that the Defendant should have applied the *Altmark* criteria is rejected, as these criteria relate to the question of whether State aid is present, whereas the assessment of the Defendant took place under the assumption that all support granted to municipal kindergartens constitutes State aid.

111. The Defendant submits that the Applicant never clarified how it considers private kindergartens to be discriminated against by the financing system. With regard to the application of the cost coverage principle through the financing system, the Defendant admits that this leads in general to higher amounts of support paid to the municipal kindergartens. However, the Defendant is of the opinion that the cost coverage principle is the normal method of compensation for services of general interest, regardless of whether the supported undertaking is efficient or not, and as such can therefore not be contrary to the EEA Agreement.[102] To the Defendant, it is immaterial whether or not this

[102] Reference is made to Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2005 L 312/67 (taken over into the EEA Agreement by Decision of the EEA Joint Committee 91/2006 of 7 July 2006, OJ 2006 L 289/31), recitals 4, 11 and 14; Commission Decision C(2007) 641 final of 7 March 2007 on State aid NN 8/2007 – Spain, Financing of workforce reduction measures for RTVE, points 20, 45–46; Commission Decision 2005/406/EC of 15 October 2003 on ad hoc measures implemented by Portugal for RTP, OJ 2005 L 142/1, at paragraphs 153–157, 194; Commission Decision 2004/838/EC of 10 December 2003 on State aid implemented by France for France 2 and France 3, OJ 2004 L 359/62, at paragraphs 56, 101; Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group), OJ 2005 L 53/29, at paragraph 59, 123–148; Commission Decision C(2003) 3371 of 1 October 2003 on State aid N 37/2003 – United Kingdom, BBC Digital Curriculum, at paragraphs 23, 51; Commission Decision C(2005) 4668 final of 7 December 2005 on State aid N395/2005 – Ireland, Loan guarantees for social infrastructure schemes funded by the Housing Finance Agency (HFA), at paragraph 38, 42; Buendia Sierra, *An analysis of Article 86(2)*, in: Sanchez Rydelski (ed.), *The EC State Aid Regime*, 2006, p. 541 at p. 555–556; and Barosch,

principle will lead in practice to a higher average payment to municipal kindergartens, as the reason for this would be the higher costs of the municipal kindergartens, not the fact that they are municipal. It is submitted that higher subsidies based on higher costs are not an advantage as in the end, the advantage received by all the recipients is the same: the coverage of their costs.

112. The Defendant agrees that an aid system has to be in conformity with the rules on free movement, and that a national legislation treating public undertakings more favourably than all other undertakings would be discriminatory. However, based on the argument of the foregoing paragraph, it is submitted that discrimination can only be found if a deviation from the cost coverage principle exists, depending on whether the two groups are in objectively similar situations and whether any difference of treatment might be justified.

113. The Defendant points out that it assessed two deviations from the cost coverage principle in the Decision: first, a municipality is not obliged to grant aid to non-municipal kindergartens covering higher operational costs than its own kindergartens have and second, the municipalities can refuse to pay for a significant rise in costs in a non-municipal kindergarten. The Defendant finds both exceptions justified by the fact that the municipalities are, as owners, in control of the cost development of their own kindergartens, but not of the private ones, and that the private kindergartens have, as opposed to the municipalities, the possibility to make profits which, moreover, would necessarily come mainly from the municipal purse. With regard to the first deviation, it is added that a municipality as grantor cannot be supposed to finance a higher service level than what it has found appropriate for its own kindergartens. With regard to the second deviation, the Defendant finds that an EEA State is not obliged to design a system of compensation which allows an undertaking to change its business concept and still receive full compensation.

Other submissions regarding serious doubts

114. The Defendant refutes the Applicant's argument relating to *Preyon-Rupel*.[103] He points out that Norway was asked only once to submit information, and that the Decision was adopted within 5 months after its receipt.

*The Government of Norway*

Article 61(1) EEA – The notion of undertaking

115. The Government of Norway recalls that according to ECJ case law, only entities engaged in economic activity, defined as offering goods or services on a

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*Sozialer Wohnungsbau und europäische Beihilfenkontrolle*, EuZW 2007, 559, 564, with further references to literature and Commission practice.

103 Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867.

given market, are undertakings.[104] Economic activity presupposes the assumption of risk for the purpose of remuneration.[105]

116. The Government of Norway concludes that the municipalities are not engaged in an "economic activity".[106] First of all, the Government finds, having regard to the intense regulation of the market and the massive financial contributions by the State towards it, that a sector which is not based on supply and demand but on the size of public grants cannot be regarded as a "market" for the purpose of State aid rules. It is added that the municipalities have no economic interest in attracting children to municipal or non-municipal kindergartens and that consequently no real competition exists between the municipalities and other providers of kindergarten services. This finding is supported by the arguments that no price competition exists and that there is still a shortage of kindergarten places. Finally, the Government takes the position that the parental fee cannot be considered as "consideration for the service in question" for the following reasons: a) it is *de facto* determined by Stortinget (the Norwegian Parliament) and not agreed upon by kindergartens and parents; b) it is not even near the real costs of the service and c) it is not paid to the municipal kindergarten as such, but is entered into the general municipal budget.[107]

117. The Government of Norway disputes the Applicant's view that the municipal kindergartens are not based on the principle of solidarity. The Government argues that the purpose of the system is to enable all parents to afford kindergarten places. It is explained that the public grants should be seen rather as financial contributions to parents in order to promote social equality than as a financial support to kindergartens as such. The Government further points to the existence of graduated fees for social reasons. It refutes the argument of the Applicant that graduated fees are also common in other sectors such as transportation, as in these sectors even the graduated fee is never below marginal costs, thus having a different rationale than the discounts in the kindergarten system.

118. The Norwegian Government agrees with the Defendant that the ECJ´s case law in *Humbel* and *Wirth* applies to the present case, as the notion of "service" and the notion of "undertaking" are interlinked which each other. It notes that the consequence of the Applicant's arguments would be that any public educational institution would be an undertaking under the State aid rules, a consequence which would be contrary to the general understanding of the two cases. With regard to the Applicant´s argument that considerations as to culture and social welfare would be irrelevant for the determination of aid, it is claimed

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104 Reference is made to Case C-41/90 *Höfer and Elser* [1991] ECR I-1979, at paragraph 21; and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, at paragraph 36.

105 Reference is made to Case C-180/98 *Pavlov* [2000] ECR I-6451, at paragraphs 76–77.

106 Reference is made to Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, at paragraph 18; Case C-218/00 *Cisal* [2002] ECR I-691; Case 263/86 *Humbel* [1988] ECR 5365, at paragraph 18; and Case C-109/92 *Wirth* [1993] ECR I-6447, at paragraph 16.

107 Reference is made to Case 263/86 *Humbel* [1988] ECR 5365, at paragraphs 17 and 19.

that the notion of aid has to be distinguished from the notion of undertaking, and that such considerations are relevant to the latter. It is argued that the same service which is not an economic activity for a public entity might be such an activity for a private operator seeking profit.[108]

119. The Government of Norway further agrees with the Defendant that the provision of kindergarten services not only fulfils the underlying considerations in *Humbel* and *Wirth*, but that kindergartens are indeed educational institutions. With regard to the arguments of the Applicant, it submits that it is not relevant that kindergartens are not schools and that the education methods are not entirely the same. To the Government, what matters is the fact that the educational tasks of kindergartens go far beyond childcare in the narrow sense. This finding is supported by the fact that in Norway, kindergartens are the responsibility of the Ministry of Education, and they are widely regarded as part of the educational system and organised and financed under the responsibility of the municipalities in a way similar to schools.

120. Finally, with regard to the fact that neither secondary nor higher education is compulsory in Norway, the argument of the Applicant that kindergarten attendance is not obligatory is rejected. It is added that the absence of such an element cannot make the service any less a public obligation.

Article 61(1) EEA – Existence of cross-border effect

121. The Government of Norway submits that the Applicant's argument that the existence of NUFs would establish proof of an effect on trade is based on an overly formal approach to the effect on trade criterion. It is noted that the judgments quoted by the Applicant merely show that an EEA State cannot refuse to recognise a foreign registered company as a lawful legal object, and that the Applicant has not argued that any of the NUFs have encountered unlawful restrictions in their course of business due to their decision to register their company abroad. It is added that the NUFs receive financial support on the same terms as all other non-municipal kindergartens.

122. The Norwegian Government submits that only a cross-border activity which is actually carried out, or which is likely to occur, can fulfil the conditions for effect on trade. The Government finds it difficult to see how inter-state trade is likely to be affected or capable of being affected if the recipients of the aid, its customers and its competitors are all engaged in the same State.[109]

123. The Government finds that the Defendant has assessed the possibility of potential trade effects with due regard. It argues that, contrary to the suggestions of the Applicant, the basis for the analysis has to be whether it is the application

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108 Reference is made to Case C-109/92 *Wirth* [1993] ECR I-6447, at paragraph 17; and Case C-76/05 *Schwarz*, judgment of 11 September 2007, not yet reported, at paragraphs 40–41.

109 Reference is made to Case C-730/79 *Philip Morris Holland BV* v *Commission* [1980] ECR-2671, at paragraph 11.

of the cost coverage principle on the municipal kindergartens which is likely to deter foreign investments, and not whether any changes to the financing of the non-municipal kindergartens might affect the level of foreign investment. It is added that, although the effect on trade criterion is normally considered easily met, it should require more than a mere hypothesis that foreign companies may enter the Norwegian market for the Court to find that a contested measure is capable of affecting inter-state trade.[110]

Article 59(2) EEA – Compatibility

124. Like the Defendant, the Government of Norway finds it difficult to see which part of the financing system is seen as discriminatory by the Applicant.

125. As far as the Applicant might be challenging the cost coverage principle as such, the Government of Norway refutes this in accordance with the arguments put forward by the Defendant. It is submitted that Article 59(2) EEA permits a system of cost coverage, and that a limitation to the coverage of real costs effectively prevents overcompensation. With view to the existence of the maximum price ceiling, it is added that applying a different principle leading to a lower compensation for municipal kindergartens would render the municipal kindergartens unable to provide their services; thus putting at stake the paramount objective of the Kindergarten reform, namely to increase the number and availability of kindergarten places. The Government argues that to the contrary, it would be the introduction of the unit cost principle with a high amount to each kindergarten which would lead to a real risk of overcompensation. With regard to the alleged abuse of the "discretionary funds", it is added that earmarked grants which are not spent on the activity for which they are granted must be returned to the State.

126. The Norwegian Government does not share the Applicant's view that the Regulation entails discrimination on the basis of nationality. It is argued that the rules do not differentiate between Norwegian and foreign or public and private, but between municipal and non-municipal operators. The reason for the differentiation between these groups is that the municipal authorities have control over the budget of the municipal kindergartens, but not over the non-municipal kindergartens. To the Government, real equal treatment would include barring non-municipal kindergartens from making profits and giving municipal authorities the right to determine the annual cost level of each non-municipal kindergarten.

127. The Government of Norway shares the view of the Defendant with regard to the limitations to the cost coverage principle for private kindergartens.[111] With regard to the limitation on cost increases, it is further argued that without such a limitation, private kindergartens could simply increase their profits to a higher

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110 Reference is made to Case C-280/00 *Altmark* [2003] ECR I-7747, at paragraph 79.

111 See paragraphs 112 and 113 of this Report.

level in order to get more funding, as profits are regarded as part of the costs. This would practically lead to the introduction of the unit cost approach. It is added that the limitations to the obligation of the municipalities to cover the costs of the non-municipal kindergartens do not bar the municipalities from granting more cost coverage.

128. The Government disagrees that private kindergartens are impaired in their market behaviour. It points out that any cost increase resulting from an increase of the number of children or the composition of children in the kindergarten would be covered under the Regulation. Furthermore, the Government finds that it is for the authorities to determine the scope and level of the service when assigning a public service obligation, and that the undertaking discharging the obligation cannot claim a right to provide the service at a more costly level than the one requested by the authorities. The Government submits that the normal increase of prices and costs in the municipal sector is a legitimate benchmark which does not lead to unreasonable results in practice. It is argued that as the average annual cost increase in municipal kindergartens is not known at the time when the grants are calculated, this benchmark is the best alternative. Furthermore, the Government finds that until now, this benchmark has led to higher average cost increase in non-municipal kindergartens than in municipal kindergartens.

*The Commission of the European Communities*

Article 61(1) EEA – The notion of undertaking

129. To the Commission, the central question in the present case is whether the municipalities, when providing kindergarten places for their constituency, are engaged in an economic activity by offering services on a market, or whether their activity is non-economic in nature.

130. Considering the existing case law of the ECJ, the Commission makes several observations: first, the ECJ has consistently held that where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect.[112] The Commission notes that there is no general exception sheltering the social field as a whole from the application of State Aid and other competition rules. Second, the ECJ has held that the concept of undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.[113] Third, the ECJ did not consider organisations charged with the management of certain social security schemes to be undertakings if the scheme was compulsory,

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112 Reference is made to Joined cases 209/84 to 213/84 *Asjes and others* [1986] ECR 1425, at paragraph 40.

113 Reference is made to Case C-41/90 *Höfer and Elser* [1991] ECR I-1979, at paragraph 21; and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, at paragraph 36.

based on the principle of solidarity and entirely non-profit.[114] Fourth, the ECJ held a non-profit organisation which managed an optional pension scheme intended to supplement a basic compulsory scheme, operating according to the principle of capitalisation, to be an undertaking within the meaning of Article 85 *et seq* of the EC Treaty.[115]

131. The Commission notes that the ECJ has not yet decided whether, and to which extent establishments in the field of education can be regarded as "undertakings" within the meaning of the competition provisions of the EC Treaty. However, the Commission points to the judgments *Humbel* and *Wirth*, where the ECJ decided with regard to the provisions on free movement of services that courses given by educational institutions under the national education system do not constitute services within the meaning of the EC Treaty.[116] The Commission adds that the ECJ did not attach significance to the question of whether the education was mandatory or not, but in particular to the fact that only services provided against remuneration are to be considered as services within the meaning of the EC Treaty. The Commission itself has applied this case law in a number of State aid decisions.[117]

132. With regard to the case law in question, the Commission finds that although providing kindergarten services could constitute an economic activity, this is not the case in the specific framework in place in Norway. The Commission points to the strong public nature of the system, the absence of any potential competition on price, the duty of the municipalities to ensure a sufficient number of kindergarten places, the fact that it is not possible to charge cost-covering fees, the objective of providing sufficient kindergarten places irrespective of costs and the strong element of solidarity which is thereby introduced into the system.

133. The Commission takes the view that by establishing and maintaining such a system, the Norwegian State is not seeking to engage in a gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. For these reasons, the Commission considers that given the specific circumstances of the case, municipal kindergartens in Norway do not carry out an economic activity.

Article 61(1) EEA – Existence of cross-border effect

134. With regard to the question of whether the Norwegian system has an effect on trade by deterring foreign companies from establishing kindergartens in

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114 Reference is made to Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, at paragraphs 18–20; and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* [2004] ECR I-2493, at paragraph 57.

115 Reference is made to Case C-244/94 *Fédération Française des Sociétés d'Assurance* [1995] ECR I-4013, at paragraph 22; and Case C-67/96 *Albany* [1999] ECR I-5751, at paragraph 87.

116 Reference is made to Case 263/86 *Humbel* [1988] ECR 5365, at paragraph 20; and Case C-109/92 *Wirth* [1993] ECR I-6447, at paragraph 19.

117 See footnote 54 of this Report.

Norway, the Commission notes that the parties agree that the NUFs examined by the Defendant in the Decision are foreign undertakings, and concurs accordingly.[118] However, the Commission finds that this is not relevant to answer the question of whether an effect on trade does exist. It notes that in principle, there are no restrictions on private undertakings, including undertakings from other EEA States, to set up private kindergartens in Norway. The Commission therefore considers that the aid might be liable to affect cross-border trade to the extent that the current financing system is discriminatory against private kindergartens.[119]

135. The Commission acknowledges that the Decision enumerates certain factors which moderate this view. However, neither the small amount of aid or size of the undertaking, nor the regional or local character of the services supplied are sufficient to exclude an effect on trade.[120] It is added that an effect on trade can also exist where undertakings from other Member States could be tempted to establish themselves in another Member State in order to provide services in that Member State.[121]

136. Finally, the Commission notes that in the assessment of whether a measure involves state aid, it is not required to establish that aid has a real effect on trade, but only that aid is liable to affect such trade and distort competition.[122] The Commission states that the judgment of the CFI in *Wam SpA*[123] should not be considered as relevant authority as it is currently under appeal precisely as regards the extent of the duty of the Commission to motivate the existence of an effect on trade.[124]

137. The Commission concludes that since it is not excluded that undertakings from other EEA countries might establish themselves in Norway to establish private kindergartens, it cannot be excluded *a priori* that trade between EEA countries could be affected.

Other submissions regarding serious doubts

138. With regard to the argument of the Applicant that the duration of the procedure proves the existence of serious difficulties, the Commission recalls that the reasonable length of time for concluding a preliminary investigation

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118 Reference is made to Case C-212/97 *Centros* [1999] ECR I-1459; Case C-208/00 *Überseering* [2002] ECR I-9919; and Case C-167/01 *Inspire Art* [2003] ECR I-10155.

119 Reference is made to Case C-222/04 *Cassa di Rispamio di Firenze* [2006] ECR I-289, at paragraph 142.

120 Reference is made to Case C-172/03 *Heiser* [2005] ECR I-1627, at paragraphs 32–33; and Case C-280/00 *Altmark* [2003] ECR I-7747, at paragraphs 81–82.

121 Reference is made to Case C-451/03 *Calafiori* [2006] ECR I-2941, at paragraph 58.

122 Reference is made to Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, at paragraph 44; Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, at paragraph 111; Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289, at paragraph 140; and Joined Cases T-298/97 et al *Mauro and others* v *Commission* [2000] ECR II-2319, at paragraph 95.

123 Case T-316/04 *Wam SpA* v *Commission* [2004] ECR II-3917.

124 Pending Case C-494/06 P *Commission* v *Italy and Wam SpA*.

depends on the circumstances of each specific case.[125] It is argued that the CFI's decision in *Prayon-Rupel* does not establish a rule of law that a delay of 2 years is *ipso facto* evidence of serious difficulties, and that this part of the judgment was an *obiter dictum*.[126] The Commission further refuses the Applicant's submission that the requests for information made by the Defendant could constitute such evidence. Such an assessment would defeat the purpose of the preliminary investigation procedure, during which it must be possible for the investigating authority to make requests for information to the Member State without prejudging the outcome of the preliminary investigation.

139. The Commission does not agree that the Defendant needed to arrive at the firm conviction that no aid is at issue because the measure to assess was not notified.[127] What matters is the substantive difficulty in disposing of the matter. The Commission finds that at least with regard to the question whether kindergartens in Norway do constitute undertakings, all relevant facts are well established in the Decision and not contested, and that accordingly, the Defendant did not encounter any particular difficulties.

*The Government of Iceland*

140. The Government of Iceland supports the submissions of ESA and restricts itself to make, after outlining the Icelandic law on kindergartens, some observations on its view that municipal kindergartens are not undertakings.

141. With reference to the judgments of the ECJ in *Humbel* and *Wirth*, it is argued that the provision of kindergarten places by the municipalities is a public function falling outside the scope of State aid rules of the EEA Agreement. It is pointed out that pre-primary education is a service available to all which is not motivated by profits, but rather part of the national education system. The Government of Iceland adds that in Iceland, providing kindergartens is an obligation imposed on the municipalities by law. Finally, it is claimed that even though the municipality provides its services on a given market, it cannot be held to be an undertaking as it does so in order to perform a public function of a purely social nature.[128]

Carl Baudenbacher
Judge-Rapporteur

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125 Reference is made to Case T-95/96 *Gestevision Telecinco SA* v *Commission* [1998] ECR II-3407, at paragraph 75; Case T-395/04 *Air One* v *Commission* [2006] ECR II-1343, at paragraph 63 *et seq*.

126 Reference is made to Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, at paragraphs 85, 98

127 Reference is made to Case C-301/87 *France* v *Commission (Boussac)* [1990] ECR I-307, at paragraphs 21–22.

128 Reference is made to Case T-319/99 *FENIN* v *Commission* [2003] ECR II-357, at paragraph 37–39.