Norway

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Overview

1 Outline your jurisdiction's state aid policy and track record of compliance and enforcement. What is the general attitude towards subsidies in your system?

Norway has a strong public sector and the Norwegian state is generally relatively active and involved in the market through public ownership, regulations, direct subsidies and other forms of state aid. Services of general economic interest (SGEI) are a popular tool currently applied in sectors such as transport, broadcasting, healthcare, public infrastructure and culture. Norwegian/EEA state aid enforcement is, nevertheless, still at a fairly low level compared with EU member states. The European Free Trade Association (EFTA) Surveillance Authority (ESA) adopted four decisions (as per 30 April 2019), six decisions (2018), 14 decisions (2017), 17 decisions (2016), 19 decisions (2015) and 21 decisions (2014) respectively concerning state aid in Norway. However, there is a sharp rise in cases notified under the General block exemption Regulation (GBER) in recent years (31 Norwegian cases in 2018).

The most important Norwegian aid schemes are found in the energy sector (renewables, CO2 carbon capture, alternative fuels infrastructure, aid to demonstration plants, electrical vehicles grants, etc), transportation (special tax system for shipping, coastal agreement for Hurtigruten, refund scheme for seafarers, etc), media (production grants, reduced or zero VAT, etc) and agriculture (largely outside the scope of the EEA Agreement and state aid rules, see EEA Agreement article 8 (3) stating that the EEA Agreement applies to 'goods falling under Chapter 25 to 97 of the Harmonised Commodity Description and Coding System, with the exception of products listed in Protocol 2').

As for notable recent cases, firstly, ESA in March 2019 closed the case concerning a complaint in August 2018 from the environmental organisation Bellona alleging that the Norwegian cash refund of the tax value of petroleum exploration costs constituted state aid (18/19/COL). The complaint was a consequence of changes to the petroleum tax act in 2005: (i) oil companies were given a right claim annual refund of the tax value (78 per cent) of exploration costs incurred in connection with oil and gas activities on the Norwegian Continental Shelf (NCS) (Refund Scheme), and (ii) oil companies were given right to claim refund of the tax value (78 per cent) of the tax losses and unused free income upon cessation of its petroleum activities on the NCS (Cessation Refund Scheme). By implementing these changes the Norwegian state in effect guarantees for 78 per cent of all investments on the NCS. However, the changes have also stimulated activity and investments on the NCS, as the refund arrangements have been attractive to investors and new oil and gas companies. Total refunds since 2005 amount to 110 billion Norwegian kroner (Refund Scheme) and 11.6 billion Norwegian kroner (cessation refund scheme). ESA held that the refund scheme was a tax rule, and not a subsidy and assessed the scheme under the three-step analysis. The reference system according to ESA was the petroleum tax regime (not the general tax regime). At the facts, ESA found that prima facie there was no selectivity, first, since the companies that were not in a tax position were in a unique position compared with companies in a tax position. ESA noted that searching for oil and gas constitutes an integrated and necessary part of extracting oil and gas. ESA emphasised the logics of the petroleum tax system and neutrality as part of this logic.

Second, in case 72/18/COL ESA greenlighted the new Coastal Route Agreements in Norway. Following a competitive tender for the operation of regular sailings between Bergen and Kirkenes, ESA concluded that no state aid was involved in the agreements. To facilitate multiple bids in the tender, Norwegian authorities split the competition into three smaller packages and awarded contracts to two transport companies. In addition to Hurtigruten sailing the coastal route as of 2021, the Norwegian entity Havila also enters the route. Hurtigruten and Havila will be compensated by the state for performing daily sailings from Bergen to Kirkenes throughout the year with calls at 34 ports. In effect, the compensation to Hurtigruten, which was held to constitute (lawful) state aid in 2017 for the period 2012–2019, will now as of 2021 not be considered as state aid.

Third, on 16 April 2019 ESA opened a formal investigation into potential unlawful state aid granted to Trondheim Spektrum AS by the Municipality of Trondheim. Trondheim Spektrum AS owns and operates a multipurpose facility used mainly for sports events, concerts and trade fairs. The alleged aid measures include lease agreements allegedly not entered into on market terms, a capital increase, the financing of infrastructure costs, and an implicit guarantee for a loan.

There are relatively few state aid cases concerning Norwegian non-compliance with EEA state aid rules. Generally, Norway maintains a well-responded notification policy and a good track-record with the ESA. However, the recent decision from the Court of Justice in case C-349/17 (*Eesti Pagar*) may raise new issues in (Norwegian) state aid enforcement. There is a multitude of state aid grantors and an increased use of the GBER entailing that many aid schemes are never assessed by ESA prior to implementation. In the case of aid that is unlawfully paid out under the GBER, the decision of the Grand Chamber in *Eesti Pagar* now states that the member state must ensure 'recovering on its own initiative the aid that was unlawfully granted'. This raises several questions under national and EEA state aid law (eg, what if there is no legal basis under national law to recover the aid? To what extent may the aid beneficiary rely on legitimate expectations under national law? Is the recovery obligation affected by the fact that the aid could have been approved by ESA?).

2 Which national authorities monitor compliance with state aid rules and have primary responsibility for dealing with the European Commission on state aid matters?

At the outset, it should be recalled that Norway is not a member of the EU, but a member of the EFTA and a signatory of the EEA Agreement. EEA state aid law is, however, closely modelled on EU state aid law. The powers of ESA in the area of state aid therefore generally mirror the extended competencies of the European Commission. All existing aid, as well as any plans to grant or alter state aid, shall be subject to constant review as to their compatibility with the EEA Agreement, and ESA has the right to take decisions, provide recommendations, deliver opinions and issue notices or guidelines on matters dealt with in the EEA Agreement, including state aid.

The Ministry of Trade and Fisheries, the department for competition, and its section for state aid are responsible for drafting and interpreting state aid rules nationally. Among other things, the section for state aid is responsible for coordinating and handling state aid notifications and simplified notifications concerning aid under the GBER, providing general legal guidance and advising aid recipients in individual

cases. The ministry is assisted by other public bodies when coordinating and handling state aid notifications.

The section also advises public bodies (including regional and local authorities) on compliance of Norwegian measures or contemplated measures with EEA state aid law, provides knowledge and advises on the handling of negotiations with ESA in state aid cases. The section staff consists of around six case handlers in addition to the head of section.

The Office of the Attorney General (Civil Affairs), assisted by the Ministry of Trade and Fisheries and the granting public authority, represents the Norwegian government in proceedings brought before the EFTA or EU Courts.

3 Which bodies are primarily in charge of granting aid and receiving aid applications?

Responsibility for the granting and day-to-day administration of state aid schemes is decentralised, and a wide variety of bodies grant aid in Norway, including government departments (eg, ministries), regional governments (eg, the counties and municipalities), regional and local development agencies and non-departmental bodies.

However, notifications to and dealings with ESA are centralised and sorted under the Ministry of Trade and Fisheries.

The most significant aid grantors next to the Ministry of Finance (tax and VAT measures) are the Norwegian Research Council (the chief advisory body for the government authorities on research policy issues), Enova SF (a Norwegian state-owned company established to manage the Norwegian Energy Fund) and Innovation Norway (a Norwegian state-owned company established as an instrument to ensure innovation and development of Norwegian enterprises and industry).

A national state aid control system was established in July 2016 (the register for state aid), where all aid in excess of €500,000 must be registered. The registry is accessible at https://data.brreg.no/rofs.

4 Describe the general procedural and substantive framework.

State aid measures are governed by and executed in accordance with public law.

The granting of state aid generally requires a legal basis that may be found in specific legislation (Act, Regulation, Decision, etc) or as part of the Finance Act or its attached documents. There is no single act serving as the legal basis for the granting of state aid, as this legal basis may be found in various different legislative acts. As a main rule, however, a state aid scheme should have as basis a regulation. The decision to grant subsidies is, broadly speaking, governed by public law – in other words, by the general statutes on administrative procedure as well as the budgetary rules and the grant or rejection of aid would normally be in the form of a public administrative decision. While the question of granting subsidies is a matter of public law, the authorities often choose to use instruments governed by private law when implementing the state aid measures – for example, capital injections, guarantees and loans.

5 Identify and describe the main national legislation implementing European state aid rules.

The Norwegian State Aid Act of 1992 provides that aid shall be in compliance with the EEA Agreement. The Act establishes an obligation to register aid in the Norwegian State Aid registry, notify ESA (if state aid) and provides further rules on the investigative powers of ESA as well as rules on recovery. The Act does not regulate the granting of aid, but is currently under review by the legislator.

The substantive and procedural rules on state aid are set out in the EEA Agreement, which is implemented as Norwegian law, and the Surveillance Authority and Court Agreement (SCA), requiring ESA to ensure the proper functioning of the EEA Agreement in the field of state aid (articles 5 and 24). The criteria for assessing the existence of aid are set out in EEA article 61(1) and mirror the criteria in TFEU article 107(1) (state resources, economic advantage, undertakings, distortion of competition and effect on trade). The criteria for assessing whether aid shall be or may be compatible (lawful) are set out in EEA article 61(2) and (3) and similarly mirror the criteria in TFEU article 107(2) and (3). The detailed rules on the powers and functions of ESA in the field of state aid are set out in Protocol 3 to the SCA.

Article 7 of the EEA Agreement provides that Acts referred to or contained in the annexes to the Agreement shall be binding upon Norway as an EFTA state and shall be made part of the domestic law. In effect, the EU Regulations and Directives on financial transparency, aid to shipbuilding, de minimis aid, SGEI and the GBER are legally binding to Norway (see Annex XV to the EEA Agreement, which contains the relevant EU legislation in the field of state aid).

Note that the scope of the EEA Agreement is generally more limited than EU law. However, the EEA state aid law is closely modelled on the EU state aid law, and ESA and EFTA Court have broadly ensured that the state aid provisions of the EEA are homogenously applied and interpreted. By way of example, the fact that tax law as such is not covered by the EEA Agreement does not prevent the Agreement's basic rules on state aid placing the same restrictions on the EFTA states' taxation competence as identically worded provisions in EU law, for example, EFTA Court Case E-6/98 *Norway v ESA*.

Programmes

6 What are the most significant national schemes in place governing the application and the granting of aid, that have been approved by the Commission or that qualify for block exemptions?

The State Aid scoreboard for 2018 is yet to be published, but the scoreboard for 2017 (published February 2018) shows that Norway spent around €3.6 billion on aid in 2017, a nominal increase of 13.7 per cent from 2016 (the figure is incomplete and excludes, among others, agricultural aid, aid to railways, etc). The most important significant schemes in place in Norway relate to environmental and energy aid schemes, regional aid and R&D&I aid. By way of example, these aid categories accounted for about €910 million, €890 million and €560 million respectively in 2015. GBER-aid now accounts for roughly 45 per cent of the state aid paid by the Norwegian state. Environmental aid accounts for around 39 per cent of the aid paid, and tax is the most applied tool to implement aid, accounting for more than 74 per cent of the aid.

R&D&I aid

The most significant aid programme is the SkatteFUNN aid scheme. The scheme had a budgeted tax deduction of €594 million for research and development projects. The ESA approved an evaluation plan for assessing the effectiveness and impact of the scheme in June 2015, and another evaluation plan was submitted in July 2018. In the last evaluation report, it is stated that '[a] major advantage of SkatteFUNN, compared to many other national schemes, is its neutrality with respect to geographic location, industry, ownership and technology. As it is a rights-based, general scheme, decisions on R&D investment are left to the market'. The evaluation report recommended several changes in the scheme, among others to abolish the distinction between large and SME undertakings and improve the control and audit routines.

Regional aid

The most extensive aid scheme in Norway is a regional aid scheme in the form of differentiated social security contributions. The total annual reduction in social security contributions benefiting from the aid is estimated to be €900 million. All employers in Norway are subject to compulsory contributions to the national social security scheme, calculated on the basis of the gross salary paid to employees. The general tax rate is 14.1 per cent. This tax rate is reduced in the five geographical zones covered by the scheme, from 10.6 per cent in the southernmost zone down to zero per cent for the northernmost zone covering Finnmark county and certain municipalities in Troms county. In total, the scheme includes up to 236 Norwegian municipalities (up to 195 municipalities are excluded)(the municipality reform will reduce the number of municipalities).

Energy

Most aid schemes in Norway relate to the energy sector and are granted pursuant to pre-approved Enova schemes or (if substantial) individually approved under the Enova schemes.

- In Case E-2/06, the EFTA Court upheld a decision on the exemption from the tax on electricity consumption for manufacturing and mining industries in Norway. Ever since the Norwegian tax on electricity consumption was introduced in 1971, certain power-intensive industries have benefited from either reduced rates or full tax exemptions. In 2002, this aid was estimated to constitute around 4.6 billion Norwegian kroner per year. It is worth noting

that the EU energy tax directive that justified the acceptance of the aid as compatible with the EEA article 61(3)(c) was not part of the EEA Agreement. Curiously, however, ESA accepted that a similar arrangement could be made under EEA law. Ultimately, the decisions meant that the traditional Norwegian electricity tax exemption scheme could be prolonged with some adjustments. For 2012, this aid was estimated to be around 5.2 billion Norwegian kroner.

- In March 2011, ESA approved the Norwegian guarantee scheme for the purchase of electricity on long-term contracts enabling certain power-intensive industries to benefit from a state guarantee for their payment obligations when entering into long-term power contracts. The guarantee covered up to 80 per cent of the payment obligations of contracts lasting from seven to 25 years. The scheme is managed by GIEK, which received no applications for guarantees in 2016.
- In September 2013, ESA approved a Norwegian aid scheme for the compensation of indirect emission costs. The scheme is designed to compensate certain energy-intensive industries for increases in electricity prices as a result of the EU Emissions Trading System. The scheme ends on 31 December 2020 and is administered by the Norwegian Environment Agency.
- In July 2016, ESA approved beneficial depreciation rates for wind power. Instead of being based on the lifetime of the equipment, the new rules entail that assets for wind power plants are depreciated over five years. The advantage for the beneficiaries is an increased present value of these deductions from taxable income. Several large wind power projects are under way in Norway, and the aim is to have 28.4 terrawatts of new renewable electricity capacity in Norway and Sweden by the year 2021. The rules apply for projects that started on 19 June 2015 or later. The aid is estimated to be €12.2 million annually.
- Norway has implemented measures that have strengthened the demand for zero emission vehicles, hence contributing to a 'greener' transport sector. In Decision 150/15/COL, ESA deemed several state aid measures indirectly benefiting manufacturers and dealers of electric vehicles and batteries as compatible aid under article 61(3) of the EEA Agreement. The comprehensive scheme, which is intended to run until 31 December 2017, includes zero VAT rating for the supply, import and leasing of electric vehicles and the supply and import of batteries for electric vehicles, reduced annual vehicle tax, exemptions from road tolls and road ferries' boarding charges, and favourable income tax calculation for employees benefiting from private use of corporate electric cars. Decision 232/16/COL accepted ancillary aid for electric car owners (and manufacturers and suppliers) when deciding not to raise any objections to the prolongation and budget increase of a programme for alternative fuels infrastructure. The scheme consisted of five separate aid schemes with an annual budget of 500 million Norwegian kroner run by Enova in the period 2017–2022 directed at supporting electric charging infrastructure for vehicles, shore-side electricity supply for ships, hydrogen and biofuels refuelling infrastructure for vehicles, as well as LNG refuelling infrastructure for ships. The granting of the aid would be based on a bidding process or, if not suitable, the methodology for identifying eligible costs as set out in the EEAG (funding gap analysis and maximum aid intensities). ESA, as in Decision 150/15/COL, noted that the aid addressed a market failure evident in the lack of refuelling/recharging infrastructure – in particular in more rural areas of Norway.
- In 2006, ESA scrutinised the Norwegian Energy Fund, a support scheme for the production of renewable energy, such as wind, biomass and solar energy for the introduction of energy-saving measures; and for the development of new energy technologies in the aforementioned fields. The scheme is operated by Enova, a state enterprise owned by the Norwegian state. Enova does not operate in any market and does not generate any income. Its principal task is to administer the Energy Fund, implement the support schemes, and achieve the energy policy objectives set out by the Norwegian Parliament. The Energy Fund is subsidised by the Norwegian state budget and financed via a levy on the electricity distribution tariff. ESA ultimately approved the Energy Fund Scheme until 1 January 2011. The fund was later reorganised and reassessed by ESA in 2012. Under the reorganised model, the fund comprises an aid scheme for demonstration plants, an investment scheme for innovative environmental investments and an alternative fuels infrastructure programme (all 2017–2022), among other things.
- Enova also operates a number of aid schemes under the GBER (Local Infrastructures Scheme – article 56 GBER; Energy Efficiency Scheme - article 38 GBER; Environmental Studies Scheme – article 49 GBER; Promotion of energy from renewable sources Scheme – article 41 GBER; Energy Efficient District Heating and Cooling Scheme – article 46 GBER; Going Beyond Union Standards for environmental protection or increasing the level of environmental protection in the absence of Union standards Scheme – article 36 GBER and the experimental development scheme. Further information is available here: https://www.enova.no/om-enova/drift/rettslig-grunnlag-for-enovas-stotteordninger/).

Telecom

In June 2014, ESA approved a nationwide state aid scheme to roll out broadband infrastructure in Norway. The scheme aims to ensure that all Norwegian citizens receive basic broadband services of good quality and introduce Next Generation Access. The total budget of the scheme was around €212 million over the period 2014–2017.

Transport

In the transport sector, ESA has approved aid schemes pertaining to a reduced rate of taxation on electricity directly provided to vessels (2016), an aid scheme for short sea shipping services (2016), a special tax system for shipping (2016), a tax refund scheme for employing seafarers in the period 2016–2026 and an aid scheme for investment in the European Rail Traffic Management System.

7 Are there any specific rules in place on the implementation of the General Block Exemption Regulation (GBER)?

The GBER has been implemented in Norway by Regulation No. 1213 of 14 November 2008 as updated pursuant to EU Regulation No. 615/2014. Aside from the implementing regulation, there are no specific Norwegian rules in place on the implementation of the GBER.

Public ownership and services of general economic interest (SGEI)

8 Do state aid implications concerning public undertakings, public holdings in company capital and public-private partnerships play a significant role in your country?

There are a wide range of public structures and partnerships in Norway, and the government (in particular the state) has a large ownership stake in a number of commercial undertakings, either pursuing a commercial purpose (Statoil, Telenor, Hydro, Yara, Statnett, Statkraft, SAS, etc), political sector purposes (the Norwegian wine monopoly (Vinmonopolet), the Norwegian gambling monopoly (Norsk Tipping) and the Norwegian broadcaster (NRK)) or non-commercial purposes (the meteorological institute and hospital pharmacies). It has previously been assumed that public undertakings account for around one-third of economic activity. In addition to this, Norway has, since 2015, increased the combined state aid. Norwegian state aid expenditures are high relative to GDP, and well above the average for EU countries.

Public undertakings such as former incumbent airline SAS, Norwegian road company Mesta (formerly the Production Department of the Public Road Administration in Norway), hospital pharmacies and Norwegian public television broadcaster NRK have indeed been involved in important state aid cases. ESA has also pursued other cases relating to cross subsidies (for example, the financing of public dental healthcare services and the Analysis Centre of Trondheim municipality).

9 Are there any specific national rules on SGEI? Is the concept of SGEI well developed in your jurisdiction?

There are no specific national rules, but SGEI rules are set out in article 63 and Annex XV of the EEA Agreement (adjusting definitions in Commission Decision 2012/21/EU to the EEA context) and in ESA guidelines based on the *Altmark* ruling. Pursuant to EEA Annex XV, both Commission Decision 2012/21/EU of 20 December 2011 and Commission Regulation (EU) No. 360/2012 of 25 April 2012 are applicable with some minor modifications.

SGEI rules have been applied in subsequent cases including ESA Case 306/09/COL of 8 July 2009 concerning compensation to the Norwegian public broadcaster, NRK. SGEI is relevant in Norway in particular in relation to public broadcasting, energy supply, public transport, certain health services and rail and air transport.

The landmark case as concerns the *Altmark* test in the EEA is the EFTA Court ruling in the *Hurtigruten* case (Joined Cases E-10/11 and E-11/11, Hurtigruten ASA), concerning state aid through overcompensation for the performance of certain transport services consisting of the combined transport of persons and goods along the Norwegian coast from Bergen to Kirkenes. The EFTA Court considered the four *Altmark* criteria and concluded that Hurtigruten had been overcompensated. In relation to the third *Altmark* criterion, the court noted that there was never any clear separation of accounts between public service operations and commercial operations and that ESA therefore enjoyed a wide discretion upon evaluating additional public service costs when assessing whether the third *Altmark* criterion was satisfied.

On 29 March 2017, ESA approved the €550 million compensation granted to Hurtigruten for operating similar services for a new period from 2012 to 2019. In its decision, however, ESA encouraged Norway to facilitate more competition in future public procurement processes of this size.

Considerations for aid recipients

10 Is there a legal right for businesses to obtain state aid or is the granting of aid completely within the authorities' discretion?

There is no general right for businesses to obtain state aid. The granting of aid is within the discretion of the authorities and subject to the terms of a particular scheme (if one applies).

However, if an undertaking fulfils the conditions set out in legislation governing the state aid scheme in question, it will normally be entitled to apply for and receive state aid on equal terms to other applicants. In some cases, however, choices between different aid applicants are necessary for budgetary reasons, and in these cases an element of discretion is unavoidable.

11 What are the main criteria the national authorities will consider before making an award?

The criteria that Norwegian authorities will consider before making an award vary, and are specific to each scheme. The criteria will typically be made clear in a framework document or on the website of the administering institution. However, job creation, regional policy, green energy or R&D efforts or considerations will typically be useful in the current political climate.

12 What are the main strategic considerations and best practices for successful applications for aid?

Applicants for aid measures are normally expected to demonstrate, as part of their application, that they meet the eligibility conditions of the scheme (eg, to demonstrate that they perform relevant R&D&I activities). It is therefore important that any applications for public funding show clearly that the relevant criteria are met.

The main considerations and practices are staying well informed on the different schemes of aid, establishing a foundation for the aid application, applying in a timely fashion and complying with the applicable award criteria laid down by the granting authority. Applicants should identify the relevant political objectives in the scheme involved.

It may be helpful to contact the relevant funding body to establish how to apply for aid as well as applying publicly available sources such as ESA and the ministry's guidelines on best practices for the conduct of state aid control procedures. It is crucial to establish an early dialogue with the Ministry of Trade and Fisheries. Most, if not all, notifications are based on pre-notification contact with ESA.

An application for state aid is normally more successful either if it is based on an existing aid scheme that provides an explicit legal right to obtain state aid or if there is public authorities' continuous decision-making practice to grant support if certain circumstances are being met. Applications for ad hoc aid are significantly less likely to succeed.

Also, Norwegian authorities may be easier to convince if it can be demonstrated that the matter would not raise any material issues under EEA state aid law (eg, if covered by an exemption in the EEA Agreement or a block exemption in the state aid rules or in line with the existing guidelines and framework).

Depending on the size of the assisted project, political contacts help in facilitating the discussions, such as politicians at all levels, the civil service, trade unions, etc.

13 How may unsuccessful applicants challenge national authorities' refusal to grant aid?

If an undertaking has received a refusal to be granted aid, the undertaking may often be entitled to launch an appeal within an administrative system, since the refusal would normally constitute a (contestable) decision under public administrative law. A refusal may, in principle, be also challenged before the courts as long as the administrative decision is final, although the state aid rules as such do not give any legal rights to aid.

14 To what extent is the aid recipient involved in the EU investigation and notification process?

Most of the aid granted in Norway is based on aid schemes and as such the aid recipient is not frequently involved in ESA notification process. In ad hoc cases the aid recipient (which has the market knowledge and bears the main risks in that it is the recipient that will ultimately be affected by a negative decision) may be indirectly involved in presenting the case.

In large and complex state aid cases involving publicly owned undertakings or public service providers such as SAS, Hurtigruten, Narvik municipality (concession power) and Energi Norge (beneficial depreciation rates for wind power), the Ministry will normally involve the parties or beneficiaries in gathering the relevant documentation and preparing the notification etc.

Strategic considerations for competitors

15 To which national bodies should competitors address complaints about state aid? Do these bodies have enforcement powers, and do they cooperate with authorities in other member states?

It will often be reasonable to address the authority responsible for the aid directly or, in the case of agencies or local state authorities, to address the ministry relevant for the sector, as there is currently no central body to which a complaint can be filed. In case of municipalities, a complaint may be filed with the state authority (County Governor) responsible for monitoring the municipalities. If made at an early stage, ideally when the authorities are still in the beginning of the negotiations, such submissions are more likely to succeed. Civil servants are often risk averse and, of course, bound by EEA state aid rules. Alternatively, one could file an appeal within the administrative system after the decision to grant state aid has been made. If successful, this complaint will be enforced by the responsible ministry against the entity that granted the state aid.

Complaints can also be submitted to ESA if the aid scheme has an effect on trade between member states. ESA frequently cooperates with the European Commission pursuant to the rules of Protocol 27 to the EEA Agreement.

Following a report submitted to the Ministry of Trade and Fisheries 23 January 2018 concerning non-discrimination between public and private market participants, the Ministry is currently considering a proposal to establish a national supervisory authority to handle state aid complaints. A legal framework for a state aid supervisory authority, for which the exact scope remains to be clarified, is likely to be presented for political decision in 2021.

16 How can competitors find out about possible illegal or incompatible aid from official sources? What publicity is given to the granting of aid?

The state aid registry gives an overview of state aid implemented (https://data.brreg.no/rofs). The Norwegian Altinn web portal for electronic dialogue between the business/industry sector, citizens and government agencies also offers an overview of subsidy schemes in Norway (www.altinn.no/no/Starte-og-drive-bedrift/Oversikt-stotteordninger).

Further, annual reports from the most significant aid grantors are helpful resources (eg, Enova, the Norwegian Research Council and Innovation Norway).

The GBER is applicable.

17 Give details of any legislation that gives competitors access to documents on state aid granted to beneficiaries.

Access to the public authority's case file is provided under section 3 of the Act on Public Access to Documents in Administrative Files. Internal documents and documents containing confidential information (ie, trade secrets), as well as correspondence with ESA and the government's legal counsel are, in practice, exempted from accessible files. In practice, it may therefore be arduous for the aid recipient's competitors to obtain sufficient information, but the level of access depends on the relevant County Governor (overseeing the municipalities and several other public institutions, eg, the Hospital Trusts).

18 What other publicly available sources can help competitors obtain information about possible illegal or incompatible aid?

Other relevant sources are the state budget plan or annual budgets of regional/local authorities, ESA annual reports, media and information from other aid-granting or administrating authorities (the Guarantee Institute for Export Credit, Export Credit Norway, the Norwegian Culture Council, NordForsk, Eurostars, H2020, etc), prospectuses, annual reports of aided companies and trade magazines.

19 Apart from complaints to the national authorities and petitions to national and EU courts, how else may complainants counter illegal or incompatible aid?

It is unlikely that such measures would constitute unfair business practices, and competitors have in the past occasionally complained to third parties about unlawful state aid (eg, contracting authorities procuring services or goods from a beneficiary of unlawful aid/cross-subsidies, etc). Competitors may also seek to raise their queries before a relevant Parliamentary Committee with a view to achieving a political intervention ending or amending the grant of the contested aid.

Private enforcement in national courts

20 Which courts will hear private complaints against the award of state aid? Who has standing to bring an action?

The Norwegian courts may hear private state aid complaints from plaintiffs in a legal position to instigate such proceedings (standing). Standing under the Norwegian Civil procedure Act will require that the plaintiff can demonstrate to be directly and individually affected by the aid.

21 What are the available grounds for bringing a private enforcement action?

The main legal basis for private enforcement of the state aid rules is EEA articles 61 and 62 and Part II, Chapter I, section II, article 2 (the standstill obligation) of Protocol 3 SCA. As compared to Denmark, Norway has no state aid rules for aid not affecting trade between EEA/EU states (compare Danish Competition Act section 11a).

22 Who defends an action challenging the legality of state aid? How may defendants defeat a challenge?

In general, the public authority responsible for the granting of challenged state aid will be the defending party. Other authorities (eg, the relevant ministry) or private parties, such as aid recipients, can intervene in favour of the defendant to the extent that they can show the requisite interest in such intervention.

23 Have the national courts been petitioned to enforce compliance with EU state aid rules or the standstill obligation under article 108(3) TFEU? Does an action by a competitor have suspensory effect? What is the national courts' track record for enforcement?

There is very little Norwegian case law on private enforcement of state aid rules.

The national courts of the EEA/EFTA states do not have the power to declare a state aid measure compatible with article 61(2) or (3) of the EEA Agreement, but may be asked to intervene in cases where an EFTA state authority has granted aid without respecting the standstill obligation (unlawful state aid), and they play an important role in the enforcement of recovery decisions. A search of the Norwegian court database reveals a total of 98 results on 'state aid' in the period 1994 to 30 April 2019, but the actual number of cases dealing with substantive state aid matters is significantly lower (if we include 'EEA' in the same search, the number of cases drops to 31). EEA state aid law has been invoked to set aside private agreements claiming invalidity, interpret public concessions, and interpret long-term power purchase agreements.

An action by a competitor will not automatically have a suspensory effect on the administrative decision to grant state aid. However, in some instances the authority can itself decide to postpone the provision of the aid (Administrative Act section 42) pending a court case on the matter. Also, the competitor may in principle file a separate claim for a temporary precautionary measure (see Chapter 34 of the Civil Procedure Act). This is rarely done.

Generally, national courts are in line with Luxembourg case law and EFTA decisions are considered to be a weighty source in the court's legal reasoning. An interesting example in this regard is the decision of 17 December 2013 (*Hydro-Søral*), where the Norwegian Supreme Court ruled that the obligation to recover unlawful state aid arises only once the state or grantor has adopted a recovery decision. This means that the limitation period does not run from the time of ESA's final decision declaring the aid unlawful, but only later once the national authorities have ordered recovery. If the decision is interpreted literally, the decision entails that the standstill obligation is not relevant to the recovery of the aid, and that the standstill obligation does not in its own right establish an obligation to recover the aid. If interpreted this way, the decision appears to contradict the direct effect of the standstill obligation and the principle of efficient enforcement of EEA law, and would mean that the standstill obligation would not serve as a legal basis for private damages claims, recovery or other legal effects related to the invalidity of the grantor's aid decision – the CJEU decisions in case C-284/12 (*Lufthansa*) and C- C-349/17 (*Eesti Pagar*). The standstill obligation is the only element in EU/EEA state aid law having direct effect. The direct effect and the principles of homogeneity, efficiency and equivalency mean that the national courts must ensure that undertakings are granted damages if they can prove economic losses as a consequence of unlawful state aid.

As for the cost risk, a plaintiff may become responsible for the defendant's legal costs if the case is lost or the claim is dismissed and no good reasons are given for why the parties should split the costs.

24 Is there a mechanism under your jurisdiction's rules of procedure that allows national courts to refer a question on state aid to the Commission and to stay proceedings?

There is a mechanism for national courts to request the EFTA Court for an advisory opinion on the interpretation of the EEA Agreement, but the courts are not required to use this when deciding on EEA matters. When an opinion is requested and provided, the Supreme Court have stated that these are not legally binding but should have a considerable influence on the court's reasoning. One noteworthy example on this matter is a recent decision where the Frostating Court of Appeal (LF-2015-187242) explicitly deviated from the EFTA Court's opinion, stating that the opinion was flawed as the court had not appropriately discussed the impact of a decision from the Court of Justice of the European Union (CJEU) on the question at hand. This decision has been appealed to the Supreme Court, which decided yet again to ask the EFTA Court for guidance as to whether any breach of the public procurement rules is sufficient for there to be a basis of liability for positive contract interest (judgment to be delivered in 2019). The EFTA Court has received some 40 actions for nullity in competition and state aid cases in total.

25 Which party bears the burden of proof? How easy is it to discharge?

The burden of proof lies on the party claiming the existence of (illegal) aid. It depends on the merits of each case whether this is in practice a heavy burden of proof.

Discovery is not available under Norwegian law, but there are modified rules on discovery as the courts may, subject to strict requirements, order a search for evidence or order the defendant to

disclose documents, whenever the strict disclosure conditions under the Norwegian Civil Procedure Act are met.

26 Should a competitor bring state aid proceedings to a national court when the Commission is already investigating the case? Do the national courts fully comply with the *Deutsche Lufthansa* case law? What is the added value of such a 'second track', namely an additional court procedure next to the complaint at the Commission?

Decisions by ESA to formally open an investigation have no direct effect on national court proceedings. Still, the national court may, pursuant to the Civil Procedure Act, decide to postpone the proceedings pending an ongoing ESA investigation, if the court finds it appropriate to do so. For such an assessment, the court will of course have to review and assess the *Deutsche Lufthansa* case. However, as the decision is somewhat ambiguous, the courts may interpret the results of the ruling in light of other legal sources, making the final outcome uncertain.

From a practitioner's point of view, it is difficult to see how the 'duty to take all the necessary measures when confronted with the violation of the standstill clause' (case C-284/12 – para 41) would translated into complex state aid investigations (eg, the Norwegian cash refund of the tax value of petroleum exploration costs, where the actual payment under the scheme amounted to 110 billion Norwegian kroner, much of which was paid out to companies no longer in existence). The CJEU recent decision in competition case C-724/17 (*Skanska*) may further complicate the issue, since the Court held that parent companies can be held liable for the damage caused by a competition infringement committed by their subsidiary if the parent company (that holds all the shares in the subsidiary) has dissolved the subsidiary but continued its economic activity.

In a procedural decision of the Gulating Court of Appeal (LG-2008-16104) regarding a dismissal of arguments from the plaintiff pertaining to state aid law, the court noted in an obiter dictum that when the EFTA Court will be deciding on a matter that is also before the national courts, there are 'good reasons' for postponing until the EFTA Court decides on the matter.

Consequently, there may be very limited added value in a 'second track', as there is a real risk that the courts could postpone any private litigation.

27 What is the role of economic evidence in the decision-making process?

Pursuant to the Civil Procedure Act, there are no formal evidential rules when assessing the merits and evidence presented by the parties. Thus, the courts may take economic evidence into account. In cases involving complex economic evidence, the parties may request that the court sit with expert judges. The court normally accepts such requests. In addition, the parties frequently call economists or other experts as witnesses. Our experience is therefore that economic evidence plays a significant role in court cases involving complex economics (for example, competition cases such as the *SAS* case). However, to date Norwegian courts have less experience in dealing with state aid cases.

28 What is the usual time frame for court proceedings at first instance and on appeal?

Pursuant to the Norwegian Civil Procedure Act the main or appeal hearing should be set no later than six months after the date of the writ of summons or appeal unless special circumstances necessities a longer preparatory phase. An additional two to four weeks are allowed to put a judgment in writing. The time frame of the individual case will depend on how the parties choose to conduct the proceedings (for example, whether the action is stayed following parallel ESA proceedings or preliminary reference).

Judicial review proceedings tend to be quicker than damages claims because these proceedings do not involve a detailed assessment of factual issues; for example, around causation and quantification.

Norwegian Courts Administration statistics published in the annual report for 2016 indicate that the average time taken to hear a judicial review case in the first instance from lodging an application was around five months in 2018 (all case types). Complicated state aid matters will normally take longer. There is usually the possibility of a first appeal to the Court of Appeals, which will last one to two years, depending on the nature of the case, and a second appeal solely on points of law, which will last about six months to a year.

29 What are the conditions and procedures for grant of interim relief against unlawfully granted aid?

Interim measures may be provided for in accordance with Chapter 34 of the Civil Procedure Act.

The court can grant an interim measure when it is necessary to either provisionally secure the claim because the action or execution of the claim would otherwise be considerably impeded, or make a temporary arrangement in a disputed legal issue to avert considerable loss or inconvenience, or to avert violence. The claimant needs to prove the basis for security on a balance of probabilities.

30 What are the legal consequences if a national court establishes the presence of illegal aid? What happens in case of (illegal) state guarantees?

If a national court finds that the standstill obligation has been violated, the plaintiff may claim recovery of the aid and damages for any financial loss.

Pursuant to relevant EU/EEA case law, the main goal of recovery under Norwegian law is to restore the competitive situation prior to the illegal aid. Consequently, recovery pertaining to illegal state guarantees must be understood in the light of the *Residex* case law, meaning that a cancellation of the guarantee may not be a sufficiently effective measure in some cases and that the national court could rule on the annulment of the underlying contract instead. This will require, however, that the other party to this underlying agreement be included as a party in the court proceedings.

Further, the two general exemptions from recovery (recovery contrary to general principles of law and the existence of exceptional circumstances that would make it absolutely impossible to implement the recovery decision (eg, C-404/00 *Commission v Spain)*) also apply.

31 What are the conditions for competitors to obtain damages for award of unlawful state aid or a breach of the standstill obligation in article 108(3) TFEU? Can competitors claim damages from the state or the beneficiary? How do national courts calculate damages?

The party claiming damages in a court case must demonstrate that it has suffered a financial loss owing to the award of the unlawful state aid. As in any other case regarding damages, the claim must be directed at the entity causing the damages. This could be either the state or the beneficiary, depending on the circumstances. The lack of case law could probably in part be explained by difficulties for plaintiffs in proving and documenting economic loss in state aid cases.

There is to date no known Norwegian case law where damages have been granted for the award of unlawful state aid or breach of the standstill obligation. NorFraKalk AS, a Norwegian–Finnish joint venture burned lime producer, did, however, try a follow-on damages suit based on a breach of the standstill obligation before the Oslo Court of First Instance. The suit was brought after NorFraKalk had successfully filed a complaint to ESA claiming that the Norwegian allocation of free emission allowances plan resulted in improper discrimination in violation of the EEA Agreement provisions on state aid (article 61) and the ban on imposing restrictions on the freedom of establishment (article 31). The court held that there is no breach of the implementation prohibition if the state has ensured that the aid-granting body can only grant the aid after ESA has cleared the aid (here the allocation plan).

In other cases, the national courts generally have a conservative approach to the calculation of damages, and claims are often reduced on a discretionary basis.

State actions to recover incompatible aid

32 What is the relevant legislation for the recovery of incompatible aid and who enforces it?

ESA may adopt a decision that the aid is to be recovered and the Norwegian Ministry of Trade and Fisheries may recover unlawful aid. If ESA orders recovery, the ministry becomes responsible for the actual recovery.

The relevant legislation is the Norwegian State Aid Act of 1992, which regulates the enforcement of the EEA Agreement's provisions on

state aid. Also relevant is Protocol 3, Part II to the Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice (SCA) and the related ESA Decision No. 195/04/COL, which are transposed into national law in Regulation No. 1323 of 30 October 2009. The recovery procedure is further detailed in ESA state aid guidelines on recovery of unlawful and incompatible aid in Part II, Chapter VII.

33 What is the legal basis for recovery? Are there any grounds for recovery that are purely based on national law?

The legal basis for recovery of incompatible aid follows from a decision by the Ministry pursuant to section 5 of the act relating to state aid, or from a decision adopted by ESA pursuant to the EEA Agreement articles 61 and 62 and Protocol 3 SCA, Part II, article 14.

Recovery of aid may also be sought based on ordinary Norwegian principles for dishonoured contracts, giving raise to recovery rights or claims for damages. Furthermore, recovery may be sought on the basis of the principle of condictio indebiti, a legal basis for recovery where payment has been granted by mistake or on an unlawful basis.

In Joined Cases E-5/04 – E-704 *Fesil and Finnfjord and others v ESA*, the court had to deal with a question as to whether there was a sufficient legal basis for recovery. The case concerned tax exemptions from electricity tax granted to the mining and manufacturing industry in Norway. ESA had referred to its guidelines ‘on application of the EEA state aid provisions to aid for environmental protection’ of May 2001 and the proposal to the Norwegian government to bring the existing environmental aid schemes into line therewith. The government argued that the guidelines were too general and vague to entail severe consequences such as recovery. The court held that the agreement between ESA and Norway and the guidelines did suffice as a legal basis for recovery, and noted that in the case at hand there existed only two relevant aid schemes, and there had been extensive exchanges of views between ESA and the government. Concerning the protection of legitimate expectations, the court noted that ESA had only ordered recovery from the date when it published a note in the EU Official Journal.

34 Has the Commission ever opened infringement procedures before the CJEU because of non-recovery of aid under article 108(2) TFEU?

There is one case, E-25/15 EFTA (*Surveillance Authority v Iceland*), where ESA opened proceedings before the EFTA Court, claiming that Iceland had failed to recover unlawfully granted aid. The case concerned an investment incentive scheme aimed at creating jobs in disadvantaged regions of Iceland. ESA had originally approved the scheme, but Iceland later amended some parts of it without approval. ESA eventually became aware of this and deemed the amendments unlawful after an assessment of the new scheme. Hence, the aid granted pursuant to the new scheme was ordered to be recovered. Iceland did not do as instructed and, after some time, ESA opened proceedings before the EFTA Court. The court ruled that Iceland had failed to comply with ESA’s decision and ordered Iceland to bear the cost of the proceedings.

Update and trends

State aid is expected to become more of an issue in the years to come. The high state aid activity in relation to energy (in particular wind-power), R&D and public transport will continue, while at the same time we expect an uptake in private enforcement of state aid. ESA has commissioned a study concerning private enforcement in the EEA EFTA states since 1994/95. The study is due for completion in June/July 2019 and will provide useful insights into difficulties experienced by private parties, the courts and defendants when bringing state aid matters before the ordinary courts.

From a legislative perspective, it is worth noting that the Norwegian State Aid Act and regulation is under revision. The proposal for a revised state aid regulation contains rules eg regarding costs that may be offset, state aid amounts and intensities, rules on undertakings in financial difficulties (not able to receive aid) and recovery. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of article 108 of the Treaty on the Functioning of the European Union (the procedural regulation) is still under consideration in the EEA EFTA states.

On a practical note, the Ministry of Trade and Fisheries has published a new guide (work still being added). The guide is available here: https://www.regjeringen.no/globalassets/departementene/nfd/dokumenter/veiledninger/veileder_offentlig-stotte.pdf.

35 How is recovery implemented?

The public body in charge of recovering the unlawful and incompatible aid will recover it by way of an administrative decision, which may in turn be challenged before the courts. If the recovery of aid has been initiated by ESA, there are two deadlines for the recovery pursuant to the guidelines from ESA on recovery of aid in Chapter VII. First, within two months of a decision being given by ESA, the Norwegian state must inform ESA which measures will be initiated. Second, within four months of ESA’s decision being given, the incompatible aid shall be completely recovered.

36 Can a public body rely on article 108(3) TFEU?

Yes. There are several examples from national case law where EEA state aid law has been invoked in order to interpret an agreement. In one of these, national energy company Statkraft argued successfully before the Borgarting Court of Appeal (LB-1998-1805) that it was not obliged to deliver power under long-term power purchase agreements below marked price because this, among other things, would entail the granting of state aid.

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37 On which grounds can a beneficiary defend itself against a recovery order? How may beneficiaries of aid challenge recovery actions by the state?

Recovery actions by the state may be challenged before the courts. A final decision from the Norwegian courts cannot be appealed to the EFTA Court, but the Norwegian courts have the possibility to request the EFTA Court for an opinion about the interpretation of the EEA Agreement (see question 24).

As for the grounds of defence, Norwegian law does not, as a matter of principle, hinder the aid beneficiary after having been the subject of a recovery decision to claim damages from the state for gross negligence in not notifying the aid to ESA. However, in practice, if the aid beneficiary were able to obtain damages after having recovered the aid to the state, this would go against the principle of efficient enforcement and the purpose of the state aid rules (to return to the status quo from before the aid was granted). It is, therefore, unclear whether such a claim could succeed, not least after the CJEU decision in C-349/17 *Eesti Pagar* in which the Court clearly states that article 108(3) TFEU obliges the national authorities to recover on their own initiative aid that they have unlawfully granted, including where Regulation No. 800/2008 has been misapplied.

38 Is there a possibility to obtain interim relief against a recovery order? How may aid recipients receive damages for recovery of incompatible aid?

In principle, the claimant or recipient can seek interim relief if the claimant can prove that the recovery order is unlawful and the other conditions for interim relief are met (see question 29). Whether the aid recipient may seek damages for recovery has not been tested in case law and will depend on the legal basis for the aid and the culpability of the state. Legitimate expectations and culpa in contrahendo could in principle form the basis for a claim, but the scope for successfully bringing such a claim is likely to be narrow – see above in relation to the CJEU decision in C-349/17 *Eesti Pagar*.