

IV

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

No 127/07/COL

of 18 April 2007

on Research and Development aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter (Norway)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 thereof,

HAVING REGARD to Article 1(2) and (3) in Part I and Articles 1, 4, 6, 7(3), 10, 13, 14, 16 and 20 in Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾,

HAVING REGARD to the Authority's Guidelines ⁽⁵⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular Chapter 14 thereof, 'Aid for Research and Development',

HAVING REGARD to the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 ⁽⁶⁾,

HAVING REGARD to the Authority's Decision No 217/94/COL of 1 December 1994 to propose appropriate measures to Norway on, amongst others, the aid scheme Industrial R&D Programmes,

HAVING REGARD to Norway's acceptance of the proposed appropriate measures by letter dated 19 December 1994,

HAVING REGARD to the Authority's Decision No 60/06/COL of 8 March 2006 to open the formal investigation procedure with regard to R&D aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter ⁽⁷⁾,

HAVING CALLED on interested parties to submit their comments to this Decision and having regard to their comments,

Whereas:

I. FACTS

1. Procedure

By letter dated 5 March 2002 (Doc. No 02-1733-A), the Authority received a complaint alleging that State aid had been granted by Norway through the Research Council of Norway (hereinafter the RCN) to various research projects in connection with the development of the software programme Turborouter.

⁽¹⁾ Hereinafter referred to as 'the Authority'.

⁽²⁾ Hereinafter referred to as 'the EEA Agreement'.

⁽³⁾ Hereinafter referred to as 'the Surveillance and Court Agreement'.

⁽⁴⁾ Hereinafter referred to as 'Protocol 3'.

⁽⁵⁾ Procedural and Substantive Rules in the Field of State Aid, Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, EEA Supplements, 3.9.1994, No 32. Hereinafter referred to as 'the Guidelines'.

⁽⁶⁾ Published in OJ L 139, 25.5.2006, p. 37 and the EEA Supplement No 26 of 25.5.2006, p. 1.

⁽⁷⁾ OJ C 258, 26.10.2006, p. 42.

The Authority requested information from the Norwegian authorities by letter dated 26 April 2002 (Doc. No 02-2605-D). The Ministry of Trade and Industry replied by letter dated 3 June 2002 (Doc. No 02-4177-A), which included RCN's comments on the Turborouter project.

After various exchanges of correspondence ⁽⁸⁾, by letter dated 8 March 2006 (Event No 363353), the Authority informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement in respect of R&D aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter.

By letter dated 7 April 2006, the Norwegian authorities submitted comments to the Authority's decision to open the formal investigation procedure.

The Authority's Decision No 60/06/COL to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereof ⁽⁹⁾. The Authority called on interested parties to submit their comments.

The Authority received comments from one interested party. By letter dated 1 December 2006 (Event No 400677) the Authority forwarded these comments to the Norwegian authorities. By letter from the Ministry for Government Administration and Reform dated 8 January 2007 (Event No 405517) forwarding a letter from the Ministry of Education and Research dated 5 January 2007, the Norwegian authorities submitted comments.

2. The four projects related to the software programme Turborouter supported with RCN funds

2.1. Description of the projects

In the following, the Authority will only provide a brief description of the projects under assessment. For a detailed description of each of them, reference is made to the Authority's Decision No 60/06/COL ⁽¹⁰⁾.

⁽⁸⁾ For more detailed information on the various correspondences between the Authority and the Norwegian authorities, reference is made to the Authority's Decision to open the formal investigation procedure, Decision No 60/06/COL, published in OJ C 258, 26.10.2006, p. 42 and EEA Supplement No 53 of 26.10.2006, p. 15.

⁽⁹⁾ See footnote 7.

⁽¹⁰⁾ See footnote 7.

2.1.1. Project 40049 — Strategic activities within maritime transport and logistics (the first version of the software programme Turborouter)

Turborouter is a tool ⁽¹¹⁾ for optimising vessel fleet scheduling, i.e. to decide which vessels to assign different cargoes to. It combines the knowledge and experience of the planners with the calculating capabilities of the computer. Turborouter is based on electronic sea charts where scheduling information can be displayed and includes a database for vessels, ports, cargoes, etc; automatic calculation of port-to-port distances; vessel position reports and automatic update of estimated time of arrival; sophisticated optimisation routines for fleet scheduling and schedule visualisation or schedule calculator for manual planning.

The first version of the pilot software Turborouter was developed in the first year of research of one of the sub-projects of Project 40049 'Strategic activities within maritime transport and logistics' called 'Methods and analytical tools for design and operation of integrated transport and logistics chains'.

2.1.2. Further development of the software programme Turborouter

According to the information provided by the Norwegian authorities, the RCN selected several projects related to the development of the software package Turborouter for R&D support.

2.1.2.1. Project 138811 — AlgOpt

The aim of this project ⁽¹²⁾ was to develop and carry out practical tests of algorithms to calculate the optimal utilisation of a fleet of ships, given the obligations to load cargoes for several customers, the requirements as to when cargoes must be loaded and discharged in the destination port, the possibility of carrying joint cargoes of a limited number of bulk goods on each voyage, as well as limitations that mean that not all the vessels involved are suitable for serving all customers or all ports. Algorithms should be integrated into a software concept that would offer users full control and the possibility of overriding the suggestions made by the algorithms.

According to the information submitted by the Norwegian authorities, the Project AlgOpt was only a pre-study defining the user requirements and investigation of the feasibility of using Turborouter for the contract partner, the company Beltship Management AS.

⁽¹¹⁾ The following information has been obtained from the brochure 'TurboRouter Vessel schedule optimizing software', available at the website of Marintek: <http://www.marintek.no>

⁽¹²⁾ Information obtained from Marintek's website: <http://www.marintek.no>

2.1.2.2. Project 144265 — Shiplog II

The Shiplog project mainly dealt with transport at sea. This project⁽¹³⁾ was supposed to use the results of a previous project called Shiplog (which did not involve the use of Turborouter) to focus on the requirements for door-to-door delivery of goods, when transport at sea is a key element. One of the main activities concerned the integration of Transport Chain Management System (TCMS) and Turborouter, which should specify the interface and demonstrate the exchange of information between Turborouter and the TCMS demonstrator. This project failed to achieve its objective mainly because TCMS and Turborouter could not be satisfactorily integrated.

2.1.2.3. Project 144214 — Library of optimisation routines for scheduling in shipping

The pre-competitive research project 'Library of optimisation routines for scheduling in shipping' was aimed at developing algorithms for advanced optimisation and scheduling of very complex shipping operations. The Norwegian authorities have explained that the library of algorithms is very trade and company specific and must thus be company owned and not part of the standard Turborouter 'tool kit'.

2.2. Description of the relationship between the four grants of aid and the Norwegian aid scheme for industrial R&D programmes

According to the information provided by the Norwegian authorities, the four grants of aid covered by the present Decision received aid within the framework of the aid scheme 'Industrial R&D Programmes' (*brukerstyrte forskningsprogrammer*).

The aid scheme called 'Industrial R&D Programmes' (*brukerstyrte forskningsprogrammer*) which was administered by the RCN was established prior to the entry into force of the EEA Agreement.

In December 1994, the Authority adopted a Decision on several aid schemes for research and development existing in Norway prior to the entry into force of the EEA Agreement, amongst others, the aid scheme Industrial R&D Programme (*brukerstyrte forskningsprogrammer*, Case No 93-183). In this Decision, the Authority proposed appropriate measures to bring the scheme in line with the State aid rules of the EEA Agreement⁽¹⁴⁾. In particular, the Authority proposed to Norway the introduction of detailed provisions which would ensure that awards of aid were granted in accordance with the principles laid down in Chapter 14 of the State Aid Guidelines.

Norway accepted the appropriate measures proposed by the Authority by letter dated 19 December 1994. The acceptance

⁽¹³⁾ Information obtained from Marintek's website: <http://www.marintek.no>

⁽¹⁴⁾ Decision of the EFTA Surveillance Authority No 217/94/COL of 1.12.1994. The schemes covered by this decision were: Industrial R&D Contracts (Case 93-147) and Public R&D Contracts (Case 93-182) granted by the SND and Industrial R&D Projects (Case 93-181) and Industrial R&D Programs (Case 93-183) granted by the RCN.

of appropriate measures implied that the award of aid under the Industrial R&D Programme would be done in accordance with the provisions of the Authority's R&D Guidelines as they were adopted in 1994.

The aid was granted by the RCN to these projects within the R&D scheme Industrial R&D Programme.

3. Doubts of the Authority expressed in Decision No 60/06/COL

On 8 March 2006, the Authority decided to open the formal investigation procedure provided for in Article 1(2) in Part II of Protocol 3 to the Surveillance and Court Agreement on R&D aid granted by the RCN in connection with the development of the software programme Turborouter (Decision No 60/06/COL). In the opening decision, the Authority described the complaint, the four projects related to the software programme Turborouter supported with RCN funds and the relationship between the four grants of aid and the Norwegian scheme for Industrial R&D Programmes.

The Authority made a detailed assessment of the applicable legal framework to the assessment of the four projects concerned⁽¹⁵⁾. Following the acceptance of the appropriate measures suggested in the Authority's Decision No 217/94/COL, any grant of aid under the Industrial R&D Programme had to be done in accordance with the 1994 R&D Guidelines. Hence, by definition, any aid granted under the scheme Industrial R&D Programmes which does not comply with the provisions of the 1994 R&D Guidelines would fall outside the scope of application of the scheme. Accordingly, it would constitute new individual aid and should, as such, be notified to the Authority individually and be assessed on the basis of the R&D Guidelines applicable at the time the aid was granted.

As to the reasons for opening the formal investigation, the Authority expressed doubts on several points as to whether the four R&D projects concerned had received support within the framework of the aid scheme Industrial R&D Programmes.

The Authority had doubts as to whether these projects went beyond the stage of applied or pre-competitive research to constitute a commercial product. The borderline between a pilot project, which could not be used commercially, and a commercial final product seemed very diffuse in the case in hand because the software needs to be adapted anew for each new application specific to each final user. The Authority questioned to what extent the further development of the software programme Turborouter, for use in developing applications which serve concrete needs for the final users, can be covered by the definition of applied research.

⁽¹⁵⁾ See Section II.1 of Decision No 60/06/COL, p. 11 ff.

On the basis of the information available at that stage of the procedure, the Authority was not in the position of ascertaining whether these projects were correctly classified as pre-competitive development activities or whether, on the contrary, they were already too close to the market to be eligible for state aid.

Furthermore, the Authority had doubts concerning the financing of the projects, in particular regarding the effective disbursement of the own-contributions, in kind, of the beneficiaries of the projects.

Following the arguments put forth by the complainant, the Authority had doubts as to whether the overall costs of the projects had been artificially increased to cover operational expenses of the beneficiary undertakings and whether the real research cost of the projects corresponded to the amounts granted by the RCN.

It seemed to the Authority that it was Marintek, the research institute that developed the first software programme Turborouter, which had the necessary know-how and technological competence to do the project. Therefore, it appeared rational to assume that most of the work would have been carried out by its own staff. This would imply, in principle, that the involvement of the staff of the participating undertakings would most probably have been related to the definition of the users needs and/or, to some degree, of testing. To the extent that the contribution in kind of the participating undertakings may not have corresponded to research costs, the overall costs of the research project would be lower and the aid intensities accordingly higher.

For these reasons, the Authority had doubts both as to whether the above mentioned projects had received aid in compliance with the applicable R&D Guidelines and as to whether the beneficiaries had used the aid in contravention of the accepted appropriate measures on the scheme Industrial R&D Programmes.

4. Comments from third parties

On 24 November 2006, the Authority received comments from an interested party which were more of a general nature than directly related to the doubts the Authority expressed in Decision No 60/06/COL to open the formal investigation procedure on R&D granted in connection with the development of the software programme Turborouter. This party alleged that the Norwegian Research Council had given substantial funds to a new project called OPTIMAR⁽¹⁶⁾. This project is entirely supported by the Norwegian Research Council for the years 2005-09. Ideally, this project is directed by the Department of Operative Research of the Norwegian University of Science and Technology (hereinafter NTNU) in Trondheim. The ultimate goal for this project is to further develop Turborouter into a commercial project, a process which is already under way.

⁽¹⁶⁾ See <http://www.iot.ntnu.no/optimar/>

This party added, 'Prof Marielle Christiansen (Head of OPTIMAR project) in Trondheim considers that it is very difficult for companies to participate and take advantage of results from this program which is said to be a public research programme with the view of broadening the base for all Norwegian companies, because they are already working closely with SINTEF and MARINTEK and had promised to share the research results with these commercial organisation (SINTEF and MARINTEK are both institutes located in Trondheim and has for a number of reasons close ties with the Technical University NTNU).'

In the opinion of this party, 'Turborouter is very much the common element in this issue as all personnel working at NTNU/Dept of Oper Res/Marintek/SINTEF see TURBOROUTER as their common goal'.

This party alleges that the companies working to develop TURBOROUTER are now getting even more state aid through the NTNU, covered as funds to basic research.

The final comment made was that Turborouter was not used by any of the companies that received funds to develop it, which lead this party to conclude that the funds received in the research project were merely subsidies to their daily operations.

5. Comments by the Norwegian authorities

5.1. *Comments to the Authority's decision to open a formal investigation procedure*

5.1.1. **Comments from the Ministry of Government Administration and Reform**

In the letter dated 7 April 2006, the Ministry of Government Administration and Reform referred to the description made in the Authority Decision No 60/06/COL of the formal correspondence with the Norwegian authorities. The Norwegian authorities made further reference to the meetings between the Authority and the Norwegian authorities in October 2002, and in September 2004 and added that a meeting had been held between the Authority and the Norwegian authorities in Brussels on 22 May 2003.

The Norwegian authorities pointed out that the Authority's Decision No 60/06/COL did not describe *how* the aid to the development of the Turborouter programme distorted competition in the EEA or in third markets. In their opinion, this question should be clarified because the Turborouter R&D programme failed to deliver the expected results. Although the Norwegian authorities acknowledged that the intangible know-how from the project had been disseminated into other R&D projects, they did not consider it evident that this had affected competition in the Internal Market, or in third country markets.

The Norwegian authorities questioned some of the facts in the complainant's allegations that were reiterated in the Authority's decision, in particular, the allegations in Section 3 on page 3 in Decision No 60/06/COL and the supporting quotes from the complainant.

The Norwegian authorities first of all questioned how the complainant had been able to classify the projects as being too close to the market. Further, they questioned how the complainant was able to allege that the R&D results had not been disseminated despite the fact that Marintek received the property rights to the programme. Finally, they questioned how the complainant was able to claim that the own-capital contributions from the participating companies were in reality lower than stated in the application form. According to the RCN, the complainant has had its request for access to the application forms and the R&D contracts denied for professional confidentiality reasons. On this background, the Norwegian authorities believed that the allegations from the complainant generally seem to be lacking in substantiation. The Norwegian authorities added, 'The allegations from the complainant that the own-capital contributions from the concerned companies were lower than stated in the application forms also implies that these firms are accused of misusing State aid. This also raises questions related to the legal certainty of the companies that participated in the Turborouter projects. These claims from the complainant should therefore clearly be substantiated.'

5.1.2. Comments from the Research Council of Norway

In a letter enclosed to the above mentioned letter from the Ministry of Administration and Reform, the Research Council of Norway (hereinafter the RCN) commented upon the Authority's Decision No 60/06/COL. The RCN pointed out that it had forwarded to the Authority all available information and clarification requested, including the submission of copies of all project documentation for the four projects related to the development of Turborouter supported with funds from RCN. According to the RCN, in the meetings and correspondence up to and including the letter from the Norwegian authorities of 20 June 2003, the only matter of discussion was the correct classification of the projects according to the Guidelines for aid for R&D.

Regarding the description of the projects, the RCN alleged that the tables given in the description of the funding of the projects in the Authority's Decision No 60/06/COL did not comply entirely with the figures given in the text. The funds granted by the RCN to the projects consisted of two parts. One part of funds from RCN was in fact private funds originating from the Norwegian Shipowners' Association, while the rest was public funds. The table below, which is the same as submitted to the Authority in the letter of 11 April 2003, describes the situation. Regarding Project 138811 AlgOpt, the table in Decision No 60/06/COL gives the figures as they were at the start of the project. During the execution, the project was given additional funding of NOK 100 000 of which NOK 25 000 was granted from RCN.

Table 1

Projects supported by RCN, involving development of Turborouter

	P 40049		P 144265		P 138811		P 144214	
	Strategic activities within maritime transport and logistics		Shiplog II		AlgOpt		Library of optimisation routines for scheduling in shipping	
	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%
Own Funds	4 500	43	800	13	625	61	1 950	28
Other private funds	0	0	3 250	52	75	7	2 750	39
Other public funds	0	0	0	0	0	0	0	0
RCN prgr. MARITIM	6 000	57	2 150	35	325	32	2 300	33
Of which NSA	1 380	13	750	12	120	12	805	12
Of which public	4 620	44	1 400	23	205	20	1 495	21
Total funds	10 500	100	6 200	100	1 025	100	7 000	100
Personnel and indirect	8 700	83	800	13	545	53	4 100	59
Purchase of R&D	600	6	2 150	35	380	37	2 900	41

	P 40049		P 144265		P 138811		P 144214	
	Strategic activities within maritime transport and logistics		Shiplog II		AlgOpt		Library of optimisation routines for scheduling in shipping	
	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%	NOK 1 000	%
Equipment	450	4	100	2	0	0	0	0
Other operating costs	750	7	3 150	51	100	10	0	0
Total cost	10 500	100	6 200	100	1 025	100	7 000	100
Contract partner	Marintek		UECC		Beltship Management AS		Beltship Management AS	
Participants	NTNU		Marintek		Marintek		Marintek	
			R.S. Platou Shipbrokers				Iver Ships AS	
			Iver Ships AS				Shipnet AS	
			LogIT AS				Laycon Solutions AS	
			Lorentsen & Stemoco AS					
			Astrup Fearnleys AS					
			DFDS Tollpost Globe					
			Shipnet AS					
			Wallenius Wilhelmsen					
			SINTEF Tele og data					
Project Period	Jan. 1996-Dec. 1998		Jan. 2001-Dec. 2002		Jan. 2000-Oct. 2000		Jan. 2001-Dec. 2002	

Regarding the Authority's comment in Decision No 60/06/COL that the RCN did not seem to control how the own contributions of the beneficiaries were distributed to various activities and whether they were effectively disbursed, the RCN considered that they had described how eligible costs were controlled before aid was paid to the contracting partner and how the different contributions were disbursed in previous correspondence with the Authority ⁽¹⁷⁾.

Regarding the classification of the Projects 138811 AlgOpt, 144265 Shiplog II and 144214 Library of optimisation routines for scheduling in shipping, the RCN restated that all three projects were classified as pre-competitive development based on a thorough assessment and evaluation of the project applications according to the RCN procedures and guidelines for project evaluation. These procedures and guidelines were put in place to make sure that aid granted under the aid

scheme Industrial R&D Programmes are in accordance with the principles laid down in Chapter 14 of the State Aid Guidelines.

The RCN explained that there is an internal system of quality assurance of RCN's activities. This system is called DOKSY. DOKSY comprises a broad documentation of the guidelines, procedures and practices that are followed in the RCN. One of these documents is the guidelines for determining aid intensity applied to retained projects. This internal document, DOKSY-5-6-1-4-IE, entitled 'Støtteandel etter EØS-bestemmelser' (aid intensities according to EEA rules) corresponds to the Authority's R&D Guidelines. The document applies definitions and corresponding aid intensities in compliance with the definition of the different R&D stages in the Authority's R&D Guidelines. The assessment and classification of all the projects that receive aid from the RCN is based on the DOKSY guidelines.

⁽¹⁷⁾ In particular, in their letter dated 31 January 2005, p. 4.

After 1999, in addition to DOKSY 5-6-1-4-IE, all projects have been evaluated using the computer-based system 'Provis'. Provis is described in Doksy No 5-6-1-2-EE 'Prosjektvurdering i Provis'. In Provis, each project is evaluated according to 11 different aspects. The most important aspects in Provis related to the classification of research categories, are aspect No 3 'Research Content' and aspect No 9 'Additionality'. For each of the aspects, there are several criteria or characteristics that are applied in order to characterise to what extent the project is in compliance with the aspects.

In the description of the Guide for evaluation of aspect No 3 in Doksy No 5-6-1-2-IE, it is underlined that 'Research content indicates to what degree the project produces new knowledge'. This criterion is directly linked to the description of Industrial Research in the R&D guidelines where the requirement is that the activity is 'aimed at the acquisition of new knowledge'.

In the Guide for evaluation of aspect No 9 in Doksy No 5-6-1-2-EE, the description is, 'Additionality indicates to what degree support from the Research Council will trigger efforts, actions, results and effects that would not have been achieved had support not been granted.' This criterion is linked to the R&D guidelines, point 14.7, Incentive effect of R&D aid.

On this basis, the RCN argued that since the evaluation of the projects was thoroughly carried out in accordance with the RCN procedures and guidelines for project evaluation, it should not be questionable that they were correctly classified. The RCN, after the complaint was raised and the Authority started their preliminary investigation, looked again at these projects and nevertheless reiterated its original position.

'In the meeting in Brussels 22 May 2003, the classification of certain activities in two of the Projects, No 40049 and No 144214, were discussed. In the letter of 20 June 2003, which was a response to this meeting, we advocated that the RCN's principal position was that, at a minimum, all activities in project No 40049 could be classified as industrial research, and all activities in Project No 144214 may at least be classified as pre-competitive development. We did however demonstrate to the Authority that the total amount of aid given to the projects was within the permissible limit of a weighted average as defined in the R&D guidelines Chapter 14.5.2(5). This is the case even when the disputed activities are not supported in the case of Project No 144214. Similar considerations and calculations may be done for the Projects 138811 and 144265. In this context we would also make reference to the fact that all these three Projects 138811, 144214 and 144265 involved effective cooperation between firms and public research bodies (in this case Marintek). According to point 14.5.3 (5)(b) of the R&D Guidelines these

activities, classified as pre-competitive development may be eligible for an aid intensity of 35 %. The Authority has also expressed their doubts concerning the financing of the projects and the aid intensities. Regarding the slight discrepancy between the figures related to Project 138811 AlgOpt in Tables 1 and 2 on page 17 of Decision 60/06/COL, this is explained in Section 1.3.a) above. The correct figures including the contribution from the Norwegian Shipowners' Association are given in the table in that section of this letter.'

In the case of Project 144265 Shiplog II, regarding the Authority's remark that the amount granted by the RCN equalled the sum necessary to purchase R&D, the RCN argued that this does not imply that the private means invested in Shiplog II were not used on R&D activities, 'In industry-driven projects, which can be applied for by private companies, we generally encourage cooperation between private companies and public R&D institutions. In order to promote such cooperation we may in some calls for proposals for industry-driven projects state that the application will be evaluated favourably if the external purchases of R&D from research institutions (institutes or universities) are at least as high as the support given by the RCN. The purpose of this approach is to provide the incentives for increased investments by private sector towards purchase of R&D from research institutions. This is the reason why the funds granted by the RCN correspond exactly to the amount necessary to purchase R&D services in several projects.'

In its Decision No 60/06/COL, the Authority stated that it was questionable whether this approach of the RCN led beneficiaries to include their normal operating cost in the R&D costs. Therefore it questioned whether the figures for the total project costs had been inflated to seemingly obtain more public financing. In the opinion of the RCN, it is not understandable how the RCN's approach with a built-in incentive structure to promote the purchase of R&D might lead to such results.

In its letter to the Authority dated 31 January 2005, the RCN explained the standard procedure for documentation of project costs valid at the time of these projects, 'For the involved projects, the contracting partner was required to submit a cost claim report (*regnskapsrapport*) three times a year detailing the cost of the project, including a verification of the persons involved (by name), the number of working hours spent by each person, and the cost per hour charged to the project account. The report is signed by the project responsible person. At the end of the year, the accounts for the year are also checked and signed by a certified accountant. The accountant is external to the contract partner. The RCN payment was contingent upon approval of the submitted accounts.'

The RCN informed the Authority that it had been in contact with United European Car Carriers (UECC) and with Jepsens (successor of Beltship Management) and requested further documentation on the costs related to these projects. The letter from Jepsens dated 17 March 2006 and the letter from UECC dated 29 March 2006 were forwarded to the Authority. The cost claim reports for Project 144265 Shiplog II provided in the letter from UECC include signed cost statements from the other participating partners. The companies did not have any general recording system for working hours, which means that the hours spent on the projects were only documented in the cost claim reports sent to the RCN three times a year. No further documentation exists. In the opinion of the RCN, this means that the costs of the projects have to be assessed by the available cost claim reports.

The RCN finally pointed out that these cost claim reports were in accordance with reporting procedures of the RCN, and that the beneficiaries had fulfilled all their obligations according to the contracts awarding the grants. In the opinion of the RCN, 'unless clear evidence of the contrary there is no reason to believe that any misuse of aid has taken place.'

5.2. *Comments to third party's comments*

By letter of the Ministry for Government Administration and Reform dated 8 January 2007 (Event No 405517) forwarding a letter from the Ministry of Education and Research dated 5 January 2007, the Norwegian authorities submitted observations to the third party comments.

In the opinion of the Norwegian authorities, the comments regarding the project OPTIMAR do not provide any information related to the four projects which are the subject of the Authority's decision 60/06/COL. 'Though it is not explicitly stated, it seems like the third party is of the opinion that illegal State aid has been granted to support a basic research project called Optimisation in Maritime Transportation and Logistics, OPTIMAR. We are of the opinion that this is not the case. In support of the OPTIMAR project, the Norwegian University of Science and Technology (NTNU) in Trondheim receives funds from the RCN under Project No 1666S6. The industrial partners that were participants in the four original projects do not take part in this basic research project.'

Regarding the third party's allegation that Turborouter is not used by any of the companies that received funds, the RCN is of the opinion that even if this should be the case, it is not an argument for any illegal use of State aid in the case of the four projects which are the subject of the Authority's Decision No 60/06/COL. It is one of the most typical features of research and development that there is a risk involved. Sometimes research results can be applied in operations or used in commercial products or services, sometimes they cannot.

II. APPRECIATION

1. The presence of state aid

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

According to Article 61(1) of the EEA Agreement,

'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.'

Thus, in order for a measure to be considered State aid, it must constitute a selective advantage in favour of certain undertakings, be granted through state resources, distort competition and affect trade between the Contracting Parties to the EEA Agreement.

The Authority already came to the conclusion that the grants given by the RCN to the projects related to the development of the software programme Turborouter under review constitute State aid in its assessment in Decision No 60/06/COL. In this respect, reference is made to point II.2 of this Decision. This assessment has not been disputed by the third party or the Norwegian authorities. The Authority therefore upholds its view that the grants constitute State aid.

1.2. *The applicable legal framework*

In Decision No 60/06/COL to open the formal investigation procedure on R&D aid granted by the RCN in connection with the development of the software programme Turborouter, the Authority explained in detail what would be the applicable legal framework for the assessment of the four projects concerned by this investigation. For the sake of understanding of the assessment hereinafter, the Authority briefly outlines the legal situation ⁽¹⁸⁾ below.

The four projects assessed in this Decision were granted R&D aid in the framework of the Industrial R&D Programme (*brukerstyrte forskningsprogrammer*, Case No 93-183). The Industrial R&D Programme was already in place before 1994. By way of Decision No 217/94/COL of December 1994, the Authority assessed the Industrial R&D Programme and proposed appropriate measures to require that the granting of aid be done in accordance with the principles laid down in Chapter 14 of the State Aid Guidelines.

⁽¹⁸⁾ For further details, reference is made to Decision No 60/06/COL, Section II.1, p. 11.

The acceptance by the Norwegian authorities of the proposed appropriate measures implied that, thereafter, any grant of aid under the Industrial R&D Programme had to be done in accordance with the R&D rules applicable at the time when the Authority adopted Decision No 217/94/COL, i.e. the 1994 R&D Guidelines ⁽¹⁹⁾.

1.3. *The assessment of the projects on the basis of the aid scheme Industrial R&D Programmes*

The Authority considered, by the opening of a formal investigation in Decision No 60/06/COL, that the four projects had been granted R&D aid in the framework of the Industrial R&D Programme. This program was already in place before 1994. Following the adoption of new R&D guidelines in 1994, thereafter any grant of aid under a R&D scheme had to be done in accordance with the new rules. Hence, the Authority considered that, by definition, any aid granted under the scheme Industrial R&D Programmes which does not comply with the provisions of the 1994 R&D Guidelines, would fall outside the scope of application of the scheme. Accordingly, the measure would constitute new individual aid and should, as such, be notified to the Authority individually.

In the following, the Authority will assess whether the application of the scheme Industrial R&D Programmes to the four concrete projects identified as relating to the development of the software programme Turborouter was done in line with Article 61(3)(c) of the EEA Agreement on the basis of the provisions of the 1994 R&D Guidelines.

1.3.1. **Project 40049 — Strategic Activities within maritime transport and logistics (The first version of the software programme Turborouter)**

One of the sub-projects covered by Project 40049 'Strategic activities within maritime transport and logistics as industrial research' led to the development of the first version of the software programme Turborouter. The RCN classified the whole Project 40049 Strategic activities within maritime transport and logistics as industrial research as a whole.

Basic industrial research was defined under Point 14.1.(2) of the 1994 R&D Guidelines as 'original theoretical or experimental work whose objective is to achieve new or better understanding of the laws of science and engineering as they might apply to an industrial sector or the activities of a particular enterprise.'

Although Turborouter has become a commercial software tool, the Authority considers that the RCN funds allocated to the

sub-project 'Methods and analytical tools for design and operation of integrated transport and logistics chains' of Project 40049 which led to the development of the first software programme Turborouter concerned a phase of R&D which qualified as industrial research within the meaning of the 1994 R&D Guidelines. As the Authority noted in Decision No 60/06/COL, since the first software was developed in the first phase of the sub-project back in early 1996, the software has been further improved and also marketed. However, it seems that the granting of aid to Project 40049 which resulted, amongst others, in the development of the first software Turborouter, cannot, by this fact, be considered in relation to market proximity to be beyond the stage of industrial research as it was classified by the RCN. The Authority has no reason to question the RCN's assessment that the sub-project 'Methods and analytical tools for design and operation of integrated transport and logistics chains' achieved a new or better understanding of the laws of science and engineering applicable to an industrial sector, which constitutes industrial research within the meaning of the 1994 R&D Guidelines.

As industrial research, Project 40049 was granted aid from the RCN for an amount corresponding to 43,8 % of the costs of the project. This intensity is below the maximum aid intensity allowed by the Guidelines according to which 'the level of aid for basic industrial research should not be more than 50 % of the gross costs of the project or programme.'

For the purpose of calculating the intensity of aid from R&D activities, Section 14.5.1 of 1994 R&D Guidelines foresaw the following eligible costs:

- personnel costs (researchers, technicians, other supporting staff) calculated as a sum of the total amount needed to carry out the project;
- other running costs calculated in the same way (costs of materials, supplies, etc.);
- instruments and equipment, land and buildings;
- consultancy and equivalent services including bought-in research, technical knowledge, patents, etc.;
- additional overhead costs incurred directly as a result of the R&D project or programme being promoted.'

⁽¹⁹⁾ In January 1994, the Authority adopted Decision No 4/94/COL on the adoption and issuing of the Procedural and Substantive Rules in the Field of State Aid (Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3). Chapter 14 thereof deals with Aid for research and development, which mainly corresponded to the Community framework for State aid for research and development. This Decision was published on the Official Journal L 231, 3.9.1994, p. 1-84 and EEA Supplement No 32, 3.9.1994, p. 1.

According to the information provided by the Norwegian authorities, the costs of the project taken into account in the determination of the granting of aid were covered by the definition of eligible costs provided in the 1994 R&D Guidelines. Section 3 to the *Retningslinjer for Norges Forskningsråds behandling av brukerstyrte og næringsrettede prosjekter* referred to the costs that could be considered eligible by the RCN when assessing the granting of R&D aid to a project. They covered personnel costs (salary and social costs for R&D personnel, i.e. researchers, technicians and assistants related to the project and necessary to carry it out), purchasing of R&D services (consultancy services and equivalent services), operating costs (including material costs and other operating costs directly related to the project and necessary to complete it) and equipment and instruments if used only for R&D. Thus, the Authority considers the description of the eligible costs to be in accordance with the definition provided for in the 1994 R&D Guidelines.

The project was exclusively carried out by the research institute Marintek without further participation of or collaboration with private undertakings at this stage of the R&D.

As already mentioned in the decision to open the formal investigation procedure, under the 1994 R&D Guidelines, and accordingly under the provisions of the aid scheme Industrial R&D Programmes, there was no written obligation to disseminate the results of research. Thus, even if the allegation brought forward by the complainant that the result of the research had not been disseminated and that the research institute Marintek had received the property rights to sell the programme were correct, it would not contravene the provisions of the R&D Guidelines applicable at the time of the granting of aid.

For these reasons, the Authority considers that the granting of aid to Project 40049 falls within the scheme Industrial R&D Programme as amended on the basis of Chapter 14 of the Authority's 1994 R&D Guidelines. The aid is therefore granted in accordance with Article 61(3)(c) EEA.

1.3.2. *The projects relating to the further use of the software programme Turborouter*

1.3.2.1. Doubts of the Authority expressed in Decision No 60/06/COL

In 2000, the RCN authorised the granting of R&D aid to three R&D projects which concerned the use and further development of the software programme Turborouter: Project 138811 'AlgOpt', Project 144265 'Shiplog II' and Project 144214 'Library of optimisation routines for scheduling in shipping'.

In Decision No 60/06/COL to open the formal investigation procedure, the Authority expressed doubts regarding the classification of the R&D projects as pre-competitive research and regarding the classification of the different parts of each project within each research category. Moreover, the Authority questioned whether the aid intensities were respected and whether the financing of the projects was done in accordance with the provisions of the 1994 R&D Guidelines and accordingly with Article 61(3)(c) of the EEA Agreement. The Authority had doubts as to whether the financial contributions of the private participants, mostly to be disbursed in kind, really corresponded to working hours related to the development of the R&D projects or whether, on the contrary, they covered operating costs of the concerned undertakings.

1.3.2.2. The applicable provisions of the R&D Guidelines

The RCN classified all three projects as pre-competitive development activity. Point 14.1.(2) of the R&D Guidelines of 1994 distinguished between three categories of research: fundamental, basic industrial and applied research and development. Applied research and development corresponded to the concept of pre-competitive research used from the adoption of the 1996 R&D Guidelines onwards. According to this provision, applied research 'covers investigation or experimental work based on the results of basic industrial research to acquire new knowledge to facilitate the attainment of specific practical objectives such as the creation of new products, production processes or services. It could normally be said to end with the creation of a first prototype.' Development is considered to cover 'work based on applied research aimed at establishing new or substantially improved products, production processes or services up to but not including industrial application and commercial exploitation.'

Section 14.4 of the 1994 R&D Guidelines sets out the aid intensities allowed. The intensity of aid that may be accepted is assessed by the EFTA Surveillance Authority on a case-by-case basis. The assessment takes into consideration the nature of the project or programme, the technical and financial risk involved, overall policy considerations related to the competitiveness of European industry, as well as the risk of distortion of competition and effect on trade between the Contracting parties to the EEA Agreement. A general evaluation of such risks leads the EFTA Surveillance Authority to consider that basic industrial research may qualify for higher levels of aid than those for applied research and development activities which are more closely related to the market introduction of R&D results and, there, if aided, could more easily lead to distortions of competition and trade'. Taking account of these factors, the 1994 R&D Guidelines state that the level of aid for basic industrial research should not be more than 50 % of the gross costs of the project and consider that, as the activity being aided gets nearer to the marketplace, the level of aid should be lower. It is only in the 1996 R&D Guidelines that the permissible gross aid intensity for pre-competitive development activities is fixed at 25 % of the eligible costs.

1.3.2.3. Assessment of whether the aid was granted in accordance with the R&D Guidelines and of whether the aid was misused

(a) Classification as pre-competitive development activity.

As mentioned above and explained in detail in the Decision No 60/06/COL, the Authority expressed doubts as regards the classification of Project 138811 'AlgOpt', Project 144265 'Shiplog II' and Project 144214 'Library of optimisation routines for scheduling in shipping' as pre-competitive development activities.

In its Decision No 60/06/COL, the Authority expressed doubts regarding the difference between the pre-competitive phase of a product and the final commercial product in respect of these kinds of IT projects. The Norwegian authorities have not made clear what this difference should be. However, they have stressed that the classification of the projects was based on a thorough assessment and evaluation of the projects according to the RCN procedures and guidelines for project evaluation. According to the information provided, these guidelines incorporate the provisions of the Authority's R&D Guidelines.

The RCN explained that there is an internal system of quality assurance of RCN's activities called DOKSY. DOKSY comprises a broad documentation of the guidelines, procedures and practices that are followed in the RCN. One of these documents is the guidelines for determining aid intensity applied to the selected projects. This internal document, DOKSY-5-6-1-4-IE entitled 'Støtteandel etter EØS-bestemmelser' (aid intensities according to EEA rules) corresponds to the Authority's R&D Guidelines. The document applies definitions and corresponding aid intensities in compliance with the definition of the different R&D stages in the Authority's R&D Guidelines. The assessment and classification of all the projects that receive aid from the RCN is based on the DOKSY guidelines.

After 1999, in addition to DOKSY 5-6-1-4-IE, all projects have been evaluated using the computer-based system 'Provis', which is described in Doksy No 5-6-1-2-EE 'Prosjektvurdering i Provis'. According to the provisions of Provis, each project is evaluated according to eleven different aspects⁽²⁰⁾. For each aspect, Provis foresees the application of several criteria or characteristics to characterise to what extent the project is in compliance with the

⁽²⁰⁾ The Guidelines for project evaluation in Provis take account of several aspects: (i) the general quality of the project, (ii) an evaluation of the project based on significant criteria such as the innovation level, the research level and content, international orientation, business value, socio-economic effect, risk, (iii) the effect of the support, (iv) the relevance of the programme and for the field of competence as well as (v) eligibility.

aspects. One of the most important aspects related to the classification of research categories is the research content.

In the description of the Guide for evaluation of the research content of a project in Doksy No 5-6-1-2-IE, it is underlined that 'Research content indicates to what degree the project produces new knowledge'. According to the information provided by the RCN, this criterion is directly linked to the description of the R&D guidelines where the requirement is that the activity is 'aimed at the acquisition of new knowledge'.

The RCN has informed the Authority that the evaluation of the projects was thoroughly carried out in accordance with the RCN procedures and guidelines for project evaluation, more specifically, on the basis of the requirements laid down in the Doksy and Provis internal documents, in line with the R&D Guidelines.

On the basis of the information brought forward before and during the formal investigation procedure the Authority has not been able to conclude that there has been mismanagement or failed assessment of the projects. In lack of such conclusive evidence, and in light of the above described routines and the capacity of the professional staff working for the RCN, the Authority has no basis for concluding that they have made an incorrect assessment of the projects as pre-competitive research.

(b) The participation of the beneficiary undertakings and the aid intensities:

The Norwegian authorities have clarified the figures regarding the financing of the projects as mentioned above under Section 4.1.2 of this Decision.

The Authority raised doubts in its Decision No 60/06/COL to open the formal investigation procedure on the participation of the companies involved in the research project. In its opinion, it would seem rational to assume that most of the work would have been carried out by the own-staff of the research institute Marintek which would imply, in principle, that the participation of the staff of participating shipping companies as the final users of the software, would have most probably been related to the definition of the users needs and/or, to some degree, of testing. Therefore, the Authority questioned whether the figures for the total project costs had been inflated to seemingly obtain more financing.

The Norwegian authorities provided the Authority with copies of cost claim reports which the participating undertakings had to submit to the RCN three times a year detailing the costs of the project, including a verification of the persons involved, the number of working hours spent by each person and the cost per hour charged to the project account. According to the explanations given by the Norwegian authorities, these reports are signed by the project responsible person and verified and signed by a certified accountant at the end of the year. The Authority has no reason to question the truthfulness of these reports on the basis of which the beneficiary undertakings were granted the R&D aid amounts.

Although it could be argued in general that it might be desirable to introduce certain controls during the development of the research projects to verify the accuracy of these costs reports, the Authority considers that the RCN has properly applied the provisions of the 1994 R&D Guidelines which do not require the carrying out of any further checks.

1.4. Conclusion

On the basis of the foregoing assessment, the Authority considers that the granting of aid to the above mentioned R&D projects was done in compliance with the provisions of the existing aid scheme Industrial R&D Programmes, which was in line with the applicable R&D Guidelines. The Authority could not establish in the course of this formal investigation procedure that the beneficiaries of R&D aid for Project 40049 'Strategic activities within maritime transport and logistics', Project 138811 'AlgOpt', Project 144265 'Shiplog II' and Project 144214 'Library of optimisation routines for scheduling in shipping' used the aid in contravention with the scheme or of Article 61(3)(c) of the EEA Agreement.

Since the projects received State aid within the framework of the scheme Industrial R&D Programmes and not individual aid, there is no need to assess whether the aid would have been compatible if it was granted outside the scheme,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to close the formal investigation procedure pursuant to Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement regarding R&D aid granted by the Research Council of Norway in connection with the development of the software programme Turborouter because it was granted in accordance with the existing aid scheme Industrial R&D Programmes in line with Article 61(3)(c) of the EEA Agreement and the State Aid Guidelines on Research and Development.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 18 April 2007.

For the EFTA Surveillance Authority

Bjørn T. GRYDELAND
President

Kurt JÄGER
College Member