Decyzja nr 173/22/COL z dnia 7 września 2022 r. o wszczęciu formalnego postępowania wyjaśniającego w sprawie niektórych przypadków pomocy państwa przyznanej w ramach programu pomocy Norweska Katapulta

Zaproszenie do zgłaszania uwag dotyczących pomocy państwa zgodnie z częścią I art. 1 ust. 2 protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości

(2022/C 428/07)

Wspomnianą wyżej decyzją, zamieszczoną w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA poinformował władze norweskie o swojej decyzji o wszczęciu postępowania wyjaśniającego zgodnie z częścią I art. 1 ust. 2 protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości.

Zainteresowane strony mogą zgłaszać uwagi w terminie jednego miesiąca od daty publikacji na adres Urzędu Nadzoru EFTA:

EFTA Surveillance Authority
Avenue des Arts 19H
1000 Bruxelles/Brussel
BELGIQUE/BELGIË
registry@eftasurv.int

Otrzymane uwagi zostaną przekazane władzom norweskim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

Streszczenie

Procedura

Władze norweskie poinformowały Urząd Nadzoru EFTA („Urząd") o programie pomocy Norweska Katapulta („program Katapulta" lub „program") przy pomocy arkuszy informacyjnych o sygnaturze GBER 38/2017/R&D&I oraz GBER 58/2020/R&D&I. Według władz norweskich program jest zgodny z przepisami ogólnego rozporządzenia w sprawie wyłączeń grupowych („GBER").

Urząd Nadzoru EFTA monitoruje środki pomocy uznane przez państwa EOG–EFTA za zgodne z GBER. W trakcie cyklu monitorowania w 2018 r. Urząd dokonał oceny niektórych przypadków pomocy przyznanej w ramach programu Katapulta.

Urząd zakończył monitorowanie pismem z 13 grudnia 2021 r. („zalecenie dotyczące odzyskania środków"). W zaleceniu dotyczącym odzyskania środków pomocy Urząd stwierdził, że pomoc przyznana pięciu beneficjentom jako pomoc inwestycyjna na rzeczowe aktywa trwałe na podstawie art. 27 GBER dotyczącego pomocy dla klastrów innowacyjnych wydaje się być niezgodna z prawem, ponieważ nie spełnia warunków określonych w GBER. Zarzucane nieprawidłowości dotyczyły art. 6 ust. 2 (efekt zachęty), art. 27 ust. 5 (koszty kwalifikowalne w przypadku pomocy inwestycyjnej) i art. 27 ust. 6 (intensywność pomocy inwestycyjnej) GBER. W związku z tym Urząd zalecił władzom norweskim odzyskanie kwot pomocy określonych w zaleceniu dotyczącym odzyskania środków.

Pismem z 21 lutego 2022 r. władze norweskie poinformowały Urząd, że nie zastosują się do zalecenia. Ich zdaniem przedmiotowa pomoc była zarówno zgodna z prawem, jak i zgodna z funkcjonowaniem Porozumienia EOG. 24 czerwca 2022 r. władze norweskie przekazały dodatkowe informacje.

Opis przedmiotowej pomocy

Decyzja dotyczy niektórych przypadków pomocy przyznanej jako pomoc inwestycyjna na rzeczowe aktywa, o której mowa w art. 27 ust. 5 i 6 GBER. Kwoty pomocy określone wstępnie w decyzji są następujące:

— 57,25 mln NOK na rzecz *Future Materials*,

— 44 930 658 NOK na rzecz *Manufacturing Technology*,

— 55,4 mln NOK na rzecz *Sustainable Energy*,

— 18,5 mln NOK na rzecz *Ocean Innovation*,

— 19,96 mln NOK na rzecz *Digica*t.

Ocena

Zgodnie z art. 27 ust. 5 GBER pomoc inwestycyjną można przyznać na utworzenie lub modernizację klastrów innowacyjnych. Koszty kwalifikowalne określono jako koszty inwestycji w rzeczowe aktywa trwałe i wartości niematerialne i prawne.

Urząd rozumie wstępnie, że przedmiotowa pomoc została przyznana na wsparcie leasingu sprzętu, w odniesieniu do którego nie istnieje obowiązek zakupu. Ponadto Urząd wyraża wstępnie stanowisko, że koszty takie nie stanowią kosztów inwestycji w rzeczowe aktywa trwałe. Oznaczałoby to, że pomoc została przyznana w odniesieniu do kosztów, które nie są kwalifikowalne na podstawie art. 27 ust. 5 GBER.

Ponadto wydaje się, że część przedmiotowej pomocy na rzecz *Future Materials* odnosi się do kosztów, które zostały poniesione przed złożeniem wniosku o tę pomoc. Oznaczałoby to, że pomoc przyznana na projekty lub działania, których te koszty dotyczą, nie wywołała efektu zachęty w rozumieniu art. 6 ust. 2 GBER.

Na podstawie dostępnych informacji Urząd stwierdza, że pomoc będąca przedmiotem decyzji, przyznana jako pomoc inwestycyjna na rzeczowe aktywa trwałe na podstawie art. 27 GBER dotyczącego pomocy dla klastrów innowacyjnych, nie spełniała warunków pomocy określonych w żadnym innym artykule GBER.

W świetle powyższych rozważań Urząd wstępnie stwierdza, że pomoc była niezgodna z prawem.

Urząd ma wątpliwości, czy pomoc jest zgodna z funkcjonowaniem Porozumienia EOG.

Po pierwsze, Urząd ma wątpliwości, czy pomoc można uznać za zgodną z rynkiem wewnętrznym na podstawie wytycznych w sprawie pomocy państwa na działalność badawczą, rozwojową i innowacyjną („wytyczne BRI"). Koszty kwalifikowalne dla poszczególnych kategorii takiej pomocy określono w załączniku I do wytycznych BRI. W odniesieniu do pomocy na tworzenie lub modernizację klastrów innowacyjnych koszty kwalifikowalne są zdefiniowane jako koszty inwestycji w rzeczowe aktywa trwałe i wartości niematerialne i prawne.

Definicja ta jest identyczna z definicją w art. 27 ust. 5 GBER. W związku z tym na podstawie tego samego uzasadnienia, co uzasadnienie poczynione w odniesieniu do GBER, Urząd wstępnie stwierdza, że pomoc nie spełnia mających zastosowanie warunków określonych w wytycznych BRI.

Jeśli chodzi o kwestię zgodności bezpośrednio na podstawie art. 61 ust. 3 lit. c) Porozumienia EOG, Urząd nie oceniał wcześniej pomocy dla klastrów innowacyjnych na pokrycie kosztów leasingu rzeczowych aktywów trwałych, w odniesieniu do których nie istnieje obowiązek zakupu. Na obecnym etapie Urząd zidentyfikował szereg elementów budzących wątpliwości co do zgodności przedmiotowej pomocy z rynkiem wewnętrznym.

Elementy te obejmują w szczególności kwestię, czy pomoc była odpowiednia i proporcjonalna. Ponadto w odniesieniu do pomocy na rzecz Future Materials przeznaczonej na projekty lub działania, w przypadku których koszty zostały poniesione przed złożeniem wniosku o pomoc, ustalenie rzeczywistego efektu zachęty wymagałoby szczegółowej analizy na podstawie wiarygodnych dowodów. Na obecnym etapie Urzędowi nie przedłożono takich dowodów.

State aid granted under the aid scheme Norwegian Catapult – Decision to open a formal investigation procedure

1. Summary

(1) The EFTA Surveillance Authority („ESA") wishes to inform the Norwegian authorities that, after a preliminary examination of aid granted under the aid scheme *Norwegian Catapult* („the Catapult-scheme" or „the scheme"), it finds that doubts are raised as to the compatibility of certain aid with the functioning of the EEA Agreement. ESA has therefore decided to open a formal investigation procedure pursuant to Articles 4(4) and 13 of Part II of Protocol 3 to the Surveillance and Court Agreement („Protocol 3"). This decision is based on the following considerations.

2. Procedure

(2) The Norwegian authorities informed ESA of the Catapult-scheme by information sheets with references *GBER 38/2017/R&D&I* and *GBER 58/2020/R&D&I* ([1]). According to the Norwegian authorities, the scheme complies with the General Block Exemption Regulation („GBER") ([2]). The granting authority is *Siva SF – The Industrial Development Corporation of Norway* („Siva").

(3) In keeping with Chapter II of the GBER, ESA monitors aid measures considered by the EEA EFTA States ([3]) to comply with the GBER. During its 2018 monitoring cycle, ESA assessed aid granted under the Catapult-scheme ([4]).

(4) The monitoring went on for several years and involved considerable information exchanges between ESA and the Norwegian authorities. The Norwegian authorities were requested, encouraged and given ample opportunity to provide information. In preparation for closing the monitoring case, ESA did in a letter dated 27 October 2021 specifically invite the Norwegian authorities to provide any additional information relevant for the assessment of the lawfulness of the aid under Article 27(5) GBER. It was specified that such information could relate to: (i) consortium agreements; (ii) lease contracts; (iii) purchase obligations; (iv) purchase prices and financing plans; or (v) other subjects ([5]).

(5) The Norwegian authorities responded by letter of 8 December 2021 ([6]). An extensive memo, prepared by an external law firm, was enclosed with this letter ([7]).

([1]) The information sheets are available on ESA's website (www.eftasurv.int).

([2]) Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), referred to at point 1j of Annex XV to the EEA Agreement, see Joint Committee Decision No 152/2014, published in the OJ L 342, 27.11.2014, p. 63, and EEA Supplement No 71, 27 listopada 2014, p. 61, as amended by Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating schemes for outermost regions and amending Regulation (EU) 702/2014 as regards the calculation of eligible costs (OJ L 156, 20.6.2017, p. 1), see Joint Committee Decision No 185/2017, published in the OJ L 174, 27.6.2019, p. 56, and the EEA Supplement No 67, 19 października 2017, p. 668, and Commission Regulation (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments (OJ L 215, 7.7.2020, p. 3), see Joint Committee Decision No 115/2020, not yet published, and Commission Regulation (EU) 2021/1237 of 23 July 2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 270, 29.7.2021, p. 39), see Joint Committee Decision No 196/2022, not yet published.

([3]) Iceland, Liechtenstein and Norway.

([4]) The correspondence concerning the monitoring is filed on Case 87323.

([5]) Document No. 1237125.

([6]) Document No. 1254527.

([7]) Document No. 1254529.

(6) In line with what was indicated in the letter of 27 October 2021, referred to in paragraph (4) above, ESA then concluded the monitoring by letter of 13 December 2021 („the recovery recommendation") ([8]). In the recovery recommendation, ESA expressed that aid granted to five beneficiaries, as investment aid for tangible assets under Article 27 GBER on aid to innovation clusters, appeared unlawful on the basis that it did not fulfil the conditions in the GBER. The apparent irregularities related to Articles 6(2) (incentive effect), 27(5) (costs eligible for investment aid) and 27(6) (intensity of investment aid) GBER.

(7) ESA therefore recommended to the Norwegian authorities to recover the following aid amounts from the below beneficiaries:

— *Future Materials*: NOK 58,8 million.

— *Manufacturing Technology*: NOK 42 930 658.

— *Sustainable Energy*: NOK 57,4 million.

— *Ocean Innovation*: NOK 18,5 million.

— *Digicat*: NOK 21,960 million.

(8) By letter of 21 February 2022, the Norwegian authorities informed ESA that they will not follow the recommendation. In their view, the aid concerned was both lawful and compatible with the functioning of the EEA Agreement ([9]).

(9) In view of this feedback, ESA's monitoring team closed the monitoring case with a recommendation for ESA to open a formal investigation ([10]).

(10) On 24 June 2022, the Norwegian authorities submitted additional comments ([11]). No additional documentation was however provided in this letter.

3. The aid concerned

3.1. *Background*

(11) The present decision addresses certain aid granted as investment aid for tangible assets („the grants") under Article 27(5) and (6) GBER, building upon the recovery recommendation. The grants are identified in sections 3.2 to 3.6 below.

(12) The Norwegian authorities have conceded that one irregularity has occurred with respect to the grants. In the letter of 7 September 2021, the Norwegian authorities acknowledged that due to a clerical error, Future Materials has received excess aid of NOK 450 000 in breach of Article 27(6) GBER on maximum aid intensities. The Norwegian authorities further confirmed that Siva will recover this aid ([12]).

(13) On this basis, ESA will not include the apparent irregularity concerning Article 27(6) GBER on maximum aid intensities in the present decision. Consequently, this opening decision will focus on irregularities concerning Articles 6(2) (incentive effect) and 27(5) (costs eligible for investment aid) GBER.

([8]) Document No. 1255265.
([9]) Document No. 1271178.
([10]) Document No. 1271381.
([11]) Document No. 1298148.
([12]) Document No. 1226788.

3.2. ***Future Materials***

3.2.1. *The investment aid for tangible assets*

(14) The aid concerning Future Materials was granted through three granting decisions. The first grant was made in a letter of 9 November 2018 for activities in 2018 ([13]). The second granting letter, also dated 9 November 2018, covered activities in 2019 ([14]). The third granting letter is dated 24 February 2020 ([15]). It specified the aid amounts granted for 2020.

(15) The granting letters distinguish between three categories of aid ([16]). These are: (1) investment aid for equipment (*investeringsstøtte til utstyr*), (2) aid for developing competence and services (*utviklingsstøtte til kompetanse- og tjenesteutvikling*), and (3) establishment aid (*etableringsstøtte*).

(16) To ESA's understanding, it follows from the granting letters that the investment aid for equipment (Category 1) was granted as investment aid under Article 27(5) and (6) GBER. This aid is therefore addressed by this opening decision. Respectively, NOK 16.5 million, NOK 15 million and NOK 26.2 million were granted as investment aid for equipment (Category 1) in the three granting letters.

(17) The recovery recommendation additionally encompassed NOK 1.1 million granted in the third granting letter as establishment aid (Category 3). However, it appeared from the granting letter that this aid was granted as operating aid under Article 27(7) to (9) GBER, and that it may have concerned costs eligible for such aid.

(18) The Norwegian authorities are therefore invited to clarify whether the NOK 1.1 million in establishment aid were granted as operating aid in compliance with Article 27(7) to (9) GBER.

(19) The aid granted for developing competence and services (Category 3) falls outside the scope of this decision. This applies also for such aid granted in the granting letters addressed in sections 3.3 to 3.6 below. The aid granted in these granting letters for developing competence and services (Category 3) will therefore not be identified in the following.

3.2.2. *The ownership of the tangible assets for which the investment aid was granted*

(20) ESA has been provided with the annual accounts of Future Materials for 2019 („the 2019 accounts"). These also include the figures for 2018 ([17]).

(21) The 2019 accounts indicate that Future Materials does not own the tangible assets (equipment) for which investment aid was granted under Article 27(5) and (6) GBER in the first and second granting letter. First, no equipment appears as assets in the balance ([18]). Second, it is specified in note 7 of the 2019 accounts that: „Future Materials is undertaking marketing, sales and administrative activities on behalf of the equipment owners who are its shareholders" ([19]).

(22) As regards the third granting letter of 24 February 2020, Future Materials applied for this aid by application of 20 December 2019 ([20]). However, Future Materials subsequently submitted an updated, but undated, budget ([21]). The granting letter was based on this budget ([22]).

([13]) Document No. 1191214.
([14]) Document No. 1191216.
([15]) Document No. 1191224.
([16]) In addition, the two first granting letters include a row on Investment aid for building space (*Investeringsstøtte til lokaler*). No such aid was however granted.
([17]) Document No. 1191144.
([18]) Section 3 under the heading „Eiendeler".
([19]) Section 3 under the heading „Eiendeler". Above translation provided by ESA.
([20]) Document No. 1225684.
([21]) Document No. 1225672.
([22]) This sentence reads as follows in the original Norwegian wording: „Future Materials AS ivaretar markedsføring, salg og administrative aktiviteter på vegne av utstyrseierne som er selskapets aksjonærer".

(23) In the column „owner of equipment" (*utstyrseier*), the updated budget lists the owners of the equipment in respect of which aid was applied for. These are exclusively other entities than Future Materials. Also with respect to the third granting letter, it is therefore ESA's understanding that Future Materials does not own any of the tangible assets (equipment) for which aid was granted as investment aid under Article 27(5) and (6) GBER.

(24) The above understanding is corroborated by a spreadsheet submitted by the Norwegian authorities ([23]). This spreadsheet also includes the column „owner of equipment" (*utstyrseier*). All the listed owners are other entities than Future Materials.

3.3. ***Manufacturing Technology***

3.3.1. *The investment aid for tangible assets*

(25) The aid concerning Manufacturing Technology was also granted through three granting decisions. The first grant was made in a letter of 17 October 2018 for activities in 2018 ([24]). The second granting letter, of the same date, was for activities in 2019 ([25]). The third granting letter was of 26 February 2020 ([26]). It specified the aid amounts granted for 2020.

(26) It is ESA's understanding that the investment aid for equipment (Category 1) was granted as investment aid under Article 27(5) and (6) GBER. Respectively, NOK 20 million, NOK 34 million and NOK 2 million were granted as investment aid for equipment (Category 1) in the three granting letters.

(27) The third granting letter encompassed NOK 2 million granted as establishment aid (Category 3). It appears that this aid was granted as operating aid under Article 27(7) to (9) GBER, and that it may have concerned costs eligible for such aid. The Norwegian authorities are however invited to clarify whether this is indeed the case.

3.3.2. *The ownership of the tangible assets for which the investment aid was granted*

(28) ESA has been provided with the 2018–2020 project accounts („the project accounts") of Manufacturing Technology ([27]). The column „owner of equipment" (*Eier av utstyret*) lists other equipment owners than Manufacturing Technology (*MTNC*).

(29) The breakdown into different equipment items is more detailed in a spreadsheet submitted by the Norwegian authorities ([28]). ESA has accordingly used this document for the purposes of identifying the aid amounts which do not concern equipment owned by Manufacturing Technology.

(30) According to the spreadsheet, the costs of equipment (*Utstyr inkl. Installasjon*) was NOK 53 925 093. In addition, „in-kind"-contributions are specified as amounting to NOK 54 017 686.

(31) The ownership of the equipment is specified in the column „owner" (*eier*). The combined listed costs of the equipment owned by Manufacturing Technology (*MTNC*) were NOK 21 113 684. In addition, the document lists in-kind contributions from Manufacturing Technology amounting to NOK 1 025 000.

([23]) Document No. 1225678.
([24]) Document No. 1191218.
([25]) Document No. 1191220.
([26]) Document No. 1191222.
([27]) Document No. 1225674.
([28]) Document No. 1225682.

3.4. ***Sustainable Energy***

3.4.1. *The investment aid for tangible assets*

(32) The aid concerning Sustainable Energy was granted through two granting decisions. The first grant was made in a letter of 27 June 2019 for activities in 2019 ([29]). The second granting letter, of 26 February 2020, concerned activities in 2020 ([30]).

(33) It is ESA's understanding that the investment aid for equipment (Category 1) was granted as investment aid under Article 27(5) and (6) GBER. Respectively, NOK 14.2 million and NOK 41.2 million were granted as investment aid for equipment (Category 1) in the two granting letters.

(34) The recovery recommendation additionally encompassed NOK 2 million granted in the second granting letter as establishment aid (Category 3). It however appears from the granting letter that this aid was granted as operating aid under Article 27(7) to (9) GBER.

(35) The Norwegian authorities are therefore invited to clarify whether the NOK 2 million in establishment aid was granted as operating aid in compliance with Article 27(7) to (9) GBER.

3.4.2. *The ownership of the tangible assets for which the investment aid was granted*

(36) ESA has been provided with the annual accounts of Sustainable Energy for 2019 ([31]). These indicate that Sustainable Energy did not own the equipment in 2019. In particular, the balance does not include equipment corresponding to the value of the grants.

(37) As noted on page 5 of the recovery recommendation, ESA has further not found indications of an obligation for Sustainable Energy to buy any of the equipment in respect of which the aid was granted. As further noted on that page, ESA did in the monitoring case ask the Norwegian authorities to provide any information relevant for ESA's preliminary assessment that Sustainable Energy does not own any of the concerned equipment. Nevertheless, the Norwegian authorities have not provided any beneficiary-specific documentation substantiating that the owner of the equipment concerned is Sustainable Energy.

(38) On the basis of the above, it is still ESA's understanding that the investment aid was granted in respect of equipment owned by other entities than Sustainable Energy.

3.5. ***Ocean Innovation***

3.5.1. *The investment aid for tangible assets*

(39) The aid concerning Ocean Innovation was granted by means of the granting letter of 3 June 2019 ([32]).

(40) It is ESA's understanding that the investment aid for equipment (Category 1) was granted as investment aid under Article 27(5) and (6) GBER. NOK 18.5 million were granted as investment aid for equipment.

3.5.2. *The ownership of the tangible assets for which the concerned investment aid was granted*

(41) The Norwegian authorities have provided a spreadsheet ([33]). As ESA understands it, the column „owner" (*eier*) lists the owners of the equipment in respect of which the investment aid was granted. The owners are exclusively other entities than Ocean Innovation.

(42) ESA is not aware of any obligation on the part of Ocean Innovation to buy the equipment concerned.

([29]) Document No. 1191228.
([30]) Document No. 1191230.
([31]) Document No. 1191142.
([32]) Document No. 1191212.
([33]) Document No. 1225686.

3.6. ***Digicat***

3.6.1. *The investment aid for tangible assets*

(43) The aid concerning Digicat was granted through two granting decisions. The first grant was made in a letter of 3 June 2019 for activities in 2019 ([34]). The second granting letter, of 26 February 2020, concerned activities in 2020 ([35]).

(44) It is ESA's understanding that the investment aid for equipment (Category 1) was granted as investment aid under Article 27(5) and (6) GBER. Respectively, NOK 7.060 million and 12.9 million were granted as investment aid for equipment (Category 1) in the two granting letters.

(45) The recovery recommendation additionally encompassed NOK 2 million granted in the second granting letter as establishment aid (Category 3). However, it appears from the granting letter that this aid was granted as operating aid under Article 27(7) to (9) GBER.

(46) The Norwegian authorities are therefore invited to clarify whether the NOK 2 million in establishment aid was granted as operating aid in compliance with Article 27(7) to (9) GBER.

3.6.2. *The ownership of the tangible assets for which the concerned investment aid was granted*

(47) The Norwegian authorities have provided a spreadsheet ([36]). As ESA understands it, the column „owner" (*eier*) lists the owners of the equipment in respect of which the investment aid was granted. The owners are exclusively other entities than Digicat

(48) ESA is not aware of any obligation on the part of Digicat to buy the equipment concerned.

3.7. ***Summary***

(49) As follows from the above, it is ESA's understanding of the documentation submitted in the monitoring case that the concerned investment aid has, with the exception of Manufacturing Technology, exclusively been granted in respect of tangible assets, which are not owned by the beneficiaries. Based on the contact with the Norwegian authorities in the monitoring case, it is further ESA's understanding that, in those cases where the tangible assets are not owned by the beneficiaries, the costs considered eligible by the Norwegian authorities under Article 27(5) GBER are the costs of leasing the assets under leasing contracts. It is ESA's preliminary understanding that these contracts do not include an obligation to purchase the assets.

4. **Presence of State aid**

(50) Article 61(1) of the EEA Agreement reads as follows: „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."

(51) The qualification of a measure as State aid within the meaning of this provision requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.

([34]) Document No. 1191228.
([35]) Document No. 1191230.
([36]) Document No. 1225662.

(52) As reflected in the information sheets referred to in section 2 above, the Norwegian authorities consider that the Catapult-scheme constitutes a State aid scheme. ESA is not aware of any information suggesting that the aid concerned, which was granted under this scheme, does not amount to State aid.

(53) In this respect, ESA notes, first, that Siva is a State-owned company. The notified scheme is administered by Siva and financed by the State budget. Consequently, the aid involves the consumption of State resources.

(54) Second, it is ESA's understanding that the direct beneficiaries concerned (Future Materials, Manufacturing Technology, Sustainable Energy, Ocean Innovation, and Digicat) engage in economic activities by making available their resources in exchange for remuneration. This would be sufficient to conclude that the aid has accrued to undertakings.

(55) Third, the aid has been granted exclusively to these beneficiaries. The aid is therefore selective.

(56) Fourth, based on the correspondence in the monitoring case, it is ESA's understanding that the beneficiaries offer highly specialised equipment used by undertakings engaged in international competition. In this capacity, it appears likely that the beneficiaries compete with alternative providers of access to equivalent equipment. Such alternative providers may operate exclusively in other EEA States, through subsidiaries in Norway, or be interested in establishing activities in Norway. The aid therefore appears to be liable to distort competition and affect trade within the EEA.

(57) In view of the above considerations, ESA preliminarily concludes that the aid concerned amounts to State aid, as defined in Article 61(1) of the EEA Agreement.

5. Aid scheme or individual aid

(58) According to the information sheets referred to under section 2 above, the Catapult-scheme is an aid scheme. ESA will therefore proceed on the basis that the aid is granted on the basis of an aid scheme ([37]).

6. Lawfulness of the aid

6.1. *Introduction*

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

(60) GBER establishes exemptions from this notification obligation for pre-defined categories of aid. As set forth in Article 3 GBER, an aid measure is compatible with the functioning of the EEA Agreement, and exempted from the notification requirement in Article 1(3) of Part I of Protocol 3, provided that the measure fulfils the conditions in Chapter I of the GBER, as well as the specific conditions for the concerned category of aid in its Chapter III.

([37]) See Article 1(d) of Part II of Protocol 3.

(61) The Court of Justice has acknowledged that the GBER is intended to increase administrative clarity and legal certainty by ensuring effective and simplified monitoring of the competition rules on State aid ([38]). At the same time, that court has also emphasised how the obligation of prior notification, which is derogated from by the GBER, is one of the fundamental features of the system of monitoring in the field of State aid ([39]). In line with the latter observation, it has taken a strict approach to the interpretation of both the current and the previous ([40]) GBER ([41]).

6.2. ***Whether the aid fulfils the conditions in Article 27(5) (investment aid to innovation clusters) GBER***

(62) Pursuant to Article 27(5) GBER, investment aid may be granted for the construction or upgrade of innovation clusters. The eligible costs are specified as the investment costs in intangible and tangible assets. It further follows from Article 7(1), second sentence, GBER that the eligible costs shall be supported by clear, specific and contemporary documentary evidence.

(63) As set out in section 3 above, it is ESA's understanding that the concerned aid has been granted in support of leasing of equipment for which there exists no purchasing obligation.

(64) In the letter of 24 June 2022, the Norwegian authorities argued that the classification of leasing contracts, as financial or operational leasing, depend on several criteria. The classification should, in the view of the Norwegian authorities, be made on the basis of the so-called IFRS 16 regulation ([42]) ([43]).

(65) At the same time, the Norwegian authorities do not appear to dispute that Siva has granted aid in respect of costs pertaining to leasing of equipment. The Norwegian authorities also do not dispute that aid has been granted in respect of equipment that has not been, and will not be, purchased by the beneficiaries ([44]).

(66) On this basis, ESA will go on to assess whether, within the meaning of Article 27(5) GBER, the costs of leasing contracts that do not contain a purchasing obligation amount to investment costs in tangible assets.

(67) The meaning of the term „investment costs" in the context of Article 27(5) GBER is not defined in the GBER. It however follows from settled case-law that the terms of a provision of EEA law which makes no express reference to national law, must normally be given an autonomous and uniform interpretation throughout the EEA. Moreover, the meaning and scope of such terms must be determined by reference to their usual meaning in everyday language, whilst also taking into account the context in which they occur and the purposes of the rules of which they are part ([45]).

([38]) Judgment of 24 September 2020, *NMI Technologietransfer GmbH* v *EuroNorm GmbH*, C-516/19, EU:C:2022:59, paragraph 68.

([39]) Judgment of 5 March 2019, *Eesti Pagar AS* v *Ettevõtluse Arendamise Sihtasutus, Majandus- ja Kommunikatsiooniministeerium*, C-349/17, EU:C:2019:172, paragraph 59.

([40]) Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 TFEU and 108 TFEU] (OJ L 214, 9.8.2008, p. 3). The Regulation was incorporated in the EEA Agreement by Joint Committee Decision No 120/2008 (OJ L 339, 18.12.2008, p. 111, and EEA Supplement No 79, 18 grudnia 2008, p. 20).

([41]) See e.g. Judgment of 21 July 2016, *Dilly's Wellnesshotel GmbH* v *Finanzamt Linz*, C-493/14, EU:C:2016:577, paragraph 37; *Eesti Pagar*, referenced in footnote 39, paragraph 60; *NMI Technologietransfer GmbH*, referenced in footnote 38, paragraph 65.

([42]) Commission Regulation (EU) 2017/1986 of 31 October 2017 amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Standard 16 (OJ L 291, 9.11.2017, p. 1), referred to at point 10ba of Annex XXII to the EEA Agreement, see Joint Committee Decision No 101/2018, published in the OJ L 340, 15.10.2020, p. 38, and the EEA Supplement No 66, 15 października 2020, p. 47.

([43]) Document No. 1298148, p. 4-5.

([44]) Document No. 1298148.

([45]) See e.g. *NMI Technologietransfer GmbH*, referenced in footnote 38, paragraphs 44–46; Judgment of 27 January 2022, *SIA „Zinātnes parks"* v *Finanšu ministrija*, C-347/20, EU:C:2022:59, paragraph 42.

(68) In ESA's preliminary view, there is a commonly accepted distinction in everyday language between purchasing and leasing tangible assets. While a purchase entails that the ownership is permanently transferred in exchange for payment of the agreed price, leasing denotes payments on an ongoing basis for the right to use the asset.

(69) Moreover, it is also ESA's preliminary view that in everyday language concerning tangible assets, the term „investment" is used in reference to acts involving a purchase. Under this understanding, the distinguishing feature of an investment in tangible assets is the transfer of ownership in exchange for payment.

(70) This interpretation is supported by the system and purpose of the GBER. An interpretation whereunder the distinguishing feature of an investment in tangible assets is the transfer of ownership in exchange for payment, is clear and easy to apply. As such, it facilitates the administrative clarity and legal certainty that is sought brought about by the GBER. On the flip side, it does not open up for complex economical assessments by national authorities of whether a lease should, in a given case, be regarded as equivalent to an acquisition ([46]).

(71) In view of the above considerations, ESA preliminarily concludes that the costs of leasing of assets for which there exists no purchasing obligation, does not amount to investment costs in tangible assets. This would entail that the aid has been granted in respect of costs which are not eligible under Article 27(5) GBER.

(72) While replies from the European Commission to questions on the interpretation of the GBER do not have the same legal force as the GBER itself, ESA notes that the above interpretation is also consistent with guidance provided in respect of the current and previous ([47]) GBER. In response to a question concerning Article 36 in the current GBER, the European Commission has stated that: „GBER allows lease costs to be covered by investment aid only when it is in the form of financial leasing, which contains an obligation to purchase the asset at the expiry of the term of the lease" ([48]).

(73) In respect of the previous GBER ([49]), the European Commission has stated the following in response to a question concerning its Article 15: „In order to be eligible under the GBER, investments must satisfy several conditions, such as the condition that the investment be financed through an agreement of financial leasing. The second paragraph of Art. 13(7) reads: »Costs related to the acquisition of assets under lease, other than land and buildings, shall be taken into consideration only if the lease takes the form of financial leasing and contains an obligation to purchase the asset at the expiry of the term of the lease«. This condition concerns the other aids targeting investments, such as those granted to SMEs according to Art. 15" ([50]). A similar provision to the referenced Article 13(7) in the previous GBER, is found in Article 14(6)(b) of the current GBER, which states: „for plant or machinery, the lease must take the form of financial leasing and must contain an obligation for the beneficiary of the aid to purchase the asset upon expiry of the term of the lease".

6.3. *The aid does not fulfil the conditions for operating aid under Article 27(7) to (9) GBER*

(74) The Norwegian authorities have not purported that the concerned aid fulfils the conditions for operating aid under Article 27(7) to (9) GBER. However, in light of the arguments presented with respect to the foreseen revision of the GBER, addressed in section 6.5 below, ESA considers it appropriate to establish why the aid concerned does not fulfil the conditions for operating aid under Article 27(7) to (9) GBER.

([46]) See in this regard, *Eesti Pagar*, referenced in footnote 39, paragraphs 67–68 and 79.
([47]) Commission Regulation (EC) No 800/2008 of 6 August 2008, referenced in footnote 40.
([48]) This reply was previously publicly available on the Commission's GBER FAQ-page.
([49]) Commission Regulation (EC) No 800/2008 of 6 August 2008, referenced in footnote 40.
([50]) At the time of the adoption of this decision, the reply was available on the following link: https://ec.europa.eu/competition/state_aid/legislation/gber_practical_faq_en.pdf.

(75) Article 27(8) GBER defines the costs eligible for operating aid as: „[…] the personnel and administrative costs (including overhead costs) relating to: (a) animation of the cluster to facilitate collaboration, information sharing and the provision or channelling of specialised and customised business support services; (b) marketing of the cluster to increase participation of new undertakings or organisations and to increase visibility; [and] (c) management of the cluster's facilities; organisation of training programmes, workshops and conferences to support knowledge sharing and networking and transnational cooperation".

(76) On the basis of the available documentation, ESA does not see that the aid concerned was granted in respect of eligible personnel and administrative costs as defined in Article 27(8) GBER. Rather, it is ESA's understanding that the aid concerned relates to the costs of leasing tangible assets.

6.4. ***Whether the third grant to Future Materials fulfils the conditions in Article 6(2) (incentive effect) GBER***

(77) As follows from the above, ESA's preliminary view is that the aid concerned does not fulfil the conditions in Article 27(5) GBER. Further, ESA is not in possession of information enabling it to conclude that the aid fulfils the conditions for any of the other categories of compatible aid set out in Chapter III of the GBER.

(78) This entails that the aid is not covered by the GBER, and that, as a consequence, it remains subject to the notification obligation ([51]). While therefore not strictly necessary for assessing the lawfulness of the aid, ESA will nevertheless also address apparent irregularities concerning the incentive effect of the aid to Future Materials.

(79) According to the first sentence of Article 6(2) GBER, „[a]id shall be considered to have an incentive effect if the beneficiary has submitted a written application […] before work on the project or activity starts". The incentive effect is thus assessed per project or activity.

(80) The wording in Article 6(2) GBER is equivalent to that in Article 8(2) of the previous GBER ([52]). With respect to the latter provision, the Court of Justice has found that it must be interpreted as meaning that „work on the project or activity" started when a first order of equipment required for the project or activity was made by entering into an unconditional and legally binding commitment ([53]). This situation will in the following be referred to as the point in time when costs are incurred.

(81) As identified in paragraph (22), Future Materials applied for additional aid by application of 20 December 2019 ([54]). As also set forth in that paragraph, it is ESA's understanding that the investment aid for equipment (Category 1), subsequently granted in the third granting letter of 24 February 2020, reflects an updated budget submitted after the application ([55]).

(82) This updated budget included costs listed in the three last quarters of 2019 (Q2, Q3 and Q4). However, since the application is dated 20 December 2019, it is ESA's understanding that the costs listed in the updated budget as concerning Q2 and Q3 of 2019, were incurred prior to the application being submitted. Further, it is not possible to rule out from the updated budget that (parts of) the costs listed as concerning Q4 of 2019, were also incurred prior to the application being submitted on 20 December 2019.

([51]) See e.g. *Dilly's Wellnesshotel*, referenced in footnote 41, paragraph 36; *Eesti Pagar*, referenced in footnote 39, paragraphs 59 and 86; Judgment of 29 July 2019, *Bayerische Motoren Werke AG* v *Commission*, C-654/17P, EU:C:2019:634, paragraphs 129 and 138.
([52]) Commission Regulation (EC) No 800/2008 of 6 August 2008, referenced in footnote 40.
([53]) *Eesti Pagar*, referenced in footnote 39, paragraph 82.
([54]) Document No. 1225684.
([55]) Document No. 1191224.

(83) Based on the available information, it is not completely clear to ESA whether the application of 20 December 2019 concerned one or several projects/activities. As explained above, however, it seems to follow from the updated budget that parts of the budgeted costs were incurred prior to the application being submitted. This would entail that aid granted in respect of the project/activity to which these costs relate, did not have an incentive effect within the meaning of Article 6(2) GBER.

6.5. ***The foreseen revision of the GBER***

(84) In the letter of 24 June 2022, the Norwegian authorities refer to a targeted review of the GBER initiated by the European Commission ([56]). The Norwegian authorities refer, first, to the proposed amendment concerning „technology infrastructures". In the view of the Norwegian authorities, the Catapult centres are such „technology infrastructures" ([57]).

(85) Second, the Norwegian authorities point out that the proposal entails widening the circle of entities eligible for operating aid to innovation clusters ([58]).

(86) In this respect, ESA notes first that the draft referred to by the Norwegian authorities has not been enacted by the Commission in the form of a revision of the GBER. At this stage, it is therefore incapable of constituting a reference to examine the lawfulness of the aid concerned.

(87) Second, even if the proposal was to be adopted and incorporated into the EEA Agreement, it treats „technology infrastructures" as a form of „testing and experimentation infrastructures" ([59]). The proposed Article 26a will allow for investment aid for testing and experimentation infrastructures of up to 25 % of the eligible costs. On the basis of the documentation referred to in section 3 above, it is ESA's understanding that the aid addressed in this decision exceeds this limit. Further, only investment aid would be eligible under the proposed Article 26a.

(88) Third, concerning the proposed amendment of the circle of entities eligible for operating aid to innovation clusters, ESA notes that it will not affect what categories of costs are eligible for operating aid. This is so because the proposal does not entail amending Article 27(8) of the existing GBER. As already noted, this provision defines the eligible costs as: „[…] the personnel and administrative costs (including overhead costs) relating to: (a) animation of the cluster to facilitate collaboration, information sharing and the provision or channelling of specialised and customised business support services; (b) marketing of the cluster to increase participation of new undertakings or organisations and to increase visibility; [and] (c) management of the cluster's facilities; organisation of training programmes, workshops and conferences to support knowledge sharing and networking and transnational cooperation".

(89) As established in section 6.3 above, ESA does not see that the aid concerned was granted in respect of costs eligible for operating aid under Article 27(8) GBER. Accordingly, even if the GBER was to be amended as regards the circle of entities eligible for operating aid to innovation clusters, the aid concerned could not lawfully have been granted as operating aid under Article 27(7) to (9) GBER.

(90) On this basis, ESA takes the preliminary view that the foreseen revision of the GBER does not affect the conclusion as to the lawfulness of the aid.

([56]) The public review of the proposal ended on8 December 2021. At the time of the adoption of this decision, the consultation documents, including the draft regulation, were available on the following link: https://competition-policy.ec.europa.eu/public-consultations/2021-gber_en.

([57]) Document No. 1298148, p. 9.

([58]) Document No. 1298148, p. 9.

([59]) See recital 2 of the draft regulation, referred to in footnote 56 above.

6.6. ***Summary of the aid which appears unlawful***

6.6.1. *Future Materials*

(91) ESA preliminarily concludes that the NOK 57.7 million granted to Future Materials as investment aid for equipment (Category 1) is unlawful.

(92) The entire amount appears unlawful based on an assessment against Article 27(5) GBER. Parts of the amount, granted in the third granting letter, also appears unlawful based on an assessment against Article 6(2) GBER.

(93) As identified in section 3.1, it is ESA's understanding that the Norwegian authorities have already recovered NOK 450 000 of the aid concerned with reference to another irregularity. This would leave NOK 57.25 million in unrecovered unlawful aid.

6.6.2. *Manufacturing Technology*

(94) ESA preliminarily concludes that parts of the investment aid for equipment (Category 1) granted to Manufacturing Technology in the three granting letters is unlawful.

(95) As follows from the above, the costs eligible for investment aid under Article 27(5) GBER are the costs related to the acquisition of equipment owned by Manufacturing Technology. Based on the spreadsheet ([60]), it is ESA's understanding that these costs amount to NOK 22 138 684 ([61]).

(96) The maximum aid intensity allowed by Article 27(6) GBER is 50 %. On the premise that the eligible costs amount to NOK 22 138 684, the maximum lawful aid amount under Article 27(6) GBER would be NOK 11 069 342.

(97) The unlawful aid amount is the difference between the NOK 56 million granted as investment aid for equipment (Category 1), and the maximum lawful aid amount of NOK 11 069 342. This amount is NOK 44 930 658.

6.6.3. *Sustainable Energy*

(98) ESA preliminarily concludes that the NOK 55.4 million in investment aid for equipment (Category 1) was granted in respect of costs which are not eligible under Article 27(5) GBER. This aid is therefore unlawful.

6.6.4. *Ocean Innovation*

(99) ESA preliminarily concludes that the NOK 18.5 million in investment aid for equipment (Category 1) was granted in respect of costs which are not eligible under Article 27(5) GBER. This aid is therefore unlawful.

6.6.5. *Digicat*

(100) ESA preliminarily concludes that the NOK 19.96 million in investment aid for equipment (Category 1) was granted in respect of costs which are not eligible under Article 27(5) GBER. This aid is therefore unlawful.

([60]) Document No. 1225682.

([61]) According to ESA's calculations, the sum of the equipment costs is NOK 21 113 684 and that of the in-kind contributions NOK 1 025 000 (NOK 22 138 684 in total). To what extent in-kind contributions constitute costs eligible for investment aid under the GBER Article 27(5), has however not been assessed in this decision.

6.7. *Conclusion*

(101) The Norwegian authorities granted the aid identified in section 6.6 without notifying it to ESA. On the basis of the above assessment, ESA therefore takes the preliminary view that the Norwegian authorities have not respected their obligations under Article 1(3) of Part I of Protocol 3. This would make the aid unlawful.

7. Compatibility of the unlawful aid

7.1. *Introduction*

(102) It follows from Article 61(1) of the EEA Agreement that, unless provided otherwise, State aid measures are incompatible with the functioning of the EEA Agreement.

(103) The derogations in Article 61(2)(a) to (c) of the EEA Agreement concern respectively aid having a social character, aid to make good the damage caused by natural disasters or exceptional occurrences, and aid granted to the economy of certain areas of the Federal Republic of Germany. As the aid concerned is not furthering the attainment of any of these objectives, the derogations in Article 61(2)(a) to (c) of the EEA Agreement are not applicable in the case at hand.

(104) With respect to the derogations contained in Article 61(3)(a) and (b) of the EEA Agreement, these also concern objectives which the aid in question does not contribute to the fulfilment of. Article 61(3)(a) of the EEA Agreement addresses aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, whereas its Article 61(3)(b) concerns aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EU Member State or an EFTA State. Accordingly, these derogations are also not applicable.

(105) As for the derogation in Article 59(2) of the EEA Agreement concerning undertakings entrusted with the operation of services of general economic interest, ESA observes that the beneficiaries have not had a public service obligation to discharge with respect to the concerned activities. Since the compensation is not granted in respect of an undertaking entrusted with a service of general economic interest, the derogation in Article 59(2) is not applicable.

(106) Article 61(3)(c) of the EEA Agreement provides that ESA may declare compatible „aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest". In order to declare an aid measure compatible under this provision, it must, first, facilitate the development of certain economic activities or of certain economic areas (the positive condition). Second, it must not adversely affect trading conditions to an extent contrary to the common interest (the negative condition) ([62]).

(107) ESA will in the following assess the aid against Article 61(3)(c) of the EEA Agreement.

7.2. *ESA doubts whether the conditions in the RDI-guidelines are fulfilled*

(108) The Guidelines on State aid for research and development and innovation („the RDI-guidelines") set out conditions under which aid measures will be regarded as compatible with the EEA Agreement on the basis of its Article 61(3)(c) ([63]). Where an EEA EFTA State has demonstrated that a measure fulfils the applicable conditions in those guidelines, ESA will approve the measure in question ([64]).

([62]) Judgment of 22 September 2020, *Austria* v *Commission* (*Hinkley Point C*), C-594/18 P, EU:C:2020:742, paragraphs 18–20.

([63]) OJ L 209, 6.8.2015, p. 17.

([64]) EFTA Surveillance Authority Decision No: 271/14/COL of 9 July 2014 amending for the 97th time the procedural and substantive rules in the field of State aid by adopting new Guidelines for research and development and innovation [2015/1359], published in the OJ L 209, 6.8.2015, p. 17 and the EEA Supplement No 44, 6 sierpnia 2015, p.1, at paragraph 14. The Guidelines were amended by ESA Decision No: 090/20/COL of 15 July 2020, published in the OJ L 359, 29.10.2020, p. 6 and the EEA Supplement No 68, 29 października 2020, p. 4.

(109) The costs eligible for the different categories of aid are defined in Annex I. In respect of aid for the construction or upgrade of innovation clusters, the eligible costs are defined as the investment costs in intangible and tangible assets.

(110) This is the same definition as that in Article 27(5) GBER. In view of the assessment set forth in section 6.2, ESA therefore preliminarily concludes that the aid cannot be declared compatible with Article 61(3)(c) of the EEA Agreement on the basis that it complies with the RDI-guidelines.

7.3. *ESA doubts whether the aid is compatible directly on the basis of Article 61(3)(c) of the EEA Agreement*

7.3.1. *Facilitation of the development of certain economic activities*

7.3.1.1. Economic activities supported

(111) In order to be compatible under Article 61(3)(c) of the EEA Agreement, the measure must contribute to the development of certain economic activities or areas.

(112) As reflected in the GBER ([65]) and the RDI-guidelines ([66]), aid for the construction or upgrade of innovation clusters can in particular contribute to combating coordination problems. Such problems hamper the development of innovation clusters, as well as the interaction and knowledge flows within clusters.

(113) It is therefore common ground that aid for the construction or upgrade of innovation clusters can directly facilitate that economic activity which cluster organisations engage in when making available the resources of the innovation cluster. In turn, this will indirectly facilitate the economic activities conducted by the users of the cluster facilities.

(114) On this basis, ESA is preliminarily inclined to conclude that the aid has directly facilitated the economic activities of the direct beneficiaries concerned, and indirectly the economic activities engaged in by the end users. However, ESA has not previously assessed aid to innovation clusters in support of the costs of leasing tangible assets for which there exists no purchasing obligation. The Norwegian authorities are therefore invited to elaborate in further detail on how the aid facilitates economic activities within the meaning of Article 61(3)(c) of the EEA Agreement.

7.3.1.2. Incentive effect

(115) State aid is only compatible with the functioning of the EEA Agreement if it has an incentive effect. It must be demonstrated that the measure changes the behaviour of the undertaking concerned so that it engages in an activity which it would otherwise not carry out, or which it would carry out in a more restricted or different manner.

(116) It follows from settled case-law ([67]), reflected in ESA's decision-making practice ([68]), that a distinction needs to be drawn between respectively (i) the presumption for the existence of an incentive effect for aid applied for prior to the start of the activity/project; and (ii) establishing an actual incentive effect on the basis of a thorough assessment of the circumstances.

([65]) Recital 50.
([66]) Paragraph 12(e).
([67]) See e.g. *Eesti Pagar*, referenced in footnote 39, paragraphs 64, 67, 78 and 79; Judgment of 13 June 2013, *HGA Srl and Others* v *Commission*, Joined Cases C-630/11 P to C-633/11 P, EU:C:2013:387, paragraphs 106 and onwards; Judgment of 14 January 2009, *Kronoply GmbH & Co. KG* v *Commission*, T-162/06, EU:T:2009:2, paragraphs 80–85, upheld on appeal in the Judgment of 24 June 2010, *Kronoply GmbH & Co. KG* v *Commission*, C-117/09 P, EU:C:2010:370.
([68]) EFTA Surveillance Authority Decision No: 83/19/COL of 28 November 2019 on alleged unlawful aid to Trondheim Spektrum AS, published in the OJ L 82, 19.3.2020, p. 3, and the EEA Supplement No 17, 19 marca 2020, p. 1.

(117) As identified in section 6.4 above, the present Article 6(2) GBER stipulates that „[a]id shall be considered to have an incentive effect if the beneficiary has submitted a written application […] before work on the project or activity starts". The Court of Justice has found that the equivalent provision in Article 8(2) in the previous ([69]) GBER amounted to a simple, pertinent and adequate condition for enabling the existence of an incentive effect to be presumed without a detailed assessment. Moreover, that Court has underlined that the verification of the existence of an actual incentive effect falls under the exclusive competence of the European Commission ([70]).

(118) The formal criterion in Article 6(2) GBER does however not limit the scope for concluding, in an analysis under Article 61(3)(c) of the EEA Agreement, that aid has an actual incentive effect. It is therefore possible that aid which does not have an incentive effect within the meaning of Article 6(2) GBER, has an incentive effect in the sense of Article 61(3)(c) of the EEA Agreement.

(119) By way of example, in a decision concerning aid to Trondheim Spektrum, ESA found that while a capital injection was granted after works on the concerned renovation and extension of an infrastructure had started, it changed Trondheim Spektrum's behaviour in such a way that it engaged in the additional activity of finalising this upgrade. On that basis, even if the grant of the capital increase could not satisfy the formal requirement on incentive effect in Article 6(2) GBER, ESA concluded in its analysis under Article 61(3)(c) of the EEA Agreement that it had an actual incentive effect ([71]).

(120) Aside from the aid to Future Materials addressed in section 6.4 above, it is ESA's understanding that the aid concerned was applied for prior to the start of the activities/projects that it relates to. However, the Norwegian authorities are invited to elaborate further on the actual incentive effect of the aid.

(121) As further described in section 6.4, ESA's preliminary view is that parts of the aid to Future Materials did not have an incentive effect within the meaning of Article 6(2) GBER. As reflected in the decision concerning aid to Trondheim Spektrum, the establishment of an actual incentive effect in cases where such an effect cannot be presumed on the basis of a prior application, necessitates a detailed analysis on the basis of reliable evidence ([72]). At this stage, ESA therefore doubts that parts of the aid concerned to Future Materials had an actual incentive effect within the meaning of Article 61(3)(c) of the EEA Agreement.

7.3.2. *Compliance with relevant EEA law*

(122) If a State aid measure, the conditions attached to it, or the activity it finances entail a violation of relevant EEA law, the aid cannot be declared compatible with the functioning of the EEA Agreement ([73]).

(123) ESA has no indications that the aid, the conditions attached to it, or the activity it finances entail a violation of relevant EEA law.

([69]) Commission Regulation (EC) No 800/2008 of 6 August 2008, referenced in footnote 40.
([70]) *Eesti Pagar*, referenced in footnote 39, paragraphs 64 and 68.
([71]) EFTA Surveillance Authority Decision No: 83/19/COL, referenced in footnote 68, paragraphs 220 to 229 and 259 to 273.
([72]) EFTA Surveillance Authority Decision No: 83/19/COL, referenced in footnote 68, paragraph 264.
([73]) Judgments of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 78; 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraphs 94–116; *Austria* v *Commission* (*Hinkley Point C*), referenced in footnote 62, paragraph 44; 14 October 2010, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 51–51.

7.3.3. *Whether the aid adversely affects trading conditions to an extent contrary to the common interest*

7.3.3.1. Introduction

(124) As follows from section 7.3.1, ESA has identified potential positive effects of the aid in that it may facilitate the development of certain economic activities. However, as will be described below, ESA has also identified possible negative effects in terms of distortions of competition and adverse effects on trade. These positive and negative effects must then be weighed up.

7.3.3.2. Markets affected by the aid

(125) As identified in section 7.3.1.1, ESA is preliminarily inclined to conclude that the aid has directly facilitated the economic activities of the direct beneficiaries, and indirectly the economic activities engaged in by the end users of the resources offered by them. At this stage, ESA is not aware that the aid has affected other markets. However, the Norwegian authorities are invited to comment on this.

7.3.3.3. Positive effects of the aid

(126) As established in section 7.3.1.1, and reiterated directly above, ESA is preliminarily inclined to conclude that the aid has directly facilitated the economic activities of the direct beneficiaries, and indirectly the economic activities engaged in by the end users. However, as was emphasised in section 7.3.1.1, ESA has not previously assessed aid to innovation clusters in support of the costs of leasing tangible assets for which there exists no purchasing obligation. The Norwegian authorities are therefore invited to elaborate in further detail on how the aid facilitates economic activities within the meaning of Article 61(3)(c) of the EEA Agreement.

7.3.3.4. Limited negative effects of the aid

7.3.3.4.1. Introduction

(127) Article 61(3)(c) of the EEA Agreement requires an assessment of any negative effects on competition and on trade. The aid must not adversely affect trading conditions to an extent contrary to the common interest.

7.3.3.4.2. Necessity of the aid

(128) A State aid measure is necessary if it is targeted towards situations where aid can bring about a material improvement that the market cannot deliver itself.

(129) As was touched upon in paragraph (112), it is recognized in both the GBER ([74]) and the RDI-guidelines ([75]) that aid for the construction or upgrade of innovation clusters is necessary to address, in particular, market failures in the form of coordination problems. Such problems hamper the development of innovation clusters, as well as the interaction and knowledge flows within clusters.

(130) On this basis, ESA is therefore generally inclined to conclude that aid for the construction or upgrade of innovation clusters is necessary in order to address market failures in the form of coordination problems. The Norwegian authorities are however invited to provide further information and reasoning on the necessity of the aid assessed in the case at hand.

([74]) Recital 50.
([75]) Paragraph 12(e) and Annex I.

7.3.3.4.3. Appropriateness of the aid

(131) EEA EFTA States can make different choices with regard to policy instruments, and State aid control does not impose a single way to intervene in the economy. However, State aid under Article 61(1) of the EEA Agreement can only be justified by the appropriateness of a particular instrument to contribute to the development of the targeted economic activities or areas.

(132) ESA normally considers a measure appropriate where the EEA EFTA State can demonstrate that alternative policy options would not be equally suitable, and that alternative, less distortive, aid instruments would not deliver equally efficient outcomes.

(133) As reflected in the GBER ([76]) and the RDI-guidelines ([77]), ESA has experience in assessing investment aid for the construction or upgrade of innovation clusters. Such aid is appropriate for addressing, in particular, the coordination problems hampering the development of innovation clusters, as well as the interaction and knowledge flows within clusters.

(134) However, ESA does, as already mentioned, not have experience in assessing aid to innovation clusters in support of the costs of leasing tangible assets for which there exists no purchasing obligation. At this stage, it is not evident to ESA that such aid is not more distortive than the alternative of granting investment aid within the meaning of the GBER ([78]) and the RDI-guidelines ([79]).

(135) On this basis, the Norwegian authorities are invited to elaborate on the appropriateness of the aid encompassed by this opening decision.

7.3.3.4.4. Proportionality of the aid

(136) State aid is proportionate if the aid amount per beneficiary is limited to the minimum needed to incentivise the additional investment or activity.

(137) With respect to investment aid for the construction or upgrade of innovation clusters, the GBER ([80]) and the RDI-guidelines ([81]) allow for an aid intensity of 50 %.

(138) As set forth in section 6.2, it is ESA's preliminary conclusion that the distinguishing feature of eligible investments in tangible assets under those instruments is the transfer of ownership in exchange for payment. In order to be eligible for aid, the beneficiary must therefore take on the risks of ownership. Those risks include, in particular, the risk of obsolescence.

(139) The leasing of the concerned tangible assets, for which there exists no purchasing obligation, does to ESA's preliminary understanding shield the beneficiaries from the risks of ownership. It is ESA's understanding that the leasing contracts provide the lessees with increased flexibility compared with contracts involving a purchasing obligation.

(140) In view of the above, ESA questions whether, in order to incentivise additional economic activities, it was necessary to grant aid with the same intensity as if it had concerned investments in tangible assets within the meaning of the GBER ([82]) and RDI-guidelines ([83]). Accordingly, ESA doubts whether the aid was proportional.

([76]) Article 27.
([77]) Paragraph 12(e) and Annex I.
([78]) Article 27(6).
([79]) Paragraph 12(e).
([80]) Article 27(6).
([81]) Annex 1.
([82]) Article 27(6).
([83]) Annex 1.

(141) On this basis, the Norwegian authorities are invited to elaborate on whether, in light of the concrete risks associated with the leasing contracts, the aid amount per beneficiary is limited to the minimum needed to incentivise the economic activities in question. ESA underlines that this assessment will have to be made with reference to each individual contract.

7.3.3.4.5. Conclusion on limited negative effects

(142) In light of the above, ESA currently doubts whether the negative effects of the aid on competition and trade are sufficiently limited.

7.3.3.5. Balancing the positive and negative effects of the aid

(143) For aid to be compatible with the functioning of the EEA Agreement, the limited negative effects of the aid measure as concerns distortion of competition and adverse impact on trade between Contracting Parties, must be outweighed by positive effects in terms of contribution to the development of economic activities or areas. It must be verified that the aid does not adversely affect trading conditions to an extent contrary to the common interest.

(144) As follows from the above, ESA is preliminarily inclined to conclude that the aid has directly facilitated the economic activities of the direct beneficiaries, and indirectly the economic activities engaged in by the end users. However, ESA has not previously assessed aid to innovation clusters in support of the costs of leasing tangible assets for which there exists no purchasing obligation. Consequently, what are more precisely the positive effects of the aid, is not evident to ESA.

(145) In respect of the negative effects, ESA doubts whether the negative effects of the aid on competition and trade are sufficiently limited. It is not evident that the aid is not more distortive than the alternative of granting investment aid within the meaning of the GBER ([84]) and the RDI-guidelines ([85]). ESA further questions whether, in order to incentivise additional economic activities, it was necessary to grant aid with the same intensity as if it had concerned investments in tangible assets within the meaning of the GBER ([86]) and the RDI-guidelines ([87]).

(146) At this stage, ESA therefore doubts that the positive effects of the measure outweigh its possible distortions of competition and adverse impact on trade.

8. **Conclusion**

(147) As specified in section 6.6, ESA preliminarily concludes that the aid amounts identified in that section are unlawful. As further set out in section 7, ESA doubts whether this aid is compatible with the functioning of the EEA Agreement.

(148) Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, ESA hereby opens the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of ESA.

(149) Acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, ESA therefore invites the Norwegian authorities to submit their comments by 6 October 2022, and to provide all documents, information and data needed for ESA's assessment. In the event that the Norwegian authorities should submit that the concerned aid is compatible with the functioning of the EEA Agreement, the Norwegian authorities are invited to provide a complete compatibility analysis of the aid.

([84]) Article 27(6).
([85]) Paragraph 12(e).
([86]) Article 27(6).
([87]) Annex 1.

(150) The Norwegian authorities are also requested to immediately forward a copy of this decision to the aid recipients.

(151) If this letter contains confidential information which should not be disclosed to third parties, please inform ESA by 16 September 2022, identifying the confidential elements and the reasons why the information is considered to be confidential. In doing so, please consult ESA's Guidelines on Professional Secrecy in State Aid Decisions ([88]). If ESA does not receive a reasoned request by that deadline, the Norwegian authorities will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter.

(152) Finally, ESA will inform interested parties by publishing a meaningful summary in the *Official Journal of the European Union* and the EEA Supplement thereto. All interested parties will be invited to submit their comments within one month of the date of such publication. The comments will be communicated to the Norwegian authorities.

For the EFTA Surveillance Authority,

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Responsible College Member

Stefan BARRIGA
College Member

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([88]) Published in the OJ L 154, 8.6.2006, p. 27 and EEA Supplement No 29, 8 czerwca 2006, p. 1.