

Brussels, 2 April 2019  
Case No: 82159  
Document No: 1045635  
Decision No 020/19/COL

Ministry of Trade, Industry and Fisheries  
PO BOX 8090 Dep  
0032 Oslo  
Norway

**Subject: Leangbukten Båtforenings Andelslag**

## 1 Summary

- (1) The EFTA Surveillance Authority (“the Authority”) wishes to inform Norway that, having assessed the alleged state aid measures benefitting Leangbukten Båtforenings Andelslag SA (“LBA”), it considers that the measures do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.<sup>1</sup>
- (2) The Authority has based its decision on the following considerations.

## 2 Procedure

- (3) On 25 May 2018,<sup>2</sup> Asker Marina AS (“the complainant”) lodged a formal complaint with the Authority, concerning two alleged state aid measures benefitting LBA.
- (4) By letter dated 29 May 2018,<sup>3</sup> the Authority forwarded the complaint to the Norwegian authorities and requested their comments. By letter dated 4 July 2018,<sup>4</sup> the Norwegian authorities provided their initial comments on the complaint.
- (5) By letter dated 23 August 2018,<sup>5</sup> the Authority requested additional information from the Norwegian authorities. By letter dated 17 September 2018,<sup>6</sup> the Norwegian authorities replied to the information request.
- (6) By letter dated 10 October 2018,<sup>7</sup> the Authority, pursuant to paragraph 48(b) of the Authority’s Guidelines on Best Practices for the conduct of state aid control procedures,<sup>8</sup> provided the complainant with its preliminary assessment of the complaint. By letter dated 9 November 2018,<sup>9</sup> the complainant provided the Authority with additional comments.

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<sup>1</sup> Reference is made to Article 4(2) of the Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

<sup>2</sup> Document No 915156.

<sup>3</sup> Document No 915254.

<sup>4</sup> Documents No 922683 and 922681.

<sup>5</sup> Document No 927539.

<sup>6</sup> Documents No 930334 and 930332.

<sup>7</sup> Document No 930549.

<sup>8</sup> [OJ L 82, 22.3.2012, p. 7](#) and EEA Supplement No 17, 22.3.2012, p. 1.

<sup>9</sup> Document No 1037805.

### 3 Description of the measures

#### 3.1 Background

- (7) Norway has one of the largest boat and marina markets in Europe, with an estimated 750 000 leisure craft in operation. 24.5% of all Norwegian households own at least one leisure boat. A significant share of Norwegian leisure boats and marinas are located in the Oslofjord area.<sup>10</sup> By comparison, the total number of leisure boats in the EU is approximately 6 million.<sup>11</sup>
- (8) The municipality of Asker (“the Municipality”) is part of the greater Oslo area. It has a population of 59 000 people. The Municipality’s harbour (“Leangbukta harbour”), where both the complainant and LBA operate, has in total approximately 2 000 berths for boats.

#### 3.2 The beneficiary of the alleged aid measures

- (9) LBA is a cooperative non-profit membership association, owned by its 1 250 members, whose purpose is owning and maintaining a 1 250 berth marina in Leangbukta harbour. Each individual member of LBA owns one berth and is prohibited from owning more.
- (10) Leangbukten Båtforenings Medlemslag (“LBF”) is the local boating association in the Municipality, affiliated with LBA. It was formed to promote leisure boating in the Municipality and has 2 400 members. Members of LBF are not required to own boats or berths. However, only members of LBF can purchase a share in LBA, and thus membership in LBF is a prerequisite for owning a berth in LBA’s marina.
- (11) LBA covers its operating and maintenance costs by collecting maintenance fees from its owners, and seasonal rent from members of the affiliated boating club LBF, who choose to rent berths on a seasonal basis. Only berths that are not being used by the owners themselves can be rented out, and only LBF members have the possibility of renting an LBA berth.<sup>12</sup> LBA rents out approximately 150 berths in the winter season and 400 berths in the summer season to LBF members.
- (12) LBA’s annual turnover in 2017 was NOK 9.8 million. Of this, approximately NOK 3.45 million was revenue from the seasonal rental of berths to members of LBF. The owners of LBA do not receive any dividends or other income from their berths in the marina, and LBA operates at break-even. LBA exists primarily to provide the local population of the Municipality with affordable access to leisure boating. To that effect, residents of the Municipality have priority when it comes to the distribution of available berths.<sup>13</sup>

#### 3.3 The complainant

- (13) The complainant, Asker Marina AS, is a private operator of marinas in the Oslofjord area, and operates a marina with 500 berths in Leangbukta harbour. The complainant rents out these berths to boat owners, and provides a range of other services typically provided by marinas such as winter harbour services and boat storage on land.
- (14) The complainant is wholly owned by Båtgutta AS, which also owns several other marina-sector companies in the Oslofjord area, such as Holmen Yachtverft AS, Leangbukta

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<sup>10</sup> The numbers are based on estimates in the 2012 report [Båtlivsundersøkelsen Fritidsbåtlivet i Norge 2012](#) by Kongelig Norsk Båtforbund and Norboat.

<sup>11</sup> Commission Decision SA.39403 *Netherlands - Investment aid for Lauwersoog port*, OJ C 259, 7.8.2015, p. 4.

<sup>12</sup> Document No 922681, p 1 and Document No 930332, p 2. See also the shared [website](#) of LBA and LBF.

<sup>13</sup> Document No 930332, p 2. See also LBF’s and LBA’s shared [website](#).

Holding AS, Stradex AS and Asker Marina Drift AS. Fredensborg AS, a large property company, owns approximately 60% of the shares in Båtgutta AS.

### 3.4 *The alleged aid measures*

- (15) In its complaint, Asker Marina AS alleges that LBA has received unlawful state aid from the Municipality through two separate agreements, namely:
- a) On 19 December 2006, the Municipality granted LBA the right to lease a land and sea area in Leangbukta for 25 years at conditions not corresponding to market terms (LBA pays NOK 225 000 annually for the lease).
  - b) On 25 June 2008, the Municipality and LBA entered into an agreement granting LBA the right to develop the sea area in Leangbukta. LBA did not pay any remuneration for this right. The complainant maintains that a private party had signalled that it would be willing to pay NOK 50 million for this right, and that the Municipality had previously performed a valuation that indicated that the right was worth NOK 17.5 million. The complainant further submits that this agreement seems to be unlimited in time and only subjects LBA to some general obligations.

## 4 Arguments of the complainant

- (16) The complainant maintains that the alleged aid measures meet the cumulative criteria for state aid within the meaning of Article 61(1) EEA, as the alleged aid measures confer a selective advantage through state resources to an undertaking.
- (17) The complainant further maintains that the alleged aid measures have an effect on trade between EEA States. In that respect, the complainant argues that it is not necessary to establish that the aid has an actual effect on intra EEA-trade, but only whether the aid is liable to affect such trade. Where aid granted by an EEA State strengthens the position of an undertaking as compared to other undertakings competing in intra-EEA trade, the latter must be regarded as affected by the aid.<sup>14</sup> The complainant maintains that in the present case, the subsidised operator has increased supply, rendering further investment by private investors difficult.
- (18) The complainant asserts that the Commission's decisional practice, where it has concluded that support to local marinas did not affect trade, can be distinguished from the case at hand. In cases involving marinas of a similar size to that of LBA's marina, the Commission has concluded that such marinas perform regular economic activities, capable of affecting trade.
- (19) The complainant stresses that international actors are investing in marinas in Northern Europe and Norway, indicating increased investor-interest in the sector. The complainant further notes that the alleged aid to LBA affects not only the marina market, but also associated markets, such as the market for dry spaces.
- (20) Finally, the complainant asserts that the alleged aid measures constitute incompatible aid, and that at least the agreement of 25 June 2008, relating to the right to develop the sea area in Leangbukta, constitutes new unlawful aid.

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<sup>14</sup> E-01/16 *Synnøve Finden AS v Staten v/Landbruks- og matdepartementet* [2016] EFTA Ct. Rep. 931, paragraph 45.

## 5 Comments by the Norwegian authorities

- (21) According to the Norwegian authorities, it is common practice among municipalities along the coastline in Norway to rent out berths to residents. However, instead of renting out directly to private persons, municipalities sometimes rent out land to non-profit member organisations, which in turn provide the service of renting out berths. Therefore, since it is common for municipalities to rent out berths, and/or rent out land for berth-purposes, the market price is in general equivalent to the price in the agreement between the Municipality and LBA. However, private investors are seeking to increase this general market price, especially in or nearby cities.
- (22) According to the Norwegian authorities, LBA is required, on the basis of the agreement of 25 June 2008, to perform its marine activity on a non-profit basis and to establish a publicly accessible runway.
- (23) The Municipality has confirmed that it did not have any indication that a private party was willing to pay NOK 50 million for the right to develop the sea area. It did, however, obtain an expert evaluation that estimated the value to NOK 17.5 million. This valuation was based on a condition that the right to develop the sea area was not subject to any restrictions, and that the necessary public permissions would be given. On this basis, the Norwegian authorities contend that LBA did not receive any economic advantage related to the 25 June 2008 agreement, as that agreement contains various obligations not included in the valuation.
- (24) The Norwegian authorities further argue that LBA's operations are of a purely local nature. LBA is a cooperative, owned by its 1 250 members, who in turn are all members of LBF, which has 2 400 members. In order to purchase a share in LBA and own a berth, one must first become a member of LBF. Members of LBF are assigned membership numbers (seniority), which determines who can buy an open share in LBA. Residents of the Municipality also have priority over non-residents when it comes to buying a share in LBA. Only one share can be owned per person, the prices are fixed and a shareholder may not sell their share at a profit. Furthermore, when an owner chooses not to use their own berth, LBA has the opportunity to rent it out, but only to a member of LBF. This structure has led to a situation where no non-Norwegian residents own or rent LBA berths, as all members of LBF are Norwegian residents.

## 6 Presence of state aid

- (25) 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.”
- (26) The qualification of a measure as state aid within the meaning of this provision therefore 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; and (iv) threaten to distort competition and affect trade between EEA States.
- (27) In the present case, the Authority considers it appropriate to look first at the alleged aid measures' possible effect on trade between EEA States.

## 6.1 Impact on competition and effect on trade between EEA States

### 6.1.1 General

- (28) An effect on trade cannot be merely hypothetical or presumed. That said, an economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between EEA States is not required.<sup>15</sup> However, it must be established why the measure is liable to have an effect on intra-EEA trade, based on the foreseeable effects of the measure.<sup>16</sup>
- (29) In that respect, the Authority and the Commission have in a number of decisions considered that certain activities and measures, in view of their specific circumstances, have a purely local impact and consequently no effect on intra-EEA trade.<sup>17</sup> In those cases, the Authority and the Commission ascertained in particular: (i) that the beneficiary supplied goods or services to a limited area within the territory of an EEA State and was unlikely to attract customers from other EEA States, and (ii) that it could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment.<sup>18</sup>

### 6.1.2 Supplying services to a limited area and unlikelihood of attracting customers from other EEA States

- (30) With regard to whether the beneficiary is active in a limited area, the Norwegian authorities have indicated that LBA represents only a small part of the regional market for the renting of marina berths. The Authority notes that while the size of a marina can be a factor in an assessment of effect on trade, it is not alone decisive. Other factors, beside size, must be taken into account. In state aid cases, involving marinas, where effect on trade could not be excluded, the marinas in question had a significant market share, did not predominantly cater local users, or both.<sup>19</sup> However, in similar cases, where effect on trade was excluded, the marinas had a small market share and provided services predominantly, or entirely, to local customers.<sup>20</sup>
- (31) LBA has 1 250 berths in total, but only 150 to 400 of them are available for rent each year. The other 850 to 1 100 berths are not rented out, but instead owned and used by the

<sup>15</sup> See, for instance, judgment of the Court of Justice in *Mediaset SpA v Commission*, C-403/10 P, EU:C:2011:533, paragraphs 111, 113 and 115.

<sup>16</sup> See, for instance, judgment of the General Court in *AITEC and others v Commission*, Joined Cases T-447/93, T-448/93 and T-449/93, EU:T:1995:130, paragraph 141.

<sup>17</sup> See, for instance, the Authority's [Decision No 459/12/COL](#), *Bømlabadet Bygg AS*, OJ C 193, 4.7.2013, p. 9 and the EEA Supplement No 39, 4.7.2013, p. 1, and the Commission's decisions in cases N 258/2000 *Leisure Pool Dorsten*, OJ C 172, 16.6.2001, p. 16; N 458/2004 *Editorial Andaluza Holding*, OJ C 131, 28.5.2005, p. 12; SA.34576 *Jean Piaget North-east Continuing Care Unit*, OJ C 73, 13.3.2013, p. 1; SA.38035 *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery*, OJ C 188, 5.6.2015, p. 3 and SA.38208 *Alleged aid to UK member-owned golf clubs*, OJ C 277, 21.08.2015, p. 4.

A number of these decisions have concerned the operation of recreational ports. See, for instance, the Commission's decisions in C10/2003 *Non-profit harbours for recreational crafts*, OJ L 34, 6.2.2004, p. 63; SA.39403 *Investment aid for Lauwersoog port*, OJ C 259, 7.8.2015 p. 4 and SA.45220 *Komunala Izola Marina*, OJ C 291, 1.9.2017, p. 3 (On appeal before the General Court, see *Marinvest and Porting v Commission*, Case T-728/17).

<sup>18</sup> See the Authority's [Guidelines on the notion of State aid as referred to in Article 61\(1\) of the EEA Agreement](#) (OJ L 342, 21.12.2017, p. 35 and EEA Supplement No 82, 21.12.2017, p. 1), paragraph 196.

<sup>19</sup> See the Commission's decisions in SA.34815 *Dutch marina - Jachthaven Scharendijke*, OJ C 219, 22.6.2018, p. 1. and SA.36621 *Port of Capo d'Orlando*, OJ C 69, 7.3.2014, p. 9.

<sup>20</sup> See the Commission's decisions in C10/2003 *Non-profit harbours for recreational crafts* and SA.45220 *Komunala Izola Marina*.



individual members of LBA. These berths cannot be considered to be in a market for berth rentals and are not in direct competition with private operators, such as the complainant, which offers berths for rent. Therefore, at most 400 of LBA's 1 250 berths (32%) could be regarded as potentially competing directly with the services offered by private operators specialized in mooring and berth rental services.

- (32) Although the Authority has not received exact figures on the number of marinas or berths for rent in the Oslofjord area, it appears based on a cursory examination that LBA, with its 150–400 berths available for rent, has a very low market share on a market for berth rentals in the Oslofjord area.<sup>21</sup> The same considerations would apply to other related markets, such as the market for dry spaces. Furthermore, LBA operates only in the Municipality of Asker, thereby only providing services in a limited area within the territory of a single EEA State.
- (33) With regard to whether the beneficiary is unlikely to attract customers from other EEA States, the Authority notes that being a member of LBF, the local boating association in the Municipality, is a necessary prerequisite for owning or renting an LBA berth. When berth owners, who decide not to use their berths, rent them to other boat owners in the summer or winter, they can only rent them out to other LBF members.<sup>22</sup> Thus, no one who is not a member of LBF has the possibility to rent a berth from LBA. In light of these specific circumstances, it appears that LBA is very unlikely to attract customers from other EEA States. Indeed, the Norwegian authorities have confirmed that all LBF members, and therefore all berth owners and renters, are Norwegian residents. No berths are owned or rented by non-Norwegian residents.
- (34) Moreover, LBA operates only in the municipality of Asker, at Leangbukta, which is located more than 100 kilometres (by road) from the Swedish border, the closest EEA border. The closest Swedish marina is located approximately 150 kilometres (by road) from the Municipality. It is reasonable to assume that Swedish resident customers for berth rentals will generally use alternative marinas, rather than travelling more than 100 kilometres, or from even further away.
- (35) Furthermore, LBA does not market its rentals of berths by other means than word-of-mouth and via a restricted section of its own website, accessible only to its members, who in turn must also be members of LBF. All information on LBA's website is in Norwegian and thus does not appear to be targeted to non-Norwegian residents in any way.<sup>23</sup>
- (36) Therefore, based on the above, the Authority considers that the alleged beneficiary supplies goods or services to a limited area within the territory of an EEA State and is unlikely to attract customers from other EEA States.

### 6.1.3 *Effect on the conditions of cross-border investments and establishment*

- (37) With regard to cross-border investments and establishment, the Authority notes that LBA is not active on any other market than the market for berths in the Municipality, and would appear to have a very low market share on the market for berth rentals in the Oslofjord area, let alone on a national or European market. Furthermore, LBA does not attract non-local customers, and currently provides services exclusively for Norwegian residents. Therefore, the alleged aid measures cannot indirectly strengthen the position of an undertaking active in a transnational market. The measures also appear to be of limited

<sup>21</sup> See statistics in paragraph 7 of this Decision.

<sup>22</sup> See paragraph 11 of this Decision.

<sup>23</sup> <https://leangbukten.no/>.

scope, and thus unlikely to preclude or deter undertakings from other EEA States from establishing themselves in the marina sector in the Oslofjord area or in Norway in general.

- (38) Moreover, LBA is subject to multiple restrictions when it comes to providing marine services, such as renting berths, including the obligation to prioritize service to residents of the Municipality, and to establish a publicly accessible runway.
- (39) Finally, the limited economic activities of LBA, whose annual turnover in 2017 from short term rentals was NOK 3.45 million (approx. EUR 350 000), as well as the relatively low amount of alleged state aid, provide further indications that the alleged aid measures only insignificantly, if at all, affect intra-EEA trade.
- (40) Consequently, the alleged aid measures cannot be seen to have, if any, more than a marginal effect on the conditions of cross-border investments or establishment.

## **6.2 Conclusion**

- (41) Accordingly, based on an overall assessment of the above indications, and in light of the available evidence, the Authority has reached the conclusion that the alleged state aid measures are not liable to affect trade between EEA States.
- (42) As the measures are not liable to affect trade between EEA States, there is no need to examine the other cumulative conditions for the existence of state aid within the meaning of Article 61(1) EEA.

## **7 Conclusion**

- (43) On the basis of the foregoing assessment, the Authority considers that the measures subject to the complaint do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

For the EFTA Surveillance Authority,

Yours faithfully,

Bente Angell-Hansen  
President  
Responsible College Member

Frank J. Büchel  
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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*