

Brussels, 10 July 2019  
Case No: 83835  
Document No: 1058866  
Decision No 052/19/COL

Ministry of Trade, Industry and Fisheries  
Postboks 8090  
Dep N-0032  
Oslo, Norway

**Subject: Farsund Vekst**

## 1 Summary

- (1) The EFTA Surveillance Authority (“the Authority”) wishes to inform the Norwegian authorities that it has concerns that measures related to the development of the Nordkapp and Farøy areas in Farsund municipality in Vest-Agder county might entail state aid pursuant to Article 61(1) of the EEA Agreement, and has doubts as to the compatibility of the measures with the EEA Agreement. Therefore, the Authority is required to open a formal investigation procedure <sup>(1)</sup>.
- (2) The Authority has based its decision on the following considerations.

## 2 Procedure

- (3) By letter dated 16 April 2018 <sup>(2)</sup>, the Authority received a complaint alleging that Farsund Municipality (“the Municipality”) in Norway has granted unlawful state aid to Glastad Farsund AS and its wholly owned subsidiaries Farsund Vekst AS and Nordkapp Utvikling AS.
- (4) By letter dated 18 April 2018 <sup>(3)</sup>, the Authority forwarded the complaint to the Norwegian authorities and invited them to comment on it. By letter dated 21 June 2018 <sup>(4)</sup>, the Norwegian authorities responded.
- (5) By letter dated 10 October 2018 <sup>(5)</sup>, the Authority requested information from the Norwegian authorities. By letter dated 6 December 2018 <sup>(6)</sup>, the Norwegian authorities responded.
- (6) By letter dated 26 November 2018 <sup>(7)</sup>, the Norwegian authorities forwarded supplementary information from the complainant to the Authority <sup>(8)</sup>. By letter dated 13 December 2018, the Authority invited the Norwegian authorities to comment on the supplementary information and requested a meeting to discuss

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<sup>(1)</sup> Reference is made to Article 4(4) of 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 909653.

<sup>(3)</sup> Document No 909644.

<sup>(4)</sup> Document No 1045487.

<sup>(5)</sup> Document No 932210.

<sup>(6)</sup> Document No 1042409.

<sup>(7)</sup> Document No 1040145.

<sup>(8)</sup> Document No 1040147.

the case. On 10 January 2019, a videoconference was held between the Authority and the Norwegian authorities. By letter dated 6 March 2019 <sup>(9)</sup>, the Norwegian authorities provided their comments on the supplementary information from the complainant <sup>(10)</sup>.

- (7) By email dated 21 May 2019, the complainant submitted further information on the market value of a plot of land in the Farøy area <sup>(11)</sup>.

### 3 Description of the measures

#### 3.1 Background

- (8) In 2010, the Municipality and Glastad Farsund AS (“Glastad”) planned the development of housing and commercial real estate in Farsund, Norway. The Municipality and Glastad decided to develop certain areas in Farsund Municipality; (i) Nordkapp, located in gnr. <sup>(12)</sup> 1 bnr. <sup>(13)</sup> 199 m.fl. <sup>(14)</sup> (“the Nordkapp area”) and (ii) Farøy, located in gnr. 3, bnr. 80 & 49 and part of gnr. 3 bnr. 23 (“the Farøy area”).
- (9) On 21 December 2010, a valuation of the areas was made by a real estate agency located in Kristiansand, Næringsmegleren Sædberg & Hodne AS <sup>(15)</sup>. The Nordkapp area was valued at NOK 25 million and the Farøy area at NOK 10.5 million. The valuation took into account estimated preparation costs and future use of the areas. The valuation was based on the assumption that the areas would be rezoned in the near future and that they would be ready for construction. The valuation of the Nordkapp area estimated that the reclamation of land needed to complete the plot would cost around NOK 12 million.
- (10) Regarding the preparation costs, the Municipality engaged one of Norway’s largest consulting engineering and architectural firms, Asplan Viak, to assess how much it would cost to fill out the property at Nordkapp. Asplan Viak estimated that the cost of filling out the property would be NOK 12 million excluding VAT, and this cost estimate was used in the assessment from Næringsmegleren. Asplan Viak assumed that inexpensive mass from the nearby area Røssevika could be used. However, it turned out that the expected quantity of masses from Røssevika was not available when the municipality needed it. The municipality acknowledges having spent approximately NOK 15.8 million including VAT on landfills in the Nordkapp area <sup>(16)</sup>.
- (11) On 27 May 2011, a shareholders’ agreement was entered into between the Municipality and Glastad, establishing Farsund Vekst AS. The two parties each owned 50% of the shares of Farsund Vekst AS <sup>(17)</sup>. On the same day, the Municipality concluded option agreements with Farsund Vekst AS for the Nordkapp area (“the Nordkapp option”) and the Farøy area (“the 2011 Farøy option”). The prices in the options for acquiring the areas were set according to the valuation from 2010.

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<sup>(9)</sup> Document No 1057576.

<sup>(10)</sup> Document No 1057574.

<sup>(11)</sup> Document No 1070527.

<sup>(12)</sup> Gnr. is an abbreviation for Gårdsnummer (English translation: Cadastral unit number)

<sup>(13)</sup> Bnr. is an abbreviation for Bruksnummer (English translation: Property unit number)

<sup>(14)</sup> M.fl. is an abbreviation for Med flere (English translation: With others)

<sup>(15)</sup> Document No 1045487 (attachment 1).

<sup>(16)</sup> Document No 1057574 (attachment 23).

<sup>(17)</sup> Document No 1045487 (attachment 2).

### 3.2 The Nordkapp option

- (12) The Nordkapp option <sup>(18)</sup> provided Farsund Vekst AS with the exclusive right to start immediately the construction of a shopping mall in the Nordkapp area and then buy the land for NOK 25 million within a period of 18 months. The Nordkapp area is about 16 300 m<sup>2</sup> and zoned for housing and commercial real estate. The area was not measured and the agreement states that a deviation of +/- 10% should not result in a change in the agreed option price. According to the agreement, deviations beyond this provide a basis for revising the agreed price according to the price per square meter.
- (13) According to the Nordkapp option, Farsund Vekst AS must develop 200 parking spaces for public use free of charge to replace the parking spaces already located in the Nordkapp area.
- (14) On 22 November 2012, five days before it was set to expire, Farsund Vekst AS let the Municipality know that it intended to make use of the option <sup>(19)</sup>. However, no actual payment took place at that time, since Farsund Vekst AS could not afford to buy all of the Nordkapp area.
- (15) Early 2015, it was clear that Farsund Vekst AS could not afford to make use of the entire Nordkapp option at a total price of NOK 25 million all at once. At that time, Farsund Vekst AS had already started to build the shopping centre. On 10 March 2015, the Municipality agreed to allow Farsund Vekst AS to informally exercise the Nordkapp option by paying NOK 8.5 million for the area already covered by the shopping centre <sup>(20)</sup>. On 14 October 2015, the Nordkapp option was formally divided into 3 parts ("Nordkapp part 1/2/3") <sup>(21)</sup>. The price for each part was based on the 2010 valuation for the whole Nordkapp area.
- (16) Nordkapp part 1 was valued at NOK 8.5 million. The option provided Farsund Vekst AS with the exclusive right to buy the land under the shopping centre in the Nordkapp area. As previously stated, on 10 March 2015, Farsund Vekst AS, through its wholly owned subsidiary Nordkapp Utvikling AS, exercised Nordkapp part 1 for NOK 8.5 million <sup>(22)</sup>.
- (17) Nordkapp part 2 was valued at NOK 9 million. The option provides Farsund Vekst AS with the exclusive right to buy the remaining land already reclaimed in the Nordkapp area. The option covers just over 1/3 of the whole Nordkapp area. Even before exercising the option, Farsund Vekst AS is allowed to make use of the parking spaces in the area, but the 200 parking spaces they must develop shall be available before the Municipality completes its construction on the rooftop of the shopping centre (see paragraph (25) below). The option is not time limited, but must be exercised before the Municipality starts construction on the rooftop of the shopping centre. Nordkapp part 2 has not been exercised yet.
- (18) Nordkapp part 3 is valued at NOK 7.5 million. The option provides Farsund Vekst AS with the exclusive right to buy the west end of the Nordkapp area (the area that has not been reclaimed). The option covers approximately 1/3 of the whole

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<sup>(18)</sup> Document No 909656.

<sup>(19)</sup> Document No 1042409 (attachments 6–7).

<sup>(20)</sup> Document No 1057574 (attachment 14).

<sup>(21)</sup> Documents Nos 909658 & 1042409.

<sup>(22)</sup> Document No 1057574 (attachment 14).

Nordkapp area and shall be reclaimed in accordance with the original Nordkapp option. Nordkapp part 3 is not limited in time and has not been exercised yet.

### **3.3 The 2011 Farøy option**

- (19) The 2011 Farøy option <sup>(23)</sup> provided Farsund Vekst AS with the exclusive right to work on the development and rezoning of the Farøy area and to buy it for NOK 10.5 million. The option had to be used within a period of 18 months, starting on the day the area would be rezoned.
- (20) The Farøy area allowed for approximately 1 900 m<sup>2</sup> of industrial real estate, the area was not measured and the agreement states that a deviation of +/- 10% should not result in a change in the agreed option price. The agreement further states that deviations beyond +/- 10% provided basis for revising the agreed price according to the price per square meter.
- (21) Farsund Vekst AS did not exercise the 2011 Farøy option before it was amended in 2015.

### **3.4 The 2015 Farøy option**

- (22) On 14 October 2015, the Municipality agreed to amend the 2011 Farøy option <sup>(24)</sup>. The amended 2011 Farøy option (“the 2015 Farøy option”) is different as it concerns a larger area than the 2011 Farøy option and a price adjustment mechanism was introduced. The 2015 Farøy option provides Farsund Vekst AS with the exclusive right to buy the Farøy area for NOK 10.5 million, based on the assumption that a new zoning plan will allow for a minimum utilisation of 2 400 m<sup>2</sup>. According to the Norwegian authorities, the additional area (500 m<sup>2</sup> (1 900 m<sup>2</sup> vs 2 400 m<sup>2</sup>)) is supposed to be developed as a recreational park for public use.
- (23) Farsund Vekst AS has a right to require a reduced price if utilisation will be below 2 400 m<sup>2</sup>. There is no corresponding right for the Municipality to require a higher price for a higher utilisation.
- (24) The 2015 Farøy option has the same time limit as the 2011 Farøy option (18 months starting on the day the area would be rezoned). A new zoning plan was adopted by the Municipality in September 2018, but has been appealed to the County Governor of Agder, who still considers the case. Farsund Vekst AS has not yet exercised the 2015 Farøy option. Based on the information available to the Authority, it is not clear whether the appeal has any implications for the date of expiry of the option.

### **3.5 The sale of shares in Farsund Vekst AS**

- (25) On 17 September 2015, the Municipality decided to sell all its shares (50%) in Farsund Vekst AS <sup>(25)</sup>. At that time, the first and second floor of the shopping centre was commenced, but not completed. On 14 October 2015, it was decided that Glastad would buy the shares <sup>(26)</sup>. The price was set to NOK 21 million, based on the total equity capital of Farsund Vekst AS <sup>(27)</sup>. Glastad never transferred the funds to the Municipality. Instead, the parties agreed that the rights

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<sup>(23)</sup> Document No 1042409 (attachment 4).

<sup>(24)</sup> Documents No 909657.

<sup>(25)</sup> Documents Nos 909661 and 1042409 (attachments 1 and 2).

<sup>(26)</sup> Document No 909659.

<sup>(27)</sup> Document No 1045487 (attachments 4–7).

to build a third and a fourth floor on the rooftop of the shopping centre (a right held by Farsund Vekst AS, the company that the Municipality was in the process of selling to Glastad) should be sold to the Municipality. On 7 August 2015, Næringsmegleren Sædberg & Hodne AS valued the right to develop the rooftop at NOK 8 million (if developed solely as a commercial property) or NOK 42.5 million (with a maximum capacity of apartments) <sup>(28)</sup>. The Municipality and Glastad agreed to a purchase price of NOK 23.5 million. Hence, the Municipality agreed to pay the difference of NOK 2.5 million (NOK 23.5 million minus NOK 21 million equals NOK 2.5 million) to Glastad.

- (26) Today, almost four years later, the Municipality has not made use of the acquired right to construct.

## 4 The complaint

### 4.1 The alleged aid measures

- (27) The complainant alleges that the Municipality has granted unlawful state aid to Glastad and its wholly owned subsidiaries Farsund Vekst AS and Nordkapp Utvikling AS through the following measures connected to the development of the Nordkapp and Farøy areas.
- a. By providing option agreements for the Nordkapp and Farøy areas that have no price adjustment mechanism in case of future price increases and where the Municipality is not compensated for the options.
  - b. By selling Nordkapp part 1 at a price below market price.
  - c. By selling the Municipality owned shares in Farsund Vekst AS at a price below market price.

### 4.2 The value of the Nordkapp area

- (28) The complainant argues that the 2010 valuation from Næringsmegleren Sædberg & Hodne AS of the Nordkapp area that provides an estimation of NOK 12 million in preparation costs and a total price of NOK 25 million is not representative of the market price. The complainant notes that a better indication of the value of the Nordkapp area can be found in the court ruling of Lister District Court from 19 November 2011 <sup>(29)</sup> (the “Lister District Court ruling”) <sup>(30)</sup>. The Lister District Court ruling sets the redemption cost for land No 1, unit No 787 and 789, which were absorbed by the larger property covered by the Nordkapp option. According to the complainant, the ruling indicates that the value of the Nordkapp area is approximately NOK 69 million. Further, the ruling, as well as the memos and meeting minutes from the Municipality show that the Municipality’s costs of preparing the Nordkapp area have been upwards of NOK 42.5 million (NOK 19 million in property purchases and NOK 23.5 million in preparations costs <sup>(31)</sup>).

### 4.3 The value of the land covered by Nordkapp part 1

- (29) The complainant states that the sale of Nordkapp part 1 constitutes state aid as the relevant area accounts for more than 1/3 of the whole Nordkapp area, while the purchase price was based on a third of the valuation from 2010 without

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<sup>(28)</sup> Document No 909660.

<sup>(29)</sup> Lister District Court ruling No 11-061831SKJ-LIST [2011].

<sup>(30)</sup> Document No 1040143 (attachment 3).

<sup>(31)</sup> Document No 1040143 (attachments 4–5).

adjustment to market developments. Furthermore, the current use of the land covered by Nordkapp part 2 is now a roundabout outside the shopping centre, providing access to the centre's parking lot.

#### **4.4 The value of the land covered by the 2011 Farøy option**

- (30) The complainant notes that the Farøy area is a west-facing property, on the seafront in Farsund inner harbour. It is within walking distance of the old city centre and the new shopping centre at Nordkapp. The island of Farøy has traditionally been one of the most exclusive residential areas in the municipality. A rough calculation based on the principles used in the Lister District Court ruling, and applying an increase of 20% to account for the more valuable location, provides a price per square meter of NOK 10 200 per m<sup>2</sup>. Based on this calculation, the stipulated Farøy area of 1 900m<sup>2</sup> in 2011 should have been valued at NOK 19.4 million.

#### **4.5 The value of the land covered by the 2015 Farøy option**

- (31) The complainant notes that the 2015 Farøy option increased the size of the Farøy area, but the purchase price was still based on the valuation from 2010 without adjustment to market rates. The price set in the 2015 Farøy option, NOK 10.5 million, is based on a minimum utilisation of 2 400 m<sup>2</sup> housing. This gives a square meter price of NOK 4 375 per m<sup>2</sup>. The complainant argues that this deviates from market terms since it gives the beneficiary a right to a reduced price if utilisation is below 2 400 m<sup>2</sup>, without a corresponding right for the Municipality to require a higher price for higher utilisation.
- (32) The complainant notes that the current zoning proposal provides an utilisation of around 3 000 m<sup>2</sup>, which means that Glastad will receive the extra square meters for free if the zoning plan is confirmed and the option is exercised.
- (33) Furthermore, the complainant notes that the current zoning proposal includes two outriggers for moorings for small boats. These outriggers can provide space for at least 36 boats in total. Such berths are usually sold separately from residential units and there is no mechanism in the 2015 Farøy option to compensate for it. As an indication of value, berths further from the city centre have a current price of NOK 130 000 each <sup>(32)</sup>. Assuming construction costs of around NOK 500 000 for two outriggers and necessary anchoring, etc., this indicates a profit on berths alone of at least NOK (36 x 130 000 – 500 000 =) 4 180 000.

#### **4.6 The value of the shares in Farsund Vekst AS**

- (34) The complainant argues that the sale of the municipally owned shares in Farsund Vekst AS constitutes state aid. The complainant notes that the Municipality did not look for any other buyers, the purchase price for the shares was not based on a neutral assessment as it seems to be based solely on equity capital (not taking into account the value of options and properties held in the company, development potential etc.). The complainant further notes that the price that the Municipality paid for the rooftop (NOK 23.5 million) is higher than 50% of the total company value (NOK 21 million). This indicates that either the shares in Farsund Vekst AS were sold far below market value, or the rooftop was severely overpriced. Either way, the difference means that the private party received a significant and uncompetitive advantage.

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<sup>(32)</sup> <https://www.finn.no/boat/dock/available/ad.html?finnkode=142829167>.

## 5 Comments from the Norwegian authorities

### 5.1 *The position of the Norwegian authorities*

- (35) According to the Norwegian authorities, none of the above-mentioned measures involves state aid, since the Municipality acted in line with the market economy operator (“MEO”) principle and all the prices reflect market value.

### 5.2 *General comments on the option agreements*

- (36) In terms of compensating for the value of the options, the Norwegian authorities note that it is not common that a municipality is compensated for options. The Norwegian authorities stress that an option holder is a high-risk taker and must pay large sums to develop the area.
- (37) The Norwegian authorities are also of the opinion that it is uncommon to include a price adjustment mechanism in contracts like the ones in question. When the options were granted it was deemed difficult to determine a mechanism that would be reasonable. The parties therefore did not include such a clause in the option agreements.
- (38) Furthermore, the Norwegian authorities note that according to the Nordkapp option, Farsund Vekst AS is obligated to develop 200 parking lots for free public use. This is an expense Farsund Vekst AS must pay alone, which consequently can be considered compensation to the Municipality in addition to the purchase price itself.

### 5.3 *General comments on the amendments to the option agreements in 2015*

- (39) The Norwegian authorities note that the amendments to the option agreements in 2015 were only to formalize what was previously decided regarding the partition of the Nordkapp area into three options and the development of a recreational park in the Farøy area, not to change the main terms of the original agreement, price included.
- (40) The Norwegian authorities confirm that the 2015 Farøy option includes a larger area than the 2011 Farøy option, without a corresponding increase in price. The reason for this is that the additional area will be a recreational park for the public and will not be rezoned in the future. The Norwegian authorities are of the opinion that this area has no financial value for Farsund Vekst AS. On the contrary, this entails significant commitments for Farsund Vekst AS, since it is obligated to invest a significant amount to upgrade the area, in order to offer its use to all residents and visitors in the Municipality.
- (41) The Norwegian authorities add that the parties discussed whether there should be a corresponding right for the Municipality to require a higher price for higher utilisation. This proposal was rejected for mainly two reasons. First, if the Municipality were given this right, it would have been an incentive for it to regulate as much as possible for its own gain. It was not desirable to incentivise the Municipality's administrative authority in this way. Second, the Norwegian authorities stress that private undertakings must be allowed to make good deals with public authorities without this constituting state aid. That is a part of the negotiations and the conclusion of an agreement. The Norwegian authorities are therefore of the opinion that this is not in itself a deviation from market terms which leads to state aid.

#### **5.4 The value of the Nordkapp area**

- (42) The Norwegian authorities are of the opinion that the valuation of the Nordkapp area carried out in 2010 gives a qualified, independent and best estimate of the value of the property at that time, and that there has been no price increase in the following years.
- (43) The Norwegian authorities state that the Nordkapp area was valued at NOK 25 million in 2010. The valuation was conducted based on generally accepted market indicators and valuation standards. This valuation formed the basis for the option agreement. In other words, the Municipality acted as any other commercial player in the market would have.
- (44) In 2006, the Municipality obtained a valuation of the Nordkapp area from the assessor Jan P. Svendsen, who assessed the value of the area to be NOK 700 per m<sup>2</sup> <sup>(33)</sup>. The valuation from Næringsmegleren in 2010 concluded with a value of approximately NOK 1 050 per m<sup>2</sup>, which is 33% higher than the estimated value by Jan P. Svendsen five years earlier. This is a significantly higher increase than the general price increase in these five years, and a solid indication that Næringsmegleren's assessment was not too low.
- (45) The complainant has referred to a valuation of the properties No 787 and 789, which were expropriated by the Municipality in 2011. The Norwegian authorities are of the opinion that a comparison with these properties cannot be made just because they are in the same area as Nordkapp. First, the Municipality has obtained a separate valuation for the Nordkapp area, which is a more specific assessment than the valuation of the other two properties. Second, the private parties obtained the valuations submitted in the Lister District Court ruling for these properties. It must be assumed that these parties wanted the highest possible price for the properties. Furthermore, the Lister District Court ruling was not published until one year after the valuation of Nordkapp and was thus in any case not available at the time of the valuation of Nordkapp.
- (46) In conclusion, the Norwegian authorities state that the Municipality obtained a price estimate from a professional consultancy firm and based its decision on the best available estimate. There is always a risk of additional costs, and this cannot be used as an indication of illegal state aid. A private company would, under the same circumstances, have had to accept a similar risk in a project of this nature.

#### **5.5 The division of the Nordkapp option and the exercise of Nordkapp part 1**

- (47) The Norwegian authorities note that the price for Nordkapp part 1 is not only related to the size, but also to the permitted use of the area. Nordkapp part 1 makes up a larger area than the two other options, but the risk of building there is much higher than for the other areas. Building the two first floors of a commercial building is high risk, expensive and difficult. It is much cheaper and involves less risk building the two next floors with mainly apartments on top of the existing building. Therefore, despite the fact that Nordkapp part 2 constitutes a smaller area; it has a higher value than Nordkapp part 1.
- (48) The Municipality was, and still is, of the opinion that this solution benefitted the Municipality and furthered a responsible and rational development of the

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<sup>(33)</sup> Document No 1057574 (attachment 6).



Nordkapp area. It was important for the Municipality to make sure that progress of the development was viable and appropriate considering its importance for Farsund as a whole.

### **5.6 The value of the Farøy area**

- (49) The Norwegian authorities agree that Farøy is a good location, but state that Næringsmegleren considered this in the price assessment. With regard to the valuation as such, Castelar Holding AS, which has the same owners as Glastad, bought three properties (land No 3, units No 23, 65 and 84) only a few hundred meters from the actual property at Farøy in 2009. Selvaaggruppen, which, according to the Norwegian authorities, has been an active nationwide property developer and investor for more than 60 years, sold the properties. The properties bought by Castelar Holding AS included a fully zoned housing project, where approximately 40 apartments, with associated berths and parking garages, could be built. The total usable floor area was about 6 300 m<sup>2</sup> <sup>(34)</sup>. The total cost for these properties were NOK 8.25 million, i.e. a cost of NOK 206 250 per planned unit, and NOK 1 310 per usable floor area of apartments <sup>(35)</sup>.
- (50) The current zoning plan for the Farøy area allows for 26 units in sizes varying from 60 to 200 m<sup>2</sup>, and totalling 2 770 m<sup>2</sup> of usable floor area. Based on the option price of NOK 10.5 million this implies a cost of NOK 403 846 per unit, and NOK 3 790 per usable floor area of apartments. The valuation performed by Næringsmegleren and the option price is consequently significantly higher than the market price paid by Glastad for comparable properties a few years earlier.
- (51) In addition, all the zoning risks lie with the option holder and the option holder pays for all costs of getting the property zoned. Glastad has so far spent NOK 1.9 million on zoning work. As of today, the Municipality owns the land with existing buildings, and the Municipality receives the rent from the buildings.
- (52) The Norwegian authorities state that the above supports the Municipality's view that the agreed price for the Farøy area, as assessed by Næringsmegleren, is at least at market value.

### **5.7 The sale of shares in Farsund Vekst AS**

- (53) According to the Norwegian authorities, the price reflects that there was, in their view, only one potential buyer of the shares – the other shareholder. There were no other known prospective buyers at that time willing to purchase a 50% stake of the company – with a half-finished shopping centre with uncertain prospects and major guarantee commitments. On the other hand, the Municipality had an overall desire not to lose large amounts by selling the shares, and did not want to sell it for less than paid-in capital.
- (54) The Municipality and Glastad made an overall assessment of the project and its value, with special emphasis on the fact that the object for sale was shares and not a property. The Municipality was, and still is, of the opinion that it was unrealistic to expect that any other private investors would have taken upon itself these obligations and responsibility at a higher price than Glastad was willing to do, at that time.

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<sup>(34)</sup> The Norwegian term used in the supporting documents for usable floor area is *bruksareal* (BRA).

<sup>(35)</sup> Document No 1057574 (attachments 25–26).

- (55) The Norwegian authorities explain that the rooftop is a regulated area ready for construction. The rooftop could be used for apartments, which are of higher value than the commercial area on the first and second floor of the centre. In other words, the Municipality's potential related to the rooftop, implies a small risk compared to owning shares in Farsund Vekst AS.

## 6 Presence of state aid

- (56) 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.”

- (57) The qualification of a measure as 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 (selectivity); and (iv) be liable to distort competition and affect trade.

### 6.1 Presence of state resources

- (58) For a measure to constitute aid, it must be granted by the state or through state resources. State resources include all resources of the public sector, including resources of intra-state entities (decentralised, federal, regional, municipal or other), see the Authority's Guidelines on the notion of state aid (“NoA”) <sup>(36)</sup>.
- (59) The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A positive transfer of funds does not have to occur; waiving revenue that would otherwise have been paid to the state constitutes a transfer of state resources <sup>(37)</sup>.
- (60) If the Municipality sells the land and/or the shares below its market price, it will forego income. In such circumstances, the beneficiaries should have paid more and therefore there is a transfer of resources from the Municipality.
- (61) For these reasons, the Authority considers that if the transactions did not take place in accordance with market conditions, state resources within the meaning of Article 61(1) of the EEA Agreement would be involved.

### 6.2 Advantage

#### 6.2.1 Introduction

- (62) The qualification of a measure as state aid requires that it confers an advantage on the recipient. An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit that an undertaking could not have obtained under normal market conditions <sup>(38)</sup>.

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<sup>(36)</sup> [OJ L 342, 21.12.2017, p. 35](#) and EEA Supplement No 82, 21.12.2017, p. 1, para. 48.

<sup>(37)</sup> NoA, para. 51.

<sup>(38)</sup> NoA, para. 66.

- (63) The measure confers an advantage not only if it confers positive economic benefits, but also in situations where it mitigates charges normally borne by the budget of the undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities <sup>(39)</sup>.
- (64) Economic transactions carried out by public bodies are considered not to confer an advantage on the counterpart of the agreement, and therefore not to constitute aid, if they are carried out in line with normal market conditions. This is assessed pursuant to the market economy operator principle (“MEOP”) <sup>(40)</sup>.
- (65) The conclusion of option agreements can qualify as state aid if the eventual sale of the underlying property is below market price. If the option agreements, as such, cannot be said to comply with the MEOP, the Authority will assess whether the property was transferred at market value when the sale takes place <sup>(41)</sup>.

### 6.2.2 *The Nordkapp and the 2011 Farøy options*

- (66) The Nordkapp and the 2011 Farøy options both provide Farsund Vekst AS with the exclusive right to buy the areas and fix the price for a later transfer.
- (67) The original Nordkapp option was limited to 18 months and expired on 27 November 2012. However, the Nordkapp option in fact has no clear time limit. On 22 November 2012, Farsund Vekst AS sent an email to the Municipality saying that they will make use of the option <sup>(42)</sup>. But no actual sale took place at that time, since Farsund Vekst AS could not afford to buy the entire Nordkapp area. On 10 March 2015, Farsund Vekst AS bought Nordkapp part 1 <sup>(43)</sup>. On 14 October 2015, the Nordkapp option was formally divided into three parts. According to the Norwegian authorities <sup>(44)</sup>, Farsund Vekst AS has the exclusive right to buy Nordkapp part 2 until the Municipality decides to start building on the roof area of the shopping centre (“the rooftop”), and there is no time limit on their right to buy Nordkapp part 3.
- (68) This enables Farsund Vekst AS to observe the development of property prices over the years, before deciding whether to buy.
- (69) The agreed price in the Nordkapp and the 2011 Farøy options is based on a valuation of the areas made in 2010. Even if the prices represent the market price in 2011, the Authority questions whether the market value only corresponds to the value of the underlying properties. In the Authority’s view, that would entail that Farsund Vekst AS got the Nordkapp and the 2011 Farøy options for free.
- (70) The Authority notes that the Nordkapp area was used as a public parking space before the Nordkapp option was concluded. The fact that Glastad has to provide 200 parking spaces for public use therefore cannot be considered as a payment for the option since the construction of a shopping mall must include parking spots for its customers.

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<sup>(39)</sup> NoA, para. 68.

<sup>(40)</sup> NoA, para. 76.

<sup>(41)</sup> Case E-12/11 *Asker Brygge* [2012] EFTA Ct. Rep. 536, para. 64.

<sup>(42)</sup> Document No 1042409 (attachments 6–7).

<sup>(43)</sup> Document No 1057574 (attachment 14).

<sup>(44)</sup> Document No 1042409.

- (71) The Nordkapp and the 2011 Farøy options prevent the Municipality from selling the areas to other buyers, and thus ties up capital for which the Municipality could have found alternative uses or received interest. Furthermore, it enables Farsund Vekst AS to actively approach the Municipality, in order to reregulate the areas for purposes that would increase the market value. Moreover, the Municipality would not receive any payment in case of no subsequent sale
- (72) In the Authority's preliminary view, the Nordkapp- and the 2011 Farøy options themselves, independently of whether they were exercised or not, had a value in 2011, when the agreements were concluded. From the documentation and explanations the Authority has received so far, there is no information that Farsund Vekst AS paid for the options.
- (73) For these reasons, the Authority has doubts that a market economy operator would have entered into such option agreements, on similar conditions as the Municipality, without requiring remuneration for the option and the favourable conditions as such. By simply requiring a remuneration corresponding to the value of the property in 2011, the Municipality runs the risk of granting state aid later if property prices should increase <sup>(45)</sup>.

#### 6.2.3 The 2015 Farøy option

- (74) The agreed price in the 2015 Farøy option is based on a valuation of the Farøy area made in 2010. Even if the price represented the market price in 2010, the Authority questions whether the market value of the 2015 Farøy option only corresponds to the value of the underlying property in 2010. In the Authority's preliminary view, that would entail that Farsund Vekst AS got the 2015 Farøy option for free. When the 2011 Farøy option was amended, five years had passed from the valuation of the area, current zoning proposals included higher utilization and a new shopping mall was about to open close by.
- (75) The Norwegian authorities explain that the additional land area will not be rezoned in the future. It is not clear to the Authority how the Norwegian authorities can assert that so clearly.
- (76) The Authority further notes that the additional area for a recreational park provided in the 2015 Farøy option is located in front of a plot that is owned by a shareholder of Glastad. The area could therefore have a higher value for him than anyone else.
- (77) The 2015 Farøy option provides Farsund Vekst AS with the right to a reduced price if utilisation will be below 2 400 m<sup>2</sup> of housing, without a corresponding right for the Municipality to require a higher price for higher utilisation.
- (78) For these reasons, at this stage the Authority has doubts as to whether a private market economy operator would have entered into such an agreement.

#### 6.2.4 The sale of Nordkapp part 1

- (79) On 10 March 2015, Farsund Vekst AS bought Nordkapp part 1, through its subsidiary Nordkapp Utvikling AS, for NOK 8.5 million <sup>(46)</sup>. The price was based

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<sup>(45)</sup> Asker Brygge, paras. 12, 50 and 59.

<sup>(46)</sup> Document No 1057574 (attachment 14).

on approximately one third of the valuation for the whole Nordkapp area made in 2010.

- (80) On the basis of the Nordkapp option, Farsund Vekst AS had already started building the shopping mall in the Nordkapp area before making use of the option. Because Farsund Vekst AS could not afford to buy the entire Nordkapp area, the Municipality decided to allow Farsund Vekst AS to buy only the part that was already covered by the shopping mall.
- (81) At that time, five years had passed from the valuation and Nordkapp part 1 comprised more than a third of the entire Nordkapp area. Furthermore, the Norwegian authorities pointed out that the valuation from Næringsmegleren in 2010 estimated a value of approximately NOK 1 050 per m<sup>2</sup>, which is 33% higher than the estimated value by Jan P. Svendsen five years earlier. This is an indication of price increases for the area and the Norwegian authorities have not provided clear reasoning why the property prices did not increase between 2010 and 2015.
- (82) For these reasons, at this stage the Authority doubts that a market economy operator would have entered into such an agreement on similar conditions as the Municipality, without requesting a new valuation for each part of the Nordkapp area.

#### 6.2.5 The sale of shares in Farsund Vekst AS

- (83) When applying the MEO test, it is useful to distinguish between situations in which the transaction's compliance with market conditions can be directly established through transaction-specific market data and situations in which, due to the absence of such data, the transaction's compliance with market conditions must be assessed on the basis of other available methods<sup>(47)</sup>.
- (84) A transaction's compliance with market conditions can be directly established through transaction-specific market information in the following situations<sup>(48)</sup>:
- (a) where the transaction is carried out *pari passu* by public entities and private operators; or
  - (b) where it concerns the sale and purchase of assets, goods and services (or other comparable transactions) carried out through a competitive, transparent non-discriminatory and unconditional tender procedure.
- (85) If a transaction has not been realised through a tender, or if the intervention of the public bodies is not *pari passu* with that of private operators, this does not automatically mean that the transaction does not comply with market conditions. In such cases compliance with market conditions can still be assessed through (i) benchmarking or (ii) other assessment methods<sup>(49)</sup>.
- (86) When the Municipality sold its shares in Farsund Vekst AS in October 2015, there was no tender procedure and no effort was made to find any other buyer than Glastad.

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<sup>(47)</sup> NoA, para. 83.

<sup>(48)</sup> NoA, para. 84.

<sup>(49)</sup> NoA, para. 97.

- (87) The sale of the shares in Farsund Vekst AS, the sale of Nordkapp part 1, the valuation of the roof area of the shopping mall and the renewal of the option agreements were all done in March to October 2015. Among other factors, this closeness in time indicates that the transactions are all inter-connected and together form the Municipality's exit from the whole project. However, even though the sale of the shares in Farsund Vekst AS involved an obligation for the Municipality to later buy the roof area for NOK 23.5 million (which was subject to a new valuation around the same time), no independent valuation of the shares in Farsund Vekst AS was obtained. The agreed purchase price reflected half of Farsund Vekst AS' equity at the time of the sale, but no value was placed on the option agreements, the half-finished shopping mall or the roof area.
- (88) For these reasons, at this stage the Authority doubts that a market economy operator would have entered into such an agreement on similar conditions as the Municipality, without requesting an independent valuation of their share in Farsund Vekst AS.

### **6.3 Selectivity**

- (89) To be characterised as state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must be selective in that it favours "certain undertakings or the production of certain goods". Not all measures that favour economic operators fall under the notion of aid, but only those that grant an advantage in a selective way to certain undertakings, categories of undertakings or to certain economic sectors.
- (90) There is only one possible beneficiary undertaking for the measures under assessment, i.e. Glastad and its wholly owned subsidiaries Farsund Vekst AS and Nordkapp Utvikling AS. The measures are thus selective.

### **6.4 Effect on trade and distortion of competition**

- (91) In order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the measures must be liable to distort competition and affect trade between EEA States.
- (92) Measures granted by the state are considered liable to distort competition when they are liable to improve the competitive position of the recipient compared to other undertakings with which it competes. A distortion of competition within the meaning of Article 61(1) of the EEA Agreement is generally found to exist when the state grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition<sup>(50)</sup>.
- (93) Public support is liable to distort competition even if it does not help the recipient undertaking to expand or gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided<sup>(51)</sup>.
- (94) The Authority notes that the owner of Glastad is an active investor in Scandinavia, the UK and in the US<sup>(52)</sup>. The shopping centre in the Nordkapp area attracts

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<sup>(50)</sup> NoA, para. 187.

<sup>(51)</sup> NoA, para. 189.

<sup>(52)</sup> See Glastad's investment portfolio: <https://www.glastad.no/investment-portfolio/>.

international operators like Intersport, Cubus, Clas Ohlson and Burger King <sup>(53)</sup>. Furthermore, other developers of shopping centres like Olav Thon Group <sup>(54)</sup> and Klepierre <sup>(55)</sup> are examples of real estate developers that have shopping centres in their portfolio and are active in EEA trade. The Authority therefore cannot exclude that such real estate developers could have been interested in this project.

- (95) To the extent that the transactions have not been carried out in line with normal market conditions, they have conferred an advantage on the beneficiaries, which may have strengthened their position compared to their competitors' active in the real estate- and property development market. The business of developing real estate is in principle and in practice open to intra-EEA trade <sup>(56)</sup>. Where state aid strengthens the position of an undertaking as compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by the aid <sup>(57)</sup>.
- (96) On this basis, the Authority cannot exclude that the measures are liable to distort competition and have an effect on intra-EEA trade.

### **6.5 Conclusion**

- (97) For the above-mentioned reasons, at this stage the Authority has doubts as to whether or not the transactions concerning the Nordkapp and Farøy areas and involving Farsund Vekst AS, Glastad and Nordkapp Utvikling AS entail the grant of state aid.

## **7 Procedural requirements**

- (98) Pursuant to Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("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."
- (99) The Norwegian authorities did not notify the measures to the Authority. The Authority therefore concludes that, if the measures constitute state aid, the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

## **8 Compatibility of the aid measures**

- (100) The Norwegian authorities have not provided any arguments substantiating why the measures, if they were to constitute state aid, should be considered compatible with the functioning of the EEA Agreement. The Authority also has not identified any clear grounds for compatibility.

<sup>(53)</sup> See stores located in the shopping centre: <https://amfi.no/kjopesentre/amfi-farsund/butikker/>.

<sup>(54)</sup> See further information about the Olav Thon Group here: <http://www.olavthon.no/English/>.

<sup>(55)</sup> See further information about Klepierre here: <http://www.klepierre.com/en/portfolio/scandinavia/norway/>.

<sup>(56)</sup> See section 1.4 of the Authority's Decision No 232/11/COL on the notification of the sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the municipality of Asker (OJ L 323, 22.11.2012, p. 32, and EEA Supplement No 65, 22.11.2012, p. 56).

<sup>(57)</sup> Judgment in Eventech, C-518/13, EU:C:2015:9, para. 66.

(101) If the measures constitute state aid, the Authority has doubts as to their compatibility with the functioning of the EEA Agreement.

## 9 Conclusion

(102) As set out above, the Authority has doubts as to whether the measures constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

(103) The Authority also has doubts as to whether the measures are compatible with the functioning of the EEA Agreement.

(104) Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority 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 the Authority, which may conclude that the measures do not constitute state aid or that they are compatible with the functioning of the EEA Agreement.

(105) The Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit, by **12 August 2019** their comments and to provide all documents, information and data needed for the assessment of the measures in light of the state aid rules.

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

(107) The Authority informs the Norwegian authorities that it will publish a meaningful summary of this decision in the Official Journal of the European Union. 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,

Yours faithfully,

Bente Angell-Hansen  
President  
Responsible College  
Member

Frank J. Büchel  
College Member

Högni Kristjánsson  
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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*