

Brussels, 27 January 2010
Case No: 66375
Event No: 534287
Dec. No: 22/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 27 January 2010

on the Lease Contract between the Municipality of Lavangen and Tennevoll Mat A/S
regarding premises in the former school of Tennevoll

(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹,

HAVING REGARD to the Agreement on the European Economic Area², in particular to
Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a
Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(2) of Part II of Protocol 3 to the
Surveillance and Court Agreement⁴,

Whereas:

I. FACTS

1. Procedure

By letter dated 1 April 2009 (Event No 514586), Helgeland Investum A/S (hereinafter
“the complainant”) filed a complaint alleging that state aid was granted to Tennevoll Mat
A/S (hereinafter “TMAS”) by the municipality of Lavangen (hereinafter “the
municipality”) in connection with a lease contract regarding premises at the former school
building.

By letter dated 21 April 2009 (Event No 515599), the Authority requested additional
information from the Norwegian authorities. The Norwegian authorities replied to the
information request by letter dated 20 May 2009 (Event No 519223).

The Authority received additional information from the complainant by letter dated 9
October 2009 (Event No 533422).

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

2. Description of the aid measure

2.1. Background

Lavangen Municipality is located in the Troms region and has 1020 inhabitants. The school building is located in Tennevoll, the commercial centre of Lavangen, which has approximately 600 inhabitants.

The school of Tennevoll was built in 1984-1986, but was closed down already in 1998. Following a fire in the offices of the local health authority in 2004, the former classrooms were converted into offices for use by the local administration. By 2007, parts of the building were used by the local organization of volunteers, a fitness centre, a computer laboratory for the local adult education centre and a union. None of these uses generated any important income for the municipality.

2.2. Contract between the municipality of Lavangen and TMAS

On 26 November 2007, TMAS, a company running a grocery shop, and the municipality entered into a lease contract regarding premises in the former school of Lavangen. The contract entered into force on 1 January 2008, and on 22 May 2008 TMAS opened a SPAR supermarket on the premises.

The size of the leased premises is approximately 650 m². In addition TMAS disposes of the common areas in the building jointly with the other tenants. The rent for the premises was set to NOK 120 per m² per year.⁵ The total yearly rent thus amounts to NOK 78 000, payable in monthly instalments of NOK 6 500.

The lease contract was entered into for 10 years as of 1 January 2008, i.e. until 1 January 2018. During this period, the contract cannot be terminated by either party.⁶ TMAS has a right to request that the lease be prolonged by 5+5 years until 1 January 2028 at the longest. In case of a prolongation, TMAS will be obliged to pay “market rent”, i.e. a new rent will be determined without taking into account any renovation costs. After expiration of the last rental period TMAS will be entitled to purchase the premises at market price.

According to the contract, TMAS is obliged to use the premises to run a grocery shop / supermarket.⁷ In order to be able to do so, TMAS is entitled, but not contractually obliged, to renovate the premises.⁸ The renovation costs are not accounted for in the lease contract. However, a letter from the municipality to TMAS dated 21 November 2007 indicates that renovation costs of NOK 4 000 000 should be taken into account when establishing the rent and would be depreciated over 10 years.⁹ A consultancy firm had previously estimated that the renovation costs would amount to NOK 3 502 625, provided that the work was executed by professional craftsmen.¹⁰ It appears, however, that TMAS carried out most of the works as internal activity, which reduced the renovation costs to NOK 2 065 143.

⁵ Subject to adjustment in accordance with the general rise in consumer prices upon request by either party, see encl. 12 to the complaint, Point 6.5

⁶ Encl. 12 to the complaint, Lease Agreement between Lavangen Municipality and Tennevoll Mat A/S of 26.11.2007, Point 5.2

⁷ Encl. 12 to the complaint, Chapter 4

⁸ Encl. 12 to the complaint, Point 2.5

⁹ Encl. 11 to the complaint, Letter from Lavangen Municipality to Tennevoll Mat A/S dated 21.11.2007

¹⁰ Encl. 2 to the municipality's letter dated 20.5.2009,

2.3. The complaint

The complainant alleges that the rent paid by TMAS for the premises in question is below the market rent. According to the complainant, internal documents prepared by the municipality indicate that the market rent would be NOK 806 per m² per year.¹¹ According to the complainant, other supermarket owners would be unable to compete with TMAS due to the low rent paid under the lease contract with the municipality.

The complainant also provides copies of contracts regarding shop premises at Tennevoll. The first of these contracts dated from 2008 and was concluded for five years with a prolongation option of 5+5+5 years; the rent under this contract amounts to approximately NOK 507 per m² per year.¹² The second contract dated from 2005 and was callable with 18 months notice by either party; the rent amounts to NOK 850 per m² per year.¹³

Furthermore, the complainant argues that an alternative use for the premises would have been the establishment of a municipal kindergarten. This issue was apparently discussed in the municipal council in 2006, prior to entering into the lease contract with TMAS.¹⁴

3. Comments by the Norwegian authorities

According to the Norwegian authorities, the school building has been mainly empty since the school was closed down in 1998 in spite of the municipality's efforts to find a long-term tenant. Meanwhile, the heating and maintenance costs borne by the municipality were considerable. Therefore, renting out the premises was considered important.

The municipality determined the rent to be paid by TMAS on the basis of four criteria: (1) the rent of comparable premises in the area; (2) the market for premises in the area, (3) the demand for similar business premises; and (4) the alternative use of the building.¹⁵

The municipality carried out a market investigation in order to determine the average market rent for similar premises at Tennevoll prior to entering into the lease agreement with TMAS. The following contracts were taken into consideration for the calculation:

Owner	Tenant	Type of premises	Rent / year / m ²
SaLG Produkter	Jensens Elektriske	Shop, storage room	NOK 379, incl. approx. 70 m ² of storage space
Municipality of Lavangen	Sparebank 1	Offices	NOK 850, incl. cleaning and snow clearing
Municipality of Lavangen	NAV Lavangen	Offices	NOK 811, incl. cleaning and snow clearing
Orneset Eiendom	Municipality of Lavangen	Offices	NOK 827
Orneset Eiendom	Municipality of Lavangen	Education	NOK 737

¹¹ Encl. 13 to the complaint, Internal memorandum of Lavangen Municipality dated 21.10.2007

¹² Encl. 3 to the complaint, Lease contract of 1.4.2008 between Helgeland Fiskehelse AS and Lavangen Varesenter AS

¹³ Encl. 4 to the complaint, Lease contract of 1.12.2005 between Rikhardsen Inger og Co ANS and Lavangen Varesenter AS

¹⁴ See complainant's letter dated 9.10.2009

¹⁵ See reply by the Norwegian Authorities dated 20.5.2009 and encl. 13 to the complaint

The average rent of these contracts would be NOK 721 per year per m² per year. The municipality also considered leaving aside the first contract because the average rent paid under it deviates considerably from the rent paid under the other contracts, which may be due to the fact that the premises rented included approximately 70 m² of storage space. In this case, the average rent would be NOK 806 per m² per year.

In the same document,¹⁶ the municipality suggested that a lower rent would be acceptable in times of low demand, especially since there were several comparable premises vacant at Tennevoll at the time.

The Norwegian Authorities are of the opinion that the costs for the renovation and the refurbishment of the premises should be taken into account when calculating the rent effectively paid by TMAS. Before the contract was entered into, a consultancy calculated these costs to amount to NOK 3 502 625. Taking this amount into account, the rent actually paid by TMAS during the first ten years would amount to NOK 659 per m² per year.

II. ASSESSMENT

The presence of state aid

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

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.”

Thus, in order for a measure to involve state aid, the following requirements must be fulfilled: (1) the presence of state resources, (2) the favouring of certain undertakings or the production of certain goods, and (3) the distortion of competition and an effect on trade between Contracting Parties.

In the present case, the Authority is of the opinion that the measure does not involve state resources.

3.1. Presence of state resources

The lease contract between the municipality and TMAS would involve state resources if the municipality would forego income by renting out the premises below market rent.

The key question in this respect is whether a private investor would have acted in the same way as the municipality. If this is the case, no aid is present (private investor test). Thus, in the following, the Authority will carry out a general assessment of the lease contract and the concrete circumstances of the case in order to determine whether a market investor would have acted the same way.

3.1.1. Contractual Rent

The rent agreed upon in the lease contract between the municipality and TMAS amounts to NOK 120 per m² per year. However, in order to be able to run a supermarket in the

¹⁶ Encl. 13 to the complaint

premises, TMAS had to convert the office premises to suit the establishment of a shop. An independent assessment commissioned by the municipality prior to entering into the contract with TMAS calculated the renovation costs to amount to NOK 3 502 625.

To determine the rent, the municipality takes the renovation costs into account since it was only after transformation of the premises from office space into a shop that it could rent them out. For the municipality therefore these renovation costs were necessary to be able to rent the premises. The municipality stated this approach in the letter to TMAS dated 21 November 2007, which in the view of the Authority constitutes a supplement to the lease contract and should be taken into account when calculating the rent effectively paid by TMAS.¹⁷ In this regard, it is important that the municipality was unable to rent out the premises as offices at the prevailing market rent at the time the lease contract was entered into: According to the information provided by the Norwegian authorities, the municipality had for years unsuccessfully tried to find a long-term tenant for the premises. As a consequence, apart from sporadic rental contracts, the building had remained mainly empty.¹⁸

On the basis of the independent assessment commissioned by the municipality, the renovation costs were expected to amount to NOK 3 502 625. The Norwegian authorities have further explained that had the municipality carried out the renovation itself, it would have been obliged to take up a loan and would have incurred additional rental costs of approximately 6% - 8% of the renovation expenses.

TMAS ultimately paid only NOK 2 065 143, since parts of the work were carried out as internal activity. However, provided that the works were carried out competently, TMAS' savings cannot be imputed on the municipality, since the value added to the premises equals the amount specified by the consultancy, and not the amount actually paid by TMAS. In the Authority's view, the full renovation value of NOK 3 502 625 must therefore be taken into account when calculating the rent effectively paid for the premises.

Thus, if the amount of NOK 3 502 625 is added to the contractually agreed rent and depreciated over a period of ten years, the annual rent amounts to NOK 428 263, which corresponds to a rent of NOK 659 per m² per year.

3.1.2. *Market rent*

According to the complainant, the market rent in Tennevoll is NOK 806 per m² per year. The average rent paid under the contracts listed by the municipality (see above) amounts to NOK 721 per m² per year.

The Authority firstly observes that the contracts compiled in the overview differ as regards additional services included in the rent (some of the contracts include cleaning and snow removal, while others do not) and the type of premises that are actually rented out (size, location, floor etc.).

Secondly, the Authority observes that the rent for the only shop premises listed in the overview prepared by the municipality is decidedly lower than the rent for office premises, namely NOK 379 per m² per year. This may be due to the fact that the premises include approximately 70 m² of storage space. Furthermore, the complainant provided copies of

¹⁷ Reference is also made to the clauses of the lease contract according to which TMAS was entitled to renovate the premises and was furthermore obliged to use to premises to run a grocery shop / supermarket.

¹⁸ The fact that the municipality in 2006 had contemplated to establish a municipal kindergarten in the premises is not something that can be considered in this context. It is for the local politicians to discuss alternative uses of the premises and to take the final decision.

two lease contracts for shop premises in Tennevoll, under which the average rent amounts to NOK 507 and NOK 850 per m² per year, respectively.¹⁹ Based on this information, the average rent for shop premises in Tennevoll seems to amount to NOK 579 per m² per year.

The Authority cannot see a reason why these contracts should not be taken into account when calculating the average market rent, in particular since these contracts concern shop premises, whereas all other contracts seem to concern offices.

3.1.3. *Difference between contractual rent and market rent*

The rent actually paid by TMAS amounts to 659 per m² per year. If this sum is compared with the other rent agreements concerning shop premises in Tennevoll, and the average of which corresponds to NOK 579 per m² per year, the Authority cannot see that the municipality did not act in accordance with the market economy investor principle. The other rent contracts may be more expensive but in the Authority's view, the premises rented cannot be compared with a shop location.

However, even if the rent paid for office premises is taken into account for the calculation of the average market rent of the area, the difference between the rent paid by TMAS and the market rent would be NOK 50 or NOK 62 per m² per year, depending on whether the market rent is considered to be NOK 709 (based on all contracts presented to the Authority) or NOK 721 (the average of the overview prepared by the municipality) per m² per year. Over a period of ten years the difference between the rent paid by TMAS and the market rent would thus be NOK 325 875 or NOK 403 875, respectively.

In addition, other elements must be taken into account. Firstly, the municipality was incurring costs for the heating and maintenance of the building, even though the premises had been mainly empty. The municipality's wish to establish a long-term tenancy rather than entering into further short-term lease contracts with different tenants thus appears as a legitimate strategy to reduce the vacancy risk and the exposure of the municipality's finances. A private entity would likely have adopted the same approach.

Secondly, the lease contract between the municipality and TMAS is entered into for a fixed term of ten years during which neither party can terminate the contract. This seems to be a rather long period for a lease contract. A ten year lease provides the landlord with increased security and a prolonged planning horizon. Therefore, it is usual that a long-term lease contract will yield lower rents than a short-term contract.

Thirdly, there was apparently low demand for comparable premises in Tennevoll at the time the lease contract was entered into. There were empty spaces available in Tennevoll, not least premises owned by one of the complainant's subsidiaries. This particular circumstance may have justified a further reduction of the rent.

3.1.4. *De minimis*

Finally, the Authority remarks that the requirements of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid are met.²⁰

¹⁹ Encl. 3 and 4 to the complaint

²⁰ As incorporated into Annex XV, Points 1e and 1ea, to the EEA Agreement by Decision No 88/2002 (OJ L 266, 3.10.2002, p. 56 and EEA Supplement No 49, 3.10.2002, p. 42) and Decision No 29/2007 (OJ L 209, 9.8.2007, p. 52 and EEA Supplement No 38, 9.8.2007, p. 34)

The only other aid TMAS received during the years 2005 through 2009 was the sum of NOK 11 688 from the business fund in Lavangen Municipality in 2007. If this amount is added to the difference between the contractual rent and the market rent (NOK 325 875 or NOK 403 875, respectively), the total aid received by TMAS in any three consecutive fiscal years including the year 2007 would be NOK 337 563 (approximately EUR 40 000) or NOK 415 563 (approximately EUR 50 000), respectively. Neither of these amounts exceeds EUR 200 000 over any period of three fiscal years.

Therefore, following the application of the “de minimis” rules, the aid measure is deemed not to meet all the criteria of Article 61(1) of the EEA Agreement.

3.1.5. Conclusion

On the basis of an overall view of the circumstances of the present case the Authority concludes that a private investor in the same situation at the same moment in time would likely have acted in the same way as the municipality. In any case, the aid amounts in question fulfil the requirements of the “de minimis” rules.

4. Conclusion

On the basis of the foregoing assessment, the Authority considers that the lease contract between the municipality of Lavangen and Tennevoll Mat A/S does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the lease contract between the municipality of Lavangen and Tennevoll Mat A/S does not involve state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 27 January 2010

For the EFTA Surveillance Authority

Per Sanderud
President

Kurt Jaeger
College Member