

Case No: 66330
Event No: 558895
Dec. No: 236/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 16 June 2010

on the transfer of property from Narvik municipality to LKAB in 2004, the sale of excavated stone material and the transfers of land in the development agreement of 26 February 2009

(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 email dated 24 March 2009, the EFTA Surveillance Authority (“the Authority”) received information indicating that unlawful aid may have been granted to Luossavaara Kiiruunvaara Norge AS (“LKAB”) in connection with the acquisition of land from Narvik Municipality (“the municipality”) in 2004, the SILA construction project and the agreement between the municipality and LKAB of 26 February 2009. The email and the attachments thereto were registered by the Authority on 25 March 2009 (Event Nos 513501 and 513502) and on 21 April 2009 (Event No 515832).

On 14 May 2009, the Authority sent an information request to the Norwegian authorities. The reply thereto was received on 10 August 2009 (Event Nos 526972, 526998 and 527268-72). By email of 28 October 2009, the Authority was informed by the alleged aid recipient that further information would be submitted. This information was received on

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.

24 November 2009 (Event No 537957) and 18 January 2010 (Event No 543295-98 and 543300-11).

2. The Complaint

The complainant alleged that through several transfers of land and other deals, the municipality had granted state aid to LKAB.

LKAB is the Norwegian subsidiary of Luossavaara Kiirunvaara AB, a public limited company that is 100% owned by the Swedish state. The mother company has approximately 3 700 employees, of which 600 are located outside Sweden. It supplies highly upgraded iron ore products to the steel industry, custom-adapted mineral products for other industrial sectors and products and technologies for mining.⁵

2.1. Transfer of land from Narvik municipality to LKAB in 2004

In 2004 the municipality sold several areas of land to LKAB. According to the complainant, in total 274 000 m² were sold at a price of NOK 127 per m².

The complainant alleges that similar, albeit not entirely comparable premises in the vicinity of the area in question were sold at a price of NOK 700 per m² at approximately the same time. Compared with this price level, the state aid involved in the deal between the municipality and LKAB would amount to NOK 122 million.

2.2. The purchase of excavated stone material from the SILA project

In 2005 LKAB was granted permission to start the construction of new ore storage silos, the so-called SILA project. The new ore storage facilities were blasted out of the stone in the area transferred from the municipality to LKAB in 2004. The municipality and LKAB entered into an agreement, according to which LKAB would deliver blasted stone bulk (a by-product of the construction project) to the municipality for a total price of NOK 50 million. The price was inclusive of the transport and dropping-off of the bulk at a place designated by the municipality.

The complainant alleges that the price LKAB would have had to pay for disposing of the bulk in another manner (for example a waste dump) might have been higher than NOK 50 million, and that the purchase price thus may have been disproportionate.

2.3. The transfers of land in the development agreement of 26 February 2009

On 26 February 2006 LKAB and the municipality entered into a development agreement, which was endorsed by the municipality's council on 17 March 2009. The complainant alleges that two of the several issues covered by the agreement might involve state aid.

Firstly, the agreement reduced the amount of blasted stone bulk LKAB had to deliver to the municipality. Nonetheless, the municipality's payment obligations remain unchanged. According to the complainant, this agreement may involve a loss for the municipality of NOK 25-30 million.

Secondly, the municipality transfers land in the Lundbergsjakta and Framnesodden areas to LKAB. At the same time, LKAB transfers several areas to the municipality. However, these areas are mainly regulated as recreation areas and may thus not be particularly

⁵ See Event No 537957, LKAB's letter of 23.11.2009, and LKAB's website, accessible at <http://www.lkab.com/?openform&lang=EN>.

valuable. The complainant alleges that no value assessment had been carried out prior to entering into the deal and that the municipality may have incurred substantial losses.

3. Comments from the Norwegian authorities

In their letter of 10 August 2009 the Norwegian authorities provided a detailed description of the incidents mentioned in the complaint.

3.1. Transfer of land from Narvik municipality to LKAB in 2004

On 11 August 1998 the municipality and Norges Statsbaner AS (the Norwegian State Railways, “NSB”) entered into an agreement, according to which the municipality would be entitled, over a period of three years, to acquire land located in the so-called Trekant area in Narvik from NSB for a price of NOK 55 per m².⁶

However, in December 2000, NSB informed the municipality that a private investor was interested in acquiring the land and that it might organise an open sales procedure. In a resolution adopted on 8 February 2001, the municipality considered two options for addressing the situation:⁷ (1) to refer to the parliamentary bill and subsequent agreements with NSB and request that NSB transfer the land to the municipality at a price below market value; failing this (2) to participate jointly with LKAB in the open bidding procedure. The municipality conducted parallel negotiations with NSB and LKAB in order to pursue both strategies.

As regards the second option, a draft agreement with LKAB was reached on 20 March 2001. It foresaw that the municipality would purchase the land in the Trekant area and then transfer to LKAB the plot with gnr. 40 bnr. 944, which LKAB already leased from NSB under an existing ground lease agreement. The agreement also contains a clause according to which LKAB would be entitled to buy these areas even if the municipality’s direct negotiations with NSB proved successful.

On 22 March 2001 the municipality received an offer from NSB corresponding to the original agreement i.e. a purchase price of NOK 55 per m².⁸ The deal was confirmed by the municipality’s town council on 22 May 2001.⁹

On 10 October 2001 LKAB initiated court proceedings before the Court of Ofoten (Ofoten Tingrett) requesting that the terms of the draft agreement of 20 March 2001 be honoured. In April 2004 LKAB and the municipality (through its development company, Narvikgården) reached a settlement which included, but was not limited to, the transfer of land referred to in the complaint. The municipality agreed to transfer 274 000 m² of land to LKAB for a price of NOK 35 million. These were mainly the areas covered by the ground lease agreement. Furthermore, the parties put an end to their disputes regarding outstanding leasehold charges and agreed that LKAB would continue to pay for the lease

⁶ The background to this agreement was a bill regarding the restructuring of ore transport on the Ofoten Railway line, which the Norwegian Parliament had adopted in 1996 (St.prp. nr 64 and Innst.S. nr 278 (1995-96)). The bill *inter alia* entitled NSB to transfer property in Narvik to the municipality at a price below the market value in order to indemnify the latter for the loss of jobs and to enable it to develop new business activities.

⁷ Event No 527270, Enclosure 1.5, Excerpt from the municipal meeting book of 07.5.2001.

⁸ Event No 527270, Enclosure 1.6, Excerpt from the municipal meeting book of 07.5.2001.

⁹ Event No 527270, Enclosure 1.7, Excerpt from the municipal meeting book of 21.8.2001.

of those parts of the area that were not included in the transfer.¹⁰ On 27 May 2004 the municipality endorsed the agreement.¹¹

The Norwegian authorities take the view that the transfer of land in question cannot be assessed as a normal sale since the transfer of the property and the establishment of the price were part of an out-of-court settlement. They admit that the price was not established exclusively on the basis of turnover figures but also involved an evaluation of the risk related to the ongoing dispute with LKAB. Moreover, the Norwegian authorities highlight that due to the existing lease contract not due to expire until 2030, LKAB seemed to be the only viable purchaser of the areas in question.

The Norwegian authorities also submit that the settlement ultimately strengthened the financial position of Narvikgården with a view to further developing the area for business purposes.

3.2. The purchase of excavated stone material from the SILA project

On 20 December 2005 LKAB and the municipality entered into an agreement regarding the sale of excavated stone material from the SILA project. According to this agreement, LKAB would deliver 1.2 million m³ of blasted stone bulk (a by-product of the construction of new ore storage silos) for a total price of NOK 50 million (in other words, NOK 40 per m³).

According to the Norwegian authorities, the market price for blasted stone bulk at the time was approximately NOK 90 per m³. LKAB had initially proposed charging NOK 110 per m³.¹²

The municipality intended to use the stone bulk for filling works in the Indre Havn and Fagernes areas. The price included delivery by LKAB of the stone bulk to a designated drop-off point.

However, in September 2007 LKAB applied for an alteration of the construction permit for the SILA project. Amongst other changes, the number of silos was reduced from 13 to 12. As a consequence, the amount of blasted stone would be correspondingly less and LKAB would be unable to fulfil its supply obligations under the agreement with the municipality.

By agreement dated 26 February 2009 the municipality and LKAB entered into a development agreement, the purpose of which was *inter alia* to clarify their contractual relations regarding the delivery of stone bulk under the agreement of 2005 and to settle their disputes that had arisen over the years.

The agreement of 26 February 2009 entitled LKAB to buy itself out of the delivery obligation for the remaining bulk stone. The calculation of the sum due by LKAB was made on the basis of a tender for delivery of bulk stone commissioned by them, where the lowest offer had been NOK 12 million. On this basis, the municipality's payment obligation was upheld.

¹⁰ Event No 527271, Enclosure 1.14, Agreement between LKAB Produksjon Narvik and Narvikgården AS of 27.5.2004.

¹¹ Event No 527271, Enclosure 1.15, Excerpt from the municipal meeting book of 28.5.2004.

¹² See Event No 55825, Enclosure 2.7, Purchase Protocol.

3.3. The transfers of land in the development agreement of 26 February 2009

The Norwegian authorities describe the background to the land transfers as follows.

Due to an increased demand for pellet products and the reduction in size of the SILA project, LKAB realised that it would have to continue using Lundbergsjakta for pellet storage and thus wanted to acquire the area which it currently rented from the municipality. The municipality, on the other hand, needed access to industrial areas in order to offer businesses new establishment opportunities. The areas Fagernesfjellet and Teknologibyen, owned by LKAB, were defined as appropriate for these purposes. LKAB, for its part, no longer needed these areas in order to carry out its business. Thus, the parties agreed to swap some areas of land.

No independent value assessment was carried out at the time since the parties considered themselves competent to assess the value of the areas separately and jointly themselves. Both parties considered the result of the negotiations to be economically balanced.

According to the Norwegian authorities, the transfer of property is just one part of the more comprehensive agreement of 26 February 2009 which, as noted above, had the objective of resolving several disputes and disagreements which had arisen between them over the years.

4. Comments from the alleged aid recipient, LKAB

4.1. Transfer of land from Narvik municipality to LKAB in 2004

According to LKAB, any assessment of whether this deal involves state aid must ascertain that a private investor in the situation of the municipality would not have entered into this settlement.¹³

4.2. The purchase of excavated stone material from the SILA project

As regards the price for the excavated stone material, LKAB reiterates that the price of NOK 40 per m³, agreed between the parties, was far below the market price of NOK 90 per m³.

4.3. The transfers of land in the development agreement of 26 February 2009

In its letter of 23 November 2009 LKAB provided value assessments for the areas that had been transferred under the development agreement of 26 February 2009. These assessments were carried out by an independent company in October 2009. The tables also provide a detailed overview of the plots transferred.

The Municipality transferred the following plots to LKAB:

Area reference (Contract of 26.2.2009)	Area reference (LKAB Letter)	Size	Value in NOK (Assessment of October 2009)
Gnr. 40 bnr. 944, Lundbergsjakta	Gnr. 40 bnr. 1332, Lundbergsjakta area	65 000 m ²	200 per m ² Total 13 000 000

¹³ Event No 537957, LKAB's letter of 23.11.2003, p. 3.

Gnr. 39 bnr. 1772, Framnesodden	Gnr. 39 bnr. 1772, Framnesodden	10 439 m2	100 per m2 Total 1 043 900
Total		75 439 m2	14 043 900

LKAB transferred the following plots to the municipality:

Area reference (Contract of 26.2.2009)	Area reference (LKAB Letter)	Size	Value in NOK (Assessment of October 2009)
Part of gnr. 40 bnr. 2 plot at Fagernesfjellet	Fagernesfjellet / Narvikfjellet gnr. 40 bnr. 1327 and 1328	2 490 000 m2	0,75 per m2 Total 1 867 500
Part of gnr. 40 bnr. 2 plot at Taraldsvikjordet	Plot at Taraldsvikjordet (gnr. 39 bnr. 1880)	Under separation from the main plot	none
Part of gnr. 39 bnr. 2 and gnr. 38 bnr. 1, Småbåthavna- Teknologibyen	Småbåthavna- Teknologibyen gnr. 39 bnr. 1876, and gnr. 38 bnr. 160	16 300 m2	20 per m2 Total 326 000
Not mentioned	Småbåthavna- Teknologibyen gnr. 39 bnr. 1879	13 100 m2	20 per m2 Total 262 000
Gnr. 39 bnr. 1436, Småbåthavna	Gnr. 39 bnr. 1436, Småbåthavna	29 105 m2	50 per m2 Total 1 455 250
Part of gnr. 39 bnr. 2, Einarvika	Part of gnr. 39 bnr. 1878, Einarvika - Småbåthavna	32 500 m2	20 per m2 Total 650 000
Garden Centre site, Framnes (gnr. 39 bnr. 1525 and 1778)	Garden Centre site, Framnes (gnr. 39 bnr. 1525 and 1778)	5 639 m2	150 per m2 Total 845 850
Nursing home site, Furumoen (gnr. 38 bnr. 115)	Nursing home site, Furumoen (gnr. 38 bnr. 115)	19 238 m2	150 per m2 Total 2 885 700
Ball area, gnr. 39 bnr. 1514	Ball area, gnr. 39 bnr. 1514	2 261 m2	20 per m2 Total 45 220
Playground in Hamsundveg, gnr. 39	Playground in Hamsuns vei (gnr. 30	1 889 m2	20 per m2 Total 37 780

bnr. 2 and 1123	bnr. 1877 and 1123)		
Playground at Finnbekken vel (gnr. 39 bnr. 2)	Playground at Finnbekken vel (gnr. 39 bnr. 1875)	3 165 m2	20 per m2 Total 63 300
Parts of Bromgårdspark (gnr. 40 bnr. 18)	Parts of Bromgårdspark (gnr. 40 bnr. 1330, 1265 and 1251)	2 121 m2	1 000 per m2 Total 2 121 000
Total		2 602 218 m2	10 297 600

LKAB agrees with the assessment of the municipality that the agreement as a whole represents an economic balance between the parties.

II. ASSESSMENT

1. The presence of state aid within the meaning of Article 61(1) EEA

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.”

1.1. Presence of state resources

1.1.1. *Transfer of property from Narvik municipality to LKAB in 2004*

The sale of land below market value can involve state aid since the state (in this case represented by the municipality) foregoes potential income.

The 2004 transfer of land from the municipality to LKAB occurred in the context of a court settlement. LKAB paid NOK 35 million for 274 000 m2 of land, which equals a price of NOK 127.74 per m2. This is more than twice the amount paid by the municipality to NSB (NOK 55 per m2) three years previously. However, it might be less than the market value, which was estimated to be NOK 200 per m2 for parts of the same plot in 2009 (see table at page 5 above).

The Norwegian authorities admit that the price was not exclusively established on the basis of the turnover figures but was a result of an evaluation by both parties of the risks involved in the court dispute. As stated above, LKAB takes the view that any assessment of whether this deal involves state aid must ascertain that a private investor in the situation of the municipality would not have entered into this settlement.

According to the General Court, states are not precluded from entering into dispute settlement, and “the possibility cannot be excluded that a transaction concluded [...] in

order to avoid the uncertainty of litigation amounts to conduct which would be normal for a private creditor seeking to recover sums due to him.”¹⁴

Thus, the subject of the Authority’s assessment is whether a private investor in the same situation as the municipality would have entered into the same settlement with LKAB in order to avoid further procedural risk.

In this respect, LKAB submits the following: (a) the parties had been negotiating for over three years prior to entering into the settlement, and (b) there was a risk that pursuing the court proceedings would result in a loss for the municipality (they are 100% owners of Narvikgården, the party to the litigation), including the risk of having to pay costs for the proceedings. In addition, the Norwegian authorities highlight the existing lease contract with LKAB.

On the basis that a binding intention had been expressed in the draft agreement of 20 March 2001, the Authority cannot conclude that a private investor in the same situation as the municipality at the time of entering into the settlement would have acted differently. In particular, the comments of the two parties clearly demonstrate that there was a risk for the municipality of incurring (even greater) losses if the court proceedings had been continued.

The Authority therefore takes the view that no state aid was involved in the settlement between the municipality and LKAB. It was concluded in order to avoid the uncertainty of litigation for the municipality and a private creditor seeking to recover sums due to him would have acted in the same way.

1.1.2. The sale of excavated stone material

According to the agreement of 5 May 2006 LKAB would deliver 1.2 million m³ of blasted stone bulk to the municipality at a price of NOK 40 per m³. The documents submitted to the Authority indicate that the market price for blasted stone bulk was approximately NOK 90 per m³ at the time. On this basis, the municipality cannot be said to have overpaid for the stone bulk.

It would therefore appear that no state aid was involved in this transaction.

State aid may also result from purchases in excess of the actual needs of a municipality.¹⁵ However, the information available to the Authority contains no suggestion that this is the case here. On the contrary, the actual use to which the stone bulk was put is documented in the case file (e.g. filling of Indre Havn).

Due to changes made to the scope of the SILA project, the amount of blasted stone bulk that would be generated was reduced. The matter of how to fulfil the needs of the municipality was addressed by the parties in their agreement of 26 February 2009.

It was agreed that LKAB would pay the municipality an amount intended to cover procurement of the outstanding volume of stone bulk. The Authority understands that the calculation of the sum due was made on the basis of a tender for delivery of stone bulk commissioned by LKAB, where the lowest offer had been NOK 12 million. Thus, the

¹⁴ Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para 99.

¹⁵ Joined cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2003] ECR II-2957, para 117.

municipality's payment obligation was upheld, but it received a sum of money equivalent to what would be required for it to procure the necessary amount of stone bulk elsewhere and thereby make up the shortfall in the quantity delivered. Contrary to the allegations in the complaint, the effect of this payment is to effectively reduce the net amount paid by the municipality in relation to delivery of stone bulk.

To the extent that this transaction satisfied actual needs for and was based on the market price of blasted stone bulk (determined by the tender carried out by LKAB), the Authority concludes that no state aid was involved.

1.1.3. The transfers of land in the development agreement (“utbyggingsavtale”) of 26 February 2009

The Authority observes that the assessments submitted by LKAB show that the difference in value between the land transferred from the municipality to LKAB and the land transferred from LKAB to the municipality was approximately NOK 3 846 300 in favour of LKAB. These assessments were carried out in autumn 2009, i.e. only 6 months after the agreement was entered into. It may therefore be concluded that the values are a relatively accurately reflection of the values of the plots in February when the transfers were made.

While it is true that, if viewed in isolation, the transfer of property appears to favour LKAB, it must be borne in mind that the deal was part of a bigger agreement, namely the development agreement of 26 February 2009. The Authority thus takes the view that the transfer of properties between LKAB and the municipality must be assessed in the context of the agreement of 26 February 2009 as a whole.

The purpose of this agreement was to put an end to several disputes that had been going on between the parties for years and that had lead to a deadlock. Both parties had an interest in resolving outstanding issues so as to be able to use and develop the areas concerned for future business purposes. In addition to the property transfers, the agreement addresses other matters, such as regulation and clearing up of some of the industrial areas transferred and extension of a right of first refusal for the municipality over a number of areas currently owned by LKAB. Finally a net payment of NOK 43 million was made from LKAB to the municipality.¹⁶

In light of the foregoing, the Authority takes the view that the overall outcome of the agreement of 26 February 2009 seems to be balanced. In particular, the Authority takes the view that a private investor in the situation of the municipality would have entered into a similar agreement in order to be able to move on and to realise future development projects.

Thus, the Authority concludes that the transfer of properties forms an integral part of the agreement of 26 February 2009, and does not involve state aid within the meaning of Article 61(1) EEA.

2. Conclusion

On the basis of the foregoing assessment, the Authority considers that the transfer of property from Narvik municipality to LKAB in 2004, the sale of excavated stone material

¹⁶ The documents refer to a payment of NOK 55 million. NOK 12 million were to indemnify the municipality for LKAB's inability to deliver the originally agreed amount of blasted stone bulk from the SILA project (see section II-1.1.2 above).

and the transfers of land in the development agreement (“utbyggingsavtale”) of 26 February 2009 do not involve state aid within the meaning of Article 61(1) EEA.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the transfer of property from Narvik municipality to LKAB in 2004, the sale of excavated stone material and the transfers of land in the development agreement (“utbyggingsavtale”) of 26 February 2009 do 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, 16 June 2010.

For the EFTA Surveillance Authority

Per Sanderud
President

Sverrir Haukur Gunnlaugsson
College Member