

Case No: 65139
Event No: 636103
Dec. No.: 260/12/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 4 July 2012

Skien Airport

(Norway)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD to the Agreement on the European Economic Area,¹ in particular to Articles 59(2) and 61(1) thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice,² in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Articles 4(2), 4(3) and 13(1) of Part II of Protocol 3 to the Surveillance and Court Agreement,³

WHEREAS:

I. FACTS

1. Procedure

- (1) On 18 July 2008, the EFTA Surveillance Authority (the “Authority”) received a complaint (the “Complaint”) in which the Federation of Norwegian Aviation Industries (“NHO Luftfart” or the “Complainant”)⁴ alleged that the Municipality of Skien (*Skien kommune*) had granted illegal state aid to the operations of Skien Lufthavn AS at Geiteryggen airport in Norway (“Skien Airport”), and to the airline Vildanden AS.⁵
- (2) On 3 October 2008, the Municipality of Skien provided the Authority with preliminary comments on the Complaint (Event No 493715).
- (3) On 25 October 2008, the Norwegian authorities notified, pursuant to Article 1.3, Part I, Protocol 3, certain proposed investments in infrastructure and equipment at Skien Airport (Event No 496166).
- (4) On 22 April 2009, the Authority adopted Decision No 192/09/COL concerning that notification, raising no objections to the notified investments.

¹ The “EEA Agreement”.

² The “Surveillance and Court Agreement”.

³ “Protocol 3”.

⁴ NHO Luftfart is a business organisation that organises the majority of Norwegian commercial aviation.

⁵ Event No 486453. The Authority received a copy of the Complaint by e-mail on 18.7.2008 (Event No 486357). The original was received on 22.7.2008.

- (5) The Complainant maintained its Complaint and by letter dated 9 June 2009 (Event No 515852), the Authority requested additional information from the Norwegian authorities.
- (6) By letter dated 7 July 2009 (Event No 523852), the Norwegian authorities replied to the Authority's request for information.
- (7) Subsequently, the Authority and the Norwegian authorities have been in contact regarding the case. Information received by the Authority in that context was consolidated in a letter submitted electronically on 12 August 2010 by the Norwegian authorities (Event No 566416).

2. The Complaint

- (8) The Complainant claims that Skien Lufthavn AS has received illegal state aid from the Municipality of Skien in the form of (i) annual financial contributions between 2003 and 2005, (ii) rent-free use of airport facilities, and (iii) free use of Skien Municipality staff.
- (9) The Complainant also claims that (iv) the airline Vildanden AS received illegal state aid from the Municipality of Skien in the form of an interest-free loan.⁶

3. Background

3.1 Skien Lufthavn AS

- (10) Skien Airport at Geitryggen is one of the older regional airports in Norway. It was established in 1952 and commercial flights began the same year. A number of domestic commercial carriers operated out of Skien Airport for several decades. However, regular commercial passenger services decreased towards the end of the 1990s. Skien Airport has always had a very low volume of traffic. Historical figures show a peak of 60,000 passengers in 1987. In 2005 the number of passengers was 28,214. The opening of new routes in 2007 resulted in an increase in passenger numbers to 48,693 and in 2008 traffic volume reached 50,001 passengers. However, passenger numbers decreased again in 2009 to 47,877.
- (11) From 1985 to 2002, Skien Airport was owned and operated by an inter-municipal company – Skien Lufthavn – jointly owned by the Municipality of Skien, two other municipalities and the county municipality.⁷ The operation of the Airport involved the provision and management of airport facilities to airlines (including ground handling) in return for a fee. This company was dissolved in December 2002 and the Municipality of Skien acquired sole ownership in Skien Airport and its infrastructure.
- (12) On 19 December 2002, the Municipality of Skien set up Skien Lufthavn AS in co-operation with other shareholders, to run the Airport.⁸
- (13) On 16 November 2004, the Municipality of Skien acquired all of the shares in Skien Lufthavn AS.
- (14) On 3 July 2008, the Municipality of Skien transferred its shares in Skien Lufthavn AS to Kontorbygg AS, an existing public company wholly owned by the Municipality of Skien.⁹
- (15) In April 2010, the Municipality of Skien again acquired all shares in Skien Lufthavn AS.¹⁰

⁶ This decision deals only with the issues raised by the Complainant.

⁷ See Event No 566241.

⁸ The shareholders were: Municipality of Skien (55%); Magne Dale (25%); Grenland flyklubb (5%); Grenland fallskjermklubb (5%); and two trade associations in Skien (10%).

⁹ See Decision No 192/09/COL of 22.4.2009.

- (16) The operation of Skien Airport has essentially been loss-making since its establishment in 1952. During the period of inter-municipal ownership between 1985 and 2002 operating losses increased from year to year.¹¹ When the Municipality of Skien took over Skien Airport in December 2002, it paid off the losses inherited from the inter-municipal company (see the measures described below). Despite the various changes in ownership in Skien Lufthavn AS, the operation of Skien Airport has continued to be loss-making.

3.2 Vildanden AS

- (17) As of 2002, the Municipality of Skien and local stakeholders sought to encourage regular passenger services from Skien Airport. After some initial unsuccessful attempts these efforts resulted in the establishment, in 2005, of Vildanden AS, a privately owned airline.¹²
- (18) Vildanden AS commenced regular operations in 2005. However, it never made a profit and was in financial difficulties at least from 2006.¹³ After a restructuring and expansion of its routes in 2007, passenger volumes increased. However, its financial difficulties continued.
- (19) The Norwegian authorities have explained to the Authority that the operation of Skien Airport would not be possible without an airline operating out of the Airport, and that Vildanden AS was the only airline that was willing to provide air services from Skien Airport.¹⁴ When Vildanden's financial problems became severe in autumn 2006, it was granted relief from paying interest on a loan provided by Skien Municipality (see section 4.2 below).
- (20) The Authority understands that Vildanden AS filed for bankruptcy on 14 January 2011 and ceased operations. Bankruptcy proceedings were opened on 17 January 2011. On 9 January 2012, the bankruptcy proceedings came to an end and, on 10 January 2012, Vildanden AS was removed from the Central Coordinating Register for Legal Entities in Norway.

3.3 Skien Airport's civil aviation concession and the public service obligation on the airport operator

- (21) Since 1952, the operation of Skien Airport has been based on concessions awarded by the Norwegian Civil Aviation Authority. The current concession was awarded to Skien Lufthavn AS on 24 February 2003 for a period of ten years, that is, until 2013 (the "Concession").¹⁵ The Concession refers to a requirement for the airport to be open to the public in line with certain technical requirements stipulated therein, together with specific duties imposed in the approval of the Concession issued by the Norwegian Aviation Authority (the "Approval Document").¹⁶
- (22) The Norwegian authorities have indicated that the Municipality of Skien has always required that the Airport be kept open for the public as a service in the general economic interest.

¹⁰ Decisions of the Municipality of Skien of 3.2.2010 (*Sak 001/10*); 11.3.2010 (*Sak 0020/10*); and 17.6.2010 (*Sak 0100/10*).

¹¹ *Sak 01/01852*; *Sak 06/4387* (Event No 566241).

¹² Vildanden AS was owned by a group of individuals and undertakings; it had no public shareholders. It was a "virtual airline", in that it did not operate any routes itself; routes marketed by the company were served by other airlines, which, prior to Vildanden's bankruptcy, operated routes between Skien and Bergen, Stavanger and Trondheim.

¹³ Based on the annual accounts for Vildanden AS between 2005 and 2010.

¹⁴ See Event No 588749.

¹⁵ "Skien Lufthavn, Geiteryggen – fornyet konsesjon til å inneha og drive lufthavnen", 24.2.2003; Event No 563661.

¹⁶ "Konsesjonsvilkår for Skien Lufthavn, Geiteryggen" issued on 25.2.2003; Event No 563661.

- (23) In the context of the 2008 reorganisation when Kontorbygg AS acquired all shares in Skien Lufthavn AS, the public service obligation was confirmed by the Municipality of Skien.¹⁷ In a letter from the Municipality to Kontorbygg AS dated 20 October 2008,¹⁸ the conditions for compensation were set out: Skien Airport should be operated on the basis of commercial principles, but if, on the basis of the annual budget, the operation of the airport were loss-making, the Municipality of Skien would compensate for the losses; any compensation exceeding the losses would have to be repaid to the Municipality;¹⁹ moreover, separate accounts should be kept for operating the public service on the one hand, and any ancillary commercial activities (such as shops, kiosks, cafes, parking etc.) on the other hand.
- (24) The Norwegian authorities have explained that although those conditions had already existed prior to the acquisition of all the shares in Skien Lufthavn AS by Kontorbygg AS in 2008, the Municipality deemed it necessary to set them out in writing on that occasion.²⁰
- (25) According to the Norwegian authorities, the aim pursued by the Municipality of Skien has been to maintain a service in the general economic interest which has existed for a long time, and which affords the region added accessibility for the general public and a direct benefit to its economic development potential. Specifically, the Norwegian authorities have stated that the Municipality of Skien imposed the public service obligation for the following reasons.²¹
- To provide emergency helicopter services (State air ambulance service) for the largest hospital in the region (Telemark), which is located in close vicinity to the airport (two minutes away).
 - To provide services to the police helicopter and rescue service.
 - To ensure that commuting workers and students had access to a local airport: the Municipality of Skien has a general interest in ensuring that the local population, which includes off-shore oil commuting workers, has access to a local airport with daily return trips.²² The alternative transport links consist of long rail or road journeys (4.5 to 8 hours) and are therefore poor options for daily return journeys. While air services are also offered from Sandefjord Lufthavn Torp, the Municipality considers that that airport is not a realistic option for daily return journeys due to its distance from the Municipality of Skien.²³ Thus, the Municipality believes that its concerns cannot be adequately served by airports located in other regions.²⁴
 - To provide the possibility of air leisure activities for the general public (parachute club; model airplane club etc).

¹⁷ Decision of Skien City Council of 03.07.2008 in Case No. 102/08.

¹⁸ Letter of 20.10.2008, "*Pålegg i forbindelse med overtakelse av Skien Lufthavn AS*"; Event No 499014.

¹⁹ Excess compensation is verified on the basis of a review of the annual accounts.

²⁰ See Event No 590635.

²¹ Event Nos 590635 and 590673.

²² The Municipality has stated that approximately 50% of passengers are linked to offshore oil, and that there are approximately 330 offshore workers in Skien (whose population is approximately 50,000) and approximately 900 offshore workers in Grenlandsregionen (whose population is approximately 100,000), see Event No 590635.

²³ The Authority understands that the nearest alternative airport to Skien is Sandefjord Lufthavn Torp, which is located at 56 km from Skien Airport.

²⁴ Letter to the Authority of 18.11.2008 from Schødt (Event No 499014).

4. Description of the Measures

4.1 Skien Lufthavn AS

4.1.1 Support for operating the airport

- (26) On 27 September 2001, the Municipality of Skien undertook to cover any operating deficit at Skien Airport, thus undertaking to guarantee the operation of the Airport, including to provide funding of up to a maximum of NOK 3.6 million from 2002 until at least 2004.²⁵ This was followed by a decision adopted on 12 December 2002 by the Municipality of Skien to grant Skien Lufthavn AS an annual amount of NOK 1 million for the period from 2003 to 2005 (i.e. a total of NOK 3 million) to compensate for costs related to operating the airport.

4.1.2 Rental relief

- (27) The different operators of Skien Airport, including Skien Lufthavn AS, did not pay any rent for the Airport facilities (including the terminal building) or for use of the land from the date of establishment of the Airport until 2 July 2008, when the rental relief ceased.
- (28) The value of the land and facilities was fixed on the basis of evaluations carried out by an independent expert, Takstforum Grenland AS,²⁶ and since 3 July 2008, when Skien Airport was acquired by Kontorbygg AS, rent has been paid for the land at an annual rate of NOK 300,000 (excluding VAT).²⁷ As regards the facilities, Skien Municipality made a capital contribution of those facilities to its wholly owned subsidiary Kontorbygg AS,²⁸ which became the full owner of those facilities on 3 July 2008.²⁹

4.1.3 Use of personnel

- (29) The Norwegian authorities have explained that personnel employed by the Municipality of Skien has been loaned to Skien Lufthavn AS. However, they have informed the Authority that the costs of such personnel have consistently been charged to Skien Lufthavn AS.³⁰
- (30) In line with the Norwegian rules on standard penalty interest on delayed payment of invoices,³¹ the Norwegian authorities have also informed the Authority that the Municipality of Skien has charged Skien Lufthavn AS the generally applicable interest rate for delayed payment of invoices.³²

4.2 Vildanden AS

4.2.1 Interest-free loan

- (31) On 6 October 2006, the Municipality of Skien provided Vildanden AS with an initially interest-free loan of NOK 2.5 million, repayment of which was agreed to be due as of 1 January 2009.³³ The loan was designed to provide Vildanden AS with start-up assistance and to support new routes.

²⁵ Sak 0103/01 of 27.9.2001.

²⁶ The reports are dated 19.12.2006 and 26.11.2008 (Event No 566032); e-mail from Skien Municipality to the Authority dated 3.8.2010 (Event No 566034).

²⁷ Agreement between Skien Municipality and Kontorbygg AS dated 4.7.2008 (Event No 566034).

²⁸ Aftale om kjøp/salg av aksjer i Skien Lufthavn AS (Event No 566032).

²⁹ "Leiekontrakt" of 4.7.2008 (Event No 566034).

³⁰ Letter dated 7.7.2009 from the Norwegian authorities to the Authority (Event No 523852).

³¹ Issued by the Norwegian Ministry of Finance "Forsinkelsesrente"; <http://www.regjeringen.no/nb/dep/fin/tema/Renter/Kalkulator-for-forsinkelsesrenten.html?id=475428>.

³² Event No 566242, e-mail dated 6.8.2010 from Skien Municipality to the Authority.

³³ Decision of the Municipality of Skien of 6.10.2006 (Sak 176/06 and Sak 06/4387).

- (32) On 1 January 2007, Vildanden AS repaid NOK 1.4 million of that loan, thus reducing the amount outstanding to NOK 1.1 million.
- (33) On 25 October 2007, the Municipality of Skien provided a further NOK 2 million to Vildanden AS, thus increasing the total loan to NOK 3.1 million.³⁴
- (34) The Norwegian authorities have stated that the loan had priority over Vildanden AS's debts to its shareholders.³⁵
- (35) From 1 January 2009 to 28 February 2010, Vildanden AS paid interest at 5% on the total loan amount of NOK 3.1 million, in addition to capital repayments.³⁶ The interest rate was a fixed rate based on NIBOR (Norwegian Inter Bank Offered Rate) plus a supplement.
- (36) On 1 March 2010, Vildanden AS was granted a new period free of interest payments until 28 February 2011. As of 1 March 2011, interest was to be paid at a rate of 5% until the loan was paid off by November 2014. However, as noted above, Vildanden AS went bankrupt in January 2011 and ceased operations.

II. ASSESSMENT

1. The Presence of State Aid

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

- (37) Article 61(1) of the EEA Agreement provides that:
- “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.”*
- (38) It follows from Article 61(1) EEA that in order for a measure to amount to state aid the following conditions must be met:
- i. The aid must be granted through *state resources*;
 - ii. It must favour certain undertakings or the production of certain goods, that is the measure must confer an *economic advantage* on an undertaking;
 - iii. It must be *selective*; and
 - iv. It must be capable of *distorting competition* and *affecting trade* between Contracting Parties.
- (39) Prior to examining whether these four cumulative conditions are met, it is relevant first to examine whether the operation of Skien Airport qualifies as an “undertaking” within the meaning of Article 61(1) of the EEA Agreement. It is therefore necessary to examine whether the activities qualify as “economic activity” within the meaning of Article 61(1) EEA.

³⁴ Decision of the Municipality of Skien of 25.10.2007 (*Sak 113/07*); loan agreement between the Municipality of Skien and Vildanden AS “*Låneavtale – Likvidetslån stort kr. 3.100.000*” (Event No 523852).

³⁵ Event No 523852.

³⁶ Vildanden AS paid NOK 136,129 during the period between 1.1.2009 and 12.4.2010.

- (40) As regards the operation/management of airports, the Authority notes that on 12 December 2000 the then Court of First Instance of the European Communities (“CFI”) held, in its judgment in “*Aéroports de Paris*”, that:

*“The provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP [Aéroports de Paris], must be regarded as an economic activity. Similarly, the facilities within the Paris airports are essential, since their use is indispensable to the provision of various services, in particular ground handling. The management and provision of those facilities for the supply of such services constitute an economic activity.”*³⁷

- (41) Prior to that judgment, the question of whether the operation or management of airports constituted an economic activity within the meaning of the EEA competition rules had been unclear.
- (42) While the scale of airport activities in the *Aéroports de Paris* case was substantially different to the activities at Skien Airport, the nature of the activities are largely similar. In the light of the *Aéroports de Paris* judgment, the Authority considers the operation of Skien Airport to constitute an economic activity, at least since that judgment was rendered.³⁸

1.2 Skien Lufthavn AS

1.2.1 Presence of state resources

- (43) In order to constitute state aid within the meaning of Article 61(1) EEA, the aid at issue must be granted by the State or through state resources.
- (44) For the purposes of the EEA state aid rules, local and regional authorities are considered to be equivalent to the State.³⁹ Therefore, the Municipality of Skien must be seen to be equivalent to the State for the purposes of the EEA state aid rules.

1.2.1.1 Support for operating the Airport

- (45) The Municipality of Skien provided annual funding between 2003 and 2005 to Skien Lufthavn AS. Accordingly, these direct grants were disbursed from state resources.

1.2.1.2 Rental relief

- (46) The failure of the Municipality to charge Skien Lufthavn AS rent for land and airport facilities amounts to a loss of revenue.

1.2.1.3 Use of personnel

- (47) The personnel loaned to Skien Lufthavn AS by the Municipality of Skien were employees of the Municipality, and therefore of the Norwegian State; therefore, the loan of such personnel must be considered to be state resources.

1.2.2 Economic advantage

- (48) In order to constitute state aid within the meaning of Article 61(1) EEA the measure at issue must also confer an advantage that relieves an undertaking of charges that are normally borne from its budget.

³⁷ Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, paragraphs 121-122, upheld on appeal by the European Court of Justice in Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297.

³⁸ See also the Authority’s State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports, paragraph 21.

³⁹ Article 2 of Commission Directive 2006/111/EC on the [transparency of financial relations between Member States and public undertakings](#), OJ L 318, 17.11.2006, p. 17, incorporated through Annex 15 to the EEA Agreement.

1.2.2.1 Use of personnel

- (49) As regards the loan of personnel, as noted above, the Norwegian authorities have explained that the costs of such personnel have consistently been charged to Skien Lufthavn AS and that the Municipality of Skien charges interest on overdue payments. The Authority understands that debt has accumulated in this respect.⁴⁰ To the extent that the costs of the loan of personnel have been charged to Skien Lufthavn AS and paid, the Authority considers that Skien Lufthavn AS has not been in receipt of an economic advantage. To the extent that some of the debt remains unpaid, the Authority has received no information that any of the outstanding debt has been waived and therefore that it remains due. On that basis, the Authority considers that no economic advantage is involved. Therefore, no state aid is involved in respect of the loan of personnel.

1.2.2.2 Support for operating the Airport and rental relief

- (50) Skien Lufthavn AS benefited from the use of land and airport facilities rent-free, and it received direct grants from the Municipality of Skien.

No exclusion of aid on the basis of Altmark

- (51) As, in the submission of the Norwegian authorities, both the funding and the rental relief constituted compensation for costs that Skien Lufthavn had to bear due to public service obligations imposed on it by Skien Municipality, the presence of an economic advantage might be excluded pursuant to the *Altmark* case law.
- (52) In that judgment, the Court of Justice of the European Union (“ECJ”) has clarified what can and cannot be considered as state aid within the realm of public service compensation. According to the *Altmark* case law, state compensation for the provision of a public service that cumulatively fulfils the four criteria laid down in that case⁴¹ (the “*Altmark* criteria”) does not constitute state aid within the meaning of Article 61 of the EEA Agreement.⁴² Conversely, state measures which do not comply with one or more of the conditions must be regarded as state aid within the meaning of Article 61 EEA.⁴³
- (53) According to the fourth *Altmark* criterion, the beneficiary must be chosen in a public tender. Alternatively, the compensation cannot exceed the costs of a well-run undertaking that is adequately equipped with the means to provide the public service.⁴⁴ This criterion should be read in the light of the second criterion, which requires that the parameters for calculating the compensation must be established in advance in an objective and transparent manner.⁴⁵

⁴⁰ Letter dated 7.7.2009 from the Norwegian authorities to the Authority (Event No 523852); e-mail dated 6.8.2010 from Skien Municipality to the Authority (Event No 566242).

⁴¹ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraphs 89-93.

⁴² Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 94 and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 60.

⁴³ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 94.

⁴⁴ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 93: “Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”

⁴⁵ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraphs 90-91: “Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been

- (54) In the present case, Skien Lufthavn AS was not selected following any public procurement procedure. Similarly, the Norwegian authorities have not argued that (or provided any information enabling the Authority to verify whether) the costs incurred by Skien Lufthavn AS in carrying out the services it provided correspond to the costs of a typical undertaking, well-run and adequately equipped. Therefore, the fourth *Altmark* criterion is not met and, accordingly, the presence of state aid cannot be excluded on the basis of the *Altmark* judgment.

Only partial exclusion of aid on the basis of the private investor principle

- (55) As regards the funding provided between 2003 and 2005, the Norwegian authorities have argued that that funding was provided in order to contribute liquidity during attempts to stabilise Skien Airport and thereby safeguard its economic value. Thus, in the view of the Norwegian authorities, the direct grants constituted an investment with a view to achieving profits in the longer term. However, the Norwegian authorities have not provided any documentation to substantiate that interpretation.
- (56) The Authority observes that an economic advantage within the meaning of the EEA state aid rules can be excluded if the funding provided to Skien Lufthavn AS reflected an investment by the Municipality of Skien with a view to receiving a return on its capital. Pursuant to the private market investor principle, no state aid is involved if it can be established that the State has invested under the same or similar terms to those under which a private market investor would have invested in similar circumstances.⁴⁶ Conversely, if the State invests under circumstances in which no return on its capital may be expected, an economic advantage is involved.
- (57) In this regard, the Authority's State Aid Guidelines on holdings by public authorities provide that:

"...there is state aid [involved] where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions. This is the case:

*- where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested".*⁴⁷

- (58) The ECJ has held that where a company has made almost no profit for 10 years, its financial situation is still poor and no credible restructuring plan is in place, private investors would not invest.⁴⁸
- (59) In the present case, Skien Lufthavn AS received funding from the Municipality of Skien to cover losses incurred in the operation of Skien Airport. Skien Lufthavn AS has essentially been loss-making since its incorporation. When Skien Lufthavn AS was incorporated, passenger numbers had fallen from their peak of 60,000 in 1987: in 2005, the number of passengers was 28,214.

established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty."

⁴⁶ Case C-124/10 P *Commission v EDF*, judgment of 5.6.2012 (not yet published); Case C-261/89 *Italy v Commission* [1991] ECR I-4437, paragraph 8.

⁴⁷ State Aid Guidelines on public service compensation, state ownership of enterprises and aid to public enterprises, paragraph 6(c).

⁴⁸ Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 20. See also Joined Cases C-328/99 and C-399/00 *Italian Republic v Commission and SIM 2 Multimedia SpA v Commission* [2003] ECR I-4035, paragraphs 37-45 and the Opinion of Advocate-General Geelhoed, delivered on 27.9.2001.

- (60) The funding was not accompanied by a restructuring plan for Skien Airport aimed at cutting losses and achieving profitability.
- (61) In that light, the Authority considers that in providing funding from 2003 to 2005 to Skien Lufthavn AS, following a period of losses and with no concrete restructuring plan in place, the Municipality of Skien did not act like a private investor operating under normal market conditions.
- (62) Conversely, the rent-free use of the land ceased on 3 July 2008, and as of that date rent has been fixed on the basis of an independent expert valuation (see section 4.1.2 above). The Authority considers that that rent reflects the market rate: the Authority's State Aid Guidelines on state aid elements in sales of land and buildings by public authorities provide that the involvement of state aid can be excluded where the sales price represents the market rate, either because the price results from a public tender or has been fixed on the basis of an evaluation by an independent expert. While the present case concerns the letting as opposed to the sale of land, which is not covered by those Guidelines,⁴⁹ the Authority considers that the basic principle that a value identified by an independent expert opinion is indicative of the market rate, is relevant also for identifying the market rate for the letting of land.
- (63) Similarly, as regards the airport facilities, the rental relief also ceased by 3 July 2008, when ownership in the buildings became vested in Kontorbygg AS.
- (64) On the basis of the above, the Authority considers that the fact that Skien Lufthavn AS had at its disposition land and airport facilities without having invested in them, or paid for their usage until 2 July 2008, reduced its operating costs. Thus, the Authority concludes that both the funding and the rental relief as granted by the Municipality of Skien to Skien Lufthavn AS until 2 July 2008 involved an economic advantage within the meaning of Article 61(1) EEA.

1.2.3 Favouring certain undertakings or the production of certain goods

- (65) In order to constitute state aid within the meaning of Article 61(1) EEA the measure at issue must also be selective by favouring certain undertakings or the production of certain goods.
- (66) The ECJ has held that in order to determine whether a measure is selective, the question is whether the undertaking in question is in a legal and factual situation that is comparable to other undertakings in the light of the objective pursued by the measure.⁵⁰
- (67) In the present case, both the direct grants made available to it and the rental relief in respect of land and airport facilities granted by Skien Municipality favoured Skien Lufthavn AS to the exclusion of other airport operators. Other airport operators, in Norway and elsewhere in the EEA, are in a similar legal and factual situation to Skien Lufthavn AS. On that basis, the measures at issue were selective in favour of Skien Lufthavn AS.

1.2.4 Distortion of competition and effect on trade between Contracting Parties

- (68) Finally, in order to constitute state aid within the meaning of Article 61(1) of the EEA Agreement the measure at issue must distort or threaten to distort competition and affect trade between Contracting Parties. According to the case law of the EFTA Court,

⁴⁹ Section 1(4) of the State Aid Guidelines on state aid elements in sales of land and buildings, <http://www.eftasurv.int/?1=1&showLinkID=15142&1=1>.

⁵⁰ Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41.

this condition requires the Authority to examine whether the measure is *liable* to affect trade and to distort competition.⁵¹

- (69) In Decision No 192/09/COL, referred to above in paragraph 4, relating to certain proposed investments in infrastructure and equipment at Skien Airport, the Authority found the criteria of effect on trade to be met in respect of airports that engage in economic activity. It also found that the transfer of funds from the State to one airport operator strengthens that operator's position as compared to other airport operators competing in the EEA. In that light, the Authority concludes that the measures at issue were liable to affect trade and to distort competition.

1.2.5 Conclusion on the presence of state aid for Skien Lufthavn AS

- (70) Based on the above, the Authority concludes that the funding and the rent-free use of the land and facilities at Skien Airport provided to Skien Lufthavn AS by the Municipality of Skien constituted state aid within the meaning of Article 61(1) of the EEA Agreement.

1.3 Vildanden AS

- (71) Vildanden AS was relieved of interest payments between 2006 and 2009 and for a short period from 2010 to 2011 on the loan it had received from Skien Municipality; Vildanden AS also benefited from an interest rate on that loan below the market rate for a period between 2009 and 2010.⁵²
- (72) Vildanden AS qualified as a "small" enterprise pursuant to Regulation 800/2008.⁵³ While the Regulations on *de minimis*⁵⁴ appear not to be applicable to the funding granted to Vildanden AS due to the fact that the company was in financial difficulties throughout the period it was in operation, the funding involved nonetheless fell below the relevant thresholds set out in those Regulations.⁵⁵ The aid granted between October 2006 and October 2009 amounted to approximately NOK 855,925 (EUR 96,776), and therefore fell below the threshold of EUR 100,000 under which grants qualify as *de minimis* under the 2001 *de minimis* Regulation. The aid granted between October 2009 and February 2011 amounted to approximately NOK 615,730 (EUR 72,068), and would therefore qualify as *de minimis* under the 2006 *de minimis* Regulation, even at

⁵¹ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finn fjord and Others v EFTA Surveillance Authority* [2005] EFTA Court Report 2005, p.117.

⁵² The interest rates to be considered as market rates are laid down in the State Aid Guidelines on reference and discount rates, which require the specific situation of the borrower to be taken into account (Vildanden AS was in serious financial difficulties). The 5% rate applied to the period from 1.1.2009 to 28.2.2010 was below the Authority's reference rates for the period. The reference and discount rates are applied as a proxy for the market rate and to measure the grant equivalent of aid, in particular when it is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes.

⁵³ See the definition of small-medium sized enterprises set out in Annex 1 to Commission Regulation 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3. Regulation 800/2008 has been incorporated into the EEA Agreement, Annex 15.

⁵⁴ Commission Regulation 69/2001 on the application of Articles 87 and 88 of the EC Treaty [now 106 and 107 TFEU] to *de minimis* aid (OJ L 10, 13.1.2001, p.30), which was in force until 31 December 2006; Commission Regulation 1998/2006 of 15.12.2006 [on the application of Articles 87 and 88 of the EC Treaty \[now 106 and 107 TFEU\] to de minimis aid](#), OJ L 379, 28.12.2006, which came into force on 1.1.2007. Both regulations have been incorporated into Annex 15 to the EEA Agreement.

⁵⁵ Under the *de minimis* Regulations, aid received may not exceed the *de minimis* threshold during "any period of three years".

the maximum possible applicable interest rates pursuant to the State Aid Guidelines on reference rates and discount rates.⁵⁶

- (73) As already stated in section 3.2 above, Vildanden AS was declared bankrupt at the beginning of 2011 and is no longer in operation. The Authority is not aware of the existence of any successor company. Further, on 9 January 2012, Vildanden AS was removed from the Company Register in Norway.
- (74) In the light of the above, the relatively small amounts concerned and on grounds of procedural economy, the Authority considers that there is no interest in further investigation of whether the conditions in Article 61(1) EEA are met.

1.4 Conclusion on presence of state aid

- (75) The Authority concludes that the funding and the rent-free use of the land and facilities at Skien Airport provided to Skien Lufthavn AS by the Municipality of Skien constituted state aid within the meaning of Article 61(1) of the EEA Agreement. As regards Vildanden AS, the Authority takes the view that there is no interest in examining whether the conditions in Article 61(1) EEA are met given that that company has gone bankrupt and has been removed from the Company Register in Norway.

2. Compatibility of the State Aid Granted to Skien Lufthavn AS

- (76) State aid was granted in favour of Skien Lufthavn AS in the form of operating support between 2003 and 2005 and in the form of rental relief for the use of land and airport facilities until 2 July 2008.
- (77) The Authority notes that prior to 2005 and to the introduction of the Authority's State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports,⁵⁷ it was not clear how the state aid rules applied to airports. The previous 1994 guidance by the European Commission related almost exclusively to the conditions for granting state aid to airlines, and stated that "*the construction of (airport) infrastructure projects represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on state aid*".⁵⁸
- (78) In this case, given that the provision of the aid started before the 2005 Guidelines were adopted, those Guidelines are not directly applicable.⁵⁹ However, the Authority is of the view that relevant guidance can be drawn from those Guidelines in the present case.

2.1 Article 59(2) of the EEA Agreement

- (79) The Authority considers below, pursuant to Article 59(2) EEA, whether the aid to Skien Lufthavn AS constituted compensation for costs incurred in carrying out public service obligations imposed on it.
- (80) Article 59(2) EEA provides that

⁵⁶ According to the Authority's State Aid Guidelines on reference rates and discount rates the maximum interest rate applicable is 16%; see <http://www.eftasurv.int/?1=1&showLinkID=16021&1=1>.

⁵⁷ State Aid Guidelines on financing of airports and start up aid to airlines departing from regional airports, <http://www.eftasurv.int/?1=1&showLinkID=15137&1=1>.

⁵⁸ See State Aid Guidelines on financing of airports and start up aid to airlines departing from regional airports, paragraphs 8 and 9. The Chapter of the EFTA Surveillance Authority State Aid Guidelines on aid to the aviation sector (OJ L 124, 23.05.1996 and the EEA Supplement No. 23, 23.5.1996) refers to the Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aid in the aviation sector and states that the Authority will apply criteria corresponding to those found in the Commission's 1994 guidelines.

⁵⁹ State Aid Guidelines on financing of airports and start up aid to airlines departing from regional airports, paragraph 76.

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.”

- (81) The Authority recalls that the EFTA States have a wide margin of discretion to define what they regard as services of general economic interest,⁶⁰ and that the definition of such services by an EFTA State can be questioned by the Authority only in the event of manifest error.⁶¹
- (82) The concept of service of general economic interest within the meaning of Article 59 EEA requires that the undertakings in question have been entrusted with a special task by the State.⁶² The Authority’s 2005 Guidelines provide that certain economic activities carried out by airports can be considered by the public authorities as constituting a service of general economic interest. In such cases, the relevant national authority may impose on the airport operator certain public service obligations in order to ensure that the general public interest is appropriately served. In such circumstances, the airport operator may be compensated by the public authorities for the additional costs deriving from the public service obligation. It is possible for the overall management of an airport, in exceptional cases, to be considered a service of general economic interest.⁶³
- (83) As regards the present case, the Authority considers that Skien Lufthavn AS has been subject to a public service obligation which was initially established on the basis of an administrative practice and later set out in a decision specifying the relevant obligation (see section 3.3 above).⁶⁴
- (84) The operation and maintenance of a regional airport may be a legitimate public service task of the State. The Authority observes that in the present case, the operation of Skien Airport was imposed on Skien Lufthavn AS in order to achieve a number of objectives, in particular to provide emergency helicopter services for the largest hospital in the region, and to ensure that commuting workers and students had access to a local airport. The duties imposed on Skien Lufthavn AS are identified and described in the Approval

⁶⁰ Case E-9/04 *The Bankers’ and Securities’ Dealers Association of Iceland v EFTA Surveillance Authority* [2006] EFTA Court Report 42, paragraph 65; Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81.

⁶¹ See, for example, Case T-17/02 *Fred Olsen v Commission* [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraph 166.

⁶² See Case C-127/73 *BRT v SABAM* [1974] ECR-313.

⁶³ State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports, 2005, paragraph 24. The Authority notes that Decision 2005/842 of 28.11.2005 on the application of Article 86(2) of the EC Treaty [now Article 106(2) TFEU] to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29/11/2005 p. 67; incorporated in point 1h of Annex 15 to the EEA Agreement) sets out the conditions under which state aid in the form of public service compensation granted to undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the EEA Agreement. The Decision applies, *inter alia*, to public service compensation for airports for which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 1,000,000 passengers (subject to the fulfillment of certain conditions) and refers to sums of up to EUR 30 million per year. Decision 2005/842 entered into force in December 2005, after the provision of aid in this case commenced.

⁶⁴ Decision of Skien City Council of 03.07.2008 in Case No. 102/08; letter of 20.10.2008, “*Pålegg i forbindelse med overtakelse av Skien Lufthavn AS*”; Event No 499014.

Document. Concrete requirements are set out in that Document regarding the level of standards and action required in order to satisfy the public service obligation.⁶⁵

- (85) As regards the amount of compensation, the general rule is that the amount may not exceed what is necessary to cover the costs incurred in discharging the public service obligation, taking into account a reasonable profit.⁶⁶ In that regard, only the costs associated with the public service obligation should be taken into consideration, and a cost separation should be carried out between services of general economic interest and any other activities.⁶⁷
- (86) On the basis of the information submitted by the Norwegian authorities, the Authority understands that Skien Lufthavn AS is, and has been, required to have separate accounts for operating the public service obligation on the one hand, and ancillary commercial activities (such as shops, kiosks, cafes, parking etc.) on the other.
- (87) It is the Authority's understanding that the level of compensation paid to Skien Lufthavn AS was limited to covering losses incurred in carrying out the public service obligation, and did not therefore extend to covering all costs incurred in meeting its public service obligation (or indeed a reasonable profit). In addition, any compensation which might subsequently turn out to go beyond covering losses was required to be repaid by Skien Lufthavn AS.⁶⁸ The compensation mechanism therefore implies that the operation of Skien Airport as a public service has been underfunded. Accordingly, the question of possible over-compensation does not arise.
- (88) In the light of the above, the Authority concludes that the compensation granted by the Municipality of Skien to Skien Lufthavn AS for carrying out its public service obligation was not excessive but appears, rather, not to have covered the costs of carrying out that obligation. Accordingly, the Authority considers that the compensation was necessary for the operation of the service of general economic interest.
- (89) The Complainant has argued that a service for which a well-functioning market already exists cannot be defined by an EFTA State as a service of general economic interest. It claims that Sandefjord Lufthavn Torp ("TRF airport") serves competing routes and is located only 56 km from Skien Airport.⁶⁹
- (90) The Authority disagrees. First, it has been established above that a public service obligation was in place. Secondly, the Authority notes that small regional airports – such as Skien Airport, which is classed in category D pursuant to the 2005 State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports – do not generally compete with other airports except, in some cases, with neighbouring airports of a similar size whose markets overlap.⁷⁰ The Authority

⁶⁵ "Konsesjonsvilkår for Skien Lufthavn, Geiteryggen" issued on 25.2.2003; Event No 563661.

⁶⁶ See, for example, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747; Decision 2005/842 of 28.11.2005 on the application of Article 86(2) of the EC Treaty [now 106(2) TFEU] to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29/11/2005 p. 67; incorporated in point 1h of Annex 15 to the EEA Agreement), Article 5; State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports, 2005, paragraph 55.

⁶⁷ Costs linked to investments may be taken into account where necessary for providing the public service.

⁶⁸ However, the Authority understands that Skien Lufthavn AS has never made a profit in respect of the operation of Skien Airport; it has always run at a loss.

⁶⁹ In this context, the Complainant refers to Case T-17/02 *Fred Olsen v Commission* [2005] ECR II-2031 (appeal rejected by the ECJ in Case C-320/05 P).

⁷⁰ State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports, 2005, paragraph 6. Skien Airport's average annual traffic peaked at 60,000 passengers in 1987 (see above).

notes that TRF airport is not of a comparable size to Skien Airport: according to its website, its yearly passenger numbers have, since 2002, exceeded one million and, therefore, TRF airport falls within category C of the 2005 Guidelines (paragraph 7).⁷¹ In any event, even if it could be considered that there were some limited overlap in flight routes, that would not be enough in and of itself to exclude the imposition of a public service obligation. For example, overlapping services may not ensure comparable services in terms of continuity, regularity and frequency on all relevant routes, or the emergency services.⁷²

- (91) The Authority also notes that Skien Airport is a very small Norwegian regional airport – with passenger numbers for the most part falling under 50,000 passengers per year – and is thus an extremely small category D airport. Category D airports comprise airports with up to one million passengers;⁷³ therefore, pursuant to the 2005 Guidelines, an airport more than 20 times the size of Skien Airport in terms of passenger numbers would be categorised as “small”.
- (92) In addition, the Authority understands that the only non-domestic route operated from Skien Airport during the period addressed in the Complaint commenced in 2007 from Skien to Stockholm, and that TRF airport does not have a route to Stockholm.⁷⁴
- (93) The 2005 Guidelines provide that public financing granted to small regional airports is unlikely to distort competition or affect trade to an extent contrary to the common interest.⁷⁵ Taking account of the specific elements of this case, in particular the public service obligation imposed on the operator of Skien Airport in order to achieve a number of important objectives, in particular to provide emergency helicopter services for the largest hospital in the region and to the police helicopter and rescue service; the size of the Airport and the fact that category D airports generally do not compete with other airports, as specifically addressed in the 2005 Guidelines; and the small overall amounts involved, which were limited to covering losses (total funding of NOK 3 million over three years and low rental relief (valued in 2008 at an annual rate of NOK 300,000 – see above),⁷⁶ the Authority is of the view that the development of trade is not affected to such an extent as would be contrary to the interests of the Contracting Parties, and that the proportionality test that must be satisfied pursuant to Article 59(2) EEA is met.⁷⁷

2.2 Conclusion on Article 59(2) of the EEA Agreement

- (94) On the basis of the above, the Authority considers the state aid granted by the Municipality of Skien to Skien Lufthavn AS for carrying out its public service

⁷¹ <http://www.torp.no/Pages/Artikkel.aspx?pkMenu=202&pksMenu=216&Language=EN>.

⁷² Case T-17/02 *Fred Olsen v Commission* [2005] ECR II-2031, paragraphs 215-228.

⁷³ State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports, 2005, paragraph 7.

⁷⁴ Letter from the Norwegian authorities to the Authority dated 3.10.2008 (Event No 493715).

⁷⁵ State Aid Guidelines on the financing of airports and start up aid to airlines departing from regional airports, 2005, paragraph 29. See also Case N 106/2003 – Italia, Contributi straordinari [della Regione Toscana] alla provincia di Livorno e Aerealba SpA per la realizzazione di interventi a favore dell'aeroporto di Marina di Campo nell'Isola d'Elba, C(2004)3475 fin.

⁷⁶ The sums involved, while exceeding the thresholds set out in the Regulations on *de minimis* (€100,000 until 2006 and €200,000 from 2007), remain relatively low. Commission Regulation 69/2001 on the application of Articles 87 and 88 of the EC Treaty [now 106 and 107 TFEU] to *de minimis* aid (OJ L 10, 13.1.2001, p.30, which was in force until 31.12.2006; Commission Regulation 1998/2006 of 15 December 2006 [on the application of Articles 87 and 88 of the EC Treaty \[now 106 and 107 TFEU\] to de minimis aid](#), OJ L 379, 28.12.2006, which came into force on 1.1.2007. Both regulations have been incorporated into Annex 15 to the EEA Agreement.

⁷⁷ Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Report 1, paragraph 70.

obligation to be compatible with the functioning of the EEA Agreement pursuant to Article 59(2) EEA.

3. Procedure

- (95) Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, “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”.
- (96) The Authority notes that the Norwegian authorities did not notify the Authority prior to the grant of state aid to Skien Lufthavn AS for carrying out its public service obligation. Therefore, in that regard, the Norwegian authorities infringed their notification obligation pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

4. Conclusion

4.1 Skien Lufthavn AS

- (97) On the basis of the foregoing assessment, the Authority considers that the conditions for the presence of state aid within the meaning of Article 61(1) of the EEA Agreement are met with respect to both (i) the funding between 2003 and 2005 and (ii) the former rent-free use of the land and facilities at Skien Airport provided to Skien Lufthavn AS by the Municipality of Skien until 2 July 2008.
- (98) However, the Authority concludes that that both aid measures referred to in paragraph (97) amounted to compensation in respect of a public service obligation imposed on Skien Lufthavn AS. The Authority considers, on the basis of the information before it, that the compensation was not excessive and therefore constituted state aid which is compatible with the functioning of the EEA Agreement pursuant to Article 59(2) of the EEA Agreement.
- (99) As regards the loan of Skien Municipality personnel to Skien Lufthavn AS, the Authority concludes that that did not involve state aid within the meaning of Article 61(1) of the EEA Agreement as no economic advantage was involved.

4.2 Vildanden AS

- (100) As regards the interest relief granted by the Municipality of Skien to Vildanden AS, the Authority considers that in view of the fact that Vildanden AS has gone bankrupt and has been removed from the Company Register, there is no interest in examining whether that relief constituted state aid which was incompatible with the functioning of the EEA Agreement pursuant to Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The loan to Skien Lufthavn AS of Skien Municipality personnel did not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

The relief from rental payments until 2 July 2008 and the direct grants by the Municipality of Skien between 2003 and 2005, both in favour of Skien Lufthavn AS, to compensate for the obligation to operate Skien Airport as a public service, constituted state aid which is compatible with the functioning of the EEA Agreement pursuant to Article 59(2) of the EEA Agreement.

Article 2

The case concerning alleged state aid in favour of Vildanden AS is hereby closed.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 4 July 2012.

For the EFTA Surveillance Authority,

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member