

Case No: 70645
Event No: 625996
Dec. No: 289/12/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 11 July 2012

on alleged state aid granted to Oslo Cancer Cluster Innovasjonspark AS

(Norway)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 4(2) and Article 10 of Part II,

Whereas:

I. FACTS

1. Procedure

- (1) By letter dated 15 October 2009 (Event No 533908), the society “Aksjon Nærmiljø Ullernchaussén” (“the complainant”) filed a complaint against Norway alleging that a ground lease agreement between the Municipality of Oslo (“the municipality”) and Oslo Cancer Cluster Innovasjonspark AS (“OCCI”) constituted unlawful state aid. By letter dated 23 October 2009 (Event No 534543), the Authority acknowledged receipt of the letter and requested the complainant to provide additional information. By email dated 9 November 2009 (Event No 536525), the Authority received additional information from the complainant.
- (2) The Authority considered that further information was necessary and sent a request for information on 9 November 2009 to the Norwegian authorities (Event No 536527). The Norwegian authorities requested an extension to reply (Event No 540503) which was granted by the Authority (Event No 540712). By letter dated 13 January 2010 (Event No 542878) the Authority received comments from the Norwegian authorities.

- (3) By letter dated 19 January 2010 (Event No 53445), the Authority informed the complainant that it would not investigate the case further at the time being seeing that the lease agreement had not been formally concluded. By email dated 6 April 2010 (Event No 552413), the Authority received additional information from the complainant. In this email, the complainant submitted that also a tenancy agreement between the same parties involved unlawful state aid.
- (4) By letter dated 12 May 2010 (Event No 557160), the Authority sent an additional request for information to the Norwegian authorities. The Authority received a reply by letter dated 16 June 2010 (Event Nos 560874, 560877, 560880 and 560980).
- (5) By email dated 26 October 2010 (Event No 574794), the Authority received additional information from the complainant. By emails dated 11 January 2011 (Event No 582759) and 31 January 2011 (Event Nos 585192, 585194), the Norwegian authorities submitted additional information.

2. Description of the alleged aid measure

2.1 Background

The re-construction of a new school and the project of Oslo Cancer Cluster Innovasjonspark AS

- (6) In 2007, entailed by a decision adopted by the Municipality of Oslo a year before to relocate parts of the education that had been offered by the upper secondary school Sogn Videregående skole, to Ullern Videregående skole (“Ullern vgs”), the municipality¹ was approached by the owners of what later became the company Oslo Cancer Cluster Innovasjonspark AS (OCCI)². They presented a plan of establishing a combined business-, research- and innovation park (“the innovation park”) on the plot where Ullern vgs is situated, next to the hospital Radiumhospitalet³.
- (7) The proposed plan should be carried out in close cooperation with the municipality.
- (8) With regard to Ullern vgs, the proposed plan suggested that OCCI should undertake an obligation to demolish the old school building at its own expense after which OCCI should construct a new school building on the same location. OCCI should also be responsible for the construction of the other buildings in the innovation park. The plan provided furthermore that the municipality should rent the new school from OCCI as a part of the arrangement, according to a tenancy agreement.
- (9) The location of the school, situated next to the hospital’s institute of cancer research and science, was essential. OCCI could then guarantee a close collaboration between the hospital’s own research and science activities – and Ullern vgs. According to the Norwegian authorities, it could also guarantee the combination of education and work training for the students at Ullern vgs, which is important in order to ensure that students complete their education and pass it with satisfactory result.

¹ Byrådsavdelingen Kultur og utdanning ved seksjon for barn og utdanning.

² OCCI is owned by Oslo Cancer Cluster and Oslo Næringsseidom AS. Oslo Cancer Cluster is a non-profit member organization dedicated to accelerate the development of new cancer diagnostics and medicines. Oslo Næringsseidom AS is private property developer in Oslo, which focuses on creating/fulfilling projects through competences and alliances (www.oslon.no/).

³ Radiumhospitalet is a public hospital (and institute) located in Oslo dedicated to cancer treatment and research. It is the largest cancer centre in Northern Europe and it is a part of Oslo University Hospital (<http://www.ous-research.no/>).

- (10) A formalized co-operation or partnership with the municipality on the project was also important for OCCI, as the municipality is the owner of the land where Ullern vgs is situated.⁴
- (11) On 5 September 2008, the municipal agency for education and OCCI had finalized three drafts of separate agreements for the co-operation arrangement, including a tenancy agreement for the school building.
- (12) In 2010, a separate agreement for the lease of the site where the school is situated (“the lease agreement”) was finalized.⁵
- (13) All four agreements (“the co-operation arrangement”) were formally approved by the Municipal Council on 15 December 2010.

2.2 The co-operation arrangement

- (14) The co-operation arrangement between OCCI and the municipality provided several agreements; 1) a paramount partnership agreement that should govern the co-operation in general, 2) an academic service agreement that should govern the supply of academic services from OCCI to Ullern vgs, 3) a tenancy agreement for the municipality’s use of the renewed Ullern vgs, and finally 4) a lease agreement for the school’s site which should remain as a property owned by the municipality.

2.2.1 The paramount partnership agreement

- (15) The paramount partnership agreement⁶ (“the partnership agreement”) provides general provisions of the contractual relationship between the parties. It points out that the objective of the co-operation is to create collaboration and synergies between education, research, science and business activities. Thus, it is the framework agreement for establishing the new innovation park.
- (16) The initial provisions make it clear that the partnership agreement forms part of a wider arrangement, together with two supplementary agreements; namely the tenancy agreement and the academic service agreement.⁷
- (17) The partnership agreement also indicates that there are several contractual links between the agreements in question, in particular between the tenancy agreement and the academic service agreement.
- (18) The partnership agreement provides that OCCI is obliged to comply with the public procurement rules when it performs procurements in order to re-construct the new school.⁸ It also points out that OCCI may, if necessary, seek assistance from Oslo Cancer Cluster or Ullevål University Hospital⁹ or from Rikshospitalet¹⁰, respectively, in order to fulfil its obligations under the agreements.¹¹

⁴ The municipality’s ownership is managed by Undervisningsbygg which is the municipal undertaking for educational buildings and property.

⁵ The Authority has not been provided with the dated and signed lease agreement.

⁶ The paramount partnership agreement which is submitted to the Authority is not dated. The municipality’s stamp on the front page indicates 8.9.2008.

⁷ The lease agreement is however not expressly stipulated in the partnership agreement.

⁸ Paragraph 2.1 in the partnership agreement.

⁹ Ullevål University Hospital (*Norwegian*: Ullevål Universitetssykehus) is the largest public hospital in Norway. It is a highly specialized hospital and a level I trauma centre servicing approximately half of Norway’s population.

- (19) In the event of a breach of contract, the rent in the tenancy agreement (*i.e.* of the new school building) can be reduced for a corresponding value.¹² Furthermore, it is provided that a fundamental breach¹³ of the partnership agreement – or of any of the other agreements, entitles the other party to cancel the entire co-operation arrangement.¹⁴
- (20) The duration of the partnership agreement is dependent on the duration of the two other agreements.¹⁵ Consequently, the partnership agreement expires when one or more of the other agreements expires unless there is a fundamental breach of contract.
- (21) The partnership agreement also entitles the municipality to take over the new Ullern vgs at its “written-down” value when the partnership agreement expires.¹⁶

2.2.2 *The academic service agreement*

- (22) As an essential element in the co-operation arrangement, OCCI shall supply the new Ullern vgs with academic services¹⁷. A specific supplementary academic service agreement governs the supply of this service.
- (23) As OCCI’s obligation to supply the new school with various academic services is essential in the arrangement, the academic service agreement provides that the duration of the services supply is dependent on the existence of the partnership agreement.¹⁸
- (24) Moreover, the academic service agreement provides that OCCI shall “free of charge” supply Ullern vgs with various academic services at the value of NOK 3 750 000 per year.¹⁹ Thus, under the academic service agreement, the municipality shall not pay anything to OCCI for these services, but the value is to be included in the rent to be paid according to the tenancy agreement. Furthermore, it is provided that the value then is to be calculated by the parties at a price which is lower than the costs of purchasing comparable consulting services. In this respect, it is provided that the municipality shall only be charged for OCCI’s costs for supplying Ullern vgs with these services.
- (25) The academic service agreement has an annex that explains how the value of NOK 3 750 000 has been calculated. The amount is based on several elements, each with a separate estimated value. The parties have also estimated a value on how much each specific service *represents for the municipality* (*i.e.* for the school) – as well as the corresponding price that the municipality *will actually be charged for this service*. The estimates indicate that the municipality will in total (only) be charged for NOK 1 400 000 of the estimated value of NOK 3 750 000. For example, the municipality will neither be charged for OCCI’s supply of economic scholarships nor the obligation to offer students at Ullern vgs

¹⁰ Rikshospitalet is also a highly specialized public university hospital with special assignments in research/science and in the development of new methods of treatment. Many of the patients admitted to Rikshospitalet are referred from other hospitals in Norway for more specialized investigations and treatment and the hospital plays an important part with expert knowledge of the treatment of rare and complicated disorders. It covers the whole country in various fields, including organ and marrow transplants and advance neurosurgery.

¹¹ Paragraph 2.5 in the partnership agreement.

¹² Paragraph 3.5 in the partnership agreement.

¹³ In *Norwegian*: “vesentlig mislighold”.

¹⁴ Paragraph 3.7 in the partnership agreement.

¹⁵ Paragraph 1.5 and 4 in the partnership agreement.

¹⁶ Paragraph 5.4 in the partnership agreement.

¹⁷ OCCI had already a strong involvement in Radiumhospitalet’s research and science activities through Oslo Cancer Cluster.

¹⁸ Paragraph 1.4 in the academic service agreement.

¹⁹ Paragraph 2.1 in the academic service agreement.

specific work training at Radiumshospitalet.²⁰ However, the stipulated value of the other services, *inter alia* to supply to the school with various academic lectures by scientists and professionals at the hospital, corresponds to the amounts that the municipality will be charged for in the rent.

- (26) Finally, the academic service agreement provides that a breach of the contract can be set off against the rent in the tenancy agreement, which complies with the provisions in the partnership agreement.²¹

2.2.3 The tenancy agreement

- (27) As indicated above in paragraph 8, OCCI will undertake an obligation to demolish the “old” school building at its own expense before it shall construct a new Ullern vgs on the same site. The new school building, exclusive of the site, will then, as a “quid pro quo”, become an asset of the innovation park, owned by OCCI.
- (28) The municipality will rent the new school building from OCCI according to a tenancy agreement that the parties have entered into. The total size of the new Ullern vgs is according to the tenancy agreement stipulated to 12 000 m².²² It is also indicated that the renewed school building shall only serve education-, research- and school-/study related activities.²³
- (29) There are provisions in the tenancy agreement on the date of “take-over”.²⁴ Moreover, the duration of the agreement is stipulated to 25 years, starting from the time of take-over and with an option to prolong the tenancy agreement for an additional 15 years, and thereafter for 4 additional periods – each containing a 10 years contract (a total of 80 years).
- (30) The annual rent is stipulated at NOK 27 915 301. The tenancy agreement provides that the rent is based on a so-called “principle of cost-absorption”. The agreement²⁵ also stipulates individual values of the elements included in the rent as in the following:

	Costs (in NOK)
Financial cost ²⁶	20 639 381
Cost share for the lease of land ²⁷	3 900 000
Administration and maintenance costs for the school area (NOK 141.17 per m ²)	1 355 232
Administration and maintenance costs for the common area (NOK 258.62 per m ²)	620 688

²⁰ The supply of work training per year for 45 “VG1” and 30 “VG2” health/social care students; and trainee positions for 15 “VG3” students and 10 electro-engineering students.

²¹ Paragraph 5 in the academic service agreement.

²² Paragraph 1.3 in the tenancy agreement.

²³ Paragraph 1.4 in the tenancy agreement.

²⁴ Paragraph 2.1 in the tenancy agreement.

²⁵ Paragraph 4.1 in the tenancy agreement.

²⁶ The annual financial cost is based on NOK 300 million as the construction cost of the new school.

²⁷ OCCI is according to a separate lease agreement obliged to pay a rent for the lease of land where the school building is situated. A proportional share for the rent of the school building is covered by the municipality in the rent for the tenancy agreement. Annual adjustments in the lease rent is however governed by the lease agreement.

Academic services ²⁸	1 400 000
Total	27 915 301

- (31) The rent is subject to annual adjustments.²⁹
- (32) In order to correspond with the provisions in the two other agreements, namely the academic service agreement and the partnership agreement, the tenancy agreement provides that a breach of the academic service agreement can be set off against the rent in the tenancy agreement.³⁰
- (33) Finally, the tenancy agreement also provides, as the partnership agreement, that the municipality is entitled to take over the new school building, when the tenancy agreement expires, at a “written down” value.³¹

2.2.4 *The lease agreement*

- (34) The parties have also entered into a lease agreement for the underlying site of Ullern vgs. for a duration of 80 years.³²
- (35) According to the lease agreement, the market value of the entire plot corresponds to NOK 125 million.³³ Based on this, the agreement stipulates an annual lease of NOK 7.2 million, calculated based on the application of a reasonable rate of return in the market (5.75% of NOK 125 mill = approx. NOK 7.2 mill).³⁴
- (36) The content of the lease agreement is rather limited but there is an annex that supplements the terms in the lease agreement (cf. paragraph 7 in the agreement).
- (37) The annex to the lease agreement explains that the objective of the agreement is that OCCI shall construct several new buildings on the plot and that OCCI (as the lessee) shall demolish the old building of Ullern vgs “at its own expense”. Furthermore, it also provides (cf. paragraph 7.13 in the annex) that the size of the new school building would be approximately 12 000 m².
- (38) It is provided (cf. paragraph 7.2 in the annex) that the stipulated lease is to be adjusted every ten years.³⁵ The adjustment of the annual lease cannot be set to an amount which is less than the lease agreed upon when the contractual relationship initially started (*i.e.* 2008).
- (39) It is finally provided in the annex (cf. paragraph 7.13) that the municipality is to take over the buildings on the land in question at its market value when the lease agreement expires.³⁶

²⁸ As explained above in paragraphs 24–25, this amount refers to the price that the municipality will be charged for per year for the supply of academic services even though the academic service agreement stipulates that the value of this service for the school is in real terms NOK 3 750 000 per year.

²⁹ Paragraph 4.1 in the tenancy agreement.

³⁰ Paragraph 11.3 in the tenancy agreement.

³¹ Paragraph 17.2 in the tenancy agreement.

³² Paragraph 5 in the lease agreement.

³³ Paragraph 1 in the lease agreement.

³⁴ Paragraph 4 in the lease agreement and Paragraph 7.2 in the annex.

³⁵ It explains that the adjustment shall be based on the market value of the property multiplied with a required rate of return which corresponds to a ten year swap interest plus a margin of 100 points.

³⁶ Paragraph 7.13 in the annex to the lease agreement.

2.3 The evaluation report assessing the market value of the lease agreement

- (40) Following on the Authority's preliminary investigation in this case in 2010, the municipality³⁷ decided to engage Agdestein Takst og Eiendomsrådgivning ("Agdestein"), as an independent expert, to evaluate the market value of the lease agreement. The engagement did not concern the other agreements in the contractual arrangement but it appears to be understood by Agdestein that the lease agreement forms part of a wider contractual arrangement (the co-operation arrangement).
- (41) By letter dated 16 June 2010 (Event Numbers 560874 and 560980) the Norwegian authorities submitted the consecutive evaluation of 22 March 2010 by Agdestein ("the Agdestein report").
- (42) The valuation assessment is based on the following:
*"the area has a very attractive location, positioned next to Radiumhospitalet, which provides for an unique combination of research/education/commercial development".*³⁸
- (43) As the planned innovation park consists of more land than just the plot in the lease agreement (*i.e.* for the school), it follows from the valuation report that Agdestein firstly, assessed the sales value (*i.e.* market value) of the zoned land which is the subject for the development plan, at NOK 170 million, after which he then identified the value of the plot in the lease agreement. Agdestein applied the following method: Of the 20 836 m² of zoned land, the municipality owns 15 273 m² which equates to 73.3% of the entire property ($15\,273/20\,836 = 73.3\%$). Thus, the market value of the property owned by the municipality is NOK 124.6 million (73.3% of NOK 170 million = NOK 124.6 million.).
- (44) In order to identify the market rent of lease agreements in general, Agdestein referred to a Norwegian Supreme Court case,³⁹ that states that the lessee should be granted "*a normal, reasonable economic return on the value of the land*".⁴⁰
- (45) Based on the figures above and by identifying a reasonable rate of return for the time being⁴¹, Agdestein concluded that the reference rate for the first ten years should be 5.25% (and not 5.75% as applied in the agreement). Hence, by applying the assessed rate of return at 5.25%, the market rent of the lease agreement should amount to NOK 6.54 million for the first ten years (5.25% of NOK 124.6 million = NOK 6.54 million).

3. The Complainant

- (46) The complainant, who represents seven residents' associations⁴² in the area, have argued that neither the lease agreement nor the tenancy agreement have been subject to public announcements. Consequently, there is a presumption that the lease in the lease agreement and the rent in the tenancy agreement, respectively, deviates from the market value, thus it is alleged that unlawful state aid is involved.

³⁷ Undervisningsbygg engaged Agdestein while acting on behalf of the municipality.

³⁸ Event No 560980.

³⁹ Rt 2001 s. 140.

⁴⁰ "*Bortfester skal sikres en normal rimelig avkastning av de verdier festeearealet representerer*".

⁴¹ With the reference to the current interest of Norwegian government bonds over ten years time.

⁴² Smedstadgrendens Vel, Bestum Vel, Montebello Vel, Abbedikollen Vel, Søndre Huseby Vel, Husebyåsen Vel og Generallunden Boligsameie. Their objective is to protect the local environment in the planned construction work along the route of Ullernchauseen/Ring 3.

4. Comments by the Norwegian authorities

- (47) The Norwegian authorities have submitted that the municipality has been acting as a market investor.
- (48) The contractual arrangement is favourable for the municipality, thus no unlawful state aid is involved. All individual agreements have been subject to negotiations and the stipulated rent in the lease agreement and the tenancy agreement, respectively, are both competitive with the market value.
- (49) To demonstrate that the lease agreement is market based, the Norwegian authorities have submitted an independent expert evaluation from Agdestein. According to the Norwegian authorities, Agdestein's value assessment confirms that the lease agreement corresponds to market terms.
- (50) As regards the tenancy agreement, the Norwegian authorities have submitted two tables of the rent of other comparable schools in the area.⁴³ Both overviews confirm that the rent in the tenancy agreement is competitive as the rent is a bit lower than for other comparable schools in the area.
- (51) According to the Norwegian authorities it is also important to bear in mind the value of the academic service agreement in this case. Economically, the academic services constitute a rather small part of the rent in the tenancy agreement. However, from the municipality's point of view, this part has nevertheless a higher economic value for the school than what the municipality is being charged for as a part of the rent. The value of this unique service, and also the quality, were essential for selecting OCCI as a partner for the contractual arrangement. Thus, the rent in the tenancy agreement is favourable for municipality.

II. ASSESSMENT

1. The presence of state aid

- (52) 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

- (53) It follows from the above that to be considered as state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must confer on the recipient (in this case, OCCI), an economic advantage which is not received in the normal course of business.⁴⁴
- (54) The lease agreement and the tenancy agreement, respectively, which are both subject of the Authority's inquiry in this case, would involve state aid if the municipality would forego income by leasing out the land below the market price – and/or if the municipality

⁴³ Event Nos 585192 and 585194.

⁴⁴ Case C-39/94 *SFEI v La Poste* [2006] ECR I-3547, para. 60.

is making funds available to OCCI by paying a rent for using the new school above market rent.

- (55) In the assessment of whether the agreements confer on OCCI an economic advantage, the Authority has to apply the market economy investor test⁴⁵, which in essence provides that state aid is granted whenever a state (or a municipality) makes funds available to an undertaking which, in the normal course of events, would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social, political and philanthropic nature.⁴⁶ However, by making this assessment, the Authority cannot replace the municipality's judgement with its own, which implies that the municipality, as in this case, must enjoy a wide margin of judgement.
- (56) If the transaction is carried out in accordance with the market economy investor principle, *i.e.* if the municipality entered into the two agreements at market terms such that the conditions of the agreements would have been acceptable for a private investor, the Authority can exclude that the two agreements involve state aid.
- (57) Thus, in the following, the Authority will assess the two agreements in question in order to determine whether a market investor would have acted in a similar manner.

The lease agreement

- (58) In order to determine whether the lease agreement confers on OCCI an advantage by state resources, the Authority must assess whether the lease to be paid corresponds to market value.
- (59) The Authority recalls that the mere fact that the lease agreement has not been subject to a tender – or that the rent has not been based on a prior independent expert valuation does not in itself mean that state aid is involved.
- (60) The Authority's Guidelines on state aid elements in sales of land and buildings by public authorities⁴⁷ provide simple procedures that allow EFTA States to handle sales of land and buildings in a way that normally precludes state aid. Where an independent expert has carried out a prior valuation of the land on the basis of generally accepted market indicators, this is a clear indicator of the market price that can be used to exclude state aid.
- (61) Despite the fact that the Authority's Guidelines on state aid elements in sale of land and buildings are not directly applicable to lease agreements, the Authority considers that the method as provided in the Guidelines, can nevertheless be used in this particular case by analogy.⁴⁸
- (62) As mentioned above, it is stipulated in the lease agreement that OCCI and the municipality had based the price for the lease on the market value of the plot and used a reasonable rate of return to determine the annual payment (5.75% of NOK 125 mill = approx. NOK 7.2 mill).

⁴⁵ This principle is explained in the Authority's Guidelines Part VI on Public service compensation, state ownership of enterprises and aid to public enterprises – Application of state aid provisions to public enterprises in the manufacturing sector of 12.4.2000.

⁴⁶ Cf., for example, Opinion of Advocate General Jacobs in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, para. 28.

⁴⁷ Available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁴⁸ See e.g. the Authority's Decision No 125/11 COL.

- (63) Moreover, the Norwegian authorities have submitted a valuation report of 22 March 2010 by Agdestein, who should determine the market value of the land and a market based lease.
- (64) Furthermore, on the basis of the explanation in the valuation report on how the market value of the lease agreement has been assessed, the Authority considers that Agdestein has carried out his task on the basis of generally accepted market indicators.
- (65) It is nevertheless noted that the municipality did not engage Agdestein to carry out the valuation assessment before it entered into negotiations on the lease agreement. The engagement of Agdestein was entailed later when the Authority had started its inquiry in this present case, based on the allegation of unlawful state aid. And it is unclear to the Authority what basis the municipality had for agreeing on the fixed rent of NOK 7.2 million per year when it approved the lease agreement.
- (66) Agdestein's report of 22 March 2010 concludes nevertheless that the market value of the lease agreement is NOK 6.54 million per year which is indeed also lower than the agreed rent. The Authority has not been provided with any information that indicates that Agdestein's assessment is wrong.
- (67) The price reached in the context of the negotiations is higher than the value determined by the independent expert. The Authority considers that the result of the independent expert assessment strengthens the conclusion that the agreement was entered into on the basis of negotiations between the municipality and OCCI which complied with the market economy investor principle. The Authority is furthermore not in possession of any documents that contradict this fact or that indicate that the municipality intended to grant OCCI any aid.
- (68) Based on the fact that OCCI is going to pay the municipality a lease which is deemed higher than the market value, it is evident that the lease agreement complies with the market investor test. Hence, in the light of the report and current available information, the Authority cannot find that the lease agreement constitutes state aid.

The tenancy agreement

- (69) Also with regard to the tenancy agreement, the complainant has argued that state aid is involved because the agreement has not been subject to a tender.
- (70) Again, the Authority will note that the mere fact that the agreement has neither been subject to an announced tender competition nor assessed by a prior independent expert evaluation does not in itself entail that state aid is involved. The decisive question is whether the municipality pays a rent equal to the market value for the school building.
- (71) The Norwegian authorities have argued that the tenancy agreement is based on a market rent and it has been subject to negotiations. They have also underlined that the tenancy agreement has several links to the academic service agreement and that a moderately assessed value of this particular service is included in the rent.
- (72) The Norwegian authorities have also submitted two tables that compare with the rent for other (re-constructed) schools in the area.⁴⁹ One of the tables, which was included in the case file for the Municipal Executive Committee's meeting on 26 August 2010, and also

⁴⁹ See reference in footnote 43.

later when the Municipal Council approved the four agreements on 15 December 2010, provided the following comparison⁵⁰:

	The cooperation project between the municipality/Ullern vgs and OCCI	Proposed budget (2009) for the reconstruction of Ullern vgs without the OCCI co-operation	Persbråten Videregående skole (another cooperation project between the municipality and a private undertaking)
Construction costs per m ²	28 250	42 386	25 577
Current rental cost per student	585 806	960 000	684 911

- (73) The stipulated amounts in the table provide, firstly, a comparison of re-construction costs per m² and rental costs based on each student, secondly, the economic estimate for re-constructing Ullern vgs by Undervisningsbygg (without the OCCI cooperation) and thirdly, the comparable costs for a so-called public-private-partnership (PPP) which was applied on the re-construction⁵¹ of another upper secondary school in Oslo (Persbråten Videregående skole).
- (74) The comparison of the amounts shows that the rent that the municipality is paying according to the tenancy agreement appears to be lower than for comparable schools in the area.
- (75) The second overview that has been provided in this case⁵² also includes the comparable costs of the upper secondary school Nydalen Videregående skole, in Oslo.
- (76) Both submitted tables in this case indicate that the fixed rent in the tenancy agreement appears to be favorable for the municipality. The Authority has not received information that alters this view.⁵³
- (77) The Norwegian authorities have also emphasized that the presence of the academic service agreement is essential in this case and this part was also essential for the municipality's decision to enter into the co-operation arrangement at hand with OCCI.
- (78) Based on the assessed value of the services in the academic service agreement, the estimated price for the academic service supply, which is included in the rent that the municipality shall pay according to the tenancy agreement, is less than 50% of its value for the municipality (NOK 3 750 000 000 versus NOK 1 400 000). And seeing as the academic services are moderately priced when included in the rent due under the tenancy agreement, the conclusion that the tenancy agreement is favorable for the municipality is further strengthened.
- (79) The Authority does not have any information on its possession to indicate that the municipality wanted to grant any state aid to OCCI with this agreement, or actually did so.

⁵⁰ Event No 560874. All amounts are exclusive costs for administration, operation and maintenance.

⁵¹ *Norwegian*: Offentlig Private Samarbeid (OPS).

⁵² Event Nos 585192 and 585194.

⁵³ The Authority will however note that the complainant has submitted an article from a Norwegian newspaper (DN) that indicates that the annual rent is higher than the market rent for business premises in the area. It is the Authority's view that that this article is not relevant for this case as the rent in question should be compared with the rent of comparable school buildings in the area and not with other types of premises/premises used for a different sort of activities.

On the contrary, all evidence provided to the Authority confirms that the tenancy agreement was signed in accordance with the market economy investor principle in the context of bilateral negotiations. On the basis of these negotiations, the municipality reached a lower price for the rent than for other similar transactions.

- (80) In the light of the submitted information, and as demonstrated above, it appears as the rent that the municipality is paying according to the tenancy agreement complies with the market investor test. Thus, the Authority concludes that tenancy agreement does not involve state aid.

2. Conclusion

- (81) On the basis of the foregoing assessment and in view of the information available, the Authority concludes that the two agreements referred to in the complaint, namely the lease agreement and the tenancy agreement, both approved by the Municipal Council of Oslo on 15 December 2010, do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.
- (82) Seeing that no aid is involved, it is not necessary for the Authority to assess whether the other criteria required under Article 61(1) of the EEA Agreement are met.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the lease agreement and the tenancy agreement between Oslo Municipality and Oslo Cancer Cluster Innovasjonspark AS, both approved by the Municipal Council 15 December 2010, do not constitute 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 language version of this decision is authentic.

Decision made in Brussels, on 11 July 2012.

For the EFTA Surveillance Authority



Signed version

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member