

Case No: 55120
Event No: 480965
Dec. No: .387/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 7 October 2009
on the sale of Youngstorget 2 AS

(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹,

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

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

HAVING REGARD to Articles 4(2) and Article 13(1) of Part II of Protocol 3 to the Surveillance and Court Agreement⁴,

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement⁵,

Whereas:

I. FACTS

1. Procedure

By letter dated 13 March 2001, received and registered with the Authority on 16 March 2001 (Doc. No: 01-1978 A), the Norwegian political party Venstre filed a complaint against the sale of the shares in the company Youngstorget 2 AS by Oslo Municipality. The complainant argued that this sale to the Norwegian Labour Party and connected organisations involved the grant of state aid.

By letter dated 6 September 2005 (Event No 280278), the Authority informed the Norwegian authorities about the complaint and requested the Norwegian authorities to provide all information necessary to carry out an assessment under Article 61 of the EEA

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

⁵ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231 of 3.9.1994, p. 1 and EEA Supplement No 32 of 3.9.1994, p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/>

Agreement. The Norwegian authorities replied to this information request by letter dated 6 October 2005 (Event No 345559).

By letter dated 16 May 2007 (Event No 421524), the Authority contacted the complainant and queried whether he was still interested in pursuing the case. In reply, the complainant confirmed that he did not have any further interest in pursuing the case.

2. The disputed sale

2.1. The company

Folketeaterbygningen AS (hereinafter the Company) was set up in the 1920s as a result of an initiative from interest groups in Oslo who wished to establish a theatre for “ordinary people” in the eastern part of Oslo. The Company was not an ordinary limited company, but a sui generis construction in the form of a mixture between a limited company and a society with a cultural purpose. Another particularity of the Company was that the bylaws provided that each owner should only have one vote, independently of the contribution of the relevant owner.

The owners of the Company was Oslo Municipality, who had contributed with approximately 90% of the capital of the Company, private individuals, some of the main employers in Oslo, the Norwegian Labour Party and other local and national organisations that were part of the Norwegian labour movement. However, as a consequence of the bylaws, Oslo Municipality had only one vote, although it had made the by far largest financial contribution (approximately NOK 3 million out of NOK 3.4 million).

The purposes of the Company were partially of a cultural nature, e.g. contributing to the public being offered good art at reasonable prices, but also commercial, with the bylaws providing that the Company should own and administer the properties of Storgata 21, 23 and Youngstorget 2 in Oslo, Norway.

2.2. The property owned by the Company

The Company owns properties in central Oslo. The properties consists of buildings on both sides and over a roofed walking-passagen called “Opera-passagen”. The site includes several different buildings with both offices and shops, and with the main part being a theatre hall and related areas. The total surface area is approximately 40.000m².

2.3. The dispute

In the late 1980’s it came to the owners knowledge that the Norwegian legislation did not permit any kind of limited liabilities companies other than what was defined in the Norwegian Limited Liability Company Act. A transformation of the Company appeared thus needed, but an agreement on new bylaws could not be reached among the parties and extensive litigation before the courts followed. A Supreme Court judgment from 1997 appeared to solve the issue, and new bylaws were subsequently presented. However, Oslo Municipality refused to approve the suggested changes to the bylaws, claiming they were not fully in line with the Supreme Court’s judgment. Oslo Municipality was also of the opinion that the Company should claim full market rent from its tenants, thus maximising its economic results. The disputes resulted in two new proceedings being instituted before the national courts.

2.4. The settlement

The shareholders of the Company were interested in finding a prompt and acceptable solution. A settlement arrangement was discussed and a dispute settlement agreement was reached which led to the ongoing civil court cases being terminated.

The details of the settlement is set out in an agreement, concluded on 21 December 2000 between Oslo Municipality, the Norwegian Labour Party and the company Youngstorget Eiendom AS (hereinafter the Agreement).

According to this Agreement, the Norwegian Labour Party and other minority shareholders from organisations connected to the Labour Party and labour unions agreed to first transfer all their shares in the Company to a newly established company called Youngstorget Eiendom AS, owned by the Norwegian Labour party and connected organisations. Youngstorget Eiendom AS would then transfer all its shares in the Company to Oslo Municipality at par value, or at the value of the original capital contribution, at a price of NOK 15.000 in total. One part of the property owned by the Company would then be separated from the rest and be established as a separate limited liability company, named Youngstorget 2 AS. Finally, Oslo Municipality would sell all its shares in Youngstorget 2 AS to Youngstorget Eiendom AS. The price paid by Youngstorget Eiendom AS for the shares in Youngstorget 2 AS amounted to NOK 76 million.

The Agreement covered only part of the property owned by the Company, who had now become exclusively owned by Oslo Municipality, and the Company thus retained the largest part of its property portfolio.

2.5. Valuation of the property

A valuation of the property owned by Youngstorget 2 AS was obtained from two independent experts. The expert e from the firm OPAK estimated the property to be worth either NOK 95 million, or NOK 106 million, depending on the size of the property (report dated 24 May 2000). The valuating firm Catella estimated the property to be worth NOK 85 million (report dated 25 May 2000).

2.6. Comments by the Norwegian authorities

The Norwegian authorities underline that the Agreement should not be seen as a stand-alone transaction, but rather as a part of a solution resulting from a settlement of two ongoing proceedings before the national courts.

The Norwegian authorities declare that prior to the settlement agreement, despite its large initial financial contribution, Oslo Municipality did not have positive control of the Company and the properties owned by it and, could therefore not dispose of any part of the values involved. Hence, prior to the Agreement and unless consent from the other shareholders was obtained, Oslo Municipality was not able to sell the shares of the Company or (all or part of) the property owned by the Company on the market. Consequently, the Norwegian authorities have argued that without the prior consent of the other shareholders, it would not even have been possible for Oslo Municipality to sell any of the properties according to the relevant EEA state aid rules.

Prior to the Agreement, Oslo Municipality's rights in relation to the company were limited to negative control over certain aspects of the management of the company, e.g. having veto rights with regards to certain defined issues, and the right to appoint a minority of the members of the board of the Company.

The Norwegian authorities stress that from the above, it follows that the Agreement should not be seen as granting an advantage to the Norwegian Labour Party, but rather as a long-term strategic decision of the Oslo Municipality to ensure that it would obtain sole control of most of the value of the Company's properties and that it could exploit its full economic potential.

The Norwegian authorities explain that as a consequence of the Agreement, Oslo Municipality achieved full control over approximately two thirds of the properties in addition to the cash received from the sale of the shares in Youngstorget 2 AS. In total, and as a result of the Agreement, Oslo Municipality obtained assets of approximately NOK 200 million.

Finally, the Norwegian authorities point out that the two expert evaluations relate to the property, and not to the value of the shares of Youngstorget 2 AS. The value of the shares are different from the value of the property, due to other asset, debt and other applicable tax rules. Youngstorget 2 AS would allegedly have had to pay a 28% tax on profit, had the property as such been sold, whilst the sale of the shares did not result in any taxes being imposed on Oslo Municipality.

II. ASSESSMENT

3. The presence of state aid

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.”

3.1. Presence of state resources

To qualify as state aid within the meaning of Article 61(1) of the EEA Agreement, the measure must first be granted by the State or through state resources.

In the present case, it is clear that any support from Oslo Municipality in the form of foregoing revenues by asking a lower price than market price for the property would fall within the notion of “state resources” within the meaning of Article 61(1) of the EEA Agreement.

3.2. Favouring certain undertakings or the production of certain goods

First, the measure must confer on the buyer of the shares in Youngstorget 2 AS, i.e. Youngstorget Eiendom AS, advantages that relieve it of charges that are normally incurred by such transaction. Second, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. In the current case, the potential measure would favour one undertaking, Youngstorget Eiendom AS, and is therefore selective.

Youngstorget 2 AS was sold by Oslo Municipality to Youngstorget Eiendom AS on 21 December 2000 for the price of NOK 76 million. Seven months prior to this sale, the independent asset valutors from OPAK and Catella estimated the market value of the

property owned by Youngstorget 2 AS at respectively NOK 95 million or NOK 106 million, or NOK 85 million, depending on the size of the property covered by the sale.

The valuation reports focused solely on the sale of the property in isolation. However, in order to establish the market price for this particular transaction, the Authority must assess which price would have been acceptable to a market investor taking into account the overall situation between the parties and the ongoing settlement discussions. What falls to be examined is therefore whether a private investor operating in the market economy would have chosen to enter into a settlement agreement based on the same price and on the same terms as in the agreement in question. In making that assessment, the Authority can not replace the municipality's commercial judgment with its own, which implies that the municipality as a party to the settlement agreement must enjoy a wide margin of judgment.⁶.

The Authority is of the opinion that the Agreement, and the price paid for the shares in Youngstorget 2 AS, must be seen in the context of the settlement arrangement that terminated the fundamental disagreement that had existed among the parties regarding major structural ownership issues as well as the economic activities of the Company. An inherent part of a settlement deal is that the parties seek compromises and to a certain extent make concessions and accept solutions, which seen in isolation, might appear unsatisfactory, but in the broader context may lead to an improved situation.

According to the information provided by the Norwegian authorities, in accordance with the obligations accepted under the Agreement, the Norwegian Labour Party and other minority shareholders transferred a substantial amount of assets to Oslo Municipality by virtue of the sale of all their shares in the Company to Youngstorget 2 AS. As a consequence of this, Oslo Municipality achieved full control over approximately two thirds of the properties previously owned by the Company in addition to the cash received from the sale of the shares in Youngstorget 2 AS.

Based on the available information and, in particular in light of the settlement arrangement that enabled the value of the property to be fully exploited and the on-going disputes to be terminated, the Authority finds that it cannot be established in this case that the sale of the shares in Youngstorget 2 AS to Youngstorget Eiendom AS conferred any advantage to this company within the meaning of Article 61(1) of the EEA Agreement.

4. Conclusion

On the basis of the foregoing assessment, the Authority considers that Youngstorget Eiendom AS did not receive state aid within the meaning of Article 61(1) of the EEA Agreement in connection with the above-mentioned transaction.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that it cannot establish that aid within the meaning of Article 61(1) of the EEA Agreement was granted to Youngstorget Eiendom AS regarding the sale of Youngstorget 2 AS.

Article 2

This Decision is addressed to the Kingdom of Norway.

⁶ See section 1.2.1 of the decision by the EFTA Surveillance Authority 8 July 2009 No. 305/09/COL

Article 3

Only the English version is authentic.

Done at Brussels, 7 October 2009.

For the EFTA Surveillance Authority,

Per Sanderud
President

Kurt Jaeger
College Member