

Case No: 68642
Event No: 566039
Dec. No: 417/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 3 November 2010

to initiate the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the sale by Oppdal municipality of the plot of land gbnr 271/8

(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 and Protocol 26,

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 1(3) of Part I and Articles 4(4) and 6 of Part II,

HAVING REGARD to the consolidated version of the Authority’s Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 (“the Implementing Provisions Decision”)¹,

HAVING REGARD to the State Aid Guidelines on state aid elements in sales of land and buildings by public authorities²,

Whereas:

I. FACTS

1. Procedure

By letter dated 3 July 2008 (Event No 484519), Oppdal Booking AS (OB) filed a complaint against Oppdal municipality’s intended sale of the property 271/8 in Oppdal to Strand Drift Oppdal AS (SDO).

¹ Available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>

² This Chapter of the Guidelines corresponds to the Commission Communication on state aid elements in sales of land and buildings by public authorities (OJ No. C 209, 10.07.97, p. 3) also available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

By letter dated 9 July 2008 (Event No 485146), the Authority requested additional information from the Norwegian authorities. The Norwegian authorities replied in a letter dated 9 August 2008 (Event No 490114).

By letter dated 8 September 2008 the buyer, SDO, submitted comments to the Authority (Event No 491369).

On 1 October 2008, OB provided supplementing information in a letter to the Authority (Event No 493593).

2. Chronology of events

On 7 February 2007, SDO had through an application, proposed to the municipality the building of a service facility for ski resort customers on property 271/8. An amendment of the municipal regulations would be necessary to use the area as a public parking facility. In a letter to the municipality dated 19 February 2007, SDO expressed their interest in buying the property. The municipality replied in a letter dated 30 November 2007, that until it had decided on the amendment of the municipal regulations, SDO's proposal to buy the property would be put on hold.

On 31 March 2008, the municipality approved the application. OB then filed a complaint on the municipality's decision. By letter dated 5 May 2008 the municipality informed SDO of the complaint, and that the request to buy the property could not be considered before a decision on the complaint was taken. On 26 May 2008, the municipality referred OBs' complaint to the regional regulations authority (Fylkesmannen) for processing.

By letter dated 30 May 2008 OB expressed its interest in buying the property to the municipality, in case their complaint was not sustained by the regional authority. By letter dated 6 June 2008 the municipality informed SDO that the municipality would not consider the request to buy the property until the complaint on the municipality's decision had been dealt with by the regional authority. The municipality also explicitly denied that SDO had any option on buying the property.

On 30 June 2008, Oppdal municipality decided to obtain two separate evaluations of the property, and thereafter proceed with sale negotiations with SDO.³

Oppdal municipality obtained two separate reports which assessed the value of the property. The first report dated 7 July 2008, was made by Ragnar Lian, and the second report, dated 9 July 2008, was made by Geir Husebø. The property's value was assessed respectively as 850 000 and 800 000 NOK. Both experts had estimated a "normal sales value", defined as the price the property could be sold for on the day of appraisal, meaning a price that more than one buyer would be willing to pay. One of the experts, Geir Husebø, also added to this definition in his report, that the assessment disregarded potential buyers who due to exceptional circumstances were willing to pay a particularly high price.

On 15 July 2008, the municipality invited SDO to a meeting to discuss a draft sales contract for the property for the first time. The municipality informed SDO of the appraisals, and that the sales price would be 850 000 NOK. According to the municipality's minutes from the meeting, the municipality planned to decide on the result of the negotiations on 24 July 2008. SDO signed the contract on 18 July.

³ Minutes from meeting 30.6.2008 in Oppdal Municipality (Formannskapet)

The appraisals were sent to OB at their request on 21 July 2008. By letter dated 23 July, OB complained about the appraisals, alleging that they did not reflect the proper market value. OB maintained *inter alia* that they were willing to pay a far higher price, based solely on a calculation of the profit they could derive from the property. The same day OB forwarded a letter to the municipality with an offer of NOK 3.1 million. The offer was described as a "starting offer" and was made on conditions that the necessary permits for developing the property would be granted, and that OB would be given sufficient time to design the building that was to be erected.

On 31 July 2008, the Municipality signed the contract with SDO. As the Authority understands the facts, it was only at this moment that a binding agreement under Norwegian law was entered into.

3. The complaint

In July 2008, OB complained to the Authority alleging that Oppdal municipality was going to sell property 271/8, which served as a parking area for customers of a nearby ski resort, without notifying the sale.

OB owns and operates a number of ski resorts in the Norwegian municipality Oppdal. The buyer of the plot in question, SDO, is a competitor who had previously leased an area from OB for use in its business related to ski equipment and ski instructor services. After OB increased the lease, SDO was looking for new premises.

In its complaint, OB alleged that the property would be sold without conducting an unconditional bidding procedure, as described in the Authority's guidelines for sales of land and public buildings, paragraph 2.1.⁴ OB also argued that the municipality had not acted in accordance with the alternative procedure described in paragraph 2.2 in the Authority's guidelines, since it had started sale negotiations with the potential buyer prior to obtaining an independent evaluation of the property. Moreover, OB maintained that it was unclear on which principles the evaluation reports are based. OB alleged that its own NOK 3.1 million offer, based on the same exploitation of the property as the buyer, showed that the market price was not reflected in the sales price, and that OB could not be considered to be a buyer with a particular interest in the property.

4. Comments by the Norwegian authorities

The Norwegian authorities consider that the procedure described in paragraph 2.2 in the Authority's guidelines for sales of land and public buildings had been followed, and that no state aid was involved in the transaction. The Norwegian authorities argue that the expert evaluations were obtained prior to any sale negotiations with SDO and reflected the market price. Oppdal municipality has in addition produced an overview dated 29 August 2008, of prices on sales of land in Oppdal, which shows that the price obtained for the property involved is the highest price per square meter known to the municipality.

The authorities further maintain that when assessing the market price the expert should consider which price regular buyers would pay for the property by voluntary sale. Speculative buyers, and buyers with particular needs should be disregarded. Thus, the experts in this case have assessed the market price correctly.

⁴ [State aid elements in sales of land and building by public authorities](http://www.eftasurv.int/?1=1&showLinkID=15142&1=1), published on the Authority's website: <http://www.eftasurv.int/?1=1&showLinkID=15142&1=1>

The offer of NOK 3.1 million from OB must in any case be regarded as coming from a party with a particular need, since OB has a dominant position in the local ski service market, and is willing to go far in eliminating its competitors.

II. ASSESSMENT

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

Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement”.

In the following the Authority will assess whether the municipality of Oppdal has granted state aid to SDO in connection with the sale of the plot of land gbnr 271/8. If the transaction was carried out in accordance with the market economy investor principle, *i.e.*, if the municipality sold the land for its market value and the conditions of the transaction would have been acceptable for a private seller, the transaction would not have involved the grant of state aid. On the contrary, state aid could be involved if the sale was not carried out at market price.

1.1. Market investor principle

As a point of departure, the assessment of whether a property has been sold at market value should be assessed at the time of the conclusion of the contract.

The State Aid Guidelines on state aid elements in sales of land and buildings by public authorities give further information on how the Authority interprets and applies the provisions of the EEA Agreement governing state aid when it comes to assessing sales of public land and buildings. Section 2.1 describes a sale through an unconditional bidding procedure, while Section 2.2 describes a sale without an unconditional procedure (by way of an independent expert valuation).

In this case, the municipality did not organise an unconditional bidding procedure but the sale took place on the basis of two value assessments carried out by independent experts. The assessments were obtained by the municipality on 7 and 9 July 2008, respectively.

Section 2.2 of the State Aid Guidelines on state aid elements in sales of land and buildings by public authorities, regarding sale without an unconditional bidding procedure, provides that *“if public authorities intend not to use the procedure described under Section 2.1, an independent evaluation should be carried out by one or more independent asset values prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting state aid.”* (Emphasis added)

Although SDO had already contacted the municipality in February 2007 and applied for an amendment of the use of property 271/8, and later the same month, signalled its interest in purchasing the property, the correspondence submitted by the Norwegian authorities indicates that the municipality refused to discuss a sale until the regulatory issues regarding the property were decided upon. This is the reason why it was not until 30 June 2008 that Oppdal municipality decided to obtain two value assessments, and then to proceed with the sale negotiations. According to the information provided by the Norwegian authorities, no discussions on the price or other conditions of the sale had taken place between the municipality and SDO prior to the value assessments.

Both reports estimated a very similar market value for the property: NOK 800 000 and 850 000. The price paid by the purchaser was determined by reference to the valuation report which indicated the highest price, *i.e.* NOK 850 000.

However, as the information has been presented to the Authority, before a binding contract was concluded on the basis of these value assessment, Oppdal municipality received a substantially higher offer of NOK 3.1 million from OB. Nevertheless, the municipality sold the land to SDO for NOK 850 000 on the basis of the price determined by the independent experts.

It would appear that a situation such as the one in the present case is not explicitly foreseen by the Guidelines. The Guidelines refer to two possible scenarios: first, the use of a bidding procedure; second, the use of independent expert valuation. However, they do not deal with the situation that a binding offer is received after the receipt of the expert evaluation but prior to the conclusion of a binding contract. In the case at hand the offer was close to four times higher than the price considered to be market price by the experts.

The Authority considers that in a situation such as this, the submission of an offer is liable to cast doubts on whether the evaluations reflect the actual market price of the property. Generally, a credible and binding offer would seem to be a better basis for the determination of market price as it reflects what someone is actually prepared to pay for the property. The Authority notes that the Norwegian authorities have not presented any information substantiating that the offer was not credible or that it did not accurately reflect the market value of the property, *inter alia*, due to the special interest of the bidder in acquiring the property.

The Commission has in a decision of 30 January 2008, in case C35/2006, dealt with a similar issue, *i.e.* the situation that an offer is made after the receipt of the expert evaluation. In its decision the Commission stated:

“Even if the expert evaluation had been carried out in accordance with the Communication⁵, i.e. an evaluation of the actual plot of land that was to be sold carried out just before the sale and on the basis of generally accepted evaluation standards, this evaluation would only be a second best instrument to determine the market price of the land, in the absence of real price offers. From the moment that a credible and binding bid is submitted and provided that this bid is directly comparable to and higher than the price estimate according to the evaluation, the former must be preferred. The bid establishes a

⁵ Section 2.2 of the State Aid Guidelines on state aid elements in sales of land and buildings by public authorities corresponds to the Commission Communication on state aid elements in sales of land and buildings by public authorities (OJ No. C 209, 10.07.97, p. 3)

*real market price and should be considered as a better proxy for the foregone State resources than an expert evaluation”.*⁶

On the basis of the above, the Authority cannot exclude that the sale of the concerned plot of land gbnr. 271/8 to Strand Drift Oppdal AS for the sales price of NOK 850 000 involved state aid within the meaning of Article 61(1) of the EEA Agreement, provided that the other conditions of the Article are fulfilled.

1.2. The presence of state aid

1.2.1. State resources

In order to qualify as state aid, the measure must be granted by the State or through state resources. The concept of the State does not only refer to the central government but embraces all levels of the state administration (including municipalities) as well as public undertakings.

If the municipality sold the land below its market price, it would have foregone income. In such circumstances, SDO should have paid more for the land and therefore there is a transfer of resources from the municipality.

For these reasons, the Authority considers that if the sale did not take place in accordance with market conditions, state resources within the meaning of Article 61(1) of the EEA Agreement would be involved.

1.2.2. Favouring certain undertakings or the production of certain goods

First, the measure must confer on SDO advantages that relieve the undertaking of charges that are normally borne from its budget. If the transaction was carried out under favourable terms, in the sense that SDO would most likely have had to pay a higher price for the property if the sale of land had been conducted according to the market investor principle, the company would have received an advantage within the meaning of the state aid rules.

Second, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. There is only one possible beneficiary of the measure under assessment, *i.e.* SDO. The measure is thus selective.

1.2.3. Distortion of competition and effect on trade between Contracting Parties

The aid must threaten to distort competition and be liable to affect trade between the Contracting Parties of the EEA Agreement.

A support measure granted by the State would strengthen the position of SDO vis-à-vis other undertakings that are competitors active in the same business areas. Any grant of aid strengthens the position of the beneficiary vis-à-vis its competitors and accordingly distorts competition within the meaning of Article 61(1) of the EEA Agreement. It appears that SDO operates in the market for ski rental and related services, economic activities which are subject to competition from other undertakings.

To the extent that the company is active in areas subject to intra-EEA trade, the requirements of Article 61(1) of the EEA Agreement for a measure to constitute state aid

⁶ Commission decision of 30.1.2008 in case C 35/06, OJ 2008, 14.5.2008, L 126/3, paragraph 59.

appear to be fulfilled.⁷ It appears from the complaint that the ski resort in Oppdal competes for its customers particularly with ski resorts in Sweden. Also, the Swedish company, Skistar, is a large operator in the Norwegian market. Therefore, any state support granted in this case seems likely to affect trade between member states within the meaning of Article 61(1) of the EEA Agreement.

1.3. Conclusion

For the above mentioned reasons, the Authority has doubts as to whether or not the transaction concerning the sale by Oppdal Municipality of the plot of land gbnr 271/8 to SDO as laid down in the agreement between the parties signed 31 July 2008 entails the grant of state aid.

2. Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3, “*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*”.

The Norwegian authorities have not submitted a notification of the sale of land and the measure has been enacted. Therefore, the Authority concludes that if the measure constitutes state aid, the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

3. Compatibility of the aid

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement.

The derogation of Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Neither Article 61(3)(a) nor Article 61(3)(b) of the EEA Agreement applies to the case at hand. The area where the property is located can benefit from regional aid within the meaning of Article 61(3)(c) of the EEA Agreement, according to the Authority’s decision no 227/06.⁸ However, the Authority’s guidelines on National Regional Aid 2007-2013 at paragraph 30 require that the beneficiary has applied for aid and the authority responsible for administering the aid scheme has confirmed in writing that, subject to detailed verification, the project in principle meets the conditions of eligibility laid down by the scheme before the start of work on the project.⁹ Thus the Authority has doubts regarding whether aid could be granted according to the above mentioned guidelines.

The Authority therefore doubts that the transaction under assessment can be justified under the state aid provisions of the EEA Agreement.

⁷ Cf. Commission decision 2003/521/EC “Bolzano” paragraph 32, where it is stated that “...cableways used to support an activity capable of attracting non-local users will generally be regarded as having an effect on trade between Member States.” In this case the intended use of the land was to erect a service center in support of the ski-sport activities in Oppdal. OB’s webpages seem to indicate that its activities in Oppdal are capable of attracting customers from Sweden, cf.

<http://www.oppdalbooking.no/Index.aspx?PageID=276> and its rating among international ski resorts
<http://www.oppdalbooking.no/Index.aspx?PageID=248>

⁸ The decision is available at <http://www.eftasurv.int/?1=1&showLinkID=10177&1=1>

⁹ The guidelines are available at <http://www.eftasurv.int/?1=1&showLinkID=15125&1=1>

4. Conclusion

Based on the information submitted by the Norwegian authorities, the Authority has doubts as to whether or not SDO has received unlawful state aid within the meaning of Article 61(1) of the EEA Agreement in the context of the transaction regarding the sale of a plot of land.

The Authority has moreover doubts that this state aid can be regarded as complying with Article 61(3)(c) of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question do not constitute state aid or are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision.

Within one month of receipt of this decision, the Authority request the Norwegian authorities to provide all documents, information and data needed for assessment of the compatibility of the said transaction.

It invites the Norwegian authorities to forward a copy of this decision to SDO immediately.

The Authority would like to remind the Norwegian authorities that, according to the provisions of Protocol 3, any incompatible aid unlawfully put at the disposal of the beneficiaries will have to be recovered, unless this recovery would be contrary to the general principles of law.

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the sale of the plot of land gbnr 271/8 in Oppdal, by Oppdal municipality.

Article 2

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

The Norwegian authorities are requested to provide within one month from notification of this decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English language version of this decision is authentic.

Decision made in Brussels, on 3 November 2010.

For the EFTA Surveillance Authority

Per Sanderud
President

Sverrir Haukur Gunnlaugsson
College Member