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EFTA SURVEILLANCE AUTHORITY DECISION

OF 18 DECEMBER 2000

ON THE NORWEGIAN STATE'S INVOLVEMENT WITH THE INFORMATION TECHNOLOGY CENTRE AT FORNEBU

(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area[1], 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 Justice[2], in particular to Article 24 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Authority's Guidelines[3] on the application and interpretation of Articles 61 and 62 of the EEA Agreement, in particular chapters 18B, 19 and 20 thereof,

WHEREAS:

I. FACTS

1. The notification

By letter dated 3 February 2000, received and registered by the Authority on 4 February 2000 (Doc. No: 00-1035 A), the Mission of Norway to the European Union informed the Authority about the Information Technology Centre at Fornebu.

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[1] Hereinafter referred to as the EEA Agreement.
[2] Hereinafter referred to as the Surveillance and Court Agreement.
[3] 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 EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No. 32, last amended by the Authority's Decision No. 78/00/COL of 12 April 2000, not yet published; hereinafter referred to as "State Aid Guidelines".

By letter dated 25 May 2000 from the Mission of Norway to the European Union, received and registered by the Authority on 25 May 2000 (Doc. No: 00-3992 A), the Norwegian authorities notified the Norwegian State's involvement with the information technology centre at Fornebu.

By letter dated 7 June 2000 (Doc. No: 00-4189 D), the Authority acknowledged receipt of the notification and requested further information.

By letter dated 29 June 2000, received and registered on 30 June (Doc. No: 00-4749 A), the Mission of Norway to the European Union submitted further information.

By letter dated 24 July 2000 (Doc. No: 00-5234 D), the Authority requested further information.

By letter dated 31 August 2000, received and registered by the Authority on 1 September (Doc. No: 00-6053 A), the Mission of Norway to the European Union submitted further information.

By letter dated 2 October 2000 (Doc. No 00-6811 D), the Authority (with reference to the Government's proposal to Parliament, St. prp. nr. 35 (1999-2000)) informed the Norwegian authorities *"that the five per cent reduction in the purchase price for the property at Fornebu may not be in accordance with Chapter 18B.2.2(c)*[4] *of the Authority's State Aid Guidelines. The contracts foreseen in St.prp. nr. 35 (1999-2000) therefore may contain illegal State aid".* The Authority furthermore stated that *"if the Norwegian State were to conclude the contracts contained in St.prp. nr. 35 (1999-2000) under the conditions currently laid down, i.e. containing a five per cent reduction, the Authority would be obliged to open proceedings according to Article 1 of Protocol 3 to the Surveillance and Court Agreement".*

By letter dated 3 November 2000, received and registered by the Authority on 6 November 2000 (Doc. No 00-7846 A), the Royal Ministry of Trade and Industry notified the Authority of its intention to renegotiate the disputed part of the agreement, that is the five per cent reduction for special obligations related to the land and buildings. In the same letter, the Ministry indicated that an amendment to the notification of 22 May 2000, containing a document which rewrites this part of the agreement, will be sent to the Authority as soon as the negotiations have taken place.

By letter dated 28 November 2000, received and registered by the Authority on 29 November 2000 (Doc. No 00-8691 A), the Norwegian authorities submitted an amended notification. The amended notification contained an adjusted sales agreement in which the clause concerning the five per cent reduction[5] had been revoked.

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[4] State aid elements in sales of land and buildings by public Authorities.

[5] Point 3.1.3 in the sales agreement of 18 November 1999, as approved by the Parliament 7 March 2000.

2. Description of the Norwegian State's involvement with the Information Technology Centre (IT-Centre) at Fornebu

2.1. Introduction

The Norwegian State's involvement in the IT-Centre is bipartite. The State participates in an increase in share capital in two limited enterprises with the aim of establishing and running the IT-Centre. Secondly, the State sells its property at Fornebu to one of the enterprises. The project went through a long political process that commenced in 1998 before the Parliament ("Stortinget") made its final decision.[6]

The notification contains extensive information, not only about the alternative finally decided upon by Stortinget, but also about the political deliberations in Stortinget, the evaluation of the contenders[7] as well as a description and comparison of both negotiated alternatives that were presented to Stortinget.

Hereafter the Authority gives a description of the IT-Centre as finally decided upon by Stortinget (point 2.2.). Furthermore, a more detailed description is given of the Norwegian State's role as an investor in the IT-Centre (point 2.3.) and the sale of land and buildings (point 2.4.) The description is thus restricted to the aspects of the Norwegian State's involvement with the IT-Centre considered relevant for the Authority's assessment of the notification.

2.2. Description of the IT-Centre

On 7 March 2000 Stortinget decided that the Norwegian State is to participate in establishing an IT-Centre at Fornebu outside Oslo[8]. The State participates in co-operation with a joint venture of private investors known as IT Fornebu Technoport. The decision was taken after a project contest (see footnote 7), followed by negotiations with two alternative groups of investors[9].

The agreements between the State and IT Fornebu Technoport include joint ownership of two limited enterprises (IT Fornebu AS and IT Fornebu Eiendom AS), and sale of real property from the State to one of the jointly owned enterprises (IT

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[6] Before the final proposal was submitted to Stortinget, the Government presented the project in the following documents: St. meld. Nr. 38 (1997-98) IT-kompetanse i et regional perspektiv, St. meld. Nr. 13 (1998-99) Enkelte gjenstående spørsmål i forbindelse med etablering av IT-senter på Fornebu, St. meld. Nr. 42 (1998-99) Status og fremdrift for etablering av et IT- og kunnskapssenter på Fornebu, St.prp. nr. 2 (1999-2000) Forhandlinger om etablering av et IT- og kunnskapssenter på Fornebu and in St.prp. nr. 1 for 1997-98, 1998-99 and 1999-2000, respectively.
Stortinget discussed the project in the following documents: Innst. S nr. 232 (1997-98), Dok. 8:64 (1997-98), Innst. S nr. 193 (1997-98), Dok 8:82 (1997-98), Innst. S nr. 99 (1998-99), Innst. S nr. 199 (1998-99), Dok. 8:58 (1998-99), Innst. S nr. 244 (1998-99) and Innst. S nr. 8 (1999-2000).

[7] The Government published on 12 March 1999 an invitation to private investors to submit proposals for the establishment of an IT-Centre. Seven investors or groups of investors submitted their proposals.

[8] St.prp. nr. 35 (1999-2000) Sluttforhandlingene om etablering av et IT- og kunnskapssenter på Fornebu. Valg av statens samarbeidspartner and Innst. S. nr. 124 (1999-2000) Innstilling fra næringskomiteen om sluttforhandlingene om etablering av et IT- og kunnskapssenter på Fornebu. Valg av statens samarbeidspartner.

[9] The group of investors not selected by Stortinget was Nettverk Fornebu AS. This was the alternative recommended by the Government. The negotiated agreements with IT Fornebu Technoport and Nettverk Fornebu were presented in St. prp. nr. 35 (1999-2000).

Fornebu Eiendom AS). Stortinget voted to allocate NOK 260 million (EURO 32.2 million[10]) for the State's participation in the increase in the share capital in the two enterprises.

Stortinget decided that an IT-Centre ("IT-, kunnskaps- og innovasjonssenter") of international importance shall be established. The objective of the IT-Centre is to contribute to the establishing of new enterprises and new educational functions in a co-operation between research, education and industry.

Annex 1 of St.prp. nr. 35 (1999-2000) contains the main agreement between the State and IT Fornebu Technoport ("Hovedavtale mellom staten og IT Fornebu Technoport"). The agreement sets out *i.a.* the vision of the IT-Centre ("Visjonen"), the structure of the organisation, financial aspects and it describes the two enterprises; IT Fornebu AS and IT Fornebu Eiendom AS.

The vision for the IT-Centre is formulated as: *"I et samspill mellom forskning, utdanning og næringsliv, på lang sikt å skape mangfold i et fremtidsrettet kunnskapsmiljø og derigjennom øke den nasjonale nyskaping og kunnskapsbaserte næringsutvikling".*[11]

IT Fornebu AS is responsible for administration and development of the vision. It can also invest in enterprises being started from the IT-Centre or in other knowledge-based activities. The State will own 33.4% of the shares in IT Fornebu AS.

IT Fornebu Eiendom AS shall buy, develop and administer the real estate which will be a part of the IT-Centre. The State will own 35% of IT Fornebu Eiendom AS, pending increases in the share capital. The relationship between IT Fornebu and IT Fornebu Eiendom AS is regulated by an agreement on co-operation.

Annex 2 of St.prp. nr. 35 (1999-2000) contains the contract between the State (the seller) and IT Fornebu Eiendom AS (the buyer) regarding the purchase of land and buildings ("Kjøpsavtale mellom Staten og IT Fornebu Technoport").

2.3. The Norwegian State's role as an investor.

A due diligence procedure has been carried out in order for the Norwegian State to ensure that the contractual premises were correct and to gather information for the necessary valuation of IT Fornebu AS and IT Fornebu Eiendom AS[12]. On the basis of the due diligence report, negotiations have been carried out between the State and IT Fornebu Technoport on the valuation of the companies in order to form a basis for determining the subscription terms for the State.

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[10] Exchange rate: 1 Euro = 8.0815 NOK (Official exchange rate from the Norwegian Central Bank 1 December 2000.)

[11] An unofficial translation reads: In a co-operation between research, education and industry, to create, in the long term, a multitude in a forward looking knowledge environment, and thus increase the national growth and knowledge-based industry development.

[12] The due diligence investigation has been carried out by State Authorised Auditor Kjell Melhus and Attorney-at-Law Ragnar Vik. Their report is enclosed as appendix 6.13 of the notification.

It is planned that the State will acquire 33.4% of the shares in IT Fornebu AS, estimated at an injection of approximately NOK 14 million (EURO 1.7 million). The rest of the NOK 260 million granted by Stortinget shall be injected in IT Fornebu Eiendom AS. This will initially give 35% of the share capital in IT Fornebu Eiendom AS. The private shareholders in IT Fornebu Eiendom AS will inject a minimum of NOK 700 million (EURO 86.6 million), timed according to the capital needs of the enterprise.

The estimated profitability of the project shows a negative net present value of NOK 9 million (EURO 1.1 million) with a nominal required rate of return after tax of 7.65%. If net present value is set equal to zero, the internal rate of return is calculated at 7.57%. The Norwegian authorities have expressed, in St. prp. nr. 35 (1999-2000) and in the notification, that the estimated profitability of the project was not satisfactory.

However, the authorities point out that even small changes in rental income, operational costs or investments can generate a more satisfactory result. Moreover, the Norwegian authorities state in the notification that *"notice should be given to the fact that municipal planning of the area of Fornebu already opens for a more intense utilisation of the properties in regard of buildings for housing than the earlier estimates have taken into account."*

The organisation structure is based on a fundamental division of functions between the two enterprises. IT Fornebu AS will be dedicated towards development of the vision and plans for the centre, whereas IT Fornebu Eiendom AS will dedicate itself towards the property development. IT Fornebu AS will also run an incubator and facilitate for research and education in the IT-Centre. The enterprises have separate ownership structures.

The governmental influence on the companies is regulated through normal corporate regulations applicable and through two shareholder agreements, one for each enterprise.

The shareholder agreement for IT Fornebu AS stipulates that as long as the Norwegian State owns a minimum of 10 per cent of the total outstanding shares in the enterprise, the State has a right of veto for decisions on changes in the articles of association, except as regards decisions to increase the share capital, and until 2010, a right of veto in respect of decisions to change the clauses for existing shareholders on the right of first refusal to purchase shares transferred to third parties.

As long as the State owns a minimum of 15 per cent of the total outstanding shares in IT Fornebu AS, the State may appoint a minimum of 2 out of a maximum of 15 shareholder elected board members. The shareholders are required to obtain a signed subscription to the shareholder agreement from any purchaser of shares in the company. This clause may be terminated by a majority vote of 2/3, except that the State has a right of prior consent to such termination provided the State holds a minimum of 15 per cent of the total outstanding shares in the company.

The shareholder agreement regarding IT Fornebu Eiendom AS stipulates that as long as the State owns a minimum of 15 per cent of the total outstanding shares in the enterprise, the State may appoint 1 out of maximum 9 board members. The shareholder agreement will terminate in the event of the enterprise being introduced on a stock exchange. The shareholder agreement does not have clauses that require new shareholders to subscribe to the agreement, and as the articles of association have no clause on the right of first refusal to purchase shares transferred to third parties, the effect of this agreement may be eroded through a sale of shares in the enterprise.

2.4. The sale of land and buildings

The amended agreement of purchase[13] between the State (the seller) and IT Fornebu Eiendom AS (the buyer) stipulates that the buyer shall buy 31.6 hectare of land (including buildings) for NOK 668 million (EURO 82.7 million). The price is in accordance with the estimated market value set by a group of three independent appraisers. The report from the appraisers is included in the notification[14].

The mandate for the appraisers specified that they were requested to assess today's market value of the relevant real property. The mandate further specified that the market value was to be assessed for the properties as non-serviced sites, *i.e.* with regard to the fact that the buyer will have to meet a proportional share of the costs related to new infrastructure etc. Furthermore the assessment was to be made on the basis of the existing public plans for the property's utilisation ratio.

The valuation of the property is based on the value of the land and on the estimated cost and the time required for future infrastructure investments. It is stated in the appraisal report that there is considerable uncertainty regarding the requirements that might be made by the municipal authorities for infrastructure investments. The appraisers also took into account the expected effects on the market value of certain variations on the allowed property utilisation ratio.

Furthermore, the appraisers have assessed the effect on the market value of restricting the use of the properties to activities and business related to information technology to justify a five per cent reduction in the price.

In the agreement of purchase that was presented to Stortinget, the buyer was allowed a five per cent reduction in the sales price. This equals NOK 33.2 million (EURO 4.1 million). After a preliminary assessment, the Authority informed the Norwegian authorities that the five per cent reduction may not be in accordance with its State Aid Guidelines (see point I.1 above). The amended notification received 29 November 2000 (Doc. No 00-8691 A) contained an adjusted sales agreement in which the clause concerning the five per cent reduction[15] had been revoked.

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[13] Annex 2 of St. prp. nr. 35 (1999-2000) and new point 3.1.3 in the sales agreement as notified on 29.11.2000.

[14] Appendix 6.4.

[15] Amendment in point 3.1.3 in the sales agreement of 18 November 1999, as approved by Stortinget 7 March 2000 (Annex 2 of St.prp. nr. 35 (1999-2000).

II. APPRECIATION

1. The presence of State aid and notification formalities

Article 61 of the EEA Agreement stipulates:"*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, insofar as it affects trade between the Contracting Parties, be incompatible with the functioning of the Agreement.*"

The notified financial involvement of the Norwegian State in the IT-Centre at Fornebu is being funded by State resources in the meaning of Article 61(1) of the EEA Agreement. Any aid will in the present case favour certain undertakings in the meaning of Article 61(1), benefit enterprises that actually or potentially will be in competition with similar undertakings in Norway and other EEA states and hence threaten to affect trade and distort competition.

The Norwegian authorities have, by notifications dated 25 May 2000, received and registered by the Authority on 25 May 2000 (Doc. No 00-3992 A), and 28 November 2000, received and registered by the Authority on 29 November 2000 (Doc. No 00-8691 A), respected their obligations pursuant to Article 1 (3) of Protocol 3 of the Surveillance and Court Agreement.

Consequently, the Authority is obliged to assess whether the Norwegian State's involvement in the IT-Centre contains State aid, and if so, if any of the exemption clauses under Article 61(2) or (3) of the EEA Agreement are applicable.

The Authority's examination of the notification is based on the criteria set out in its State Aid Guidelines, in particular Part IV, Rules on State ownership of enterprises and on aid to public enterprises[16], and Chapter 18B: State aid elements in sales of land and buildings by public Authorities.

2. The Norwegian State's role as an investor.

The EEA Agreement establishes both the principle of impartiality with regard to the system of property ownership (Article 125) and the principle of equality between public and private enterprises. This means that the Authority may neither penalise nor favour public authorities that provide companies with equity capital. Nor is it for the Authority to express any opinion with regard to whether the funds are of private or public origin.

The State Aid Guidelines make it clear however, that where the State provide finances to an enterprise in circumstances that would not be acceptable to an investor operating under normal market economy conditions, *i.e.* in contradiction to the so-called Market Economy Investor Principle, there is State aid involved. In the case at hand, the Authority therefore has to assess whether the Norwegian State's involvement in IT

[16] Chapter 19 and 20 of the State Aid Guidelines.

Fornebu AS and IT Fornebu Eiendom AS takes place on conditions different from the conditions applicable for the private investors in the project.

The Norwegian authorities have stated that the expected profitability of the project is low, or even unsatisfactory[17]. However, as the expected profitability is acceptable to professional and commercially oriented private shareholders, it is not so much the absolute expected profitability of the project which is of relevance for the Authority's assessment, but more whether the conditions applicable for the State are different from the conditions applicable to the private investors. If the conditions are different in such a way that it makes it possible for the private investors to achieve a higher rate of return than the State, it would indicate that the State's involvement was in contradiction to the Market Economy Investor Principle and that State aid is involved.

The conditions for the Norwegian State as an investor in IT Fornebu AS and IT Fornebu Eiendom AS are subject to normal corporate regulations regarding minority shareholders as well as the shareholder agreements referred to above in point I.2.3. Furthermore, the State's influence[18] in the project is, as for any other shareholder, dependent on the size of its holdings. The Authority does not find that the agreements place the Norwegian State in any less favourable position than private shareholders with holdings of the same size would have been subject to. The Authority's conclusion is therefore that the Norwegian State's involvement in the IT-Centre is in accordance with the Market Economy Investor Principle.

3. The sale of land and buildings

Chapter 18B of the State Aid Guidelines concerning State aid elements in sales of land and buildings by public Authorities, sets out two alternative procedures that allow EFTA States to handle sales of land and buildings in a way that automatically precludes the existence of State aid. This is either to conduct the sale through an unconditional bidding procedure or to conduct it on the basis of an independent expert evaluation. In the case at hand, the Norwegian authorities opted for an independent expert evaluation.

Chapter 18B.2.2 of the State Aid Guidelines states that if the public authorities intend not to use the unconditional bidding procedure, an independent evaluation should be carried out by one or more independent asset valuers 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 upon without granting State aid.

According to Chapter 18B of the State Aid Guidelines, an asset valuer is a person of good repute who has obtained an appropriate degree at a recognised centre of learning or an equivalent academic qualification, has suitable experience and is competent in valuing land and buildings in the location and of the category of the asset.

In the notification, the Norwegian authorities have submitted documentation of the qualifications of the appraisers (CVs). The Norwegian authorities have also submitted copies of letters from the appraisers stating that they do not have any economic

[17] St. prp. nr. 35 (1999-2000), Chapter 1.2.
[18] The public influence in the project was an important factor in St. prp. nr. 35 (1999-2000).

interests in any of the contenders, and that there are no other circumstances that can affect their independence. The Authority finds that the appraisers are independent and of good repute.

Chapter 18B of the State Aid Guidelines clarifies that market value means the price at which land and buildings could be sold under a private contract, between a willing seller and an arm's length buyer on the date of valuation, assuming that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale[19].

As referred above in points I.1. and I. 2.4., the notification of 25 May 2000 (Doc. No: 00-3992 A) contained a contract with a reduction in the sales price of 5 per cent. This was in accordance with the appraiser's report. In the amended notification of 29 November 2000 (Doc. No 00-8691 A) this was revoked. This is therefore no longer an issue for the Authority.

The appraisers have established the market value of NOK 668 million on the basis of generally accepted market indicators and valuation standards. The Authority therefore finds that the sale of land and buildings has been conducted in accordance with the State Aid Guidelines (Chapter 18B.2.2.), and that there is no State aid element in the agreement on the sale of land and buildings[20].

4. Reporting obligations

The Authority reminds the Norwegian authorities of the reporting obligations laid down in Chapter 19(13) of the State Aid Guidelines.

HAS ADOPTED THIS DECISION:

The EFTA Surveillance Authority has decided not to raise objections to the Norwegian State's involvement with the establishment of an Information Technology Centre at Fornebu (Norway) as notified by the Norwegian authorities by letters from the Mission of Norway to the European Union dated 25 May 2000, received and registered by the Authority on 25 May 2000 (Doc. No: 00-3992 A), and 28 November 2000, received and registered by the Authority on 29 November 2000 (Doc. No 00-8691 A).

Done at Brussels, 18 December 2000.

For the EFTA Surveillance Authority

Knut Almestad
President

Hannes Hafstein
College Member

[19] Article 49(2) of Council Directive 91/674/EEC (OJ No L 374, 31.12.91, p. 7), cf. Point 12 (b) of Annex IX to the EEA Agreement.

[20] Annex 2 of St.prp. nr. 35 (1999-2000), Kjøpsavtale mellom Staten og IT Fornebu Eiendom AS.