

Case No: 47657
Event No: 499140
Dec. No: 304/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 8 July 2009
on alleged aid being granted to Bjørndalen Eiendom 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 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 e-mails dated 22 May 2002 (Doc No: 02-4376-A) and 23 January 2003 (Doc No: 03-442-A), the Authority received a complaint concerning an agreement between the Municipality of Oslo and Bjørndalen Eiendom AS.⁶ According to the agreement, Bjørndalen would buy the property Midtåsen 30 and build a nursing home, Midtåsenhjemmet. The Municipality of Oslo would rent Midtåsenhjemmet from Bjørndalen for a period of 20 years. The complainant argues that both the sale of land and the rental agreement may contain state aid elements.

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 03.09.1994 p. 1 and EEA Supplement No 32 of 03.09.1994 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/>

⁶ Hereinafter referred to as "Bjørndalen". On 1 October 2004, Bjørndalen changed its name to Anthon B. Nielsen Eiendom AS.

On 2 July 2002, the Authority informed the Norwegian authorities about the complaint and asked the Norwegian authorities to provide all information necessary in order to carry out an assessment under Article 61 of the EEA Agreement (Doc No: 02-4445-D). The Norwegian authorities replied to this request by letter dated 10 September 2002 (Doc No: 02-6636-A).

By letters dated 11 March 2004 (Event No: 256937), 25 July 2005 (Event No: 306837) and 7 March 2007 (Event No: 410247), the Authority asked for additional information. The Norwegian authorities replied by letters dated 6 May 2004 (Event No: 281062), 29 September 2005 (Event No: 334871) and 10 May 2007 (Event No: 334871). In addition, the Authority has received numerous emails from the complainant.

2 The sale of Midtåsen 30

2.1 The sales agreement

In December 2001, Forsvarsbygg⁷ and Bjørndalen signed a sales agreement on the sale of a property located at Midtåsen 30⁸ (hereinafter referred to as Midtåsen 30) in which the sales price was fixed at NOK 22 000 000. The property is approximately 6 605 m², including buildings of approximately 3 000 m².

The sale is part of a wider framework agreement, signed on 16 November 2000, between the Municipality of Oslo, the Norwegian Ministry of Defence and Bjørndalen with the objective to build Midtåsenhjemmet. As a first step of this agreement Bjørndalen would buy Midtåsen 30 from the Norwegian Armed Forces.

At the time of the sale, Midtåsen 30 was zoned for residential housing purposes. In November 2002, after the sale, Midtåsen 30 was re-zoned for nursing home purposes in order to allow for the establishment of Midtåsenhjemmet.

It follows from Article 10(3) of the sales agreement that the buyer, i.e. Bjørndalen, was obliged to construct a nursing home, and that Midtåsenhjemmet would be used for that purpose for 20 years following the date of issuance of the deed.

The sale was conditional upon approval and signature of the lease agreement between Bjørndalen and the Municipality of Oslo (see below).

2.2 Method used for establishing the market value of Midtåsen 30

According to the Norwegian authorities, the sale of Midtåsen 30 was not subject to public announcement⁹, but it was subject to an independent value assessment before the sale.

According to the valuation report dated 3 May 2001, Oddvar Knutsen and Birger Lyngaas estimated the market value of Midtåsen 30 at NOK 26 000 000. The valuation report is based on a visual inspection of the property carried out on 23 April 1998. According to the Norwegian authorities, the valuers are well reputed and independent, and the valuation was carried out in accordance with generally approved methods and standards.

⁷ Forsvarsbygg is a subordinated agency under the Norwegian Ministry of Defence. Forsvarsbygg is, among other things, responsible for the sale of real estate, construction and buildings which the Norwegian Armed Forces no longer need.

⁸ Registered in the Norwegian Property Register as Gnr. 182 Bnr. 661, Oslo.

⁹ This has been confirmed in a report made by the Norwegian Office of the Auditor General.

However, even though Midtåsen 30 was regulated for residential housing purposes and planned to be used for nursing home purposes, the market value established in the valuation report is based on zoning status and use for commercial purposes.

According to Oddvar Knutsen, at the time of the valuation, the valuers were not aware of the planned use of Midtåsen 30 for nursing home purposes. In a letter dated 7 September 2005 to Forsvarsbygg, Mr. Knutsen states that, had the valuers known of the planned use for nursing home purposes, “[t]his would have consequently resulted in a reduction of the estimated market value established in the valuation report which would have been close to the actual sales price”.¹⁰

3 Midtåsenhjemmet – the lease agreement

3.1 Introduction

In December 2001, Bjørndalen entered into a lease agreement¹¹ with the Municipality of Oslo, whereby the Municipality would rent Midtåsenhjemmet. The lease agreement is part of the framework agreement mentioned above.

In December 2003, the parties signed an accompanying agreement¹² in order to establish a mutual understanding of the lease agreement. In addition, the parties signed a management and maintenance agreement¹³ to clarify the responsibility of the parties in relation to management and maintenance.

According to the lease agreement, the Municipality of Oslo would rent 96 residential units in Midtåsenhjemmet for a period of 20 years. Additionally, it follows from the accompanying agreement, that the Municipality of Oslo would rent 50 parking spaces in connection with Midtåsenhjemmet.

The Municipality of Oslo has a right to renew the agreement on the same conditions for a period of an additional 10 years.

3.2 Method for calculating the annual rental fee

According to the lease agreement, the annual rental fee is calculated based on an estimation of the project cost.

The annual rental fee consists of four main elements: financing costs, depreciation, management and maintenance, and rent of parking spaces, where financing costs and depreciation counts for more than 75%.

It follows from the lease agreement and the accompanying agreement that the financing costs shall be calculated on the basis of the net project cost, including land cost, multiplied by a stipulated interest rate. This rate shall be fixed for five years at a time and be the lowest of at least three offers received from financial institutions. After each period of five years this procedure is to be repeated.

In addition, it follows from the lease agreement, and the management and maintenance agreement, that the Municipality of Oslo shall compensate Bjørndalen for the management

¹⁰ Translation from Norwegian by the Competition and State Aid Directorate.

¹¹ Hereinafter referred to as the “lease agreement”.

¹² Hereinafter referred to as the “accompanying agreement”.

¹³ Hereinafter referred to as the “management and maintenance agreement”.

and maintenance costs accrued in the operation of Midtåsenhjemmet, plus an administration fee of 4%.

Lastly, it follows from the accompanying agreement that the Municipality of Oslo shall rent 50 parking spaces for a unit price of NOK 3 000.

II. ASSESSMENT

1 The presence of state aid

Article 61(1) EEA 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

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

In the current case, two measures should be assessed as potential state aid: 1) the sale of the property Midtåsen 30 from Forsvarsbygg to Bjørndalen and 2) the lease agreement between Bjørndalen and the Municipality of Oslo concerning the rent of Midtåsenhjemmet. All aid financed from public recourses, including aid granted by regional and local bodies, fulfils the condition of using state resources. The owner of Midtåsen 30 was the Ministry of Defence. The sale was carried out by Forsvarsbygg, which is a subordinated agency of the Ministry.

Regarding the lease agreement, it is the Municipality of Oslo that entered into an agreement with Bjørndalen.

It is thus clear that any support from Forsvarsbygg, in the form of foregoing revenues by asking a lower price than market price for the property, or from the Municipality of Oslo, by paying a higher price than market price for the lease agreement, would fall within the notion of “state resources” within the meaning of Article 61(1) of the EEA Agreement.

1.2 Favouring certain undertakings or the production of certain goods

First, the measure must confer on Bjørndalen advantages that relieve it of charges that are normally borne from its budget. This is possible if Bjørndalen was allowed to buy the property Midtåsen 30 for a price below market price, or if the lease agreement, between Bjørndalen and the Municipality of Oslo, overcompensates Bjørndalen for the rent of Midtåsenhjemmet. These two questions will be dealt with separately below.

Second, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. In this case the potential measure would favour one undertaking, Bjørndalen, and is therefore clearly selective.

1.2.1 Sale of Midtåsen 30

The chapter on State aid elements on sales of land and buildings by public authorities in the State Aid Guidelines describes two sales procedures that allow EFTA States to handle sales of land and buildings in a way that automatically precludes the existence of state aid. The two procedures are an unconditional bidding procedure and an independent expert evaluation.

According to information provided by the Norwegian authorities, Midtåsen 30 has not been subject to an unconditional bidding procedure.

Concerning the second option, the State Aid Guidelines provide that “*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*”.

Midtåsen 30 was sold from Forsvarsbygg to Bjørndalen on 21 December 2002 at the price of NOK 22 000 000. On 3 May 2001, 7 months prior to the sale, the independent asset valuers Oddvar Knutsen and Birger M. Lyngaas estimated the market value of Midtåsen 30 at NOK 26 000 000. It would therefore appear that the procedure laid down in the Guidelines has not been followed since a sales price of NOK 4 000 000 less than the independent valuation was agreed.

However, the valuation report was based on an assumption that Midtåsen 30 had a zoning status for commercial purposes, and not for a nursing home.

The Authority is of the opinion that the use or zoning of Midtåsen 30 is an important element, which has to be taken into consideration in order to arrive at the market value of Midtåsen 30 at the time of the sale. In this respect, the Authority finds the statement of the asset valuer that the estimated market value of Midtåsen 30 would have been close to the actual sales price if the correct zoning of Midtåsen 30 had been used particularly instructive.

Based on the information available to it and particularly in light of the statement of the asset valuer as to the effect of zoning on the market value, the Authority cannot establish that the sale of Midtåsen 30 from Forsvarsbygg to Bjørndalen involved state aid within the meaning of Article 61(1) EEA.

1.2.2 The lease agreement

The Authority must also determine whether the lease agreement confers an advantage upon Bjørndalen.

According to the lease agreement, the annual rental fee is calculated based on an estimation of the project cost. The annual rental fee consists of four main elements: financing costs, depreciation, management and maintenance, and rent of parking spaces. The method of calculating each element is laid down in the agreement itself and the accompanying agreement specifies which elements are subject to adjustment in line with the Consumer Price Index.

Although the precise economic consequences of the lease agreement are difficult to assess, none of the information available to the Authority leads it to conclude that Bjørndalen perceived an advantage as a result of the terms of that agreement.

In light of this, the Authority has not been able to establish that the lease agreement between Bjørndalen and the Municipality of Oslo constitutes state aid within the meaning of Article 61(1) EEA.

1.3 Conclusion on the existence of state aid

On the basis of the foregoing assessment, the Authority considers that Bjørndalen did not receive state aid within the meaning of Article 61(1) of the EEA Agreement regarding either the sale of Midtåsen 30 or the lease agreement for Midtåsenhjemmet.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that no aid within the meaning of Article 61 of the EEA Agreement was granted to Bjørndalen regarding either the sale of Midtåsen 30 or the lease agreement for Midtåsenhjemmet.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 8 July 2009

For the EFTA Surveillance Authority,

Per Sanderud
President

Kristján A. Stefansson
College Member