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Subject: Alleged unlawful aid to Leangbukten Båttforenings Andelslag SA in the Oslo fjord area
- Preliminary assessment of complaint under paragraph 48(b) of the Authority's Guidelines on Best Practices for the conduct of state aid control procedures

1 Introduction

Reference is made to your complaint on behalf of Asker Marina AS to the EFTA Surveillance Authority ("the Authority") dated 25 May 2018 regarding alleged state aid granted to Leangbukten Båttforenings Andelslag SA ("LBA").

You refer to the two following alleged aid measures in your complaint:

1. On 19 December 2006, the municipality of Asker granted LBA the right to lease a land and sea area in Leangbukta for 25 years at conditions not corresponding to market terms.
2. On 25 June 2008, the municipality of Asker and LBA entered into an agreement granting LBA the right to develop the sea area in Leangbukta. LBA did not pay any remuneration for this right.

Since receiving your complaint, the Authority has gathered information from the Norwegian authorities. Following a preliminary examination of the complaint, the Authority is of the view that LBA has not received aid in breach of the EEA state aid rules.

2 Effect on trade between Contracting Parties

Pursuant to Article 61(1) of the EEA Agreement, a measure constitutes state aid if the following conditions are cumulatively fulfilled: the measure (i) is granted by the state or through state resources; (ii) confers a selective economic advantage on the beneficiary; and (iii) is liable to affect trade between Contracting Parties and to distort competition.

The Authority has come to the preliminary view that the measures covered by your complaint are not liable to affect trade between Contracting Parties.

An effect on trade cannot be merely hypothetical or presumed. An economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between Contracting Parties is not required.¹ However, it must be established why the measure is

¹ See, for instance, judgment in *Mediaset v Commission*, Case T-177/07, EU:T:2010:233, paragraphs 145–146, confirmed by judgment in *Mediaset SpA v Commission*, C-403/10 P, EU:C:2011:533, paragraphs 111, 113 and 115.

liable to have an effect on trade between EEA States, based on the foreseeable effects of the measure.²

In that respect, the Authority and the Commission have in a number of decisions considered that certain activities and measures, in view of their specific circumstances, have a purely local impact and consequently no effect on trade between EEA States.³ In those cases, the Authority and the Commission ascertained in particular; (i) that the beneficiary supplied goods or services to a limited area within an EEA State and was unlikely to attract customers from other EEA States, and (ii) that it could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment.⁴ A measure is considered not liable to affect trade, if these two criteria are met.

With regard to the first criterion, *i.e.* whether the beneficiary is active in a limited area and unlikely to attract customers from other EEA States, LBA, which has 1 250 berths in its marina, represents only a small part of the regional market for marina berths. The Authority has not received any exact figures on the number of marinas or berths in the Oslo Fjord area, but based on a cursory examination it appears that LBA has a very low market share on the regional market for berths, at around 2.1%.⁵ The same considerations would apply to other related markets, such as the market for dry spaces. Furthermore, LBA operates only in The municipality of Asker, supplying services in a limited area within an EEA State.

With regard to whether the beneficiary is unlikely to attract customers from other EEA States, LBA, which is a registered non-profit cooperative, has 1 250 owners, one for each berth in the marina. Approximately 400 berths in the summer and 150 berths in the winter are rented out by the berth owners to other boat owners.

Leangbukta Båtforening Medlemslag, ("LBF"), the local boating association in the municipality of Asker, formed to promote leisure boating in Asker, has 2 400 members. Members of LBF are not required to own boats, but being a member of LBF is necessary to become an owner of LBA, and thus membership in LBF is a prerequisite for owning an LBA berth. When a berth owner, who decides not to use their berth, rents it to other boat

² See, for instance, judgment in *AITEC and others v Commission*, Joined Cases T-447/93, T-448/93 and T-449/93, EU:T:1995:130, paragraph 141.

³ See, for instance, the Authority's decision No 459/12/COL, *Bømlabadet Bygg AS*, OJ C 193, 4.7.2013, p. 9, and the Commission decisions in cases N 258/2000 *Leisure Pool Dorsten*, OJ C 172, 16.6.2001, p. 16; N 458/2004 *Editorial Andaluza Holding* OJ C 131, 28.5.2005, p. 12; SA.33243 *Jornal de Madeira*, OJ C 131, 28.5.2005, p. 12 and SA.34576 *Portugal – Jean Piaget North-east Continuing Care Unit*, OJ C 73, 13.3.2013, p. 1. A number of these cases have concerned the operation of recreational ports. See, for instance, the Commission decisions in cases C10/2003 *Netherlands - Non-profit harbours for recreational crafts*, OJ L 34, 6.2.2004, p. 63; SA.39403 *Netherlands - Investment aid for Lauwersoog port*, OJ C 259, 7.8.2015, p. 4 and SA.45220 *Komunala Izola Marina*, OJ C 291, 1.9.2017, p. 3.

⁴ See the Authority's [Guidelines on the notion of State aid as referred to in Article 61\(1\) of the EEA Agreement](#) (OJ L 342, 21.12.2017, p. 35), paragraph 196.

⁵ According to information from the Norwegian authorities, there are approximately 675 000 leisure craft in Norway and 200 000 in the Greater Oslo Region (Oslo and Akershus). In the EU there are approximately 6 000 000 leisure craft, (see <http://www.europeanboatingindustry.eu/facts-and-figures>), and 1 750 000 berths, (see the Commission's decision in case SA.34815 *Netherlands - Dutch marina - Jachthaven Scharendijke*, OJ C 219, 22.6.2018, p. 1). From those numbers it can be extrapolated that for every leisure craft there are circa 0.29 berths. Accordingly, the number of berths in the Greater Oslo Region should be around 58 000, and LBA's market share on that regional market around 2.1%. It follows that LBA's has approximately 0.64% market share on the Norwegian market and 0.064% on the EU+Norway market.

owners in the summer or winter, they can only rent to other LBF members. Thus, no one that is not a member of LBF has the possibility to rent a berth from LBA. In light of these specific circumstances, it appears that LBA is very unlikely to attract customers from other Contracting Parties. Indeed, the Norwegian authorities have confirmed that all members of LBF, and therefore all berth owners and renters, are Norwegian residents. No berths are owned or rented by non-Norwegian residents or tourists.

Furthermore, LBA does not market its rentals of berths by other means than word-of-mouth and via a restricted section of its own website (accessible only to its members). In order to become a member, it is necessary to register on LBA's website and pay an annual fee of NOK 230. All information on LBA's website, including about the registration process, is in Norwegian and thus does not appear to be targeted towards non-Norwegian residents or tourists in any way.

With regard to the second criterion, *i.e.* the effect on the conditions of cross-border investments and establishment, LBA is not active on any other market than the market for berths in the municipality of Asker and has a very low regional market share. Therefore, the alleged aid cannot indirectly strengthen the position of an undertaking active in a transnational market. Moreover, the alleged aid measures are unlikely to preclude or deter undertakings in other EEA States from taking up marina activities in the Oslo Fjord area. Consequently, the alleged aid measures cannot be foreseen to have, if any, more than a marginal effect on the conditions of cross-border investments or establishment.

Accordingly, based on an overall assessment of the above indications, and in light of the available evidence, the Authority has reached the preliminary conclusion that the alleged state aid measures are not liable to affect trade between Contracting Parties and that they therefore do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

3 Preliminary view

Therefore, with reference to paragraph 48(b) of the Authority's [Guidelines on Best Practice for the conduct of state control procedures](#)⁶ and based on the information available, it is the Authority's preliminary view that Leangbukten Båtforenings Andelslag SA has not received any aid in breach of the EEA state aid rules.

If you have any additional information you would like to submit that might change this preliminary view, please do so by **9 November 2018**. Otherwise, the case will be closed without further notice.

Yours sincerely,

Gjermund Mathisen
Director
Competition and State aid

This document has been electronically authenticated by Gjermund Mathisen.

⁶ OJ L 82, 22.3.2012, p. 7.