

Invitation to submit comments pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on State aid with regard to the sale and rent by the Norwegian authorities of Lista air base

(2007/C 250/09)

By means of Decision No 183/07/COL of 6 June 2007, reproduced in the authentic language on the pages following this summary, the EFTA Surveillance Authority initiated proceedings pursuant to Article 1(2) in Part I of Protocol 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'). The Norwegian authorities have been informed by means of a copy of the Decision.

The EFTA Surveillance Authority hereby gives the EFTA States, EU Member States and interested parties notice to submit their comments on the measure in question within one month from the publication of this notice to:

EFTA Surveillance Authority
Registry
Rue Belliard 35
B-1040 Brussels

The comments will be communicated to the Norwegian authorities. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

SUMMARY

PROCEDURE

The EFTA Surveillance Authority (hereinafter referred to as 'the Authority') learnt about the sale of the Lista air base by way of a report issued by the Office of the Auditor General which concludes that the Norwegian Defence Estates Agency (hereinafter the 'NDEA') is unable to produce reliable evidence documenting that Lista air base was sold at market value.

On 14 September 2005, the Authority sent a letter to the Norwegian authorities requesting information regarding the sale of Lista air base located in the municipality of Farsund in Southern Norway.

By letter dated 28 October 2005 from the Norwegian Mission to the European Union, forwarding two letters, respectively dated 26 October 2005 from the Ministry of Modernisation and 24 October 2005 from the Ministry of Defence, the Norwegian authorities replied to the questions raised by the Authority. This letter was received and registered by the Authority on 29 October 2005.

By letter dated 28 March 2007, the Authority requested the Norwegian authorities to communicate additional information.

By letter dated 4 May 2007, received and registered by the Authority on the same day, the Norwegian authorities provided further information.

ASSESSMENT OF THE MEASURES

The Decision No 183/07/COL concerns two distinct measures: firstly, the sale, and secondly, the lease of Lista air base.

Sale of Lista air base

On 12 September 2002, the NDEA sold Lista air base to Lista Flypark AS. The sale resulted in a net disbursement from the Norwegian State to Lista Flypark AS of NOK 10 875 000. Two sets of evaluations had been carried out by two distinct independent evaluators: Verditakst had estimated that the market value of the property was of NOK 11 000 000 whereas OPAK had concluded to a market value of NOK 32 000 000.

The sales price was agreed on the basis of the valuation carried out by Verditakst, namely NOK 11 000 000. An amount of NOK 7 500 000 was deducted from the value of the property to take into account the works that needed to be carried out in order to comply with applicable fire safety standards. The sales price of the property was therefore brought down to NOK 3 500 000.

However, in addition to the above, the Norwegian authorities contractually agreed to compensate the buyer of the air base for the following costs:

- NOK 3 500 000 corresponding to the need to carry out works relating to technical installations (such as electrical transmission lines),
- NOK 5 500 000 corresponding to works to be carried out for the development of new infrastructure, and
- NOK 5 375 000 corresponding to compensation for the lease agreement entered into with LILAS (see below, Section *Leasing out of Lista air base*).

The total compensation agreed and amounting to NOK 14 375 000 was set off against the sales price of NOK 3 500 000. The Norwegian authorities thus actually paid the purchaser NOK 10 875 000.

Transfer of the property took place on 9 December 2002.

The Authority's doubts relate to both the value of the property *per se* (i.e. the choice of the Verditakst report over the OPAK report) and the justification for the compensations which the Norwegian authorities contractually agreed to.

Leasing out of Lista air base

On 27 June 1996, the NDEA entered into a ten year lease agreement with Lista Airport Development AS ('LAD') to enter into effect on 1 July 1996 until 30 June 2006 with the possibility for LAD to rent the air base for another ten year period. LAD was owned by the Municipality of Farsund (20 %) and local investors (80 %).

The lease agreement was later transferred to Lista Lufthavn AS ('LILAS') which had been established on 3 May 1996.

According to Articles 3(1) and 3(2) of the lease agreement, LILAS would rent a specified part of the buildings and the airstrip at an annual price of NOK 10 000.

The Norwegian authorities admitted that '*LILAS' rent is also extremely low and below market price (NOK 10 000 a year)*'.

Consequently, the Authority has doubts whether the rent paid by LILAS reflected fair market value.

CONCLUSION

In the light of the foregoing considerations, the Authority decided to open the formal investigation procedure in accordance with Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement. Interested parties are invited to submit their comments within one month from publication of this decision in the *Official Journal of the European Union*.

EFTA SURVEILLANCE AUTHORITY DECISION

No 183/07/COL

of 6 June 2007

to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the sale and the rent of Lista air base

(Norway)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

Having regard to the Agreement on the European Economic Area ⁽²⁾, 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 ⁽³⁾, in particular to Article 24 thereof,

Having regard to Article 1 in Part I and Articles 10 and 13 in Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines ⁽⁴⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular, the Chapter on State Aid elements in sales of land and buildings by public authorities,

Whereas:

I. FACTS

1. Procedure

The Authority learned about the sale of the Lista air base by way of a report issued by the Office of the Auditor General which concludes that the Norwegian Defence Estates Agency (hereinafter the 'NDEA') is unable to produce reliable evidence documenting that Lista air base was sold at market value ⁽⁵⁾.

On 14 September 2005, the Authority sent a letter to the Norwegian authorities requesting information regarding the sale of Lista air base located in the municipality of Farsund in Southern Norway (Event No 332322).

By letter dated 28 October 2005 from the Norwegian Mission to the European Union, forwarding two letters, respectively dated 26 October 2005 from the Ministry of Modernisation and 24 October 2005 from the Ministry of Defence, the Norwegian authorities replied to the questions raised by the Authority. This letter was received and registered by the Authority on 29 October 2005 (Event No 348525).

By letter dated 28 March 2007 (Event No 414743), the Authority requested that the Norwegian authorities communicate additional information.

By letter dated 4 May 2007 (Event No 420179), received and registered by the Authority on the same day, the Norwegian authorities provided further information.

⁽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⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 in Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, EEA Supplements No 32, 3.9.1994. The Guidelines were last amended on 3 May 2007. Hereinafter referred to as 'the State Aid Guidelines'.

⁽⁵⁾ Report No 3:7 (2004-2005), The Auditor General's study of the sale of Lista air base.

2. Description of the sale

On 12 September 2002, the NDEA sold Lista air base to Lista Flypark AS. The sale resulted in a net disbursement from the Norwegian State to Lista Flypark AS of NOK 10 875 000.

2.1. The property sold

Lista air base covers 5 000 000 m² of land. The conglomeration of buildings consists of storage buildings, barracks, mess halls and hangars representing in total approximately 28 000 m². The estate also includes an airstrip and a wetland area.

According to the municipal sector plan of Lista air base approved by the Municipal Council of Farsund ⁽⁶⁾, the property may be used for commercial activities including aviation services, public development, crafts and industry. The area around Slevdalsvannet, which encompasses the wetland area and an ammunition depot for the Norwegian Armed Forces, has been reserved for the use of the Norwegian Armed Forces, airport services and nature conservation. Around 1 900 000 m² can be used for industrial purposes.

Finally, parts of the land and some buildings are protected in accordance with National Protection Plan from the Norwegian Armed Forces, including:

- three hangars and the air defence simulator ⁽⁷⁾,
- a mess hall, and
- parts of the land, including runways, taxiways and some of the road network.

2.2. The LILAS agreement

In Proposition No 50 (1994-1995) to the Parliament, the Ministry of Defence presented its proposal on the closing of Lista air base. The Ministry of Defence proposed the so-called 'development alternative' providing that the military air base activities on Lista air base should cease as from 1 July 1996.

According to such alternative, the Norwegian Armed Forces would evaluate the conglomeration of buildings to decide on the buildings which could not or should not be used for industrial and commercial purposes.

⁽⁶⁾ Decision No 73/01 and 05/00 of 18 December 2001 by the Municipal Council of Farsund.

⁽⁷⁾ See Regulation 2004-05-06 No 718 based the Norwegian Heritage Act from 1978.

The remaining buildings, which could be used for such purposes, should be maintained in condition for a period of maximum ten years in order to review the possibilities of industrial and commercial development and arrange for best possible commercial use of Lista air base. In its recommendation to the Parliament, the Parliamentary Committee supported the proposal from the Government.

On 12 June 1995, the Parliament made a resolution in accordance with the recommendations of the Parliamentary Committee.

On 27 June 1996, the NDEA entered into a ten year lease agreement with Lista Airport Development AS ('LAD') to enter into effect on 1 July 1996 until 30 June 2006 with the possibility for LAD to rent the air base for another ten year period. The company was owned by the Municipality of Farsund (20 %) and local investors (80 %).

The agreement covered a conglomeration of buildings which in total adds up to 12 500 m² and approximately 60 % of the estate.

The main objective of the agreement was to develop, as part of the implementation of the 'development alternative' within a period of maximum ten years, commercial air services on the air base.

The lease agreement was later transferred to Lista Lufthavn AS ('LILAS') which, as such, was established on 3 May 1996.

According to Articles 3(1) and 3(2) of the lease agreement, LILAS would rent a specified part of the buildings and the airstrip at an annual price of NOK 10 000.

Article 7(5) of the lease agreement further provides that the owner of the air base is responsible for external maintenance of buildings and maintenance of the airstrip. The liability is limited to NOK 1 500 000 annually. As consideration for this obligation, the owner is entitled to a split of the profit as provided by Article 3 of the lease agreement ⁽¹⁾.

In case LILAS does not use its right to prolong the lease at the end of the initial ten year period, it may buy, according to Article 13(1) of the lease agreement, a specified area of the air base at a price of NOK 10 000 000.

According to Article 13(6) of the lease agreement, LILAS may buy, in a situation where the NDEA decides to sell Lista air base *en bloc* during the lease period, the entire air base at a price of NOK 25 000 000. By letter dated 13 December 2002, LILAS waived its pre-emptive right to buy Lista air base *en bloc*.

In June 2006, in conformity with Article 13(1) of the lease agreement, LILAS exercised its pre-emptive right to purchase parts of the Lista air base for an amount of NOK 10 000 000 from Lista Flypark AS. Section 3 of the 2002 sales agreement between the NDEA and Lista Flypark AS, provided that in case of sale by the buyer of part of the property within five years, the formal approval of the NDEA had to be granted and 50 %

⁽¹⁾ Article 3 of the lease agreement provided that in case the profit generated as a result of the commercial use of the air base exceeded NOK 4 500 000, the owner of the air base would be entitled to a share of the profit equal to 20 % of the share of the profit exceeding NOK 4 500 000.

of the proceeds of the sale had to be paid to the NDEA. Consequently, when Lista Flypark sold parts of the air base to LILAS, NDEA in turn exercised its right to be paid by Lista Flypark AS an amount corresponding to 50 % of the net income of the sale.

LILAS' plan for civil use of the air base was to operate domestic scheduled flights and international air freight with export of fish to Europe, the United States and the Far East. The commercial services stopped as of 1 November 1999. LILAS received however some income from the sub leases of certain parts of the air base.

2.3. The sales process

During 2000, to attract potential buyers, the NDEA had put several advertisements in Norwegian newspapers in which the possible uses of parts of Lista air base were listed. According to the Norwegian authorities, the advertisements were published in Farsund Avis, which is a local newspaper, Fedrelandsvennen and Stavanger Aftenblad, both of which are regional newspapers.

According to the Norwegian authorities, an *en bloc* sale of Lista air base was not advertised at this stage.

On 16-17 August 2001, the NDEA hosted the 'Lista conference' to which 7 000-8 000 potential investors were invited. 180 participants attended the conference. The objective of the conference was to present Lista air base to potential buyers. On the agenda was the transformation of the air base from military to civilian commercial use. Further to the conference, the Norwegian authorities engaged Mr Christer Hjort, a Swedish consultant, to assist them with the sale process. The Norwegian authorities have indicated that Mr Christer Hjort had concluded that the possibilities of considering Lista air base as an investment object were limited due to the ten year lease agreement in which LILAS had been granted a privileged position.

In August 2001, the NDEA decided that the air base should be sold *en bloc*. Several reports were requested in order to assess the condition of the air base, including a report regarding fire-technical status, possible need to decontaminate the land and the necessity to improve the land drainage system.

The Norwegian authorities only provided the NDEA with a fire safety report dated 24 January 2002 in which a consultancy, TekØk, estimated that the necessary fire safety upgrades required to meet the applicable standard, amounted to NOK 14 596 800.

In the beginning of 2002, sales negotiations were initiated with the real estate developers Intervest Eiendom AS and Interconsult Prosjektutvikling AS, following an initiative from the Municipality of Farsund.

As part of the negotiations with the two companies mentioned here above, the NDEA ordered two value assessments by the real estate value assessors Verditakst and OPAK ⁽²⁾.

⁽²⁾ The conclusions of which are mentioned below in section 2.5.

For the years 2002-2004, the Parliament gave the Ministry of Defence, according to Section 2.1(1) of the Regulation on Alienation (hereinafter the 'Regulation'), the authority to alienate redundant property, buildings and installations used by the Armed Forces at market value. On behalf of the Ministry of Defence, the alienations were to be carried out by the NDEA.

According to Section 3.1 of the Regulation, alienation had to be conducted in such a way that the State received the best economic result possible. Alienation had to be done either by the NDEA itself or through a real estate agent. It followed from Section 3.4 of the Regulation that alienation by the NDEA itself should, in principle, be conducted by way of a public announcement. The announcement should be made public in the Official Norwegian Gazette and at least one local newspaper. As a general principle, the bidding procedure should be open; however a closed bidding procedure could be used if the NDEA considered it appropriate. Finally, it followed from the last paragraph of Section 3.4 of the Regulation that if the property had insignificant value or if there was only one or a limited number of potential buyers, the NDEA could alienate in the form of a direct sale. This would imply a sale based on bids from either one or a limited number of invited buyers. The sale price could not in any event be agreed below the market value established in the value assessment.

2.4. *The terms and conditions of the sale*

On 12 September 2002, the NDEA sold Lista air base to Lista Flypark AS. The sales price was agreed on the basis of the valuation carried out by Verditakst, in which the market value of Lista air base was estimated at NOK 11 000 000.

At the time of the sale, there was no air service activity on Lista air base; however, the air base was still being used for some military activities (*inter alia* shooting range, ammunition depot and a mobilisation depot among others).

An amount of NOK 7 500 000 was deducted from the value of the property to take into account the works that needed to be carried out in order to comply with applicable fire safety standards. The sales price of the property was therefore brought down to NOK 3 500 000.

In addition to the above, the Norwegian authorities contractually agreed to compensate the buyer for the following costs:

- NOK 3 500 000 corresponding to the need to carry out works relating to technical installations ⁽¹⁾ (such as electrical transmission lines),
- NOK 5 500 000 corresponding to works to be carried out for the development of new infrastructure ⁽²⁾, and
- NOK 5 375 000 corresponding to compensation for the lease agreement entered into with LILAS ⁽³⁾. The amount of this compensation is based on the fact that the NDEA was, at the time of the sale in 2002, under an obligation to pay LILAS a yearly amount of NOK 1 500 000 for costs related to the maintenance of the buildings for approximately another four years.

⁽¹⁾ Article 20 of the Sales agreement and section 2 in the Annex to the registered deed.

⁽²⁾ Article 19 of the Sales agreement and section 2 in the Annex to the registered deed.

⁽³⁾ Article 9 of the Sales agreement and section 2 in the Annex to the registered deed.

The total compensation agreed and amounting to NOK 14 375 000 was set off against the sale price of NOK 3 500 000. The Norwegian authorities thus paid the purchaser NOK 10 875 000.

Transfer of the property took place on 9 December 2002.

2.5. *The valuation reports of Lista air base*

Two independent valuation reports of the property were carried out.

2.5.1. *The Verditakst valuation report*

The valuation report dated 7 June 2002 estimated that the *en bloc* market value of Lista air base was NOK 11 000 000. The Verditakst report was based on an inspection of the property carried out on 23 May 2002.

The estimation of the market value was based on the following set of assumptions:

- the NDEA was positive to a sale of Lista air base,
- Lista air base could publicly be advertised for sale during a normal period,
- potential buyers who were willing to bid unreasonably high due to special interests in the property could be disregarded,
- the information provided by the NDEA was accurate,
- Verditakst had not surveyed the conglomeration of buildings, checked foundations, or controlled the presence of asbestos in the buildings,
- Verditakst had not been provided with a certificate of practical completion, or controlled whether there were public orders, including fire safety orders or whether the use of the property at the time was permitted,
- Verditakst had not controlled registered servitudes or possible transmission lines in the ground, and
- Lista air base was fully insured.

The market value of NOK 11 000 000 corresponds to:

- capitalised value of net income from the lease: NOK 6 500 000,
- value of the land: NOK 4 500 000.

According to the Verditakst report, the technical installations in the buildings were partly outdated. No technical inspection was carried out. The condition of the buildings as regards maintenance has not been inspected, only roughly estimated. Verditakst evaluated that the total building area was of 25 000 m².

By letter dated 4 May 2005, the Norwegian authorities asked Verditakst to provide some additional information. Thus, the valuator was asked whether it had taken into account the deficiency of the technical condition revealed by the TekØk report regarding fire safety and the liability related to the ten year lease.

By letter dated 6 May 2005, Verditakst confirmed that it had not taken into account those two elements when assessing the value of the property.

2.5.2. The OPAK valuation report

According to a simplified valuation report dated 29 May 2002, OPAK estimated the *en bloc* market value of Lista air base by using three alternatives. Alternative 1 resulted in an estimated market value of NOK 32 000 000 and alternative 2 in an estimated market value of NOK 34 000 000. The third alternative value estimated the market value at NOK 25 000 000.

Indeed, OPAK considered that there were three alternative ways to assess the value of the property:

- alternative 1: sale of the property to new purchaser: NOK 32 000 000,
- alternative 2: sale of the property to LILAS on the basis of its pre-emptive right to buy part of the leased building and land at the end of the ten year lease: NOK 34 000 000, and
- alternative 3: sale of the property to LILAS on the basis of its pre-emptive right to buy the property *en bloc* during the lease period: NOK 25 000 000.

The OPAK report was based on an inspection of the property carried out on 21 May 2002.

The estimated market value was based on the following assumptions:

- the NDEA was positive to a sale of Lista air base,
- Lista air base could publicly be advertised for sale during a normal period,
- potential buyers who were willing to bid unreasonably high due to special interests in the property could be disregarded,
- the information provided by the NDEA was accurate,
- OPAK had not obtained financial information or status of tenants present at the time,
- OPAK had not surveyed the conglomeration of buildings, controlled foundations, or controlled the presence of asbestos in the buildings,
- OPAK had not been provided with a certificate of practical completion, or controlled whether there were public orders, including fire safety orders or whether the use of the property at the time was permitted,
- OPAK had not controlled registered servitudes or possible transmission lines in the ground, and
- all costs in relation to possible contamination of the ground was held to be the responsibility of the NDEA.

The conditions of the sale actually corresponded to the alternative 1 as the air base was sold to a new purchaser.

The market value arrived at for alternative 1 and rounded up to NOK 32 000 000 corresponds to:

- capitalised value of net income from the lease: NOK 26 500 000,

— value of the land: NOK 10 000 000,

— compensation for LILAS agreement deducted from the value: NOK 5 000 000.

According to the OPAK report, the condition of the buildings as regards maintenance had not been inspected, only roughly estimated. During inspection, OPAK did not take note of any ground pollution. OPAK was aware of the existing lease agreements including the LILAS agreement. OPAK estimated the total building area at 28 467 m².

3. Comments by the Norwegian authorities

The Norwegian authorities have argued that the possibility for the air base to be seen as an attractive investment for potential investors was very limited, particularly in the light of the existing lease agreement entered into with LILAS and the possibility for the latter to purchase the property at the end of a ten year period. Indeed, very few would-be buyers would be willing to invest in the air base and develop it as the tenant of the property was given the right to purchase part/all of it after just a few years.

The Norwegian authorities consider that *'the market value of the air base is by definition not more than possible buyers are willing to pay. (...) NDEA made its best efforts to achieve the highest possible price in the existing markets'*.

The Norwegian authorities have argued that the reason for their choosing the Verditakst report instead of the OPAK report was because *'the value assessment made by OPAK AS dated 29 May 2002 was a temporary and simplified value assessment primarily carried out for budgetary purposes. Basically, the assessment was a suggestion of the highest possible payment investors might be willing to pay for the air base, provided that all favourable preconditions were fully met'*.

The Norwegian authorities have furthermore indicated that the value of NOK 25 000 000 which was set in the case LILAS decided to buy the entire property *en bloc* during the lease, was the result of negotiations. According to the Norwegian authorities, such a high amount was arrived at because *'in 1996, the parties were optimistic about the potential outcome of their mutual efforts in developing the property and thereby create additional value to the property'*.

The Norwegian authorities have furthermore indicated that their aim in selling Lista air base was to save the government future costs. Indeed, over the period 1996-2002, the NDEA spent NOK 41 500 000 on the management, maintenance and upgrades of the air base. The works included drainage, installation of runway lightening and public relations spending. The cost arising from the 'development alternative' was of NOK 50 000 000 whereas maintaining the air base would have had a cost of NOK 50 000 000-258 000 000. The Norwegian authorities consider that this element should be taken into account when evaluating whether the NDEA should have sold the property at the agreed price.

II. APPRECIATION

1. The presence of State aid

1.1. 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, between Contracting Parties, be incompatible with the functioning of this Agreement'.

Aid falling within this provision is, as a rule, incompatible with the EEA Agreement and hence prohibited, provided that the following four conditions are fulfilled:

1. the aid is granted by 'EC Member States, EFTA States or through state resources in any form whatsoever';
2. the aid 'distorts or threatens to distort competition';
3. the aid favours 'certain undertakings or the production of certain goods'; and
4. the aid 'affects trade between the Contracting Parties'.

The measure under review could take two distinct forms which could amount to State aid: firstly, the sale of the air base at a price below market value (see Section 2.3 below) and secondly, the leasing out of the air base at a price below market value (see Section 2.4 below).

1.2. State aid within the meaning of the State Aid Guidelines — Chapter on State aid elements in sales of land and buildings by public authorities

The State Aid Guidelines, Chapter on State aid elements in sales of land and buildings by public authorities, gives 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 bidding procedure (by way of an independent expert evaluation). These two procedures allow EFTA States to handle sales of land and buildings in a way that precludes the existence of State aid.

The State Aid Guidelines, Chapter on State aid elements in sales of land and buildings by public authorities provides expressly that 'the guidance concerns only sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements'. (emphasis added)

1.3. The sale of Lista air base

1.3.1. Presence of State resources

Condition 1 above is directed at all aid financed from public resources. It is thus clear that aid from the NDEA falls within the scope of State resources.

Sale of publicly owned land and buildings below market value implies that State resources are involved. However, the Chapter on State aid elements in sales of land and buildings provides for two cases where, if the applicable conditions are met, the price paid for the property will be held to correspond to fair market value therefore excluding the presence of State resources.

Two situations should be distinguished: cases where the sale has taken place through an unconditional bidding procedure (see (i) below) and those where the sale has been carried out with reference to value assessments carried out by independent experts (see (ii) below).

(i) Sale through an unconditional bidding procedure

The Norwegian authorities recognise that 'the process started out as an unconditional bidding procedure regarding the sale of parts of the air base. Advertisements listing possible uses of the air base were published in different newspapers such as Farsund Avis, Fedrelandsvennen and Stavanger Aftenblad in 2000'.

Neither the advertisements nor the so-called 'Lista conference' led to any sale. The process did not cover the case of a sale of the air base *en bloc*. The Authority therefore considers that there was no unconditional bidding procedure in connection with the sale of the air base *en bloc* and that the possibility to preclude the existence of State aid on the basis of the relevant Chapter of the State Aid Guidelines is therefore excluded.

(ii) Sale without an unconditional bidding procedure

Section 2.2 of the State Aid Guidelines — Chapter 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 valuers prior to the sale negotiations in order to publish 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)

The Norwegian authorities have indicated that 'in the beginning of 2002, sales negotiations were initiated with the real estate developers Intervest Eiendom AS and Interconsult Prosjektutvikling AS, following an initiative from the Municipality of Farsund. As part of the negotiation with the above mentioned companies, NDEA ordered two new value assessments, by the real estate value assessor firms Verditakst AS and OPAK. A sales agreement was reached on 12 September 2002 between NDEA and Lista Flypark AS'.

This is confirmed by the Report from the Auditor General which concluded that neither a valuation of the entire property nor a public announcement of the intended sale was made prior to the start of the negotiations with Lista Flypark AS in March 2002.

As the conditions set by the State Aid Guidelines — Chapter on State Aid elements in sales of land and buildings by public authorities appear not to have been fulfilled, the Authority cannot exclude that the sale may have involved some elements of State aid. Indeed, some uncertainties exist regarding the purchase price of the air base.

(iii) Uncertainties regarding the purchase price

Based on the information submitted, the Authority has serious doubts as to whether the value of the property used as a basis for determining the price finally paid by the purchaser reflected market value.

The price paid by the purchaser was determined by reference to the valuation report which was carried out by Verditakst, i.e. NOK 11 000 000. The Authority has doubts whether this amount represented the market value of the property as OPAK concluded that the value was of NOK 32 000 000 and as the sales price stated in the lease agreement was of NOK 25 000 000 for the whole airport.

Indeed, in the light of the nearly identical set of assumptions used by both Verditakst and OPAK to assess the value of the property, the Authority cannot see how the significant difference between the value reached by both independent evaluators (i.e. from NOK 11 000 000 for Verditakst to NOK 32 000 000 for OPAK) can be explained. This difference is even more difficult to explain in view of the fact that OPAK took into account, in its value assessment, the liability related to the existence of the LILAS lease agreement.

The Authority has not been presented with convincing evidence that the high value reached by OPAK can be explained, as argued by the Norwegian authorities, by the fact that such value assessment was *'a temporary and simplified value assessment primarily carried out for budgetary purposes. (...) the assessment was a suggestion of the highest possible payment investors might be willing to pay for the air base, provided that all favourable preconditions were fully met'*.

The doubts are furthermore confirmed by the Study of the Auditor General which concludes that there is no documentation available indicating that the valuation of NOK 11 000 000 was used as a basis for calculating the sales figure. Furthermore, the Auditor General is of the opinion that documentation proving that the purchase price reflected the market value had not been produced.

Furthermore, Section 2.2.c of the Chapter on State aid elements in sales of land and buildings by public authorities states that: *'special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them, irrespective of whether or not he runs a business or of the nature of his business. The economic disadvantage of such obligations should be evaluated separately by independent valuers and may be set off against the purchase price (...)'*. (emphasis added)

In the case at hand, the purchaser was compensated for the following:

- compensation related to technical installations: NOK 3 500 000,
- compensation related to the development of new infrastructure: NOK 5 500 000, and
- compensation related to LILAS agreement: NOK 5 375 000.

The Authority notes that these compensatory payments together with the applied value assessment implied in reality that the

Norwegian State paid Lista Flypark AS NOK 10 875 000 to obtain the air base and the related buildings.

The Authority has doubts whether these payments can be said to compensate for special obligations that relate to the land and the buildings in the meaning of the above quoted Section 2.2.c of the relevant Chapter of the mentioned Guidelines.

1.3.2. Favouring certain undertakings or the production of certain goods

Referring to the third condition mentioned above, it is to be noted: first, the aid measure must confer on Lista Flypark AS advantages that relieve it of charges that are normally borne from its budget. The Authority considers that if Lista Flypark AS was able to buy the property for less than its fair market value, the difference between the price actually paid and the fair market value would constitute an advantage.

Second, the aid measure must be selective in that it favours *'certain undertakings or the production of certain goods'*. In the case at hand, the beneficiary would be Lista Flypark AS.

The Authority considers that this condition is fulfilled.

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

According to conditions two and four, the aid measure must distort competition and affect trade between the Contracting Parties. Under settled case law for the purpose of these provisions, the mere fact that an aid strengthens a firm's position compared with that of other firms, which are competitors in intra-EEA trade, is enough to allow the conclusion to be drawn that intra-EEA trade is affected.

The Authority considers that the real estate market in Southern Norway is not limited to local undertakings. Lista Flypark AS is in competition with similar undertakings in Norway and other EEA States. A sales price below market value favouring Lista Flypark AS would distort or threaten to distort competition and affect trade between Contracting Parties. Consequently, the Authority considers that conditions two and four above, are fulfilled.

1.4. The leasing out of part of Lista air base

1.4.1. Presence of State resources

Should the air base have been rented out at a price below market value, the condition regarding involvement of State resources would be met for the same reasons as those set out above regarding the sale of the air base.

On the basis of the information it has been provided with at this stage, the Authority has doubts that the value of the rent paid under the LILAS agreement corresponded to fair market value. Indeed, the Norwegian authorities themselves have admitted that the rent was below market value. In such a case, the difference between the amount actually paid by the tenant and the market value of the property would result in State resources having been involved.

1.4.2. Favouring certain undertakings or the production of certain goods

The Norwegian authorities have indicated in their letter dated 24 October 2005 that 'LILAS' rent is also extremely low and below market price (NOK 10 000 a year)'. (emphasis added)

LILAS may thus have been benefiting from a favourable treatment in the form of a reduced rent.

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

The aid measure must distort competition and affect trade between the Contracting Parties. Under settled case law for the purpose of these provisions, the mere fact that an aid strengthens a firm's position compared with that of other firms, which are competitors in intra-EEA trade, is enough to allow the conclusion to be drawn that intra-EEA trade is affected. The activity LAD and then LILAS were intending to carry out at the time of the signing and then of the transfer of the lease agreement was the operation of domestic scheduled flights and international air freight with export of fish to Europe, the United States and the Far East. The fact that both companies may have benefited from favourable conditions may then have distorted competition and had an effect on trade within the EEA.

By allowing LILAS to benefit from a reduced rent to carry out its economic activities, the NDEA may thus have distorted competition and affected trade within the EEA.

1.5. Conclusion

The Authority, after having reviewed all the data in its possession, considers that it cannot be excluded that both the sale of the Lista air base and the leasing out of part of the air base could both constitute aid measures.

2. Procedural requirements

Pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, '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 State Aid Guidelines, Chapter on State Aid elements in sales of land and buildings by public authorities, states *inter alia* that the EFTA States should notify any sale of land and buildings by public authorities that was not concluded on the basis of an open and unconditional bidding procedure and any sale that was, in the absence of such procedure, conducted at less than market value.

The Norwegian authorities did not notify the sale of Lista air base to the Authority. If the doubts of the Authority as to the sale below market price were confirmed, this would constitute State aid within the meaning of Article 61(1) of the EEA Agreement. In that case the Norwegian authorities would not have respected their obligations pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

Furthermore, the Norwegian authorities have also indicated that the rent paid under the LILAS agreement was below market

value, which could result in some elements of State aid being involved prior to the signing of the sales agreement. If such were the case, the rent at lower than market value was not notified to the Authority. This would also constitute a breach of the Norwegian authorities' obligations pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

3. Compatibility of the aid

The Authority has assessed the two potential aid measures under Article 61(3) of the EEA Agreement. With regard to the sale of the air base, the Authority has also assessed the measure in combination with the State Aid Guidelines, Chapter on State aid elements in sales of land and buildings by public authorities.

3.1. Sale of the air base

The Norwegian authorities have argued that the sale does not contain aid. However, after assessing the likely involvement of State aid in the sale of the air base, it has to be considered whether such aid could be compatible with the EEA Agreement by virtue of Article 61(3) of the EEA Agreement.

On the basis of the information the Authority has received, Article 61(3)(a)-(c) of the EEA Agreement appears to be inapplicable. In the view of the Authority, the sale is not designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, to promote a project of common European interest or to facilitate the development of certain economic activities or of certain economic areas.

3.2. Leasing out of the air base

Regarding the leasing out of the air base at a price which may be below market value, for the same reasons as those set out under 3.1 here above, it is not clear either on what grounds such a measure could be held to amount to compatible aid.

4. Conclusion

Based on the information submitted by the Norwegian authorities, the Authority cannot exclude the possibility that the measure(s) under scrutiny constitute aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that these measures can be regarded as complying with Article 61(3) of the EEA Agreement. The Authority thus doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance with Article 10 in Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1(2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question 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) in Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision.

In light of the foregoing consideration, the Authority requires that, within one month of receipt of this decision, the Norwegian authorities provide all documents, information and data needed for assessment of the compatibility of both the sale of the air base and the renting out of the air base to LILAS. It requests the Norwegian authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Authority would like to remind the Norwegian authorities that, according to the provisions of Protocol 3 to the Surveillance and Court Agreement, any incompatible aid unlawfully put at the disposal of the beneficiaries will have to be recovered, unless this recovery would be contrary to a general principle of EEA law,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement against Norway regarding the sale of Lista air base and the lease agreement between the Norwegian Defence Estates Agency and LILAS.

Article 2

The Norwegian authorities are requested, pursuant to Article 6(1) in Part II of Protocol 3 to the Surveillance and Court Agreement, 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 required to provide within one month from notification of this Decision, all documents, infor-

mation and data needed for the assessment of the compatibility of the aid measure.

Article 4

The EC Commission shall be informed, in accordance with Protocol 27(d) of the EEA Agreement, by means of a copy of this Decision.

Article 5

Other EFTA States, EC Member States, and interested parties shall be informed by publishing this Decision in its authentic language version, accompanied by a meaningful summary in languages other than the authentic language version, in the EEA Section of the *Official Journal of the European Union* and the EEA Supplement thereto, inviting them to submit comments within one month from the date of publication.

Article 6

This Decision is addressed to the Kingdom of Norway.

Article 7

Only the English version is authentic.

Done at Brussels, 6 June 2007.

For the EFTA Surveillance Authority,

Kurt JAEGER
Acting President

Kristján Andri STEFÁNSSON
College Member