

DECISIONS

COMMISSION DECISION

of 8 February 2012

on State aid SA.28809 (C 29/10) (ex NN 42/10 and ex CP 194/09) implemented by Sweden in favour of Hammar Nordic Plugg AB

(notified under document C(2012) 546)

(Only the Swedish text is authentic)

(Text with EEA relevance)

(2012/293/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 26 May 2009, registered on 16 June 2009, the Commission received a complaint concerning the alleged grant of State aid to Hammar Nordic Plugg AB through the sale of public property below market price by the Municipality of Vänersborg.
- (2) On 27 October 2009, the Commission forwarded a non-confidential version of the complaint to the national authorities. Sweden replied by letter of 30 November 2009, registered on the same day.
- (3) On 9 March 2010, the Commission requested further information and Sweden replied by letter dated 20 April 2010.
- (4) On 11 May 2010, the Commission received information submitted by Chips AB.
- (5) By means of the letter dated 27 October 2010, the Commission notified Sweden that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ⁽²⁾ (TFEU) in respect of the aid. The Commission

decision to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the aid.

- (6) By letter dated 23 November 2010, Sweden asked for an extension of the deadline to submit comments on the opening decision.
- (7) By letters dated 15 and 17 December 2010, the Swedish authorities submitted their comments to the Commission. Hammar Nordic Plugg AB submitted its comments to the Commission by letter of 22 January 2011.
- (8) On 1 February 2011, the Commission sent the observations of Hammar Nordic Plugg AB to the Swedish authorities for comments.
- (9) On 1 June 2011, the Commission sent a further request for information, to which Sweden replied by letter of 29 June 2011 and sent further clarifications by emails of 12 September 2011 and 30 September 2011.
- (10) On 6 June 2011, the Commission sent a questionnaire to Chips AB, to which the company did not reply directly. Some information was provided, however, by Chips AB to the Swedish authorities, which incorporated this information into their abovementioned comments of 12 September 2011.
- (11) On 19 October 2011, a meeting took place between the Commission services and representatives of Hammar Nordic Plugg AB.
- (12) By e-mail of 3 November 2011, Hammar Nordic Plugg AB submitted additional information to the Commission. The Commission forwarded that information to the Swedish authorities for comments on 4 November 2011. Sweden confirmed on 28 November 2011 that the authorities had no comments.

⁽¹⁾ OJ C 352, 23.12.2010, p. 22.

⁽²⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽³⁾ See footnote 1.

2. DESCRIPTION

2.1 The beneficiary and the parties involved

- (13) The beneficiary of the measure is Hammar Nordic Plugg AB ('Hammar'). It is a limited company whose business consists of property rental and real estate management. The company is based in Trollhättan, in the province of Västra Götaland (Sweden). Hammar is 100 % owned by its parent company Hammar Nordic Fastigheter AB, which in turn is wholly owned by a private individual, Anders Hammar⁽⁴⁾.
- (14) The Municipality of Vänersborg ('the Municipality') is situated in the province of Västra Götaland in Sweden, close to Norway. According to the Swedish Regional Aid map 2007-2013, the Municipality is not located in an assisted area.
- (15) Fastighets AB Vänersborg ('FABV') is a real estate company wholly owned by the Municipality.
- (16) Topp Livsmedel ('Topp') belonged to Chips AB⁽⁵⁾, a division of the international business group Orkla ASA ('Orkla').
- (17) The property subject to the measure ('the Facility') comprises two plots of land, a production site, movable property and intellectual property rights (e.g. trademarks). It is located in Brålanda, a small community in the Municipality. Until 2007, Topp produced frozen vegetables in the Facility with about 30 employees.

2.2 Overview of the measure

- (18) By letter dated 26 May 2009, the Commission received a complaint concerning an alleged grant of State aid through the sale of public property (the Facility) below market price.
- (19) The facts are as follows. At the end of 2007, Chips AB announced that it would shut down production at Topp and started the process of selling the Facility.
- (20) On 13 February 2008, the Municipality — through FABV — bought the Facility from Chips AB for SEK 17 million (EUR 1,7 million)⁽⁶⁾.
- (21) Also on 13 February 2008, FABV entered into two agreements with Hammar. The first agreement was a

tenancy agreement by which FABV let the whole Facility to Hammar⁽⁷⁾. The second agreement consisted of an option allowing Hammar to buy the Facility from FABV for the set price of SEK 8 million (EUR 0,8 million) at any time between 1 March 2008 and 28 February 2010. Hammar exercised its option and acquired the Facility from FABV for the set price on 11 August 2008.

- (22) By agreement of 1 March 2008, Hammar sub-let most of the Facility to local entrepreneurs at a rent⁽⁸⁾ higher than the rent agreed between FABV and Hammar. In addition, as a condition for signing the tenancy agreement, the local entrepreneurs demanded an option to purchase the Facility in the future, should Hammar become owner of the Facility. The option agreement was signed on that same date, giving the local entrepreneurs the right to acquire the Facility for SEK 40 million (EUR 4 million).
- (23) On 2 September 2008, a contract was concluded between Hammar and the local entrepreneurs selling the Facility to the latter for the agreed price of SEK 40 million.

3. THE OPENING DECISION

- (24) The Commission had reasons to believe that the FABV's sale of the Facility to Hammar involved State aid. On 27 October 2010, therefore, the Commission opened the formal investigation procedure on that transaction⁽⁹⁾.
- (25) Sweden and Hammar have provided comments to the opening of the formal investigation procedure.
- (26) Sweden is of the view that FABV's sale of the Facility to Hammar does not constitute State aid. It maintains that the sole objective of the Municipality when buying the Facility through FABV was to secure continued production and jobs. As it had no intention of running operations itself, the Municipality opted for the solution proposed by Hammar, i.e. a lease with an option to buy. Sweden also notes that the option granted to Hammar required a capital injection of SEK 9 million (EUR 0,9 million) from the Municipality's budget to FABV, to provision for the loss that would arise if Hammar exercised the option.
- (27) Hammar argues that FABV's purchase of the Facility from Chips AB was undertaken at an excessively high price which could entail State aid to Orkla. In addition, Hammar argues that its purchase of the Facility from FABV was carried out on market terms and that the sale neither affected trade between Member States nor distorted competition.

⁽⁴⁾ The property subject to this measure represents the company's only asset and business activity. For the sake of clarity, it must be noted that in the opening decision an independent company (Hammar Nordic AB), also owned by the same shareholder Mr Anders Hammar, was erroneously identified as the parent company of Hammar Nordic Plugg AB.

⁽⁵⁾ Chips AB is a manufacturer of potato crisps based in Mariehamn, Åland, Finland, active in the Nordic and Baltic countries, with a consolidated turnover of approximately SEK 2,6 billion per year and around 800 employees. In 2005, Chips AB was acquired by the Norwegian group Orkla ASA.

⁽⁶⁾ The average exchange rate for 2008 is SEK/EUR 9,62. The amounts in euro in this decision are purely indicative.

⁽⁷⁾ The annual rent payable for years 1–5 was set at SEK 500 000, SEK 650 000, SEK 800 000, SEK 950 000 and SEK 1 100 000, respectively.

⁽⁸⁾ The annual rental payable for years 1 to 6 was set at SEK 3 500 000, SEK 3 500 000, SEK 7 000 000, SEK 7 000 000, SEK 10 500 000 and SEK 10 500 000, respectively.

⁽⁹⁾ See footnote 1.

- (28) In order to support its allegations, Hammar provided an *ex post* assessment of the value of the Facility dated 20 January 2011, prepared by PricewaterhouseCoopers (the PwC report). That report maintains that the degree of uncertainty when estimating the market price of this type of property is so great that the price could be said to have been close to market terms each time the Facility was sold (i.e. FABV's purchase from Chips AB, the subsequent sale to Hammar and finally Hammar's sale to the local entrepreneurs). In particular, in relation to FABV's sale to Hammar and to the subsequent sale to local entrepreneurs, the PwC report considers that the prices paid were market-conform, given the financial conditions in the two tenancy agreements (i.e. between FABV and Hammar on the one hand and between Hammar and the local entrepreneurs on the other).
- (29) At the meeting with the Commission services on 19 October 2011 and in its submission to the Commission of additional information of 3 November 2011, Hammar argued that, at the time the Municipality and Hammar agreed to give the latter an option to acquire the Facility for SEK 8 million, there were no other bids for the Facility and thus this price should be considered the market price, irrespective of any valuations which are necessarily hypothetical.
- (30) On 3 November 2011, Hammar submitted a report to the Commission prepared by Copenhagen Economics A/S⁽¹⁰⁾ ('Copenhagen Economics') concerning the possible effect on trade between Member States of both FABV's purchase of the Facility from Chips AB and the subsequent sale of the Facility to Hammar. The report concludes that the first transaction had the potential to affect intra-Union trade, because the seller Chips AB is an international company — the Finnish subsidiary of the Norwegian group Orkla — that competes internationally. By contrast, the report argues that FABV's sale of the Facility to Hammar had no or an insignificant effect on intra-Union trade, as Hammar operates only at local level and does not encounter international competitors on the relevant market(s).
- or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (32) The Commission notes that the beneficiary of the measure, i.e. Hammar, qualifies as an undertaking since it pursues economic activities, offering real estate and real-estate-related services on the market.
- (33) The transaction was concluded by the Municipality through FABV. FABV is wholly owned by the Municipality, which covers FABV's potential losses from its normal budget. FABV's board is made up of members taken from the Municipality's ruling body. Thus, the decisions of FABV are imputable to the State and, to the extent that they have financial implications, they imply the use of State resources. Moreover, the Municipality was clearly involved in this operation, as the option granted to Hammar required a capital injection of SEK 9 million from the Municipality to FABV to provision for the loss that would arise if Hammar exercised the option. In this respect, the Commission concludes that the sale of the Facility to Hammar involved State resources.
- (34) Since the transaction benefited a specific undertaking (i.e. Hammar), it has to be considered a selective measure.
- (35) The measure distorts or has the potential to distort competition and affect trade within the Union and the European Economic Area ('EEA trade') within the meaning of the State aid case law of the Court of Justice of the European Union. In order to maintain that the selective advantage entailed in the sale of the Facility to Hammar had no or an insignificant effect on trade, the report prepared by Copenhagen Economics (see recital 30) argues that the real estate market in which Hammar is active is purely local. However, the potential effect on trade does not depend on whether a particular aid recipient happens to be active internationally or only nationally, but on whether the goods or services in which he trades are or could be subject to intra-Union trade⁽¹¹⁾. That criterion is met in this case, given that real estate and real-estate-related services are subject to intra-Union trade and investment, a fact which, in the present case, is substantiated by the fact that the previous owner of the Facility (Chips AB) is the Finnish-based subsidiary of Orkla, a group with international operations. This constitutes evidence of cross-border interest in the asset in question, i.e. the Facility, which, moreover, is not an empty plot of land but an operational production facility for frozen foodstuffs.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of State aid

- (31) In order to assess whether FABV's sale of the Facility to Hammar entailed State aid, it needs to be assessed in the light of Article 107(1) TFEU, which provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings

⁽¹⁰⁾ Copenhagen Economics A/S is a consultancy firm. It provides advisory services in the fields of competition, regulation, international trade, impact assessment and regional economics. See www.copenhageneconomics.com

⁽¹¹⁾ See Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission* [2000] ECR II-3207, p. 86.

(36) Therefore, the Commission is of the view that, even if Hammar operates exclusively at local level, the company is active in a market where an effect on intra-Union and EEA trade and competition cannot be ruled out. The arguments put forward by Hammar thus give the Commission no reason to depart from the preliminary findings of the opening decision on this criterion.

The advantage

(37) The sole criterion of the State aid definition under discussion, therefore, is whether FABV's sale of the Facility conferred an advantage on Hammar. On the basis of the information available, the Commission is of the view that FABV sold the Facility to Hammar at a price below its market value, which a private market investor is unlikely to do, thereby granting an advantage to Hammar.

(38) The present case concerns the sale of certain assets in public ownership to a private undertaking. Some of those assets are real estate (land and buildings) and to assess the presence of aid in those cases the Commission applies the Commission Communication on State aid elements in sales of land and buildings by public authorities⁽¹²⁾ ('the Communication'). When the sale concerns other types of assets, the Commission applies the test of the private operator in a market economy, i.e. it assesses whether the public seller behaved as a private investor operating in a market economy. However, since the Communication is based on the same private investor test, for ease of presentation, the Commission will refer to that Communication to assess the whole transaction⁽¹³⁾.

(39) In particular, in accordance with point II.1 of the Communication, the existence of State aid in favour of the buyer is automatically ruled out when the sale follows 'a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid'. According to the information gathered by the Commission, it appears that no bidding procedure was organised by FABV for the sale of the Facility. Therefore, the presence of State aid cannot be automatically ruled out on that ground.

(40) Hammar argues that the price of SEK 8 million reflects the market value of the Facility because at the time the option was agreed there were no other bids. The Commission notes, however, that the Municipality's sale

of the Facility was not transparent and open to other bidders. Consequently, the price at which it was sold does not allow the Commission to draw any conclusion as to its genuine market value⁽¹⁴⁾. In addition, the Commission notes that FABV purchased the Facility for SEK 17 million on 13 February 2008, and on the same date agreed to provide a purchase option to Hammar for the much lower price of SEK 8 million.

(41) Point II.2(a) of the Communication further provides that, if the sale takes place without an 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 Commission notes that FABV did not request any independent evaluation of the Facility prior to the sale negotiations.

(42) However, notwithstanding the absence of an open and unconditional bidding procedure and of an independent evaluation prior to the sale negotiations, the market value of the Facility as it was sold by FABV to Hammar can be inferred from other information available.

(43) Indeed, when the Facility was put up for sale in late 2007, Chips AB commissioned Colliers International⁽¹⁵⁾ to draw up a memorandum of sale for the Facility. Colliers International indicated a sale price of SEK 27 million (EUR 2,7 million) for the real estate alone, i.e. not including movable property and intellectual property rights. As noted in the opening decision, the Commission believes this to constitute a reasonable estimate of the market price because (i) the estimate was obtained prior to the sale negotiations; (ii) it was commissioned by Chips AB in relation to the sale of the Facility, i.e. in a context where Chips AB could reasonably have had no other interest than to obtain an accurate estimate of the market value; (iii) the study was performed by a third party independent of both seller and buyer; and (iv) Colliers International has wide experience in the real estate sector. However, Hammar contests the Commission's preliminary view that this evaluation was independent, as it was commissioned by the seller. Hammar also considers that the assumptions used by Colliers International were not realistic (*inter alia*

⁽¹²⁾ OJ C 209, 10.7.1997, p. 3.

⁽¹³⁾ In relation to the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity, it must be pointed out that the Court has held that such a sale may include elements of State aid, in particular where it is not made at market value, i.e. where it is not sold at the price which a private investor, operating in normal competitive conditions, would have paid (Case C-290/07 P *Commission v Scott* [2010] not yet published in the ECR, p. 68, and Case C-239/09 *Seydaland* [2010] not yet published in the ECR, p. 34).

⁽¹⁴⁾ The Communication defines market value as the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed 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 (point II.2).

⁽¹⁵⁾ Colliers International is a global commercial real estate services organisation. It provides a range of services to commercial real estate users, owners, investors and developers worldwide. The organisation serves the hotel, industrial, mixed-use, office, retail and residential property sectors. See www.colliers.com

as it assumed only a 10 % vacancy rate), in view of the situation of the Facility at the time of the transaction.

- (44) Another possible indicator of the market price of the Facility is contained in the valuation carried out by Swedbank Kommersiella Fastigheter⁽¹⁶⁾ ("Swedbank") in June 2008. This valuation was done on behalf of the local entrepreneurs who subsequently bought the Facility and was intended for the purposes of a loan for the acquisition of the Facility. Swedbank estimated the market value of the Facility at SEK 30 million (EUR 3 million), even though the premises valued were smaller than the total size of the Facility⁽¹⁷⁾. The vacancy rate assumption used by Swedbank was 35 %, while all other assumptions were comparable to those used by Colliers International.
- (45) The PwC report provides a series of market value estimates for the Facility depending on the moment at which it was sold. For instance, the report concludes that the value of the Facility at the time of the sale from Chips AB to FABV was approximately SEK 9 million, while it was approximately SEK 5,5 million (EUR 0,55 million) when rented by Hammar from FABV on the same date (13 February 2008). The PwC report provides a third estimate of the market value of the Facility at the time when Hammar rented it to the local entrepreneurs (1 March 2008) of approximately SEK 21 million (EUR 2,1 million).
- (46) The Commission first notes that the PwC report provides diverging figures for the market value of the Facility over a short period of time. Given that the market value of real estate tends to remain relatively constant in the short term, except in the occurrence of exceptional circumstances, the Commission has strong doubts as to some of the valuations provided in the PwC report, in particular in view of the fact that all transactions took place within a very short timeframe.
- (47) In relation to the first two valuations of the Facility contained in the PwC report (SEK 9 million and SEK 5,5 million, respectively), the Commission comes to the conclusion that, when compared to the contemporaneous estimates of Colliers International and Swedbank, these two valuations appear unrealistic. On the one hand, in relation to the estimate of SEK 5,5 million, the Commission notes that PricewaterhouseCoopers ("PwC") bases its valuation on the cash flows derived from the rents paid by Hammar to FABV for the rental of the Facility, rents which PwC itself acknowledges to be very low compared to the normal

return on a comparable industrial facility. This is particularly striking when compared to the rents charged by Hammar to the local entrepreneurs only a few days later, which were approximately seven times higher (see footnotes 7 and 8). In view of this, the Commission concludes that the rents charged to Hammar were below market price. The Commission thus considers that the valuation of SEK 5,5 million, which rests on an assumed level of rental income which is below market level, does not reflect the true market value of the Facility. On the other hand, the estimate of SEK 9 million rests on an assumed vacancy rate of 100 % in the two first years of ownership, which then falls to 75 % in year 3 and 50 % in year 4 and levels out at 60 % for the remainder of the period covered by the valuation. However, the assumed vacancy rate disregards the fact that, at the time of the sale, it was known that the local entrepreneurs were prepared to rent the Facility, and that consequently the value to assess is that of the Facility with a tenant.

- (48) The third estimate of the PwC report places the market value of the Facility at the time when Hammar sold it to the local entrepreneurs at approximately SEK 21 million, even if the premises covered by that estimate are somewhat smaller than the total size of the Facility (see footnote 17). That estimate is based on essentially the same methodology as the estimates by Colliers International and Swedbank, and uses as its main assumption the terms of the tenancy agreement between Hammar and the local entrepreneurs, i.e. the terms of the actual lease that applied at the time of the sale. It must also be noted that the terms of the lease presumably were market conform, in particular since they were agreed between two private market operators arguably having only economically rational motives. The Commission thus considers that the third estimate of the market value of the Facility contained in the PwC report is plausible.
- (49) Therefore, irrespective of which estimate of the Facility's market value one chooses (the Colliers International one, the Swedbank one, or the third estimate in the PwC report), it is clear that the price of SEK 8 million at which FABV sold the Facility to Hammar was well below market price, and consequently that it granted an advantage to Hammar.
- (50) Since all the necessary criteria of Article 107(1) TFEU are met, the Commission concludes that the measure under assessment constitutes State aid. Moreover, since this State aid measure was provided to the beneficiary without prior Commission authorisation, it constitutes unlawful aid.

Quantification of the advantage

- (51) The advantage for the beneficiary will correspond to the difference between the price paid by Hammar, i.e. SEK 8 million, and the market price of the Facility.

⁽¹⁶⁾ Swedbank Kommersiella Fastigheter is a subsidiary of the large banking group Swedbank and operates as a broker within the commercial real estate business in Sweden. See <http://www.swedbankkf.se>

⁽¹⁷⁾ Valuation of 17 590 m² as opposed to the total extent of the Facility (22 504 m²).

- (52) In establishing the market price of the Facility, the Commission will examine the possible alternatives and estimates available, namely: (i) the SEK 17 million effectively paid by FABV to Chips AB on 18 February 2008; (ii) the SEK 40 million effectively paid by the local entrepreneurs to Hammar; (iii) the SEK 27 million estimated by Colliers International before the sale; (iv) the SEK 30 million estimated by Swedbank in June 2008; and (v) the SEK 21 million valuation contained in the PwC report.
- (53) The Commission considers that the price of SEK 17 million paid by FABV to Chips AB at the time of its purchase of the Facility does not constitute compelling evidence of the market value. The Commission has already explained in the opening decision that Chips AB accepted a price lower than the estimated market value of the Facility because it wanted to avoid damage to its corporate reputation deriving from the closure of the Facility and the job losses that would have followed. It also wished to avail itself of the opportunity of a quick sale to close the book on its Topp operations. A private market operator not having these constraints (which are specific to Chips AB) would have requested a higher price. For those reasons, the Commission does not deem it necessary to reply to the argument of Hammar (summarised in recital 27 of the present Decision), which moreover concerns a point which is not part of the formal investigation.
- (54) On the basis of the information received in the course of the formal investigation procedure, the Commission has also found that the amount of SEK 40 million agreed with the local entrepreneurs does not seem a good proxy for the market price of the Facility, because the entrepreneurs financed this agreed amount partly through a bank loan and partly through a loan from Hammar itself. The large proportion of funding provided by the seller (who is the same time creditor of the transaction) and the corresponding credit risk borne by him do not directly support the argument that the nominal price of SEK 40 million represents the actual financial value of the Facility. The nominal price paid in this transaction is thus not compelling evidence of the price that would have been paid for the Facility in a sale on market terms, but it is certainly a further indication that the price of SEK 8 million does not reflect the market value of the Facility. Indeed, the two options were set within a period of less than three weeks, and such a considerable price difference over a short period of time confirms that this amount was not a market price.
- (55) Regarding the estimates of Colliers International and Swedbank, the Commission sees in principle no reason to doubt that they are independent and produced according to generally accepted standards. However, the Commission acknowledges that those estimates are not immediately comparable, since some of the assumptions underlying the assessments diverge. On the basis of the information available, the Commission cannot be entirely certain as to whether those estimates provide the most reliable reflection of the true market value of the Facility, as they rely on assumptions and comparisons with other deals in the market rather than with transactions involving the Facility itself.
- (56) On balance, the Commission considers it appropriate to use the market value from the third estimate in the PwC report. As noted in recital 48, the Commission acknowledges that that estimate — despite it being posterior to the transactions — is based on cash flow figures from a tenancy agreement that actually existed (the one between Hammar and the local entrepreneurs) and is thus based on actual market observations. In this respect, the estimate of SEK 21 million constitutes a plausible, albeit conservative, estimate of the market value of the Facility, when compared to the estimates of Colliers International and Swedbank. Moreover, the Commission observes that Hammar entered into an option agreement on 13 February 2008 to buy the Facility for SEK 8 million, and exercised that option on 11 August 2008. On 1 March 2008, Hammar entered into an option agreement with local entrepreneurs to sell the Facility for SEK 40 million and the contract of sale was concluded, in execution of the option, on 2 September 2008. The date which the PwC report uses as its basis for the estimated value of SEK 21 million for the Facility is 1 March 2008. Given the proximity in time between all these transactions, there is no reason to believe that the market value of the Facility could have been substantially different from SEK 21 million at the time when Hammar bought it or entered into the option agreement.
- (57) On this basis, the advantage to Hammar amounts to SEK 13 million (EUR 1,3 million). The advantage is calculated as the difference between the market value of SEK 21 million and the actual price of SEK 8 million paid by Hammar for the Facility.

4.2. Compatibility of the aid

- (58) Neither Sweden nor Hammar have put forward arguments on the compatibility of the aid. The only objectives indicated by the Swedish authorities with respect to the measure at stake were the political intentions of the Municipality to preserve the business as a going concern and at the same time to safeguard employment in the Vänersborg area.
- (59) Given that the Municipality is not located in an assisted area (see recital 14), it is not eligible for regional aid. The types of objective for the measure put forward by Sweden could be taken into consideration in the light of the Communication from the Commission — Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁸⁾. However, there are no indications that the conditions laid down in these

⁽¹⁸⁾ OJ C 244, 1.10.2004, p. 2.

Guidelines would be met in this case. In particular, nothing indicates that Hammar was a firm in difficulty at the time of its purchase of the Facility.

- (60) In any event, it has not been sufficiently demonstrated so far that the measure was necessary and proportionate to attain any objectives of common interest. Therefore, the Commission has not identified any grounds to declare the aid compatible with the internal market in the light of Article 107(3) TFEU.
- (61) No other grounds for compatibility seem to apply. The Commission therefore concludes that the sale of the Facility to Hammar by the Municipality constitutes State aid that is unlawful and incompatible with the internal market on the basis of Article 107(1) TFEU.

4.3. The tenancy agreement and the price of the option

- (62) In the opening decision, the Commission also raised doubts as to the compliance with market conditions of the tenancy agreement concluded between FABV and Hammar on 13 February 2008 and the price of the option granted to Hammar to purchase the Facility (see paragraph 38 of the opening decision).
- (63) Regarding the tenancy agreement, the Commission considers that it entails State aid, given that the necessary requirements of Article 107(1) TFEU are met for the same reasons set out in section 4.1 above: (i) the beneficiary of the measure, i.e. Hammar, qualifies as an undertaking; (ii) the decisions of FABV are imputable to the State, and to the extent that they have financial implications, they imply the use of State resources; (iii) the measure is selective, since it benefited a specific undertaking; (iv) as explained in recital 47, and as recognised by the PwC report submitted by Hammar itself, the Commission considers that the rents charged by FABV to Hammar are below market price and therefore entail an advantage to Hammar; and (v) even if Hammar operates exclusively at local level, it is active in a market where an effect on intra-Union and EEA trade and competition cannot be ruled out.
- (64) In order to determine the advantage enjoyed by Hammar, a comparison should be made between the rent agreed between FABV and Hammar on 13 February 2008 — SEK 0,5 million for the first year — and the rent agreed on 1 March 2008 between Hammar and the local entrepreneurs — SEK 3,5 million for the first year. The Commission considers that the terms of this latter agreement represent the market value for letting the Facility, given that it was agreed between two private parties with economically rational motives. It must also be noted in this respect that the PwC report uses the latter amount to calculate the value of the Facility. Given that Hammar paid rent to the Municipality only

between 1 March 2008 and 11 August 2008, the date on which it exercised its option, i.e. for approximately six months, a pro rata calculation of the SEK 3 million advantage, being the difference between the rent agreed between FABV and Hammar and the rent agreed between Hammar and the local entrepreneurs, would lead to a figure of SEK 1,5 million (EUR 0,15 million).

- (65) Given that no compatibility grounds apply or have been invoked (see Section 4.2), the Commission concludes that the tenancy agreement concluded between FABV and Hammar on 13 February 2008 entails State aid that is unlawful and incompatible with the internal market on the basis of Article 107(1) TFEU.
- (66) In relation to the price of the option granted to Hammar to purchase the Facility, the Commission notes that this option does not seem to be enforceable as, under Swedish law, commitments to buy or sell real estate at a point in the future are in principle not binding⁽¹⁹⁾. The advantage that Hammar could have derived from such an option is thus very uncertain, if not inexistent, and in any event may well have been outweighed by the rent paid or the sale price. It can thus not be firmly established that Hammar derived an advantage from that option separate from the advantage it received through the tenancy agreement and subsequent sale of the Facility.

5. RECOVERY

- (67) Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽²⁰⁾ lays down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (68) Given that the measure at hand constitutes unlawful and incompatible aid, the amount of aid must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery shall therefore be effected from the time when the advantage occurred to the beneficiary, i.e. when the aid was put at the disposal of the beneficiary, and shall bear recovery interest until effective recovery.
- (69) The incompatible aid element of the measures should be calculated as SEK 14,5 million, consisting of the difference between the market price of the Facility (SEK 21 million) and the price paid by Hammar (SEK

⁽¹⁹⁾ Under the Swedish Land Code (Jordabalken), a binding transfer of land must be made, inter alia, in writing and contain a formal declaration of transfer of the property. In the present case, the 'option' contract contained only a 'right to purchase'.

⁽²⁰⁾ OJ L 83, 27.3.1999, p. 1.

8 million), which amounts to SEK 13 million, plus the amount that should be recovered under the lease agreement (SEK 1,5 million).

- (70) Recovery interest should be paid on that recovery amount. For the incompatible aid element of SEK 13 million, recovery interest should be calculated as from the date on which Hammar exercised its option and acquired the Facility from FABV, i.e. 11 August 2008. For the incompatible aid element of SEK 1,5 million, recovery interest should be calculated as from the date on which the rent was due, i.e. 1 March 2008,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to SEK 14,5 million, unlawfully granted by Sweden, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Hammar Nordic Plugg AB in the form of selling and renting of public property in Brålanda, in the Municipality of Vänersborg, below its market value is incompatible with the internal market.

Article 2

1. Sweden shall recover the aid referred to in Article 1 from Hammar Nordic Plugg AB.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of Hammar Nordic Plugg AB until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽²¹⁾.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Sweden shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following the date of notification of this Decision, Sweden shall submit the following information to the Commission:

- (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
- (b) a detailed description of the measures already taken and planned to comply with this Decision;
- (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Sweden shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Kingdom of Sweden.

Done at Brussels, 8 February 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽²¹⁾ OJ L 140, 30.4.2004, p. 1.