IV

(Other acts)

EUROPEAN ECONOMIC AREA

THE EEA JOINT COMMITTEE

EFTA SURVEILLANCE AUTHORITY DECISION

No 318/05/COL
of 14 December 2005

to close the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the exemptions from document duties and registration fees in connection with the establishment of Entra Eiendom AS (Norway)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area (1), in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (2), in particular to Article 24 and Article 1 in Part I of Protocol 3 thereof,

HAVING REGARD TO the Authority’s Guidelines (3) on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

HAVING CALLED ON interested parties to submit their comments pursuant to the provisions cited above (4) and having regard to their comments,

WHEREAS:

1. FACTS

1. Procedure and correspondence

By letter dated 22 May 2002 (Doc. No: 02-3856 D), the Authority requested the Norwegian Government to submit relevant information regarding the establishment of Entra Eiendom AS (hereinafter ‘Entra’) to enable the Authority to assess whether the founding of the enterprise was in accordance with the State aid rules. The Norwegian authorities responded by letter from the Mission of Norway to the European Union dated 10 October 2002 (Doc. No: 02-7036 D) the Authority requested additional information. The letter addressed, as point 1, the exemption from document duties and registration fees connected with the change of ownership of real estate, and as point 2, the deduction in the assessed value on the basis of special termination conditions. The Norwegian authorities responded by letter from the Ministry of Norway to the European Union dated 14 November 2002, forwarding a letter from the Ministry of Trade and Industry dated 7 November 2002, both received and registered by the Authority on 14 November 2002 (Doc. No: 02-8219 A).

(1) Hereinafter referred to as the EEA Agreement.
(2) Hereinafter referred to as the Surveillance and Court Agreement.
(4) Dec. No: 132/04/COL. The decision to open the formal investigation procedure was published in OJ C 319, 23.12.2004, p. 17, and in the EEA Supplement No 64, on the same date, p. 46. The decision can also be found at the Authority’s homepage: http://www.eftasurv.int/ fieldsofwork/fieldstateaid/stateaidregistry/sadecinor04/132_04_entra.DOC
By telefax from the Ministry of Trade and Industry dated 9 December 2002, received and registered by the Authority the same day (Doc. No: 02-8912 A), the Norwegian Government requested that the Authority provide its conclusion in the case regarding the establishment of Entra. By letter dated 17 December 2002 (Doc. No: 02-9062 D) to the Mission of Norway to the European Union, the Authority informed the Norwegian authorities that the Authority might be in a position to close the part of the case as regards deduction in the assessed value on the basis of special termination conditions depending upon the submission of additional specified and detailed documentation concerning this issue.

Such detailed documentation was submitted by a telefax from the Ministry of Trade and Industry dated 23 January 2003, received and registered by the Authority on 23 January 2003 (Doc. No: 03-424 A). By letter to the Mission of Norway to the European Mission dated 31 January 2003 (Doc. No: 03-588 D), the Authority informed the Norwegian authorities that — since no aid seemed to be involved — it 'will not raise objections to the value assessment made in the opening balance of the properties transferred from the Norwegian State to Entra Eiendom AS'. However, the Authority stressed that this statement was without prejudice to the issue on document duties and registration fees.

By letter dated 2 April 2003 (Doc. No: 03-1827 D), the Authority once more addressed the issue of exemption from registration fees and excise duties and requested the Norwegian authorities to provide additional and clarifying information. By letter from the Mission of Norway to the European Mission dated 5 June 2003, forwarding a letter from the Ministry of Trade and Industry dated 4 June 2003, both received and registered by the Authority on 10 June 2003 (Doc. No: 03-3631 A), additional information was submitted.

On 16 June 2004, the Authority decided to open the formal investigation procedure (Dec. No: 132/04/COL). The decision to open the formal investigation procedure was published on 23 December 2004.

By telefax dated 13 August 2004 (Event No: 290206) and letter from the Norwegian Mission to the European Union dated 17 August 2004, received and registered by the Authority on 18 August 2004 (Event No: 290456), the Norwegian authorities requested a one month extension of the deadline for submitting comments.

By letter dated 17 August 2004 (Event No: 290305), the Authority agreed to extend the deadline by one month.

By telefax dated 16 September 2004 (Event No: 292867) and letter from the Norwegian Mission to the EU dated 20 September 2004, forwarding a letter from the Ministry of Trade and Industry dated 16 September 2004, received and registered by the Authority on 21 September 2004 (Event No: 293392), the Norwegian authorities submitted comments to the opening decision. The Norwegian authorities concluded that the exemption from document duties and registration fees provided for in the establishment of Entra does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

The Authority did not receive any comments to the opening decision from other interested parties within the deadline of one month after publication in the Official Journal of the European Union.

By letter dated 4 May 2005, received and registered by the Authority on 9 May 2005 (Event No: 318691), the law Firm Selmer, representing Entra, submitted comments to the Authority's decision to open the formal investigation procedure (see point 3.4 below).

The case was discussed at a meeting in Oslo on 19 May 2005 with representatives from different Norwegian Ministries and representatives from the Authority present.

By telefax from the Ministry of Modernisation dated 26 July 2005 (Event No: 327938), and letter from the Mission of Norway to the EU dated 1 August 2005, received and registered on 3 August 2005 (Event No: 329110), forwarding a letter dated 30 June 2005 from the Ministry of Trade and Industry, the Norwegian authorities submitted further information concerning whether the exemption constituted an economic advantage for Entra. The conclusion of the Ministry of Trade and Industry was that the exemption was no advantage for Entra.

2. The establishment of Entra

2.1. Proposal to establish a new limited liability company

The Norwegian Government presented the reorganisation of the public body, the Directorate of Public Construction and Property (Statsbygg), and the establishment of Entra, on 4 June 1999 (1). On the same date, the Government presented a special Act on the conversion of parts of the real estate activity of Statsbygg to a limited liability company to resolve some transitional questions concerning the transformation and establishment of Entra (2). Paragraph 3 of this Act (hereinafter

(1) ‘St prp nr 84 (1998-99) Om ny strategi for Statsbygg og etablering av Statens utleiebygg AS'. The original name of the company was 'Statsens utleiebygg AS'. Hereinafter ‘Entra' is used for Entra Eiendom AS and Statens utleiebygg AS.

the contested Act) states that re-registration in the real estate registry and other public registries are to be done as a change of name. As a consequence of this, Entra was not obliged to pay document duties and registration fees, but still became the title holder in the Real Estate Register.

Statsbygg is an administrative body (Forvaltningsbedrift), responsible to the Ministry of Modernisation. Statsbygg acts on behalf of the Norwegian Government as manager and advisor in construction and property affairs and offers premises to governmental organisations. Statsbygg continued operations and management of the property stock that was not transferred to Entra. Statsbygg currently manages around 2.2 million m² of floor space, in Norway and abroad. The property portfolio consists of office conditions, schools, accommodation and specialised buildings throughout the country, embassies and residences outside Norway. The annual building budget is approximately NOK 2.3 billion (some EUR 288 million). Statsbygg has 669 employees (October 2005) (1).

In St.prp. nr. 84 (1998-99) it is i.a. stated that the purpose of the reorganisation is to clarify the different roles of Statsbygg and to achieve a more efficient use of buildings owned by the State. To ensure better framework conditions for the part of Statsbygg being in competition with other private undertakings, buildings operated in a competitive market (konkuransesatte bygge) were to be diverged from the special purpose buildings and become part of a new portfolio of real estate owned by Entra. The Government indicated that at a later stage, an alternative could be to sell part of the company to private interests.

Entra has the following object clause in its bylaws: The main purpose of the company is to provide state agencies with premises. The company may own, purchase, sell, operate and administer real estate and conduct other businesses in connection with this. The company may also own shares or interests in and participate in other companies that conduct activities such as those mentioned in the previous sentence' (unofficial translation by the Authority).

2.2. Entra’s opening balance

In the proposal presented to Parliament, the Norwegian Government laid out the basic principles behind the transfer of assets to the new undertaking. No conclusions were drawn with regards to the actual value of the assets to be transferred. Rather, it is stated that this question was to be dealt with at a later stage, as it is written that: ‘the final opening balance for the company will be presented in the budget for year 2000’ (2). Nor was there established any specific methodology for determining this value.

In the period from 4 June 1999 and until the final valuation was settled by Royal Decree 22.6.2000, the value of the assets to be transferred was subject to extensive scrutiny. The aim was to determine the correct transaction value in accordance with the principles from Proposition No 84 (1998-99) for the transfer of the assets. Several methods and assumptions for arriving at this price were considered.

Firstly, Statsbygg requested the independent consultant Catella Eiendom Consult AS (CEC) to perform a valuation of the properties to be transferred. This valuation was done according to the Norwegian Valuers and Surveyors Association (NTF) framework for valuation, by evaluating each property and then adding up the individual properties to arrive at the total portfolio value. The result arrived at was NOK 3 852 110 000. This valuation was later audited by the Norwegian Valuers' and Surveyors' Association (NTF), who concluded that the value arrived at was acceptable, but cautiously assessed.

Secondly, Statsbygg performed its own valuation of the assets. This was done according to another methodology. Statsbygg used the discounted cash flows for the total portfolio as a basis for their calculations, instead of considering each property as a separate calculation to be added to the total. The result arrived at was NOK 3 137 500 000.

Thirdly, the Ministry of Administration also performed a valuation, based on the same principles as Statsbygg, but with different assumptions. The result arrived at was NOK 3 337 500 000.

The band between the highest and lowest valuations at this point was NOK 714 610 000, or a difference of 22 % relative to the lowest assumed price. Without going into further details, it should be mentioned that the methods used differ significantly. This observation was also made in an independent audit carried out by PricewaterhouseCoopers (PWC), where the three above values were assessed.

In their assessment PWC concluded that given the large methodological differences, a detailed comparison between the three assessments would be both a complex task to assemble and, more importantly, of little relevance. They concluded that ‘in our view, all the three values are all within a reasonable band’. Further, PWC stressed the point that it was impossible to arrive at any specific number that should be regarded as the ‘correct’ value. Rather, this price would be the subject of negotiations between the parties, and might thus fluctuate according to the assumptions made.

(1) Source: http://www.statsbygg.no/english/
(2) Unofficial translation by the Authority.
Fourthly, the Ministry decided to reassess the value once again. After an extensive discussion on whether or not the fact that the government agencies were able to terminate their leases on 12 month’s notice should affect the market value of the properties, the value of the properties was now set to NOK 2,837,550,000. This value was submitted to Stortinget in connection with the State budget for 1999-2000. However, the proposal reserved the right for the Government to make final adjustments.

Fifthly, this right to adjust the final balance was exercised by the Ministry, who after adjusting, inter alia, some of Entra’s rental contracts, and thereby changing the assumptions of the model again, arrived at a higher value. By Royal Decree the value in the final opening balance was set at NOK 3,222,871,000.

The process is summarised below. As can be seen, the band of values that has been suggested ranges from NOK 3,852,110,000 to NOK 2,837,550,000. This difference in values that has been suggested ranges from 35.8% to 10.8% relative to the lowest price, NOK 2,837,550,000. This difference in values was submitted to Stortinget in connection with the State budget for 1999-2000. However, the proposal reserved the right for the Government to make final adjustments.

According to the Norwegian authorities, simulated accumulated document duty is estimated to NOK 80,571,775, and accrued registration fee is estimated to an amount of NOK 147,300 (150 properties * NOK 982), in total NOK 80,719,075 (some EUR 9,87 million).

The company (group (5)) had an operating income of NOK 1,072 million (some EUR 128 million) in 2004, and a profit before tax of NOK 134 million (some EUR 16 million). The group’s consolidated equity (book value) as of 31.12.2004 was NOK 1,288 million (some EUR 154 million). At year-end, the group’s property portfolio (book value) was NOK 8,768 million (some EUR 1,047 million). As of 31.12.2004, Entra had 133 employees. The total property portfolio consists of some 110 properties, amounting to approximately 900,000 m² (4).

3. The Norwegian Government’s assessment of whether the exemption of document duties and registration fees is in compliance with the state aid provisions of the EEA Agreement

3.1. The Government’s assessment presented in connection with the establishment of Entra

An assessment by the Norwegian Government as to whether the exemption from stamp duty and registration fees is in compliance with the State aid provisions of the EEA Agreement is given in Proposition no 84 (1998-99), chapter 7.6.1. The text reads as follows (unofficial translation by the Authority):

The next question raised is whether the company can be absolved from the duty to register the transfer of title from Statsbygg to Statens utleiebygg AS and thereby not pay the registration fee and excise duty. According to the Act on Court Charges Chapter 6 and Article 7 of the Act on Document Duty, duties in connection with registration of documents transferring rights to property shall be paid to the Treasury. The duty to pay costs therefore only becomes due when the transfer of title is registered in the real estate registry. Payment of excise duty is not required for a change of name in the register.

The Norwegian authorities, simulated accumulated document duty is estimated to NOK 80,571,775, and accrued registration fee is estimated to an amount of NOK 147,300 (150 properties * NOK 982), in total NOK 80,719,075 (some EUR 9,87 million).
The Ministry finds it highly uncertain whether the division of property between the State and Statens utleiebygg AS will imply a transfer of title that should be entered into the real estate register. It seems more natural to regard the situation as an organisational change in the State's property portfolio where the State will retain the registered rights to the properties. It is not a question of transfer of title, but merely a change of name in the register. A consequence of this is that the situation does not require the payment of excise duty. The company is therefore not required to pay registration fees and excise duty. The Ministry, however, further suggests, in a separate proposal to the Odelsting, that re-registering in connection with organisational changes is carried only as a name change. In relation to the Real Estate Register this will imply that there will be no need for a transfer of title. The provision entails that there, with certainty, will be no need for a transfer of title. The proposal corresponds to rules given in connection with other transformations to State-owned undertakings, cf. e.g. Act of 24 June 1994 No 45 on the establishment of Televerket as a limited liability company, and Act of 22 November 1996 No 65 on the establishment of the State-owned Post company article 73. The question is whether this practice leads to a different competition situation for the State limited liability companies than that of private entities who separate parts of their property activity into their wholly owned limited liability company.

The Ministry therefore must assume that the exception from the requirement to register transfer of rights will not place Statens utleiebygg AS in a different competitive situation than that pertaining to a private investor on the market. The exception is not seen as being in conflict with the EEA Agreement.

Further, it is a general assumption that the value assessment of the properties to be transferred to Statens utleiebygg AS is put at market value, and that any possible later transfer of capital from the State takes place in the same manner as a private investor providing contributions to the undertaking.

3.2. Arguments presented by the Norwegian authorities before the Authority decided to open the formal investigation procedure

By letter of 20 June 2002, the Ministry of Labour and Government Administration provided information concerning the framework conditions for Entra and the establishment of its opening balance. The Ministry described the cash flow method used to assess the total value of the property portfolio and stated that this method was used ‘because it would better satisfy the requirements of Propostion No 84 to the Storting (1998-99) to provide the company with framework conditions on equal footing with other players in the same sector’. The letter did not describe whether, and if so how and to what extent, the lack of payment of the excise duty influenced the opening balance. Nor did it discuss whether paragraph 3 of the contested Act required that the exception from the excise duty should be met with an increase in the portfolio assessment corresponding to the amount that would have been paid had the registration in the real estate register been treated as a change of title and not as a change of name.

By letter dated 7 November 2002, the Ministry of Trade and Industry developed in more detail its argument already presented in the preparatory works that private investors might choose solutions that avoid a formal transfer of the
deed and thus avoid having to pay document duties and registration fees. As the registration of the transfer of title was not mandatory, enterprises could, regardless of whether they were privately or publicly owned, lawfully avoid document duties and registration fees by simply not registering any transfer of ownership. To let the title remain with the original owner constituted a risk for the new owner for 'holder of good faith' towards a third party. However, it was possible to eliminate that risk by the registration of a 'restriction of the right of ownership'. The registration of declaration on the restriction of the right to ownership did not exclude the risk of execution proceedings/creditor's or bankruptcy estate's extinction of the rights of a legal successor to the debtor's property. According to the Norwegian authorities, that method was widely used by privately owned enterprises, especially between related parties.

In the view of the Ministry, a private owner of Statsbygg would, most probably, have demerged Statsbygg without releasing the obligation to pay registration fee or excise duty. This method was not a realistic option in the case of the establishment of Entra. That is i.a. due to obstacles arising from the fact that Statsbygg is subject to public and political control. Methods like keeping the title to the properties with Statsbygg would imply that Entra would be dependent on the approval from a public body for transactions concerning the properties. If the title to the properties remained in Statsbygg, that would imply that the State was both the renter and the formal title holder of the properties. To use such methods for Statsbygg/Entra would blur the distinction between the two entities' different roles. Statsbygg is entrusted with the task of owning and operating non-commercial public buildings, while Entra operates on a commercial basis.

In the letter dated 7 November 2002, the Ministry also brought forward an argument against the application of Article 61 of the EEA Agreement that was not mentioned in the preparatory works cited above. The Ministry reiterated that the value of the real estate portfolio was based on the method of 'net capitalisation'. In short this method implied that the property's future cash flow (net rent from existing contracts plus assessment of future net rent after the expiry of existing contracts) was discounted to present value by a factor observing a relevant rate of return requirement. This rate was set at 9.5% as it reflected a benchmarking with similar private operators in the trade. According to the Ministry, if document duties and registration fees had been payable, the costs would have been activated as an asset, while the value of the properties would have been reduced correspondingly. Thus, this would not have reduced Entra's total balance sheet or the total asset valuation. In contrast, if the excise duty would have been introduced without adjusting the value of the properties, this would have resulted in 'a higher value of total assets, resulting in a rate of return of only 9.1%, which is well below Entra Eiendom AS required level. This would give Entra Eiendom AS a considerable disadvantage compared to private operators'.

By letter dated 4 June 2003, the Ministry of Trade and Industry submitted additional information and arguments concerning i.a. the measures used by private undertakings. The Ministry, moreover, reiterated the arguments in the letter dated 7 November 2002 as to why it believed that the non-payment of the duty did not affect the company's capital structure, solidity and total value.

As an additional third argument for not viewing the exemption from the excise duty as aid, the Ministry referred to the 'continuity principle' in Norwegian law. It stated that this principle is an umbrella term for a number of rules that presuppose that the acquiring undertaking takes over the legal position of the transferring company. The purpose of the continuity principle is to facilitate mergers and demergers. When the continuity principle applies, the transferring undertaking's legal situation is deemed to continue in the acquiring company. According to the Ministry, continuity with regard to tax and duty positions was an important aspect of the principle. Indeed, the Registration Act construed in light of the company legislation implied that reorganisation of private activities in numerous cases could occur without triggering demands for registration fees and document duties. On this basis, the Ministry argued that the exemption was a general measure, which did not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. Point 9, Conclusion, of the letter dated 4 June 2003, reads:

'The common system regarding registration fee and document duty is that the continuity principle determines if conversion processes, both public and private, may be done as a name change in relation to inter alia the rules on registration fee and document duty. The purpose of the continuity principle is to facilitate the implementation of mergers, demergers and restrukturings, which is regarded as socio-economically desirable. The special legislation and the reimbursement of accrued document duty resulting from the reorganisation of hydropower/electricity companies are a result of the same considerations. Thus, the practice is a general measure, which according to well established case law does not constitute State aid within the meaning of Article 61 of the EEA Agreement.'

3.3. Arguments presented by the Norwegian authorities after the Authority opened the formal investigation procedure

In the letter from the Ministry of Trade and Industry dated 16 September 2004, the Norwegian authorities commented upon the Authority's decision to open the formal investigation procedure. The view of the Norwegian Government was that none of the conditions of Article 61(1) of the EEA Agreement were fulfilled. Hence, the non-payment for Entra of excise duty did not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.
The Ministry reiterated, firstly, its previously presented argument that the measure did not constitute an advantage for Entra. It did not change the capital structure, the solidity and the total value of the company. If document duties and registration fees were accrued in the opening balance sheet, there would have been an alternative opening balance. It stated that it is the Norwegian Government's opinion that the tax measure in question should not be distinctly separated from the opening balance of the company. Moreover, the purpose of the main rule on document duties and registration fees is to tax real transfers between different economic entities. Where the transfer is in appearance only and the entities transferring and acquiring are substantially the same, the main principle in Norwegian law, according to the Ministry, would be to let the acquiring undertaking keep the legal position of the transferring undertaking (continuity principle). The Ministry considers that the continuity principle is not restricted to specific transfers, but is regarded as the main rule where the transferring entity and the acquiring entity are substantially the same. Entra was consequently not relieved from a charge normally borne from their budgets, according to the Norwegian authorities.

Secondly, the Ministry referred to the fact that the transfer of title in the case at hand by paragraph 3 of the contested Act was done as a change of name and not by transfer of title. Thus, the obligation on Entra to pay document duty was never released and there was, according to the Norwegian authorities, no loss of tax revenue and hence, no consumption of State resources.

Thirdly, the Norwegian authorities argued that the measure in question did not affect trade between the Contracting Parties. The Ministry considered that a market survey can show whether the real estate market for urban business premises in Norway was of a purely national character and not subject to cross-border competition. The Ministry considered that except for foreign investments in financial institutions, non-Norwegian investors have not operated in the Norwegian real estate market.

Fourthly, the Ministry argued that the exemption from the document duties and registration fees was not a selective measure. The Ministry referred to the fact that a main criterion in applying Article 61(1) of the EEA Agreement to a tax measure is that the measure provides an exception to the application of the tax system in favour of certain undertakings in the EFTA State. The common system applicable should thus first be determined. If a tax measure derogates from the common system, it must be examined whether the derogation is justified by the nature or general scheme of the tax system. The Ministry considered that the practice with name changes as a procedure for transferring property title did not constitute a derogation from the tax system. In case the Authority would find that the practice constituted a derogation from the tax system, the Ministry considered the derogation to be justified by the nature or general scheme of the tax system.

Finally, the Ministry referred to Commission decision C 27/99 of 5 June 2002 (1) regarding exemptions from transfer taxes in the case of restructuring of certain public undertakings into joint stock companies in Italy. According to the Ministry, the factual situation in the Italian case was similar to the case in hand and that the same considerations could be made. The Ministry concluded that the exemption was justified by the nature or general scheme of the system and did not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

By letter dated 30 June 2005, the Ministry of Trade and Industry submitted further arguments as to why the exemption from document duties and registration fees did not constitute an economic advantage for Entra. The Ministry referred to the fact that the opening balance for Entra was prepared by using the Net Present Value method (NPV). The future expected cash flow from each building was estimated and discounted with a required rate of return. The rate of return was fixed by using the Capital Asset Pricing Model after having compared other competing real estate companies. The equity was fixed at approximately 40 %, which was comparable to other similar companies.

The Ministry considered that the calculated value of the properties was the best estimate of what an investor, 'not having to pay the document duties and registration fees', would have been willing to pay for the portfolio. If the buyer of the portfolio (in this case Entra) would have to pay the document duties and registration fees, the price the investor would be willing to pay would be reduced by the same amount as the document duties and registration fees. The fixed asset value of the properties in the balance sheet would have been reduced by the same amount, while financial fixed assets would have been increased by the same amount, so that the total value of the assets would have been the same. On the liability side, equity and total debt would not have changed although short-term debt would have increased corresponding to the value of the document duties and registration fees. The Ministry concluded that the financial position of Entra had not changed as a consequence of the exemption from the document duties and registration fees.

The Ministry acknowledged that one cannot draw a general conclusion that it will always be the seller of a property who de facto bears the burden of an excise duty, since this result is dependent on particular circumstances. However, in the case at hand, it would be the seller that carried the burden, as the method for the assessment of the real estate that was used in relation to Entra in the opening balance implied that (unofficial translation by the Authority): 'In such a case, and when the NPV-method is used, all types of costs in connection to the purchase will be deducted from the purchase price, since all elements are a part of the value assessment method itself, as the buyer otherwise does not obtain the required rate of return ...

3.4. Comments from interested parties

By letter dated 4 May 2005, the law firm Selmer, representing Entra, submitted comments to the Authority’s decision to open the formal investigation procedure. Selmer argued that the exemption from document duties and registration fees did not constitute an advantage for Entra and that the exemption was within the nature and general logic of the Norwegian system.

Firstly, Selmer referred to the fact that it was decided to establish the company with equity of 40% of the total capital. As a consequence of this, if Entra had to pay the document duties and registration fees, the value of the properties would have been reduced by the same amount as the document duties and registration fees and the Norwegian State would have to inject the same amount into the company, in order to keep the equity at 40%. Selmer considered that this did not change the economic situation of the company and that Entra did not receive any economic advantage.

Secondly, Selmer stated that all state reorganisations have taken place in a consistent manner based on the continuity principle, and referred to the reorganisations of the Norwegian Broadcasting Corporation (NRK), Telenor, the National Rail Company (NSB), Posten Norge, Avinor, Mesta and Statkraft. Selmer therefore considered that the exemption of document duties and registration fees was within the nature and general logic of the Norwegian system.

4. The Norwegian legislation concerning document duty and registration fee on the registration of transfer of real estate

4.1. What triggers the obligation to pay document duty and registration fee?

All real estate in Norway is identified in the Real Estate Registry (Eiendomssregisteret), which, from 1995, onwards contains information from Tinglysingsregisteret/Grunnboken and ‘GAB-registeret (Grunneiendommer, Adresser og Bygninger)’ (1).

Tinglysingsregisteret was established pursuant to the Registration Act 1935 No 2 (Lov om tinglysing). Every property is identified by registry identification under which information about the ownership, title and encumbrances etc. may be entered. The registry contains, inter alia, information on various rights and obligations to the property in question. Interested parties acting in good faith are entitled to rely on the information contained in the Real Estate Registry.

Pursuant to Section 7(1) of the Act on Document Duty 1975 No 59 (Lov om dokumentavgift), the registration of transfer of ownership title (hjemmelsoverføring) to real estate property releases an obligation to pay document duties (dokumentavgift). The tax rate is 2.5% based on the sales value of the property. The new title holder is responsible for paying the duty, cf. Section 2-6 of Regulation on Document Duty, Ministry of Finance, 16 September 1975 and later amendments.

In addition, the registration of transfer of title in the Real Estate Registry is subject to a registration fee (tinglysingsgebyr) pursuant to the Court Fee Act 1982 No 86 (Rettsgesfylleten). When Entra was established, this fee was fixed at NOK 982 (some EUR 123) per document registered. The provisions concerning the conditions for levying the document duty and registration fee are identical.

As mentioned above, the excise duty is released by the registration of the transfer of title to another legal entity (hjemmelsoverføring). Consequently, if there is no transfer of title to another legal entity, but only a change of name of the same legal entity in the registry (grunnboken), no excise duty will be payable.

There is no legal obligation to register (tinglyse) rights related to real estate (ownership etc.) in the registry. It is not necessary to register transfer of title in order to affect the transfer of ownership. The holder of the rights may however choose to register his rights in order to protect his rights against third parties.

4.2. When can the designation of the title holder be changed without incurring excise duty?

The practise with regard to the payment of excise duties from 1990 to 1 July 2005 — and thus at the time Entra was established — is described in two sets of circulars, namely Circular G-37/90 from 25 May 1990 from the Norwegian Ministry of Justice and the yearly circulars from the Norwegian Customs and Excise (NCE) (Toll- og Avgiftsdirektoratet) (2). According to point 1.1 in the latter circulars, an exemption from stamp duty will not be granted unless there is a direct legal basis in the Act on Document Duty or by Parliamentary decisions (3).

(1) Source: Statens Kartverk — Tinglysingen, see: http://www.statkart.no/ips/tinglysing?module=Articles&action=ArticleFolder.publicOpenFolder;ID=2207

(2) E. inter alia Dokumentavgift 2000 — S12-DOK-2001 and Rundskriv nr. 12/2005 5, to which reference is made below. See also http://www.toll.no/upload/dokumentavgift1_1.pdf

(3) The text reads as follows in Norwegian: ‘Det gis ikke fritak for dokumentavgift med mindre det er direkte hjemmel i loven eller stortingsvedtak’.
(i) Mergers

In the cases of mergers, there exists, according to the Norwegian Ministry of Justice, no transfer of title for the purpose of the Act on Document Duty. It is therefore sufficient that the merger be registered in the Real Estate Registry by confirming that the company has been merged with another. Such a confirmation can be issued by the Company Registry and does not trigger the payment of registration fee and excise duty. This applies to mergers between limited liability companies within the meaning of Section 14(7) of Law No 59 of 4 June 1976 (the ‘limited liability Company Act’) (1), and also to other mergers undertaken on the basis of Chapter 14 in the same law and mergers between saving banks (Chapter 8 of Law No 1 of 24 May 1961: the ‘Saving Bank Act’) (2).

(ii) Demergers under the Limited Liability Company Act of 1976

Where, in the case of demergers, the ownership of real estate was transferred from the original company (A) to the company which has been separated out (B), both Circular G-37/90 and point 1.4 in the yearly circulars from Norwegian Customs and Excise Directorate provided that both registration fee and document duty must be paid (3).

In contrast, in case the real estate remained with the original company (A) from which a part (B) was separated out, there was no obligation to pay registration fee and document duty (4). The reason for this is that in this case the real estate is not transferred to a new legal subject (which would have been the case if the real estate had been transferred to the company which had been separated out).

(iii) Transfer of ownership from joint ownership to a form of partnership

In the relevant period, transfer of ownership of real estate from joint ownership to a general partnership or limited partnership (or vice versa) implied a transfer from one legal subject to another legal subject. Thus, both Circular G-37/90 and point 1.4 in the yearly circulars from Norwegian Customs and Excise Directorate stated that this will therefore trigger payment of excise duty.

(iv) Conversion from one corporate form to another

A situation which is not mentioned in the Circular is the situation where an undertaking is transformed from one form of corporation to another. In the Norwegian Government’s letter of 4 June 2002 it is stated, that the main rule in such situations was that ‘there must be a transfer of title. Accordingly, registration fee and document duty are payable. This is how the legislation has been practised.’ The Norwegian Government, however, argues that it should be possible to consider exemptions to this rule based on considerations linked to the continuity principle (5).

To this, the Authority notes that the Court of Appeal (Frostating Lagmannsrett) in an order of 1997-10-09 published in LF-1997-671 held that a conversion from a ‘kommanditselskap’ to a ‘aksjeselskap’ (North West Terminalen AS) did trigger excise duty. In this respect, the Lagmannsrett referred to the above mentioned circulars from the Ministry of Justice and the Customs and Excise Directorate and stated that it follows from the Act on Document Duty that duty should be paid unless directly stated in the act itself or provisions made pursuant thereto. As the new company was a different legal entity than the original one, it did not matter that it was the same owners who continued in the new company and thus that the only change in reality was the form under which the company was operated.

In addition, reference can be made to a case mentioned in Annex 1 of the Norwegian Government’s letter of 4 June 2002 in which the Norwegian authorities refused to exempt from duty a conversion from a ‘selvende institusjon’ to a ‘allmen­naktselskap’.

(v) Transfer of ownership from a municipality to a separate legal entity wholly owned by the municipality

At the meeting between the Norwegian Authorities and the Authority on 19 May 2005, the Norwegian Authorities indicated that it was most likely that under the circulars applicable at the time of the establishment of Entra, stamp duty would have incurred in connection to a reorganisation in which the ownership of a building was transferred from a municipality to a limited liability company owned by that municipality. In contrast, it had for some time been the practice that no stamp duty would incur in relation to transfer of titles in connection with reorganisations pursuant to the Norwegian act of 29 January 1999 on inter-municipal companies (6).

(1) Reference is also made to law No 44 and law No 45 of 13 June 1997 on limited companies and public limited liability companies, respectively.

(2) Reference is made to In Circular G-37/90, page 1, to point 1.3. in Dokumentavgift 2000 and to point 1.3 in Rundskriv nr. 12/2005 S.

(3) The Authority takes note of the remark by the Norwegian Government in point 4.3 in its letter of 4 June 2003 that it could be discussed ‘whether registration of a document should still be required as an expression of transfer of title. The question is under consideration in the Ministry of Justice’. However, the fact remains that consecutive circulars of the Government maintained that position until June 2005 and only changed the registration practice with regard to registrations after that date.

(4) This is so even if the company which has been separated out (B) takes over the name of the original company (A) since the reality is that the owner of the real estate remains to be the same, namely the original company (A). This will be considered as a mere name change. See also opinion of the Norwegian Ministry of Justice published in U87-4.

(5) Cf. Point 7h) of the letter.

(6) Cf. e.g. point 3.9 in Rundskriv nr. 12/2005 S.
(vi) The practice after 1 July 2005

As the registration of the name change in the Real Estate Registry took place in connection with the establishment of Entra, the rules described above form the relevant comparison with provision in paragraph 3 of the contested Act. It should, however, be mentioned that on 21 June 2005, The Ministry of Justice adopted a new Circular (G-6/05) on the procedure of transfer of real estate in connection with mergers, de mergers and transformation of companies (1). The new circular introduced, with effect from 1 July 2005, a new practice with regard to situations where the designation of the title holder can be changed without it being considered a transfer of title. According to the new Circular, registration in connection with de mergers based on the continuity principle will now be treated in the same way as mergers in relation to the rules on excise duties and thus no longer be subject to stamp duty. The same applies to conversions carried out on the basis of the rules in Chapters 13, 14 and 15 of the Limited Liability Company Act and the Public Limited Liability Company Act.

In contrast, according to the new Circular, excise duty will still be payable when real estate is transferred according to a set of rules not based on continuity (for example a merger of general partnerships (‘ansvarlige selskaper’)). A transfer from one form of company to another, for example from a general partnership to a limited liability company, will also continue to be liable to excise duty.

5. Other reorganisations of public undertakings

As stated in the letter dated 4 June 2003 from the Norwegian authorities, other reorganisations have contained provisions similar to the contested Act (Posten AS, NSB AS, Mesta AS, Avinor AS, Telenor AS and health enterprises) (2).

The Authority notes that other reorganisations have also taken place where a provision similar to the one contained in the contested Act was not adopted. The reorganisations that the Authority has become aware of, where such a provision has not been adopted include the establishment of BaneTele AS, Secora AS and Statkraft AS.

BaneTele AS is a provider of a nationwide fibre broadband network. The limited liability company was established on 1 July 2001. Before this date, the activities carried out were a part of the National Rail Administration (Jernbaneverket). BaneTele is a limited liability company 100% owned by the Norwegian State, represented by the Ministry of Trade and Industry. The National Rail Administration is responsible for the management of the national railway network, on behalf of the Ministry of Transport and Communication. The proposal to establish the limited liability company BaneTele was presented to the Parliament in St.prp. nr. 80 (2000-2001) Omdanning av BaneTele til aksjeselskap (3) and Ot.prp. nr. 93 (2000-2001) Om lov om omdanning av Jernbaneverkets kommersielle televirksomhet til aksjeselskap (4). Ot.prp. nr. 93 (2000-2001) and the subsequent law (Law of 15 June 2001) do not contain any provision similar to paragraph 3 in the contested Act.

Secora AS is a specialised contractor in the development of safe and efficient harbours and coastal waterways. The limited liability company was established on 1 January 2005. The activities were previously carried out by the production unit of the Norwegian Coastal Administration (Kystverket). Secora AS is 100% owned by the Norwegian State represented by the Ministry of Fisheries and Coastal Affairs. The Norwegian Coastal Administration is the Norwegian national agency for coastal management, marine safety and communication. The proposal to establish Secora AS was presented in St.prp. nr. 1 (2004-2005) Om omdanning av Kystverkets produksjonsvirksomhet til statlig aksjeselskap m.m. (5), and in Ot.prp. nr. 20 (2004-2005) Om lov om omdanning av Kystverkets produksjonsvirksomhet til stat­saksjeselskap (6). Ot.prp. nr. 20 (2004-2005) and the subsequent law (Law of 17 December 2004) do not contain any provision similar to paragraph 3 in the contested Act.

Statkraft AS is the biggest producer of electricity in Norway. The limited liability company was established on 1 October 2004. The company was previously a state undertaking (Statsforetak (SF)), and the state undertaking Statkraft SF still exists as the formal owner of Statkraft AS. The first proposal to establish the limited liability company was presented to the Parliament in St.meld. nr. 22 (2001-2002) Et mindre og bedre statlig eierskap (7) and thereafter in St.prp. nr. 53 (2003-2004) Statens eierskap i Statkraft SF (8) and in Ot.prp. nr. 63 (2003-2004) Om lov om omorganisering av Statkraft SF (9). In St. prp. nr. 53 (2003-2004) the Government stated that the reorganisation would entail

(1) Rundskriv G-6/05: Den tinglysingsmessige fremgangsmåten når fast eiendom blir overført i forbindelse med fusjon, fisjon og omdanning. The Circular can be found at the homepage of the Ministry of Justice: http://www.odin.dep.no/dok/norsk/dokverk/rundskriv/012001-250018/dok-bn.html

(2) For some of the reorganisations no reasons for the exemptions are given in the preparatory works. For others, the provision is seen as a deviation from the normal rules pertaining to excise duties. It is stated, moreover, that the provision corresponds to similar provision in relation to the other transformations of state enterprises to public limited companies. Finally, it is often said that the provision concerned corresponds to the approach concerning transfer of real estate in case of mergers of public limited companies and banks.

(3) See http://www.odin.dep.no/repub/00-01/sttppr/80

(4) See http://www.odin.dep.no/repub/00-01/sttppr/93

(5) See http://www.odin.dep.no/filarkiv/226433/STP0405001-T06-TS.pdf

(6) See http://www.odin.dep.no/repub/04-05/sttppr/20

(7) See http://www.odin.dep.no/nhd/norsk/dok/regpub/stmeld/024001-040006/dok-bn.html

(8) See http://www.odin.dep.no/filarkiv/208116/STP0304053-TS.pdf

(9) See http://www.odin.dep.no/filarkiv/207892/OTP0304063-TS.pdf
that Statkraft AS would have to pay excise duties (unofficial translation by the Authority) ‘in accordance with the normal rules of the act’ on excise duties and that the costs would reduce the surplus for the undertaking and thus also the basis for dividends. The excise duties were estimated to be NOK 1 500 million (approximately EUR 188 million) (1).

II. APPRECIATION

1. The existence of State aid

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, insofar as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

To be considered as State aid under Article 61(1) of the EEA Agreement, a measure must fulfil all the following four criteria:

1. The aid must be granted by the State or through state resources;

2. the aid must confer an advantage to the recipients that reduces the costs they normally bear in the course of the business;

3. the advantage must be specific or selective in that it favours certain undertakings or the production of certain goods;

4. the aid must distort or threaten to distort competition and affect trade between the Contracting Parties.

Whereas the Authority, in its decision to open formal investigations, made the preliminary conclusion that all the said conditions were fulfilled, the Norwegian Government have argued that none of the conditions were fulfilled (2). The Authority must therefore examine the exemption of excise duty in light of relevant case law to see whether it constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

1.1. The aid must be granted by the state or through state resources

With regard to the first condition mentioned above, it is established case law (3) that this condition is fulfilled when a measure directly or indirectly entails some form of financial burden on public funds.

In its decision to open the formal investigation procedure, the Authority made the preliminary conclusion that the provision in paragraph 3 in the contested Act entailed that an excise duty otherwise payable was not paid. This exemption from paying excise duty entailed a direct loss of tax revenue for the Norwegian State which was equivalent to the consumption of State resources. Therefore, the Authority drew the preliminary conclusion that the first condition was fulfilled.

In their comments to the opening decision, the Norwegian authorities, however, argued (2) that as the obligation on Entra to pay the document duty was never released (because 'the transfer of title in the case at hand was done as a name change and not by transfer of title'), there had been no loss of tax revenue and hence, no consumption of State resources.

The Authority cannot agree with that argument. A benefit in the form of a tax exemption covered by Article 61(1) is typically made by way of an express exemption. However, as Article 61(1) focuses on the effect of, and not the formality behind, the national legal system, it also covers situations where a tax relief is brought about indirectly by reference to a particular legal notion (in casu ‘name change’) the result of which is that no tax should be paid. In both situations, and with reference to the case at hand, the effect is that a registration in the real estate register could take place without triggering excise duties only because of the particular legislative provision. No such tax-free registration could have taken place had it not been for the special provision.

(1) The text reads as follows in Norwegian: ‘Den foreslåtte omorganiseringen av Statkraft vil medføre at det påløper dokumentavgift til staten, jf Stortingets vedtak om dokumentavgift § 1 første ledd. Utgiften vil være i størrelsesorden 1,5 milliarder kroner. Departementet legger til grunn at Statkraft betaler dokumentavgift i tråd med lovens normalordning. Utgifter til dokumentavgift vil redusere overskuddet til selskapet og dermed også udsatte grunnlaget’.

(2) Letter dated 16 September 2004 from the Ministry of Trade and Industry.

In the proposal to the Parliament (1), the Norwegian Government stated that it was highly uncertain if the transfer of the properties from Statsbygg to Entra would trigger the excise duty. However, as demonstrated below under point 1.2, the Norwegian Government has not convincingly shown that the registration of the transfer of properties from the State to Entra could have been exempted from excise duty in the absence of the particular provision in paragraph 3 of the Act of 18 February 2000. No other provision in Norwegian law explicitly prescribed that such a transaction was exempted from excise duty. Moreover, the Authority cannot see how the reorganisation of Statsbygg — in the absence of Paragraph 3 in the Act of 18 February 2000 — could have been exempted under the Registration Act as it was then interpreted.

The contested Act applies only to a particular transaction between Statsbygg and Entra. It is true that similar acts have been adopted when other state owned limited liability companies have been established (see Part I above). However, the fact that similar rules have been introduced in relation to a range of other state privatisations does not entail that the lex specialis at hand becomes non-selective.

Firstly, it should not be overlooked, that in other state reorganisations, similar provisions to the contested Act were not adopted. For example, when BaneTele AS (2) was established, the new limited liability company was not exempted from paying excise duties. The same applies when Secora AS (3) was established. In the case of the reorganisation of Statkraft, the Norwegian Government stated that the company should pay excise duties in accordance with the normal rules (4).

Secondly, it would in any event be the case that tax legislation that treats reorganisations of state undertakings more favourably than those concerning restructurings of private undertakings would be selective within the meaning of Article 61(1). However, under the Act on Document Duty the starting point was that all transfer of titles between different entities release excise duty regardless of whether or not the new owner continues the same activity as the previous one. As shown above, until July 2005, both the 1990-circular from the Ministry of Justice and a range of consecutive circulars from the Customs and Excise Directorate only contained one relevant exception to this rule. Both sets of circulars unequivocally stated that it was only where ownership was transferred in the context of mergers between limited liability companies that continuity considerations implied that a registration with the new title holder could be done by a name change and not a change of title triggering excise duty. In contrast, excise duty was triggered as a result of the registration or the transfer or ownership of title in the Real Estate Registry for demergers, conversions from one corporate form to another, transfers of ownership from joint ownership to a form of partnership and transfer of ownership from a municipality to a separate legal entity wholly owned by the municipality (5). This was also made clear in the judgment from Frostating lagmannsrett, cited above, which held that excise duties should be paid where an unlimited liability type of company (kommanditsselskap) was converted to a limited liability company even if the same owners continued in the new company and the only real change was the form under which the company operated.

The Authority finds that the establishment of Entra cannot be said to be analogous with a merger. It is much more similar to either a demerger, a conversion of one legal entity to another, or to a municipality’s separation of a given activity into a separate legal subject. Thus, exemptions from excise duties similar to the one found in paragraph 3 of the contested Act were not, at the time of the establishment of Entra, open to the most comparable transactions.

The Authority therefore maintains that the first condition is fulfilled.

1.2. The measure must be specific or selective in that it favours ‘certain undertakings or the production of certain goods’

1.2.1. Material selectivity

In its decision to open formal investigations, the Authority made the preliminary conclusion that the adoption of a special law exempting it from paying excise duty, (for one company only (Entra)), should be classified as a selective measure.

In contrast, with reference to its above presented arguments concerning the continuity principle, the Norwegian authorities have argued that the practice with name changes as a procedure for transferring property title did not constitute a de facto derogation from the common tax system. It was, therefore, a general measure.

The Authority makes reference to Chapter 17B.3.1 of the Authority’s State Aid Guidelines on direct business taxation concerning the specificity or selectivity of tax measures, which reads:

‘Tax measures, which are open to all economic agents operating within the EFTA State, are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect.’

The Authority finds that the establishment of Entra cannot be said to be analogous with a merger. It is much more similar to either a demerger, a conversion of one legal entity to another, or to a municipality’s separation of a given activity into a separate legal subject. Thus, exemptions from excise duties similar to the one found in paragraph 3 of the contested Act were not, at the time of the establishment of Entra, open to the most comparable transactions.


(2) Lov av 15.6.2001 ‘Om omdanning av jernbaneverkets kommuners kommersielle tele­verkømhet til aksjeselskap’.

(3) Lov av 17.12.2004 ‘Om omdanning av Kystverkets produksjonsvirksomh­het til statsaksjeselskap’.

(4) The text reads as follows in Norwegian: ‘Departementet legger til grunn at Statkraft betaler dokumentavgift i tråd med lovens normalordning’.

(5) See point 1.4 above.
Therefore, paragraph 3 in the contested Act cannot be said to be an expansion of an already general (non-selective) rule regarding non-payment in relation to certain types of transfer of title in the Real Estate Registry. Consequently, the measure was materially selective.

1.2.2. Is the exemption from paying excise duty justified by the nature or general scheme of the tax system?

According to the case law of the ECJ (1), it is possible to draw a distinction between:

— differentiated treatment that results from the application, to specific situations, of the same principles as those underlying the ordinary rules (no aid);

— differentiated treatment, which, favouring certain undertakings, departs from the internal logic of the ordinary rules (aid) (2).

This distinction is also described in Chapter 17B.3.4(1) of the General Scheme of the System (3). (4)

To this argument the Authority notes that, in the case at hand, the question is the scope of the continuity principle in relation to the obligation to pay document duties and not the scope of the continuity principle as such, hereunder its application in company law.

Based on the analysis of the rules pertaining to excise duties given above under point I.4, the Authority takes the view that while the continuity principle might have had a fundamental place in Norwegian law at the time of the establishment of Entra, it was not, at that time, an inherent and general part of the rules and practice on excise duties in connection with other types of reorganisations of companies.

As already stated, until July 2005, it was only where ownership was transferred, in the context of mergers between limited liability companies, that continuity considerations implied that a registration with the new title holder could be done as a change of name and not a change of title, triggering excise duty. In contrast, excise duty was triggered as a result of the registration or the transfer or ownership of title in the Real Estate Registry for demergers, conversions from one corporate form to another, transfers of ownership from joint ownership to a form of partnership, and transfer of ownership from a municipality to a separate legal entity wholly owned by the municipality (5).

The Norwegian authorities have explained that the logic behind the exemptions to the general rule on excise duty can be found in the continuity principle. However, the authorities have not explained the logic behind the different treatment of the above listed types of transfers. On the contrary, the Norwegian Government has merely stated that it would in fact be more logical to treat mergers and certain other reorganisations alike. Yet, only with effect from July 2005, approximately five years after the establishment of Entra, has the interpretation of the Act on Document Duty been changed so that the treatment of certain different situations has been aligned. On this basis, the Authority finds it difficult to establish any other logic behind the interpretation of the Act on Document Duty that prevailed at the time of the establishment of Entra than what follows from the quoted Circulars, namely that only mergers between limited liability companies would escape excise duties otherwise payable. The application of the continuity principle in relation to the Act on Document Duty was limited to such cases and not to other cases as mentioned above.

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(2) Cf., inter alia, Joined Cases E-5/04, E-6/04 and E-7/04 Fesil, Pfl and the Kingdom of Norway v the EFTA Surveillance Authority, judgment of 21 July 2005 (paragraphs 82-85); Case 173/73 Italy v Commission, [1974] ECR 709 (paragraph 33), Case C-143/99 Adria Wien Pipeline [2001] ECR I-8365 (paragraph 42); Case C-157/01 Kingdom of the Netherlands v Commission, cited above (paragraph 42), and Case C-308/01 GIL Insurance Ltd, cited above.
(3) Cf. e.g. Case 157/01 Kingdom of the Netherlands v Commission, cited above, paragraph 43.
(4) See point I.4 above.
(5) See point I.4 above.
As stated above under point 1.2.1, the Authority, in any event, finds the establishment of Entra much more similar to these situations where a registration in the Real Estate Register at the relevant time would have entailed excise duties than those in which it did not. On that basis, the Authority cannot see that the exemption in the contested Act can be justified by the nature and logic of the Norwegian rules pertaining to excise duty at the time the exemption was applied. It does not change the assessment that similar reorganisations of public commercial activities also have been exempted from excise duty. The pursuance of the underlying objectives of the continuity principle cannot justify that an exemption to the general rule on excise duties should be applicable to specific reorganisations if the most comparable private reorganisations are not subject to similar exemptions.

1.2.3. The ‘Italian case’

The Norwegian Authorities have referred to a decision from the European Commission and argued that the factual situation of this case is the same as in the Entra case.

In the Commission Decision of 5 June 2002 (1), the Commission examined the Italian law which provided for a special tax regime for joint stock companies with a majority public shareholding set up under a specific law. In this regard the Italian law specifically provided for an exemption from all transfer taxes related to the conversion of special and municipal undertakings into joint stock companies (‘the transfer tax exemption’). In the Italian legal system transfer taxes normally applied to the creation of a new economic entity or to the transfer of assets between different economic entities. However, the Italian authorities had explained that Italian law generally reflected the principle of tax neutrality (which means that no tax is applied) in the context of the conversion of the legal status of a company (i.e. when the legal status of a firm changes but the firm remains the same from an economic viewpoint) (2).

The Authority understands the reasoning of the Commission to be that where the national law pertaining to stamp duties in connection with conversions made by private undertakings builds upon a general principle of tax neutrality — so that the focus is on the continuation of the same economic entity rather than on whether the legal subject used thereto is the same — it will be within the logic of such a tax regime to extend that principle also to cover situations whereby the State or a municipality separates an economic entity that has hitherto been driven as a part of the State or municipality into a separate legal entity.

The Authority fully agrees with such an approach. However, the logic of each tax system must be assessed on its own merits. The Commission Decision relied on the fact that the Italian legal system provided for a possibility of exempting transfer tax in the context of the conversion from one corporate form to another. In contrast, Norwegian legislation, as interpreted and applied by the tax authorities, did not provide for such a possibility. In fact, as already stated, comparable cases to Entra concerning private reorganisations (regarding demergers or conversion from one corporate form to another) were not exempted from paying the excise duties. In the view of the Authority, the factual situations of the two cases are therefore different. That the continuity principle might have existed in other areas of Norwegian law, including most notably company law and the legislation pertaining to direct taxation of the entity concerned, cannot be given weight in the assessment of the similarity between the Italian and the Norwegian situations.

1.2.4. Conclusion on selectivity

In conclusion, the measure must be considered to be selective in the sense of Article 61(1) of the EEA Agreement and cannot escape that classification by reference to the nature and logic of the Norwegian rules on excise duties.

The Commission found that although it appeared as if the winding up of the municipal undertaking and the setting up of a ‘new’ joint stock company would be equivalent to creating a new economic entity, this was in appearance only due to legal technicalities. In reality the new joint stock company was the same economic entity as the municipal undertaking operating under a different legal status. In the light of this the Commission accepted that the general principle of tax neutrality in Italian law was similarly applied with regard to the situations falling within the special tax regime. Hence, no transfer tax had to be paid (3).

The measure must confer an advantage to the recipients that reduces the costs they normally bear in the course of the business

According to the case law of the European Court of Justice (ECJ) (4) and Chapter 17B.3.1(2) of the Authority’s State Aid Guidelines ‘the measure must confer on recipients an advantage, which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm’s tax burden in various ways, including’ (…) ‘a total or partial reduction in the amount of tax (such as exemption or a tax credit)’.

(2) Cf. paragraph 37 of the Decision.
(3) Cf. paragraphs 76-81 of the Decision.
By the adoption of the statutory provision in paragraph 3 of the contested Act, Entra was relieved of the cost of excise duties for approximately NOK 81 million (close to EUR 10 million). As demonstrated above under point 1.1 and 1.2, these duties would otherwise have been payable from its budgets. On that basis, the Authority, in its decision to open formal investigation, drew the preliminary conclusion that Entra did receive an advantage in the sense of Article 61(1) of the EEA Agreement.

In contrast, the Norwegian Authorities have argued that the condition is not fulfilled for two reasons: firstly, that the exemption did not place Entra in a better competitive position compared to a private investor. Secondly, that the capital structure, the solidity and the total values in the company would have been unchanged if the excise duty had been paid. In the following, the Authority will discuss these arguments in turn.

1.3.1. The comparison with private firms

As referred to above under point 1.3.1, in the proposal to the Parliament, the Norwegian Government stated that a private owner could choose not to transfer the title, but, for example, keep the title in a holding company, when a new company is established. The State, according to the Norwegian authorities, must transfer the properties to a new legal entity. Thus, according to the Norwegian authorities, there is no distortion of competition when Entra is exempted from the document duty.

According to the European Court of First Instance, an advantage in the sense of Article 87(1) EC (corresponding to Article 61(1) EEA) does not necessarily exist in all situations where a measure is introduced in order to free a public company from a structural disadvantage that it has in relation to its private sector competitors (1). Article 61(1) of the EEA Agreement is aimed merely at prohibiting advantages for certain undertakings, and the concept of aid covers only benefits or release of burdens normally assumed in an undertaking’s budget and which are to be regarded as an economic advantage, which the recipient undertaking would not have obtained under normal market conditions. However, the Authority does not agree with the Norwegian authorities that the arguments advanced by Norway can lead to the conclusion that a comparison with private operators shows that Entra did not receive an advantage by being exempt from excise duties.

The methods that a private owner can use to avoid paying excise duty are equally open to undertakings established in connection with state privatisations. The structural disadvantage that the Norwegian authorities claim to have faced was not of a legal kind. Norwegian law would not have precluded the establishment of and transfer of the properties to Entra without registering this in the Real Estate Register. Moreover, Entra and the Norwegian authorities could have taken the same precautions as a private operator. The reason for not using these methods in relation to Statsbygg and Entra was merely that the Norwegian authorities found that the political, managerial and practical inconveniences connected to such methods were so negative that Entra should become the new title holder.

In the opinion of the Authority, such considerations cannot lead to a conclusion that Entra was not granted an advantage by the exemption to pay the excise duty. This follows already from the fact that the methods that can be used to avoid excise duties all are based on the non-registration of transfer of ownership (retaining of the title). If the title (grundbokshjæmme(2) is not transferred, no excise duty is payable. But the protection offered by the registration is not available to private operators not transferring the title, whereas Entra did obtain this protection. Such methods are therefore not equivalent to the procedure that took place in the present case where Entra became the new title holder.

Moreover, even if that had been the case, the Authority cannot see that the claimed structural problem for the Norwegian State is of a fundamentally different character than the one faced by private operators. It might be correct that a non-transfer of title in practice might, in some respects, pose greater inconveniences to a publicly owned entity than to a privately owned company. However, in the Authority’s opinion, questions concerning the inter partes relationship between the previous and the present owner of real estate should be viewed apart from the discussions relating to registration in the Real Estate Registry. This registration will normally not affect the inter partes relation between the two legal subjects but only have importance in relation to third parties. Thus, registration might be important in order for the buyer to avoid that a third party, who in good faith, later buys the property from the previous owner, would have a stronger title to the real estate. It also has important bearing on the protection against the creditors of the previous owner, just as it can influence the ability of the buyer to obtain mortgage and other loans. In all these situations, the disadvantages of not registering in the Real Estate Registry is fundamentally the same for privately and publicly owned undertakings. In fact, in some aspects, the methods described may be less favourable for private undertakings compared to public ones, since the registration of declaration on the restriction of the right to ownership does not exclude the risk of execution proceedings/creditor’s or bankruptcy estate’s extinction of the rights of a legal successor to the debtor’s property.

Finally, the Authority emphasises that the Norwegian authorities have not demonstrated that a private party would choose with certainty not to transfer the title. Norway has merely argued that it was more likely than not that a private operator in similar circumstances would have decided not to transfer the title in the Real Estate Registry.

1.3.2. The argument concerning the opening balance

As already mentioned, the Norwegian authorities have argued (1) that the exemption from excise duty should not be viewed separately from the opening balance sheet of the company. They argue that the measure in question did not change the capital structure, the solidity and the total value of the company. Theoretically, if excise duties were to be accrued in the opening balance sheet, there would have been an alternative opening balance where the value of the properties would have been reduced with the same amount as the excise duty.

As demonstrated above in point 1.2, according to the normal rules of the Norwegian tax system, Entra was obliged to pay the excise duty. Consequently, irrespective of how the opening balance was established, it is the transaction value between the seller and the buyer which constitutes the tax base for the excise duty. Whatever considerations the buyer (Entra) or the seller (the State) would have in relation to the agreed price, it is that price and nothing else that the tax authorities will apply when they calculate the excise duty to be paid.

The Authority cannot therefore agree with the Norwegian Government that Entra did not receive an advantage in the sense of Article 61(1) of the EEA Agreement by being exempt from excise duty, and still receiving the protection afforded by being in the Real Estate Register.

In the letter dated 4 June 2003 from the Ministry of Trade and Industry, the Ministry states that: Theoretically, if document duty and registration fee were to be accrued in the opening balance sheet, the adjusted and alternative opening balance would have been as described in attachment 2'. Attachment 2 describes an alternative opening balance sheet where total assets and liabilities/equity are the same, but where i.a the value of the properties is reduced with the same amount as the excise duty. The Ministry concludes that Entra has not received any economic advantages as a consequence of the exemption from excise duties.

The hypothetical opening balance sheet described by the Norwegian authorities is based on the assumptions that the buyer (Entra) would not reduce its demanded rate of return (9,5 %) and equity ratio (40 %) if the excise duty had to be paid. This implies that the hypothetical opening balance sheet is based on the assumption that the seller will always pay 100 % of the excise duty and that the value of the buildings in an alternative opening balance would be reduced by exactly the same amount as the excise duty.

The Authority has no reason to question the legitimacy of the Net Present Value method used when the opening balance of Entra was established. However, as the Norwegian Government's own attempts to find the correct value of the real estate shows (see point I 2.2 above and the considerable differences between the alternative values), other methods could have been used. Other assumptions could also have been used, and those other methods and assumptions could very well have resulted in a situation where the burden of the tax would not have been born 100 % by the seller. In a normal market situation with several bidders, it is more likely that the extra burden of the excise duty through the agreed transaction price would have been split between the seller and the buyer.

The Authority does not find it possible to establish a general rule according to which the market price of a building will always rise with exactly the amount that the buyer should normally pay in indirect taxes for registering that building in situations where those taxes have either already been paid or shall not be incurred due to a legislative exemption. Indeed, in the letter dated 30 June 2005 from the Ministry of Trade and Industry, the Ministry acknowledges that one cannot make such a sweeping conclusion and that the Government's argument about the net effect on the non-payment on the excise duty is based purely on the use of the specific method for value assessment that the Government chose to apply to Entra.

In the present case, Norway chose not to levy the excise duty on Entra and did specify that the later assessment of the value of the real estate depended on this premise. Norway, therefore, basically argues that in the hypothetical situation it had decided that Entra should be subject to normal excise duty, it would still have chosen the net-present-value method and used the same assumptions for calculating the sales price. To admit such an argument would be to let the scope of Article 61(1) of the EEA Agreement depend on an EEA State's ability to persuade the Authority and the EFTA Court that it would have taken imaginary steps in hypothetical situations.

Finally, the Authority emphasises that in the very few cases where the Court of Justice — in different kinds of situations — has accepted a quid pro quo argument, it has always been a precondition that the countervailing mechanism was decided beforehand (and not ex post facto) in a clearly defined, objective and transparent manner (1). However, nowhere in the preparatory works to the relevant legislation is it specified that it was a precondition for granting the advantage ensuing from the exemption to pay excise duty, that this advantage be met by a higher assessment of the value of the relevant real estate than a private party would have paid for the building in open sale. On the contrary, the Norwegian authorities' argument that Entra did not receive an advantage compared to a situation in which it would have paid the excise duty, seems to run counter to the explicitly stated aim behind relieving Entra from paying excise duty. As cited above in point I.3.1. in the Government's proposal to the Stortinget, it was explained that the purpose of the exemption clause was that Entra should not bear the economic burden of the excise duty, since private competing undertakings could, to a large extent, escape that burden by other means. In other words, in the proposal to the Parliament, there is an underlying assumption that payment of the excise duty would indeed put Entra in a less economically advantageous position than if Entra did not pay the duties. Furthermore, it was the intention of the Parliament that Entra should not be put in this non-advantageous position.

1.3.3. Conclusion on advantage

In conclusion, the Authority maintains that paragraph 3 of the contested Act did confer Entra an advantage in the meaning of Article 61(1) of the EEA Agreement.

1.4. The measure must distort or threaten to distort competition and it must affect trade between the Contracting Parties

In the opening decision, the Authority came to the preliminary conclusion that the measure did threaten to distort competition and affected intra EEA-trade within the meaning of Article 61 (1) of the EEA Agreement. In contrast, The Norwegian authorities argue that the measure in question ‘will not affect trade between the Contracting Parties’ and that the Authority must assess the relevant market. Furthermore, the Norwegian authorities claim that 'non-Norwegian investors have not operated in the Norwegian real estate market' (2).

The ECJ has held (2) that competition is distorted from the moment that the state's financial aid strengthens the position of an undertaking compared with other competing undertakings. The granting of aid reduces costs and thereby gives beneficiaries a competitive advantage over those who have to bear all costs at their own expense. On that basis, the Authority finds that the aid granted to Entra in the form of no excise duty distorted competition within the meaning of Article 61(1) of the EEA Agreement. Indeed, the Norwegian authorities have not argued that competition is not distorted (but only that trade is not affected).


(2) See letter dated 16 September 2004 from the Ministry of Trade and Industry.

Turning to the question concerning effect on trade, it must be examined whether the aid in question is capable of strengthening the position of an undertaking compared with that of undertakings competing in EEA trade (1). As held by the EFTA Court, the Authority is not required to establish that the aid has an appreciable effect on trade between the Contracting Parties, but only to examine whether the aid was liable to have such an effect (2). Hence, the criterion of the effect on trade has been traditionally interpreted in a non-restrictive way to the effect that, in general terms, a measure is considered to be State aid if it is capable of affecting trade between the EEA States (3).

According to Chapter 17B.3(2) of the Authority's State Aid Guidelines, "under settled case-law, for the purposes of this provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Contracting Parties'. However, aid may affect trade within the EEA even if the recipient undertaking does not itself participate in cross-border activities (4). This is because the granting of state support to an undertaking may lead to the internal supply being maintained or increased, with the consequence that the opportunities for undertakings established in other EEA States to offer their services to the market of that State are reduced (5).

According to Entra's own Annual Accounts for 2001, Entra is engaged in 'developing, letting, management, operation, sale, and purchase of real estate in Norway'.


The biggest Norwegian owned real estate company (or group of companies), is the Olav Thon Gruppen. The Group was also active in 2000 when Entra was established. Olav Thon Gruppen currently owns 320 properties in Norway and 18 abroad (mainly in Brussels). The first property in Brussels was bought in 1988 (Thon Belgium SA). The Group employs about 3 400 people. In addition to letting of offices, the Group is also involved in hotels, restaurants and shopping centres (8).

One of the companies mentioned above, Linstow AS, owns and develops real estate in Norway as well as in the Baltic States, Portugal and Sweden. Linstow AS is wholly owned by the Anders Wilhelmsen Group which purchased and delisted the company from the Oslo Stock Exchange in 1999. The Anders Wilhelmsen Group is one of the owners of the shipping company Royal Caribbean Cruise Line (RCCL). Linstow AS i.a. manages the Norwegian portfolio (Nordea Portfolio) of properties owned by Curzon Global Partners. The portfolio consists of 31 properties (by November 2005) spread all over Norway. Curzon Global Partners is a London-based investment management company owned by IXIS AEW Europe (IAE). IAE is a European real estate investment manager owned by Groupe Caisse d'Epargne and Caisse des Dépôts in France. IAE is responsible for approximately EUR 11 billion of assets under management (9).

One of the other companies, ICA Eiendom Norge AS, is a daughter company of ICA Fastigheter AB, a Swedish company. ICA Fastigheter AB is a wholly owned subsidiary to ICA AB. ICA Fastigheter AB builds, manages and sells real estate in Scandinavia and the Baltic countries. The portfolio has a book value of SEK 5.7 billion and consists mainly of store facilities and warehouse facilities. Besides ICA stores and companies, the company also offers real estate to external clients. The ICA Group (ICA AB) is one of the Nordic region’s leading retail companies, with just over 2 600 of its own and associated stores in Scandinavia and the Baltic countries (10).


(6) Association of Commercial Real Estate is a part of the Federation of Norwegian Building Industries (Byggingens Landsforening (BNL)). BNL is a part of Confederation of Norwegian Enterprise (NHO).

(7) Source: http://www.foreningen-naringseiendom.no/medlemsbedriftene

(8) Source: http://www.ica.no/

(9) Source: http://www.olavthon.no/

(10) Source: http://www.ne.no/linstow

(11) Source: http://www.ica.no/
At the same time as Entra was established (in 2000), Aberdeen Property Investors Norway AS was established as a daughter company of Aberdeen Property Investors. Aberdeen Property Investors is a part of Aberdeen Asset Management PLC, an independent fund management group listed on the London Stock Exchange. Currently, Aberdeen Property Investors manages EUR 7.8 billion in property investments in Northern Europe, of which NOK 9 billion (some EUR 1.1 billion) is in Norway. In 2001, Aberdeen Property Investors Norway AS bought Norske Liv Eiendom, another real estate company on the Norwegian market, and today the company manages the real estate portfolios of i.a. NSB, Nordea Liv and API Eiendomsfond. Aberdeen Property Investors has 200 employees in Norway (1).

Of the companies mentioned above which are active in the same market as Entra (the developing, letting, management, operation, sale and purchase of real estate in Norway), and which were active in 2000 when Entra was established, it is thus clear that several had non-Norwegian owners, several were active both in Norway and outside Norway and several managed real estate portfolios owned by foreign clients.

It follows from the description in point I above that the assets and activities transferred to Entra were exposed to competition. Accordingly, Entra competes with other providers of buildings/properties. This applies to Entra as owner, purchaser, seller, operator and administrator of real estate. Entra operates all over Norway in a market where economic agents from other EEA States are active. Consequently, condition 4 is also fulfilled as the measure affects or threatens to affect competition and trade between the Contracting Parties.

2. Compatibility of the aid

Based on the foregoing considerations, the tax exemptions at issue constitute aid within the meaning of Article 61(1) of the EEA Agreement.

The Norwegian authorities have argued that the measure at issue does not contain aid, and have not put forward any arguments concerning compatibility. However, after assessing the likely involvement of State aid, it has to be considered whether such aid could be compatible with the EEA Agreement by virtue of Article 61(2) and (3) of the Agreement.

The application of the exceptions under Article 61(2) is not appropriate. The establishment of Entra does not entail aid having a social character granted to individual consumers or aid to make good the damage caused by natural disasters or exceptional occurrences.

Under Article 61(3)(a) aid may be considered compatible with the EEA Agreement when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Since the measure in question is not limited to such areas, this provision does not apply. Also the exemption laid down in Article 61(3)(b) is not applicable. Lastly, as regards the exemption laid down in Article 61(3)(c), the Authority cannot see that the aid can be considered to facilitate the development of certain economic activities or of certain economic areas in the meaning of this Article. Consequently, the aid does not qualify for any of the exemptions provided for in Article 61(3) of the EEA Agreement.

3. Procedural requirements and the character of the aid

3.1. The notification obligation

Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement states: 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. Aid provided without notification or aid that is notified late, i.e. notified after being 'put into effect' is considered unlawful aid.

The exemption from excise duties provided for in the establishment of Entra was not notified to the Authority and it was put into effect.

3.2. Recovery

The Authority draws the attention of the Norwegian Government to Article 1 in Part II of Protocol 3 to the Surveillance and Court Agreement. The exemption from excise duties was introduced after the entry into force of the EEA Agreement. Any aid in this case should therefore be qualified as new aid. As stated above no notification of such aid has been received. The aid is in this case to be considered unlawful as defined in Article 1(f) of Part II to Protocol 3 to the Surveillance and Court Agreement.

According to Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement, in cases of unlawful aid, should it be found incompatible, the Authority orders, as a rule, the EFTA State concerned to reclaim aid from the recipient.

(1) Source: http://www.aberdeenpropertyinvestors.no
The Authority is of the opinion that no general principles preclude repayment in the present case. According to settled case law, abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the EEA Agreement in regard to State aid. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (1). It also follows from that function of repayment of aid that, as a general rule, save in exceptional circumstances, the Authority will not exceed the bounds of its discretion, recognised by the case law of the Court, if it asks the EFTA State concerned to recover the sums granted by way of unlawful aid since it is only restoring the previous situation (2). Moreover, in view of the mandatory nature of the supervision of State aid by the Authority under Protocol 3 of the Surveillance and Court Agreement, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the provisions of that Protocol (3).

4. Conclusion

In light of the foregoing considerations, the Authority finds that the exemption from document duties and registration fees adopted in connection with the establishment of Entra is State aid which is not compatible with the functioning of the EEA Agreement. Consequently, the Authority closes the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with a negative decision and orders the Norwegian authorities to recover the State aid plus accrued interest from Entra.

HAS ADOPTED THIS DECISION:

1. The exemption of document duties and registration fees provided for in the establishment of Entra Eiendom AS (ref. Paragraph 3 of Law of 18 February 2000, No 11) constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. The aid has been awarded in contraven tion to the procedural requirements of Article 1(3) in Part 1 of Protocol 3 to the Surveillance and Court Agreement, and does not qualify for exemptions according to Articles 61(2) or 61(3) of the EEA Agreement.

2. The Norwegian Government shall recover from Entra the foregone stamp duty and the foregone registration fees plus accrued interest calculated on the basis of the relevant reference rate of interest, beginning from the date on which the excise duties were payable until the date of recovery.

3. The Norwegian Government shall be informed by means of a letter containing a copy of this decision.

4. The Norwegian Government shall inform the Authority within two months of the date of the notification of this Decision, of the measures taken to comply with it.

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

6. Other EFTA States, EC Member States, and interested parties shall be informed by the publishing of this decision in its authentic language version in the EEA Section of the Official Journal of the European Union and the EEA Supplement thereto.

7. This decision is authentic in the English language.

Done at Brussels, 14 December 2005.

For the EFTA Surveillance Authority

Einar M. BULL Kurt JAGER
President College Member