

## EFTA SURVEILLANCE AUTHORITY DECISION

No 232/11/COL

of 13 July 2011

**on the notification of the sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the municipality of Asker (Norway)**

THE EFTA SURVEILLANCE AUTHORITY ("the Authority"),

Having regard to the Agreement on the European Economic Area ("the EEA Agreement"), in particular to Article 61 and Protocol 26,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("the Surveillance and Court Agreement"), in particular to Article 24,

Having regard to Protocol 3 to the Surveillance and Court Agreement ("Protocol 3"), in particular to Article 1(2) of Part I and Articles 7(5) and 14 of Part II,

Having regard to the consolidated version of the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 ("the Implementing Provisions Decision")<sup>(1)</sup>,

Having called on interested parties to submit their comments pursuant to those provisions<sup>(2)</sup> and having regard to their comments,

Whereas:

## I. FACTS

## 1. PROCEDURE

By letter of 15 December 2008 (Event No 508884), received by the Authority on 13 February 2009, the Norwegian authorities notified a sale of land at Nesøyveien 8, gnr. 32 bnr. 17 by the municipality of Asker, pursuant to Article 1(3) of Part I of Protocol 3.

By letter dated 8 April 2009 (Event No 512188), the Authority requested additional information. The Norwegian authorities replied by letter dated 11 May 2009 (Event No 518079).

By letter of 7 July 2009 (Event No 521778), the Authority sent a second request for information. The Norwegian authorities responded by letter dated 14 August 2009 (Event No 527555).

The Authority thereafter informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 in respect of the sale of land.

The Authority's Decision No 538/09/COL to initiate the procedure was published in the Official Journal of the European Union and the EEA Supplement thereto on 8 July 2010<sup>(3)</sup>. The Authority called on interested parties to submit their comments thereon.

The Authority received comments from one interested party, namely the buyer Asker Brygge AS. The letter dated 29 January 2010 was forwarded by the Municipality of Asker as an attachment to the Municipality's letter of the same date.

At 14 October 2010 a meeting between the Authority and the Norwegian authorities was held where the case was discussed. After the meeting the Norwegian Authorities submitted their final comments on the case on 19 November 2010.

## 2. DESCRIPTION OF THE NOTIFICATION

The Norwegian authorities notified a sale of a plot of land by the municipality of Asker to the company Asker Brygge AS ("Asker Brygge"). The property is registered in the Norwegian property register as Nesøyveien 8, gnr. 32 bnr. 17 in the municipality of Asker ("gbnr. 32/17") and is approximately 9 700 m<sup>2</sup>. There were no buildings on the property. Slependen Båtforening rented part of the property from the Municipality.

The municipality of Asker and Asker Brygge entered into an agreement in 2001 ("the option agreement"), according to which Asker Brygge was granted an option, lasting until 31 December 2009, to buy land for a fixed sum of NOK 8 million, adjusted according to the consumer price index. According to the option agreement the municipality intended to give Asker Brygge the option to buy the property at market price provided that Asker Brygge undertook extensive planning and research with the aim of obtaining a reregulation of the property and then developing the property.

In 2004 the option agreement was renewed, and the validity of the option was extended until 31 December 2014 under similar conditions regarding the progress of the reregulation work.

In 2005, Asker Brygge called upon the option to buy the land. The parties entered into a sales agreement on 21 March 2007 for the price of NOK 8 727 462. The land was transferred to Asker Brygge on the same date although only the first instalment of 30 % of the sales sum was paid on the date of the transfer of the property. The second and largest instalment, 70 % of the sales sum (NOK 6 109 223), is due at the latest 31 December 2011. The municipality of Asker will not charge any interest rate on the second instalment.

The municipality of Asker and Asker Brygge are of the opinion that the sales contract does not entail any state aid because the sales price reflects the market value. The Norwegian authorities nonetheless decided to notify the transaction for reasons of legal certainty.

<sup>(1)</sup> Available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>

<sup>(2)</sup> Published in OJ C184 of 8.7.2010, p. 20 and EEA Supplement No 35 of 8.7.2010.

<sup>(3)</sup> See OJ C 184, 8.7.2010 and the EEA Supplement to the Official Journal No 35, 8.7.2010.

### 3. COMMENTS FROM THE NORWEGIAN AUTHORITIES

The municipality of Asker is of the opinion that the sales contract does not entail any state aid because the sales price reflects the market value. The municipality of Asker has stressed that the sales price was not subject to negotiations as it was established in 2001. Though no independent value assessment was made at the time of the option agreement in 2001, the municipality at the time made its own assessment based on its extensive experience in the property market in Asker.

The municipality has submitted that it must enjoy a margin of judgment. The value assessments carried out in June 2006 and June 2008 assessed the market value in 2001 to be NOK 9,6 (with a possible variation of +/- 15 %) million and NOK 8 million respectively. The assessments are thus in accordance with the sales price in 2001, which is the relevant period for the assessment to be made. The assessment dated 18 January 2008 is based on wrong premises, and did not take into consideration important factors for the assessment.

The option cannot be considered granted without remuneration, since Asker Brygge in return undertook obligations related to planning and research. The municipality considered the property difficult to develop, and it did not want to undertake the research necessary to uncover the risks related to difficult soil conditions and pollution. The research by Asker Brygge removed the said risks, and the municipality could then sell the property without having to argue vis-à-vis potential buyers regarding these risks. Thus the obligation that Asker Brygge undertook was of value to the municipality.

The municipality accepts that a private investor would not have granted postponed payment of 70 % of the sales sum free of interest, but any possible state aid due to lack of such interest would be considered de minimis aid.

### 4. COMMENTS FROM THIRD PARTIES

Asker Brygge has submitted that the Authority can not conclude that state aid has been involved in the sale.

#### 4.1. The value in 2001

Asker Brygge submitted that the assessment of the alleged aid measures shall be based on the facts available to the Municipality at the time it entered into an option agreement in which Asker Brygge was given a right to purchase the property in question, i.e. in 2001. Thus, the market value of the property has to be assessed at the time of the conclusion of the Option Agreement. It is not the role of the Authority to replace the Municipality's judgment with regard to the economic assessment of the property's value in 2001. Thus, Asker Brygge submits that the Municipality enjoyed a margin of discretion in its assessment of the property's market price in 2001.

In 2001, the agreement with Slependsen Båttforening (Slependsen) and the obligation to provide a future solution for Slependsen must be regarded as an encumbrance on the property which clearly influenced its market value.

A reregulation of the property would be necessary to develop the land for business activity. This was not a realistic alternative for the municipality in 2001. The preparatory works that would be required prior to a complete reregulation are both expensive and time consuming. Moreover, there was a potential risk for Asker Brygge that the Municipality and other public institutions would not accept an application for reregulation, such as the Public Road Administration or the County Governor.

Further, it must be taken into consideration that the property is in close proximity to the motorway E18, which means that the property is exposed to both the noise from the road as well as pollution. In addition, the proximity to the motorway considerably limits the possibility to develop the property. According to the motorway development plan, it was prohibited to build anything closer to the road than 35 m. As the property is very narrow and situated close to the road, this limitation implies that nearly 90 % of the property was subject to that prohibition. Moreover, as follows from Section 1 of the Agreement and pursuant to a public road development plan, a part of the property was planned to be used in a new road situated beside the existing motorway. Approximately 1/3 of the property would be comprised by the new road.

Asker Brygge would also like to emphasize the uncertainty with regard to the conditions of the property. As stated above, the property in question was regarded very difficult to develop due to its soil conditions. In addition it was regarded as likely that the soil and shoreline was highly polluted. Thus, when Asker Brygge contacted the Municipality in 2001 with the purpose to buy the land, it was regarded by the Municipality as almost impossible to develop the land for business activity. Neither Asker Brygge nor the Municipality had sufficient or exact information regarding these issues, and development would require considerable analysis of the property's conditions. Asker Brygge submits that the limitations mentioned above must be regarded as encumbrances on the property which clearly influenced its market value.

Further, the Authority cannot base its assessment on subsequent factual circumstances. Doing so would imply that the Authority bases its decision using facts that were not available to the Municipality when entering into the Agreement. Any increase in value of the property after 2001 is due to work which is undertaken by Asker Brygge. Without the work undertaken by Asker Brygge the area would likely still remain undeveloped with a very limited monetary value for the municipality.

#### 4.2. The relevance of the value in 2007

To the extent the 2007 value is relevant, the Authority shall take into consideration and deduct the added value which is a result of the work undertaken by Asker Brygge from 2001–2007.

#### 4.3. Remuneration for the option

The obligation to finance research work, which amounts approximately to NOK 4 or 5 million, must, in the view of Asker Brygge be taken into consideration when assessing the remuneration for the option given to Asker Brygge. In general this methodology is not unusual as a basis for fixing the price of an option as regards undeveloped land as in this case.

#### 4.4. The value assessments

None of the value assessments of the property sufficiently takes into consideration the factual circumstances in 2001. Asker Brygge's main objection to the valuations is that the estimation of the market price *inter alia* has been based on a presumption that further development of the marina was possible and intended for by the Municipality and Asker Brygge. Reference is made to the value assessment undertaken by TJB Eiendomstaksering page 6-9, in which the valuer bases its assessment on the fact that it is possible to dredge the shoreline to establish further boat spaces and to establish storage yards for boats on the land area. Reference is also made to Takstsenteret's value assessment page 14 and 15, which also bases its assessment on such development of the property.

However, when the Agreement was concluded in 2001 such development of the property was neither intended nor regarded as possible by the Municipality and Asker Brygge. Further, due to the conditions of the shoreline below the land area, and to avoid displacement of mass and damaging the foundation of a road bridge close to the property, the Public Road Administration prohibited further dredging in the area.

## II. ASSESSMENT

### 1. THE PRESENCE OF STATE AID

State aid within the meaning of Article 61(1) EEA Agreement

Article 61(1) of the EEA Agreement reads as follows:

*"Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement."*

#### 1.1. Market investor principle

##### 1.1.1. Introduction

If the transaction was carried out in accordance with the market economy investor principle, i.e., if the municipality sold the land for its market value and the conditions of the transaction would have been acceptable for a private seller, the transaction would not involve the grant of state aid. The sale of land could qualify as state aid if the sale was not carried out at market price. As a point of departure, the assessment of whether a property has been sold at market value should be assessed at the time of the conclusion of the contract. The circumstances of this sale of land are somewhat particular in the sense that there exist several agreements concerning the sale: An option agreement from 2001, an extended option agreement from 2004 and a sales agreement from 2007.

The option agreement not only gave Asker Brygge a right to acquire the property at any given time over the years to come but also fixed the price for a later transfer. The option thereby

entailed a possibility for Asker Brygge to observe the development of property prices over a number of years, and thereafter to take up the option to buy the property for the price agreed in 2001. While the Authority fully recognises the right for public authorities also to operate in a market on commercial terms, it nevertheless finds reason to consider carefully whether a similar agreement would have been concluded by a private market operator. The Authority has in that regard considered whether Asker Brygge paid for the option as such, and whether the favourable conditions for the buyer appear to be balanced by corresponding obligations for the buyer or rights for the seller.

The Authority has concluded that the option agreement as such cannot be said to comply with the private market investor principle. The Authority has then assessed whether the property was transferred at market value when the sales agreement was concluded in 2007 based on the price agreed in 2001. The Authority has on this point concluded that the property was sold below market value in 2007. Thus, the Authority has in the following firstly assessed the option agreement of 2001 (and the extension signed in 2004), and, secondly, whether the actual sale of land in 2007 was accomplished at market price.

##### 1.1.2. The market price of the option agreement signed in 2001

As regards the option agreement, it has to be examined whether a private investor operating in a market economy would have chosen to enter into a similar agreement regarding the price and terms as the one signed between the municipality of Asker and Asker Brygge in 2001. In making that assessment, the Authority cannot replace the municipality's commercial judgement with its own, which implies that the municipality, as the seller of the plot of land, must enjoy a margin of judgement. There can be a number of commercially sound reasons to enter into an agreement under given conditions. When there is no plausible explanation for the municipality's choice the measure could qualify as state aid.

On the basis of the information available to the Authority, the conditions for the later sale were laid down in the option agreement signed in 2001. This agreement gave Asker Brygge a right, but not an obligation, to buy the property on pre-determined conditions at any given time until 31 December 2009. On the other hand, the municipality was barred from selling the property to someone else in the same period. The main features of the option agreement which are relevant for the state aid assessment are (i) the agreed price of NOK 8 million, adjusted in accordance with the consumer price index, (ii) the right of renegotiation agreed for Asker Brygge in case property prices should decrease considerably before the option was invoked (there was no corresponding right of renegotiation for the municipality should the property prices increase considerably), (iii) the payment in two instalments, whereby 70% of the sales price would be paid before 31 December 2011 at the latest, but no interest would be charged for this delay.

In 2004 the municipality and Asker Brygge prolonged the option agreement until 2014, but did not modify any of the other conditions for the transaction <sup>(4)</sup>.

According to the information available to the Authority, the municipality did not carry out any independent value assessment of the property before it entered into the agreement with Asker Brygge in 2001. The Municipality has explained that it assessed the value based on its experience in the real estate market, but no details other than that has been provided to the Authority. Thus, it is not clear to the Authority on which basis the municipality arrived at the agreed price of NOK 8 million for the sale of the land.

Even if it is assumed that NOK 8 million represented the market price for the property as such in 2001 <sup>(5)</sup>, the market value of the other elements agreed upon in the option agreement should be assessed. In the Authority's view, if only the market value for the property had to be considered, that would entail that Asker Brygge got the option as such for free without any economic consideration for this preferential right of purchase.

As mentioned above, this option enabled the company to observe the development of property prices for a number of years. Statistically, property prices tend to increase over time. Furthermore, Asker is located close to Oslo and has experienced a continuous growth in population, something that would usually influence property prices positively.

The option agreement barred the municipality from selling the property to another buyer, and thus tied up capital for which the municipality could have found alternative uses or received interest. However, the municipality would not receive any payment or compensation in case Asker Brygge would decide not to buy the property.

Additionally, the extension in 2004 prolonged the option with 5 additional years without remuneration. It enabled Asker Brygge to actively approach the municipality in order to reregulate the property for purposes that would increase the market value.

Under the option agreement, some aspects of a possible future sales contract were also agreed upon. In particular, regarding the reregulation of the area, Asker Brygge had an obligation to finish the preparatory works that would lead to the reregulation process. If this condition was not met, the municipality of Asker could terminate the contract.

The Norwegian authorities have argued that the option cannot be considered granted without remuneration, since Asker Brygge in return undertook obligations related to planning and research. Even if the municipality considered the property difficult to develop, and it did not want to undertake the research necessary to uncover the risks related to difficult soil conditions and pollution, the option agreement gave Asker Brygge the opportunity to work on it for several years before deciding to buy the property, which in the opinion of the

Authority reduced the risk considerably. In addition, if the property was reregulated, this would increase the value of the property. Hence, the option agreement did not entail any real risk for Asker Brygge. The amounts spent on research would benefit the buyer, and if the research was to show that the property was unsuitable for development, the research works could be stopped and costs minimized, without any obligation to buy the property.

Asker Brygge has argued that the obligation to finance research work, which it is said to amount to approximately NOK 4 or 5 million, must be taken into consideration when assessing the remuneration for the option. It is argued that this methodology is not unusual as a basis for fixing the price of an option as regards undeveloped land as in this case. The Authority notes that Asker Brygge has not submitted any documentation on the claims mentioned above. The Norwegian Authorities have not been able to confirm neither the amounts spent on research, nor that this is a common method to fix the price on undeveloped land.

In the Authority's view, the option itself, independent of whether it was exercised or not, had a value in 2001 when the agreement was concluded. From the documentation and explanations the Authority has received so far, there is no information that the buyer paid remuneration for the option as such which a private investor would have accepted.

The option agreement refers to Asker Brygge's possibility to conduct research works on the property with a view to its regulation for other purposes in exchange for the option to buy the property at market price. However, there was no guarantee that the property actually would be properly researched. There was no unconditional obligation to carry out any particular type of research as the buyer could instead chose not to conclude a sales agreement, e.g. if the initial research works would show the project to be unprofitable, or for any other reason. Thus, the risks on the buyer under the option agreement were minimal, while the municipality would not profit from it if the research showed that the property could be developed. The buyer would then be in a position to await the development of the real estate market over a long period, and could chose to buy the property for a fixed price at the time when it was considered to be most profitable for the buyer. Moreover, on the basis of the information available to the Authority, the requirement that Asker Brygge would have to carry out research works within certain time limits in order to maintain the option cannot be considered as a proper payment for the possibility to buy the land within the meaning of the market investor principle.

The option agreement also included other elements that appear to be capable of increasing the value of the option. The first element concerns the mechanism to regulate the price. Asker Brygge had the right to request renegotiations of the price if property prices in Asker should decrease considerably before the option was invoked. As mentioned above, the agreement did not provide a corresponding right of renegotiation for the municipality should the property prices increase considerably. According to the Norwegian authorities, the background for including a right for Asker Brygge to renegotiate the agreement was that the municipality of Asker considered the property to be difficult to develop, inter alia due to the short distance to the highway (E18), and the transaction would therefore involve substantial economic risk. The Authority

<sup>(4)</sup> Event # 518079, enclosure 1.

<sup>(5)</sup> Whether this corresponds to the market price will be assessed in Section 1.1.2 below.

finds however, that a private market investor would not have entered into such an agreement without a mutual right to adjustment if property prices should increase or decrease considerably. In this regard, the right for the municipality to adjust the price in accordance with the consumer price index appears not to be sufficient to compensate for the lack of a corresponding right of renegotiation.

In the Authority's view, the consumer price index is not the correct index to use when adjusting for changes in property prices. The consumer price index is a measure estimating the change in the average price of consumer goods and services purchased by households, and does not reflect the price movements of the property market. Property prices develop at a different pattern than other prices, and real estate prices for property such as the one at issue in the case at hand are therefore normally not taken into account when determining the consumer price index.

In addition, the Option Agreement contains the municipality of Asker's agreement to postpone the payment of 70 % of the agreed sales price until 31 December 2011 at the latest<sup>(6)</sup> without charging any interest for this deferral. According to the Norwegian authorities, the postponement of full payment without any interest was accepted because the property was considered difficult to develop. The Authority finds that a private operator would not have agreed to postpone the payment over such a long period of time without requiring any interest payments. Moreover, it finds that a private operator would not have transferred full ownership of the property before full payment had been received. The municipality of Asker agrees that a private investor would have required remuneration for the postponed payment. Although the municipality of Asker has brought forward that any aid in this respect would be below the *de minimis* threshold, it has not provided any documentation to this extent.

For the reasons outlined above, the Authority finds that a private operator would not have entered into such a long option agreement, on similar conditions as the municipality of Asker without requiring remuneration for the option and the favourable conditions as such. By simply requiring a remuneration corresponding to the value of the property in 2001, the municipality of Asker ran the risk of granting state aid later in particular if property prices should increase.

The Authority therefore concludes that the Option Agreement was not entered into on market conditions and accordingly the presence of state aid cannot be excluded.

It is therefore necessary to examine whether the property was sold at a price below market value.

<sup>(6)</sup> According to the sales contract clause 3, the payment shall take place prior to any building activity starts and in any case within 31.12.2011, see event # 508884, enclosure 1.

### 1.1.3. *The market value of the property at the time of the sales agreement*

In 2005, Asker Brygge called upon the option. Although the conditions for the sale were laid down in the 2001 option agreement, the sales contract was not concluded until 21 March 2007. The Norwegian authorities have explained that the sales price was not subject to negotiations in 2007 but had been agreed in 2001.

The value of the property in 2001 is not decisive for the assessment of whether state aid was granted with the current transaction since the sale was not carried out in 2001, but in 2007. Whereas the option agreement of 2001 gave Asker Brygge a right to buy the property for the next 10 years, the property remained with the municipality in the meantime, for as long as Asker Brygge did not call upon the option. Thus, the relevant point in time for the Authority's state aid assessment is the time when the property was sold and transferred to a new owner, in 2007.

In the following, the Authority will therefore compare the price of NOK 8 727 462 paid by Asker Brygge at the time the sale was carried out in 2007 with the market value of the property.

According to the Authority's State Aid Guidelines on sale of land, a sale of land and buildings following a sufficiently well-publicised and unconditional bidding procedure, comparable to an auction, accepting the best or only bid, is by definition at market value and consequently does not contain state aid. Alternatively, to exclude the existence of aid when a sale of land is conducted without an unconditional bidding procedure, an independent valuation should be carried out by one or more independent asset valuers prior to sales negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The valuer should be independent in the execution of his tasks, i.e. public authorities should not be entitled to issue orders as regards the result of the valuation. In the case at hand, the municipality of Asker did not arrange for an unconditional bidding procedure nor collect an independent expert evaluation before entering into the agreement. Thus, the existence of state aid cannot automatically be excluded.

In the notification, the Norwegian authorities have submitted 3 value assessments of the property in question. None of the value assessments were conducted before the option agreement was entered into in 2001 but established the value of the property afterwards.

The first report dated 30 June 2006 was conducted by licensed property surveyors of Verditakst AS, Takst Senteret and Agdestein<sup>(7)</sup>. According to this report the estimated value of the land in 2001, the time the option contract was entered into, was NOK 9,6 million, with a possible variation of +/- 15%. However, this appears to be a very approximate estimation. The assessors have simply considered the property's value based on the allowed usage (mainly to marina purposes)

<sup>(7)</sup> Event # 508884, Enclosure 9 to the notification.

according to the existing regulatory regime at the time of the assessment (which was the same as in 2001), and the value with an alternative combined usage of marina, housing and industry, and assessed the property's value as being the middle value of these two alternatives<sup>(8)</sup>. However, as explained above, it is the value of the land in 2007 when the property was sold and transferred to the new owner which is relevant for a state aid assessment.

The Norwegian authorities enclosed with the notification two additional value assessments which TJB Eiendomstaksring – Ek & Mosveen AS – Bjørn Aarvik had carried out on behalf of the municipality. In the first report dated 18 January 2008<sup>(9)</sup>, the market value of the land in 2007 was estimated at NOK 26 million. As the contract between the municipality and Asker Brygge was entered into in 2001, this price was discounted to 2001 values. The discounted value of NOK 26 million of 2007 using a rate of 5,5 % over 7,5 years corresponded to NOK 17 million in 2001.

In the second report dated 16 June 2008<sup>(10)</sup>, TJB Eiendomstaksring – Ek & Mosveen AS – Bjørn Aarvik estimated the market value of the land in 2007 at NOK 12 million. The discounted value of NOK 12 million of 2007 using the same discount rate as before (*i.e.* 5,5 % over 7,5 years) corresponded to NOK 8 million in 2001. Thus, the discrepancy between the two reports is NOK 9 million for the value of the property in 2001 and NOK 14 million for the value of the property in 2007.

The Norwegian authorities have explained that this difference is based mainly on the estimated value reduction of an additional obligation on Asker Brygge with regard to the use of part of the property by Slepnden Båtförening AS<sup>(11)</sup>. The option agreement of 2001 includes a clause stating that a part of the property is let to Slepnden Båtförening as a marina for small boats, and that Asker Brygge would have to compensate for its right to a small-boat marina/compensation *vis-à-vis* the municipality of Asker if development of the property started before the rental contract expires. The rental contract expired in June 2009. Furthermore, in clause 3 of the option agreement it is stated that Asker Brygge will, together with the municipality of Asker, reach a satisfying solution regarding the needs of Slepnden Båtförening within the scope of the activity at the time of the agreement.

When the option agreement was entered into in 2001, Slepnden Båtförening paid an annual lease of NOK 19 500 to the municipality of Asker<sup>(12)</sup>. Although it was difficult to state the exact economic consequence of the obligation for Asker Brygge at the time the option agreement was entered into, Asker Brygge and Slepnden Båtförening signed an

agreement on 1 June 2006 according to which the latter was to pay NOK 850 000 (*cf.* clause 2,4 in the agreement)<sup>(13)</sup>. According to the explanations provided by the Norwegian authorities, the value assessment from January 2008 was based on an incorrect interpretation of an agreement between Asker Brygge and Slepnden Båtförening since it did not reflect the latter's right to pay only NOK 850 000 for the area in question. The asset valuers interpreted the clause in the option agreement in such a way that Slepnden Båtförening would have had the right to rent or buy the boat places at market price after the expiry of the rental contract. However, the Norwegian authorities are of the opinion that the sum of NOK 850 000, which represents the fulfilment of the obligation towards Slepnden Båtförening, had to be taken into consideration when the market value of the property was assessed for 2001 and 2007. Thus, the municipality of Asker instructed TJB Eiendomstaksring – Ek & Mosveen AS – Bjørn Aarvik to use NOK 850 000 as the basis for the value estimation of Slepnden Båtförenings's 65 boat places in their assessment dated 16 June 2008. The Authority considers that this sum is relevant for the assessment of the 2007 property value, as this was known information at the time.

In addition, the assessment of June 2008 took into consideration the risks in relation to pollution in the ground, as pointed out by the municipality<sup>(14)</sup>. Finally, the assessment of June 2008 no longer included storage for boats under the road (E18), as pointed out by the municipality<sup>(15)</sup>.

Asker Brygge has disputed the validity of the assessments. Its main objection is that the assessments include the possibility to dredge the shoreline to establish further boat spaces, and to establish storage yards for boats on the land area. According to Asker Brygge no development of the property would be foreseeable at all in 2001, and the public road administration had prohibited further dredging in the area<sup>(16)</sup>.

The Authority notes that Asker Brygge has not provided any documentation that the factual premises for the assessment of June 2008 are incorrect. Further, the Authority notes that the municipality has not disputed the validity of the assessment of June 2008, which it seems to consider as fairly accurate<sup>(17)</sup>. On the contrary, the municipality in its comments to the Authority quotes the assessment on the part where it considers dredging (in relation to the assessment of pollution in the ground) and makes no comment on that dredging would not be possible

<sup>(8)</sup> Event # 508884, Enclosure 9 to the notification, the assessment at page 15.

<sup>(9)</sup> Event # 508884, Enclosure 5 to the notification.

<sup>(10)</sup> Event # 508884, Enclosure 3 to the notification.

<sup>(11)</sup> Event # 518079, the municipality's letter to the Authority dated 11.5.2009, pages 2–3.

<sup>(12)</sup> This sum was determined on the basis of an agreement signed in 1999 between the Municipality of Asker and Slepnden Båtförening. Enclosure 8 to the letter dated 11.5.2009, event # 518079.

<sup>(13)</sup> The agreement is assessed by the law firm Hjort, see event # 508884, enclosure 7.

<sup>(14)</sup> Event # 508884, see enclosure 3 to the notification, the assessment at page 5, and the Municipality's letter to the assessors dated 5.5.2008, enclosure 8 to the notification, and the municipality's comments in its letter to the Authority dated 29.1.2010 at page 3–4, event # 544706.

<sup>(15)</sup> Event # 508884, see enclosure 3 to the notification, the assessment at pages 4 and 7, and the municipality's letter to the assessors dated 5.5.2008, enclosure 8 to the notification, and the municipality's comments in its letter to the Authority dated 29.1.2010 at page 4 (point 3.3, last paragraph), event # 544706.

<sup>(16)</sup> Event # 545173, comments from Asker Brygge, point 4.

<sup>(17)</sup> Event # 544706, see pages 3–4, and event # 518079, the municipality's letter to the Authority where it uses the assessment as its basis for explaining the calculations of the amount of aid possibly granted as stated in the notification to the Authority.

at all. Thus, the Authority can not see that there has been provided documentation which gives reason to question the factual premises for the assessment of June 2008.

The two TBJ Eiendomstaksering – Ek & Mosveen AS – Bjørn Aarvik reports have determined the price of the land in 2007. The first report prepared in January 2008 estimated the value of the land at NOK 26 million, well above the price of NOK 8,7 million paid by Asker Brygge AS. The latest (and lowest) value assessment, the second report, dated 16 June 2008<sup>(18)</sup>, estimated the market value of the land in 2007 at NOK 12 million, which is NOK 3 272 538 more than the price paid. Contrary to the first report, according to the information provided by the municipality of Asker, this second report takes into account more accurate information which was known in 2007, at the time the sale was finalised.

Asker Brygge has claimed that to the extent the 2007 value is relevant, the Authority shall take into consideration and deduct added value resulting from the works undertaken by Asker Brygge from 2001–2007. The works consisted of Asker Brygge's research of the property<sup>(19)</sup>.

The Authority finds that there is no basis for deducting from the value the works conducted by Asker Brygge in the period of 2001–2007. In this respect, the Authority notes that the value assessments of 2008 are based on the regulatory status of the property as it was in 2001 and 2007. The regulations were unchanged since 1998, according to the value assessment of June 2008<sup>(20)</sup>. The expected usage of the property was thus considered to be as a marina and storage area for boats in 2001 and in 2007<sup>(21)</sup>. The Authority can not see that this assessment was affected due to the research carried out by Asker Brygge. In addition, the assessment of June 2008 mentions the risk of pollution in the ground, but adds that the assessors have not conducted any closer research into this matter<sup>(22)</sup>. Thus, it appears that the research carried out by Asker Brygge was rightly not taken into consideration by the assessors when determining the value of the plot of land.

As mentioned, the assessment of June 2008 was based on usage of the area as a marina, according to the existing regulations. It seems however, that already in 2001 Asker Brygge saw that there was a potential in developing the property. Such a potential would normally correspond to an added value. Thus, the municipality pointed out in its letter to the assessors dated 11 April 2008, that the assessors should take into consideration whether the likelihood of adjusted regulations (presumably to a more profitable usage) should be assessed. The assessors refused however to take the possibility of adjusted regulations into consideration, as they regarded this as speculative. The

assessors added that the valuation would be quite different (meaning considerably higher) if the assessment should be based on that housing and industry were to be allowed on the property<sup>(23)</sup>.

The Authority has some doubt as to whether a private investor would have taken into account the likelihood that the property would be regulated for other and more valuable usage in the future and whether such possibilities would have led to a higher market value, i.e. (considerably) higher than the assessment of June 2008. The Authority has however taken note of the particular uncertainties connected to the future use of the property in question, inter alia pollution and regulatory requirements connected to the motorway near to the property. Thus, the assessment of June 2008, which did not take into account any potential of developing the property into another form of usage than the existing, is moderate but appears in the Authority's view accurate when one takes into account the particular characteristics of the property under assessment.

For these reasons, the Authority concludes that the sale of the land gbnr. 32/17 in 2007 for the price of NOK 8 727 462 was below its market price of NOK 12 million as established by the independent expert assessment carried out in June 2008, which the Norwegian authorities submitted.

#### 1.1.4. Conclusion on the market investor principle

For the above-mentioned reasons, the Authority finds that the price agreed upon in the option agreement did not corresponded to the market price for such an agreement, which should reflect the property value at the time of the agreement combined with the value of the option and the special arrangements granted to the buyer. Moreover, the Authority finds that the actual price agreed upon in the sales agreement did not corresponded to the market price of the property at the time the sales agreement was concluded. Therefore, the Authority concludes that the sale of the concerned plot of land gbnr. 32/17 to Asker Brygge AS for the sales price of NOK 8 727 462 was not carried out in accordance with the market investor principle.

#### 1.2. State resources

In order to qualify as state aid, the measure must be granted by the State or through state resources. The concept of State does not only refer to the central government but embraces all levels of the state administration (including municipalities) as well as public undertakings.

Given that the municipality has sold the land below its market price, it has foregone income. In such circumstances, Asker Brygge should have paid more for the land and therefore there is a transfer of resources from the municipality.

<sup>(18)</sup> Enclosure 3 to the notification.

<sup>(19)</sup> Event # 545173, point 3.

<sup>(20)</sup> See event # 508884, enclosure 3.

<sup>(21)</sup> See event # 508884, enclosure 3, the value assessment at page 6–7.

<sup>(22)</sup> See event # 508884, enclosure 3, the value assessment at page 5.

<sup>(23)</sup> See event # 508884, enclosure 8, the municipality's letter at page 2, and the assessors' (undated) letter at page 1.

For these reasons, the Authority considers that since the sale did not take place in accordance with market conditions, state resources within the meaning of Article 61(1) of the EEA Agreement are involved.

### 1.3. Favouring certain undertakings or the production of certain goods

First, the measure must confer on Asker Brygge advantages that relieve the undertaking of charges that are normally borne from its budget. Since the transaction was carried out under favourable terms, in the sense that Asker Brygge would have had to pay a higher price for the property if the sale of land had been conducted according to the market investor principle, and to have paid market interest rates for the loan if it was to borrow the same amount from a bank, the company received an advantage within the meaning of the state aid rules.

In the letter dated 11 May 2009 <sup>(24)</sup>, the municipality explained how it calculated the level of eventual aid, estimated to NOK 5,3 million in the notification form to the Authority, point 5 <sup>(25)</sup>. The estimation is based on the difference between the value assessment of June 2008 <sup>(26)</sup> (which determined the value of the land in 2007, when the sales agreement was entered into) and the sales sum, which gives approximately NOK 3,3 million. In addition the municipality has added the economic advantage of the postponed payment of the remaining 70 % of the sales price. The municipality has based its calculations on 7 % interest over a period of 4 years and 9 months related to a sum of NOK 6 million, and found that the maximum advantage conferred by the soft loan is NOK 2 million.

Second, the measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. There is only one possible beneficiary of the measure under assessment, i.e. Asker Brygge. The measure is thus selective.

### 1.4. Distortion of competition and effect on trade between Contracting Parties

The aid must distort competition and affect trade between the Contracting Parties of the EEA Agreement.

A support measure granted by the State would strengthen the position of Asker Brygge vis-à-vis other undertakings that are competitors active in the same business areas of real estate and property development. Any grant of aid strengthens the position of the beneficiary vis-à-vis its competitors and accordingly distorts competition within the meaning of Article 61(1) of the EEA Agreement. To the extent that the company is active in areas subject to intra-EEA trade, the requirements of Article 61(1) of the EEA Agreement for a measure to constitute state aid are fulfilled. The business of

<sup>(24)</sup> Event # 518079 at pages 1–2.

<sup>(25)</sup> Event # 508884, annex 1, the notification form, point 5.

<sup>(26)</sup> Of the three assessments, the valuation of June 2008 which estimated the market value of the land in 2007 at NOK 12 million gives in the view of the Authority the best indication on the property's market value in 2007.

developing real estate is in principle and in practice open to intra-EEA trade. Thus, the Authority concludes that the aid threatens to distort competition and effects trade contrary to article 61(1) EEA.

### 1.5. Conclusion

For the above mentioned reasons, the Authority finds that the transaction concerning the sale of the plot of land gbnr 32/17 to Asker Brygge as laid down in the option agreement signed in 2001 and later agreements entail the grant of state aid.

## 2. PROCEDURAL REQUIREMENTS

The Norwegian authorities submitted a notification of the sale on 13 February 2009 (Event No 508884). However, the Norwegian authorities signed the Option Agreement laying down the conditions for the purchase of the plot of land in 2001 and put the sale into effect on 21 March 2007 when the sales contract was entered into. Thus, the sale was put into effect before the Authority had taken a final decision as to its validity. The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

## 3. COMPATIBILITY OF THE AID

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement.

The derogation of Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor does Article 61(3)(a) or Article 61(3)(b) of the EEA Agreement apply to the case at hand. Further, the area where the property is located cannot benefit from any regional aid within the meaning of Article 61(3)(c) of the EEA Agreement.

The Authority therefore finds that the transaction under assessment can not be justified under the state aid provisions of the EEA Agreement.

## 4. RECOVERY

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.

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<sup>(27)</sup>. 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<sup>(28)</sup>. 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<sup>(29)</sup>. There are no exceptional circumstances visible in this case, which would have led to legitimate expectations on the side of the aid beneficiaries.

The recovery of the unduly granted state aid amounts should include compound interests, in line with Article 14 (2) in Part II of Protocol 3 to the Surveillance and Court Agreement and Article 9 and 11 of the Authority's Decision 195/04/COL of 14 July 2004.

#### 5. CONCLUSION

The Authority concludes that the Norwegian authorities have unlawfully implemented the aid in question in breach of Article 1(3) of Part I to Protocol 3.

The conditions of the sale of the property at Nesøyveien 8, gnr. 32 bnr. 17 to Asker Brygge AS entail state aid which – for the reasons set out above – is not compatible with the functioning of the EEA Agreement and should be recovered, from the date of the sales agreement signed on 21 March 2007.

HAS ADOPTED THIS DECISION:

#### *Article 1*

The sale of the plot of land at Nesøyveien 8, gnr. 32 bnr. 17 by the Municipality of Asker to Asker Brygge AS entails state aid which is not compatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

#### *Article 2*

The Norwegian authorities shall take all necessary measures to recover from Asker Brygge AS the aid referred to in Article 1 and unlawfully made available to the beneficiary.

#### *Article 3*

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of Asker Brygge AS until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.

#### *Article 4*

By 13 September 2011, Norway shall inform the Authority of the total amount (principal and recovery interests) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid.

By 13 November 2011, Norway must have executed the Authority's decision and fully recovered the aid.

#### *Article 5*

This Decision is addressed to the Kingdom of Norway.

#### *Article 6*

Only the English language version of this Decision is authentic.

Done at Brussels, 13 July 2011.

*For the EFTA Surveillance Authority*

Oda Helen SLETNES  
*President*

Sverrir Haukur GUNNLAUGSSON  
*College Member*

<sup>(27)</sup> Case C-350/93 *Commission v Italy* [1995] ECR I-699, paragraph 22.

<sup>(28)</sup> Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 66, and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 99.

<sup>(29)</sup> Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 51.