

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

EFTA SURVEILLANCE AUTHORITY DECISION

No 167/09/COL

of 27 March 2009

on the lease and sale of Lista air base (Norway)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 thereof and Protocol 26 thereto,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(2) of Part II of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾,

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement ⁽⁵⁾, and in particular Part V thereof on State aid elements in sales of land and buildings by public authorities,

HAVING CALLED on interested parties to submit their comments pursuant to Article 6(1) of Part II of Protocol 3 ⁽⁶⁾,

HAVING REGARD to their comments,

Whereas:

I. FACTS

1. PROCEDURE

Decision No 183/07/COL to initiate the formal investigation procedure was published in the *Official Journal of the European Union* and in the EEA Supplement thereto. The Authority called

⁽¹⁾ Hereinafter referred to as 'the Authority'.

⁽²⁾ Hereinafter referred to as 'the EEA Agreement'.

⁽³⁾ Hereinafter referred to as 'the Surveillance and Court Agreement'.

⁽⁴⁾ Hereinafter referred to as 'Protocol 3'.

⁽⁵⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as 'OJ') L 231, 3.9.1994 p. 1 and the EEA Supplement No 32, 3.9.1994 p. 1. The Guidelines were last amended on 16 December 2008. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: http://www.eftasurv.int/fieldsofwork/fieldstateaid/state_aid_guidelines/

⁽⁶⁾ Published in OJ C 250, 25.10.2007, p. 28 and in the EEA Supplement No 50, 25.10.2007 p. 13.

on interested parties to submit their comments. The Authority received comments from Lista Lufthavn AS. By letter dated 4 December 2007 (Event No 455712), the Authority forwarded these to the Norwegian authorities who were given the opportunity to respond. By letter dated 12 December 2007 (Event No 457245), the Norwegian authorities submitted their comments.

The Authority appointed an expert, Mr Geir Saastad, to carry out an independent expert evaluation of Lista air base. The appointment of the expert took effect on 14 April 2008. The scope of the expert's mission was to determine (i) the market value of the air base and (ii) the value that should be attached to the obligations relating to the land and buildings.

The final report of the independent expert was communicated to the Authority in May 2008.

By letter dated 18 July 2008 (Event No 486089), the Authority requested that additional information be provided by the Norwegian authorities.

The Norwegian authorities provided the information required by letter dated 28 August 2008 (Event No 489312).

2. DESCRIPTION OF THE MEASURES INVESTIGATED

Two distinct measures were investigated by the Authority: the lease and the sale of Lista air base.

2.1. DESCRIPTION OF LISTA AIR BASE

In Proposition No 50 (1994-1995) to the Parliament ⁽⁷⁾, the Ministry of Defence presented its proposal on the closing of the air base. The Ministry of Defence put forward a so-called 'development alternative'. Under that plan, the Norwegian Armed Forces would evaluate the conglomeration of buildings to decide on the buildings which could not or should not be used for industrial or commercial purposes. The buildings which

⁽⁷⁾ St.prp. nr 50 (1994-1995) of 12 June 1995 was a follow up to a resolution in which the Parliament decided on the reorganisation of the Norwegian Armed Forces. As part of the reorganisation, Lista air base was to be closed down from 1 January 1996.

could be used for commercial/industrial purposes should be maintained for a period of maximum 10 years in order to review the possibilities of commercial development and arrange for the best possible commercial use of the air base.

To follow up on the resolution from the Parliament, several reports were drawn up to get an overview of the general condition of Lista air base (the Norwegian authorities have only submitted a fire safety report dated 24 January 2002 in which TekØk reported on standards at the time, recommended upgrades and calculated the costs of the recommended works).

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

According to the municipal sector plan of Lista air base approved by the Municipal Council of Farsund, the property could be used for commercial activities including aviation services, public development, crafts and industry. The area around Slevdalsvannet, which encompasses the wetland area and an ammunition depot for the Norwegian Armed Forces, was reserved for the use of the Norwegian Armed Forces, airport services and nature conservation. Around 1 900 000 m² could be used for industrial purposes. Parts of the land and some buildings are protected in accordance with the national Protection Plan from the Norwegian Armed Forces, including:

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

2.2. THE LEASE OF LISTA AIR BASE

In the context of the reorganisation of the estates owned by the Norwegian Armed Forces, it had been decided in 1994-1995 that the military air base activities at Lista air base should cease as from 1 July 1996.

On 27 June 1996, the Norwegian Defence Estates Agency (hereinafter 'the NDEA') entered into a 10 year lease agreement with Lista Airport Development AS (LAD) to enter into effect on 1 July 1996 until 30 June 2006 with the possibility for LAD to rent the air base for another 10 year period. The company was owned by the Municipality of Farsund (20 %) and by local investors (80 %). The agreement covered nine buildings, corresponding to approximately 12 500 m², and the runway, which accounts for 421 610 m².

The main objective of the agreement was to develop, as part of the implementation of the 'development alternative' and within a period of maximum 10 years, commercial air services on the air base.

On 1 July 1996, the lease agreement was transferred to Lista Lufthavn AS (LILAS) which, as such, was established on 3 May 1996.

The lease agreement provided that LILAS would rent a specified part of the buildings and the airstrip at an annual price of NOK 10 000 to be adjusted every fifth year. The NDEA would also be entitled to 15 % of LILAS' income from the sub-lease of the buildings. During the period from 1 July 1996 until September 2002, LILAS entered into several sub-lease contracts. The income from sub-leasing paid to the NDEA was NOK 245 405.

The lease agreement provided that the owner of the air base was responsible for external maintenance of buildings and maintenance of the airstrip. The liability was limited to NOK 1 500 000 annually. As consideration for this obligation, the owner was entitled to a split of the profits. Article 3 of the lease agreement provided that in case the profit generated as a result of the commercial use of the air base exceeded NOK 4 500 000, the owner of the air base would be entitled to 20 % of the profits in excess of that figure.

Commercial services were operated for some time. Braathen Safe and Air Stord ran commercial services until 1 November 1999. During 2000, LILAS continued to investigate the possibility of re-establishing scheduled flights and to develop the airport as a freight terminal with international air freight distributed to Europe. LILAS managed to re-establish a scheduled flight between Oslo and Lista run by Cost Air throughout 2001. There were no scheduled flights operating at Lista airport in 2002. As LILAS did not achieve its initial goal of creating commercial air services at the air base, the income during the years 1996-2002 never exceeded NOK 4 500 000 annually.

At the end of the initial 10 year period, LILAS had the possibility to prolong the lease for another 10 years. If that right was not exercised, LILAS could buy a specified area of the air base at a price of NOK 10 000 000. Moreover, the contract provided that LILAS had the possibility, should NDEA decide to sell LISTA air base en bloc during the lease period, to buy the entire air base at a price of NOK 25 000 000. By letter dated 13 December 2002, LILAS waived its pre-emptive right to buy Lista air base en bloc and the air base was sold to Lista Flypark AS.

In June 2006, in conformity with the terms of the lease agreement, LILAS exercised its pre-emptive right to purchase parts of the Lista air base for an amount of NOK 10 000 000 from Lista Flypark AS.

2.3. THE SALE OF LISTA AIR BASE

On 12 September 2002, the NDEA sold Lista air base to Lista Flypark AS. The sale resulted in a net disbursement from the Norwegian State to Lista Flypark AS of NOK 10 875 000. In order to analyse the terms and conditions of the sale, two successive steps must be distinguished: the assessment of the market value of the estate on the one hand, and of the obligations attached to the land and buildings on the other.

2.3.1. *Steps taken in order to find a purchaser for the air base*

In 1997, LILAS contacted the NDEA in order to negotiate the purchase of the air base. On 21 October 1998, the Municipality of Farsund and LILAS agreed on a strategy for buying the property. The negotiations between the NDEA, the Municipality of Farsund and LILAS were however interrupted on 22 February 1999 as the parties could not agree on a price.

During the course of 2000, the NDEA had put several advertisements in local (Farsund Avis) and regional newspapers (Fedrelandsvennen and Stavanger Aftenblad) for the sale of the property. The sale as it was envisaged at that time was of **parts** of the estate. The advertisements did not lead to any sale.

On 16 and 17 August 2001, the NDEA organised the Lista Conference to which 7 000- 8 000 potential investors were invited. The purpose of the conference was to present Lista air base, and the possible transformation of the air base from military to civilian commercial use, to interested parties. After the conference, a consultant, Mr Hjort, was appointed to assist with the sales process. He concluded that 'the air base was difficult to sell to real estate developers as there were no viable buyers, and the fact that the property's potential for utilisation was very limited due to the LILAS' agreement'.

In August 2001, the NDEA decided that the property should be sold en bloc in order to prevent that certain areas of the air base would become totally unattractive to potential purchasers.

In the context of negotiations in early 2002 with real estate developers Intervest Eiendom AS and Interconsult Prosjektutvikling AS, the NDEA ordered two value assessments by the real estate value assessors Verditakst and OPAK. Those negotiations failed, but on 12 September 2002, a sales agreement was reached between the NDEA and Lista Flypark AS.

2.3.2. *The purchase price*

The purchase price was based on three elements: (i) the actual price to be paid for the property, (ii) an additional payment corresponding to 50 % of the net resale and (iii) an amount corresponding to 30 % of the net income from the lease agreement.

(i) **Price of the property**

The OPAK report, dated 29 May 2002, distinguished between the three following scenarios: sale of the property to a new purchaser (NOK 32 000 000), sale of the property to the

lessee on the basis of its pre-emptive right to buy part of the leased building and land at the end of the 10 year lease (NOK 34 000 000) and sale of the property to the lessee on the basis of its pre-emptive right to buy the property en bloc during the lease period (NOK 25 000 000).

The Verditakst report, dated 7 June 2002, concluded that the market value of the property was NOK 11 000 000.

The sales price was actually agreed on the basis of the valuation carried out by Verditakst, i.e. NOK 11 000 000.

Based on the fire safety report referred to above, an amount of NOK 7 500 000 was deducted from the value of the property to take into account the works that needed to be carried out in order to comply with applicable fire safety standards. The sales price of the property was therefore reduced to NOK 3 500 000.

(ii) **50 % split of the net resale**

According to Article 3 of the sales agreement, the NDEA was entitled to 50 % of any income generated from sale of plots on the property. The sales of two plots has resulted in a transfer of NOK 795 263 to the NDEA. In addition, NOK 5 000 000 is outstanding pending disagreement as to the interpretation of that provision in relation to the purchase by LILAS of the area on which it had an option under the lease agreement.

(iii) **30 % of the net income from the lease agreement**

The NDEA was also entitled to 30 % of any profit after tax generated under the lease agreement. However, no income was generated from Lista Flypark AS in the period from 2003 until 2006.

2.3.3. *The value attached to the obligations relating to the land and buildings*

It was agreed that the purchaser would be compensated for obligations attached to the property which had not been taken into account in the valuation. Compensation covered the following:

- (i) compensation related to technical installations (such as electrical transmission lines): NOK 3 500 000

The NDEA took on the responsibility of contributing to the transformation of the air base from a military air base to a commercial business in compliance with the Parliament's decision: 'in accordance with the parliamentary resolution, the Armed Forces are obliged to prepare the area for civilian use. This obligation especially involves any commitment towards adjacent land owners when it comes to drainage, as well as facilitating new infrastructure in conjunction with the development of the area.';

- (ii) compensation related to the development of new infrastructure: NOK 5 500 000

The NDEA was again obliged to bear the costs of transforming the air base from military to civilian use.;

- (iii) compensation related to LILAS' lease agreement: NOK 5 375 000

The lease agreement provides that the owner of the air base is responsible for running expenses and external maintenance of the buildings and maintenance of the runway. These liabilities were however limited to NOK 1 500 000 per annum. As the NDEA was, at the time of the sale in 2002, obliged to pay LILAS a yearly amount of NOK 1 500 000 for approximately another 4 years, the amount of NOK 5 375 000 was credited to Lista Flypark AS in order to fulfil these obligations towards LILAS.

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

3. COMMENTS BY THE NORWEGIAN AUTHORITIES

3.1. COMMENTS REGARDING LILAS' LEASE AGREEMENT

3.1.1. *No aid or advantage was granted to LILAS under the lease agreement*

The Norwegian authorities indicated that even though the rent as specified in the lease agreement was indeed NOK 10 000 per year, this value did not accurately reflect the actual amounts paid to NDEA. Indeed, NDEA was also entitled to 15 % of LILAS income from the sublease of the buildings. Furthermore, in case the gross income related to commercial aviation exceeded NOK 4 500 000 annually, the NDEA was also entitled to 20 % of the income in excess of that figure.

The income from subleasing paid to the NDEA was NOK 245 405. According to the Norwegian authorities, the income from subleasing of NOK 245 405 must be added to the yearly rent of NOK 10 000. The total rent during the lease until the sale in 2002 amounted to NOK 310 405.

The Norwegian authorities argue furthermore that LILAS was to develop, operate and maintain the property for commercial air

services on the air base, which amounted to a public service obligation. In this context, the amount of rent paid should be considered as somewhat immaterial for the assessment of the lease agreement. In case the project had been successful, LILAS' profits under the lease agreement could have been significant. On the other hand, if the more moderate forecasts were to be fulfilled, then the lease of the air base, due to the financial risk of the lease agreement based on substantial unavoidable costs, would not be profitable for LILAS.

3.1.2. *No effect on trade between EEA States*

The Norwegian authorities have argued that there was no indication that intra-EEA trade was affected and that competition was distorted by that aid. They referred to the State Aid Guidelines on financing of airports and start up aid to airlines departing from regional airports⁽⁸⁾ according to which Lista would be classified as a category D airport, *i.e.* a small airport with an annual passenger volume of less than 1 million. The total passenger basis of Lista airport is 32 000 people. The Airport Guidelines provide that 'funding granted to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest'⁽⁹⁾.

3.1.3. *No unlawful aid was granted*

The Norwegian authorities argue that the new Airport Guidelines⁽¹⁰⁾ should be referred to when reviewing the terms of the lease agreement. Indeed, even though they had not been adopted at the time the lease agreement was entered into, the Norwegian authorities argue that the new Airport Guidelines 'add to rather than replace' the prior guidelines and should therefore be referred to.

The Norwegian authorities argue that LILAS was entrusted with a public service obligation amounting to the 'operation of the infrastructure, comprising the maintenance and management of airport infrastructure'. They then refer to the new Airport Guidelines which provide: 'such funding does not constitute state aid if it is compensation for public services allocated for management of the airport in accordance with the conditions established in the Altmark judgment. (...) such aid may be declared compatible with the functioning of the EEA Agreement only on the basis of Articles 61(3) (a) or (c), under certain conditions, in disadvantaged regions, or on the basis of Article 59(2) if it meets certain conditions which ensure that it is necessary for the operation of a service of general economic interest and does not affect trade to an extent contrary to the interests of Contracting Parties'.

The Municipality of Farsund, in which the air base is located, is eligible for regional aid.

⁽⁸⁾ See http://www.eftasurv.int/fieldsOfWork/fieldstateaid/state_aid_guidelines/

⁽⁹⁾ See paragraph 29 of the State Aid Guidelines financing of airports and start up aid to airlines departing from regional airports.

⁽¹⁰⁾ The 'new Airport Guidelines' refer to the Guidelines adopted on 20 December 2005, *i.e.* after the LILAS lease agreement had been entered into.

The Norwegian authorities therefore conclude that any aid granted to LILAS corresponded to a compensation which did not exceed what was necessary to cover the costs incurred in discharging the public service obligations entrusted to it.

3.2. COMMENTS REGARDING THE SALES AGREEMENT

3.2.1. **No aid or advantage was granted to Lista Flypark AS in conjunction with the sale**

The Norwegian authorities argue that even though the conditions set out in Section 2.2 of the State Aid Guidelines on State aid elements in sales of land and buildings by public authorities were not strictly complied with, 'most potential purchasers were adequately informed of the NDEA's efforts to sell the air base'. Indeed, as indicated above in Section 2.3.1, many steps were taken in order to find a purchaser.

The Norwegian authorities furthermore stressed that the sales price accurately reflected the value of the property and the legal obligations related to it. They refer to the fact that the actual purchase price did not only correspond to the price of the estate but also to other components such as the 50 % profit sharing from resale and the 30 % split of possible net income at Lista Flypark AS (see above Section 2.3.2).

3.2.2. **No effect on trade between EEA States**

The Norwegian authorities reiterated the points referred to above under Section 3.1.2.

3.2.3. **No unlawful aid was granted**

The Norwegian authorities referred to their explanations concerning the lease agreement entered into with LILAS.

4. COMMENTS BY THIRD PARTIES

By letter dated 15 November 2007 (Event No 452517), the law firm representing Lista Lufthavn AS submitted comments to the Authority's decision to open a formal investigation ⁽¹¹⁾.

The comments were limited to the lease agreement and did not address the issue of the sale of the land.

⁽¹¹⁾ Decision No 183/07/COL, referred to at footnote 6.

4.1. NO AID OR ADVANTAGE WAS GRANTED TO LILAS UNDER THE LEASE AGREEMENT

The *de facto* annual rent was not of NOK 10 000 as NDEA received NOK 245 405 from subleasing. Furthermore, LILAS — through the lease agreement — was entrusted with the public service obligation to operate and manage Lista air base. This general service obligation entailed significant limitations on LILAS' possibility of exploiting the air base for other purposes. In 2001, the total cost of such operations was of approximately NOK 5 500 000 per year. In light of the significant costs, an annual cap of NOK 1 500 000 was included in the lease agreement on 9 May 2006. LILAS and their shareholders incurred substantial losses as a consequence of the lease agreement ⁽¹²⁾.

4.2. NO EFFECT ON TRADE BETWEEN EEA STATES

The LILAS agreement is strictly related to the lease of Lista air base for public service obligations of management and operation of the air base itself and not the operation of domestic scheduled flights and international air freight. In this respect any aid granted under the lease agreement would not affect trade within the meaning of Article 61(1) EEA.

4.3. ANY AID GRANTED TO LILAS WOULD BE LAWFUL AID

Should the Authority conclude that aid had been granted to LILAS, it would in any event be compatible with the EEA Agreement on the basis of the Guidelines on financing of airports and start up aid to airlines departing from regional airports.

4.4. NO BASIS FOR A RECOVERY DECISION

Finally, the lease agreement was entered into on 27 June 1996. The only information request sent during the 10 year period following that date addressed the potential grant of aid through the sale but not the lease agreement. The 10 year period was therefore not interrupted by an action of the Authority. Article 15 of Protocol 3 provides: 'the powers of the EFTA Surveillance Authority to recover aid shall be subject to a limitation period of ten years'.

II. ASSESSMENT

1. THE LEASING OUT OF PART OF LISTA AIR BASE

The lease agreement with LAD was signed on 27 June 1996 and entered into effect on 1 July 1996.

Article 15 of Protocol 3 provides:

'1. The powers of the EFTA Surveillance Authority to recover aid shall be subject to a limitation period of 10 years.

⁽¹²⁾ LILAS' accounts for the period 1997-2006 show an accumulated loss of approximately NOK 10 500 000.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the EFTA Surveillance Authority or by the EFTA State, acting at the request of the EFTA Surveillance Authority, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the EFTA Surveillance Authority is the subject of proceedings pending before the EFTA Court.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.'

The first request for information that addressed the issue of the potential aid measure in the form of the lease agreement was sent on 28 March 2007. The Authority considers that, on that date, the 10 year limitation period had expired as the contract binding the parties had been entered into on 27 June 1996. No recovery would therefore be possible. Moreover, the lease agreement itself had also already expired on that date, since LILAS did not use the option to re-new the agreement for a further 10 years. The lease agreement therefore ceased to exist on 30 June 2006 and no further effects are created as a result of that agreement.

Under these circumstances, a decision by the Authority on the classification as aid of the measure in question and on its compatibility with the EEA Agreement would have no practical effect⁽¹³⁾.

2. THE SALE OF LISTA AIR BASE

2.1. THE PRESENCE 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, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

The State Aid Guidelines on State aid elements in sales of land and buildings by public authorities give further information on how the Authority interprets and applies the provisions of the EEA Agreement governing State aid when it comes to assessing sales of public land and buildings. Section 2.1 describes a sale

through an unconditional bidding procedure, while Section 2.2 describes a sale without an unconditional procedure (by way of an independent expert valuation). These two procedures allow EFTA States to handle sales of land and buildings in a way that precludes the existence of State aid.

2.2. PRESENCE OF STATE RESOURCES

The measure must be granted by the State or through state resources. The NDEA being a State body, its resources are state resources.

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

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

(i) sale through an unconditional bidding procedure

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

Neither the advertisements nor the so-called 'Lista Conference' led to any sale. The process did not cover the case of a sale of the air base en bloc. This is confirmed by the Report from the Auditor General which concluded that neither a valuation of the entire property nor a public announcement of the intended sale had been made prior to the start of negotiations with Lista Flypark AS in March 2002. The Authority therefore considers that there was no unconditional bidding procedure in connection with the sale of the air base en bloc and that the possibility to preclude the existence of State aid on that basis, pursuant to Section 2.1 of the State Aid Guidelines on State aid elements in sales of land and buildings, is therefore excluded.

(ii) sale without an unconditional bidding procedure (expert valuation)

Section 2.2 of the State Aid Guidelines on State aid elements in sales of land and buildings by public authorities, regarding sale without an unconditional bidding procedure, provides that 'if public authorities intend not to use the procedure described under Section 2.1, an independent evaluation should be carried out by one or more independent asset valuers **prior to the sale negotiations** in order to establish the market

⁽¹³⁾ See, by analogy, Commission Decision of 25 September 2007 on the aid measures implemented by Spain for IZAR, Case C-47/2003, not yet published, and Commission Decision 2006/238/EC of 9 November 2005 on the measure implemented by France for *Mines de potasse d'Alsace* (OJ L 86, 24.3.2006, p. 20).

value on the basis of generally accepted market indicators and valuation standards. The market price thus established is **the minimum purchase price that can be agreed without granting state aid.**' (Emphasis added)

The Norwegian authorities have indicated that NDEA ordered two value assessments, by the real estate value assessor firms OPAK and Verditakst AS. These were carried out in May and June 2002, respectively. While it would appear that negotiations began already in March 2002, there is no indication that an agreement as to price was made before the conclusions of both reports were known. Both reports estimated a market value for the property, excluding obligations relating to fire safety standards, technical or infrastructure improvements or the lease agreement.

The price paid by the purchaser was determined by reference to the valuation report which was carried out by Verditakst, i.e. NOK 11 000 000.

However, OPAK had concluded that the value of the property on the date of the sale was NOK 32 000 000 and the sales price stated in the lease agreement was NOK 25 000 000 for the whole airport.

Faced with such a range of valuations, the Authority opened a formal investigation and appointed an independent expert, Mr Geir Saastad, whose assignment was to:

- compare all value assessments provided to the Authority,
- determine (i) the market value of the air base and (ii) the value of the obligations relating to the land and buildings.

The expert also appraised whether the behaviour of the State while selling this property corresponded to that of a private market investor or whether, on the contrary, a private market investor would have acted differently. In so doing, the expert took into account the particular nature of the property and the difficulty the Norwegian authorities argue they have been faced with due to the existing lease agreement entered into with LILAS and the possibility for the latter to purchase the property at the end of a 10 year period.

The expert assessed the methods used in the two existing valuations and concluded that the OPAK report, while it applies low rental prices probably reflecting the rates actually in force, does not take account of the fact that a part of the property is rented to LILAS for a fixed price (NOK 10 000 per year) which is considerably less than what was assumed to be a market rent. The allowance for vacancies and maintenance would also appear to be 'far too low'. In this regard the expert indicated that costs related to annual vacancy of 20 % would not be excessive given the nature of the property. In

addition, the expert indicated that significant operating and maintenance costs should be added. Together these expenses would reduce the value of the cash flow from NOK 26 million (as estimated by OPAK) to NOK 10 million. Finally, the value of the land itself should have been discounted to take account of the difficulty in selling plots on the site. The expert also noted, in the context of his comments on the OPAK report, that the sales price stated in the lease agreement of NOK 25 000 000 was entirely hypothetical.

The Verditakst report also failed to take into account the fact that part of the property is rented to LILAS at a rate which represents a considerable reduction in income relative to the assumption that the property should be let out at market rate. However, the market rates used correspond to what the expert himself had assumed (see Section 4 of the report). In addition, the expert notes that Verditakst had applied figures for operating and maintenance costs that correspond to the standard values applied by the industry. Finally, he notes that the estimation for the value of the land itself is more conservative than that of OPAK and expresses the opinion that this seems more appropriate than a higher valuation.

When comparing the two reports the expert found that: 'The chief difference between the valuations lies in their calculations of operating and maintenance costs. Verditakst's valuation reflects the standard figures applied by the property industry, whereas OPAK's valuation does not.'

The expert concluded that: 'the sales price applied in the transaction in 2002 would appear to be on a par with the estimated market value. Lista air base was sold at a time when there was **limited interest in this type of property**. The **property market and the financial markets had taken a downturn**, at the same time as which **the property can only be characterised as complicated and remote**. The criteria applied by Verditakst in their valuation were more correct than those applied in OPAK's valuation. The main objection to OPAK's valuation is that it failed to apply normal operating expenses when calculating the value of the property. **The compensation for the obligations transferred from NDEA to Lista Flypark AS in connection with the sale does not seem unreasonably high given the number of buildings on the site and the size of the land area involved.**' (Emphasis added)

The expert insisted on the fact that considerable uncertainty will attach to any valuation of an area such as Lista air base. This can be explained by the following factors:

- the site is remote when compared with built-up areas with a measurable property market. This affects not only land prices but also rental prices,

- the area comprises an air base on which military activities were conducted in the past. Few or no comparable reference properties exist, and
- the land and the buildings are in considerable need of repair and maintenance.

In light of the report of the independent expert, the Authority considers that the air base was sold at market value.

In the first place, the actual sale price matched the assessment of the market value given in the Verditakst report. The fact that OPAK's assessment of the market value was considerably higher does not as such provide grounds for concluding that there had been State aid ⁽¹⁴⁾.

Indeed, the expert appointed by the Authority points, as mentioned above, to several factors that indicate that OPAK's market value assessment was too high and that the criteria applied by Verditakst were more correct than those applied by OPAK. The Authority concurs with the view that the property market at Lista is atypical and difficult to assess and, as noted by Mr Saastad, that considerable uncertainty will attach to any valuation of an area such as the Lista air base. Indeed the variance in the two valuations made in 2002 would appear to support the uncertainty relating to the market there. It is also true that not only was the NDEA unable to sell plots of the land, also Lista Flypark AS has, since it bought the property in 2002, had limited success in selling plots of land to business start-ups. The low market value of the air base is further confirmed by the length and the difficulty of the sales process itself, which lasted from 1997 until 2002.

The final element in the price paid is the value attributed to certain costs, which was deducted from the value of the property to obtain the final price. Section 2.2 of the State Aid Guidelines on State aid elements in sales of land and buildings by public authorities specifically foresees that 'special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale'. The economic disadvantage of such obligations may be set off against the purchase price.

In relation to these obligations, the expert notes that the amounts are not unreasonably high, given the area to which they relate, and that it is not unusual for the value of these obligations to exceed the value of the property itself. While the procedure for transfer of funds is characterised as 'highly

unusual', the Authority considers that this does not affect the assessment of the value of the obligations themselves.

In light of the foregoing considerations, and coupled with the fact that a property burdened with pre-emption rights or options to buy will be difficult to sell, the Authority takes the view that, as regards the sale of the air base, it is not established that state resources were involved and that State aid was present.

3. CONCLUSION

On the basis of the foregoing assessment, the Authority considers that the sale of the Lista air base does not constitute State aid within the meaning of Article 61(1) EEA,

HAS ADOPTED THIS DECISION:

Article 1

The procedure initiated pursuant to Article 4(4), read in conjunction with Article 13, of Part II of Protocol 3 concerning the lease of Lista air base is hereby closed.

Article 2

The EFTA Surveillance Authority considers that the sale of the Lista air base did not constitute State aid within the meaning of Article 61 EEA.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 27 March 2009.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kurt JÄGER
College Member

⁽¹⁴⁾ See, by analogy, Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava* [2002] ECR II-1275, paragraph 85.