

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 157/12/COL

of 9 May 2012

on the sale of land gnr 271/8 by Oppdal municipality (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 7(2) 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") ⁽¹⁾,

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

Whereas:

municipality") intended sale of property gnr 271/8 (hereinafter "the property") in Oppdal to Strand Drift Oppdal AS (hereinafter "SDO").

By letter dated 9 July 2008 (Event No 485146), the Authority requested further information from the Norwegian authorities.

By letter dated 8 September 2008 (Event No 491369), the buyer, SDO, submitted comments to the Authority. By letter dated 9 September 2008 (Event No 490914), the Norwegian authorities replied to the information request. By letter dated 1 October 2008 (Event No 493593), the complainant submitted further information.

The Authority's Decision No 417/10/COL to initiate the formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 ("the opening decision") was published in the *Official Journal of the European Union* and the EEA Supplement to it ⁽³⁾. The Authority called on interested parties to submit their comments on the decision.

By letter dated 3 December 2010 (Event No 579649), the Norwegian authorities forwarded their comments (and those of SDO) on the opening decision.

I. FACTS

1. Procedure

By letter dated 3 July 2008 (Event No 484519), Oppdal Booking AS (hereinafter "OB"), the complainant, filed a complaint against Oppdal municipality's (hereinafter "the

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

⁽²⁾ Published in the *Official Journal of the European Union*, OJ C 34, 3.2.2011, and in the EEA Supplement to the Official Journal No 6, 3.2.2011.

2. Chronology of events

By letter dated 7 February 2007 ⁽⁴⁾, SDO proposed through an application to the municipality, to build a service facility for ski resort customers on property gnr 271/8. The property would need to be rezoned to use the area for this purpose.

⁽³⁾ These documents were published in the *Official Journal of the European Union*, OJ C 34, 3.2.2011, and in the EEA Supplement to the Official Journal No 6, 3.2.2011.

⁽⁴⁾ Event No 491369.

By letter dated 19 October 2007 ⁽¹⁾, SDO expressed an interest in buying the property. In a letter dated 30 November 2007 ⁽²⁾, the municipality replied that the interest to buy the property would not be considered until the area had been rezoned.

On 31 March 2008, the area was rezoned ⁽³⁾. By letter dated 23 April 2008 ⁽⁴⁾, OB filed a complaint on the decision to rezone the property. By letter dated 7 May 2008 ⁽⁵⁾, the municipality informed SDO that as a consequence of the complaint, its interest in to buy the property could not be considered until a decision was taken on the complaint. On 26 May 2008, the municipality decided not to sustain OB's complaint regarding the rezoning of the property but to refer the complaint to the County Governor's Office of Oppland (Fylkesmannen) ⁽⁶⁾.

By letter dated 30 May 2008 ⁽⁷⁾, OB expressed an interest in buying the property, in the case that its complaint was not sustained by the county administrator's office. By letter dated 6 June 2008 ⁽⁸⁾, the municipality informed SDO that it would not consider SDO's interest to buy the property before a decision had been taken by the County Governor's Office in the complaint case. Furthermore, the municipality emphasised that it had not granted SDO an option to buy the property ⁽⁹⁾.

On 30 June 2008, the executive committee of the municipality decided to obtain two separate value assessments of the property and thereafter proceed with sales negotiations with SDO ⁽¹⁰⁾. By letter dated 3 July 2008 ⁽¹¹⁾, OB filed a complaint with the Authority against the municipality's intended sale of the property to SDO.

By letter dated 10 July 2008 ⁽¹²⁾, OB requested access to the two independent value assessments.

On 16 July 2008 ⁽¹³⁾, SDO and the municipality met to discuss a draft sales contract for the property. The municipality informed SDO about the independent evaluations and the sales price for the property. The sales price was set to NOK 850 000 (in line with the independent value assessments). SDO was given until 17 July 2008 to evaluate the contract whilst the municipality planned to decide on the sale in a meeting on

24 July 2008 ⁽¹⁴⁾. SDO signed the contract on 18 July 2008 ⁽¹⁵⁾.

By letter dated 23 July 2008 ⁽¹⁶⁾, OB made an offer of NOK 3,1 million on the property.

Oppdal municipality signed the sales contract with SDO on 31 July 2008 ⁽¹⁷⁾.

3. The complaint

In July 2008, OB filed a complaint with the Authority alleging that Oppdal municipality was intending to sell property gnr 271/8 to SDO without a public tender. The property was part of an area regulated for parking, before the rezoning, for customers of a nearby ski resort.

OB owns and operates Oppdal ski resort and related businesses. The buyer of the plot in question, SDO, is a competitor of OB, who previously leased a property from OB for its business related to ski equipment and ski instructor services. After OB increased the rent, SDO started looking for new premises ⁽¹⁸⁾.

In the complaint, OB alleged that the property would be sold without a public tender, as described in the Authority's State Aid Guidelines on state aid elements in sales of land and buildings by public authorities ("the Guidelines") ⁽¹⁹⁾ section 2.1. Further, OB argued that the municipality had not acted in accordance with the alternative procedure described in section 2.2 in the Guidelines, seeing as sales negotiations were started with the potential buyer prior to obtaining an independent evaluation of the property ⁽²⁰⁾.

Moreover, OB maintained that it was unclear on which principles the valuation reports were based. OB alleged that its bid of NOK 3,1 million, based on the same exploitation of the property as the buyer, showed that the market price was not reflected in the sales price. Furthermore, OB argued that it could not be considered to be a buyer with a particular interest in the property ⁽²¹⁾.

⁽¹⁾ Event No 491369.

⁽²⁾ Event No 491369.

⁽³⁾ See minutes from meeting 31.03.2008 in Oppdal municipality (building authority) (Event No 490914).

⁽⁴⁾ Event No 491369.

⁽⁵⁾ Event No 491369.

⁽⁶⁾ See minutes from meeting 26.05.2008 in Oppdal municipality (building authority) (Event No 490914).

⁽⁷⁾ Event No 491369.

⁽⁸⁾ Event No 491369.

⁽⁹⁾ Event No 491369.

⁽¹⁰⁾ See minutes from meeting 30.6.2008 in Oppdal municipality (local executive committee) (Event No 493593).

⁽¹¹⁾ Event No 484869.

⁽¹²⁾ Event No 490914.

⁽¹³⁾ See minutes from meeting 16.7.2008 - Event No 491369.

⁽¹⁴⁾ See minutes from meeting 16.7.2008 - Event No 491369.

⁽¹⁵⁾ See the signed sales contract between SDO and Oppdal municipality (Event No 490914).

⁽¹⁶⁾ Event Numbers 491369 and 493593.

⁽¹⁷⁾ See the signed sales contract between SDO and Oppdal municipality (Event No 490914).

⁽¹⁸⁾ Event No 491369.

⁽¹⁹⁾ This Chapter of the Guidelines corresponds to the Commission Communication on state aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3) also available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁽²⁰⁾ Event No 493593.

⁽²¹⁾ Event No 493593.

4. Grounds for initiating the procedure

The Authority opened the formal investigation procedure on the basis that Oppdal municipality's sale of land to Strand Drift Oppdal AS could involve state aid. In particular, the Authority had doubts as to whether the sales price reflected the market price of the property and whether any unlawful state aid was involved. As a general rule, in the Authority's opinion, in situations where the municipality receives a conflicting higher offer on a property after an independent expert valuation, the municipality should subject the higher offer to closer scrutiny in order to ensure that the property is sold at market value. This can be done by either requesting another assessment of the property or a reassessment from the independent expert valuer.

The Authority referred to Commission decision C35/2006⁽¹⁾ which dealt with the sale of land by the Swedish municipality of Åre, where the municipality had received a conflicting higher offer on the property.

Moreover, the Authority expressed doubts as to whether the sale of land could be considered compatible with the functioning of the EEA Agreement, especially on the basis of Article 61(3)(c) of the EEA Agreement.

5. Comments by the Norwegian authorities

In a letter dated 3 December 2010⁽²⁾, the Norwegian authorities refer to their letter to the Authority dated 9 September 2008⁽³⁾.

In the letter dated 9 September 2008, the Norwegian authorities put forward that the procedure described in paragraph 2.2 of the Guidelines has been followed and thus no state aid is involved in the transaction. Further, the Norwegian authorities argue that the expert valuations were obtained prior to any sales negotiations with SDO and that the reports reflect the market price of the property. Additionally, the Norwegian authorities submitted an overview produced by Oppdal municipality showing that the price for the property is the highest price paid per square metre in the area known to the municipality.

Furthermore, the Norwegian authorities argue that the market price should reflect the value a regular buyer would be willing

to pay for the property, excluding buyers with special interests. The Norwegian authorities therefore maintain that OB's bid of NOK 3,1 million must be regarded as coming from a party with a particular interest seeing as OB has a dominant position in the local ski service market and is therefore willing to pay an excessively high price to eliminate competitors from the market. Therefore, the Norwegian authorities maintain that the value indicated by the expert valuers reflects the actual market value of the property.

6. Comments by Strand Drift Oppdal AS⁽⁴⁾

SDO submits that the present case and Commission decision C35/2006 cannot be compared. In decision C35/2006, the independent valuation of the property was carried out almost two and a half years before the sale took place and that during such a long period of time, the value of the land may have changed significantly. Secondly, SDO argues that the facts of case C35/2006 make it unclear whether the independent valuation was used for determining the contract value. In the present case, on the other hand, SDO submits that the sale of land was conducted in accordance with the Authority's Guidelines section 2.2.

SDO further maintains that OB's offer appears to be part of a strategy to become the sole provider of ski services in the local market, which, according to SDO, explains why OB made a bid far exceeding the market value of the property. SDO also refers to the information provided by the Municipality of Oppdal in an overview dated 29 August 2008⁽⁵⁾ which shows that the sales price for the property is the highest price per square metre known to the Municipality.

Further, SDO submits that the complainant has bought properties in the area for prices considerably lower than the sales price in the present case. SDO also puts forward that according to Norwegian contract law, a contract is concluded and binding if the parties have agreed to the terms, independently of whether the actual contract is signed. Therefore, SDO is of the opinion that Oppdal municipality was legally obliged to sell the property to SDO at the time OB submitted its bid.

SDO considers the sale of the property to have been carried out at market value, seeing as the sales price is based on the assessment of the two independent experts in accordance with the Authority's Guidelines. Therefore, SDO argues that no state aid is involved.

⁽¹⁾ Commission decision of 30.1.2008 in case C 35/06, OJ 2008, L 126/3.

⁽²⁾ Event No 579649.

⁽³⁾ Event No 490914.

⁽⁴⁾ Event No 579649.

⁽⁵⁾ Event No 490914.

II. ASSESSMENT

The presence of state aid within the meaning of Article 61(1) of the 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.”

6.1. State Aid Guidelines on state aid elements in sales of land and buildings by public authorities ⁽¹⁾

The aid must be granted by the State or through state resources. Municipalities are for state aid purposes considered to be part of the State, thus Oppdal municipality's resources can be considered state resources.

The State Aid Guidelines on state aid elements in sales of land and buildings by public authorities (“the Guidelines”) give further guidance 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 by way of an independent expert valuation.

Sales of publicly owned land and buildings below market value imply that state resources are involved. However, the Guidelines provide for two situations where, if the applicable conditions are met, the price paid for the property will be held to correspond to market value thereby excluding the presence of state resources. As noted above, these two situations are: (a) the sale has taken place through an unconditional bidding process; and (b) the sale has taken place after an independent expert valuation.

In the present case, the municipality did not organise an unconditional bidding process but used two independent expert valuations as the basis for determining the sales price.

Section 2.2 of the Authority's Guidelines provides that “if public authorities intend not to use the procedure described under Section 2.1,

⁽¹⁾ Available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting state aid.”

The Norwegian authorities have indicated that Oppdal municipality ordered two value assessments, by the independent appraisers Mr. Geir Husebø and Mr. Ragnar Lian. These were carried out in July 2008, respectively on the 7 and 9 of July. While SDO showed an interest in the property in February 2007 and later the same year signalled an interest in purchasing the property, no option to buy the property was granted by the Norwegian authorities, and there are no indications in the correspondence provided by the Norwegian authorities that sales negotiations or an agreement as to the purchase price was agreed upon before the conclusions of both expert valuations were known. Both reports estimated a similar market value for the property, NOK 800 000 and NOK 850 000 respectively.

6.2. The sale of the property

As the Authority pointed out in the opening decision, the Guidelines do not expressly deal with a situation where a higher conflicting bid is received after the receipt of the expert evaluation but prior to the conclusion of the contract. The Authority considers that in such a situation, the submission of a conflicting higher bid could be liable to cast doubts on whether the expert evaluations reflect the actual market value of the property.

In the opening decision, the Authority referred to Commission decision C35/2006, which dealt with a situation where an offer was made after the receipt of the expert valuation. In its decision the Commission stated:

“Even if the expert evaluation had been carried out in accordance with the Communication ⁽²⁾, i.e. an evaluation of the actual plot of land that was to be sold carried out just before the sale and on the basis of generally accepted evaluation standards, this evaluation would only be a second best instrument to determine the market price of the land, in the absence of real price offers. From the moment that a credible and binding bid is submitted and provided that this bid is directly comparable to and higher than the price estimate according to the evaluation, the former must be preferred. The bid establishes a real market price and should be considered as a better proxy for the foregone State resources than an expert evaluation” ⁽³⁾.

⁽²⁾ Section 2.2 of the State Aid Guidelines on state aid elements in sales of land and buildings by public authorities corresponds to the Commission Communication on state aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3).

⁽³⁾ Commission decision of 30.1.2008 in case C 35/06, OJ 2008, 14.5.2008, L 126/3, paragraph 59.

The Commission decision was appealed to the General Court. The General Court⁽¹⁾ disagreed with the Commission's assessment and found that no state aid was involved in the sale of land transaction. The General Court concluded that the conflicting higher offer was neither credible nor comparable to the offer accepted by the municipality⁽²⁾. Further, the General Court also pointed out that it is important to consider the specific circumstances of the case when determining whether a conflicting bid can be considered comparable⁽³⁾.

In the present case, the Norwegian authorities have submitted that OB was a buyer with a special interest in the property and as a consequence of this special interest, OB was willing to pay an abnormally high price for the property to prevent SDO from establishing a business competing with its own. OB is the dominant supplier of ski services at the ski resort. SDO's business would be in direct competition with the services provided by OB and threaten OB's market position. OB objected to the rezoning of the property and when its complaint was rejected, OB wanted to buy the property. This demonstrates OB's intentions. OB can therefore be considered as having a special interest in the property. OB's special interest is reflected in the high bid; the bid submitted by OB was over three times higher (NOK 3 100 000) than the price determined by the independent experts and the Authority has no indications that the value assessments carried out by the independent experts had any shortcomings. In the present case, the Authority considers that the bids made by SDO and OB are not comparable because of OB's special interest in the property. As a consequence of this special interest, OB is willing to make an excessively high offer on the property. This offer can therefore not be considered comparable to the offer made by SDO, which reflects the value of the property determined by the independent experts.

Therefore, in view of the circumstances of the case, the Authority concludes that the property was sold at market price in accordance with the procedure laid down in section 2.2 of the Authority's Guidelines on the sales of land and buildings by public authorities.

In light of the above, the Authority considers that no state aid was involved in Oppdal municipality's sale of the property to SDO, as the conflicting offer made by OB has to be considered as coming from a buyer with a special interest in the property. The Authority thus considers the sale to have been carried out at market value in accordance with the procedure laid down in

section 2.2 of the Authority's Guidelines on the sales of land and buildings by public authorities.

7. Conclusion

On the basis of the foregoing assessment, the Authority considers that Oppdal municipality's sale of property gnr 271/8 to Strand Drift Oppdal AS did not constitute state aid within the meaning of the state aid provisions in the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that Oppdal municipality's sale of property gnr 271/8 to Strand Drift Oppdal AS did not constitute state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

The procedure initiated pursuant to Article 4(4), read in conjunction with Article 13, of Part II of Protocol 3 concerning the sale of property gnr 271/8 by Oppdal municipality is hereby closed.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English language version of this decision is authentic.

Done at Brussels, 9 May 2012.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sabine MONAUNI-TÖMÖRDY
College Member

⁽¹⁾ Case T-244/08 *Konsum Nord v Commission*, Judgment of 13 December 2011, not yet reported.

⁽²⁾ Case T-244/08 *Konsum Nord v Commission*, paragraphs 72-76.

⁽³⁾ Case T-244/08 *Konsum Nord v Commission*, paragraph 73.