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Brussels, 9 April 2003  
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**Subject: State Aid - Notification of Sale of Rental Apartments - Municipality of Oslo**

- Acknowledgement of receipt
- Request for additional information

EU-DEL. Brussel - TW	
Ref.: 200300142-19	
10-04-2003	
Arkivkode	542.423

Dear Sir or Madam,

## 1. Introduction

The EFTA Surveillance Authority acknowledges receipt of a letter from the Mission of Norway to the European Union dated 10 February 2003 (Doc. No:03-829 A), forwarding a letter from the Ministry of Trade and Industry dated 7 February 2002 and a letter without date from the Municipality of Oslo (including 31 Annexes), all received and registered by the Authority on 11 February 2003. By way of the letter dated 10 February 2003 your authorities have submitted a notification pursuant to Article 1 (3) of the Surveillance and Court Agreement of the Municipality of Oslo's sales agreement on 1744 municipal rental apartments.

In the letter from the Municipality of Oslo it is concluded that:

*"The sale was conducted through a well-publicized, open and unconditional bidding process, albeit the period in which the apartments were marketed was shorter than the period required according to the State Aid Guidelines. There is, however, no reason to assume that the sale was conducted in a manner not likely to achieve market value for the apartments sold, or likely to exclude foreign investors.*

*Even if the Authority should be of the opinion that the sale comprise an element of aid, we submit that it should be concluded that the transaction does not fall within the ambit of Article 61(1) EEA, as intra-EEA trade is not affected".*

## 2. Background

By letter dated 18 May 2001 (Doc. No: 01-3792-D), the EFTA Surveillance Authority requested the Norwegian authorities to submit all relevant information regarding the sale of 1744 apartments to "Fredensborg Boligutleie ANS" so that the Authority could assess whether the sale was in accordance with Article 61 of the EEA Agreement and Chapter 18B, State aid elements in sales of land and buildings by public Authorities, of the Authority's State Aid Guidelines.

By letter of 31 May 2001 (Doc. No: 01-4004-D), the Authority reminded the Norwegian authorities of the "standstill-clause" in Article 1(3) of Protocol 3 to the Surveillance and

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Court Agreement and the injunction provisions ("interim measures") contained in Chapter 6, Specificities regarding aid unlawful on procedural grounds, of the State Aid Guidelines.

By letter dated 26 June 2001 from the Mission of Norway to the European Union, received and registered by the Authority on the same day (Doc. No: 01-5730-A), the Norwegian authorities submitted the documents they, in agreement with the Municipality of Oslo, regarded as containing the most relevant available information to assess whether the sale was in accordance with Article 61 of the EEA Agreement. The information submitted on 26 June 2001 contains a letter from the Ministry of Trade and Industry to the Authority dated 15 June 2001. The Ministry states in this letter *"that the Ministry does not want to express any view on the considerations presented in the submitted documents"*.

The information submitted on 26 June 2001 also contains a letter dated 5 June 2001 from the Municipality of Oslo to the Ministry of Trade and Industry. In this letter the Municipality of Oslo argues that the sale is in accordance with the Authority's State Aid Guidelines. The Municipality claims that an independent expert evaluation was carried out in accordance with Chapter 18B.2.2 of the State Aid Guidelines and that the divergence of 3.4% between the sales price and the value assessment is in line with market conditions as described in Chapter 18B2.2(b) of the State Aid Guidelines.

The Municipality of Oslo points out that the sales process must be seen in light of the time pressure. The Government implementing a hospital reform caused the time pressure that the Municipality felt subject to<sup>1</sup>. In the letter of 5 June 2001 it is stated that the time pressure might have resulted in a smaller number of bidders than desirable, and that the buyers submitted lower bids than those they would have submitted in a situation with more time at their disposal<sup>2</sup>. The Municipality argues, however, that a potentially lower price caused by the time pressure does not amount to State aid as long as the Municipality, in such a situation (under time pressure), has behaved as a private investor would have behaved in such circumstances.

By letter dated 20 July 2001 (Doc. No:01-5673 D), the Competition and State Aid Directorate stated that it had doubts about the compatibility of the sale of the rental apartments with Article 61 of the EEA Agreement. The Norwegian authorities were invited to comment on this matter, which the Authority would take into consideration before taking a decision on whether to open a formal investigation procedure (Article 1(2) of Protocol 3 to the Surveillance and Court Agreement).

The Ministry submitted its comments by telefax on 27 July 2001 (Doc. No:01-6026 A), received and registered the same day, where it stated that further proceedings *"will be carried out with the purpose to ensure that Norway's obligations under Article 61 of the EEA Agreement are respected"*. On 25 July 2001 the County Governor of Oslo and Akershus decided that the Municipality of Oslo could not lawfully transfer the right of ownership before the County Governor had made his final decision. A new expert evaluation of the value of the buildings would also be carried out.

By letter dated 31 July 2001 (Doc. No:03-829 A), the Authority informed the Norwegian authorities that it had decided not to open a formal investigation procedure at this stage. The Authority stated that it was awaiting a formal notification of the sale in accordance with its State Aid Guidelines.

<sup>1</sup> Ot.prp. nr 66 (2000-2001) Om lov om helseforetak m.m. (helseforetaksloven).

<sup>2</sup> The passage reads as follows in Norwegian: *"Dette tidspresset kan ha ført til at kretsen av interesserte ble mindre enn ønskelig, og/eller at kjøperne la inn lavere bud enn de ville gjort i en situasjon med bedre tid"*.

### 3. Information submitted

In March 2001, the Municipality of Oslo decided to sell a portfolio of 1744 rental apartments before the end of May the same year. These apartments were mainly rented out to employees in municipal hospitals. On 16 March, the independent real estate agency Akershus Eiendom AS was awarded the task of selling the apartments en bloc on behalf of the Municipality of Oslo. On 30 March, an independent consultancy firm, Catella Eiendoms-Consult AS, submitted a report on and appraisal of the apartments. A second appraisal was later ordered from an independent appraiser, OPAK AS, and submitted on 26 April. Akershus Eiendom approached the market on 2 April, with the report from Catella. The sale of the apartments was made public by a press release dated 19 April. A prospectus covering the apartments was distributed from 23 April. The appraisal done by OPAK proved to be more modest than Catella's; NOK 795 Million versus NOK 1.143 Million. OPAK's appraisal was also distributed to potential investors.

Investors were asked to submit their bids by 2 May, and the bidding contest was brought to an end on 3 May. On 8 May, Sundal Collier & Co ASA, Fredensborg Boligutleie ANS being its successor, undertook to purchase the apartments. The Municipality of Oslo considered this binding offer for three more weeks. An adjustment of the OPAK appraisal was requested by the Municipality of Oslo in order to reflect a correction of the value of certain leases due to factual circumstances not considered in the original appraisal. These factual corrections lead OPAK to reduce the value of the assets to NOK 740 Million. The adjustments were presented to the Municipality of Oslo on 14 May. By signing the contract on 31 May, the Municipality of Oslo sold the 1744 apartments en bloc at a price of NOK 715 Million to Fredensborg Boligutleie ANS.

In 2001 the Authority received information concerning the sales process and the value assessments by Catella and OPAK described in brief above. In the letter from the Municipality of Oslo attached to the letter dated 7 February 2003 from the Ministry of Trade and Industry, the Municipality has submitted comprehensive information concerning the sale, including information already submitted to the Authority in 2001. In the following, the Authority has tried to summarise in particular the new information and arguments submitted.

After the County Governor of Oslo and Akershus on 25 July 2001 decided that the Municipality of Oslo could not lawfully transfer the right of ownership, a new expert evaluation of the value of the buildings was carried out by FIGA/Nortakst. The conclusion of this appraisal (in June 2002) was that the value of the apartments was NOK 1.055 Million. In the letter from the Municipality of Oslo attached to the letter dated 7 February 2003 from the Ministry of Trade and Industry, the Municipality contests whether this appraisal reflects the value of the apartments and concludes that the appraisal from OPAK best reflects the market value.

The Municipality furthermore argues that the sale falls outside the scope of Article 61(1) EEA. The first reason is that the Municipality considers that the price obtained reflects the market value of the assets. In the view of the Municipality, the sale was made after a well publicized open auction with several participants, all having equal access to the relevant information, and the bidder with the highest bid was chosen. Thus, the sale "*is by definition at market value and consequently does not contain State aid*". Given this, it is also irrelevant "*if a different valuation of the assets existed prior to the bidding procedure*". In the present case the Municipality considers that there was even at the time of the sale an independent appraisal of the assets that confirms that market value was obtained.



Secondly, the Municipality considers that even if one should find that there is an element of aid in the transaction, and that competition has been distorted as a consequence of certain undertakings, *i.e.* Fredensborg Boligutleie ANS being favoured, there is no indication that intra-EEA trade is affected. In this context, the relevant market is the market for rental homes. As Fredensborg Boligutleie ANS, in its capacity as provider of rental homes in Oslo and surrounding areas, is not in a competitive relationship to providers of rental homes in other EEA-countries, the Municipality argues that the exchange of services between EEA countries is not affected. Also, it is highly unlikely that an aid to Fredensborg would affect cross-border trade in other markets. The Municipality therefore concludes that the sale of the apartments does not involve any state aid within the meaning of Article 61 EEA.

#### 4. Preliminary assessment of the information submitted

##### 4.1 Notification obligation

Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement states: "*The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.*" By suspending the sales contract between the Municipality of Oslo and Fredensborg Boligutleie ANS (see point 2 above), and by notifying the sale to the Authority (letter from the Mission of Norway to the European Union dated 10 February 2003 (Doc. No:03-829 A)), the Norwegian authorities have fulfilled their obligation according to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

##### 4.2 Arguments from the Municipality of Oslo in 2001 and 2003

The Competition and State Aid Directorate notes that in the letter from the Municipality of Oslo attached to the letter dated 7 February 2003 from the Ministry of Trade and Industry, the Municipality states (p.3) that: "*It is not disputed that the procedural requirements of the State Aid Guidelines have not been fully observed in the present case.*" In the letter dated 5 June 2001 from the Municipality of Oslo to the Ministry of Trade and Industry (see point 2 above), the Municipality of Oslo argued that the sale is in accordance with the Authority's State Aid Guidelines.

Furthermore, in the letter from the Municipality of Oslo attached to the letter dated 7 February 2003 from the Ministry of Trade and Industry, the Municipality argues that: "*The sale was conducted through a well-publicized, open and unconditional bidding process ...*". In the letter dated 5 June 2001, the Municipality of Oslo "*is of the opinion that the sale is within the framework of the requirements set out in ESA's guidelines. The background of this is that:*

1. An "*independent expert evaluation*" has been carried out, cf 18B.2.2 of the Guidelines
2. The sales price achieved deviates by 3.4% from the above-mentioned independent expert evaluation, cf 18B.2.2.(b) of the Guidelines".

*I.e.:* In 2001 the Municipality of Oslo argued that the sale was in accordance with the Guidelines, while now it is stated that the procedural requirements of the Guidelines have not been fully observed. Secondly, in 2001 the Municipality argued that the rules laid down in Chapter 18B.2.2, Sale without an unconditional bidding procedure, had been followed. Now it is argued that an unconditional bidding process took place, *i.e.* that the rules in Chapter 18B.2.1, Sale through an unconditional bidding procedure, and not



Chapter 18B2.2, Sale without an unconditional bidding procedure, have been followed (even if the period in which the apartments were marketed was too short).

The Competition and State Aid Directorate would appreciate receiving additional information and/or comments from the Norwegian authorities in relation to these various arguments.

#### 4.3 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."*

Aid falling within this provision is incompatible with the EEA Agreement and hence prohibited, provided that the following four conditions are fulfilled:

1. the aid is granted by "EC Member States, EFTA States or through State resources in any form whatsoever";
2. the aid "distorts or threatens to distort competition";
3. the aid favours "certain undertakings or the production of certain goods"; and
4. the aid "affects trade between the Contracting Parties".

Rulings from the European Court of Justice (ECJ) and the EFTA Court, the State Aid Guidelines as well as previous decisions by the Authority and the European Commission, provide clarification as to whether or not a measure is to be qualified as aid under Article 61(1) of the EEA Agreement.

Condition 3 above means that the measure must be specific or selective, *i.e.* that it affects the balance between the beneficiary and its competitors. In the case at hand, the beneficiary would be Fredensborg Boligutleie ANS. The Authority understands that it is not disputed that this condition is fulfilled.

Condition 1 above is directed at all aid financed from public resources, including aid granted by regional or local bodies. It is thus clear that any aid granted by the Municipality of Oslo falls within the notion of State resources. However, the Municipality of Oslo argues that: *"the price obtained reflects the market value of the assets. The sale was made after a well publicized open auction with several participants, all having equal access to the relevant information, and the bidder with the highest bid was chosen. Thus, the sale 'is by definition at market value and consequently does not contain State aid' c.f. Procedural and Substantive Rules in the Field of State Aid, hereinafter referred to as the State Aid Guidelines, point 18B.2.1 (I)."*

In Chapter 18B.2.1.(1)(a) of the State Aid Guidelines it is stated that: *"An offer is 'sufficiently well-publicized' when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real-estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers."*

*The intended sale of land and buildings, which in view of their high value or other features may attract investors operating on a Europe-wide or international scale, should*



*be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale."*

As far as the Competition and State Aid Directorate understands the sales process described in the notification, the sale was not advertised over a period of two months or more, it was not advertised in the national press or other appropriate publications and it was not advertised on a Europe-wide or international scale in publications which have a regular international circulation. The Competition and State Aid Directorate would appreciate if the Norwegian authorities could confirm this.

Furthermore, the sales price agreed (and notified) was NOK 715 Million, while the result of the new appraisal from FIGA/Nortakst was NOK 1.055 Million. The Municipality of Oslo argues that the appraisal from OPAK (NOK 740 Million) should be chosen as reflecting market value. The Competition and State Aid Directorate has doubts as to the arguments put forward by the Municipality of Oslo in this respect.

Conditions 2 and 4 above entail that the measure must distort or threaten to distort competition and affect trade between the Contracting Parties. Under settled case law for the purposes of this provision, the mere fact that the aid strengthens the firm's position compared with that of other firms, which are competitors in intra-EEA trade, is enough to allow the conclusion to be drawn that intra-EEA trade is affected. It is irrelevant that the aided enterprises do not export its produce.

The Municipality of Oslo argues (p.26) that: *"Even if the price obtained were found to be below market value, thus constituting an aid, the sale of the apartments would in the opinion of the Municipality of Oslo not constitute aid within the meaning of Article 61(1) EEA. The reason for this being that the market in which Fredensborg, the buyer, is involved, does not contain elements of cross-border trade"*.

The Municipality of Oslo also argues (p.27) that the market for rental homes in south eastern Norway has a local character and refers to cases concerning aid to service providers (for example Commission decision N 258/00, *Freizeitbad Dorsten*). The Competition and State Aid Directorate would appreciate if the Norwegian authorities would clarify whether they consider that Fredensborg Boligutleie ANS is a service provider, and whether they consider that the rules concerning services of general economic interest applies.

The Competition and State Aid Directorate considers that the real estate market in Oslo is not limited to local undertakings. Fredensborg Boligutleie ANS is actually or potentially in competition with similar undertakings in Norway and other EEA States. A sales price below market value favouring Fredensborg Boligutleie ANS would distort or threaten to distort competition and affect trade between Contracting Parties. A sales price below market value would, therefore, in the view of the Competition and State Aid Directorate, constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

## 5. Conclusion

According to Article 1(2) of Protocol 3 to the Surveillance and Court Agreement and point 5.2(1) of the State Aid Guidelines, the Authority is obliged to open the procedure provided for in Article 1(2) to the Surveillance and Court Agreement whenever it is in doubt about the compatibility of the aid with the functioning of the EEA Agreement.



The Competition and State Aid Directorate has doubts about the compatibility of the sale of buildings by the Municipality of Oslo to Fredensborg Boligutleie ANS with the State aid provisions of the EEA Agreement. To the extent that the Norwegian authorities are not able to remove these doubts by amending or withdrawing the notification, the Competition and State Aid Directorate will propose that the Authority opens the procedure provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.

The Competition and State Aid Directorate invites the Norwegian authorities to submit comments on this matter, which it will take into consideration before it decides to propose to open a formal investigation procedure. If the Norwegian authorities do not have any comments, the Competition and State Aid Directorate will proceed without further notice.

Any comments from the Norwegian authorities should reach the Authority within 20 working days from receipt of this letter.

Yours faithfully,

A handwritten signature in cursive script, appearing to read "Amund Utne".

Amund Utne  
Director