JUDGMENT OF THE COURT
17 August 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Sale of land by public authorities – Market investor principle – Option agreement – Relevant time of assessment for considering the market value)

In Case E-12/11,

Asker Brygge AS, represented by Thomas Nordby and Espen Bakken, advocates, Arntzen de Besche advokatfirma,

applicant,

v

EFTA Surveillance Authority, represented by Gjermund Mathisen, Officer, and Maria Moustakali, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for annulment of the EFTA Surveillance Authority's Decision No 232/11/COL of 13 July 2011 concerning sale of land at Nesøyveien 8, gnr. 32 bnr. 17, in the Municipality of Asker, Norway,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of the Danish Government, represented by Christian Vang, Ministry of Foreign Affairs, acting as Agent, and the European Commission ("the Commission"), represented by Davide Grespan, member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of Asker Brygge AS ("Asker Brygge" or "the applicant"), represented by Espen Bakken; the EFTA Surveillance Authority ("ESA" or "the defendant"), represented by Gjermund Mathisen; and the Danish Government, represented by Christian Vang, at the hearing on 25 April 2012,

gives the following

Judgment

I Legal context

1 Article 61 EEA provides as follows:

> *1. 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 the Contracting Parties, be incompatible with the functioning of this Agreement.*
>
> …
>
> *3. The following may be considered to be compatible with the functioning of this Agreement:*
>
> *(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;*
>
> *(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;*

> *(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;*
>
> *(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.*

2 Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

> *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. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

II Facts

Background

3 The Municipality of Asker and Asker Brygge entered into an agreement in 2001 ("the option agreement") granting Asker Brygge an option, exercisable until 31 December 2009, to purchase the property located at Nesøyveien 8, gnr. 32 bnr. 17, in the Municipality of Asker, for a fixed price of NOK 8 000 000, adjusted for inflation according to the Consumer Price Index. The property comprised land of approximately 9 700 m² on which there were no buildings. In 2001, the property was classified for use as a marina and storage area for boats.

4 Under the option agreement, the Municipality granted to Asker Brygge the right to purchase the property at an index adjusted market price, considered to be NOK 8 000 000 at the time, on condition that Asker Brygge undertook extensive planning and research to obtain permission for a change of use with a view to further develop the property as a marina.

5 The option agreement included a right of renegotiation for Asker Brygge if property prices were to decrease considerably before the option was exercised. There was no corresponding right of renegotiation for the Municipality if property prices were to increase. Moreover, Asker Brygge was given a right to pay the purchase price in two instalments, with payment of 70% of the purchase price deferred and interest-free until 31 December 2011.

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

7 In 2005, Asker Brygge exercised the option to purchase the land. The parties entered into a sale agreement for the land on 21 March 2007 at a price of

NOK 8 727 462. The land was conveyed to Asker Brygge on the same date. However, in accordance with the option agreement, only the first instalment of the purchase price (30%) was paid on the date of conveyance. The second and larger instalment (70% of the purchase price) amounting to NOK 6 109 223 was due at the latest by 31 December 2011.

8 By letter of 15 December 2008, received by ESA on 13 February 2009, the Norwegian authorities notified the sale to ESA, pursuant to Article 1(3) of Part I of Protocol 3 SCA. ESA requested additional information in letters of 8 April 2009 and 7 July 2009, to which the Norwegian authorities replied by letters of 11 May 2009 and 14 August 2009 respectively.

9 Subsequently, ESA informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 SCA in respect of the sale of the land. ESA called on interested parties to submit their comments. By a letter of 29 January 2010, it received comments from one interested party, the purchaser Asker Brygge. On 14 October 2010, a meeting between ESA and the Norwegian authorities was held to discuss the case. Following that meeting, the Norwegian authorities submitted their final comments on 19 November 2010.

The contested decision

10 On 13 July 2011, ESA adopted Decision No 232/11/COL ("the contested decision"), in which it held that the sale constituted unlawful State aid incompatible with the EEA Agreement.

11 ESA adopted a two-step approach to its State aid assessment. First, it examined whether the 2001 option agreement was concluded in accordance with the market investor principle, i.e. whether a private investor operating in a market economy would have chosen to enter an agreement with a similar price and terms as the one signed between the Municipality and Asker Brygge in 2001. Second, ESA assessed whether, when the sale agreement was concluded in 2007 on the basis of the price agreed in 2001, the property was transferred at market value.

12 ESA found that the option agreement was not concluded on market conditions, in accordance with the market investor principle. It held that a private operator would not have entered an option agreement on similar terms as the Municipality of Asker, in particular for such a long period without requiring adequate remuneration for the option itself. In ESA's assessment, by simply requiring remuneration corresponding to the consumer price indexed value of the property assessed in 2001, the Municipality ran the risk of granting State aid at a later stage. The decision found that the Municipality did not obtain an independent valuation before entering into the agreement in 2001, but assessed the property's value based on its experience in the real estate market. ESA considered that even if NOK 8 000 000 represented the market price for the property as such in 2001, the market value of the other elements agreed also had to be assessed to determine the agreement's total value. Otherwise, this would mean that Asker

Brygge obtained the option as such free of charge, without any economic consideration for its preferential right of purchase. On that point, ESA also noted that although the option agreement barred the Municipality from selling the property to another buyer, it was not entitled to any compensation were Asker Brygge to decide not to purchase the property.

13 ESA did not accept, as argued by the Norwegian authorities, that the option could not be considered to have been granted without remuneration because Asker Brygge undertook obligations in relation to planning and research on difficult soil conditions and pollution. On the contrary, ESA considered that the option agreement did not entail any real risk for Asker Brygge. The planning and research commitment did not qualify as proper payment for the possibility to purchase the land. There was no unconditional obligation to carry out any research as the holder of the option was entitled not to enter a purchase agreement, without any contractual penalty. In any event, any amount spent on research would benefit the potential purchaser. If the research were to show that the property was unsuitable for development, the research works could be stopped and costs minimised, without any obligation to purchase the property. Accordingly, the option agreement involved minimal risk for the potential purchaser, whereas the Municipality would not profit if the research showed that the property could be developed.

14 ESA found that since the option agreement was not entered into on market terms, the existence of aid in the subsequent sale could not be excluded. Consequently, ESA then, as a second step, went on to assess whether the property was sold at below market value. It reasoned that although the option agreement gave Asker Brygge a right to purchase the property valid for a period of ten years, the property remained with the Municipality until Asker Brygge exercised the option. Therefore, the relevant time for the purposes of the State aid assessment was when the property was sold and transferred to Asker Brygge in 2007 and not the date of the option agreement in 2001, when the conditions for the sale were established.

15 Consequently, ESA compared the selling price of around NOK 8 700 000 with the market value of the property in 2007.

16 In that connection, ESA analysed the three valuations of the property submitted by the Norwegian authorities together with their notification, all of which were conducted after the 2001 option agreement was concluded.

17 A first valuation of 30 June 2006 was not taken into account in the State aid assessment. In ESA’s view, the value of the property in 2007 at the time of its sale and transfer to the new owner represented the relevant value. In any event, ESA found the estimation made in the 2006 valuation to be very approximate.

18 A second report, jointly commissioned by the parties to the sale agreement, was delivered on 18 January 2008 by TJB Eiendomstaksering, EK & Mosveen AS and Bjørn Aarvik. The report concluded that the market value of the property in

2007 was NOK 26 000 000, discounted to take account of inflation to a value of NOK 17 000 000 in 2001.

19 Neither Asker Brygge nor the Municipality agreed with that assessment. Hence, a new valuation report was delivered by TJB Eiendomstaksering, EK & Mosveen AS and Bjørn Aarvik on 16 June 2008. It constituted a revised version of the earlier valuation. It reduced the assessment of the property's market value in 2007 to NOK 12 000 000, discounted to NOK 8 000 000 in 2001 prices.

20 Both of the 2008 valuations were based on the use of the property as was permitted in 2001 and 2007, that is, as a marina and storage area for boats. Both also presumed that it would be possible to dredge the shoreline to establish further moorings, and to establish boat storage yards. In the second report it was also clarified and highlighted that risks in relation to ground pollution had been taken into account in the reports.

21 ESA based its assessment of the market price on the second 2008 report. As a consequence, it concluded that, as the selling price of NOK 8 727 462 was below the property's market value in 2007 of NOK 12 000 000, the sale was not carried out in accordance with the market investor principle.

22 Furthermore, ESA found that the sale exhibited all the constituent elements of the concept of State aid as defined in Article 61(1) EEA; i.e. it was an advantage, granted by the State or through State resources, on a selective basis, affecting intra-EEA trade, and which distorts or threatens to distort competition. Finally, ESA found that the transaction could not be justified under the derogations to the prohibition on State aid provided for in Article 61(2) and (3) EEA.

23 The operative part of the contested decision reads, in extract, as follows:

> *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.

…

III Procedure and forms of order sought

24 By application registered at the Court on 21 September 2011, the applicant lodged the present action under the first paragraph of Article 36 SCA for annulment of the contested decision. ESA submitted a statement of defence, which was registered at the Court on 24 November 2011. The reply from Asker Brygge was registered at the Court on 18 January 2012. The rejoinder from ESA was registered at the Court on 24 February 2012.

25 The applicant requests the Court to:

> annul the EFTA Surveillance Authority Decision No 232/11/COL of 13 July 2011 concerning sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the Municipality of Asker.

26 ESA claims that the Court should:

(i) dismiss the application; and
(ii) order the applicant to pay the costs.

27 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Danish Government and the Commission submitted written observations, registered on 3 February 2012 and 31 January 2012, respectively.

28 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

IV Law

I – *Admissibility of certain documents*

29 Pursuant to Article 37 of the Rules of Procedure, a party may offer further evidence in reply or rejoinder. The party must, however, give reasons for the delay in offering it.

30 Compliance with Article 37 of the Rules of Procedure is a procedural requirement which may be raised by the Court of its own motion.

31 In the present case, the applicant presented evidence concerning pollution of the property in two unnumbered annexes to its reply. The applicant has not given any reasons for the delay. These annexes are therefore inadmissible.

32 According to Article 25(2) of the Rules of Procedure, English shall be used in the written and oral part of the procedure, unless otherwise provided in those rules. According to Article 25(3) of the Rules of Procedure, all supporting documents submitted to the Court shall be in English or be accompanied by a translation into English, unless the Court decides otherwise. According to the second subparagraph of that provision, in the case of lengthy documents, translations may be confined to extracts.

33 Compliance with Article 25 of the Rules of Procedure is a procedural requirement which may be raised by the Court on its own motion.

34 Consequently, an annex submitted exlusively in Norwegian is inadmissible, unless the document which refers to it contains at least an extract in English as provided for in the second subparagraph of Article 25(3) of the Rules of Procedure (see Case E-15/10 *Posten Norge* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 115).

35 In the present case, both parties have submitted documents which are in Norwegian only. This applies to annexes IV, V, VI, VII, VIII, IX, X and XI to the application, and annexes III, IV, V, VI and VII to the defence. However, the defence and rejoinder contains extracts in English of some of these annexes.

36 Annexes V, VI, VII, VIII, IX, X and XI to the application are therefore inadmissible. In the specific circumstances of the case, annex IV to the application and annexes III, IV, V, VI and VII to the defence are admissible only in so far as they have been translated.

II – *The substance of the action*

A – *The complaint alleging that ESA applied the wrong date for the assessment*

1. Arguments of the parties

37 The applicant submits that ESA erred in its assessment of the relevant time for the determination whether State aid within the meaning of Article 61(1) EEA has been granted in favour of Asker Brygge. It has not taken account of the fact that the sale is based on, and was merely an execution of, the terms agreed in the 2001 option agreement. If the closing of the sale transaction were to constitute the relevant date for the State aid assessment, this would imply that public authorities and private entities would be unable to enter option agreements corresponding to those between private parties alone. There will always be a risk, as a result of external factors that the parties cannot influence, that the subsequent contract implies State aid. Such an interpretation of the market investor principle will result in unequal treatment between private and public sellers.

38 The decisive factor when applying the market investor principle should be whether commercial agreements, including option agreements, are based on normal market conditions at the time they are entered into by the parties.

39 The applicant adds that, provided that the initial option agreement is based on normal market conditions, any profit for the commercial operator gained from the final sale agreement does not involve State aid within the meaning of Article 61(1) EEA. Applying that principle to the present case, the economic advantage gained by Asker Brygge does not constitute State aid. It merely results from the option agreement and the fact that real estate prices increased after conclusion of the option agreement.

40 The applicant concedes that it might be discussed whether Asker Brygge should have paid an option premium in addition to the cost of researching and planning the property. However, ESA did not establish a market-based reference value with a view to calculating any possible aid element of the option. Hence, in the applicant's view, ESA failed to prove that the criteria of Article 61(1) EEA are fulfilled.

41 ESA contests these arguments. It submits that it did not err in taking the date when the sale agreement was entered into in 2007 and not when the option agreement was first concluded in 2001 as the basis for the State aid assessment and the calculation of the economic advantage received by the applicant.

42 Had the option agreement been notified at the time it was first concluded, ESA would have had to assess the option alone. The same would have been the case if the agreement had been notified when it was renewed in 2004, or even when Asker Brygge exercised the option in 2005. However, no notification was made until nearly two years after the sale was effected. Both the notification form submitted by the Norwegian authorities on 9 May 2009 and a letter from the Municipality of 9 May 2009 specified that any State aid involved was put into effect on 21 March 2007. Moreover, both valuation reports commissioned by the Municipality assessed the value of the property in 2007.

43 The applicant submits, however, that pursuant to the SCA, it is within ESA's competence to undertake an assessment of all the relevant facts of a State aid case. ESA is entitled to ask for further information from the notifying party. In any event, ESA's contention that the notification of 9 May 2009 supports basing the assessment on the 2007 agreement is flawed. The notification letter of 15 December 2008 states that the Municipality of Asker consistently held the correct time for the aid assessment to be the date the parties concluded the option agreement.

44 ESA submits that its approach of taking the time when the sale agreement was entered into, in 2007, as the basis for the State aid assessment was, in effect, more lenient on the applicant. The aid that is to be recovered consists of two components, namely (i) the difference between the purchase price and the market price of the property at the time it was sold, and (ii) the economic advantage of

the “soft loan”, i.e. the interest-free deferral of payment of 70% of the purchase price, from the date of the sale agreement signed on 21 March 2007. Were the State aid assessment to be calculated from the date when the option agreement was first concluded, the additional economic advantage conferred upon the applicant by the option agreement in 2001 – and by its renewal in 2004 – would also have to be recovered. In those circumstances, the total amount of State aid would consist of (i) the difference between the market price and the purchase price at the time of the sale in 2007, together with (ii) the economic advantage of the soft loan, (iii) the unpaid option premium from 2001, and (iv) the unpaid option premium from 2004.

45 The applicant doubts whether recovery of further aid qualifies as an argument against using the date of the option agreement as the basis for the assessment. It points out that ESA argues that 2001 is not the relevant date for the assessment and, at the same time, that also the option premium and the soft loan agreed in 2001 may constitute State aid. In the applicant’s view, this approach is inconsistent and illogical. In any event, it notes that only the difference between the purchase price set out in the 2007 sale agreement and the market price was found to entail State aid in the contested decision. The applicant observes that the Court’s assessment is limited to the scope of ESA’s decision.

46 ESA argues that it used its competence and reviewed the option agreement in the contested decision. It was, however, not demonstrated that the option agreement was entered into on market terms. Rather, the exclusive right to purchase the property was granted to the applicant free of charge, and was renewed free of charge.

47 The Danish Government submits that whether an agreement constitutes an advantage in relation to the concept of State aid must, in this case, be assessed on the basis of the market investor principle, and the assessment must take place at the time the parties entered into a legally binding contract.

48 In its view, provided that the price of the option agreement was valued correctly in accordance with the Commission’s Communication on State aid elements in sales of land and buildings by public authorities and normal economic models on valuation of options at the time the parties entered into the agreement, any difference at the time when the option is exercised between the price established by the contract and the actual market price does not constitute State aid. It is merely the result of price or market fluctuations in relation to the value of the option that the applicant was granted in 2001.

49 According to the Danish Government, any part of the option agreement between the Municipality of Asker and the applicant which constitutes State aid must be taken into account when assessing the amount of aid granted. At the very least, the unpaid option premiums from 2001 and 2004, the soft loan, and the unilateral right for the applicant to demand renegotiation of the price of the property and all other terms in the contract fall within the meaning of State aid.

50 The Commission agrees in principle with the applicant's contention that the decisive point in applying the market investor principle should be whether commercial agreements, including option agreements, are based on normal market conditions at the time when they are entered into between the parties. If a public authority grants an option for the sale of land and receives appropriate remuneration for the risk of a change in the value, the presence of aid can be excluded even if the market price of the land at the time of the sale is higher than the price agreed in the option.

51 However, in the case at hand, a private operator would not have entered into such an agreement on similar terms. The option agreement thus contained an element of aid. To evaluate that aid, ESA had to place itself at the moment when that agreement was entered into in 2001. A quantification of that aid element would lead to the identification of incompatible aid to be recovered from the applicant. The applicant therefore has no legal interest in pursuing this claim, because even if it were accepted it would bring it no benefit.

52 With regard to the subsequent sale of the land to the applicant, the Commission considers that ESA was correct not to adopt a strict approach and automatically conclude that since the option agreement does not comply with the private operator test any subsequent transaction implementing that agreement also contains State aid. Even if the option agreement does not reflect the behaviour of a private operator, the possibility could not be excluded that the price agreed in the sale agreement might have reflected the market value of the land at the time when that agreement was concluded. Therefore, ESA had to consider the market value of the land at that time and compare it with the price established in the sale agreement. Only on the conclusion of that agreement was aid in the form of a difference between the selling price and the market value of the land granted to the applicant by a legally binding act of the Norwegian authorities.

2. Findings of the Court

53 By the present plea, the applicant essentially claims that the existence of State aid should be assessed at the date when the option agreement was entered into in 2001 and not when the sale of the land was carried out in 2007.

54 In the contested decision, ESA applied the market investor test. ESA first examined whether a private investor operating in a market economy would have chosen to enter an option agreement with similar price and terms as the one signed between the Municipality and Asker Brygge in 2001. ESA concluded that the option agreement was not entered into on market conditions. Accordingly, the presence of State aid in the subsequent sale of the property could not be excluded. Consequently, ESA went on to assess whether, when the sale agreement was concluded in 2007 on the basis of the price agreed in 2001, the property was transferred none the less at market value.

55 The concept of State aid in Article 61(1) EEA includes not only positive benefits, such as subsidies, loans or direct investment in the capital of undertakings, but

also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, *inter alia*, Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM Fundmanagement* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 50, and the case-law cited).

56 The conditions which a measure must meet in order to be treated as aid for the purposes of Article 61(1) EEA are not fulfilled if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of the State acting as an economic operator, that assessment is made by applying, in principle, the private investor test (see, for comparison, Case C-124/10 P *Commission* v *France*, judgment of 5 June 2012, not yet reported, paragraph 78).

57 As regards an option agreement concerning the sale of land or buildings, that is, a contract giving the option holder a right to purchase the property at a specific price at some point in the future, the relevant question is whether a private investor would have entered into the option agreement in question on the same terms and, if not, on which terms he might have done so. The comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of conclusion of the option agreement in question, having regard to the available information and foreseeable developments at that time (see, for comparison, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraphs 245 and 246).

58 If a private investor, operating in normal competitive conditions, would be likely to have entered into an option agreement on similar terms as the public authority, the existence of State aid will be excluded.

59 The applicant appears not to contest any of the factual findings concerning the option agreement but seems only to contest the legal implications. However, it cannot be considered likely that a private investor, operating in normal competitive conditions, would have entered into a contract without remuneration for the risk of a change in the value of the land. There was no option premium and the right to renegotiate the agreement was one-sided in favour of the other party to the contract. This conclusion is reinforced by the fact that the applicant expected to be able to exercise dredging rights and applied for a permission to dredge. Such a permission would have led to an important increase in the value of the land without any compensation for the municipality.

60 On the other hand, the situation might have been different if the option agreement had been notified and ESA had found that the conditions of the agreement either satisfied the private investor test or were declared compatible with the functioning of the EEA Agreement. Under the first of those possibilities,

if the price fixed in the option agreement turned out to be lower than the market price of the land when the sale took place, that difference would, in principle, not constitute State aid within the meaning of Article 61(1) EEA.

61 Therefore, ESA was entitled to conclude, without committing a manifest error of appraisal, that the provisions of the present option agreement and the intentions displayed by the private investors in this case did not demonstrate that a prudent private investor would have entered into a similar option agreement, and that, consequently, Article 61 EEA was applicable to the option agreement.

62 Moreover, the question whether a measure constitutes aid within the meaning of Article 61(1) EEA must be resolved having regard to the situation existing at the time when the measure was actually implemented (see, for comparison, Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen and Others* v *Commission* [2010] ECR II-585, paragraph 120, and Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 53).

63 Thus, as regards a sale by public authorities of land or buildings to an undertaking involved in an economic activity, the relevant time for assessing the existence of State aid must, in principle, be the time when the sale was actually carried out.

64 Based on all the foregoing, the Court concludes that ESA did not err in taking the date when the sale agreement was entered into in 2007 and not the time when the option agreement was first concluded in 2001 as the basis for the State aid assessment and the calculation of the economic advantage received by the applicant. In a situation such as that in the present case, in order to properly calculate the economic advantage received by the applicant, ESA must simply assess whether the price paid in the sale agreement corresponds to the market price regardless of the price fixed in the option agreement. Therefore, the argument that it was erroneous to use 2007 as the basis for assessment is rejected.

65 In addition, the applicant has submitted that ESA erred in any event because for the purposes of calculating the potential aid element in the option agreement it failed to establish a market-based value for any option premium which, on its assessment, should have been paid. This argument must be rejected. The measure which was notified to ESA was the sale of the land. As the subject of ESA's State aid assessment was the actual sale of the land, not the option agreement as such, ESA was not required to quantify the aid element in the option agreement. ESA was required simply to establish whether an aid element in the sale of land could be excluded because Article 61(1) EEA was not applicable. In order to do so, it merely needed to ascertain whether the option agreement was entered into on market terms.

66 It is clear from the contested decision that ESA found that the option agreement had a value, and that the Municipality did not receive any remuneration for the option. At any rate, as a quantification of the aid element in the option agreement would have entailed recovery of a greater amount from the applicant, the Court

fails to see that the applicant has any legal interest in pursuing this claim. Even if the claim were accepted, it would bring the applicant no benefit. Therefore, this argument must be rejected.

67 Consequently, the first plea must be rejected.

B – *The complaint alleging that ESA did not correctly calculate the market price in 2007*

1. Arguments of the parties

68 The applicant disputes the validity of the second 2008 valuation report, which ESA used as the basis for its State aid assessment. According to the applicant, the report cannot be used in the assessment of whether Asker Brygge has received State aid because it does not establish a reliable market price of the property. The report is based on an assumption of further development of the property as a marina, and that dredging of the shoreline to make 85 new moorings available for lease would be approved. The latter assumption is fundamentally flawed, as Norwegian law contains a general prohibition on dredging. The applicant's application for a derogation was rejected by the County Governor, and an administrative appeal brought against that decision was unsuccessful. Consequently, the prohibition on dredging continues to apply to the property. The income estimated in the report from the lease of new moorings, as well as winter storage spaces, has not materialised.

69 The applicant acknowledges that the legality of a State aid decision must be assessed in the light of the information available to ESA when the decision was adopted. However, it argues that in its third party comments on the opening of the formal investigation procedure it provided ESA with factual documentation on the basis of which ESA should have understood that the possibility for further dredging on the property is highly contested. The fundamental premise on which the valuation was based was therefore dubious. ESA should therefore have invoked the right to request further information, and to the extent necessary have adopted an order ("information injunction") pursuant to Article 10(3) of Part II of Protocol 3 SCA, in order to ensure that its decision was based on the correct factual circumstances.

70 Moreover, the applicant argues that although the property is polluted and Asker Brygge will incur cost of cleaning the land, this cost is not included in the report.

71 ESA contests the applicant's arguments and submits that the factual circumstances were appropriately taken into account when establishing the market price for the property in 2007.

72 ESA refutes the argument that the assumption that the shoreline may be dredged is "fundamentally invalid". Under Norwegian law there is no absolute prohibition on dredging. Instead, there is a general prohibition subject to a possibility to

obtain a permission. If the valuation were to disregard that possibility, it would fail to take account of the fact that investors buy property to develop.

73 A proper assessment of the property's value in 2007 must be based on the assumptions of potential buyers at that time. Indeed, the applicant itself appears to have relied upon this assumption. First, in an agreement concluded on 1 June 2006 with Slependen Båtforening it undertook to provide the necessary dredging. Second, Asker Brygge has on two occasions unsuccessfully applied for permission to dredge. Therefore, at the relevant time, Asker Brygge was planning to dredge and apparently made business calculations and entered into contracts on that basis and, thus, in fact, based itself on the assumption that the shoreline may be dredged. It thus makes sense that the assessment of the property's value in 2007 took account of the fact that other potential buyers would make the same assumption.

74 ESA submits that it was under no obligation to request further information, or to issue an information injunction against Norway, before adopting its decision. It observes that, pursuant to Article 10(3) of Part II of Protocol 3 SCA, such an injunction can only be issued after repeated failure on the part of the EFTA State concerned to provide information, despite being requested to do so and formally reminded thereof.

75 ESA contends that the applicant's assertion that the cost of cleaning the land is not included in the relevant valuation report is erroneous. Rather, the report emphasised that pollution was indeed taken into account.

76 According to the applicant, neither the applications for exemption nor the fact that a contract was entered into between Asker Brygge and Slependen Båtforening support the view that it relied on the right to dredge. Both the agreement and the applications were necessary steps in an attempt to develop the land, irrespective of the applicant's appraisal of the actual possibility to obtain an exemption from the prohibition on dredging.

77 ESA submits that the applicant's position is inherently contradictory. On the one hand, it wants the property valued on the basis that dredging is definitively prohibited. On the other, it evidently wants to dredge on the property in order to develop it.

78 The Commission fully supports ESA's view as regards the alternative plea.

2. Findings of the Court

(a) The value of the land in question

79 A sale of land or buildings by public authorities to an undertaking involved in an economic activity may include elements of State aid, in particular where it is not made at market value. In order to determine whether a sale is made at market value, ESA must apply the private investor test, to ascertain whether the price

paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires ESA to make a complex economic assessment (see, for comparison, Cases C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 68, and C-239/09 *Seydaland*, judgment of 16 December 2010, not yet reported, paragraph 34).

80 Where ESA adopts a measure involving a complex economic assessment, it enjoys a wide discretion. Judicial review of that measure, even though it is in principle a "comprehensive" review of whether a measure falls within the scope of Article 61(1) EEA, is limited to verifying whether ESA complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see, for comparison, Case E-4/97 *Norwegian Bankers' Association* v *ESA* [1999] EFTA Ct. Rep. 3, paragraph 40).

81 Measures which, in various forms, mitigate the burdens which are normally included in the budget of an undertaking and which are thereby similar to subsidies, such as, for example, the supply of goods or services on preferential terms, constitute benefits for the purposes of Article 61(1) EEA. When applied to the sale of land to an undertaking by a public authority, the consequence of that principle is that it must be determined whether the sale price could not have been obtained by the purchaser under normal market conditions. Where ESA carries out an examination for that purpose of the experts' reports drawn up after the transaction in question, it is bound to compare the sale price actually paid to the price suggested in those various reports and to determine whether it deviates sufficiently to justify a finding that there is a benefit. That method makes it possible to take into account the uncertainty of such a determination, which is by nature retrospective, of such market prices (see, for comparison, Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraphs 44 and 45).

82 In the present case, the applicant advances two arguments in support of its contention that the market price established by ESA relying on the second 2008 valuation report does not sufficiently take account of the factual circumstances in 2007. First, the applicant argues that the report is based on an assumption of dredging of the shoreline for further development of the property, even though Norwegian law contains a general prohibition on dredging unless an exception is given. Second, it asserts that the cost of cleaning the land is not included in the valuation report.

83 As regards the first argument, the Court notes that it is undisputed that dredging was a prerequisite for further development of the land in question as a marina. Moreover, it was a condition in the option agreement that the option holder undertook planning and research with a view to further development of the property. Second, the Court notes that the applicant applied in 2007 for a

derogation from the general prohibition on dredging. Moreover, at the hearing the applicant confirmed that it had another application pending. This shows that the applicant believed that there was a possibility to receive permission to dredge the property in question. In the light of these facts, the Court finds that it has not been established that ESA committed a manifest error of assessment when relying on the assumption that a buyer of the land would obtain a derogation from the general prohibition on dredging.

84 The second argument must also be rejected. As the defendant has shown, the second 2008 valuation report (annex IV to the application) clearly states that "a degree of polluted mass" was taken into account in the cost analysis. This evidence was not rebutted by the applicant. In the light of this fact, the Court finds that it has not been established that ESA made a manifest error of assessment when it calculated the value of the land.

(b) The obligation to issue an information injunction

85 Finally, the applicant has argued that ESA should have invoked the right to request further information, and to the extent necessary have adopted a decision pursuant to Article 10(3) of Part II of Protocol 3 SCA, in order to ensure that its decision was based on the correct factual circumstances. In order to make a proper assessment of this complaint, it is necessary to recall the purpose of the information injunction.

86 Article 10 of Part II of Protocol 3 SCA is applicable in cases concerning unlawful aid, that is new aid put into effect in contravention of the standstill obligation in Article 1(3) of Part I of Protocol 3 SCA.

87 Under Article 10(1) of Part II of Protocol 3 SCA, where ESA has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay. According to the second paragraph of the same provision, ESA shall, if necessary, request information from the EFTA State concerned.

88 Only if the EFTA State concerned does not comply might ESA be under the obligation to issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. According to Articles 5(1) and 5(2) of Part II of Protocol 3 SCA, which also apply *mutatis mutandis*, ESA shall request additional information if it considers that the information provided by the EEA State is incomplete or that State does not reply. If the EEA State does not comply, ESA has to send out a reminder.

89 It is only after this stage has been reached that ESA must issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA where there is no timely response or the information provided is incomplete. This is not the case in the present proceedings.

90 It is true that ESA must always examine all the relevant features of the transaction at issue and its context, particularly in applying the market investor test (see, for comparison, Case T-244/08 *Konsum Nord ekonomisk förening* v *Commission*, judgment of 13 December 2011, not yet reported, paragraph 57, and Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others* v *Commission* [2010] ECR II-4749, paragraph 172, and the case-law cited).

91 In the present case, the applicant has not shown in what way the information available to ESA was incomplete but only claims that ESA should have requested a "clarification" of the necessary factual information.

92 Moreover, it is clear from the contested decision that ESA made an assessment of the value of the property in question based on the valuation reports submitted in the course of the proceedings.

93 In those circumstances, it was not appropriate for ESA, which was in a position to make a definitive assessment as to the compatibility of the disputed aid with the common interest on the basis of the information available to it, to require Norway, by means of an information injunction, to provide it with further information to clarify the factual information before it adopted the contested decision (see, for comparison, Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 28).

94 In the light of the foregoing, this plea must also be rejected.

95 Consequently, the application must be dismissed in its entirety.

V Costs

96 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. ESA has asked for the applicant to be ordered to pay the costs. Since the latter has been unsuccessful in its application, it must be ordered to do so. The costs incurred by the Danish Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application.**

2. **Orders the applicant to pay the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 17 August 2012.

Kjartan Björgvinsson
Acting Registrar

Carl Baudenbacher
President