

**Felhívás észrevételek megtételére a Felügyeleti és Bírósági Megállapodás 3. jegyzőkönyve I. része 1. cikkének a (2) bekezdése szerint az Entra Eiendom AS (a továbbiakban: Entra) társaság megalapítása vonatkozásában megállapított bejegyzési illetékek és dokumentumadók alól mentesítés formájában nyújtott állami támogatással kapcsolatban**

(2004/C 319/07)

A 2004. június 16-i 132/04/COL határozattal, amelynek szövege a hiteles nyelvi változatban ennek az összefoglalónak a végén megtalálható, az EFTA Felügyeleti Hatóság eljárást kezdeményezett az EFTA-államok közötti, a Felügyeleti Hatóság és a Bíróság létrehozásáról szóló megállapodás (Felügyeleti és Bírósági Megállapodás) 3. jegyzőkönyve I. része 1. cikkének a (2) bekezdése szerint. A norvég kormányt tájékoztatták az e határozatról készült másolat útján.

Az EFTA Felügyeleti Hatóság ezúton figyelmezteti az EFTA-államokat, az EU tagállamait valamint az érdekelt feleket, hogy ezen értesítés közzétételétől számított egy hónapon belül az alábbi címen tegyék meg a kérdéses intézkedéssel kapcsolatos észrevételeiket:

EFTA Felügyeleti Hatóság  
74, Rue de Trèves/Trierstraat 74  
B-1040 Brüsszel

Az észrevételeket továbbítják a norvég kormánynak. Az észrevételeket előterjesztő érdekelt felek írásban kérhetik – kérésük okát megnevezve –, hogy személyazonosságukat bizalmasan kezeljék.

#### ÖSSZEFOGLALÁS

#### Eljárás

2002. május 22-én az EFTA Felügyeleti Hatóság felkérte a norvég kormányt, hogy küldjön információt az Entra Eiendom A/S ingatlanközvetítő társaságnak nyújtott állítólagos állami támogatásról. Ezt a norvég kormány és a Hatóság közötti további levelezés követte.

#### A támogatási intézkedés leírása

1999. június 4-én a norvég kormány előterjesztette a Parlamentnek az „állami beruházásokkal és állami tulajdonnal foglalkozó igazgatóság” elnevezésű állami szerv újjászervezését és az Entra korlátozott felelősségű társaság megalapítását.

Az állam részvények kibocsátásáért cserébe ingatlanokat, tőkét és személyzetet (aktívák és passzívák) ruházott át az Entrára 2000. július 1-jei hatállyal. A norvég kormány a tulajdonjogot és a szóban forgó ingatlanok jogcímét átruházta az Entrára és azokat az Entra neve alatt bejegyeztette. A társaság 100 százalékban a norvég állam tulajdonában van. Az ingatlanportfólió mintegy 120 ingatlanból áll, amelyek alapterülete összesen 880 000 m<sup>2</sup>-t tesz ki.

Norvégiában minden ingatlant az 1935. június 7-i 1935. évi 2. törvény (nyilvántartási törvény) alapján létrehozott ingatlan-nyilvántartásban rögzítenek. Az 1975. évi 59. törvény (a fogyasztási adóról szóló törvény) 7. paragrafus (1) bekezdése szerint az ingatlan tulajdonjoga átruházásának bejegyzésekor dokumentumadót kell fizetni. Az 1982. évi 86. törvény (az eljárási díjakról szóló törvény) szerint az ingatlan-nyilvántartásban szereplő jogcím átruházásának bejegyzésekor bejegyzési illetéket kell fizetni.

A parlamentnek 1999. június 4-én előterjesztett törvény értelmében az ingatlan-nyilvántartásba, illetve egyéb nyilvántartásokba történő ismételt bejegyzést névváltozásként kell feltüntetni. Ennek következtében az Entrának nem kellett dokumentumadót és bejegyzési illetéket fizetnie. A kormány megtétele szerint ez az eljárás összhangban van az állami intézmények korábbi újjászervezésével.

A beküldött információk alapján az Entra által megszerzett ingatlanok tulajdonjogának átruházása vonatkozásában fizetendő adók/díjak összege megközelítőleg 80,6 millió NOK (kb. 10,4 millió EUR).

### Értékelés

Az Entra különleges jogszabályi rendelkezések útján mentesült a dokumentumadó és bejegyzési illetékek megfizetése alól. A Hatóság úgy véli, hogy ez pénzügyi előnyt testesít meg. A norvég jognak nincsen olyan egyéb rendelkezése, amely előírja, hogy az ilyen ügyletek mentesülnek a tulajdonjog megváltozásának bejegyzésekor szokásos dokumentumadó és bejegyzési illeték fizetésének általános szabálya alól.

A norvég kormány szerint az Entrának az intézkedésből nem származik előnye a hasonló helyzetben lévő magánvállalkozásokhoz képest. Egy különleges törvényi rendelkezés szerint az állami intézkedés bizonyos vállalkozásoknak az előnyben részesítése a többi, célkitűzéseik tekintetében hasonló jogi és konkrét helyzetben lévő vállalkozáshoz képest. A Hatóság továbbra sincs meggyőződve arról, hogy az EGT-megállapodás 61. cikke (1) bekezdése nem vonatkozik a dokumentumadó, illetve a bejegyzési illeték alól való, a magánvállalkozásokkal történő összehasonlítást követő mentesítésre.

A norvég kormány továbbá úgy véli, hogy a dokumentumadó és a bejegyzési illeték alól történő mentesítés, illetve azoknak a meg nem fizetése nem jelent előnyt, mivel a tőkeszerkezet, a társaság szilárd pénzügyi helyzete és a nyitó mérleg szerinti összértéke változatlan maradna. A Hatóság előzetes véleménye azonban az, hogy a vállalkozás köteles befizetni a dokumentumadót és a bejegyzési illetéket, továbbá az ilyen kötelezettség alól való mentesítés az EGT-megállapodás 61. cikke (1) bekezdése értelmében a vállalkozás számára nyújtott előny. Ezt az előnyt a nyitó mérlegben történt feltüntetési módja miatt nem lehet nem létezőnek tekinteni.

A Hatóság továbbá azon az állásponton van, hogy az adóbevétel csökkenése tulajdonképpen az állami források pénzügyi kiadások formájában történő felhasználását jelenti.

A norvég hatóságok szerint a kérdéses intézkedés egy általános intézkedés, amely kívül esik a 61. cikk (1) bekezdésének az alkalmazási területén. Ezzel összefüggésben a Hatóság szeretné hangsúlyozni, hogy azok az adóintézkedések, amelyek az EFTA-államokban működő összes vállalkozás számára nyitva állnak, elvben általános intézkedések. Egyes intézkedések megkülönböztető jellege nem jelenti szükségszerűen, hogy azokat állami támogatásnak kell tekinteni. Ez azon intézkedésekre vonatkozik, amelyek gazdasági megfontolások alapján az adórendszer zökkenőmentes működéséhez és hatékonyságához szükségesek. A Hatóság úgy véli, hogy a fogyasztási adóval kapcsolatos jelenlegi szabályozás és gyakorlat általános összefüggéseiből nem következik, hogy az Entra a dokumentumadó és a bejegyzési illeték tekintetében a Statsbygg (egy rész) folytatásának tekintendő. Ezért az intézkedés a 61. cikk (1) bekezdése értelmében szelektívnek tekintendő.

A Hatóság továbbá megállapítja, hogy a társaság egész Norvégiában egy olyan piacon végzi tevékenységét, amely nyitva áll minden EGT-államból származó gazdasági szereplő számára. Következésképpen az intézkedés torzítja vagy torzítással fenyegeti a Szerződő Felek közötti versenyt és kereskedelmet.

### Következtetések

A fenti megfontolások alapján a Hatóság kétségbe vonja az Entra Eiendom AS társaság megalapítása vonatkozásában megállapított dokumentumadó és bejegyzési illetékek alól való mentesítésnek az EGT-megállapodás működésével való összeegyeztethetőségét. Következésképpen a Hatóság köteles hivatalos vizsgálati eljárást kezdeményezni a Felügyeleti és Bírósági Megállapodás 3. jegyzőkönyve I. része 1. cikkének a (2) bekezdése szerint.

**EFTA SURVEILLANCE AUTHORITY DECISION****No 132/04/COL****of 16 June 2004****to initiate the procedure provided for in Article 1 (2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the exemptions from document duties and registration fees provided for in the establishment of Entra Eiendom as****(NORWAY)**

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area <sup>(1)</sup>, in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice <sup>(2)</sup>, in particular to Article 24 and Article 1 in Part I of Protocol 3 thereof,

Having regard to the Authority's Guidelines <sup>(3)</sup> on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

Whereas:

**I. FACTS****1. PROCEDURES AND CORRESPONDENCE**

According to allegations in Norwegian newspapers <sup>(4)</sup>, the real estate enterprise Entra Eiendom AS (hereinafter „Entra”) received state aid when the enterprise was founded in 2000. Based on these reports, the Authority requested the Norwegian Government, by letter dated 22 May 2002 (Doc. No: 02-3856 D), to submit relevant information regarding the establishment of Entra to enable the Authority to assess whether the founding of the enterprise was in accordance with the state aid rules. The Norwegian authorities responded by letter from the Mission of Norway to the European Union dated 25 June 2002, forwarding a letter dated 20 June 2002 from the Ministry of Labour and Government Administration, both received and registered by the Authority on 26 June 2002 (Doc. No: 02-4850 A).

By letter dated 10 October 2002 (Doc. No: 02-7036 D) the Authority requested additional information. The letter addressed, as point 1, the exemption from document duties and registration fees connected with the change of ownership of real estate, and as point 2, the deduction in the assessed value on the basis of special termination conditions. The Norwegian authorities submitted the additional information by letter from the Mission of Norway to the European Union dated 14 November 2002, forwarding a letter from the Ministry of Trade and Industry dated 7 November 2002, both received and registered by the Authority on 14 November 2002 (Doc. No: 02-8219 A).

By telefax from the Ministry of Trade and Industry dated 9 December 2002, received and registered by the Authority the same day (Doc. No: 02-8912 A), the Norwegian Government requested that the Authority provide its conclusion in the case regarding the establishment of Entra. By letter to the Mission of Norway to the European Union dated 17 December 2002, (Doc. No: 02-9062 D) the Authority informed the Norwegian authorities that the Authority might be in a position to close the part of the case as regards deduction in the assessed value on the basis of special termination conditions depending upon the submission of additional specified and detailed documentation concerning this issue.

Such detailed documentation was submitted by a telefax from the Ministry of Trade and Industry dated 23 January 2003, received and registered by the Authority on 23 January 2003 (Doc. No: 03-424 A). By a letter to the Mission of Norway to the European Union dated 31 January 2003 (Doc. No: 03-588 D), the Authority informed the Norwegian authorities that – since no aid seemed to be involved - it „will not raise objections to the value assessment made in the opening balance of the properties transferred from the Norwegian State to Entra Eiendom AS”. However, the Authority stressed that this statement was without prejudice to the issue on document duties and registration fees.

<sup>(1)</sup> Hereinafter referred to as the EEA Agreement.

<sup>(2)</sup> Hereinafter referred to as the Surveillance and Court Agreement.

<sup>(3)</sup> Procedural and Substantive Rules in the Field of State Aid (State Aid Guidelines), adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in Official Journal L 231, 03.09.1994, as amended by Decision No: 90/04/COL, 23 April 2004 (not yet published). The State aid guidelines are available on the Authority's website: [www.eftasurv.int](http://www.eftasurv.int).

<sup>(4)</sup> In particular in „Dagens Næringsliv” on 9 April 2002.

By letter dated 2 April 2003 (Doc. No: 03-1827 D), the Authority once more addressed the issue of exemption from registration fees and excise duties and requested the Norwegian authorities to provide additional and clarifying information. By letter from the Mission of Norway to the European Mission dated 5 June 2003, forwarding a letter from the Ministry of Trade and Industry dated 4 June 2003, both received and registered by the Authority on 10 June 2003 (Doc. No: 03-3631 A), additional information was submitted.

## 2. THE ESTABLISHMENT OF ENTRA

The Norwegian Government presented the reorganisation of the public body, the Directorate of Public Construction and Property („Statsbygg”), and the establishment of Entra, on 4 June 1999<sup>(1)</sup>. On the same date, the Government presented a special Act on the conversion of parts of the real estate activity of Statsbygg to a limited liability company<sup>(2)</sup> to resolve some transitional questions concerning the transformation and establishment of Entra<sup>(3)</sup>. Paragraph 3 of this Act states that re-registration in the real estate registry and other public registries are to be done as a change of name. As a consequence of this, Entra was not obliged to pay document duties and registration fees.

Statsbygg is an administrative body („forvaltningsbedrift”), responsible to the Ministry of Labour and Government Administration. Statsbygg acts on behalf of the Norwegian Government as manager and advisor in construction and property affairs and offers premises to governmental organisations. Statsbygg continued operations and management of the property stock that was not transferred to Entra.

On 5 November 1999, the Government presented the opening balance of Entra and a list of properties to be transferred to the new company<sup>(4)</sup>. In cases where there were genuine providers of comparable and competing buildings on the private market, responsibility for the properties was transferred from Statsbygg to Entra.

Entra was originally founded as a „minimum” company based on cash contributions. Subsequently, property, capital and personnel (assets and liabilities) were transferred from the State to Entra in exchange for the issue of shares, with effect from 1 July 2000. Ownership and title of the properties in question were transferred from the Norwegian State to Entra and registered in Entra’s name. The company is 100 per cent owned by the Norwegian State.

Entra has the following object clause in its bylaws: „The main purpose of the company is to provide state agencies with premises. The company may own, purchase, sell, operate and administer real estate and conduct other businesses in connection with this. The company may also own shares or interests in and participate in other companies that conduct activities such as those mentioned in the previous sentence” (our translation).

The company (group<sup>(5)</sup>) had an operating income of NOK 856 million (some EUR 103 million) in 2003, and a profit before tax of NOK 26 million (some EUR 3.1 million)<sup>(6)</sup>. The group’s consolidated equity (book value) as of 31.12.2003 was NOK 1,207 million (some EUR 145 million). At year-end, the group’s property portfolio (book value) was NOK 8,127 million (some EUR 979 million). As of 31.12.2003, Entra had 135 employees. The total property portfolio consists of some 120 properties, amounting to 880 000 m<sup>2</sup>.

More detailed descriptions of the Norwegian legislation and practice concerning document duties and registration fees on the registration of transfer of real estate property in connection with reorganisation of undertakings, and the Norwegian Government’s assessment of whether the exemption of document duties and registration fees is in compliance with the state aid provisions of the EEA Agreement, are given in points I 3 and I 4, respectively.

<sup>(1)</sup> „St prp nr 84 (1998-99) Om ny strategi for Statsbygg og etablering av Statens utleiebygg AS”.

<sup>(2)</sup> The original name of the company was „Statens utleiebygg AS”. Hereinafter Entra is used for Entra and Statens utleiebygg AS.

<sup>(3)</sup> „Ot prp nr 83 (1998-99) Om lov om omdanning av deler av Statsbyggs eiendomsvirksomhet til aksjeselskap”. Law of 18 February 2000, No.11.

<sup>(4)</sup> „St.prp. nr. 1 Tillegg nr. 10 (1999-2000) Om etablering av Statens utleiebygg AS”.

<sup>(5)</sup> The group consists, in addition to Entra Eiendom AS, of Entra Eiendom Drift AS, Universitetsgaten 2 AS, Biskop Gunnerus gate 14 AS, Instituttveien 24 AS and Tollpakkhuset AS. Source: Annual report 2002. See [http://www.entraeiendom.no/files/pdf/aarsrapport\\_2002.pdf](http://www.entraeiendom.no/files/pdf/aarsrapport_2002.pdf)

<sup>(6)</sup> Preliminary accounts for 2003 presented on 19 February 2004. See [http://www.entraeiendom.no/files/Entra\\_Eiendom\\_AS\\_Preliminary\\_results\\_2003.pdf](http://www.entraeiendom.no/files/Entra_Eiendom_AS_Preliminary_results_2003.pdf)

### 3. THE NORWEGIAN LEGISLATION AND PRACTICE CONCERNING DOCUMENT DUTIES AND REGISTRATION FEES ON THE REGISTRATION OF TRANSFER OF REAL ESTATE PROPERTY IN CONNECTION WITH REORGANISATION OF UNDERTAKINGS

#### 3.1. Introduction

All real estate in Norway is identified in the real estate registry („Grunnboken”), established pursuant to the Registration Act 1935 No 2 („Lov om tinglysing”). Every property is identified by a registry identification under which information about the ownership, title and encumbrances etc. may be entered. In short, the register contains information on various rights and obligations to the property in question. Interested parties acting in good faith are entitled to rely on the information contained in the real estate registry.

There is no legal obligation to register rights related to real estate (ownership etc.) in the registry. It is not necessary to register transfer of title in order to affect the transfer of ownership. The holder of the rights may however choose to register his rights in order to protect his rights against third parties.

Pursuant to Section 7(1) of the Excise Tax Act 1975 No 59 („Lov om dokumentavgift”), the registration of transfer of ownership title („skjøte”) to real property releases an obligation to pay document duties („dokumentavgift”). The tax rate is 2.5 % based on the sales value of the property.

In addition, the registration of transfer of title in the real estate registry is subject to a registration fee („tinglygingsgebyr”) pursuant to the Court fee Act 1982 No 86 („Rettsgebyrloven”). This fee is currently (as of 1 January 2004) fixed at NOK 1.480,- (some EUR 180,-<sup>(1)</sup>) per document registered. The provisions concerning the conditions for levying the document duty and registration fee are identical.

Hereinafter, „excise duty” will be used as the common term for document duty and registration fee.

As mentioned above, the excise duty is released by the registration of the transfer of title to another legal entity. Consequently, if there is no transfer of title to another legal entity, but only a change of name of the same legal entity in the registry, no excise duty will be payable.

In cases where real estate is transferred in connection with restructuring or reorganisation of companies or other legal persons, the general point of departure is that a transfer of title occurs and that registration triggers the levy of excise duty since the property is transferred to another legal entity.

However, exemptions may follow either from the Registration Act construed in the light of the company legislation or from special legislation.

#### 3.2. Exemptions based on the Registration Act construed in the light of the company legislation

According to the information received from the Norwegian Government, the Registration Act should be read in light of the general company legislation, which states that some kinds of reorganisations are to be carried out according to rules based on the so-called continuity principle. Continuity is an umbrella term for a number of rules that presuppose that the acquiring undertaking takes over the legal position of the transferring company. Continuity with regard to tax and duty positions is an important aspect of the principle. The purpose of the continuity principle is to facilitate mergers and de-mergers. When the continuity principle applies, the transferring undertaking's legal situation is deemed to continue in the acquiring company. That entails with respect to the rules on excise duty that the registration of a transfer of real estate is treated not as a transfer of title but as a change of name.

The actual scope of the general statutory rules on reorganisations carried out according to the continuity principle and the effect of these provisions regarding the levy of excise duties are described below. The description is given in relation to three different kinds of reorganisations.

Generally, it may be noted that the scope of the exemptions from excise duties based on the application of the continuity principle, as stated in the general corporate legislation, is restricted to the specific kinds of corporations/legal entities and the specific kinds of reorganisations covered by these general company rules. A general feature of the corporate legislation at issue is that the rules apply irrespective of i.a. public or private ownership.

<sup>(1)</sup> The registration fee („tinglygingsgebyret”) is 2 times the basic court fee („rettsgebyret”), see § 21 of the Court fee Act 1982 No 86 („Rettsgebyrloven”).

### *Mergers*

By merger in this context is meant that one or more undertakings are amalgamated into one by means of an undertaking taking over the assets, rights and obligations of another or several other undertakings as a whole, against the owners of the transferring undertaking receiving shares of ownership in the acquiring company.

Statutory rules on mergers based on the continuity principle can for instance be found in Chapters 13 and 14 of the Act on Limited Companies 1997 No. 44, in Chapters 13 and 14 of the Act on Public Limited Companies No. 45, Chapter 8 of the Act on Savings Banks 1961 No. 1, Section 10-5 of the Act on Insurance Activities 1988 No. 39, Section 54 of the Act on State-Owned Enterprises 1991 No. 54, Section 53 of the Act on Foundations 2001 No. 59 (not yet entered into force).

The Norwegian authorities state that to the extent a merger is covered by such statutory rules, it will be treated according to the continuity principle also for excise duty purposes. The Authority notes that the current statutory provisions on mergers only cover mergers between a specific legal entity merging with another legal entity of the same kind.

### *De-mergers*

By de-merger is understood that an undertaking's assets, rights and obligations are to be apportioned between the undertaking itself and one or more acquiring undertakings, against the owners of the transferring undertaking receiving shares of ownership in one or more of the acquiring companies. It is also a de-merger where the undertaking ceases to exist in connection with the distribution.

According to the circular G-37/90 issued by the Ministry of Justice, a change of name is considered to be present if it is the continued company, and not the unbundled one, and the unbundled company has the same name as the original company, that is to be the title holder. A pure change of name is not deemed to be a transfer of title. It is the reality of the ownership that is the decisive aspect.

If the real estate is transferred to the unbundled company, then it is considered a transfer of title which releases excise duty.

The Norwegian authorities have further informed the Authority that during the last decade, new statutory corporative rules have been adopted that treat de-mergers based on the continuity principle. Examples are the rules in Chapter 14 of the Act on Limited Companies 1997 No. 44 and the Act on the Public Limited Companies 1997 No. 45, the rules in Section 10-5 second paragraph of the Act on Insurance Activities 1988 No. 39 and Section 54 of the Act on Foundations 2001 No. 59.

However, although it is under consideration with the Ministry of Justice, the new legislation has not yet made any changes to the treatment of transfers of property to the acquiring/unbundled company of the de-merger for excise duty purposes.

### *Conversion/transformation of the legal status/organisation*

As regards the conversion of an undertaking from one form of corporation to another, the main rule is that there must be a transfer of title. However, exemptions may be considered pursuant to the interpretation of the Registration Act as construed on the basis of company law. The provisions of Chapter 15 of the Limited Companies Act and of the Public Limited Companies Act, on the conversion from a limited company to a public limited company, or vice versa, are mentioned by the Norwegian authorities as provisions based on the continuity principle. The Norwegian authorities assume that these provisions will also have effect on the interpretation of the Registration Act in the sense that the conversion of this type will be considered as a name change and not as a transfer of title.

### 3.3. Exemptions based on special legislation

To the extent that exemption from excise duty does not follow from the Registration Act construed in the light of general company legislation, exemptions from excise duty must be laid down in special legislation.

Such special acts and provisions providing exemptions from excise duty on specific and individual reorganisations have been adopted with special regard to several reorganisations of public bodies and publicly owned enterprises in Norway during the recent years. The Norwegian Government has not submitted information on the adoption of such specific legal measures to exempt any reorganisations of privately owned enterprises from excise duty.

### 3.4. Methods used to avoid excise duties

As the registration of the transfer of title is not mandatory, enterprises can, regardless of whether they are privately or publicly owned, lawfully avoid document duties and registration fees by simply not registering any transfer of ownership. To let the title remain with the original owner constitutes a risk for the new owner for „holder of good faith” towards third party. However, it is possible to eliminate that risk by the registration of a „restriction of the right of ownership”. The registration of declaration on the restriction of the right to ownership does not exclude the risk of execution proceedings/creditor's or bankruptcy estate's extinction of the rights of a legal successor to the debtor's property. According to the Norwegian authorities, that method is widely used by privately owned enterprises, especially between related parties.

According to the submitted information, the registration of a restriction of ownership to real property may constitute a legal obstruction to use the real property as contribution in kind in exchange for the issue of shares in limited liability companies. Contribution in kind in accordance with the Limited Companies Act must be without political or legal reservations. The contribution in kind also has to be irrevocable.

## 4. THE NORWEGIAN GOVERNMENT'S ASSESSMENT OF WHETHER THE EXEMPTION OF DOCUMENT DUTIES AND REGISTRATION FEES IS IN COMPLIANCE WITH THE STATE AID PROVISIONS OF THE EEA AGREEMENT

### 4.1. Assessment in connection with the establishment of Entra

The Norwegian Government's assessment of whether the exemption from excise duties and registration fees is in compliance with the State aid provisions of the EEA Agreement is given in Proposition no 84 (1998-99) <sup>(1)</sup>. The Government argues that it is highly uncertain whether the transfer of properties from the State to Entra is a transfer that releases document duties and registration fees. It is argued that it is more natural to consider the transfer a change of the organisation of the State's real estate activities whereby the State will keep the title to the properties and, consequently, there is no transfer of title in the real estate registry, only a change of name. Change of name does not release document duties and registration fees.

The Government proposes in the special Act referred to above that the transfer is to be considered as a change of name, and not a transfer of title. The Government considers this procedure to be in accordance with previous reorganisations of state entities.

As to whether this puts Entra in a more favourable position than other private companies reorganising their activities, the Government refers to the fact that private undertakings can reorganise their activities by keeping the title in a holding company (change of name) and thus escape the obligation to pay document duties and registration fees. As the Government finds that the State does not have the same possibilities, and because it is more convenient for the State to organise the activities in a separate undertaking, the Government concludes that the exemption from document duties and registration fees is not in conflict with the State aid rules. The Government refers in this context to Chapters 19 and 20 of the Authority's State Aid Guidelines <sup>(2)</sup>.

### 4.2. Arguments in the correspondence with the Authority

By letter dated 7 November 2002, the Ministry of Trade and Industry explains how private investors can choose solutions that avoid a formal transfer of the deed and thus avoid having to pay document duties and registration fees. It further argues why the non-payment by Entra does not constitute State aid.

<sup>(1)</sup> Chapter 7.6.1.

<sup>(2)</sup> Chapter 19: Public authorities' holdings. Chapter 20: Application of State aid provisions to public enterprises in the manufacturing sector.

The Ministry argues that the methods that some private investors use to avoid document duties and registration fees described above was not an option in the case of the establishment of Entra. That is i.a. due to obstacles arising from the fact that Statsbygg is subject to public and political control. Methods like keeping the title to the properties with Statsbygg would imply that Entra would be dependent on the approval from a public body for transactions concerning the properties. If the title to the properties remained in Statsbygg, that would imply that the State was both the renter and the formal titleholder of the properties. The Ministry supposes that a private owner of Statsbygg would have de-merged Entra without releasing the obligation to pay document duties and registration fees. The Ministry argues that if such methods were used for Statsbygg/Entra, it would blur the distinction between the two entities' different roles. Statsbygg is entrusted with the task of owning and operating non-commercial public buildings, while Entra operates on a commercial basis.

In the letter dated 7 November 2002, the Ministry also argues that the non-payment of document duties and registration fees has not conferred on Entra any benefits that would constitute aid pursuant to Article 61 of the EEA Agreement. The Ministry states that if document duties and registration fees were payable, the costs would be activated as an asset, while the value of the properties would be reduced correspondingly. The Ministry states that this would not reduce Entra's total balance sheet or the total asset valuation.

By letter dated 4 June 2003, the Ministry of Trade and Industry submitted additional information and arguments concerning i.a. the so called continuity principle, clarification concerning the measures used by private undertakings, why the non-payment does not constitute an advantage, information on the current law with regard to mergers and de-mergers and on exemption from the duty to pay registration fees. The Ministry reiterates the arguments in the letter dated 7 November 2002 as to why the non-payment does not constitute an advantage for Entra. In addition, the Ministry argues that the exemption is a general measure, which does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement. Point 9, Conclusion, of the letter dated 4 June 2003, reads:

„The common system regarding registration fee and document duty is that the continuity principle determines if conversion processes, both public and private, may be done as a name change in relation to inter alia the rules on registration fee and document duty. The purpose of the continuity principle is to facilitate the implementation of mergers, de-mergers and restructurings, which is regarded as socio-economically desirable. The special legislation and the reimbursement of accrued document duty resulting from the reorganisation of hydropower/ electricity companies are a result of the same considerations. Thus, the practice is a general measure, which according to well-established case law does not constitute State aid within the meaning of Article 61 of the EEA Agreement.”

Pursuant to the submitted information, payable excise duty for the transfer of title to the real estate received by Entra would amount to approximately NOK 80.6 million <sup>(1)</sup> (some EUR 10.4 million).

## II. APPRECIATION

### 1. The existence 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.”

To be considered as state aid under Article 61(1) of the EEA Agreement, a tax measure must fulfil the following four criteria:

1. The measure must confer the beneficiaries an advantage that reduces the costs they normally bear in the course of the business.
2. The advantage must be granted by the State or through State resources.
3. The measure must be specific or selective in that it favours „certain undertakings or the production of certain goods”.
4. The measure must affect competition and trade between the Contracting Parties.

<sup>(1)</sup> Value per 2000.

**Condition 1: The measure must confer on the beneficiaries an advantage that reduces the costs they normally bear in the course of the business.**

According to the case law of the European Court of Justice <sup>(1)</sup> and Chapter 17B.3.1(2) of the Authority's State Aid Guidelines „the measure must confer on recipients an advantage, which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including:” (...) „a total or partial reduction in the amount of tax (such as exemption or a tax credit)”.

By the adoption of special statutory provisions, Entra is relieved of the cost of excise duties. Prima facie, this constitutes a financial advantage for the company. The question is therefore whether the arguments presented by Norway can lead to another result.

In this respect the Authority notes, firstly, that it finds it difficult to see how the registration of the transfer of properties from the State to Entra could have been exempted from excise duty in the absence of the particular provision in paragraph 3 of the Act of 18 February 2000.

No other provision in Norwegian law prescribes that such a transaction is exempted from the general rule that registration of change of ownership triggers excise duty. Moreover, based on the information available to it, the Authority cannot see how the reorganisation of Statsbygg – in the absence of Paragraph 3 in the Act of 18 February 2000 – could have been covered by the continuity principle pursuant to the prevailing interpretation of the Registration Act. The reorganisation of Statsbygg implies the transfer of assets (as contribution in kind) to a new limited liability company in exchange for the issuing of shares. At the same time, the transaction implies a conversion of a part of the public body, Statsbygg, to a limited liability company. That reorganization is neither covered by the exemptions related to mergers/de-mergers nor to those pertaining to conversion of legal status. Finally, the Authority notes that registration of a transfer of property from one kind of legal entity to a fully owned subsidiary of that entity having a different legal status would entail excise duty under the Registration Act. Entra became the new title holder to the real estate transferred from the Norwegian State.

As for the Norwegian Government's argument that the measure does not confer on Entra an advantage as compared to private undertakings in a similar situation – and that the adoption of paragraph 3 was necessary to provide Entra with conditions equal or comparable to those available for private undertakings in a similar situation – the Authority accepts that Article 61(1) does not necessarily apply to situations where, in the context of a state privatization, a measure is introduced in order to free a public company from a structural disadvantage that it has in relation to its private sector competitors. Article 61(1) is aimed merely at prohibiting advantages for certain undertakings and the concept of aid covers only direct benefits on release of burdens normally assumed in an undertaking's budget and which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions. Moreover, Article 61(1) requires it to be determined whether, under a particular statutory scheme, a state measure is such as to favour certain undertakings in comparison with others which, in light of the objective pursued, are in a comparable legal and factual situation <sup>(2)</sup>.

However, in the present case, the methods described by the Norwegian authorities to avoid excise duty are legally open to all kinds of undertakings, including undertakings established in connection with state privatizations. The reason for not using these methods in relation to Statsbygg and Entra was merely that the Norwegian authorities found that the political, managerial and practical inconveniences connected to the two methods were of such magnitude that a genuine transfer and registration thereof should take place.

Moreover, while it might be correct that a non-transfer of title in practice might, in some respects, pose greater inconveniences to a publicly owned entity than to a privately owned firm, the problems are for most purposes basically the same for a publicly and a privately owned firm <sup>(3)</sup>. In any event, the fact that public bodies, such as Statsbygg, for various reasons might not be able to apply the methods described by the Norwegian Authorities with the same flexibility and similar practical consequences as privately owned undertakings, constitutes a part of the general conditions and framework for publicly owned companies or public bodies compared to private companies or activities organised otherwise.

<sup>(1)</sup> Cf. Case 173/73 Italy v. Commission [1974] ECR 709.

<sup>(2)</sup> Cf. Case T-157/01 Danske Busvognmænd v Commission, judgment of 16 March 2004, para. 57.

<sup>(3)</sup> Cf. Case C-308/01 GIL Insurance Ltd, judgment of 29 April 2004.

Finally, the methods to avoid excise duties are, in any event, both based on the non-registration of transfer of ownership. Both methods thus fall outside the scope of the legislation of levying excise duties on registration of transfer of ownership. They can therefore not be held to an equivalent to the registration that took place in the present case.

In conclusion, the Authority remains unconvinced that the exemption from excise duty should escape Article 61(1) by reason of comparison with private undertakings.

The Authority hereafter turns to the Norwegian authorities' argument that the exemption or the non-payment of excise duty does not confer on Entra an advantage as the capital structure, the solidity and the total value of the company, according to the opening balance sheet, would remain unchanged.

The valuation of the assets in the opening balance sheet was based on the method of „net capitalisation” which implies that the property's future cash flow was discounted to present value by a factor observing a relevant rate of return requirement. Accordingly, the „value” or acceptable acquisition cost of the properties was a function of expected future cash flow and the rate of return requirement.

According to the Norwegian authorities, excise duties are considered an acquisition cost that is activated in the company's balance sheet pursuant to the accounting rules. As the total acceptable acquisition cost is defined by the cash flow and rate of return requirement, the activation on the balance sheet of excise duty – if paid – would necessitate a corresponding reduction in the value of the properties. Hence, neither the liabilities nor the equity, i.e. the share capital issued, according to the opening balance sheet, would be affected by the payment or non-payment of excise duty.

The application of the Norwegian accounting rules for setting up the opening balance sheet of Entra neutralizes, according to the Norwegian authorities, the financial effects of the payment compared to the non-payment of excise duties. For the assessment of whether the duties exemption constitutes an advantage for Entra in the meaning of Article 61(1) of the EEA Agreement, however, the Authority takes the view that the rules for treating the issue of excise duties in the opening balance sheet of Entra must be considered as another measure being distinct and separate from the measure at issue, i.e. the exemption from excise duties. Consequently, a comparison of the valuation of assets and liabilities of the submitted real opening balance on the one hand and of the hypothetical opening balance sheet adjusted for incurred excise duties on the other, cannot be considered as a relevant description of the reality of the exemption from excise duties as a financial advantage conferred on the reorganisation of Statsbygg compared to other reorganisations of companies.

The obligation to pay excise duties is a liability for the undertaking. A relief of such a liability is an advantage granted to the undertaking in the meaning of Article 61(1) of the EEA Agreement. This advantage cannot be considered to be non-existing due to the way the opening balance is established. Any relief from such a tax liability would in that case not be an advantage.

In conclusion, the Authority takes the preliminary view that the act in question did confer an advantage on Entra as compared to the general rules on excise duties.

***Condition 2: The advantage must be granted by the State or through State resources.***

This criterion is fulfilled if the grant of an excise duties exemption is implying that the State renounces or waives the levy of duties that it normally would be legally entitled to claim which involves a loss of revenue <sup>(1)</sup>. According to Chapter 17B.3(3) of the Authority's State Aid Guidelines, a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. As shown above, the provision in Paragraph 3 in the contested Act entails that an excise duty otherwise payable was not paid. Therefore, the second condition must be deemed to be fulfilled.

<sup>(1)</sup> Indeed, in some aspects, the methods described may in fact be less favourable for private undertakings compared to public ones since the registration of declaration on the restriction of the right to ownership does not exclude the risk of execution proceedings/creditor's or bankruptcy estate's extinction of the rights of a legal successor to the debtor's property.

**Condition 3: The measure must be specific or selective in that it favours „certain undertakings or the production of certain goods”.**

According to the Norwegian authorities, the measure at issue is a general measure that falls outside the scope of Article 61(1). This is so because the measure does not constitute an exemption to the ordinary rules in the sense that it results from, and is being justified by, the same principles as those underlying the ordinary rules. Thus, the Norwegian authorities appear to maintain that the continuity principle and the considerations for applying this principle with effect i.a. for excise duties purposes in the case at issue are to be deemed in line with the nature and logic of the current excise duty system.

Firstly, the Authority makes reference to Chapter 17B.3.1 of the Authority's State Aid Guidelines on direct business taxation concerning the specificity or selectivity of tax measures, which reads:

„Tax measures, which are open to all economic agents operating within the EFTA State, are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect.”

The special provision (paragraph 3 of Ot prp nr 83 (1998-99)) concerning the treatment of the present transaction for excise duty purposes applies only to a particular transaction between two explicitly identified entities. Moreover, as shown above, it constitutes an exemption from the normal application of the general rules in the Registration Act. The fact that similar rules have been introduced in relation to other state privatisations does not entail that this *lex specialis* becomes non-selective. The question is therefore whether the provisions concerning Entra should nevertheless, as argued by the Norwegian authorities, be held to be within the general logic of the Norwegian legislation concerning excise duties and exceptions thereto.

According to the case law of the Court of Justice, it is possible to draw a distinction between:

- differentiated treatment that results from the application, to specific situations, of the same principles as those underlying the ordinary rules (no aid)
- differentiated treatment, which, favouring certain undertakings, departs from the internal logic of the ordinary rules (aid) <sup>(1)</sup>.

This distinction is also described in Chapter 17B.3.4(1) of the Authority's State Aid Guidelines on direct business taxation concerning the justification of a derogation by „the nature or general scheme of the system”: „The differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is the case with measures whose economic rationale makes them necessary to the smooth functioning and effectiveness of the tax system. However, it is up to the EFTA State to provide such justification.”

Pursuant to the description in point I 3 above, the Authority notes that, to a certain extent, the continuity principle constitutes a part of the rules on excise duties as it is open to all firms fulfilling the statutory characteristics of some kinds of reorganisations. However, for the purpose of deciding whether a given transaction triggers excise duties, the scope of the continuity principle is quite restricted. The current interpretation and practice according to the Registration Act implies that the continuity principle is only applicable to a limited number of different and specific reorganisations defined and regulated in statutory rules of the general corporate legislation. On that basis, the Authority takes the preliminary view that the continuity principle is not inherent or a general part of the underlying logic of the current rules and practice on excise duties in connection with other types of reorganisations.

In any event, the pursuance of the underlying objectives of the continuity principle cannot justify that the principle should be applicable to specific reorganisations without the same characteristics as those where the principle applies according to the current practice. A tax legislation that treats reorganisations of state undertakings more favourably than the most similar situations concerning restructurings of private undertakings, would be selective within the meaning of Article 61(1).

In the present case, the real estate was transferred from a public body to a fully owned public limited liability company. With the exception of prior specific state privatisations, the Norwegian legislation does not seem to exempt from excise duty a registration of a transfer of real estate from the original owner of the property to a fully owned subsidiary when the owner and the subsidiary do not have the same legal status.

<sup>(1)</sup> Cf., inter alia, Case C-157/01 Kingdom of the Netherlands v. Commission, judgment of 29 April 2004.

In view of the foregoing, it should be concluded that the treatment of the reorganisation of Statsbygg according to the continuity principle implying that Entra, for excise duties purposes, should be considered as continuing (parts of) Statsbygg, cannot be derived from the general logic of the current legislation and practice on excise duties. Therefore, the measure must be considered to be selective in the sense of Article 61 (1).

**Condition 4: The measure must affect or threaten to affect competition and trade between the Contracting Parties.**

According to Chapter 17B.3(2) of the Authority's State Aid Guidelines, „[u]nder settled case-law, for the purposes of this provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Contracting Parties”. Moreover, according to case law of the Court of Justice, the condition will also be fulfilled when aid granted by the State strengthens the position of an undertaking vis-à-vis other undertakings competing in intra-community trade <sup>(1)</sup>.

It follows from the description in point I above that the assets and activities transferred to Entra were assumed to be exposed to competition. Accordingly, Entra competes with other providers of buildings/properties. This applies to Entra as owner, purchaser, seller, operator and administrator of real estate. It is not clear whether Entra may operate outside the Norwegian borders. However, it is definite that the company operates all over Norway in a market open to economic agents from any other EEA State. Consequently, the measure affects or threatens to affect competition and trade between the Contracting Parties.

## 2. Compatibility of the aid

Based on the foregoing considerations, the tax exemptions at issue appear to constitute aid within the meaning of Article 61(1) of the EEA Agreement. It is therefore necessary to determine if such an aid is compatible with the functioning of the EEA Agreement under the exceptions laid down in Article 61(2) and (3).

The Norwegian authorities have argued that the measure at issue does not contain aid, and have not put forward any arguments concerning compatibility. However, after assessing the likely involvement of state aid, it has to be considered whether such aid could be compatible with the EEA Agreement by virtue of Article 61(2) and (3) of the Agreement.

The application of the exceptions under Article 61(2) does not appear appropriate. The establishment of Entra does not entail aid having a social character granted to individual consumers or aid to make good the damage caused by natural disasters or exceptional occurrences.

Under Article 61(3)(a) aid may be considered compatible with the EEA Agreement when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Since the measure in question is not limited to such areas, this provision seems not to apply. Also the exemption laid down in Article 61(3)(b) seems not to be applicable. Lastly, as regards the exemption laid down in Article 61(3)(c), it also seems that the aid cannot be considered to facilitate the development of certain economic activities or of certain economic areas in the meaning of this Article. Consequently, the aid seems not to qualify for any of the exemptions provided for in Article 61(3) of the EEA Agreement.

## 3. The character of the aid

The Authority draws the attention of the Norwegian Government to Article 1 in part II of Protocol 3 to the Surveillance and Court Agreement. The exemption from excise duties was introduced after the entry into force of the EEA Agreement. Any aid in this case should therefore be qualified as new aid. No notification of such aid has been received. Aid would in this case be considered unlawful as defined in Article 1(f) of Part II to Protocol 3 to the Surveillance and Court Agreement. According to Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement, in cases of unlawful aid, should they be found incompatible, the Authority orders, as a rule, the EFTA State concerned to reclaim aid from the recipient. The amounts thus recovered will include interest calculated on the basis of the reference rates of interest, running from the date on which it was payable to the recipient until the date of recovery.

<sup>(1)</sup> Cf., inter alia, Case 173/73 Italy v. Commission, cited above, Case C-75/97 Kingdom of Belgium v. Commission [1999] ECR I-3671, Case C-157/01 Kingdom of the Netherlands v. Commission, cited above, and Case C-308/01 GIL Insurance Ltd, cited above.

#### 4. Conclusion

In light of the foregoing considerations, the Authority has doubts as to the compatibility with the functioning of the EEA Agreement of the exemption from document duties and registration fees adopted in connection with the establishment of Entra Eiendom AS. Consequently, the Authority is obliged to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open the formal investigation procedure is without prejudice to the final decision of the Authority.

HAS ADOPTED THIS DECISION:

1. The Authority has decided to open the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the exemptions from document duties and registration fees provided for in the establishment of Entra Eiendom AS.
2. The Norwegian Government is invited, pursuant to Article 6 in Part II of Protocol 3 to the Surveillance and Court Agreement, to submit its comments on the opening of the formal investigation procedure within two months from notification of this decision.
3. The Norwegian Government shall be informed by means of a letter containing a copy of this decision.
4. The EC Commission shall be informed, in accordance with Protocol 27(d) of the EEA Agreement, by means of a copy of this decision.
5. Other EFTA States, EC Member States, and interested parties shall be informed by the publishing of this decision in its authentic language version, accompanied by a meaningful summary in languages other than the authentic language version, in the EEA Section of the Official Journal of the European Communities and the EEA Supplement thereto, inviting them to submit comments within one month from the date of the publication.
6. This decision is authentic in the English language.

Done at Brussels, 16 June 2004

*For the EFTA Surveillance Authority*

Hannes HAFSTEIN

*President*

Einar M. BULL

*College Member*

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