COMMISSION DECISION

of 16 April 2013

on the measure SA.20112 (C 35/2006) implemented by Sweden for Konsum Jämtland Ekonomisk Förening

(notified under document C(2013) 1913)

(Only the Swedish version is authentic)

(Text with EEA relevance)

(2013/402/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first paragraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

1. PROCEDURE

(1) By a complaint registered on 14 November 2005, Den Nya Välfärden foundation informed the Commission about the sale of a plot of land by the Municipality of Åre to Konsum Jämtland Ekonomisk Förening ('Konsum'), allegedly involving illegal state aid ('the contested sale').

(2) By letter dated 3 January 2006, the Commission requested additional information from the Swedish authorities, which was submitted by letters dated 2 and 28 March 2006.

(3) By letter dated 3 January 2006, the Commission requested additional information from the complainant, which was submitted by letter dated 1 February 2006.

(4) By letter dated 19 July 2006, the Commission informed Sweden that it had decided to initiate the procedure laid down in Article 88 of the EC Treaty in respect of the contested sale [2].

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measure.

(6) Sweden submitted observations by letter dated 27 September 2006. The Commission received no comments from interested parties.

(7) By letter dated 24 January 2007, the Commission requested additional information from the Swedish authorities, which was submitted by letter dated 21 February 2007.

(8) On 30 January 2008, the Commission adopted a final decision ('the decision') [4], concluding that the contested sale contained aid within the meaning of Article 87(1) of the EC Treaty [5].

(9) The decision was appealed against by Konsum. In its judgment of 13 December 2011 in Case T-244/08, the General Court annulled the decision. Consequently, the Commission had to re-examine the measure and take a new decision on the contested sale.

(10) By letter dated 22 March 2012, the Commission requested additional information from the Swedish authorities, which was provided by letter dated 23 April 2012.

(11) After the submission of information provided by the Swedish authorities in April 2012, Den Nya Välfärden submitted comments by letter dated 21 May 2012.

(12) By letter dated 15 May 2012, Lidl Sverige KB ('Lidl') provided supplementary information in addition to the comments submitted by Den Nya Välfärden. In addition, Den Nya Välfärden provided further information at a meeting with the Commission, which took place on 25 June 2012.

(13) By letter dated 5 December 2012, the Commission requested additional clarification from the Swedish authorities, which replied by letter dated 23 January 2013.

2. DESCRIPTION OF THE MEASURE

2.1. The parties involved

(14) The municipality of Åre ('the Municipality') is located in Jämtland County, Sweden, and has approximately 10 100 inhabitants.

[1] OJ C 204, 26.8.2006, p. 5.
[2] Case C 35/2006.
[3] OJ C 204, 26.8.2006, p. 5.
[4] Commission Decision of 30 January 2008 on State aid C 35/2006 (ex NN 37/06) implemented by Sweden for Konsum Jämtland Ekonomisk Förening (OJ L 126, 14.5.2008, p. 3).
[5] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 of the EC Treaty, respectively, where appropriate.

(15) Konsum, the alleged beneficiary of the contested sale, is a cooperative society which sells consumer goods, including food and groceries, throughout Jämtland County. On 1 January 2006, Konsum merged with Konsum Nord ekonomisk förening. Both companies collaborate with Kooperativa förbundet, which is an association of Swedish cooperative societies. Kooperativa förbundet is the parent company of the KF Group which owns, among others, Norwegian retailers.

(16) Åre Centrum AB ('Åre Centrum') is a private real estate company operating independently from the Municipality. At the time of the contested sale, Åre Centrum was owned by SkiStar AB and other enterprises in Åre. Since 2007, Åre Centrum is part of the private company DIÖS Fastigheter AB.

(17) The complainant, Den Nya Välfärden, is a Swedish foundation which is mainly funded by the Confederation of Swedish Enterprise. Its mission is, among other things, to defend the interests of Swedish enterprises by monitoring the functioning of free competition in Sweden. In its complaint regarding the contested sale, Den Nya Välfärden is acting on behalf of one its members, Lidl.

(18) Lidl was the first foreign operator in the food sector to enter the Swedish market in 2003 and is a direct competitor of Konsum in the food and groceries retailing sector.

2.2. **The contested sale**

(19) The complaint concerns the sale of a plot of land by the Municipality to Konsum on 5 October 2005 for a price which was allegedly below market value.

(20) This sale was part of a larger property transaction, involving a number of different land sales and a number of different parties. These sales aimed at implementing a master development plan (hereinafter 'the MDP'), which was adopted by the Municipality on 21 June 2005. One of the objectives of the MDP was to implement certain development works in order to create a traffic-free zone around the central square of Åre ('Åre Torg'). In this respect, Åre Centrum was chosen as contractor to carry out the modernisation of Åre Torg in accordance with the MDP.

(21) As part of this plan, the following land sale transactions took place in October 2005:

1) By contract dated 4 October 2005, Konsum sold its property at Åre Torg (designation Mörviken 2:91) ([1]) to Åre Centrum for SEK 8,5 million (about EUR 910 000).

2) By contracts dated 3 and 5 October 2005, the Municipality sold land to Konsum comprising the property units Åre Prästbord 1:30, 1:68 and 1:69 ([2]) in the Produkthuset area for SEK 2 million (about EUR 213 000) ('the contested sale').

3) By contract dated 4 October 2005, Åre Centrum sold a plot of land to Konsum for SEK 1 million (about EUR 107 000) with the designation Åre Prästbord 1:76 ([3]), adjacent to the aforementioned property units Åre Prästbord 1:30, 1:68 and 1:69.

(22) Initially, the price of the contested plot of land was supposed to be set at SEK 1 at the Municipal Executive meeting of 24 August 2005. However, by a phone call followed by an e-mail dated 23 August 2005, Lidl made an offer of SEK 6,6 million (about EUR 710 602) for the same plot of land, so that the sale price was re-negotiated by the Municipality and Konsum from SEK 1 to SEK 1 million (about EUR 107 000). However, the price of SEK 1 million was revoked following an appeal submitted by two members of the Municipal Council to the County Administrative Court.

(23) A price of SEK 2 million for the contested plot of land was ultimately approved by the Municipal Executive Board on 5 October 2005. On the same day, the final sale agreement was signed by Konsum and the Municipality.

2.3. **The complaint**

(24) According to the complainant, the contested sale was not preceded by a formal bidding procedure and no independent expert valuation was carried out. The contested sale is, in its view, in breach of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU). In this regard, the complainant submits, in particular, that the bid by Lidl was credible, binding and directly comparable to the bid made by Konsum and accepted by the Municipality. By not accepting Lidl's bid, the complainant considers that the Municipality had sold the plot of land below its market value. The complainant alleges that the aid amounts to SEK 4,6 million (about EUR 495 268), or the difference between Lidl's offer and the sale price.

3. **COMMENTS FROM INTERESTED PARTIES**

(25) The Commission received no comments from interested parties.

4. **ADDITIONAL COMMENTS FROM THE COMPLAINANT**

(26) By letter dated 21 May 2012, the complainant submitted that Konsum paid SEK 861/m^2 (about EUR 92) for the land acquired from Åre Centrum compared with SEK 312/m^2 (about EUR 34) for the land bought from the Municipality. According to the complainant, this constitutes additional evidence that the contested sale took place below market value and that a private operator would have sold the plot at a higher price.

([1]) The plot was renamed after the transaction.

([2]) The plots were renamed after the transaction.

([3]) The plot was renamed after the transaction.

5. COMMENTS FROM SWEDEN

(27) According to the Swedish authorities, the sale to Konsum was part of a series of land transactions, notably involving the sale by Konsum of a plot of land in another area of Åre (Åre Torg), which was intended to be used by the Municipality for certain development purposes.

(28) Through the land sale, Konsum relocated its outlet away from Åre Torg, thereby allowing the Municipality to achieve its objectives as laid down in the MDP, i.e. the creation of a traffic-free zone around the area of Åre Torg. If it had accepted Lidl's bid instead, the Municipality would not have been able to pursue the objective of the MDP, since Konsum would have remained at its premises in Åre Torg. Therefore, Lidl's bid could not be considered comparable to Konsum's. Moreover, the Swedish authorities did not regard Lidl's offer as serious and binding due to its late submission and the lack of sufficient details.

(29) In any event, the Swedish authorities consider that the contested sale had taken place at market value. In this regard, the Swedish authorities submitted two expert reports to support their views: an evaluation report prepared by Ernst & Young Real Estate in May 2003 and an ex post evaluation report prepared by Price-waterhouse Coopers (PwC) in April 2012 evaluating the value of the land at the time of the sale in October 2005.

(30) The Ernst & Young evaluation report was carried out in May 2003. It is based on a cash flow analysis taking into account parameters such as the intended use of the land, the future development of the market in the area, operating and maintenance costs for similar properties, etc. To establish the market value, the report referred to and assessed certain land plots, one of which (Åre Prästbord 1:76) is adjacent to the land bought by Konsum from the Municipality (Åre Prästbord 1:30, 1:68 and 1:69). This report values the directly adjacent plot at around SEK 1 000/m^2 gross area (about EUR 110).

(31) According to the Swedish authorities, the plot adjacent to that to which the Ernst & Young report refers is comparable to the land sold by the Municipality to Konsum in 2005. In the end, the estimated price should correspond to the final sale price of the contested transaction of SEK 1 200/m^2 gross floor area (about EUR 129).

(32) In this respect, the Swedish authorities stress that when setting the price the Municipality took into account the value per square metre of gross area. This was due to the fact that the parties envisaged building commercial premises on the land. To this end, the Swedish authorities consider that the prices calculated by the complainant and presented as evidence that the contested sale took place below market value (see recital (26)) should not be taken into account, since they refer to the price of the land per square metre of total area.

(33) According to the Swedish authorities, the time lapse between the date of valuation by Ernst & Young and the date of the actual transaction (2,5 years) was taken into account, although a market for newly built retail premises in Åre was minor if not non-existent. To substantiate this, the Swedish authorities pointed to a consumer price index in the absence of official statistics of real estate prices for the time and area concerned. The Swedish authorities conclude that the Ernst & Young estimate is in any event comparable to the final sale price.

(34) Furthermore, in response to the Commission's request for information of 22 March 2012, the Swedish authorities provided a new ex post expert valuation prepared by PwC in April 2012. The PwC report concludes that the market value of the land in question [1] at the time of the sale (October 2005) lay between SEK 1,65 and SEK 2,474 million (about EUR 177 000 and EUR 265 000). To arrive at this value range, the report uses the local price analysis of transactions involving similar properties.

(35) Moreover, the Swedish authorities referred to a judgment of the Administrative Court of Jämtland County of 24 May 2006 which confirmed the legality of the Municipality's decision to approve the land sale to Konsum for SEK 2 million. The County Administrative Court decided that the decision was lawful and that there was no favouring of Konsum for the following reasons:

— Lidl's bid was received just before the Municipal Council adopted its decision;

— The sale concerned land which was subject to special conditions of use, according to the MDP applicable to the area;

— There was not enough evidence that the sale price was below market value;

— The decision of the Municipal Council must be regarded as part of a larger plan to relocate businesses away from the city centre. This plan included the contested sale of land to Konsum.

(36) In reply to the complainant's allegations that the property transactions did not take place and that Konsum still appears to be the owner of the real estate Åre Mörviken 2:91, the Swedish authorities allege that the transactions were followed by a process of re-allotment of all the properties involved. Thus, after the transactions were completed, the different properties switched names in the property register. In this regard, the Swedish authorities point out that the properties sold

[1] Åre Prästbord 1:30, 1:68 and 1:69.

by the Municipality and Åre Centrum AB to Konsum changed names from Åre Prästbord 1:30, 1:68, 1:76, and a part of 1:69, to Mörviken 2:91.

6. ASSESSMENT OF THE MEASURE

6.1. The existence of state aid

(37) Article 107(1) TFEU states that 'any aid granted by a Member State 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 Member States, be incompatible with the internal market'.

(38) According to settled case law ([1]), the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity may constitute state aid, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would be likely to have fixed.

(39) The Commission notes, in this regard, that land sale transactions should, in principle, be assessed under the Commission Communication on State aid elements in sales of land and buildings to public authorities ([2]) ('the Land Sale Communication'), which provides a set of guidelines for Member States to ensure that the sale of land and buildings by public authorities is free of state aid.

(40) The Land Sale Communication provides two methods of excluding the presence of aid from such transactions: first, a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid; and, second, an ex-ante valuation report prepared by an independent expert. These two methods seek to ensure that the price at which land is sold by a public authority adequately reflects, as much as possible, the market value of that land, thus conforming to the market economy investor principle (MEIP), so as to rule out the possibility that the sale confers an economic advantage on the purchaser of the land. It cannot be ruled out, however, that other valuation methods may also be applied in such instances so long as it is ensured that the price actually paid by the purchaser on the basis of those methods reflects, as far as possible, the market value of that land ([3]).

(41) In the present case, there was neither an open and unconditional bidding procedure nor an ex ante independent expert valuation prepared for the purposes of the contested sale. The Land Sale Communication is therefore not directly applicable. As a consequence, the market value of the plot of land must be inferred from other available information.

6.2. The bid by Lidl

(42) A concrete contemporaneous bid by a competitor is normally a better indicator of the market value of land than the value of the land estimated by an independent expert, since it reflects how much the market is willing to pay for the land at the date of the sale. However, for such a bid to constitute a reliable indicator of the market value of the land it must be credible, binding and comparable to the bid accepted, taking into account the specific context of the transaction at stake.

(43) The Commission notes that the credibility and binding character of Lidl's bid has been contested by the Swedish authorities. The Swedish authorities emphasized that Lidl's expression of interest was received by e-mail on the day before the adoption of the decision to go ahead with the contested sale by the Municipality's Executive Board and that it lacked sufficient detail.

(44) The Commission considers that the credibility of Lidl's bid could indeed be questioned under these circumstances. However, even if Lidl's bid were considered credible, it would not be fully comparable to Konsum's bid. That is because Lidl and Konsum were not in a similar situation as regards the contested plot of land. Rather, as regards Konsum, the contested sale was part of a set of real estate transactions that aimed at implementing the above-mentioned MDP in the Municipality to create a traffic-free zone around the Åre Torg.

(45) In this regard, it follows from the case law that the context in which a transaction takes place should be taken into account for the assessment of whether a sale of land or buildings by a public authority to an undertaking contains state aid elements within the meaning of Article 107(1) TFEU ([4]).

(46) While Lidl was only interested in obtaining the contested plot of land, Konsum, according to the Swedish authorities, would not have moved away from Åre Torg had it not been able to acquire the two adjacent plots of land in Åre Prästbord. Indeed, the contested sale formed part of a series of interlinked real estate operations pursuing the same objective under the Municipality's development plan for the area, namely a reallotment of properties deemed necessary to create a traffic-free zone around the Åre Torg. Moreover, contrary to the agreement concluded between Konsum

([1]) Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083, paragraph 34 and Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 68; Case T-244/08 *Konsum Nord ekonomisk förening* v *Commission* [2011] ECR II-0000, paragraph 61.

([2]) OJ L 209, 10.7.1997, p. 3.

([3]) Case C-239/09 *Seydaland Vereinigte Agrarbetriebe & Co. KG* v *BVVG Bodenverwertungs- und -verwaltungs GmbH* [2010] ECR I-13083, paragraph 39.

([4]) See judgment of the General Court of 13 December 2011 in Case T-244/08 *Konsum Nord ekonomisk förening* v *Commission* [2011] ECR II 00000, paragraph 57.

and the Municipality, Lidl's bid did not contain any references or specifications in relation to the MDP. Accepting Lidl's bid would therefore have jeopardised the attainment of the objectives set out in the MDP so that, from the perspective of the Municipality, the two bids cannot be considered comparable.

(47) The Commission therefore concludes that, given the context of the contested sale, Lidl's bid does not provide the best available proxy for determining the market value of the contested plot of land.

6.3. **The expert valuations**

(48) The Swedish authorities have argued that there is no official report on the development of real estate prices for Åre at the time of the contested sale due to the absence of a real estate market for transactions of that kind. Instead, the Swedish authorities submitted a valuation of an adjacent plot of land prepared by Ernst & Young in May 2003. While that valuation was undertaken by an independent asset valuer on the basis of generally accepted valuation standards, it was carried out almost two and a half years before the contested sale took place, so that the value of the land may have changed significantly during that period.

(49) Further to the Commission's request, the Swedish authorities provided an additional expert report of the market value of the plot of land in question. This new ex post valuation, conducted by PwC in 2012, estimates the market value of the plot of land at the time of the contested sale, i.e. October 2005. The report confirms the Swedish authorities' claim that at the time of the contested sale there were hardly any transactions in the area with similar characteristics from which to derive the market value of the contested property. Nevertheless, to arrive at an estimate of the property's market value, the report applies a local price analysis of transactions with similar properties. The report concludes that the market value of the contested property in October 2005 was between SEK 1,65 and SEK 2,475 million.

(50) Since this report was carried out by an independent asset valuer on the basis of generally accepted valuation standards, namely the comparative method (i.e. an analysis of transactions involving similar properties), to appraise the market value of the contested plot of land on the date of the contested sale, the Commission considers this estimate to constitute the best available proxy for determining the market value of the contested plot of land. On the basis of that estimate, the purchase price paid by Konsum to the Municipality for the plot of land – SEK 2 million – lies within the range considered to constitute the market value in October 2005.

(51) Finally, the Commission also takes into account the fact that the parties considered the price per square metre gross area when setting the price of the plot of land in question. In this respect, the price of SEK 1 000/m^2 gross floor area, as evaluated in the Ernst & Young report, appears to be comparable to the SEK 1 200/m^2 gross floor area agreed for the contested sale.

(52) In the light of the above, the Commission considers the sale of the property units Åre Prästbord 1:30, 1:68 and 1:69 in the Produkthuset area by the Municipality to Konsum on 5 October 2005 for SEK 2 million to have been made at the market price so that that sale contains no state aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The measure which Sweden has implemented for Konsum Jämtland Ekonomisk Förening does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to Sweden.

Done at Brussels, 16 April 2013.

For the Commission
Joaquín ALMUNIA
Vice-President