Level 3
State Aid Analysis

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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

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RE: HAU – State aid, public procurement and labour law issues

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TABLE OF CONTENTS

EXECUTIVE SUMMARY **2**

A. BACKGROUND **3**

B. THE ARRANGEMENTS UNDER CONSIDERATION **4**

C. FIRST SCENARIO: LEASE/CONCESSION **4**

1. EU State Aid Issues 4
   - *a. General Background* *4*
   - *b. Advantage* *7*
   - *c. Selectivity* *10*
   - *d. SGEI – Absence of aid if the "Altmark" criteria are satisfied* *10*
   - *e. SGEI – existence of aid if the Altmark criteria are not satisfied, but possibility of conformity* *13*
   - *f. Other possibilities for compatible State aid* *13*
2. Public Procurement Issues 14

D. SECOND SCENARIO: SALE OF THE AIRPORT **18**

1. State Aid Issues 18
2. Public Procurement Issues 20

E. POSSIBLE EU LABOUR LAW ISSUES **20**

1. Directive on Collective Redundancies 21
2. Directive on employees' rights in transfer of undertakings 21
3. Directive on informing and consulting employees 22

Executive Summary

Avinor's conduct in its dispute with LUB suggests it may readily rely on State aid or public procurement rules in order to (re)negotiate or terminate its commercial relations with its business partners. Therefore, extra caution will be required to avoid such exposure.

First scenario: long term lease arrangement/concession.

Potential **State aid** issues will be unlikely, if not entirely excluded, if the transaction relies on an open, transparent and non-discriminatory public tender. If this is not the procedure followed, the transaction as a whole would need to be assessed based on a "market economy operator" (MEO) test and hence, in all likelihood, an *ex ante* profitability analysis of Avinor's business plan at the time of the transaction. As the investors are unlikely to have access to this plan, we propose certain fall-back solutions.

The Airport's operation may be designated as a **Service of General Economic Interest (SGEI)**, if Norway cooperates with the idea and certain conditions are fulfilled including, in particular, the absence of direct competition with other airports. SGEI designation may allow the subsidization of the airport's operator within certain limits, either because it does not constitute State aid or because it is aid compatible with the EEA market. Other (less likely) options would be to benefit from a *de minimis* exemption or an approval as operating aid.

There is a fair chance that this first scenario would be caught by the recent **Concessions Directive**, governing public procurement type issues in a concessions context. Its applicability will largely depend on Avinor's post-transaction control over the Airport operator's tasks, and the degree of operating risk accepted by the operator. If applicable, the Directive would also impose restrictions on the concession's duration.

Second scenario: sale of the Airport.

State aid issues could arise if the Airport (taking into account any opt-out clauses) is transferred to the investors at a lower price than the lowest price a MEO in the position of Avinor would accept. Again, if the land is sold through a tender, this will simplify things; if not, independent expert studies may be needed to establish the land's market price.

Public procurement issues are less likely to arise under this scenario, unless Avinor exercises some control over the buyer and its operations post-sale.

Under both scenarios, the relevant EU labour law provisions have been generally incorporated into Norwegian law and are thus unlikely to constitute an independent source of obligations and risks.

A. Background

You have asked us to examine the potential implications, under EU State aid law and, to a lesser extent, EU public procurement and labour law, of a possible future transaction concerning the Haugesund Airport, Karmøy (the "Airport"), an international airport serving the Haugesund region in Norway.

The Airport, in use since 1975, is owned and operated today by **Avinor AS ("Avinor")**, a State entity, wholly owned by the Ministry of Transport. Avinor owns and operates more than 40 airports in Norway, most of which, including the Airport, are loss-making but financed through income generated by the larger Avinor airports. A group of investors you are advising are interested in taking over the Airport's operation and are considering various alternative scenarios.

In 2003/2004, the Airport's runway was expanded to serve larger planes/international flights. The expansion was financed by a private company (**Lufthavnutbygging AS, "LUB"**) through an amortising loan to Avinor, while the latter remained owner of the extended runway. The Avinor/LUB agreement was subsequently renegotiated and is (or was, until recently) supposed to expire on 30 April 2018. Recently, Avinor has claimed that its arrangements with LUB, as amended, were strongly in LUB's favour, would not have been accepted by a market economy operator ("MEO") in Avinor's position and therefore constituted **State aid to LUB**.

LUB did not agree with this assessment and the matter was brought to the attention of the EFTA Surveillance Authority (ESA), as a case of illegal State aid. On 1 July 2015, ESA informed the parties that it was closing the case. We assume this was the end of the matter, but cannot tell whether ESA's view resulted from any changes to the parties' agreement or its conclusion that the agreement did not raise any State aid issues despite Avinor's claims to the contrary.

Even if, strictly speaking, the Avinor/LUB dispute is unrelated to the current project, it provides a cautionary tale for the discussion that follows. Relatively small commercial arrangements relating to regional airports and involving potential State aid are unlikely to hit the ESA's (or, for that matter, the European Commission's) radar screen unless they are notified for clearance or are challenged by a third party, such as a competitor.

However, an investigation can also result from the initiative of one of the parties to any such contestable agreement if things run sour on the commercial front. Avinor has shown it is prepared to raise State aid issues in order to tilt the scales in its favour in a commercial negotiation. It may well be inclined to repeat such tactics with regard to any future leasing or other arrangements with your clients. Therefore, extra caution will likely be required with regard to any potential State aid issues involved in the leasing arrangement or sale under consideration.

Similarly, as can be inferred from its draft business plan you sent us, Avinor is aware of the existence of recent EU legislative initiatives regarding **public procurement rules for concessions**. It may therefore try to use these too to its commercial advantage.

B. The arrangements under consideration

We understand that Avinor has not yet opted for a specific way forward concerning the future of the Airport, and that your clients are open to at least two possible arrangements.

The first would be a long term lease arrangement/concession, pursuant to which Avinor would lease to a selected lessee (such as your clients) certain parts of the airport's function and/or infrastructure, perhaps in combination with some transfer funding from Avinor to cover the lessee's initial costs. After an initial period of, say, three years, the lessee's periodic lease payments could be linked to parameters associated with the airport's growth and performance.

The second possibility would be a sale of the Airport to a consortium of local public and private entities, with the latter insisting on an "opt-out" clause in the event of a change of material conditions or a negative performance of the Airport in the future. Under this scenario, the private entities participating in the consortium would become majority owners of an operating company to be established as the Airport's operator. The investors believe that a privately-owned operator could help avoid tenders and allow for more commercial flexibility (and less State aid complications) in dealing with airlines. If the arrangement does not work out, however, the shareholders could then transfer the land back to a local municipality called Karmøy. The land is, apparently, very valuable and the assumption is that the municipality will gladly take it back and develop it for real estate, housing *etc*. if the Airport project does not work out.

Under both scenarios, your current assumption is that the Airport does not require any substantial investments to operate, at least in the short term. We also note that you do not have the information necessary to assess the cost of closure of the Airport.

C. First Scenario: Lease/Concession

1. EU State Aid Issues

a. General Background

As you know, in order to fall under the prohibition of Article 107 TFEU, State aid must:

(a) be granted by the State or through State resources;

(b) confer an advantage on its recipient;

(c) favour certain undertakings or the production of certain goods (the "selectivity" condition);

(d) distort or threaten to distort competition; and

(e) affect trade between EU Member States.

These conditions are replicated in Article 61 of the EEA,[1] and their interpretation by ESA follows closely that of the European Commission. Accordingly, any references to EU law that follow also apply in relation to EFTA countries and Norway in particular, unless specified otherwise.

Criteria (d) and (e) in the above list are met easily in practice, and we can assume they would be met here too. Similarly, it is clear from Avinor's record that it assumes that, as a State-owned company, it meets condition (a). This is not necessarily true: the legal test is more subtle, even for fully-owned State companies. However, as a practical matter, if Avinor readily assumes it falls to be considered as State or at least as an entity disposing of State resources, it will be almost impossible for a third party, with an outsider's limited information on Avinor's internal organisation and decision-making, to provide compelling evidence to the contrary.

Criteria (b) and (c) are often examined summarily together, even if this is conceptually and legally wrong. It is true that, in practice, if the grant of an advantage to the recipient is proven (condition (b)), it may be difficult to argue convincingly that the advantage was not selective (condition (c)). However, the EU General Court has clearly confirmed the distinction, also in the case of airports.[2]

A risk of State aid will normally be eliminated, if the transaction in question is carried out through an **open, transparent and non-discriminatory public**

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1 Article 61(1) provides that "[s]*ave 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*."

2 In *Hansestadt Lübeck v Commission*, T-461/12, EU:T:2014:758, paragraph 57 (currently on appeal), the Court confirmed that it cannot be concluded automatically, from the existence of an alleged advantage to one or more airlines using an airport, that these are not in the same legal and factual position as other enterprises, on the one hand, without examining whether the fee regulations applying to other airlines in other airports present the same features and, on the other hand, without comparing the goods and services provided by all airports. It is reasonable to conclude that the same principle should also apply in a relationship between a State-owned airport owner and the airport's operator, as is the case here.

tender. In principle, such a procedure should ensure the absence of any advantage that could not be obtained under normal market conditions, and should thus exclude the presence of any State aid.[3] In fact, Avinor may feel compelled to organise a public tender by virtue of its obligations under applicable EU public procurement rules.

In practice, however, things may not be so simple. First, as will be discussed below, Avinor enjoys some latitude under EU public procurement rules to avoid a public tender and rely, for example, on a negotiated procedure, at least in part. Second, it is difficult to see how a complex transaction, with several interrelated variables (length of the concession, amount of lease, transfer funding for initial costs, incentive mechanisms *etc*.) and an *a priori* limited number of potential lessees, if any, can be put out to tender in its entirety. A more likely scenario would be an initial pre-selection process followed by negotiations with a few selected candidates, or an entirely negotiated procedure if no more than one candidate can be found.

Note that, even if a tender is held, questions of potential State aid may still arise, *e.g*., because the tender was not sufficiently open and transparent, bidders were not given sufficient time to respond, *etc*. On the other hand, the European Court has also confirmed that not all irregularities in the tender process will necessarily render the price offered by the winning bidder a "non-market" price susceptible to a State aid challenge. If the specific deficiencies encountered in a tender do not affect the amount of the winning bid by pushing it lower, then its price may still be accepted as the market price.[4]

A last potential concern is that even a public tender for the leasing of the Airport may be inconsistent with the MEO principle if an alternative solution, such as simply selling the Airport to the municipality of Karmøy or another third party, can be expected to generate more revenues for Avinor. As such, it would be the quick, easy and more profitable option preferred by a MEO. Avinor may have valid public policy reasons to prefer giving the Airport a "last chance" before simply selling the land for real estate development or other purposes. However, such public policy considerations fall outside the ambit of the MEO principle. Avinor could not, therefore, validly rely on them to argue that the transaction

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[3] As stated by the Commission in Case N 264/2002 *London Underground Public Private Partnership*, para 79: "*when these types of infrastructure arrangements are concluded after the observance of an open, transparent and non-discriminatory procedure, it is, in principle, presumed that the level of any public sector support can be regarded as representing the market price for the execution of a project. This conclusion should lead to the assumption that, in principle, no State aid is involved*."

[4] *Land Burgenland and Others v Commission*, Joined Cases C‑214/12 P, C‑215/12 P and C‑223/12 P, EU:C:2013:682, para. 96.

does not involve State aid, although it could invoke them to obtain a possible approval of such State aid by the ESA.[5]

We should mention, based on our practical experience in various State aid cases, that the Commission will not normally engage in an exhaustive comparison of every conceivable transaction in order to identify the one that would be the most profitable and thus consider the rest as non-MEO compatible. Whatever the reasons for this narrow analysis, (lack of resources for a full comparison, reluctance to discuss hypothetical commercial alternatives or simply bias in favour of the alleged State aid beneficiary), the European Courts have accepted it as valid, at least in some cases.

b. Advantage

To decide whether there is any "advantage" in the arrangements related to the leasing agreement and its associated arrangements (transfer funding, incentive scheme *etc*.), one would have to examine whether, in similar circumstances, a MEO would have entered into the same or similar commercial arrangements.[6]

There are two alternative methods to carry this, so-called MEO, test:

(a) Comparing the conditions the public investor/lessor/seller (*i.e.*, Avinor) is prepared to accept with those encountered in actual, comparable, market transactions entered into by comparable, private market players. This is known as the **comparator approach**.

(b) A **profitability analysis**, which involves a determination of whether a hypothetical MEO, guided by prospects of mid- to long-term profitability, would likely enter into a similar arrangement.

Our view is that, under EU case-law,[7] the profitability analysis may only be applied in those instances where it is not possible to undertake a comparator analysis. Consequently, the comparator analysis should be the default approach. However, this view is currently contested by the Commission in a number of pending cases before the European Courts, and the outcome is uncertain.

In practice, the Commission has been reluctant to accept this view, at least in the air transport sector, even in cases where a comparison between different airport

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5 *E.g.*, as regional aid, see section (f), below.

6 See, e.g., *Commission Decision of 25 July 2012 on measure SA.23324 — C 25/07 (ex NN 26/07) — Finland Finavia, Airpro and Ryanair at Tampere-Pirkkala airp*ort, OJ L 309/27 of 19.11.2013, at para. 79.

7 *Chronopost v UFEX*, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paras. 38-40; *Corsica Ferries Germany SAS v Commission*, Case T-565/08, EU:T:2012:415, para. 87.

fees was a relatively straightforward matter, because the structure and level of such fees were public information and not that different across airports. It is reasonable to assume that, here too, ESA would feel compelled to follow the Commission's lead.

Moreover, it is true that accepting a comparator approach in the present case would be objectively difficult. The contemplated lease/concession will combine several transaction-specific elements (financing, incentives *etc.*) and it will probably be very difficult, if not impossible, to find a sufficient number of similarly structured transactions, involving privately held or controlled airports that could serve as acceptable comparators, and for which the relevant information on the terms of the transaction would be available – this type of information is normally confidential. Realistically therefore, **this leaves profitability analysis as the only available alternative for showing that the transaction is compatible with the MEO principle**.

The draft business plan of Avinor we have seen is incomplete and open on the specific alternative to be followed, its underlying assumptions, the associated costs and revenue streams *etc*. But even if Avinor narrows down its options into the specifics of a proposed deal with your clients, it will likely be unwilling to allow them access to its related business plan so that they can verify themselves whether the deal is MEO-compatible for Avinor.[8]

As discussed above, the long term lease/concession under consideration could comprise at least the following interrelated elements:

(a) a long term lease/concession by Avinor to the group of investors taking over the Airport's operation;

(b) a possible transfer funding from Avinor to cover the lessee's initial costs; and

(c) a potential linking of the lease payments, after an initial period, to certain performance indicators to be agreed.

Consistent with EU case-law, which ESA must follow when applying the MEO test, it will be necessary to examine the commercial *transaction as a whole*, with all the relevant features of the measures in question and their context.[9] The

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[8] This is, in fact, one of the main weaknesses of the profitability approach, as it unfairly exposes private parties (such as airlines or airline operators) as potential beneficiaries of State aid when dealing with State-owned entities, without allowing them to verify in advance whether these entities are acting in line with the MEO principle.

[9] *Ryanair v Commission* Case T-196/04 EU:T:2008:585, para. 59.

relevant test is not, therefore, a formalistic one based, *e.g.*, on certain values fixed in advance, but a holistic case-specific assessment.

For example, in the *Tampere-Pirkkala* airport case[10] (which was concluded with a "no aid" finding), the Commission examined and cleared, among other measures, a 10 year lease agreement between Finavia, the airport's owner, and Airpro, a Finavia subsidiary and the airport's operator. The Commission took into consideration a series of case-specific factors, such as the fact that:

- Finavia had an *ex ante* business plan showing that, even under a worst-case scenario, the investment project was expected to make a positive contribution, with an average profit margin broadly in line with profit margins of other airports in the EU;
- the airport's cargo hangar had become vacant, Finavia was losing a quantifiable (but confidential) monthly rent, and it was obvious that no new tenant could be found;
- the empty cargo hangar was fully depreciated and the refurbishment costs for transforming it into a low-cost passenger terminal amounted to EUR 760 612. Even if the cargo hangar had not been converted into a passenger terminal, Finavia would have nonetheless had to undertake certain refurbishment works amounting to approximately EUR 100 000.
- Finavia had to keep the airport's runway available for military purposes 24 hours a day, 365 days a year. Therefore, an increase in traffic at the airport might result in a better allocation of resources and a reduction in possible overcapacities.

Although the MEO test allows for some leeway, a typical starting point in the present case will be to examine whether Avinor has an *ex ante* business plan showing that, based on reasonable assumptions and the facts known to Avinor at the time, the transaction is profitable in the mid- to long term (say, in 5-10 years), or at least less onerous financially to Avinor that the counterfactuals of doing nothing or selling the Airport.

As mentioned already however, this is not the type of information that Avinor will normally be willing to share with the investors. These can therefore consider the following fall-back options:

[10] *Commission Decision of 25 July 2012 on measure SA.23324 — C 25/07 (ex NN 26/07) — Finland Finavia, Airpro and Ryanair at Tampere-Pirkkala airport*, OJ L 309, 19.11.2013, p. 27–39. See, in particular, sections 3.2 and 6.1 of the decision.

(a) Discuss with Avinor the possibility of a "Chinese wall" type of arrangement, whereby the investors' economic advisors, after signing an appropriate non-disclosure agreement, could obtain access to Avinor's business plan for the purposes of verifying that its projections are MEO-compliant. Avinor's draft business plan we have received is more of a general discussion of options than the type of quantitative and robust business plan that ESA or the Commission would consider sufficient.

(b) Obtain, in any event, Avinor's written assurance, preferably in the transaction corporate documents, that its projections concerning the deal, as based on the information then available, and any commitments and targets agreed by the parties, are compatible with the MEO principle, with which Avinor is familiar. This will not provide a perfect legal shield against an opposite finding by a regulatory authority or a court: the MEO test is an objective one. However, Avinor's written assurance can at least stop it from using State aid arguments later on to renegotiate the deal, as it apparently tried to do *vis-à-vis* LUB.

(c) Carry out an independent, if less reliable, simulation of a mid- to long term (5-10 years) profitability analysis from Avinor's perspective, based on the investors' best available information on the Airport's current and its projected performance, under a best case/worst case scenario. Even without Avinor's participation, this exercise can at least provide a rough indication of the investors' potential exposure to the risk of a State aid investigation and the parameters that can affect it.

c. Selectivity

As a practical matter, the condition of selectivity will normally be considered fulfilled, if an advantage is found to exist. Here again, the presence of a tender can provide evidence that the advantage was not granted on a selective basis, but was available to other potential investors too.

The conceptual distinction between advantage and selectivity can help provide an additional defence against State aid claims if, for instance, Avinor's plans concerning the operation of the Airport and their related key features are properly publicized but do not find any interested parties other than the group of investors you advise.

d. SGEI – Absence of aid if the "Altmark" criteria are satisfied

You have also asked us what it would be required to do in order for the Airport to become an SGEI (Services of General Economic Interest)-designated airport and whether, in such a case, Avinor could still enter into a concession/lease type arrangement or even a sale.

Public authorities may define certain economic activities carried out by airports or airlines as SGEI within the meaning of the *Altmark* case-law[11] and provide compensation for discharging such services without infringing the prohibition of State aid under Article 107(1) TFEU if the following four conditions are met:

(a) the beneficiary must be formally entrusted with the provision and discharge of an SGEI, the obligations of which must be clearly defined;

(b) the parameters for calculating the compensation must be established beforehand in an objective and transparent manner;

(c) the compensation cannot exceed the amount necessary to cover all or part of the costs incurred in the discharge of the SGEI, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and

(d) where the beneficiary is not chosen through a public procurement procedure allowing for the provision of the service at the least cost to the community, the level of compensation must be determined based on an analysis of the costs which a typical, well-run, enterprise would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.

Under the Commission's 2014 Aviation Guidelines and the equivalent text adopted by ESA,[12] it is possible for the overall management of an airport, in well-justified cases, to be considered an SGEI. However, this can only be the case if "*part of the area potentially served by the airport would, without the airport, be isolated from the rest of the EEA to an extent that would prejudice its social and economic development. Such an assessment should take due account of other modes of transport, and in particular of high-speed rail services or maritime links served by ferries. In such cases, public authorities may impose a public service obligation on an airport to ensure that the airport remains open to commercial traffic.* […] *Such a situation may, in particular, occur in respect of the outermost regions, as well as islands or other areas of the EEA. Subject to a case-by-case assessment and depending on the particular characteristics of each airport and the region which it serves, it may be justified to define SGEI obligations in those airports*."

Further, both the Commission and ESA consider that the scope of public service obligations imposed on airports should not encompass the development of

11 *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, Case C-280/00, EU:C:2003:415, paras. 86-93.

12 See its para. 72.

commercial air transport services.[13] As a consequence, it is difficult to see how the designation of the Airport's operation as a SGEI could be compatible with public support for an aggressive plan for its future commercial development focused on low cost airlines.

Overall, we cannot judge reliably if the necessary conditions would be met for the Airport and how the "isolation factor" would play out in this case. Avinor's draft business plan states that "*Haugesund region has currently no other channels to foreign countries, either ferries or trains. Thus there are no direct competitors to Haugesund Airport beyond other airports*." However, the same business plan also suggests that the Airport competes against Stavanger Airport and Bergen Airport, which it could eventually supplement, especially in leisure travel – a commercially ambitious proposition that seems difficult to reconcile with the typical scenario behind a SGEI designation.

Further, a SGEI designation, if approved, could be more easily compatible with a straightforward subsidization of flights to and from the Airport, rather than the more sophisticated arrangement the parties seem to have in mind here, which could evolve over time, include an incentive mechanism *etc*.

Overall, the case for a possible SGEI designation regarding the Airport's designation seems to depend on (i) the extent to which the Airport can be considered isolated and not competing with other, nearby, airports and (ii) whether the potential investors would be interested in a "utilities type" arrangement, ensuring a reasonable return over their investment but no Avinor/State support in terms of future commercial growth for the Airport.

Having said that, the investors would not have to renounce future commercial growth; they could simply not claim SGEI compensation for that. For example, they could still receive SGEI funds for the basic maintenance of the airport's essential services and infrastructure if the continuing operation of the Airport is deemed to be an SGEI.[14]

As regards the "isolation factor" and although there is no hard and fast rule on this question, an airport that is more than an hour's driving distance from the nearest airports may have a decent chance of receiving SGEI compensation, depending on the absence of any other alternatives, the population served *etc*.

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[13] *Id*., para. 73.

[14] See, *e.g*., *Commission Decision (EU) 2015/1226 of 23 July 2014 on State aid SA.33963 (2012/C) (ex 2012/NN) implemented by France in favour of Angoulême Chamber of Commerce and Industry, SNC-Lavalin, Ryanair and Airport Marketing Services*, OJ L 201/48 of 30.7.2015, para. 221.

e. SGEI – existence of aid if the Altmark criteria are not satisfied, but possibility of conformity

Aid in the form of public service compensation granted to undertakings entrusted with the operation of SGEI can qualify as State aid but be considered as compatible with the Internal market and exempted from notification, if certain conditions are met, as set out in a 2011 Commission Decision.[15]

The Decision applies to, among other forms of compensation, that provided for the provision of SGEI as regards airports for which the average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 200 000 passengers.[16] We understand from your note that, in 2014, the Airport had more than 600 000 passengers, thus largely exceeding the Decision's maximum allowed number and depriving it of the benefit of a potential exemption without notification. An approval of the aid could still be possible, but would require individual assessment by the Commission, based on the principles discussed under the next heading.

f. Other possibilities for compatible State aid

Depending on the amount of alleged aid involved, the transaction could perhaps benefit from the Commission's Regulation exempting ***de minimis*** **aid** from the scope of the EU law prohibition of State aid.[17] In order to benefit from this exemption, the total amount of aid granted by Avinor to the investors should not exceed EUR 200 000 over any period of three fiscal years.

If the aid cannot benefit from the *de minimis* rule and any other of the above mentioned exemptions, any payments or other benefits granted to the investors under the lease/concession arrangement going beyond what an MEO would be prepared to pay would normally qualify as **operating aid** – as mentioned earlier,

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15 *Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest*, OJ L 7/3 of 11.1.2012.

16 *Id.*, Article 2(1)(e).

17 *Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid*, OJ L 352/1 of 24.12.2013. The Regulation is included in the EEA Agreement (Annex XV, State Aid, Item 1ea.) and implemented in Norwegian law through the Regulations of 14 November 2008 No 1213 concerning exemption from the notification requirement for state aid, Section 2. The Regulation applies only to State aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante* without any need to undertake a risk assessment.

there are no significant investments required for the Airport's further operation.[18] The conditions for the approval of operating aid are quite strict, and we have no elements suggesting they would be fulfilled in the present case.[19]

Still, aid to a regional airport (or its operator) can still be approved, subject to the Commission's (or ESA's) discretionary powers, for example based on Article 107(3)(c) TFEU in the EU or Article 61(3) of the EEA Agreement.[20] The Commission has occasionally shown considerable leniency in accepting that these conditions were fulfilled for certain regional airports, even in cases where these were not particularly isolated, as long as the nearest airports have a different traffic profile, and do not directly compete against the beneficiary airport.[21]

2. Public Procurement Issues

Although public procurement is not the main object of your inquiry, we believe that a quick review of the pertinent rules would be helpful because the applicable regime is new and still work-in-progress, and could have a material impact on the procedure.

The Avinor draft business plan for the Airport, received from you on 3 March, refers briefly to public procurement rules, commenting that these did not apply, at the time, to **concession contracts** (as opposed to contracts for the procurement of goods or services), but that a proposal had been tabled by the European Commission to extend EU public procurement rules to concession agreements.[22]

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18 As an example of a similar finding, see *Commission Decision (EU) 2015/1071 of 1 October 2014 on State aid SA 26190 (2012/C) (ex 2011/NN) implemented by Germany for Saarbrücken Airport and airlines using the airport*, OJ L 179/1 of 8.7.2015, paras. 18 and 319.

19 Under the Commission's 2014 Aviation Guidelines, these include (i) contribution to a well-defined objective of common interest, (ii) need for State intervention, (iii) appropriateness of the aid measure to address the objective of common interest, (iv) an incentive effect for the beneficiaries, (v) limiting the aid to the minimum necessary, (vi) avoidance of undue negative effects on competition and trade in the EEA and (vi) transparency, *i.e.*, easy public access to all relevant acts and pertinent information.

20 "*The following may be considered to be compatible with the functioning of this Agreement: ... 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*."

21 See, for example, the Commission's comments in paras. 550-554 of its decision in the recent Pau airport case (*Commission Decision (EU) 2015/1227 of 23 July 2014 on State aid SA.22614 (C 53/07) implemented by France in favour of the Chamber of Commerce and Industry of Pau-Béarn, Ryanair, Airport Marketing Services and Transavia*, OJ L 201/109, 30.07.2015).

22 Avinor draft business plan, sections 3.5.2 and 3.5.3.

In the meantime, this proposal has been adopted, as *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts*[23] (the "Concessions Directive"). "Concessions", under the Directive, means both works or services concessions. The latter (which are more relevant for present purposes) refer to "*a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment*."[24]

The same provision clarifies that the award of a services concession must involve the transfer to the concessionaire of an operating risk in exploiting those services. The concessionaire will be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire must involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire must not be merely nominal or negligible.

A first question is whether a lease agreement along the lines described above would qualify as a "concession contract" in the above sense. Certain comments in the Concession Directive's preamble suggest this is not a foregone conclusion. For example, preamble 15 clarifies that, if an economic operator (such as your clients) receives "*a right to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or <u>airports sector</u>,* [emphasis added] *whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services*," then this transaction should <u>not</u> qualify as a "concession" within the meaning of the Concession Directive – and could therefore fall outside the scope of EU public procurement rules altogether.

Therefore, the **two key criteria** in deciding whether the arrangement qualifies as a "concession" in the above sense will be whether the lessee (i) is entrusted with the provision of services that are defined sufficiently clearly (*e.g.*, in terms of the number, frequency and/or nature of routes) and are subject to specific conditions, and (ii) assumes a material operating risk in exploiting these services. We assume that both of these conditions would be met here, but this will need to be re-

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23 OJ L 94/1, 28.3.2014.

24 Concessions Directive, Article 5(1)(a).

confirmed once the exact terms of the lease or other arrangement decided by Avinor become known.

The Concession Directive's provisions govern concessions awarded by "**contracting entities**" the definition of which is wide enough to almost certainly include Avinor – something that Avinor itself seems to be taking for granted. Further, the concessions covered by the Concessions Directive include, among other activities, those "*relating to the exploitation of a geographical area for the purpose of the provision of* ***airports*** […] *or other terminal facilities to carriers by air*[.]"[25]

In principle, the Concessions Directive applies to concessions the **value of which is equal to or greater than EUR 5 225 000**[26] and imposes a comprehensive but flexible set of rules to certain types of concession agreements. It is reasonable to assume that the definition of "services concession" in the text of the Concessions Directive[27] would also cover at least part of the contemplated arrangement between Avinor and your clients, under any of the lease/concession scenarios under consideration.

EU Member States have until 18 April 2016 to transpose these new rules into their national law. Incorporation of the Concession Directive into the EEA Agreement (and hence also their eventual implementation in Norway, as an EFTA country) is an ongoing process but should be completed in the near future.[28] Therefore, there is a high chance that the contemplated arrangement with Avinor for the Airport may need to comply with these new rules too.

Unlike other EU public procurement rules, the ones now in place for concessions do not impose specific procedures that need to be followed when awarding a concession. Instead, the Concession Directive is supposed to reflect a more "light touch" and flexible regime, with some minimal requirements including, in particular:

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25 *Id.*, Article 7(1), Annex II.4.

26 As amended through Article 1 of *Commission Delegated Regulation (EU) 2015/2172 of 24 November 2015 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts*, (OJ L 307/9 of 25.11.2015, with effect as of 1 January 2016.

27 "*…a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment*."

28 See http://www.efta.int/eea-lex/32015R2172.

(a) the obligation to publish prior "concession notices" in the Official Journal of the EU, subject to certain, narrowly defined, exceptions;

(b) the obligation to predefine award criteria;

(c) the obligation to comply with general principles of objectivity, transparency and non-discrimination; and

(d) rules on the maximum duration of concessions.

Accordingly, Avinor would not appear to be required, under these new rules, to organise a tender for the concession or other arrangement it opts for; alternatives, such as a negotiated procedure with a number of candidates, can also be compatible with the new rules.

Further, since the arrangement your clients have in mind relates to a long term lease, *i.e.*, presumably, more than five years, the above rules on the maximum **duration of concessions** will likely apply. Under **Article 18 of the Concession Directive**, the duration of concessions must be limited. Further, if it's longer than five years, it may not exceed the time that a concessionaire (*i.e.*, the party who receives the concession) "*could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives. The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession*."

This obligation would apply separately from, and cumulatively with, any tests necessary to ensure that Avinor acts as a MEO and does not, therefore, grant State aid. In other words, it will be necessary to ensure that two conditions are fulfilled:

- **State aid test**: Avinor does not receive concession fees that would be lower or other terms that would be more favourable than those likely to be offered by an MEO acting in Avinor's place, and this without regard to the value of the transaction for the concessionaire – the latter is irrelevant under this test.

- **Public procurement/concession test:** the investors must not receive a concession of a duration longer that what is necessary in order for them to meet the test of Article 18 of the Concession Directive, and this regardless of the transaction's value for Avinor – which is, again, irrelevant under this, public procurement related, test.

The interaction of these two separate tests has not been explored in practice yet, as the Concession Directive is still in the process of implementation. In any event, it is clear that the two tests serve different purposes. While the first one

should be preferably backed up through a business plan by Avinor, the second one may be supported through a business plan by the concessionaire (*i.e.*, your clients).

It is also clear that if the amount of the lease is to be linked to the Airport's performance, be it immediately or after a transitional period, this will render the public procurement test of the Concession Directive's Article 18 even more complex. In fact, one wonders if the EU legislators have really thought through the implications of this provision in scenarios such as the one at hand, which are not, after all, that unusual. A relief of sorts is that, in practice, EU public procurement provisions are usually not aggressively enforced, other than in cases of manifest and serious violations. However, it is also clear that if Avinor wants to negotiate the duration of the lease and its terms, Article 18 of the Concession Directive can provide it with a legitimate excuse to do so.

D. Second Scenario: Sale of the Airport

1. State Aid Issues

The principles for a State aid analysis would be essentially the same in the event of a straightforward sale of the Airport, but its practical application would probably be simpler than in the case of a more sophisticated lease/financing/incentive type of arrangement, even if an opt out clause would complicate the quantitative assessment of the transaction's value and its compatibility with the MEO principle. For example, even if the sale price is found to be a market price, an opt out clause allowing the buyers to return the Airport to the municipality of Karmøy at the same or another guaranteed, and high, price could be considered a form of State aid.

In its 1997 *Communication on State aid elements in sales of land and buildings by public authorities*, the Commission has commented that a sale of land and buildings, after a **well-publicized, open and unconditional bidding procedure** comparable to an auction, accepting the best or only bid is, by definition, at market value and consequently does not contain State aid.

As an alternative, public authorities may rely on an **independent evaluation** by one or more independent "asset valuers" prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. One element of comfort regarding the sale of land is that it is possible to determine the market price through an expert, and the comparator test is relatively well established for sales of land. If, after a reasonable effort to sell the land and buildings at the market value, the value set by the "valuer" cannot be obtained, a divergence of up to 5 % can be deemed to be still in line with market conditions.

Special obligations that relate to the land and buildings (*e.g.*, the obligation to meet certain standards regarding the Airport's operation, the frequency of flights, *etc.*) may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them. The economic burden associated with such an obligations must be evaluated separately by independent "valuers" and may be set off against the purchase price.

The above 1997 Communication is fairly old by now, but its principles still apply and have been confirmed and further developed through case law.

For example, if Avinor decides to sell the Airport through an open, transparent and unconditional tender procedure, it can be presumed that the market price will correspond to the highest offer provided that (i) this offer is binding and credible and (ii) the consideration of economic factors other than the price is not required under the circumstances.[29] Such "economic factors other than the price" may include, in this case, the conditions of the opt-out clause. In this regard, the price at which the Airport can be resold to Karmøy in the future would be a market price as long as it would not be higher than the highest price a private investor, acting under normal competitive conditions, would be ready to pay for this land.[30]

If the land is sold through a tender, the Commission or the ESA will not be obliged to resort to other methods in order to check the market price, such as independent studies.[31]

Note that if the investors buy the Airport, there is also a risk that **they may "inherit" any State aid liabilities accumulated by the Airport.** This can be particularly the case in a share deal, but also in an asset deal unless the aid element is assessed at a market price and included in the purchase price, thus conferring a benefit to the seller rather than the buyer.[32] Further, the fact that the Airport is currently operated by a State-owned group (Avinor) does not automatically exclude the grant of State aid to that group, insofar as it acts commercially, as an "undertaking".

The buyer can avoid such a risk by including a relevant examination of State aid risks in its due diligence list. In particular, it would be important to ensure that

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[29] See, *e.g.*, *Land Burgenland and Others v Commi*ssion, Joined Cases C‑214/12 P, C‑215/12 P and C‑223/12 P, EU:C:2013:682, para. 94.

[30] *Id.*, para. 92.

[31] *Id.*, para. 95.

[32] See, *e.g.*, *Italy & SIM 2 Multimedia v Commission*, C-328/99, EU:C:2003 :252, paras. 82-84; *Germany v Commission*, C-277/00, EU:C:2004:238, paras. 78-81.

Avinor's cross-subsidization of the Airport through profits made elsewhere or other revenues does not implicate any State aid.

2. Public Procurement Issues

Straightforward sales of land are not covered by EU public procurement rules. The sale of land by a public body, such as Avinor, for market value is the disposal of an asset and not a procurement of anything or the grant of a concession.

However, things may get more complicated if the sale is part of a wider transaction between the public entity selling the land and the buyer. The mere description by the parties of the transaction as a "sale" would not be decisive in this regard.[33] For EU public procurement purposes, if a transaction contains elements of several contracts, it is necessary to refer to the main object of that contract to decide on any applicable EU rules.[34]

In principle, the risk that the Airport's sale would fall under EU public procurement rules would depend on the **extent of control that Avinor might want to exercise over the Airport's use by the buyer post-sale**. In this regard, even a simple declaration of intent by the buyers that they would continue operating the Airport as such for a minimum period, pursuant to certain minimum targets *etc*. could bring the transaction under the ambit of EU public procurement rules, and thus require Avinor's compliance with the Concessions Directive discussed above or, possibly, other provisions of EU public procurement rules.

E. Possible EU Labour Law Issues

You have asked us to examine briefly the implications, under EU labour laws, of taking over the Airport's employees into the new entity. You are aware of the Norwegian regulations governing such matters but would like to know if there are also specific EU laws that could be relevant in this case as regards, for example, the obligations of the new employer in taking on the employees and likewise, these employees' rights. The current assumption is that, under any scenario, some of the staff at the Airport would lose their jobs, at least in the mid to long term, so the investors need to be aware in advance of any associated legal risks and obligations.

Generally, relevant **EU labour law legislation was incorporated into Norwegian law some time ago and should not, therefore, provide an autonomous legal source of rules in the present context**. Moreover, the

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33 *Impressa Pizzarotti*, Case C-213/13, EU:C:2014:2067, para. 40.

34 *Id.*, para. 41.

relevant EU provisions are incorporated in Directives and cannot, therefore, be invoked directly by individuals or employee associations against private parties, such as the Airport's future operators.

We do not know if the Airport's current employees enjoy a public servant or other, special, status, under Norwegian law, given their employer's State-owned profile. For present purposes, we shall assume this is not the case.

Based on our current information, we believe that the three Directives discussed below are the ones most relevant in the present context. Other EU legal provisions may also be relevant, depending on the process eventually followed for the transfer of employees.

1. Directive on Collective Redundancies[35]

The Directive requires employers planning collective redundancies to provide workers' representatives with specific information concerning the projected redundancies and hold consultations in good time with them, with a view to reaching an agreement. The consultations must, at the minimum, cover means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating their consequences, *e.g.*, through social measures aimed at redeploying or retraining those workers made redundant.

Employers must provide the workers' representatives with written information on the reasons for the planned redundancies, the number and categories of workers to be made redundant, the period over which the redundancies will be effected, the proposed selection criteria proposed, and the method for calculating any extra redundancy payments. The employers must also inform the competent public authorities of any such planned collective redundancies.

We understand that the Directive's provisions, as well as those of the other two Directives discussed below, have been incorporated into the Norwegian Work Environment Act.

2. Directive on employees' rights in transfer of undertakings[36]

This Directive, which applies to both public and private companies, provides, among other employee rights, for the information and consultation of employees by the transferor and/or the transferee, in reasonable time, before the transfer

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35 *Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies*.

36 *Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses*.

takes place. Under the Directive, the transfer of an undertaking does not, in itself, constitute valid grounds for dismissals, and rights and obligations under the employment contract or relationship pass from the previous employer to the new one.

Further, the employees' representatives remain in office if the economic entity preserves its autonomy after the transfer. In other cases, the Member States must ensure that transferred employees continue to be properly represented until the new representation of employees is reconstituted or reappointed. These representatives and, in certain cases, the rest of the employees must be informed about the date, reasons and legal, economic and social implications of the transfer as well as the measures envisaged in relation to the employees.

3. Directive on informing and consulting employees[37]

This Directive lays down a general framework for the obligation to inform and consult with employees on a company's economic and staff situation, on decisions likely to lead to substantial changes to the work's organisation or the company's contractual relations. We understand (but cannot verify) that, based on the Norwegian implementation provisions, private companies with less than 50 employees are not covered by these provisions unless covered by a collective agreement. If the relevant thresholds are triggered, the information and consulting requirements will have to be taken into account in the timeline for the implementation of the project.

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We trust that the above addresses your inquiry at this stage, and we remain at your disposal for any follow up questions or other requests.

[37] *Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.*