Case No: 65833
Event No:511722
Dec. No: 36/09/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 30 January 2009
on the Agreement between the Norwegian State and Eksportfinans ASA concerning state funding of Eksportfinans

(Norway)

THE EFTA SURVEILLANCE AUTHORITY[1]

Having regard to the Agreement on the European Economic Area[2], 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[3], in particular to Article 24 thereof,

Having regard to Article 1(3) of Part I and Article 4(2) of Part II of Protocol 3 to the Surveillance and Court Agreement[4],

Having regard to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement[5], and in particular the Chapter on the Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis and the Chapter on Reference and Discount Rates thereof,

Having regard to Decision No 195/04 of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3[6],

Whereas:

[1] Hereinafter referred to as the Authority.
[2] Hereinafter referred to as the EEA Agreement.
[3] Hereinafter referred to as the Surveillance and Court Agreement.
[4] Hereinafter referred to as Protocol 3.
[5] Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) 1994 L 231, and EEA Supplement No 32. The Guidelines were last amended on 29 January 2009. Hereinafter referred to as the State Aid Guidelines, which can be found on http://www.eftasurv.int/fieldsofwork/fieldstateaid/state_aid_guidelines/.
[6] Decision No 195/04/COL of 14 July 2004 (published in OJ 2006 L 139 and EEA Supplement No 26), as amended. A consolidated version of the decision can be found on www.eftasurv.int.

A. FACTS

1 Procedure

By letter dated 19 December 2008 (received and registered by the Authority on 5 January 2009, Event No 503104), the Norwegian State notified the Authority of its intention to grant loans to Eksportfinans ASA (hereinafter Eksportfinans) in order to enable it to continue to provide so-called government supported or official export credits despite the financial crisis.

Complementary information and clarification were subsequently submitted by emails by the Norwegian authorities.

2 Description of the notified measure

2.1 Objective of the measure

The current financial crisis has made it increasingly difficult to raise capital for the financing of companies engaged in export. Eksportfinans is an undertaking active in developing and providing financial services on competitive conditions to Norwegian businesses involved in the export of goods and services. The Norwegian State has stated that Eksportfinans' activities are of central importance for the economy as a whole and that it intends to provide loans on market conditions to Eksportfinans to ensure that it can continue to provide financing for export companies.

2.2 The OECD export credit financing rules

The world's official export credit agencies (ECAs) play a vital role for international trade by providing, guaranteeing and insuring such finance. These official export credit systems, taken together, account for the overwhelming majority of the export credit support provided by governments globally. In general, governments provide official export credits through an ECA in support of national exporters competing for overseas sales. There are different types of ECAs; they can be government departments, government agencies or commercial institutions administering an account for or on behalf of government, separate from the commercial business of the institution. In addition, official support can be provided in different forms: export credit guarantee or insurance, official financing support (in the form of direct financing or interest rate support), or any combination of these.

In Norway, the Norwegian Guarantee Institute for Export Credits (*Garanti-Instituttet for Eksportkreditt*, GIEK) is a government agency providing guarantees and insurance for export credits. Eksportfinans provides the loans to companies requiring export credit and GIEK has been instructed by the Norwegian State to guarantee those loans.

In order to provide a framework for the orderly use of officially supported export credits and foster a level playing field for official support by setting forth the most generous export and credit terms that may be supported by its participants, several countries entered into an "Arrangement on Officially Supported Export Credits" (the OECD Arrangement[7]) in 1978. There is no definition of "officially supported export credits" in the Arrangement,

[7] The current text of the Arrangement can be found on the OECD Webpage http://webdomino1.oecd.org/olis/2008doc.nsf/Linkto/tad-pg(2008)29-final.

but deficits that might arise from the system are absorbed by the government, hence the phrase government supported interest rate is sometimes used. The OECD Arrangement is of indefinite duration and constitutes a gentlemen's agreement among the participants, of which Norway is one.

The OECD Arrangement applies to officially supported export credits with repayment terms of two years and more; it also includes rules on the circumstances in which official support in the form of trade-related tied and partially untied aid may be given. The Arrangement places limitations on the terms and conditions of export credits that benefit from official support. Such limitations include maximum repayment terms, the minimum cash payments to be made at or before the starting point of credit, minimum premium rates, minimum interest rates when a transaction benefits from official financing support, flexibilities for project finance-type transactions, etc.

The minimum interest rates are defined as the relevant Commercial Interest Reference Rate (CIRR). CIRRs are established for the currencies of most OECD countries; they are adjusted on a monthly basis and are intended to reflect market rates of interest in the domestic market of the currency concerned, closely corresponding to the rate for first-class domestic borrowers. In most cases, they are based on Treasury bond yields, plus a margin. The prevailing CIRRs are available on the OECD webpage.

2.3 The Beneficiary

Eksportfinans arranges loans for goods, ships, shipping services, etc. The company is owned by 26 banks (21 of them saving banks) active in Norway, with the biggest shareholders being DnB NOR (40%), Nordea (23,2%) and Danske Bank (8.1%), and by the Norwegian State, who took a 15% share in Eksportfinans in 2001.

Eksportfinans was founded in 1962 following an initiative of the Norwegian Ministry of Finance and the Norwegian commercial banks due to a lack of suitable long-term financing schemes for the Norwegian export industry at the time. Eksportfinans is not a bank; it is the Norwegian export credit institution for export financing. There are two types of export financing offered by Eksportfinans: namely (i) loans supported by public funds, offered at a fixed rate and covered by the OECD regime (so-called CIRR loans[8]) and (ii) market-based loans that are offered in major currencies at fixed or flexible rates, on which Eksportfinans is competing with Norwegian and international banks.

Eksportfinans is one of the largest lending institutions in Norway and it plays a fundamental role for the Norwegian export industry by providing tailored solutions in direct support of more than 1 500 exporters. As an example, all shipyards and all major suppliers to the maritime sectors in Norway are active users of the export credit financing scheme run by Eksportfinans. In addition to its direct support, the activities of Eksportfinans also indirectly support a large number of Norwegian companies that are sub-contractors to the exporters. This is in particular the case for large shipbuilding contracts and large offshore oil and gas projects. Competitors of Eksportfinans include mainly larger banks, including the largest Scandinavian ones.

The total order book of Eksportfinans (accepted but not disbursed loan commitments) is currently approx. NOK 100 billion. This figure accounts only for export credits eligible

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[8] Commercial Interest Reference Rate. In 1978, Eksportfinans entered into an agreement with the Norwegian Government to manage the OECD scheme for subsidised export financing on behalf of the Norwegian Government.

for financing under the OECD scheme. The order book is divided into approx. 45% ship financing, 45% financing to the offshore oil and gas sector and 10% to other market segments. The total order book of Norwegian shipyards as at 31 December 2008 was NOK 62 billion. This gives Eksportfinans a market share of approx. 70% as regards financing of shipbuilding in Norway. In 2008, deliveries from Norwegian shipyards amounted to approx. NOK 20 billion. Of this, Eksportfinans also had a market share of 70%, or NOK 14 billion. New disbursements for export credits in 2008 totalled approx. NOK 25 billion. The second highest market segment was oil and gas projects (NOK 6 billion) where export credit financing is crucial for, for example, export of drilling equipment to offshore units.[9]

The export industry is very important for Norwegian industry as a whole: exports account for almost 50% of the Norwegian GDP.[10]

2.4 Difficulties faced by Eksportfinans

In order to provide its services, Eksportfinans needs access to long-term funding. It is a leading borrower in the international capital markets; the company is Norway's largest international issuer of bonds and has a global investor base with Japan and the US providing 60% of its funding requirements. Funding is done primarily via syndicated debt fundings (benchmarks).

In 46 years of operation, Eksportfinans has never experienced a loss on a loan until the loss caused by the exposure to Glitnir Bank. Until the third quarter of 2007, the business showed profits. Its good credit ratings allowed it to obtain loans on favourable conditions on the international capital markets. However, a significant increase in the risk premium required by lenders as a result of the current global financial crisis has made Eksportfinans' situation weaker. Eksportfinans had a loss of NOK 149 million in 2007. In the first half of 2008, Eksportfinans suffered a loss of NOK 48 million. In the third quarter of 2008, Eksportfinans again suffered losses with a total loss for the first nine months of 2008 of NOK 180 million. Figures for the last quarter of 2008 are not yet available.

In 2007, Eksportfinans' credit ratings were Aaa from Moody's, AAA from Fitch Rating and AA+ from Standard & Poor's. In November 2007, Moody's changed its outlook from stable to negative due to results for the third quarter being influenced by unrealised losses in Eksportfinans' liquidity portfolio. In December 2008, Moody's downgraded Eksportfinans to Aa1, negative outlook, and in January 2009, Fitch downgraded Eksportfinans to AA, outlook stable.

During spring 2008, the Norwegian State twice contributed to strengthening Eksportfinans. On 13 March 2008 the State injected NOK 1,2 billion in Eksportfinans (approximately EUR 130 million) in the form of an ordinary capital increase. The other shareholders, i.e. the commercial banks, also participated in the capital increase proportionately to their shareholding.[11] In addition, the Norwegian State participated, on a pro rata basis together with the other owners, in a guarantee scheme for losses up to NOK 5 billion. A statement by an independent authorised public accountant confirmed that fees and commissions specified in that agreement (the Portfolio Hedge Agreement) were based on normal business principles and constituted normal market terms.

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[9] Data and information from the Norwegian Ministry of Finance.
[10] Data from Norway Statistics (Statistisk Sentralbyrå) http://www.ssb.no/emner/00/00/10/nokkeltall/.
[11] 84,95% of the 85% held by the other shareholders participated.

The nature of Eksportfinans' business is such that it necessitates access to long-term funding. Short-term financing would not be substitutable as Eksportfinans offers long-term loans and therefore needs to cover its outgoings on similarly long terms. However, the increased intensity of the financial crisis during autumn 2008 made it increasingly difficulty to obtain long-term financing on acceptable conditions. The Norwegian authorities have indicated that, as a result of insufficient access to appropriate funding, the board of Eksportfinans was considering suspending the granting of new loans, and in particular CIRR loans, in the near future.

2.5 The notified measures: loans to Eksportfinans

2.5.1 Limitation of the loans and calculation of the interest rate

According to the notified measure, the Norwegian State intends to issue loans to Eksportfinans so that the company can continue to finance export that is eligible for CIRR loans (i.e. publicly supported loans).

The intention is that Eksportfinans should be able to offer both CIRR loans and commercial loans to companies that qualify under the government scheme. The choice between which loan to take, i.e. a CIRR loan or a commercial loan, remains with the borrower, with the actual and forecasted market rate being of importance when making this choice. CIRR loans are offered at a fixed rate and supported by public funds in the event of a financing gap. To ensure that Eksportfinans can continue to support the export industry by offering official financing, an agreement, dated 26 November 2008, was entered into between the Norwegian State and Eksportfinans ("the Agreement") under which the Norwegian State agrees to grant loans to Eksportfinans.

NOK 30 billion will be made available to Eksportfinans in the form of one or more loans to be drawn down before 31 December 2010. The decision as to if, when and to what extent to take up the option of these loans remains with Eksportfinans and will depend on the evolution of the markets over the next two years.

The Agreement stipulates that the interest paid by Eksportfinans for a loan from the State should be in line with market conditions, i.e. it should include a mark-up on the interest that the State paid when it borrowed the money in the first place, thus reflecting the advantage that Eksportfinans has by being granted a loan from the State.

In this respect, Article 2.1 of the Agreement states:

> "*[T]he loan amounts (volume), loan currency, credit limits and other terms are set by the State. The loans shall be given with a term of five years, or less if Eksportfinans so asks. The interest rate shall be in line with commercial terms and calculated with a mark-up to the State's borrowing rate and shall reflect the benefit to Eksportfinans inherent in loans from the State.*"

On 15 January 2009, the Norwegian State and Eksportfinans entered into a loan agreement ("the Loan Agreement"). This agreement replaces the mark-up calculation described in Appendix 1 of the Agreement and contains detailed information about the conditions relating to the loans and methods for calculating the interest rate and the mark-up that should be applied to the loans granted to Eksportfinans under the Loan Agreement. It is also declared in the Loan Agreement that the loans will only be offered in Norwegian Kroner (NOK).

The Loan Agreement states that the interest rate is set at three months NIBOR (the Norwegian inter-bank swap rate) plus […] basis points, but foresees the possibility of reviewing this figure. The interest rate to be charged on each individual loan is calculated two days before the loan is paid out. The Norwegian authorities have explained that, at the same time, the necessary calculations will be done to check that the interest rate to be charged is at least equal to the one year NIBOR rate plus 60 basis points. In the event that this is not the case, the interest rate will be subject to an adjustment before the loan is paid out.[12]

Furthermore, there is a limitation on how Eksportfinans can use the loans. Article 2.3 of the Agreement provides that:

> "*Loans from the State under this Agreement shall exclusively be used to finance new export credits which qualify under the government-supported scheme in accordance with the OECD's "Arrangement on Officially Supported Export Credits" on "Commercial Interest Reference Rate" […]. Eksportfinans shall be able to issue both CIRR loans and commercial loans to borrowers that qualify under the scheme.*"

As indicated in Article 2.1 cited above, the term of the loans should be for five years (or shorter if Eksportfinans so wishes), and the State has committed itself to issuing loans in accordance with the Agreement until 31 December 2010, unless the parties agree otherwise in a new agreement.

2.5.2 Preferential share

The Norwegian authorities explained that in order to avoid any (undue) transfer of value to the owners of Eksportfinans as a result of the exceptional access to State loans, the Agreement envisages the creation of a new share with a special preferential right to dividends for the Norwegian State (the Preference Share).

Article 3.1 of the Agreement states that:

> "*Eksportfinans shall increase its share capital with one share, subscribed by the State at a nominal value of NOK 10,500. The share shall be in a separate share category which, from the accounting year 2009, gives a right, stipulated by the bylaws, to annual dividend […] equal to 22.5 per cent of the company's annual profit according to last year's presented accounts within the statutory maximum dividend basis.*"

The State is entitled to 22,5% of any profit by virtue of the Preference Share. This distribution will take place before any other distribution to the regular shareholders. Indeed, the same Article 3.1 also foresees that no dividend payments to other shareholders can take place without the State's consent:

> "*Disbursements, including dividend, from other shares than the Preference Share are contingent upon consent from the State as long as Eksportfinans has loans issued by the State under this Agreement.*"

Furthermore,

[12] Event No 506665.

> "*Eksportfinans shall redeem or buy the Preference Share at nominal value as soon as Eksportfinans has presented its annual accounts and disbursed dividend for the Preference Share for the accounting year in which all loans issued by the State in accordance with this Agreement have been fully repaid.*"

2.5.3 Audit by the State

In addition to the issuing of a new share, transparency and auditing conditions are imposed on Eksportfinans. The Agreement stipulates that the State can at any time audit Eksportfinans' activities. The State or any agency assisting the State in such an audit shall have access to all accounts and all other relevant documentation.

2.6 Budget and duration of the Agreement

The State is obliged to issue loans until 31 December 2010, unless the parties enter into a new agreement. The Agreement remains in force until Eksportfinans repays all loans issued by the State in accordance with Article 2.1 and the Preference Share has been redeemed by Eksportfinans in accordance with Article 3.1.

The budget appropriation is NOK 30 billion, i.e. approx. EUR 3,1 billion.

The Agreement is subject to approval by the Parliament, the General Assembly of Eksportfinans and the Authority and will lapse if such approval is not granted before 31 January 2009.

3 The view of the Norwegian authorities

The Norwegian authorities underline that the market for benchmark transactions has been extremely challenging for non guaranteed issuers in the last six months. The Norwegian authorities are of the opinion that the measure does not involved state aid, as the Agreement states in Article 2.1 that the interest rate shall be in line with commercial terms and calculated with a mark up on the State's borrowing rate. The mark-up chosen is said to reflect a market-oriented remuneration. The Norwegian authorities state that the rate of three months NIBOR plus […] basis point was at least equal to one year NIBOR plus 60 basis points at the date of the signing of the Agreement. They also confirm that no funding offered to Eksportfinans on the basis of a reference to three month NIBOR will breach the Authority's Guidelines on the Reference And Discount Rates, referred to in the Authority's Temporary Framework to support access to finance in the current financial and economic crisis, especially the requirement that the funding cost, in economic terms, is at least equal to one year NIBOR plus 60 basis points. Moreover, the necessary calculations will be done to check that the interest rate to be charged is at least equal to the one year NIBOR rate plus 60 basis points and where is not the case, the interest rate will be subject to an adjustment before the loan is paid out.

In any event, the Norwegian government considers the loans to be compatible with either Article 61(3)(b) or (c) EEA and in line with the European Commission's various communications on the financial crisis, as the option to draw down must be exercised before 31 December 2010. Further, the benefit of the loans will be shared by all undertakings obtaining export credit and the loans will be on commercial terms. Finally, Norway stresses that Eksportfinans' problems stem exclusively from the current financial crisis and the difficulty in obtaining long-term financing resulting there from.

B. LEGAL ASSESSMENT

1 The conditions of Article 61(1) EEA

Article 61(1) EEA 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.*"

In order to qualify as state aid within the meaning of Article 61(1) EEA, the measure must favour certain undertakings or the production of certain goods. Two aspects of the measure must be considered in this respect.

First, the measure must confer on the recipient advantages that relieve it of charges that are normally borne from its budget. Second, the measure must be selective in that it favours only "*certain undertakings or the production of certain goods*". This second condition is fulfilled in the present case since the measure is available exclusively to Eksportfinans. However, as regards the first aspect, the Norwegian authorities maintain that Eksportfinans does not receive any advantage as it pays interest on the loans at a rate equivalent to market terms.

Market Rate

The Authority's Guidelines on the temporary framework for state aid measures to support access to finance in the current financial and economic crisis state in section 4.4.1 that interest rates which are calculated according to the method laid down in the Authority's Reference and Discount Rates Guidelines do not contain state aid; the reference and discount rates are applied as a proxy for the market rate. According to the methodology set out in those Guidelines, the reference rate is calculated by adding a margin (depending on the credit rating of the undertaking concerned and the collateral offered: high, normal or low) to a base rate equal to one year IBOR. The lowest margin, for a company rated as strong (AAA-A) and with a high collateralisation, is 60 basis points and the lowest interest rate envisaged by the Guidelines therefore corresponds to one year IBOR plus 60 basis points.

If the rate that will be charged on the various loans drawn down by Eksportfinans is in line with the above methodology, the measure will not constitute state aid.

Credit Rating

Eksportfinans is currently rated Aa1 by Moody's, AA from Fitch Rating and AA+ from Standard & Poor's.[13] Despite not having the benefit of a state guarantee, the company is considered to be 'government-related' and is viewed favourably by the three major rating companies due to its low risk profile (credits are normally guaranteed by a bank or the State) and because of a high-quality credit history. Likewise interest and currency risks

[13] Standard&Poor's rating, however, seems to take into account that the company is likely to profit from government support in the near future and that the rating might be lower if Eksportfinans would be considered on a stand alone basis. As the two other rating agencies do not make similar caveats, the Authority bases itself on the ratings as such.

appear to be contained. The company therefore can be considered to fall within the rating category "strong" of the Reference and Discount Rates Guidelines.

Collateralisation

The Reference and Discount Rates Guidelines state that 'normal collateral' should be understood as the level of collateral normally required by financial institutions as a guarantee for their loan.[14]

The Norwegian authorities have therefore provided information relating to Eksportfinans and the risk it represents as a borrower. They state that Eksportfinans' risk of loss when extending loans to companies is limited to the risk of loss associated with the party acting as the loan's guarantor; i.e. the party who assumes the responsibilities of the borrower in case of default by the borrower. Given that all Eksportfinans' loans to companies are guaranteed by either banks or sovereign entities (notably export credit agencies and in particular GIEK) the risk of loss from those loans is necessarily limited to that associated with lending to banks or sovereign entities. The Authority accepts that this risk must be considered to be small.

Indeed, if the actual credit history of Eksportfinans is examined, the loss caused by exposure to Glitnir bank is the only loss experienced by Eksportfinans in its 46 years of operation.15

It would therefore appear that Eksportfinans, as a borrower, can be considered to represent a low risk in terms of default.

Furthermore, the funding by the State is limited to loans for exporters qualifying for CIRR loans. As explained above in section A.2.5.1, the nature of these loans is such that any shortfall caused by a gap between the CIRR and the rate at which funding was obtained is covered by the State. While not all loans granted by Eksportfinans will necessarily be CIRR loans, this does reduce the risk exposure, thereby increasing collateralisation.

On the other hand, the Authority does not concur with the Norwegian authorities that the Preference Share issued in favour of the Norwegian State contributes to the finding of high collateralisation: in case of default, this share simply constitutes an additional claim against the same defaulting debtor. Nevertheless, this Share provides the State with a level of control which goes beyond what follows from its regular shareholding.

In conclusion, the Authority is of the opinion that Eksportfinans can be considered to fall within the 'High' collateralisation category of the Reference and Discount Rates Guidelines.

Interest Rate

On the basis of the foregoing conclusions, Eksportfinans constitutes a company with a strong credit rating and high collateralisation: the appropriate margin to be added to the base rate (one year IBOR) when calculating the reference interest rate is therefore, according to the applicable guidelines, 60 basis points.

[14] For more details on accepted approaches to capital adequacy requirements and the notion LGD, see Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework — Comprehensive Version, available on: http://www.bis.org/publ/bcbs128.pdf.

[15] See the annual report for 2007 and the quarterly reports for 2008 which were enclosed with the notification of 19 December 2008 (or www.eksportfinans.no).

The Loan Agreement defines the rate to be paid on the loans drawn down by Eksportfinans as three months NIBOR plus […] basis points. The Norwegian authorities base the calculation of the interest rate on the Norwegian inter-bank swap rate. The Authority notes that neither the base rate (three months instead of one year) nor the margin ([…]) correspond to the methodology described in the Reference and Discount Rates Guidelines.

The Norwegian authorities have explained that, for reasons relating to the functioning of Norwegian money markets, they prefer to use three months NIBOR. However, they have also confirmed that when Eksportfinans chooses to exercise the option available to it under the Agreement, the interest rate for each individual loan will be set, according to the formula in the Loan Agreement, 2 days before the loan is paid out. At the same time, the Norwegian authorities will check that the interest rate so calculated is at least equal to the one year NIBOR rate plus 60 basis points. In the event that this is not the case, the interest rate will be subject to an adjustment so that the interest rate would be at least equal to one year NIBOR plus 60 basis points.

The Authority is therefore of the opinion that all funding offered to Eksportfinans under the Agreement will, in economic terms, be subject to an interest rate equal to at least one year NIBOR plus 60 basis points.

2. Conclusion

On the basis of the foregoing assessment, the Authority considers that the measure notified by the Norwegian State does not constitute state aid within the meaning of Article 61(1) EEA.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the measure notified by the Norwegian State does not constitute state aid within the meaning of Article 61 EEA.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 30 January 2009

For the EFTA Surveillance Authority,

Per Sanderud
President

Kurt Jaeger
College Member