

[non confidential version]

EFTA SURVEILLANCE AUTHORITY DECISION
of 10 April 2013
on the alleged aid to services provided by Bergen Kirkelige Fellesråd and Akasia
(Norway)

The EFTA Surveillance Authority (“the Authority”)

HAVING REGARD to:

The Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61 and Protocol 26 thereof,

The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

Whereas:

I. FACTS

1. Procedure

- (1) By e-mail dated 22 February 2011 (Event No 588269), the Authority received a complaint from Riss Landskap AS¹ concerning alleged illegal aid to landscape architect services and landscaping services provided by the Bergen Church Council – *Bergen Kirkelige Fellesråd* (“BKF”).
- (2) By e-mail dated 11 September 2011 (Event No 608304), the Authority received a complaint from Eidsvågneset Hage AS concerning alleged illegal aid to tree care services provided by BKF.
- (3) By e-mail dated 30 January 2013 (Event No 661255) the Authority received a complaint from Norske Anleggsgartnere Region Vest (“NAML”) concerning alleged illegal aid to all services provided by BKF’s departments BKF Landskap (landscape services), BKF Bygg (construction services), and BKF Økonomi (accounting services).²
- (4) By letters dated 14 October 2011 (Event No 598513), and 1 February 2013 (Event No 661134) the Authority requested additional information from the Norwegian authorities. By letters dated 17 November 2011 (Event No 615596), 29 May 2012 (Event No 636115)

¹ Riss Landskap is now a part of Norconsult AS.

² These departments now form part of BKF’s new management organisation Akasia, which was established on 1.1.2013, see chapter I.4. below.

and 18 March 2013 (Event No 666451) the Norwegian authorities provided the additional information.³

2. The complaints

- (5) The complainants are businesses that operate within landscaping, landscape architecture and tree care services in the western part of Norway.
- (6) The complainants are all alleging that BKF, when offering services in the market, can offer considerably lower prices than its competitors since it is a publicly funded entity. It is alleged that the commercial activities of BKF are cross-subsidised with public funds stemming from the municipality of Bergen.

3. Church councils and the Norwegian church

- (7) The church councils in Norway have their legal foundations in the Norwegian Church Act⁴ (“the NCA”) and the Funeral Services Act⁵ (“the FSA”).
- (8) In each Norwegian municipality there is one or several church parishes.⁶ Every parish has a parish council.⁷ Every municipality that has more than one parish must, in addition to the parish council, have a church council.⁸ The church councils are independent legal entities that represent the parishes.⁹ The church councils consist of members from the parish councils, a priest or dean elected by the bishop, and one representative elected by the municipality.¹⁰
- (9) Since the entry into force of the NCA, the church councils have, inter alia, been given responsibility for:
 - Taking care of administrative and economic responsibilities on behalf of the parishes,
 - Managing the ownership of the churches in the municipality,
 - Maintaining the parishes’ interests towards the municipal administration,
 - The construction, operation and maintenance of churches and cemeteries,
 - Administrative assistance to the dean when the state provides grants for this purpose,
 - Managing income and fortune connected to the church and church fund, as well as assets derived from the municipalities, the government and the parishes.¹¹
- (10) Every parish belongs to a deanery.¹² Every deanery belongs to a bishopric.¹³ The parishes, the deaneries and the bishoprics are represented by their own councils.
- (11) BKF represents the parishes of Bergen. All these parishes belong to the bishopric of Bjørgvin. This bishopric covers all the deaneries of the counties of Hordaland and Sogn og

³ The Norwegian authorities have submitted further information via email (Events No 654405, 655163, 655435, and 656551).

⁴ LOV 1996-06-07-31: Lov om Den norske kirke.

⁵ LOV-1996-06-07-32: Lov om gravplasser, kremasjon og gravferd.

⁶ In Norwegian: *Menighet*.

⁷ Section 5(1) of the NCA.

⁸ In Norwegian: *Kirkelige fellesråd*.

⁹ Section 5 of the NCA.

¹⁰ Section 12(1)(b) of the NCA.

¹¹ Section 14, 15, 18 and 19 of the NCA.

¹² In Norwegian: *Prosti*. Deaneries are, unlike the church councils, not necessarily delineated by the municipal borders. One municipality can consist of several deaneries. This is often the case in bigger municipalities, for example Bergen which has four deaneries.

¹³ In Norwegian: *Bispedømme*. Section 2 of the NCA.

Fjordane. The bishopric council shall “*promote the cooperation between the individual parish councils and other local working groups within the bishopric*”.¹⁴

- (12) When performing their duties in accordance with their statutory obligations, the church councils are mainly financed through municipal grants.¹⁵
- (13) In addition to their statutory obligations, church councils are free to offer services on the market for remuneration.

4. Bergen Kirkelige Fellesråd (“BKF”) and Akasia

4.1 Overview

- (14) BKF administers 33 churches, 27 cemeteries, 9 kindergartens, 5 chapels as well as properties connected to these. It owns a total of more than 70 000 m² of buildings and more than 600 acres of land. BKF has more than 400 employees.

4.2 The organisation of BKF before 1 January 2013

- (15) BKF is divided into different departments with responsibility for the church council’s different tasks. Before 1 January 2013, the responsibility for the management, operation, maintenance and development of the properties belonging to BKF (churches, cemeteries and kindergartens) as well as all accounting services, belonged to different departments of BKF.
- (16) BKF mainly provided services affiliated with these responsibilities to its own churches, cemeteries and other properties. However, landscaping, tree care, landscape architecture, engineering consulting, construction, cleaning and accounting services were also provided to other church councils in the county of Hordaland, which are all part of the bishopric of Bjørgvin, as well as a limited number of church councils outside of Hordaland. BKF also provided such services to customers not affiliated with the Norwegian church.
- (17) BKF offered specialized competence in the planning and building of new cemeteries to other church councils. The church councils that asked for BKF’s assistance normally had few employees and limited capacity to do the work themselves.
- (18) Before 1 January 2013 BKF was financed through grants from the municipality of Bergen, but also generated some income from the provision of services on the market.

4.3 The organisation of BKF and Akasia after 1 January 2013

- (19) As of 1 January 2013 BKF was reorganised. The responsibility for the management, operation, maintenance and development of the properties of BKF, as well as all accounting services, were transferred to a newly established division by the name Akasia. Akasia is organised as a division of BKF, and remains a part of its legal person.¹⁶ A special committee (*Forvaltningsutvalget*) has been established by BKF in order to govern Akasia. The intention of the reorganisation was to create a clearer financial division between the religious work, which remains a part of the main body of BKF, and the

¹⁴ Translation by the Authority of Section 23(3) of the NCA, which in its original language reads: “*Bispedømmerådet (...) skal fremme samarbeidet mellom de enkelte menighetsråd og andre lokale arbeidsgrupper innen bispedømmet.*”

¹⁵ Section 15(1) of the NCA and section 3(1) of the FSA.

¹⁶ BKF is registered in the company register (Brønnøysundregisteret) as a religious organisation.

professional management and development of BKF's properties, which has been transferred to Akasia.

- (20) BKF is still financed by grants from the municipality of Bergen. After 1 January 2013, BKF pays rent and compensation to Akasia for the use of properties and provision of Akasia's services. Akasia also generates income by offering the services formally offered by BKF on the market, to the same customers that BKF served before 1 January 2013.

4.4 The accounting principles, cost calculation and profit policy of BKF and Akasia

- (21) The Norwegian authorities have explained that BKF, before the establishment of Akasia on 1 January 2013, kept separate accounts for its internal activities, services provided to other church councils, as well as for other customers. The basis for BKF's pricing was a cost price per hour, calculated for each service. The cost price was derived from direct and indirect expenses related to the department of BKF that was performing the services, as well as a fair share of the overhead costs. The Norwegian authorities have provided the following explanation of the cost accounting principles that BKF applied before 1 January 2013:
- Expenses related to the department were divided into direct salary and operational expenses on the one hand and indirect departmental expenses on the other. The latter was divided between rent and unit management.
 - Rent expenses were allocated to the department by calculating the share of the rent paid for the offices used by the department, as well as a fair share of the costs for the use of the common areas.
 - The unit manager calculated what percentage of his working hours was spent on each department. Costs relating to the unit were thereby allocated to each department by dividing the sum of the costs by the declared percentages.
 - Any departmental specific expenses, related to inter alia vehicles and equipment, were also added to the cost price.
 - The mentioned costs, as well as the direct expenses to salary and operating expenses for each person in the department, were then divided by the number of yearly working hours.
- (22) When offering services to other church councils in Hordaland, BKF simply ensured that its costs were covered. It did not generate a profit. The exception was a 10% profit charged on landscaping services in accordance with the so-called Norwegian Price Book.¹⁷ Church councils belonging to counties outside of Hordaland were charged a profit on all services, in addition to the cost price.
- (23) BKF's customers that were not affiliated with the church were offered services at cost price plus a profit. In addition, the price also covered the extra costs connected with selling services on the open market, such as advertising, working hours connected to tenders lost, complaints, follow up of contracts and customers.
- (24) Akasia applies the same cost accounting principles as applied by BKF before 1 January 2013. The only difference is that after 1 January 2013, income from other church councils in Hordaland are kept on separate bank accounts (prior to 1 January 2013, they were kept

¹⁷ In Norwegian: *Norsk Prisbok*, see www.norskprisbok.no. The Norwegian Price Book is published by Norconsult Informasjonssystemer AS in cooperation with AS Bygganalyse. Norconsult Informasjonssystemer AS is a Norwegian consultancy firm providing IT solutions for design, construction and management of infrastructure and property. AS Bygganalyse provides services and products within building economics. The Norwegian Price Book is a reference book for the Norwegian building industry. It is a price calculation tool and price database. It is updated annually.

on the same account as BKF's own projects). The profit policy is also the same as before 1 January 2013.

- (25) BKF consistently charged a profit margin on its services to the market before 1 January 2013. The profit margins charged by Akasia on the services provided in the market were the following in March 2013:

Service	Profit margin
Landscaping	[...] ¹⁸
Public Procurement	[...]
Engineering consulting (engineers and architects)	[...]
Landscaping architecture	[...]
Construction	[...]
Accounting	[...]
Cleaning	[...]
Tree care	[...]

¹⁸ In this Decision, information covered by the obligation of professional secrecy has been taken out.

II. ASSESSMENT

1. The presence of state aid

(26) Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

2. Presence of state resources

(27) In order to constitute state aid, a measure must be granted by the State or through state resources. The notion of state resources also includes financial assistance from regional and local authorities.¹⁹

(28) BKF’s activities are mainly financed by grants from the Municipality of Bergen.²⁰ It is thus clear that, before the establishment of Akasia, all departments of BKF were financed through state resources. Akasia is a part of the same legal person as BKF. Hence, the rent and compensation from BKF to Akasia also stems from state resources.

3. Undertaking

3.1 Before 1 January 2013

(29) According to the definition in Article 61(1) EEA, the state aid rules only apply where the recipient is an undertaking. Undertakings are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.²¹ Economic activities are activities consisting of offering goods or services on a market.²² The concept of an undertaking depends on the specific activity under scrutiny.

(30) Before 1 January 2013, BKF provided services to external customers by inter alia participating in tenders, for example for tree care and landscaping contracts. This activity consisted of the provision of services on a market. The Authority therefore considers it to represent an economic activity. Thus, BKF acted as an undertaking when carrying out these activities.

(31) However, the Authority does not consider BKF to have offered services on a market when it provided services to other church councils within the county of Hordaland, which all belong to the bishopric of Bjørgvin. As mentioned, the NCA lays down a number of responsibilities for the church councils. For example, church councils are obliged by law to take responsibility for the construction, operation and maintenance of churches and cemeteries.²³ As many church councils do not have the resources or the personnel to fulfil these obligations themselves the services were provided by BKF. This provision of

¹⁹ Case 78/76 *Steinike und Weilig v Germany* [1977] ECR 595 and Case 248/84 *Germany v Commission* [1987] ECR 4013.

²⁰ Pursuant to section 15 of the NCA and section 3 of the FSA.

²¹ Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Court Report 2008 p. 62, paragraph 78.

²² Case C-222/04 *Ministero dell'Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, paragraph 108.

²³ Sections 14, 15 18 and 19 of the NCA.

services is the result of the internal cooperation, in line with the NCA,²⁴ between the church councils in Hordaland, which belong to the bishopric of Bjørgvin. Such internal cooperation cannot be held to be carried out on a market in competition with other market players.²⁵ It therefore cannot be considered as an economic activity. BKF did therefore not act as an undertaking when it provided services to other church councils in the bishopric of Bjørgvin.

3.2 After 1 January 2013

- (32) As the establishment of Akasia has neither had an impact on the services provided nor the customer groups they are provided to, this conclusion also applies to Akasia's service provision.

4. Advantage

4.1 Before 1 January 2013

- (33) To be classified as state aid, the state resources must, before the establishment of Akasia on 1 January 2013, have conferred on BKF (in so far as it is an undertaking) advantages that relieved it of charges that were normally borne from its budget.
- (34) The complainants allege that BKF was able to offer lower prices than the rest of the market because the entity's commercial activities were cross-subsidised with the public funds transferred to BKF. Cross-subsidisation in this case would mean that the resources stemming from the state resources were used to finance services that BKF offered to customers on the market.
- (35) It follows from the Authority's decisional practice²⁶ that when an entity carries out both commercial and non-commercial activities, a cost-accounting system that ensures that the commercial activities are not financed through state resources allocated to the non-profit making activities must be in place. This principle is also laid down in the Transparency Directive.²⁷ The Directive does not apply directly to the case at hand. However, the Authority is of the opinion that the principles of operating economic activities on commercial terms with separate accounts, and a clear establishment of the cost accounting principles according to which separate accounts are maintained, still apply. In that context the Authority notes that BKF kept separate accounts for all expenses and incomes relating to external services. The Norwegian authorities have provided an extensive explanation of BKF's cost accounting principles.
- (36) As explained in chapter I.4.4 above, BKF charged a cost price plus a profit, when providing services to external customers not affiliated with the church, as well as church councils outside Hordaland county. The cost price for each service was calculated by allocating all costs, both direct costs, such as the salaries of employees involved, operational expenses and material costs, and a portion of the indirect costs relating to

²⁴ The co-operation obligation laid down in Section 23(3) of the NCA.

²⁵ For a similar line of reasoning, see the judgment of the Court of First Instance in the Case T-125/06 *Centro Studi Antonio Manieri* [2009] ECR p. II-69. See also the Authority's Decision No 349/07/COL *The Norwegian Road Administration Møre and Romsdal District Office* (OJ C 310 20.12.2007 p. 30).

²⁶ ESA Decision 142/03/COL Regarding Reorganisation and Transfer of Public Funds to the Work Research Institute (OJ C 248, 16.10.2003, p. 6), ESA Decision 343/09/COL on the property transactions engaged in by the Municipality of Time concerning property numbers 1/152, 1/301, 1/630, 4/165, 2/70, 2/32 (OJ L123, 12.5.2011, p.72).

²⁷ Commission Directive 2006/111/EC of 16.11.2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318 17.11.2006 p. 17).

management, rent and equipment, to the service provided. The indirect cost of rent was for example allocated to the department of BKF performing the service by calculating the share of the rent paid for the offices used by the department, as well as a fair share of the costs for the use of the common areas. Expenses for the unit manager was allocated to each BKF department by dividing the total costs related to the manager by the percentages of time that the manager spent on each department.

- (37) The Authority considers that the accounting principles and practices of BKF were in line with the above mentioned principles laid down in the Authority's practice and the Transparency Directive. On this basis, the Authority concludes that the public funds providing for the non-economic operations of BKF did not provide an advantage to its services to church councils outside of Hordaland and other customers not affiliated with the church. Therefore, the financing of BKF did not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

4.2 After 1 January 2013

- (38) As the described accounting principles, cost calculation and profit policy was not changed after the establishment of Akasia, it is the Authority's opinion that Akasia does not receive state aid within the meaning of Article 61(1) of the EEA Agreement.

5. Conclusion – no aid

- (39) On the basis of the above, the Authority considers that the services of BKF and now Akasia are not cross-subsidised with grants from the municipality of Bergen. Therefore, the financing of BKF and Akasia does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The financing of Bergen Kirkelige Fellesråd and Akasia does not involve state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English language version of this decision is authentic.

Decision made in Brussels, on 10 April 2013.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sabine Monauni-Tömördy
College Member