

Case No: 62275
Event No: 582515
Dec. No: 438/10/ COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 23 November 2010
on the complaint regarding the alleged state aid to Fjord1 MRF AS
(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 thereof,

HAVING REGARD to 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 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(2), Articles 4(4) and 7(2) of Part II of Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”),

HAVING REGARD to the Authority’s Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement¹,

HAVING REGARD to the Authority’s Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3²,

Whereas:

I. FACTS

1. Procedure

By letter dated 29 May 2007, Nor-Ferjer AS³ (“the Complainant”) filed a complaint against Fjord1 MRF AS. The letter was received and registered by the Authority on 4 June 2007 (Event No 423586). The Authority called on the Norwegian authorities to submit

¹ 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 Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231 of 03.09.1994 p. 1 and EEA Supplement No 32 of 03.09.1994 p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority’s website: <http://www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/>

² Decision 195/04/COL of 14.7.2004 published in OJ C 139 of 25.05.2006 p. 57 and EEA Supplement No 26 of 25.05.2006 p. 1 as amended by Decision 319/05/COL of 14 December 2005 published in OJ C 286 of 23.11.2006 p. 9 and EEA Supplement No 57 of 23.11.2006 p. 31.

³ Nor-Ferjer AS has now been integrated into a company called Tide Sjø AS.

their comments. The Authority received a joint reply from the two owners of Fjord1 Nordvestlandske, the mother company of Fjord1 MRF AS; Sogn og Fjordane county and Møre og Romsdal county.

By letter dated 21 May 2008 (Event No 478079), the Authority received additional information from the Complainant.

By letter dated 11 September 2009 (Event No 526391), the Authority asked that additional information be provided by the Norwegian authorities.

The Norwegian authorities (through the counties of Sogn of Fjordane and Møre og Romsdal) provided the information required by letter dated 11 November 2009 (Event No 538298).

2. The complaint

The Complainant was, at the time of the complaint, a privately owned ferry company. The Complainant was a relatively small market player. In May 2008, The Complainant merged with Tide Sjø AS (hereinafter “Tide”), a privately owned company. Tide is, like Fjord1, involved in the business areas covering ferry services, scheduled and non-scheduled bus transport and a travel agency.

The Complainant alleged that Fjord1 MRF AS had benefited from unlawful aid in the context of a tendering procedure for four ferry connections in the counties of Sogn og Fjordane and Møre og Romsdal. Indeed, the Complainant considers that *“Fjord’s tenders are so low that in our view they cannot be justified on the basis of normal commercial evaluations. The tenders must either be based on the company cross-subsidising the operation of these ferry connections using revenues from other sources, or on the public owner having made other evaluations that cannot be justified on the basis of the “market economy investor test”. In our view, therefore, the company’s conduct implies that the submission of these tenders involve the provision of state aid in some form or another”*.

The Complainant further alleged Fjord1 MRF AS had received a capital injection under conditions clearly in breach of the private market investor principle. The Complainant thus considered that *“it appears to be improbable that a rational private company would have refrained from taking dividend from 2006-2010 if the only reason for this was that it might possibly produce a net dividend after 2020. Even for a long-term private investor, there is a limit to how long-term an investment one wishes to make, especially when it is very unclear whether the investment will produce any return at all after 2020”*.

3. Background information

3.1. The company

Fjord1 is a transport group owned by the counties of Sogn og Fjordane (49%) and Møre og Romsdal (51%). The group has extensive activities both offshore and onshore, mainly in Møre og Romsdal and Sogn og Fjordane. Fjord1 Nordvestlandske AS is the holding company. The subsidiaries are classified into four business areas: “Sea” (including Fjord1 MRF AS), “Bus/Combination”, “Freight onshore” and “Services”.

3.2. Information on the tendering

3.2.1. The tender procedure

On 4 December 2006, the Central Region of the Norwegian Public Roads Administration invited companies to tender for the operation of four ferry connections: Molde-Vestnes, Søsnes-Åfarnes, Aukra-Hollingsholm and Solholmen-Mordalsvågen. The potential

tenderers had to submit a combined tender for the four routes (hereinafter referred to as “the Romsdal package”).

The tender related to the operation of the connections from 1 January 2010 to 31 December 2019. However, the contract period for the Sølsnes-Åfarnes connection was from 1 January 2010 to 31 December 2012, with an option for the principal to extend the contract by up to two years under the same terms and conditions.

The competitive tendering is based on a so-called “net contract”. The party that wins the competitive tendering and is thus licensed to operate the connections bears the risk relating to both the revenues and costs during the contract period. The licensee will receive a fixed, contractually agreed fee (operating subsidy) from the Norwegian Public Roads Administration. The tenderers are therefore in reality competing on being able to operate the ferry connections with the lowest operating subsidy.

The tender documents state that a contract will be entered into with the tenderer that submits the most financially favourable tender. They also state that price will be given the greatest emphasis when assessing the tenders. Other criteria will only be considered if there are alternative tenders that differ in price by less than 5% from the lowest tender. The tender documents also state that, for the Molde-Vestnes connection, the ferries operated must use LNG only.

The competitive tendering was carried out in compliance with the Norwegian Act No 45 of 21 June 2002 relating to professional transport using motor vehicles and vessels, Regulations No 401 dated 26 March 2003 governing domestic professional transport using motor vehicles or vessels, and Regulations No 400 dated 26 March 2003 governing tenders for local scheduled transport.

3.2.2. The tenders

Four tenderers participated.

Fjord1 MRF AS submitted five alternative tenders. The lowest tender involved the ferry connections being run without a public subsidy, while the highest tender entailed a subsidy of NOK 275 089 000.

The Complainant submitted a tender of NOK 335 747 000.

Another Norwegian tenderer submitted a tender of NOK 346 953 425.

Veolia AS submitted a tender of NOK 621 845 000. The reason for this tender being considerably higher is that Veolia did not own any ferries.

The Norwegian Public Roads Administration adopted its decision on the competitive tendering on 23 May 2007. The contract was awarded to Fjord1 MRF AS, based on the company’s third lowest tender, amounting to a contract value of NOK 67 244 000. The two lowest tenders were dismissed as they did not fulfil the capacity requirements set out in the tender documents.

3.3. Information on the capital injection

The parent company of Fjord1 MRF AS, Fjord1 Nordvestlandske AS asked its owners for a capital injection in 2006. In April 2006, the capital injection was provided by the owners of Fjord1, Sogn og Fjordane county and Møre og Romsdal county, giving Fjord1

Nordvestlandske AS a total subordinated loan of NOK 150 000 000. Sogn og Fjordane county provided NOK 88 500 000 and Møre og Romsdal county NOK 61 500 000.

The capital injection took the form of a subordinated loan to be later converted into share capital.

The Norwegian authorities have indicated that the interests correspond to the terms set out in Fjord1 Nordvestlandske AS' loan agreements with its banks at the time of the subordinated loans.

II. ASSESSMENT

1. The presence of state aid

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

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

To be termed state aid, within the meaning of Article 61(1) of the EEA Agreement, a measure must meet the following four cumulative criteria: the measure must (i) confer on recipients an economic advantage which is not received in the normal course of business, (ii) the advantage must be granted by the State or through state resources, must (iii) be selective by favouring certain undertakings or the production of certain goods, and (iv) distort competition and affect trade between Contracting Parties. In the following it is examined whether these four cumulative conditions are met in the present case.

The Authority will, in its assessment, distinguish two measures: the alleged cross-subsidisation and the terms and conditions of the capital injection.

1.1. Alleged cross-subsidisation

The Complainant has alleged that *“the tender which Fjord1 has submitted in this competitive tendering cannot be justified from a business point of view. It must therefore be based on cross-subsidisation from other parts of the company's/group's operations or on other non-commercial evaluations on the part of its owners”*.

In order for cross-subsidisation to take place, there must be some transfer of funds to the benefit of Fjord1 MRF AS. The Norwegian authorities have indicated that there has been no such transfer within the group. Indeed, the Norwegian authorities have confirmed that there has been no transfer from Fjord1 to Fjord1 MRF AS and no transfer from one division to another within Fjord1 MRF AS.

Furthermore, the allegations of cross-subsidisation by a profitable part of a public group of enterprises of an unprofitable part have no force here as Fjord1 MRF AS is profitable and has not received capital from other companies in the Fjord1 group.

The Authority therefore has not found any evidence of any cross-subsidisation which would have enabled Fjord1 MRF AS to win the Romsdal package.

The Complainant furthermore alleges that even in the case where no cross-subsidisation can be established, the fact that the tender was so low must involve some form of state

resources. The Authority, however, considers that the mere fact that the tender was low cannot automatically lead to the conclusion that state aid was involved. The Authority has assessed the information provided by the Norwegian authorities regarding the different bids and the operating costs and revenues used.

A comparative analysis of the costs and revenues structure of the bids showed divergences in particular regarding leasing and insurance costs, depreciation and interests. The Norwegian authorities have explained that Fjord1 MRF has an extensive ferry fleet which enables the company to deliver the service tendered without having recourse to chartered ferries from other operators thereby reducing the operating costs of the company.⁴ Competitors with smaller fleets bear higher costs in this respect. The Norwegian authorities have furthermore explained that the parameters used for depreciation of vessels (as well as for the calculation of interests) will vary depending on whether the company already has a sufficiently large fleet or needs to acquire new vessels.⁵ The Authority understands, on the basis of the explanations provided by the Norwegian authorities, that the fact that Fjord1 MRF already had a large existing fleet meant it could offer a lower bid than its competitors and to win the tender.

The Norwegian authorities have furthermore underlined that major differences often occur between bids in the same competition in the ferry and express boat sector and provided examples of tendering procedures opened between 2004 and 2007.⁶ They have argued that these examples show that divergences are frequent and do not *per se* constitute an indication that state aid is involved.

On the basis of the information made available by the Norwegian authorities, the Authority has not found any evidence that cross-subsidisation from other activities carried out by the company with state financing has taken place, or that such cross financing is likely to take place in the context of the Romsdal package.

The first condition for a measure to constitute state aid (presence of state resources) not being fulfilled, the Authority will not review further whether the other conditions required under Article 61(1) of the EEA Agreement are met.

1.2. Capital injection

1.2.1. State resources

The measure must be granted by the State or through state resources. The capital injection was carried out by the two owners, Sogn og Fjordane county and Møre og Romsdal county, the Authority therefore considers that state resources were involved.

1.2.2. Economic advantage

A capital injection is considered to be an aid when it is made in circumstances which would not be acceptable to an investor operating under normal market conditions.

In order to evaluate whether the capital injection entailed any element of state aid, the Authority has analysed whether, in the light of the principle of the private market investor principle, (i) a private undertaking would have carried out the capital injection and if so, (ii) under comparable terms and conditions.

⁴ Letter dated 27 November 2009 (Event No 538298).

⁵ Letter dated 27 November 2009 (Event No 538298).

⁶ Letter dated 9 November 2007 (Event No 451384).

The Authority refers to its Guidelines on rules on public service compensation, state ownership of enterprises and aid to public enterprises (“Guidelines on Public authorities’ holdings”) and its Guidelines on the application of state aid provisions to public enterprises in the manufacturing sector (“the Manufacturing Guidelines”).⁷

In carrying out its assessment, the Authority will not replace the investor’s judgment. In line with the Manufacturing Guidelines⁸, the Authority will only consider that state aid is involved when there were no objective or *bona fide* grounds to reasonably expect an adequate rate of return in a comparable private enterprise at the moment the investment /financing decision was made.

When applying the private market investor principle, the Authority will take into account the fact that the capital of Fjord1 is totally held by public authorities. The Authority refers to the Manufacturing Guidelines⁹ which provide: *“the Court has stated that in the case of an enterprise whose capital is almost entirely held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have subscribed the capital in question”*. (emphasis added)

(i) The need for the capital injection

Until 2007, Fjord1 and its subsidiaries had not carried out any equity capital issuing or otherwise been provided with equity capital for many decades.

Equity capital in the balance sheet was retained earnings from the profits made in the group. At that time it was possible to have 100% debt financing of ferry investments through state loan facilities and state guarantee plans. This regime applied to the whole sector. When the transport sector, including the ferry services, was exposed to competition, this regime was changed. The industry was obliged to finance its own investments through debt financing without state guarantees, and each company must in addition provide 20-30% equity injections in the financing of investment projects.

Owner capital was obtained to satisfy Fjord1’s required equity financing of investments, in addition to external debt financing, to meet the banks demand for financing. The intention was that the subordinated loans would later be converted into share capital. The bank accepted that the loans be treated as equity.

Analyses were carried out on the basis of investments to be made in the future. Based on those reports, the governing bodies of Fjord1 and of its owners, decided in the autumn of 2006 to inject equity through subordinated loans of NOK 88,5 million and NOK 61,5 million respectively for Sogn og Fjordane and Møre og Romsdal, totalling NOK 150 million.

(ii) The terms and conditions of the capital injection

The capital injection has taken the form of a subordinated loan.

⁷ Section 1.(3) of the Manufacturing Guidelines provides that *“this Chapter does not deal with the question of the compatibility under one of the derogations provided for in the EEA Agreement and it is limited to the manufacturing sector. This does not, however, preclude the EFTA Surveillance Authority from using the approach described in these rules in individual cases or sectors outside manufacturing to the extent that these principles apply in these excluded sectors and where it feels that it is essential to determine if state aid is involved”*.

⁸ Section 5(2).

⁹ Section 3(4).

The loan was granted under the following terms: interest of NIBOR 3 months plus a margin of 0,39% and in the semi long term the opportunity to convert into share capital. In April 2009, the rate was increased to 0,65%.

The Norwegian authorities have indicated that the interest paid corresponded to the interests paid under Fjord1 Nordvestlandske AS' loan agreement with its bank.

(iii) Return on investment/payment of dividends

The Manufacturing Guidelines provide that *“a capital injection is considered to be an aid when it is made in circumstances which would not be acceptable to an investor operating under normal market conditions. This is normally taken to mean a situation where the structure and future prospects for the company is such that a normal return (by way of dividend payments or capital appreciation) by reference to a comparable private enterprise cannot be expected within a reasonable time. A market economy investor would normally provide equity finance if the present value of expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains and adjusted for risk) exceed the new outlay.”*¹⁰

The Manufacturing Guidelines also provide that *“the State, in common with any other market economy investor, should expect a normal return obtained by comparable private enterprises on its capital investments by way of dividend or capital appreciation (...) if the State forgoes dividend income from a public enterprise and the resultant retained profits do not earn a normal rate of return as defined above then the company in question is effectively being subsidised by the State. It may well be that the State sees it as preferable for reasons not connected with commercial considerations to forgo dividends (or accept reduced dividend payments) rather than make regular capital injections into the company. The end result is the same and this regular “funding” has to be treated in the same way as new capital injections and evaluated in accordance with the principles set out above”.*¹¹

The Norwegian authorities have explained that since 2001, the Fjord1 group has without exception generated profits:

	2001	2002	2003	2004	2005	2006	2007
PROFIT BEFORE TAX*	77	69	124	60	34	86	96
TAXES*	21	15	33	21	2	26	-- ¹²
NET RESULT*	56	54	91	39	32	59	96

*Million Norwegian Kroners

Furthermore, the Norwegian authorities have explained that *“Fjord1 has consistently provided an adequate return, that the Owners held and hold that sole ownership and that the volume and nature of the capital injection requires was not such as to render necessary a greater amount of information than was actually assessed by the owners prior to the injection.(...) Every year since 2001, the Fjord1 group has had good profits and net results. Fjord1 has, over time, seen relatively good results in a Market which is*

¹⁰ Section 7(1)(1).

¹¹ Section 7(4)(1) and (3).

¹² Data not available at the time the information was submitted.

*characterised by small margins. These strong results are reflected in the dividends given in the period 2005-2009”.*¹³

Prior to deciding on and granting the subordinated loans, the matter was subject to discussions by the authorities at the counties involved. In particular, recordings from the discussions of case 15/06 “Fjord1 – Emergency plan for supply of equity” at Sogn og Fjordane county show that the owners, at the time, considered the granting of subordinated loans to be a commercial investment.

The Norwegian authorities have indicated that the owner counties had indeed stated that they would refrain from taking dividends until and including 2010. The reason for the proposed renunciation to payment of dividend up to and including 2010 was to facilitate the decision according to which the capital injection was reduced from NOK 250 million to NOK 150 million. The Norwegian authorities have, however, stressed that dividends were indeed paid after the capital injection took place.¹⁴

The Authority considers that (i) the decision to proceed with the capital injection was reasonable in view of the evolution of the sector at the time, (ii) the terms and conditions appear to have been in line with the market terms as they corresponded to the terms of the loans subscribed by the group with its banks, (iii) the expected return on investment seemed adequate and (iv) despite some declarations that dividends may not be paid until 2010, dividends were actually paid.

The Authority therefore considers that there is no reason to conclude that the capital injection was carried out under circumstances that no private market economy investor would have accepted.

2. Conclusion

On the basis of the foregoing assessment, the Authority considers that the measures referred to in the Complaint, namely the alleged cross-subsidisation that would allegedly have enabled Fjord1 MRF AS to win the tender procedure and the capital injection Fjord1 Nordvestlandske AS benefited from in 2006 do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the measures referred to in the Complaint namely the alleged cross-subsidisation that would allegedly have enabled Fjord1 MRF AS to win the tender procedure and the capital injection Fjord1 Nordvestlandske AS benefited from in 2006 do not constitute 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

¹³ Letter dated 27 November 2009 (Event No 538298).

¹⁴ Dividends of NOK 30 million and of NOK 15 million were respectively paid in 2007 and in 2008. (see letter dated 27 November 2009).

Only the English language version is authentic.

Done at Brussels, 23 November 2010.

For the EFTA Surveillance Authority

Per Sanderud
President

Sverrir Haukur Gunnlaugsson
College Member