

EFTA SURVEILLANCE AUTHORITY DECISION

of 22 October 2014

opening the formal investigation procedure into aid in favour of Sandefjord Fotball 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,

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,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1(2) of Part I and Articles 4(4) and 6(1) of Part II,

Whereas:

I. FACTS

1 Procedure

- (1) Following complaints and market information submitted by concerned citizens, the Authority notified the Norwegian authorities of the state aid allegations on 31 October 2013 (Event No. 686574). In the same correspondence, the Authority requested information on the alleged aid measure, which the Norwegian authorities provided on 29 November 2013 (Events No. 691773 and 691774).
- (2) The Authority requested further information from the Norwegian authorities on 16 January 2014 (Event No. 694963), which was provided on 14 February 2014 (Event No. 699518).

2 The alleged beneficiary

- (3) Sandefjord Fotball AS is a football club organised as a limited-liability company. It was founded in 1998 based on an agreement between two football clubs in Sandefjord with the aim of establishing a professional team.
- (4) The club’s first team earned promotion to the highest Norwegian league in 2005. In the 2006 season it finished ninth and reached the national cup final, before being relegated the next year. Sandefjord Fotball played again in the highest division in 2009 – finishing

eighth – and also in 2010. Since then, it has been playing in the 1st Division, the second-highest Norwegian league.

- (5) Besides the professional (Elite) team, the club has an amateur and a junior football team. It also runs football summer schools and organises regional football competitions for young amateur players.
- (6) Sandefjord Fotball AS is owned by a number of individuals, either directly or through holding companies.

3 The complaints and market information

- (7) The complaints and market information received by the Authority are from individuals who requested anonymity. Their concerns are summarised in the following.
- (8) In 2006, the municipality of Sandefjord transferred two plots of land free of charge to Sandefjord Fotball AS for the purpose of facilitating the construction of a new football stadium at Pindsle. The municipality had previously purchased these plots of land for a price of NOK 3.7 million. The land was at the time regulated as farmland. In preparation of the transfer to the football club, the municipality adopted a new zoning plan that allowed for the construction of a stadium and commercial use for one plot, and commercial use for the other plot.
- (9) Sandefjord Fotball AS constructed the football stadium on the first plot. According to the complainants, it sold the second plot for approximately NOK 40 millions to a commercial company (Pindsle Property AS¹) in order to finance the stadium construction. Sandefjord Fotball later also sold the other plot of land, including the stadium and further business properties, to Pindsle Property AS for NOK 15 million. The complainants indicate that at the time of these transactions, Sandefjord Fotball AS and Pindsle Property AS were controlled by the same individuals, who sat on the boards of both companies.
- (10) The complainants argue that the transfer of land to Sandefjord Fotball AS did not take place at market terms and resulted in the granting of unlawful state aid.

4 Description of the measure

4.1 Background

- (11) Until 2007, Sandefjord Fotball used the municipal-owned stadium in Bugårdsparken for training purposes and matches. However, this stadium did not comply with the requirements of the Norwegian football federation for clubs playing in the highest division. An upgrade of the existing stadium was estimated to cost about NOK 30-40 million, which the municipality of Sandefjord was unwilling to invest.

4.2 The construction of the new stadium

- (12) In 2005, the municipality of Sandefjord and Sandefjord Fotball AS discussed the possibility of constructing a new stadium. The municipality agreed to provide the necessary land, and Sandefjord Fotball AS to finance and run the stadium.
- (13) The municipality acquired several plots of land in the Pindsle area for a total of around NOK 3.7 million. The land was regulated as farmland at the time. The municipality's decision of 6 September 2005 authorising the acquisition foresaw the land to be rezoned

¹ Pindsle Eindomsutvikling AS, including its subsidiaries Pindsle Stadion AS and Arena Næring AS. It will be called Pindsle Property AS in the following.

for business use and to require the construction of a stadium. In the new zoning plan, this land was split into two parts: plot 152/96 was zoned for mixed stadium and business use, and plot 152/97 for business use. By way of an agreement dated 28 November 2006, both plots of land were then transferred to two wholly-owned subsidiaries of Sandefjord Fotball AS: plot 152/96 to Sandefjord Fotball Stadion AS and plot 152/97 to Sandefjord Fotball Næring AS.

- (14) According to the agreement, Sandefjord Fotball AS was responsible for organising the necessary financing to build the stadium. The construction costs were estimated at NOK 110 million for the project. Sandefjord Fotball AS would contribute NOK 70 million from its own funds and from outside investors, the sale of naming rights etc, and take out a loan for the remaining NOK 40 million. The contribution of Sandefjord Fotball AS would partly be raised by the sale of the land zoned for business use (plot 152/97) to Pindsle Property AS.
- (15) Besides the construction of the stadium, the agreement contained a number of further obligations. In particular, Sandefjord Fotball AS agreed to carry out road works at the stadium site (at a cost of approx. NOK 6.5 million) and to cover costs in relation to the discontinued use of the old stadium, including repairs (together approx. NOK 2.6 million).
- (16) Shortly after the signing of the agreement, the shares in Sandefjord Fotball Næring AS, which owned plot 152/97, were acquired by Pindsle Property AS for NOK 40 million. No valuation of the company was undertaken prior to the sale.
- (17) The new stadium was completed in July 2007 at a total construction cost of NOK 100 million. In addition to the football pitch and stands, it contains a number of other facilities, including an athletics track, a fitness centre and meeting rooms. These are rented out free of charge to other (mainly amateur sport) organisations.

4.3 Subsequent sale of the stadium

- (18) In 2009, Sandefjord Fotball AS encountered financial difficulties. The club decided to raise funds by selling Sandefjord Fotball Stadion AS (the company owning the stadium and adjacent properties on plot 152/96) to Pindsle Property AS. This time, a third-party company valuation was required under Norwegian law as several individuals held board positions and shareholdings in both the club and Pindsle Property AS.
- (19) The expert report of 6 April 2009 valued Sandefjord Fotball Stadion AS at between NOK 14 million and NOK 16 million. The company was sold at a price of NOK 15 million on 9 June 2009.
- (20) Following the sale, Sandefjord Fotball AS has been paying annual rent of NOK 3 million plus 30% of the value of ticket sales for the use of the stadium. According to the Norwegian authorities, the rent level corresponds to what other football clubs in Norway pay for stadium use.

5 Comments by the Norwegian authorities

- (21) The Norwegian authorities argue that the transactions described above do not result in the granting of state aid.
- (22) According to the Norwegian authorities, the transfer of land by the municipality to Sandefjord Fotball AS has to be seen in the context of the wider agreement to build the

stadium. The contract of 28 November 2006 by which the plots of land were transferred to Sandefjord Fotball Stadion AS and Sandefjord Fotball Næring AS obliged Sandefjord Fotball AS to build the stadium, at an estimated cost (at the time) of NOK 110 million. In any event, the value of this obligation vastly exceeded the value of the two plots of land. Therefore the transfer of land could not result in the granting of an economic advantage to Sandefjord Fotball AS.

- (23) Regarding the value of the two plots of land in question, the Norwegian authorities argue that plot 152/96 does not have any market value as its zoning includes the use as a football stadium. This means that any development of the land must include the construction of a football stadium, implicating very important construction costs. Accordingly, no buyer except for the football club would have been interested in the land.
- (24) Regarding plot 152/97, the Norwegian authorities argue that the price of NOK 40 million paid by Pindsle Property AS for the shares in Sandefjord Fotball Næring AS cannot be taken as an indication of market value. The agreed purchase price was not primarily based on the value of the land, but rather on the financial requirements of Sandefjord Fotball AS. The owners of Pindsle Property AS were supporters of the football club and wanted to contribute to the stadium construction. In order to determine the true market value of the land, the Norwegian authorities have commissioned a third-party expert valuation. The Authority understands that the valuation report of 5 February 2014 estimates the value of plot 152/97 at around NOK 15 million (based on 2006 data and excluding the cost of access infrastructure).²
- (25) Finally, the Norwegian authorities also argue that in any event, the further obligations contained in the agreement of 28 November 2006 in relation to road works at the stadium site (at a cost of approx. NOK 6.5 million) and the discontinued use of the old stadium, including repairs (together approx. NOK 2.6 million) should be deducted from the value of the land.

II. ASSESMENT

6 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*”.
- (27) This implies that a measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement if the following conditions are cumulatively fulfilled: the measure is granted by the State or through state resources, confers a selective economic advantage on an undertaking and is liable to affect trade between Contracting Parties and to distort competition.

6.1 State resources

- (28) In order to qualify as state aid, the measure must be granted by the State or through state resources. The concept of the State does not only refer to the central government, but

² The valuation report estimates the combined value of plots 152/96 and 152/97 at NOK 31 million. The NOK 15 million results from apportioning this estimate according to the respective size of the two plots.

embraces all levels of the state administration (including municipalities) as well as public undertakings.³

- (29) The land at issue was acquired by Sandefjord municipality and then transferred to two subsidiaries of Sandefjord Fotball AS. The Authority therefore concludes that the transfer of land involves state resources.
- (30) Before the transaction, the municipality of Sandefjord changed the planning obligations for the land at issue: plot 152/96 was rezoned from farmland to mixed stadium and business use, and plot 152/97 from farmland to business use. Planning decisions are regulatory acts taken by public authorities. According to the case law, such regulatory acts usually do not result in a transfer of state resources to undertakings.⁴

6.2 Undertaking

- (31) It is well-established case law that undertakings are entities engaged in economic activities, regardless of their legal status and the way in which they are financed.⁵ Economic activities are activities consisting of offering goods or services on a market.⁶
- (32) Sandefjord Fotball AS is a professional football club organised as a private company. It is active on several markets, including the transfer market for football players as well as the markets for ticket sales, television rights, club memorabilia and sponsorship.
- (33) The Authority therefore concludes that Sandefjord Fotball AS constitutes an undertaking within the meaning of Article 61 of the EEA Agreement.

6.3 Economic advantage

- (34) A transfer of land to an undertaking may confer an economic advantage, in particular if it takes place at a price that is below the market price.
- (35) The Authority guidelines on state aid elements in sales of land and buildings by public authorities (“the Sale of Land Guidelines”)⁷ set out two procedures that can be used to ensure that a sale of land does not involve state aid: public authorities can either carry out an open and unconditional bidding procedure, or obtain an independent ex ante expert valuation of the land.
- (36) In the case at hand, the municipality of Sandefjord neither organised a bidding procedure nor obtained an ex ante expert valuation. As a result, the Authority cannot exclude the presence of state aid based on the procedure followed by the municipality.

³ Article 2 of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings (OJ L 318, 17.11.2006, p. 17), incorporated at point 1a of Annex XV to the EEA Agreement.

⁴ Case C-379/98 *Preussen Elektra v Schleswig* EU:C:2001:160, paragraphs 59-60. See also the Commission’s answer to the parliamentary question P-2491/02, OJ C 137 E, 12.06.2003, p. 87.

⁵ Case C-41/90 *Höfner and Elser v Macroton* EU:C:1991:161, paragraphs 21-2; Joined Cases C-180/98 to C-180/98 *Pavlov and Others* EU:C:2000:428; and Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] EFTA Ct. Rep. p. 61, paragraph 78.

⁶ Case C-222/04 *Ministero dell’Economica e delle Finanze v Cassa di Risparmio di Firenze SpA* EU:C:2006:8, paragraph 108.

⁷ Authority guidelines on state aid elements in sales of land and buildings by public authorities, adopted on 17 November 1999. Available at: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.

- (37) A transaction transferring state resources does not constitute state aid when it is carried out in line with normal market conditions so that it does not confer an advantage on an undertaking.⁸ This is known as the market economy operator test.

6.3.1 Transfer of plot 152/96

- (38) At the time of the transfer to Sandefjord Fotball AS, plot 152/96 was zoned for the construction of a football stadium and business use. According to the Norwegian authorities, this implies that any construction on the plot of land needs to include a stadium in order to receive planning permission.
- (39) The Authority notes that zoning obligations can influence the market price of land. However, the Authority is not convinced that the obligation to build a football stadium can be considered to reduce the market price to zero, in particular in case of a transaction aimed at assisting a football club in building a new stadium. In this context, the Authority also refers to section 2.2(c) of its Sale of Land Guidelines, which states that when carrying out a valuation, “...[o]bligations whose fulfilment would at least partly be in the buyer's own interest should be evaluated with that fact in mind.”
- (40) In addition, the Authority refers to section 2.2(d) of its Sale of Land Guidelines, which states that in principle, “the market value should not be set below primary⁹ costs during a period of at least three years after acquisition unless the independent valuer specifically identifies a general decline in market prices for land and buildings in the relevant market.” In the case at hand, the municipality of Sandefjord acquired the land that was later divided into plots 152/96 and 152/97 for NOK 3.7 million. The Authority has not yet received any specific information justifying a sale at a price below the acquisition cost for the municipality.
- (41) Based on the above, the Authority considers at this stage that the transfer of plot 152/96 free of charge conferred an economic advantage on Sandefjord Fotball AS.

6.3.2 Transfer of plot 152/97

- (42) Plot 152/97 was zoned for business use at the time of the transfer to Sandefjord Fotball AS. The Norwegian authorities argue that the transfer of plot 152/97 should be assessed in the context of the contract of 28 November 2006, which obliges the football club in particular to build the stadium in exchange for the land. Given that the estimated construction costs of the stadium exceed the value of the land, the transfer could not result in the granting of an economic advantage.
- (43) The Authority notes that plot 152/97 is zoned for business use. According to the planning rules, there is thus no obligation to build a stadium in relation to this plot of land. The contract of 28 November 2006, by which the land was transferred to Sandefjord Fotball AS, obliges Sandefjord Fotball AS to organise and finance the construction of the stadium. It foresees that plot 152/97 would be sold to finance part of the construction. The Authority considers that a market economy operator selling land would not have imposed such conditions in relation to the construction or financing of a stadium. The Authority therefore cannot exclude at this stage that the transfer of plot 152/97 to Sandefjord Fotball AS conferred an economic advantage on the undertaking.
- (44) The Authority further notes that shortly after the transfer, Sandefjord Fotball AS sold the shares in Sandefjord Fotball Næring AS, the company owning plot 152/97, to Pindsle

⁸ Case C-39/94 *SFEI and Others* EU:C:1996:285, paragraphs 60-61.

⁹ I.e. the acquisition costs incurred by the public authority in question.

Property AS for NOK 40 million. Pindsle Property AS is a private company, and was not part of the same group as Sandefjord Fotball AS at the time of the transaction. The sale thus took place between two independent companies.¹⁰

- (45) The Norwegian authorities argue that this transaction did not reflect market price due to the motives of the owners of Pindsle Property AS, who wanted to provide Sandefjord Fotball AS with sufficient funds to enable the construction of the stadium. The Authority, however, has not received any evidence showing that the acquisition of Sandefjord Fotball Næring AS had been authorised by the board and/or the owners of Pindsle Property AS at an allegedly inflated price in order to favour the football club. The Authority further understands that according to Norwegian company law, the board of a private company has to act in the best interest of the company. The Norwegian authorities have not explained how the allegedly inflated purchase price served the best interest of Pindsle Property AS.
- (46) Based on the above, the Authority considers at this stage that the sale of Sandefjord Fotball Næring AS, whose principal asset was plot 152/97, to Pindsle Property AS for NOK 40 million shows the market value of the land. Given that there was an actual market transaction that took place shortly after the transfer of the land to Sandefjord Fotball AS, it is a more reliable indication of market value than the valuation report of 5 February 2014 put forward by the Norwegian authorities.
- (47) The Norwegian authorities further argue that the cost of carrying out road works at the stadium site (approx. NOK 6.5 million) and the costs in relation to the discontinued use of the old stadium, including repairs (together approx. NOK 2.6 million) that form part of the obligations of Sandefjord Fotball AS according to the contract of 28 November 2006 should be deducted from the value of the land.
- (48) The Authority considers that for such costs to be taken into account, they have to reflect costs that the municipality would otherwise have to bear itself, and not the developer of the land. For instance, road works that a developer is required to undertake under planning regulations cannot be taken into account. Similarly, repairs that a user of a municipal stadium would normally be obliged to carry out at the end of its rental contract should not be taken into account either. Based on the information received so far, the Authority questions whether any of these obligations contained in the contract of 28 November 2006 should be deducted from the value of the land.
- (49) Based on the foregoing, the Authority currently considers that the measure at stake confers an economic advantage on Sandefjord Fotball AS.

6.4 Selectivity

- (50) The alleged state aid results from a transaction between the municipality of Sandefjord and Sandefjord Fotball AS. It represents a selective measure within the meaning of Article 61 of the EEA Agreement, in the sense that it only concerns one particular undertaking.

6.5 Distortion of competition and effect on trade between Contracting Parties

- (51) According to the case law regarding effect on trade and distortion of competition, the Authority “[i]s required, not to establish that such aid has a real effect on trade [...] and

¹⁰ This is further shown by the absence of an independent expert valuation, which is required under Norwegian company law for transactions between companies in the same group.

*that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition”.*¹¹

- (52) The mere fact that aid strengthens an undertaking’s position compared to that of other undertakings competing in intra-EEA trade is enough to conclude that the measure is liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.¹²
- (53) In 2006, Sandefjord Fotball’s professional team was playing in the highest Norwegian division, with the possibility of qualifying for European championships. Moreover, professional football clubs deploy economic activities in several markets other than participating in football competitions, such as the transfer market for professional players, publicity, sponsorship, merchandising or media coverage. Aid to a professional football club strengthens its position on each of those markets, most of which cover several countries in the EEA. As regards the market for the transfer of players, Sandefjord Fotball AS was at the time – and still is today – active on the international transfer market, regularly recruiting players notably from other countries in the EEA.
- (54) The Authority therefore considers that the measure is liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.

6.6 Conclusion

- (55) Based on the above, the Authority comes to the preliminary conclusion that the measure at stake fulfils all the conditions to constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

7 Compatibility

- (56) Should the measure assessed above involve state aid within the meaning of Article 61 of the EEA Agreement, the Authority must assess whether the aid can be declared compatible with the functioning of the EEA Agreement. According to the case law, it is up to the Contracting Party concerned to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met.¹³
- (57) The Authority notes that aid to promote sport, including aid to sport infrastructure, can be declared compatible with the functioning of the EEA Agreement under certain conditions, as is illustrated notably by the General Block Exemption Regulation¹⁴ and the decisional practice¹⁵ of the European Commission.
- (58) However, the Norwegian authorities have not yet put forward any arguments regarding compatibility. The Authority therefore has doubts at this stage whether the measure could be declared compatible with the functioning of the EEA Agreement.

¹¹ Case C-372/97 *Italy v Commission* EU:C:2004:234, paragraph 44.

¹² Case 730/79 *Philip Morris Holland BV v Commission* EU:C:1980:209, paragraphs 11-12 and Joined Cases E-5/04, E-6/04, E-7/04 *Fesil ASA and Finnjord Smelteverk AS v EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraph 94.

¹³ Case C-364/90 *Italy v Commission* EU:C:1993:157, paragraph 20.

¹⁴ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), incorporated at point 1j of Annex XV to the EEA Agreement.

¹⁵ See e.g. Commission Decision in case SA.37109 (2013/N), *Football stadiums in Flanders*, OJ C 69, 7.3.2014, p. 1-28.

8 Conclusion

- (59) Based on the information submitted by the Norwegian authorities at this stage of the procedure, the Authority is of the preliminary view that the measure at hand constitutes state aid within the meaning of Article 61(1) of the EEA Agreement and has doubts on whether it is compatible with the functioning of the EEA Agreement.
- (60) Consequently, and in accordance with Article 4(4) of Part II of Protocol 3, the Authority opens the formal investigation procedure. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measure in question does not constitute state aid or is compatible with the functioning of the EEA Agreement.
- (61) In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit their comments within one month of the date of receipt of this decision.
- (62) The Authority also requests the Norwegian authorities to provide, within one month of receipt of this decision, all documents, information and data needed for the assessment of the nature and compatibility of the measure covered by this decision.
- (63) The Authority requests the Norwegian authorities to forward a copy of this decision to the potential recipient of the aid immediately.
- (64) The Authority reminds the Norwegian authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted will have to be recovered, unless (exceptionally) this recovery would be contrary to a general principal of EEA law.

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure provided for in Article 1(2) of Part I and Article 4(4) of Part II of Protocol 3 is opened into the potential aid measure implemented by the Norwegian authorities, which is the transfer of land from the municipality of Sandefjord to Sandefjord Fotball AS.

Article 2

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure by 24 November 2014.

Article 3

The Norwegian authorities are requested to provide by 24 November, all documents, information and data needed for the assessment of

- the market price of the two plots of land at issue in line with the reasoning in section 6.3 above; and
- the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English language version of this decision is authentic.

Decision made in Brussels, on 22 October 2014.

For the EFTA Surveillance Authority

Oda Helen Sletnes

President

Helga Jónsdóttir

College Member