


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION

of 17 November 1999

AID RELATED TO THE CONSTRUCTION OF A FISHERY PATROL VESSEL
FOR THE MINISTRY OF FISHERIES AND MARINE RESOURCES IN NAMIBIA

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, in particular to Articles 61 to 63 of the Agreement,

HAVING REGARD TO the Act referred to in point 1b of Annex XV to the EEA Agreement on aid to shipbuilding (Council Regulation No. 1540/98)², in particular Articles 3 (1) and 3 (5) thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice³, in particular Article 24 and Article 1 of Protocol 3 thereof,

WHEREAS:

I. FACTS

The notification

The Norwegian Government notified to the EFTA Surveillance Authority, pursuant to Art. 3 (5) and Art. 10 (2) (c) (i) of Council Regulation No. 1540/98 establishing new rules on aid to shipbuilding⁴, its intention to grant aid related to a contract to build a Fishery Patrol Vessel for the Ministry of Fisheries and Marine Resources in Namibia (MFMR). Furthermore, the Norwegian Government informed the Authority about a grant to be awarded under the grant scheme for shipbuilding.

¹ Hereinafter referred to as the EEA Agreement.

² Included in Annex XV to the EEA Agreement by Decision of the EEA Joint Committee No 12/99 of 29 January 1999.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as the Shipbuilding Regulation.

The letter of notification was dated 15 July 1999 and registered by the Authority on 22 July 1999 (Doc. No. 99-5531-A). By letter of 11 August 1999, the Authority requested additional information (Doc. No. 99-6068-D). The Norwegian authorities replied by letter dated 20 September 1999, which was registered by the Authority on 8 October 1999 (Doc. No. 99-7472-A). By letter dated 27 October 1999, registered by the Authority on 8 November 1999 (Doc. No. 99-8341-A), the Norwegian Government provided further clarification concerning the amount of aid granted under the general shipbuilding aid scheme. Additional information regarding the tender procedure has been communicated to the Authority subsequently.

The aid project

The vessel, which is to be constructed, is estimated to have a capacity of approximately 1300 GT. The contract for building this vessel will be granted subsequent to a tender procedure. An independent maritime consultancy firm will administer this tendering procedure (including the preparation of invitation to tenders, the assessment of tenders and the making of a final recommendation). The Norwegian Government declared that the announcement of the tender, which will be published in major Norwegian newspapers, will also include information on the development assistance granted in relation to this contract. The final decision regarding the selection of the yard will be taken by the authorities of Namibia, with the assistance of the Norwegian Agency for Development Co-operation (NORAD). The contract price is expected to range between NOK 80 and 85 million, which the Norwegian Government has assured the Authority corresponds to the market price for a comparable vessel.

The project includes two aid elements. First, there will be a grant, according to the general rules of the Norwegian grant scheme for shipbuilding. In its initial notification of 15 July 1999, the Norwegian Government stated that the ordinary shipbuilding support scheme will contribute with 9% of the contract value. This grant element was based on the assumption that the contract value would be NOK 95 million. In its letter of 27 October 1999, the Norwegian Government clarified that if the actual contract value should be below Euro 10 million (i.e. NOK 87,745 million), the contribution of this support scheme would be limited to 4,5% of the contract value.

Secondly, NORAD has promised to provide tied aid financing on favourable terms. The financial arrangements involve a loan covering 85% of the total costs of the vessel, with a repayment arrangement of 30 equal semi-annual instalments; the first falling due 6 months after the date of delivery. The loan will bear an interest rate of 1% p.a.. This arrangement is stated to imply an OECD concessionality level of about 35% of the financial amount.

The aid granted by NORAD will be granted in relation to the so-called "Nansen-programme" and the "country-programme", which have been supported by NORAD since 1990. The aim of the first-mentioned programme is to achieve sustainable utilisation of Namibia's living marine resources. One objective has been to keep the frequency of illegal fishing activities as low as possible. The country-programme,

which also has focused on activities in the fishery sector, is based on bilateral agreements between NORAD and MFMR. The major part of the financial support provided since 1990 has gone into hiring and upgrading surveillance vessels and the manning of these vessels with ship officers and fishery inspectors. The two existing vessels are 20 and 24 years old and both are close to the end of their economic lifetime.

The support for the financing of the new ship follows a request by the authorities of Namibia. The Norwegian Government has assured that the vessel would be operated by the authorities of Namibia and deployed exclusively in Namibian territorial waters. The country of flagship will be Namibia and the surveillance vessel may not sail under other flags than the national one.

The Norwegian authorities notified the aid on 8 July 1999 to the participants of the OECD Understanding on Export Credits for Ships and confirmed to the EFTA Surveillance Authority that the OECD Working Party No. 6 had not raised objections concerning this notification. The Norwegian authorities have further declared that the aid constitutes Official Development Aid.

II. APPRECIATION

Grant for the construction of the vessel

The Norwegian grant scheme for shipbuilding, which was approved by the EFTA Surveillance Authority by Decision No 64/98/COL of 18 March 1998, is applicable to contracts entered into from 1st January 1998 until 31st December 1998. Under the notified national legislation, the applicable aid ceilings for shipbuilding contracts with a value of more than Euro 10 million and for shipbuilding contracts with a value less than Euro 10 million, as well as for ship conversion contracts, were 7% and 3,5% respectively. No approved aid scheme is currently in place for contracts entered into as of 1st January 1999. By letter of 9 June 1999, registered by the Authority on 25 June 1999 (Doc. No. 99-4768-A), the Norwegian Government notified to the Authority the Parliament's Decision of 25 March 1999 to increase the aid ceilings for contract-related aid from 7% to 9% for new buildings with a contract value of more than Euro 10 million, and from 3,5% to 4,5% for smaller vessels and conversions. These changes took effect as of 5 February 1999. This amendment as well as the other existing aid schemes for the shipbuilding industry are still being examined under the Shipbuilding Regulation.

Since the grant scheme for shipbuilding has not been approved yet, the grant element to the shipyard undertaking the construction, has to be assessed as an individual aid not covered by an approved general aid scheme.

According to Article 1 (b) of the Shipbuilding Regulation, 'shipbuilding' covered by this Regulation means the building of self-propelled seagoing commercial vessels as defined under Art. 1 (a). Pursuant to this latter provision, 'self-propelled seagoing commercial vessel' shall mean *i.a.* vessels of not less than 100 GT used for the transportation of passenger and/or goods or vessels of not less than 100 GT for the

performance of a specialised service (for example, dredgers and ice breakers). 'Self-propelled seagoing vessel' shall mean a vessel that, by means of its permanent propulsion and steering, has all the characteristics of self-navigability on the high seas.

The construction of a vessel with a capacity of 1300 GT, intended to be deployed for patrol services is covered by the Shipbuilding Regulation.

Pursuant to Art. 3 (1) of the Shipbuilding Regulation, production aid in support of contracts for shipbuilding and ship conversion may be considered compatible provided that the total amount of all forms of aid granted in support of any individual contract does not exceed a common maximum ceiling of 9% for shipbuilding contracts with a contract value of more than Euro 10 million and in all other cases of 4,5%. In this respect, the Authority takes note of the Norwegian Government's undertaking to apply a grant element of 9% only when the contract value exceeds Euro 10 million and to apply a grant element of only 4,5% should the actual contract price be below this ceiling. Against this background, the grant related to the shipbuilding contract, is compatible with the EEA Agreement.

Development Assistance

According to Art. 3 (5) of the Shipbuilding Regulation, aid related to shipbuilding and ship conversion granted as development assistance to a developing country shall not be subject to the prevailing aid ceiling set in Art. 3 (1).

In this context, the Authority shall assess the compatibility of development aid with the functioning of the EEA Agreement according to the following conditions:

- (1) Satisfy itself that the proposed aid falls within the scope of the Agreement of the OECD Working Party 6 concerning the interpretation of Articles 6 to 8 of the OECD Understanding on Export Credits for Ships⁵;
- (2) Verify the particular development content of the proposed aid and
- (3) Verify that the offer of development assistance is open to bids from different yards.

(1) Application of and Compliance with the Agreement of the OECD Working Party 6 concerning the interpretation of Articles 6 to 8 of the OECD Understanding on Export Credits for Ships

The Agreement concerning the interpretation of Articles 6 to 8 of the OECD Understanding on Export Credits for Ships covers *i.a.* "any sea-going ship of 100 GRT and above used for the transportation of goods or persons, or for the performance of a specialised service...that present in a permanent way by their means of propulsion and direction (steering) all the characteristics of self-navigability in the

⁵OECD document C/WP6(84)3 of 18 January 1984, "Revision of the definitions and administrative procedures concerning the Understanding on Export Credits for Ships".

high sea...". The vessel concerned is a 1300 GT sea-going patrol vessel. It is therefore deemed to fall within the scope of the OECD Understanding.

As regards the compliance with the criteria laid down in the OECD document C/WP6(84)3 of 18 January 1984, the following criteria have to be fulfilled (see point 4 and 5 of Chapter 31 of the Procedural and Substantive Rules in the field of State aid⁶):

- a) The aid may not be granted for construction of ships which will be operated under a "flag of convenience" (see list of countries under point 10 of Chapter 31 of the State Aid Guidelines).
- b) In the event that the aid cannot be classified as public development aid in the framework of OECD the donor must confirm that the aid is part of an inter-governmental agreement.
- c) The donor must give appropriate assurances that the real owner is resident in the beneficiary country and that the beneficiary company is not a non-operational subsidiary of a foreign company.
- d) The beneficiary must give undertakings not to sell the ship without prior government approval.
- e) The aid granted must contain a grant element of at least 25% in accordance with the OECD method of calculation (see OECD document C/WP(85)62 of 21 October 1985).
- f) The recipient country must be an eligible developing country (see list of countries referred to under point 6 of Chapter 31 of the State Aid Guidelines).

The Norwegian Government undertakes that the vessel will operate under the Namibian flag, which is not regarded as a flag of convenience. The aid is considered to be an official development aid within the meaning of the OECD rules. Since, the MFMR is the owner of the vessel, it goes without saying that the vessel cannot be resold without prior approval of the Namibian Government. Furthermore, the aid complies with the OECD criteria, since the credit terms are deemed to involve a concessionality level of 35%, thus being above the minimum ceiling of 25%. Finally, according to point 6 (a) of Chapter 31 of the State Aid Guidelines, Namibia is eligible for development aid and the Norwegian Government has assured the Authority that the vessel will be deployed exclusively in the waters of Namibia.

(2) Development Content

The EFTA Surveillance Authority is specifically obliged to verify the particular development content of the proposed aid, in order to ensure that the aid granted as development aid does not constitute disguised aid in favour of a shipyard in an EFTA State.⁷

In this respect it is important to note that NORAD is entrusted with the task to ensure that the State supported projects promote development in the recipient country.

⁶ Hereinafter referred to as "State Aid Guidelines".

⁷ See Judgment of 5 October 1994, Case C-400/92, [1994] ECR I-4701, paragraph 21.

Furthermore, development aid is usually reserved for projects that cannot be achieved on the basis of commercial credits.

The vessel will be owned by the MFMR and will not be deployed for commercial purposes. The use of this vessel fits into the context of the development programmes set up by the Norwegian Government. In this respect, the project will benefit from the experience of Norway as a coastal nation with long maritime traditions. The technical expertise of the donor will thus be utilised for the benefit of the recipient country. The project is therefore expected to contribute to the economic development of Namibia.

(3) Open to bids from other yards

According to Art. 3 (5) of the Shipbuilding Regulation, the offer of development assistance shall be open to bids from different yards. This provision was introduced in the Shipbuilding Regulation, in order to establish stricter rules ensuring that development assistance is not used as an operating aid to keep certain yards in business. So far, there is no established practice illustrating the interpretation of this provision. From the wording of this provision it appears that not only the contract itself must be open to bids from different yards, but also the development assistance. This means that yards submitting their offers for the construction of a specific vessel must be aware of the fact that development assistance is granted in relation to this contract. As to the requirement of a transparent selection, the wording of Art. 3(5) does not necessarily require a formal tender procedure. It is considered to be sufficient, if it is ensured in other ways that different yards are sufficiently informed about the contract. Furthermore, it is not necessary to open tenders for development aid ships to all yards within the EEA. Informing yards within the aid awarding country is deemed to be sufficient.

On the basis of the tender procedure as explained above, it can be concluded that Norwegian yards are sufficiently informed and are thus in a position to submit offers in relation to the construction of the patrol vessel for the authorities of Namibia. Therefore, the requirement that the development aid shall be open to bids from different yards is fulfilled.

Conclusions

The production aid to be granted for the construction of the fisheries patrol vessel is deemed to be compatible with the functioning of the EEA Agreement, since the Norwegian Government has assured that the applicable aid ceilings set in Art. 3 (1) of the Shipbuilding Regulation will be respected. Furthermore, the Authority considers that all requirements related to development aid as laid down in Art. 3 (5) of the Shipbuilding Regulation, as well as those set out in Chapter 31 of the State Aid Guidelines, are met in the present case. For the above reasons the proposed development assistance is deemed to be compatible with the functioning of the EEA Agreement.

HAS ADOPTED THIS DECISION:

The EFTA Surveillance Authority has decided not to raise objections to the aids which the Norwegian authorities propose to award in favour of a contract to build a fishery patrol vessel for the Ministry of Fisheries and Marine Resources in Namibia, as notified by letter of the Norwegian Government dated 15 July 1999 and registered by the Authority on 22 July 1999 (Doc. No. 99-5531-A), supplemented by letter of the same Ministry received on 8 October 1999 (Doc. No. 99-7472-A) and a letter dated 27 October 1999, registered on 8 November 1999 (Doc. No. 99-8341-A).

Done at Brussels, 17 November 1999.

For the EFTA Surveillance Authority

Knut Almestad
President

Hannes Hafstein
College Member