


EFTA SURVEILLANCE AUTHORITY

Doc. No: 99-831-I
Ref. No: SAM030.98002
Dec. No: 29/99/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 10 February 1999

on the closure of a complaint concerning State aid
to the Norwegian shipyard *Aukra Industrier A/S*
for the construction of a fishing vessel destined for the Icelandic fleet
(Norway)

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 Directive No 90/684/EEC as amended by Council Directive No 93/115/EC and Council Directive No 94/73/EC)²,

Having regard to the Act referred to in point 1c of Annex XV to the EEA Agreement (Council Regulation (EC) No 3094/95 on aid to shipbuilding, as amended by Council Regulation (EC) No 1904/96³ and Council Regulation (EC) No 2600/97⁴),

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice⁵, in particular to Article 24 and Article 1 of Protocol 3 thereof,

¹ Hereinafter referred to as the EEA Agreement.

² These Council Directives, as adapted for the purpose of the EEA Agreement by decisions of the EEA Joint Committee No 21/95, 16/96, 58/96 and 19/98, will hereinafter be referred to as the Shipbuilding Directive, or for short as the Directive. The Shipbuilding Directive expired on 1 January 1999. It has been replaced by Council Regulation No 1540/98. By EEA Joint Committee Decision No 12/99, that Regulation was incorporated in the EEA Agreement, as a new point 1b of Annex XV. That Decision, which entered into force on 30 January 1999, applies from 1 January 1999. However, at the time when the Authority received the current complaint, and also when the shipbuilding contract at issue was signed and executed, the Shipbuilding Directive was applicable.

³ Council Regulations (EC) No 3094/95 and 1904/96 were incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 85/97 of 12 November 1997.

⁴ This Regulation was included in the EEA Agreement by EEA Joint Committee Decision No 19/98 of 6 March 1998.

⁵ Hereinafter referred to as the Surveillance and Court Agreement.

WHEREAS:

I. FACTS

By letter of 8 January 1998, received and registered on 14 January 1998 (Doc. No. 98-232-A), a complaint was filed with the EFTA Surveillance Authority concerning State aid to the Norwegian shipyard Aukra Industrier A/S for the construction of a fishing vessel registered in Iceland under the name *Pétur Jónsson RE-69*.

The complainant referred, firstly, to the fact that the Icelandic Government had decided not to allocate any resources for contract-related aid to the Icelandic shipbuilding industry. Secondly, it was claimed that, at the time of the complaint, it was established that such aid for the construction of fishing vessels was prohibited within the EEA. According to the complainant, it was therefore evident that by granting aid for the construction of the vessel at issue, there had been discrimination in favour of the Norwegian shipyard obtaining the contract and to the detriment of competing Icelandic shipyards. The rule of the EEA Agreement on equal conditions of competition had therefore been violated.

The complaint letter was accompanied by a videotape containing an interview on Icelandic State Television with the owner of the vessel. In that interview, taken on 7 November 1997, the owner stated *inter alia* that the contract price had been NOK 116 million, that he himself had not received any aid in respect of the contract, but that the shipyard had received aid in the amount of 9% of the contract value before aid.

II. APPRECIATION

Main considerations

Council Directive 90/684 on aid to shipbuilding expired on 31 December 1998. It was replaced by Council Regulation No 1540/98, which has been incorporated in the EEA Agreement through EEA Joint Committee Decision No 12/99 of 29 January 1999. However, as the complaint was filed in January 1998 and relates to a contract signed in 1996 and completed in 1997, it is appropriate to examine the complaint in relation to the provisions of the Shipbuilding Directive.

Pursuant to Article 12 of the Shipbuilding Directive, the Authority receives on a current basis monitoring reports on aid to shipbuilding. An order report shall be submitted on each new shipbuilding contract within three months of signature of such contracts. A completion report shall be filed once delivery has taken place. These reports include *inter alia* the contract price and details of any contract-related aid.

With respect to the contract at issue in the complaint, the Authority has received from the Norwegian authorities both an order report and a completion report. These reports confirm the complainant's information that the contract price was NOK 116 million and that the shipyard, Aukra Industrier AS, received contract-related aid, in the form of a grant, amounting to 9% of the contract value before aid. The reports also show that the contract was signed on 22 February 1996 and that the delivery date was 31 October 1997.

According to Article 4(3) of the Shipbuilding Directive, the aid ceiling applicable to a particular contract is the one in force at the date of signature of the contract. The aid for the contract must therefore be assessed in relation to the prevailing aid regime at that time.

By Decision No 26/96/COL of 27 March 1996, the EFTA Surveillance Authority decided to set the maximum ceiling for operating aid to shipbuilding at 9% of the contract value before aid, except for small ships of a contract value of less than ECU 10 million and ship conversions, in which case the ceiling was fixed at 4,5%. This decision applied for the period as from 1 January 1996 until 30 September 1996 (i.e. for contracts signed during that period).

By Decision No 67/96/COL of 19 June 1996, the EFTA Surveillance Authority approved the prolongation, for the period 1 January 1996 to 30 September 1996, of Norwegian aid schemes for the shipbuilding sector, including the scheme "Grants for shipbuilding, newbuildings and conversion". According to that scheme, contract-related aid, in the form of a grant, may be provided to shipyards in favour of the construction of vessels of not less than 100 GT, up to the same ceiling as determined in the above decision by the Authority of 27 March 1996. While the scheme did not apply to deliveries of fishing vessels for the Norwegian fleet, the scheme, at that time, did not otherwise exclude the possibility of supporting the construction of fishing vessels destined for the fleets of other EEA States.

The above facts make it clear, firstly, that the aid for the contract at issue, signed on 22 February 1996, was granted under an approved aid scheme. Secondly, the aid for the contract is in conformity with the provisions of that aid scheme. The aid was therefore legally granted.⁶

While the complaint may, on the basis of the above conclusion, be closed without further action, the Authority finds it appropriate, for the sake of completeness, to clarify the following two questions also raised by the complaint.

Aid for the construction of fishing vessels.

The question concerning the applicable rules on aid for the construction of fishing vessels was dealt with in the Authority's Decision No. 216/97/COL of 15 October 1997 on prolongation, for the period October 1996 to December 1997, of existing Norwegian aid schemes for the shipbuilding sector.

As was noted in that decision, the Shipbuilding Directive applies *inter alia* to fishing vessels of not less than 100 GT, cf. Article 1(a) of the Directive, irrespective of whether the vessels are delivered to buyers inside or outside the EEA. The EEA Joint Committee decisions integrating the Directive in the EEA Agreement make no specific reference to fishing vessels. It follows that aid for the construction of such vessels is compatible with the acts on aid to shipbuilding referred to in Annex XV of

⁶ For clarification of the approach to be followed by the Authority when assessing complaints against individual awards of aid under an approved aid scheme, see for instance Judgment by the Court of Justice of the European Communities in Case C-47/91 *Italy v Commission*, paragraphs 24-25.

the EEA Agreement, also when the vessels are destined for the fleets of EEA countries.

Nevertheless, in the Authority's opinion, the question as to which State aid rules apply to fishing vessels was at the time of signature of the contract at issue still subject to a certain degree of uncertainty. This is explained by the fact that within the European Community, while aid for the construction of fishing vessels for third countries is ruled in full by the Shipbuilding Directive, aid for the construction of fishing vessels for the Community fleet also comes under the relevant Community legislation and guidelines on aid to the fisheries sector. However, the latter set of rules is not an integral part of the EEA State aid regime.

As a result of decisions by the Commission, in particular in 1996 and 1997, the interpretation of the two sets of Community rules in this field has been clarified. Thus, according to a decision by the Commission in State aid case C 26/96 (EX N 948/95) (Spain)⁷, the principle shall apply that, as for fishing vessels belonging to the Community fleet, aid can be granted only to the shipowner and not to the yard. In the same decision, the Commission also concluded that the same principle should apply in the context of the EEA Agreement.

In its decision of 15 October 1997, the Authority concluded that although the Shipbuilding Directive applied without reservations to fishing vessels, the above policy established by the Commission was to be recognised. Thus, in order to ensure that the Directive was not given a wider scope of application in the context of the EEA Agreement and to prevent the distortions of competition, which that would entail, the Authority decided to use its discretionary powers to secure that the EFTA States were subject to the same rules in this field as the EU Member States. Accordingly, in the course of the procedure leading up to the Authority's decision in the above case, the Norwegian Government undertook to propose to Parliament an adjustment of the Grant scheme for shipbuilding. That proposal was later adopted by the Norwegian Parliament, implying that as from January 1998, no aid can be granted to shipyards for the construction or conversion of fishing vessels, except in respect of vessels for delivery outside the EEA.

To summarize, the Authority's policy concerning a restricted application of the Shipbuilding Directive with respect to aid to shipyards for the construction of fishing vessels, was first stated in a decision of 15 October 1997. It applied as from January 1998. Accordingly, it cannot be relied on with respect to the contract at issue in the complaint, which was signed in February 1996.

Application of Article 4(5), second sub-paragraph, of the Shipbuilding Directive

The complaint could possibly be read as a request to the EFTA Surveillance Authority to apply, in respect of the contract at issue, the special procedure laid down in Article 4(5), second sub-paragraph, of the Shipbuilding Directive.

⁷ Decision to open a State aid investigation under Article 93(2) of the EC Treaty published in in OJ No C 291, 4.10.96. Final decision published in OJ No C 196, 26.6.97.

Article 4 of the Shipbuilding Directive deals with contract-related production aid. Paragraph 5 of that Article, as adapted by EEA Joint Committee Decision No 21/95, reads as follows:

"The combined effect of aid under the various aid schemes applied shall in no case exceed the ceiling fixed according to paragraph 2; the grant of aid in individual cases shall not necessitate prior notification to, or authorization from, the Competent surveillance authority as defined in Article 62 of the EEA Agreement.

However, where there is competition between yards in different States within the territory covered by the EEA Agreement, the competent surveillance authorities as defined in Article 62 of the EEA Agreement shall require prior notification of the relevant aid proposals at the request of any State. In such cases, the competent surveillance authority shall adopt its decision, after consulting the other surveillance authority, within 30 days of notification; such proposals may not be implemented before the competent surveillance authority has given its authorization. By its decision the competent surveillance authority shall ensure that the planned aid does not affect trading conditions within the territory covered by the EEA Agreement to an extent contrary to the common interest."⁸

The above procedure is designed to address the situation when, in the case of a particular contract, there is competition between shipyards in different EEA States, the objective being to seek to minimise distortions of competition caused by different levels of aid in the various EEA States and ensure that yards receiving little or no production aid are not unfairly disadvantaged. According to the Commission's established interpretation of this provision, it will, when the procedure is applicable, only permit the lowest aid level unless a higher level (within the ceiling) is necessary to ensure that the contract remains within the Community (EEA).

As to the applicability of this procedure in the present context, it must firstly be noted that the procedure can only be initiated at the request of an EEA State, i.e. other interested parties are not entitled to invoke the procedure. Secondly, it must be held that the procedure can only be applied if it is initiated during the bidding process for a contract and provided the State wishing to start the procedure demonstrate an active involvement in the bidding process of a shipyard in that State. Only at that stage can the competent surveillance authority require prior notification of aid plans. In the case at hand, the Authority received the complaint on 14 January 1998, in respect of a contract, which was signed on 22 February 1996 and completed on 31 October 1997. The procedure clearly does not apply in such circumstances. On the basis of these considerations it is concluded that the procedure in Article 4(5), second subparagraph, of the Shipbuilding Directive was not requested by the Icelandic authorities and could not have been invoked at the time when the complaint was filed.

Conclusion.

In view of the above facts and considerations, the case can be closed without further action by the Authority.

⁸ A corresponding provision is found in Article 3(3) of Council Regulation No 1540/98.

HAS ADOPTED THIS DECISION:

The case initiated by a complaint received and registered on 14 January 1998 (Doc. No. 98-232-A), concerning State aid to the Norwegian shipyard *Aukra Industrier A/S* for the construction of a fishing vessel destined for the Icelandic fleet, is closed without further action.

Done at Brussels, 10 February 1999

For the EFTA Surveillance Authority

Knut Almestad
President

Bernd Hammermann
College Member