

Case No: 57847
Event No: 548777
Dec. No.: 326/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 14 July 2010
on Section 4-23-6(4) of the Norwegian Customs Regulation
(Norway)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD to the Agreement on the European Economic Area¹, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice², in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(2) of Part II of Protocol 3 to the Surveillance and Court Agreement³,

Whereas:

I. FACTS

1. Procedure

On 2 May 2005, the EFTA Surveillance Authority (“the Authority”) received a complaint dated 27 April 2005 from the Norwegian ferry operator Bastø Fosen AS (“Bastø Fosen” or “the complainant”), alleging that the Norwegian State granted state aid to the ferry company Color Line AS (“Color Line”).⁴

By letter dated 22 December 2006, received on 4 January 2007, the complainant submitted a formalised and elaborated complaint. The complainant alleged that the Norwegian rules concerning the sale of tax free goods on board ferries on so-called “short routes” constitute state aid within the meaning of the EEA Agreement.⁵ According to the complainant, the rules in question constitute a derogation from a general prohibition of tax free sales on “short routes”, effectively favouring the route operated by Color Line between Sandefjord in Norway and Strömstad in Sweden.

On the same date, the complainant sent an identical complaint against Sweden to the Transport and Energy Directorate of the European Commission (“DG TREN”). The

¹ Referred to as the “EEA Agreement”.

² Referred to as the “Surveillance and Court Agreement”.

³ Referred to as “Protocol 3”.

⁴ Event No 317986.

⁵ Event Nos 405135 and 405136.

complainant took the view that by not collecting taxes on the goods sold aboard the ferries, both Norway and Sweden were granting state aid to Color Line.

On 13 March 2007, DG TREN sent a letter to the complainant informing it that, unless certain allegations made in the complaint were further substantiated within one month, the Commission's services would consider that there were insufficient grounds for taking a view on the complaint under Article 20(2) of Regulation No (EC) 659/1999 (the procedural regulation). The complainant replied by letter dated 30 April 2007, elaborating the allegations made on the points raised by DG TREN. In May 2007, DG TREN informed the complainant by letter that it considered that there were insufficient grounds for taking a view on the complaint pursuant to Article 20(2) of the procedural regulation. By letter dated 21 December 2007, the complainant contested DG TREN's reasoning for considering that there were insufficient grounds for taking a view on the complaint. In March 2008, DG TREN again informed the complainant that, despite the additional information provided, its preliminary view was that there were still insufficient grounds for taking a view on the complaint.

On 25 September 2008, a meeting was held at the Authority's premises, during which the complainant presented its views on the substantive issues raised by the case and maintained its view that the regulations in question constituted state aid.

By letter to the Authority dated 11 May 2009, the complainant elaborated the legal reasoning on which its previous allegations were based.⁶

The Norwegian authorities provided information regarding the Norwegian rules on tax free sales on ferries between Norway and Sweden by e-mails of 5 and 9 March 2010.⁷

2. Description of the measures complained of

Since 1987, the Norwegian ferry operator Color Line (until 2000 its predecessor Scandi-Line) has operated a ferry route from Sandefjord in Norway to Strömstad in Sweden. Since the beginning, a selection of tax free goods, including beer, wine, spirits, tobacco, chocolate and cosmetics, has been offered aboard the ferries. The exemption applies to excise duties and value added tax (VAT). Below, the exemption is referred to as "tax free" or "duty free" sales.

The rules on tax free sales on ferry routes between the Nordic countries are based on the Nordic Agreement of 1968 on the Provisioning for Passenger Vessels in Traffic between Ports in Denmark, Finland, Norway and Sweden.⁸ Pursuant to Article 3 of this Agreement, only tobacco, chocolate and other confectionery could be sold duty free onboard ferries on "short" ferry routes between the Nordic countries. Short routes were, according to the Travel Goods Regulation, defined as all routes north of the line Risør to Lysekil.⁹ On other routes ("long" routes), alcoholic beverages could also be included in the duty free selection.

⁶ Event No 518558.

⁷ Event Nos 549228 and 549509.

⁸ *Overenskomst angående proviantering av passasjerfartøyer i trafikk mellom havner i Danmark, Finland, Norge og Sverige*, referred to as "the Nordic Provisioning Agreement".

⁹ *Forskrifter om tollfrihet for reiseutstyr og reisegods* No. 12 of 26.5.1978.

On 15 December 1987, the Norwegian Ministry of Finance granted Scandi-Line an exemption from the general rules, to the effect that its route from Sandefjord to Strömstad was treated as a “long” route. As a result, the company obtained permission to sell duty free alcoholic beverages aboard its ferries on this line. Technically, this was done by inserting a legal basis for granting exemptions into Section 6 of the Travel Goods Regulation. This new provision empowered the Ministry of Finance to “grant exemptions for certain ferry routes by deciding that they are to be considered as ‘long routes’”.

While Color Line was granted an exemption on the basis of this provision from 1987, it appears that the Norwegian authorities declined several applications from other operators, including the complainant, who wished to start similar ferry routes with tax free sales. It seems that the Norwegian government also acknowledged that its practice at that time was discriminatory.¹⁰ In 2001, Bastø Fosen took the Norwegian authorities to court, alleging that the practice of granting tax free permits to Color Line only, while declining other applications, was contrary to the non-discrimination principle in Norwegian administrative law. The national court took the view that the practice in question was discriminatory and in breach of general principles of administrative law.¹¹

In 2002, the rules were amended by the insertion of three specific criteria in the exemption provision. This was based on a bilateral treaty between Norway and Sweden, the Short Routes Agreement.¹² In order to obtain an exemption, the route must be operated on a year-round basis according to a fixed schedule; it must have the capacity to transport cargo and vehicles to a significant extent; and arrangements to ensure satisfactory customs control must be made. Also, exemptions can only be granted as far north as the Sandefjord – Strömstad line. In 2004, these rules were taken into the Provisioning Regulation.¹³ As from 1 January 2009, this regulation was replaced by the new Customs Regulation, where the exemption is laid down in Section 4-23-6(4).¹⁴

3. The allegations made by the complainant

According to the complainant, the possibility to grant exemptions to routes in the area defined by the line drawn from Sandefjord to Strömstad and the line drawn from Risør to Lysekil, so that they are considered as “long routes” for the purpose of the duty free rules, constitutes state aid.

The complainant argues that the system involves transfer of state resources from the Norwegian state to the ferry operator, by the State’s failure to collect taxes which would otherwise have been due for the products in question. Furthermore, this confers an

¹⁰ See the revised national budget for 2000: “De siste årene har det kommet forespørsler fra andre fergeselskap som ønsker tilsvarende dispensasjon. For å motvirke økt grensehandel og de uheldige konkurransemessige følgene av slike flytende, skattefrie varemagasiner i forhold til den ordinære innenlandske handelen, har søknadene ikke blitt etterkommet. I tillegg vil ytterligere dispensasjoner medføre at risikoen for ulovlig innførsel øker. Dagens forskjellsbehandling er imidlertid uheldig, og Finansdepartementet er i kontakt med det svenske finansdepartementet om saken med sikte på en likebehandling av fergeselskap på samme eller tilsvarende strekninger.”

¹¹ Judgment by Oslo City Court of 5.10.2001. The practice of the Norwegian authorities is thoroughly described in the judgment.

¹² Overenskomst om proviantering av ubeskattede varer for salg om bord på såkalte korte ruter mellom Kongeriket Sverige og Kongeriket Norge.

¹³ Forskrift om proviantering av toll- og avgiftsfrie varer for salg om bord på ferger i nordisk trafikk No. 394 of 10.2.2004.

¹⁴ Regulation No 1502 of 17.12.2008.

advantage on Color Line by relieving it of the duty to pay those taxes to the State, and by allowing it to obtain far higher margins on its onboard sales than what would have been possible in the absence of the derogation. The complainant argues that the exemption constitutes a selective measure, since only Color Line (and, possibly, other companies who may fulfil the conditions for exemption laid down in Section 4-23-6(4) of the Customs Regulation), benefit from the exemption in the area in question. The complainant also contests that the system could be justified by the nature and overall structure of the tax system. Finally, since Color Line receives an advantage compared to the situation of its competitors, and is engaged in intra-EEA trade, trade and competition within the EEA are also capable of being affected.

II. ASSESSMENT

1. Introduction

1.1. The situation before 2002

In 1987, a legal basis for allowing tax free sales of alcohol on certain short routes was inserted in Section 6 of the Travel Goods Regulation. On this basis, Scandi-Line (later Color Line) was granted an exemption giving it permission to sell duty free alcoholic beverages aboard its ferries on the Sandefjord – Strömstad line. The rules and the exemption remained unaltered until 2002, when specific criteria were introduced in the exemption provision.

Pursuant to Article 1(1)(i) in Part II of Protocol 3, “*all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement*” is defined as existing aid.

It follows from the above, that the legal basis for the granting of the exemption, and, therefore, of any aid, was in force prior to the entry into force of the EEA Agreement. Hence, until the rules were amended in 2002, any aid granted to Color Line under the provision must be regarded as existing aid.

Prior to 2002, the right to tax free sales of alcohol on short routes depended upon the Ministry of Finance’s discretion. In principle, the possibility to be granted an exemption was open to all ferry operators, but on the basis of statements from the Norwegian authorities as well as the judgment by Oslo City Court of 2001, it appears that the Norwegian authorities declined several applications from other operators than Color Line, including the complainant, who wished to start comparable ferry routes with tax free sales. The national court took the view that the practice in question was discriminatory and in breach of general principles of administrative law. Even if the legislation as such was in principle non-discriminatory, it appears that the Ministry of Finance applied its discretion in a way which favoured Color Line. Such an administrative practice could, in addition to violate principles of EEA law relating to non-discrimination and free movement, also entail selective state aid.

However, it is not necessary for the Authority to reach a conclusion in that regard since even if there was state aid it would be existing aid within the meaning of Article 1(1)(i) in Part II of Protocol 3. In the case of existing aid, the Authority may only propose appropriate measures for the future, and may not require recovery of aid disbursed under

the scheme.¹⁵ Given that the legislation has already been changed, it would serve no purpose to propose appropriate measures, and, therefore, there is no need for the Authority to conclude as to whether the system in place before 2002 amounted to state aid within the meaning of Article 61(1) EEA.

1.2. The situation as of 2002

In 2002, the rules were amended. The possibility for exemptions no longer depends upon the Ministry's discretion, but rather is based upon objective criteria: the route must be operated on a year-round basis according to a fixed schedule; it must have the capacity to transport cargo and vehicles to a significant extent; arrangements to ensure satisfactory customs control must be made; and finally exemptions can only be granted as far north as the Sandefjord – Strömstad line.

Pursuant to Article 1(1)(c) in Part II of Protocol 3, alterations to existing aid shall be regarded as "new aid". The amendment of the scheme in 2002 changed the conditions for granting an exemption to the tax free rules: new criteria for granting exemptions were introduced. As a result of the amendments, the circle of potential beneficiaries seems to have been extended given the limitation of the discretion of the Norwegian authorities in applying the rules and the authorities' previous practice of refusing to grant exemptions to companies other than Color Line. On this basis, it seems likely that the amendments made to the scheme in 2002 turned the scheme into new aid.

However, in view of the Authority's conclusions with regard to the assessment of whether the scheme constitutes state aid according to Article 61(1) EEA (see Section II-2 below), the Authority does not need to conclude definitively on this issue.

2. The presence of state aid

2.1. Introduction

Article 61(1) EEA 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."

The Authority recalls that, as a general rule, the tax system of an EFTA State itself is not covered by the EEA Agreement. It is for each EFTA State to design and apply a tax system according to its own choices of policy. However, application of a tax measure may have consequences that can bring the tax measure within the scope of Article 61(1) EEA. According to case law,¹⁶ Article 61(1) EEA does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.

¹⁵ Article 18 in Part II of Protocol 3.

¹⁶ Case E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Court Report p. 76, paragraph 34; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnffjord, PIL and others and Norway v EFTA Surveillance Authority* [2005] Report of the EFTA Court p. 121, paragraph 76; Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13; and Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

The measure at issue stems from the Short Routes Agreement, a bilateral treaty between Norway and Sweden concerning the division of tax competence between the two States. In principle, the EFTA States are free to conclude agreements regarding the division of that competence. The EFTA Court has stated:

“The EEA Agreement does not oblige the Contracting Parties to give relief for double taxation within the European Economic Area, nor does it lay down any criteria for the attribution of areas of competence between the Contracting Parties in relation to the elimination of double taxation. Consequently, the Contracting Parties have retained their competence to determine the connecting factors for the allocation of their fiscal jurisdiction, inter alia by concluding bilateral agreements. However, as far as the exercise of their taxation power so allocated is concerned, the EEA States must, as stated above, comply with EEA rules. In particular, such an allocation of fiscal jurisdiction does not permit the States to introduce discriminatory measures which are contrary to EEA rules (see for comparison, Case C-170/05 Denkvit [2006] I-11949, at paragraphs 43 and 44).”¹⁷

With reference to the above, the Authority will assess the tax measure laid down in Section 4-23-6(4) of the Customs Regulation as it stands after the amendments to the rules in 2002.

2.2. Presence of state resources

In order to constitute state aid within the meaning of Article 61(1) EEA, the aid must be granted by the State or through state resources.

The Authority recalls that, according to settled case law, the definition of aid is more general than that of subsidy, because it includes not only positive benefits, such as subsidies themselves, but also state measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect.¹⁸

According to Section 4-23-6(4) of the Customs Regulation, short routes on the line Sandefjord – Strömstad or further south which are operated on a year-round basis according to a fixed schedule, which have the capacity to transport cargo and vehicles to a significant extent, and which have arrangements in place to ensure satisfactory customs control, can obtain the right to sell alcohol, tobacco, chocolate, as well as other confectionery free of duty. The measure entails a loss of tax revenues for the Norwegian State.

According to settled case law, a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places those to whom the tax exemption applies in a more favourable financial situation

¹⁷ Case E-7/07 *Seabrokers* [2008] EFTA Court Reports, paragraph 48.

¹⁸ See, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain v Commission* [2004] ECR I-6717, paragraph 90; and Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 77.

than other taxpayers, constitutes aid granted by the state or through state resources.¹⁹ Although the tax relief in this case is primarily granted to the ferry passengers and not directly to the ferry operators, the consequence for the State is that it foregoes tax revenue. Consequently, the Authority finds that the condition regarding presence of state resources is fulfilled.

2.3. Favouring certain undertakings or the production of certain goods

2.3.1. Advantage

In order to determine whether ferry companies which are granted an exemption on the basis of Section 4-23-6(4) of the Customs Regulation which enables them to sell tax free alcohol, enjoy an economic advantage, the Authority must assess whether the measure relieves the beneficiary of charges that he would normally bear in the course of his business. In the Authority's view, the question of whether the measure confers an advantage on the ferry companies must be considered in the light of the Norwegian legislation on tax free sales on ferries.

According to Section 4-23-6(4) of the Customs Regulation, ferry companies granted an exemption under the scheme will be relieved of collecting and paying excise duties and value added tax on sales of certain goods on certain short routes. Although the taxes involved are normally paid by customers and, therefore, the tax exemption benefits consumers, it also confers an advantage on the ferry company.²⁰ The tax exemption allows the ferry company to offer lower prices on the goods on the route not subject to tax/duty, with the likelihood of increased sales and higher profits, and possibly also higher margins, than would have been possible in the absence of the derogation.

Against this background, the Authority concludes that the measure confers an advantage on the beneficiaries.

2.3.2. Selectivity

Second, the measure must be selective in that it favours "*certain undertakings or the production of certain goods*".

Potential beneficiaries under the scheme are ferry companies operating certain short routes. These will be undertakings within the meaning of the state aid rules of the EEA Agreement. According to settled case law, the concept of "undertaking" covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.²¹

In order to determine whether a measure is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for

¹⁹ See to that effect Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14; and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 132.

²⁰ Case T-177/07 *Mediaset*, not yet reported, paragraph 75.

²¹ Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 107 et seq. and the case law cited there.

certain undertakings in comparison with others which are in a comparable legal and factual situation.²²

The Authority will hereinafter examine these elements with regard to Section 4-23-6(4) of the Customs Regulation whereby certain short routes between Norway and Sweden may be considered as long routes with regard to the tax free sales rules.

Reference framework

In order to classify a tax measure as selective, the Authority must begin by identifying and examining the common or “normal” regime under the tax system that constitutes the relevant reference framework.²³ The Authority considers that the relevant reference framework in this case is the rules on tax free sales on ferries between Norway and Sweden as set out in the Customs Regulation (and previously in the Provisioning Regulation). It should be noted that according to the general rules agreed upon between Norway and Sweden, goods which are destined for export from one country to the other should in general be taxed in the country of destination rather than in the country of purchase.

Factual and legal situation

Next, the Authority must assess whether, under a particular statutory scheme (in this case the rules on tax free sales on ferries between Norway and Sweden), a state measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 61(1) EEA in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.²⁴

Accordingly, the Authority must assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime in that it differentiates between economic operators who, in light of the objective assigned to the tax system of the State concerned, are in a comparable factual and legal situation.²⁵

The rules on tax free sales on ferry routes between the Nordic countries are based on the Nordic Provisioning Agreement. Pursuant to Article 3 of this Agreement, only tobacco, chocolate and other confectionery can be sold duty free on board ferries on routes between the Nordic countries defined as “short” (routes north of the line Risør to Lysekil in this case). Alcoholic beverages can only be included in the duty free selection on routes defined as “long” (south of the Risør to Lysekil line). However, the Short Routes Agreement between Norway and Sweden allows certain short routes to be granted an exception from the general rule and be treated as “long” routes for the purposes of the tax free rules. This applies to routes as far north as the Sandefjord – Strömstad line, provided

²² Case C-487/06 P *British Aggregates Association v Commission* [2008] I-10505, paragraphs 82 et seq.; Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 47; Joined cases C-428/06 to C-434/06 *UGT-Rioja and others*, [2009] ECR I-1031, paragraph 46.

²³ Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission* [2008] ECR II-3745, paragraph 143.

²⁴ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 28-31.

²⁵ Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission* [2008] ECR II-3745, paragraph 143 with further references.

that they are operated on a year-round basis according to a fixed schedule; have the capacity to transport cargo and vehicles to a significant extent; and that arrangements to ensure satisfactory customs control are made. These criteria are reflected in the Norwegian Customs Regulation.

The Norwegian authorities have explained that the objective of the tax free rules is to exempt from taxes goods which are destined for export and which are therefore subject to taxation in the destination country. The criteria determining the possibility of considering certain essentially “short” routes as “long” routes, and thereby allowing the sales of tax free alcohol on such routes, are, according to the Norwegian authorities, aimed at determining whether products bought on the route are destined for export.

In that regard, the Norwegian authorities have explained that very short routes, meaning routes north of the Sandefjord – Strömstad line, do not qualify for exemption as the danger of passengers circumventing the rules by re-importing tax free goods purchased would be too great. In addition, the condition in the rules requiring the ferries operating on exempt routes to have capacity to transport cargo and vehicles to a significant extent goes to the same aim – to avoid tax free sales of alcohol on smaller high speed ferries set up with the sole purpose of selling tax free goods with a considerable risk of goods being re-imported. That criterion also underlines, according to the Norwegian authorities, the requirement that the route must serve a genuine transport need, since it may be assumed that goods purchased on such routes are in fact exported. The condition relating to arrangements to ensure that satisfactory customs control is carried out is intended to reduce the risk of alcohol being re-imported.

It follows from the above that the criteria for allowing tax free sales of alcohol on certain short routes as laid down in Section 4-23-6(4) of the Customs Regulation are aimed at restricting tax free sales of alcohol to routes which serve a genuine transport need and where alcohol purchased is intended for export.

The Authority notes that while the risk of alcohol being re-imported is present on short routes as well as on long routes where alcohol is sold tax free, one of the criteria for permitting tax free sales of alcohol on short routes is that arrangements to provide for satisfactory customs control must be made. If the rules are infringed by passengers, that is an issue to be dealt with by Norwegian customs control.

In that light, the Authority considers that short routes fulfilling the criteria set out in the Customs Regulation are not in a comparable factual and legal situation to other short routes. Hence, the Authority concludes that undertakings which profit from the exemption whereby tax free sales of alcohol is allowed on certain short routes are not in a comparable factual and legal situation to other companies operating short routes.

Conclusion

In the light of the above, the Authority takes the view that Section 4-23-6(4) of the Customs Regulation is not selective.

3. Conclusion

On the basis of the foregoing assessment, the Authority considers that the exemption laid down in Section 4-23-6(4) of the Customs Regulation does 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 exemption laid down in Section 4-23-6(4) of the Customs Regulation does 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

Only the English version is authentic.

Done at Brussels, 14 July 2010.

For the EFTA Surveillance Authority

Per Sanderud
President

Sverrir Haukur Gunnlaugsson
College Member