

Case No: 63948  
Event No: 498323  
Dec. No: 729/08/COL

EFTA SURVEILLANCE AUTHORITY DECISION  
of 26 November 2008

on alleged state aid given to the fishing company H. Østervold AS through the sale of land  
(Norway)

THE EFTA SURVEILLANCE AUTHORITY<sup>1</sup>,

Having regard to the Agreement on the European Economic Area<sup>2</sup>, in particular to Articles 8, 20, 61 to 63, 108, 109 and Protocols 9 and 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice<sup>3</sup>, 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 Agreement<sup>4</sup>.

Whereas:

## I. FACTS

### 1 Procedure

By letter dated 21 December 2007, the fishing company Gerda Marie AS, represented by the Norwegian law firm Stiegler ANS, filed a complaint against the sale of a property located in Austevoll municipality to its competitor H. Østervold AS. The letter was received and registered by the Authority on 3 January 2008 (Event No 459007).

By letter of 18 April 2008, the EFTA Surveillance Authority (“the Authority”) warned the complainant that, since the alleged aid recipient appeared to be active in the fisheries sector, the alleged aid seemed to fall outside the product scope of the EEA Agreement (Event No. 473918). Unless it received information to the contrary, the Authority’s services would propose to the College that the case be closed without further action. The complainant was given a one month’s time limit to reply.

By letter of 19 May 2008 (Event No 478147), received and registered by the Authority on 26 May 2008, the complainant requested an extension of the above mentioned time limit. Extension until 16 June 2008 was granted by the Authority’s letter dated 27 May 2008.

The Authority has not received any reply or further submissions from the complainant.

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<sup>1</sup> Hereinafter referred to as the Authority.

<sup>2</sup> Hereinafter referred to as the EEA Agreement.

<sup>3</sup> Hereinafter referred to as the Surveillance and Court Agreement.

<sup>4</sup> Hereinafter referred to as Protocol 3.

## 2 Description of the contested measure

The complainant is a company active in fisheries in the municipality of Austevoll in western Norway. According to the complainant, its competitor, H. Østervold AS, has received an advantage in breach of the state aid rules through the purchase of a property in Torangsvåg in Austevoll municipality from the public entity Bergen og Omland friluftsråd, an inter-municipal body in charge of operating and maintaining swimming and recreation areas in the Bergen region (literally the Board for Outdoor Activities of Bergen and the Surrounding Areas, hereinafter “BOF”).

The complainant claims that it contacted Austevoll Municipality in 1997, requesting to buy the area adjacent to its property in Torangsvåg. However, the property in question was owned by BOF. The area had been acquired as a public recreation area, partially financed by the Ministry of the Environment. The area could not be used for other purposes without the consent of the relevant ministry. Following Gerda Marie AS' request, the mayor of Austevoll municipality at the time, Mr Inge Storebø, repeatedly contacted BOF to communicate a wish that BOF sells the area Tangneset for commercial uses. Initially, BOF was not interested in selling the property. Mr Storebø then suggested that a part of Tangneset could be exchanged for a new recreational area at Sveholmen in Austevoll Municipality. As a result of the pressure from the municipality, BOF agreed to sell the area.

On 4 October 2004, a letter of intent was signed by BOF and the ship-owning company H. Østervold AS.<sup>5</sup> Under this agreement, H. Østervold AS would purchase a plot of land of approximately 13,000 square metres, including a shoreline of 118 metres from BOF at the price of NOK 110,000. The agreement was conditional upon the approval by the Directorate for Nature Management (Direktoratet for naturforvaltning), which was granted on 12 November 2004.<sup>6</sup>

The area was parcelled out from land no. 37 title no. 56 in Austevoll Municipality on 21 February 2006 and given the title number 165. On 2 August 2006, title no. 165 was transferred to H. Østervold AS.<sup>7</sup>

According to the complainant, the seller did neither organise a public bidding round for the property, nor was a value assessment carried out. The complainant claims that the price paid by the buyer – NOK 110,000 – was far below the market price, especially in light of the 118 metres long shoreline of the property, which made it attractive for competing fisheries companies in need of more space for their activities.

## II. ASSESSMENT

### 1 The presence of state aid within the meaning of Article 61(1) EEA

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.”*

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<sup>5</sup> Annex 2 to Event No 459007.

<sup>6</sup> Annex 4 to Event No 459007.

<sup>7</sup> Excerpt from the property register, Annex 6 to Event No 459007.

For the state aid provisions in Articles 61 to 63 of the EEA Agreement to apply, the state aid must be granted to undertakings involved in the production of products which fall within the product coverage of the EEA Agreement.

Article 8(3) of the EEA Agreement provides that

*"Unless otherwise specified, the provisions of this Agreement shall apply only to:*

*(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*

*(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol."*

Article 8(3) of the EEA Agreement limits the material scope of the application of the EEA Agreement to the above mentioned products, unless otherwise specified in the Agreement. Fish and fish products, in so far as they do not fall under Chapters 25 to 97 of the Harmonized Commodity Description and Coding System (HS) or are specified in Protocol 3, fall outside the general scope of the application of the EEA Agreement.

The alleged aid recipient in the present case is a company described as “a ship-owning company”, and is said to “operate general fisheries activities”. In the company register (Brønnøysundregisteret), the company is registered under code 05.011, which includes “coastal and open sea fisheries”. Thus, the products produced by H. Østervold AS must be deemed to fall under Chapters 03, 05, 15, 16 and 23 of the Harmonized Commodity Description and Coding System (HS) and thus be outside the product coverage of the EEA Agreement. Nor would the products be covered by Protocol 3 to the EEA Agreement. The Authority has not received any indication that the company carries out other types of business activities or is active in other sectors.

Hence, the complaint concerns alleged state aid to companies involved in the production of products which fall outside the product coverage of the EEA Agreement as defined in Article 8(3) of the EEA Agreement. Therefore, Article 61 EEA is not applicable to the measure.

## **2 The applicability of Article 4 of Protocol 9 to the EEA Agreement**

Article 20 of the EEA Agreement provides that the “*Provisions and arrangements that apply to fish and other marine products are set out in Protocol 9*”. Article 4 of Protocol 9 reads:

- “1. Aid granted through State resources to the fisheries sector which distorts competition shall be abolished.*
- 2. Legislation relating to the market organisation in the fisheries sector shall be adjusted so as not to distort competition.*
- 3. The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of anti-dumping measures and countervailing duties.”*

Although the provision, under certain conditions, bans the granting of state aid, it is not identical to Article 61 EEA in wording. Thus, it cannot be held that it has the same material scope as Article 61 EEA.

Even if the measure in question were to constitute an infringement of Article 4 in Protocol 9, this Protocol does not confer any enforcement powers on the Authority. Nor does it confer powers on the Authority to enforce Article 61 with regard to products falling outside the general product scope of the Agreement by virtue of Article 8 (3). Hence, under the terms of the Protocol, read in isolation, the Authority would not be competent to enforce the provisions therein.

Moreover, the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9, states that, “... *where reference is made to aid granted through State resources, any distortion of competition is to be assessed by the Contracting Parties [...]*”. This indicates that the enforcement of the provisions is reserved for the EFTA States themselves.

It should, nevertheless, be considered whether such competence could be based on other provisions of EEA law. Protocol 26 to the EEA Agreement on the Functions and Powers of the EFTA Surveillance Authority in the field of State Aid enumerates the state aid provisions for which the EFTA Surveillance Authority shall have enforcement powers. These include the general state aid provisions in Articles 61 to 63 EEA, but also sector-specific provisions such as Article 49 EEA on transport and the provisions of Protocol 14 on coal and steel products. Protocol 9, however, is not included. Similarly, Article 24 of the Surveillance and Court Agreement confers on the Authority the enforcement of the state aid rules “*in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement*”. Again, the provision does not confer enforcement powers on the Authority with respect to Article 4 of Protocol 9 to the EEA Agreement.

In light of the above, in particular the above mentioned Joint Declaration, the Authority considers that the general supervisory regime of the EEA Agreement as set out in Articles 108 and 109 of the Agreement, which in principle also covers the Protocols to the Agreement, cannot be held to confer enforcement powers on the Authority with respect to Article 4 of Protocol 9.

Against this background, the Authority holds that it does not fall under its competence to assess whether alleged aid granted to a company active in the fisheries sector distorts competition within the meaning of Article 4 of Protocol 9 to the EEA Agreement. The Authority has already arrived at the same conclusion in a previous case concerning aid to the fishing industry.<sup>8</sup>

### **3 Conclusion**

On the basis of the foregoing assessment, the Authority considers that the sale of land no. 37 title no. 56 in Austevoll Municipality does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

Furthermore, the Authority considers that it does not have competence to carry out surveillance of state aid within the scope of Article 4(1) of Protocol 9 to the EEA Agreement.

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<sup>8</sup> Decision 176/05/COL of 15 July 2005 concerning alleged state aid to the fisheries sector.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the sale of land no. 37 title no. 56 in Austevoll Municipality to H. Østervold AS does not constitute state aid within the meaning of Article 61 of the EEA Agreement. The EFTA Surveillance Authority is not competent to decide on the compatibility of the said measure with the provisions of Article 4 in Protocol 9 to the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

The complainant shall be informed by a copy of this decision.

Article 4

Only the English version is authentic.

Done at Brussels, 26 November 2008

For the EFTA Surveillance Authority,

Per Sanderud  
President

Kurt Jaeger  
College Member