

Case No: 72447
Event No: 657956
Dec. No: 459/12/COL

[non confidential version]

**EFTA SURVEILLANCE AUTHORITY DECISION
of 5 December 2012**

on the aid to Bømlabadet Bygg AS for the construction of the Bømlabadet aquapark in the Municipality of Bømlø.

(Norway)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Articles 61 to 63 and Protocol 26,

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(3) of Part I and Article 4(2).

Whereas:

I. FACTS

1 Procedure

- (1) Following pre-notification contacts, by letter of 24 August 2012 (Event No 644917), the Norwegian authorities notified aid to Bømlabadet Bygg AS (“Bømlabadet Bygg”), pursuant to Article 1(3) of Part I of Protocol 3. The notification was received and registered by the Authority on 27 August 2012.
- (2) By letter dated 19 September 2012 (Event No 646339), the Authority requested additional information from the Norwegian authorities.
- (3) By letter dated 18 October 2012 (Event No 650321), the Norwegian authorities replied to the information request.

- (4) A discussion was held with the Norwegian authorities at the State Aid Package meeting in Oslo, Norway, on 22 October 2012. As a follow-up to the meeting further information was provided in a letter dated 1 November 2012 (Event No 651648).
- (5) By e-mail dated 15 November 2012 (Event No 654036), the Authority requested further information from the Norwegian authorities.
- (6) By e-mail dated 16 November 2012 (Event No 654035), the Norwegian authorities replied to the information request.

2 The Project

2.1 Introduction

- (7) The notification concerns a direct grant of approximately NOK 12.3 million to Bømlabadet Bygg from the Municipality of Bømlo for the construction of a recreational aqua park facility (“Bømlabadet”) to be located in the same municipality.
- (8) Bømlabadet Bygg is a privately owned company that will own and operate Bømlabadet, as well as being responsible for its construction.

2.2 Background

2.2.1 Bømlabadet

- (9) The aqua park Bømlabadet will be situated on the island of Bømlo on the south coast of the county Hordaland, in western Norway.
- (10) Bømlabadet is to be an indoor facility amounting to 1980 m² (530 m² of service area, 750 m² of water area and 700 m² of land area) with a capacity for 360 guests at a time.
- (11) The facility will be divided in the following manner:
 - A family bath will have a water area of 270 m² and a water temperature of 31 degrees. This part will consist of a wave pool, a beach area with waves, a climbing wall, a current canal, a play pool, water slides etc. Around the water area there will be 300 square meter area with a deck/platform and a cafeteria.
 - A spa will have a water area of 110 m² and temperatures from 31 to 38 degrees. This part of the aqua park will consist of hot water pools surrounded by decks/platforms, water massage, steam baths, Jacuzzi, coldwater pond, a sauna, a heating room, a magazine and newspaper area, a cafeteria and out-door area for all-year use with hot water ponds. Around the spa area there will be 150 square metres of decks/platform.
 - A sports bath area with a 25x15 meters pool and diving facilities. The area around the sports bath will be 200 m². This area will partially be connected to the family bath, so that the pool may be increased to 50 meters length.

- The service area is a 530 m² area consisting of a reception with a cafeteria and wardrobes, partially adjusted for families and persons with reduced mobility. Toilets, showers, saunas, solarium, technical rooms and rooms for the staff.¹
- (12) The general public will pay an entry fee at Bømlabadet, while certain groups, such as elderly, rheumatics, pregnant women and disabled people, will benefit from using the bath at a reduced price. Thereby the Municipality of Bømlo will fulfil its obligation to develop activities to promote the general health of the Municipality's population, under a partnership agreement with the county of Hordaland. However, it is stressed that the choice to offer reduced fares to certain groups has been taken by Bømlabadet alone, and has not been imposed by the Municipality.
- (13) Approximately 100.000 visitors are expected per year. According to the information provided in the notification, it is estimated that approximately 26.500 visitors will be local residents in Bømlo, 33.300 will come from the region around Bømlo, 32.500 will be tourists travelling by car, and 10.000 tourists travelling by boat.
- (14) According to information provided by the Norwegian Authorities the vast majority of tourists visiting Bømlo are Norwegians. Only a very small number of foreign tourists, mostly Germans who come to fish, visit Bømlo each year.

2.3 The notified measure

- (15) The Municipality of Bømlo plans to grant approximately NOK 12.3 million directly to Bømlabadet Bygg in order to finance the development and construction of Bømlabadet. This makes up 13.98% of the total value of the project which has been set at NOK 88 million. According to the Norwegian Authorities, no aid will be granted for the operation of the facilities.
- (16) According to the information provided by the Norwegian authorities, the grant will be financed by the Municipality with 90% of the proceeds generated from the sale of the land area Hetlevik/Myntevik (cadastral unit number 5, property unit number 1 in the Municipality of Bømlo) to Havlandet Invest AS, a local property development company. The price of the land was assessed at NOK 13.7 million by an independent valuation performed by a member of the Norwegian Valuation Association,² dated 1 September 2011.
- (17) The Norwegian authorities have also referred in the notification to possible funds from other public sources, namely county level funds and extra funds (health). The Regional Business Forum,³ the entity administering the Regional Development Program for Hordaland,⁴ has indicated that Bømlabadet Bygg may be among projects eligible for receiving grants from the county administration funds. However, Bømlabadet Bygg has not so far applied for such grants. Reference has also been made to extra funds (health) from a fund aimed at public health created in the wake of the so called Interaction Reform⁵ of the Norwegian Health System. However, the

¹ The notification first mentioned plans to build a gym in this area of the aquapark. In its letter dated 1 November 2012, the Norwegian Authorities state that these plans have been abandoned due to limited space capacity.

² In Norwegian: *Norges Takseringsforbund* ("NTF")

³ Regionalt Næringsforum.

⁴ Regionalt Utviklingsprogram for Hordaland.

⁵ Samhandlingsreformen.

company has not so far applied for such funds. The Norwegian authorities clarified during the notification procedure that potential support from these two measures do not form part of the current notification.⁶ Accordingly, they will not be assessed by the Authority in this decision.

2.4 Recipient

(18) Bømlabadet Bygg AS was established in 2007 and is registered as a limited liability company in the Norwegian company register (Brønnøysundregisteret). The company will construct the Bømlabadet aqua park, and will later remain the owner and operator of the park. Bømlabadet Bygg is currently owned by five non-profit local sports- and/or recreational organisations.⁷

(19) Pursuant to the by-laws of Bømlabadet Bygg, the company shall operate on a non-profit basis. Any eventual profit is to be reinvested in Bømlabadet or used to support local cultural, athletic and youth programs. No dividends will be paid to its share holders. Bømlabadet Bygg shall have no other activities than the development and operation of Bømlabadet.

2.5 Ownership of Bømlabadet

(20) The by-laws of Bømlabadet Bygg state that in the event of a sale, more than 50% of the shares of the company shall at any time be owned by sports clubs/organizations under the umbrella of the Norwegian Confederation of Sports (“Norges Idrettsforbund”) and/or municipalities or counties.

(21) This requirement will to a large extent determine the ownership model after the transaction. The Norwegian authorities state that the current owners will remain share holders. Havlandet Invest AS, will invest NOK [...] ⁸ in the company but will only obtain ownership to B-shares with no voting rights. The Municipality of Bømlo will not become part owners of Bømlabadet.

2.6 Operational budget and expected visitation numbers

(22) It is estimated that the aqua park will receive approximately 100.000 visitors per year (maximum capacity of 360 at a time). Based on this, Bømlabadet Bygg expects the annual turnover to be NOK [...] ⁹ million, consisting of the following items:

Item	Amount in million NOK
Ticket Sales	[...] ¹⁰
Payment from Sports Clubs	[...] ¹¹

⁶ See Event No 650321, letter follow up to the State Aid Package Meeting.

⁷ Finnås Sportsklubb (sports club), Bømlo Svømmeklubb (swimming club), Bømlo Sportsdykkere (sports scuba divers), Bømlo Revmatikerlag (rheumatism association), Bømlabadets Venner (friends of Bømlabadet).

⁸ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 12 – 20 million.

⁹ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 10 – 20 million.

¹⁰ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 5 – 10 million.

¹¹ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 200 000 – 2 million.

Income from cafeteria	[...] ¹²
The spa and wellness centre	[...] ¹³
Solarium	[...] ¹⁴
General sales of products	[...] ¹⁵
Total	[...] ¹⁶

II. ASSESSMENT

1 The presence of state aid

(23) 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.”

1.1 State recourses

(24) Firstly, in order to constitute state aid, the measure must be granted by the State or through state resources.

(25) The notion of state resources also includes financial assistance granted by regional and local authorities. The support to Bømlabadet Bygg is granted by the Municipality of Bømlo. It is thus clear that the measure involves state recourses.

1.2 Selective Advantage

(26) Secondly, the measure must confer an advantage on the beneficiary which reduces the costs it should normally bear from its own budget. By receiving the support of the Municipality in the form of a NOK 12.3 million contribution, Bømlabadet Bygg’s costs for the financing and construction of the project are reduced. Therefore, the company is granted an advantage within the meaning of Article 61(1) EEA Agreement.

(27) Moreover, the aid measure must be selective in that it favours “certain undertakings or the production of certain goods”.

¹² The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 500 000 – 3 million.

¹³ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 500 000 – 3 million.

¹⁴ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 200 000 – 2 million.

¹⁵ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 100 000 – 2.5 million.

¹⁶ The exact figure is covered by the obligation of professional secrecy. It is in the range of NOK 10 – 20 million.

(28) The Authority considers that the payment of NOK 12.3 million for the construction of Bømlabadet will be selective as there is only one beneficiary, namely Bømlabadet Bygg.

1.3 Distortion of competition and affect on trade between Contracting Parties

(29) Thirdly, the aid measure must be liable to distort competition and affect trade between the Contracting Parties to the EEA Agreement.

(30) Under settled case law, the mere fact that a measure strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, is enough to conclude that the measure is liable to distort competition with undertakings established in other EEA States and affect trade between Contracting Parties.¹⁷

(31) The Authority's Guidelines on a simplified procedure for the treatment of certain types of state aid recall that for measures to be considered as not having any effect on intra-EEA trade, regard must be had to the specificities of the case. In particular, Commission practice¹⁸ requires, most prominently, a demonstration by the EFTA State of the following features: that the aid does not lead to investments being attracted in the region concerned; that the goods/services produced by the beneficiary are purely local and/or have a geographically limited attraction zone; that there is no more than marginal effect on consumers from neighbouring EEA States; and that the market share of the beneficiary is minimal on any relevant market definition used and that the beneficiary does not belong to a wider group of undertakings.

(32) As to the first feature, the Norwegian Authorities have explained that Bømlabadet Bygg will operate on a non-profit basis, and no dividends will be paid to its share holders. In the Authority's view, this choice of organisation makes it very unlikely that the aid will attract any foreign investment to the aquapark itself.

(33) As to the second feature, the question is whether the attraction zone of the service provided is so limited that it cannot affect trade between Member States. Trade in services can be affected if the demand for accepting the service at the location of the company receiving aid would be of a transboundary character i.e. would be created abroad.¹⁹

(34) Bømlø is an island in the southern part of the county of Hordaland. The island is connected to the mainland with a bridge, and there are ferry routes to the surrounding cities of Haugesund, Bergen and Stavanger. It takes between 45 minutes and 2.5 hours to reach these cities, either by car or ferry. The closest alternative aqua park is at Os, south of Bergen, 86.4 km and 2 hours by car away from Bømlø. The other closest alternatives are at distances of 117 to 300 km from Bømlø. The closest airport to Bømlø is at Stord, 30 km away, but it offers only domestic flights. The second closest airport is 75 km away, in Haugesund, with a very limited offer in international flights.

¹⁷ Case 730/79 Philip Morris Holland [1980] ECR 2671 paragraphs 11–12.

¹⁸ See the Commission's Decisions in cases N 258/2000 Leisure pool Dorsten – Germany (JOCE C/172/2001), N 486/2002 Aid in favour of a congress hall in Visby – Sweden (JOCE C/075/2003), N 610/2001 Tourism infrastructure program Baden-Württemberg – Germany (JOCE C/164/2002), N 377/2007 Support to Bataviawerf – Reconstruction of a vessel from the 17th century – The Netherlands (JOCE C/35/2008).

¹⁹ Case N 258/2000 Leisure pool Dorsten – Germany (JOCE C/172/2001).

The bigger airport of Bergen is 120 km away. Furthermore, the distance to the closest international border by car is 580 km from Bømlo. The remote location of the island therefore inevitably limits the attraction zone of the planned facilities.²⁰ Consequently, there is no other similar facility within a reasonable distance from Bømlabadet Bygg can be affected by the measures in issue in this case.

- (35) Indeed, the Norwegian authorities have explained that Bømlabadet Bygg expects around 40% of the visitors to Bømlabadet to be tourists travelling either by car or ferry. However, given the distance to the border, and the remote location of the island of Bømlo, the Authority finds it unrealistic that these facilities will attract a significant number of residents in other EEA states among these tourists.
- (36) The planned facilities of Bømlabadet can also be compared to those assessed by the Commission in the landmark Dorsten case.²¹ The swimming pool facility of Dorsten comprised a 25 meter swimming pool indoors, an attractive sauna, an outdoor pool with certain events which would in addition offer the possibility to swim in lanes, and an attractive restaurant. The expected annual number of visitors was 250 000. The facilities of Bømlabadet can be seen as comparable, with its two pools (the sports bath and the family bath), as well as the spa area. Even though Bømlabadet will have a somewhat more extensive offer of playing facilities for children,²² the expected number of visitors²³ is less than half the visitors to the Dorsten facility.
- (37) The attraction zone of Bømlabadet therefore should be viewed as limited and equivalent to the one applied for the Dorsten swimming pools. In any case the attraction zone cannot be considered to extend 580 km across the border to Sweden.
- (38) For these reasons, the Authority considers that the services provided by Bømlabadet are of a local nature.
- (39) As to the third feature, the remote geographical location of Bømlabadet makes the effect on foreign consumers limited. Bømlo has limited possibilities to accommodate tourists. To date, the number of tourists coming to Bømlo only during daytime is also small. According to the information provided by the Norwegian authorities, the vast majority of the tourists visiting Bømlo are Norwegians, although there is a small number of foreign tourists, mostly Germans, who visit the island during their summer vacation, mostly motivated by fishing opportunities.
- (40) The tourism capability of the island is limited. The notification states that there are currently 50 fishing huts and a hotel with 30 beds on the island of Bømlo. Installations for activities in areas with a small number of facilities and with limited tourism capability tend to have a purely local use and are not capable of attracting users that have other alternatives in other Member States. In those circumstances, the Commission has also considered in several past decisions²⁴ that there would not be significant distortions of competition and effects on trade. In line with this approach,

²⁰ The distance to the border was also used as an argument in Commission decision SA.34404 (the Netherlands).

²¹ Case N 258/2000 Leisure pool Dorsten – Germany (JOCE C/172/2001).

²² Water slides, current canal, climbing wall and beach area.

²³ 100.000 per year, calculated on the background of a maximum capacity of 360 people at a time.

²⁴ State aid SA.32737 (2011/N) Aid for the renovation and upgrading of the Parnassos ski resort – Greece Case N 676/2002 N 731/2007 Aid to local ski resorts in Veneto – Italy (JOCE C/106/2008), Cableways Valle d’Aosta – Italy (JOCE C/131/2005).

the Authority considers that in the case at hand the limited tourism capability indicates the unsuitability for the resort to attract foreign customers so as to have an effect on trade.

- (41) Bømlabadet will be one of many aqua parks in Norway. The co-operative society Badelandene.no BA (“the aqua parks”) has 22 members.²⁵ The Norwegian Authorities have identified 46 facilities that in their view qualify as aqua parks.²⁶ Judging by Bømlabadet’s maximum visitors’ capacity, and its remote location, Bømlabadet will *not* be amongst the five biggest such parks in Norway.²⁷ The facility therefore seems to be neither relatively large nor unique in character.²⁸ It seems more realistic that foreign consumers will use alternative installations in their home country, rather than travel over the border from Sweden, 580 km away, to visit Bømlabadet that is remotely located on the west coast of Norway.²⁹
- (42) As to the fourth feature, Bømlabadet Bygg does not belong to a wider group of undertakings, nor do any of the other aqua parks in the Norwegian market according to the Norwegian Authorities’ research. In light of the number of aqua parks in Norway, Bømlabadet must be considered to have a minimal market share on any relevant market.
- (43) In addition to the mentioned features, decision making practice³⁰ has not limited the assessment to whether the beneficiaries only operate on a local level, but included whether “*state support to this activity harmed or discouraged the supply in loco of installations by operators of other Member States*”.³¹
- (44) In Norway there is one leisure facility with focus on water activities that has foreign owners, namely Bø Sommarland (“Sommarland”) in the county of Telemark in the east of Norway.³² However, the Norwegian Authorities argue that Bømlabadet will not compete with Sommarland as the parks are not comparable.
- (45) Sommarland can be distinguished from other aqua parks on several points, both in size and character. Sommarland is exclusively an open air facility, with an opening season only in the summer months. The activities offered by Sommarland include non-

²⁵ Badelandene.no BA is a membership society for swimming and aquatic facilities. According to the by-laws of the society, membership requires that the aqua park appears as leisure facility, and comprises more than what the market perceives as just a swimming pool.

²⁶ It is stated in letter dated 18 October 2012 (Event no 650321) that “*we have, in answering ESA’s question, considered it prudent to only exclude from the definition smaller facilities that are limited to swimming pools, or spa services etc.*”

²⁷ Table supplied by the Norwegian Authorities:

	Visitors 2011	Turnover 2011
Drammensbadet, Drammen	387 360	NOK 39 700 000
Pirbadet, Trondheim	360 000	NOK 46 215 000
Ankerskogen, Hamar	250 000	NOK 13 616 000
Grottebadet, Harstad	203 000	NOK 20 081 000
Østfoldbadet, Askim	165 000	NOK 23 967 000

²⁸ See Dorsten case page 4.

²⁹ See Commission decision SA.34466 (Cyprus) paragraph 24, and Cableways Valle d’Aosta – Italy (JOCE C/131/2005) paragraph 14.

³⁰ See decisions in the cases: N376/2001, N676/2002 and C42/2002.

³¹ See the Commission decision in case C42/2000 (Italy) paragraph 29.

³² The dutch company Centaur Holding Norway AS, which is owned by the Dutch company Centaur Nederland 2 B.V.

aquatic features such as mini-golf, carousels, an electric car track, ferries wheel, fairy tale houses, etc. The aquatic part of the activities are also more numerous, varied and original compared to the average aqua park, including a large variety of slides, one of which is 26 metres tall, river canoe paddling etc. The activities seem to be exclusively for leisure and have no aim of promoting active sports or treatment of any kind, like most aqua parks do at least partly. Sommarland therefore has more similarities with a theme park or leisure park, than with an aqua park.

- (46) Sommarland is owned by an international corporation, which also has ownership in several other *theme parks* in Europe, including Tusenfryd, outside Oslo. It can thus be concluded that Sommarland must be characterised as a theme park that, in the view of the Authority, is not comparable to aqua parks such as Bømlabadet.³³ As opposed to more local attractions such as Bømlabadet, these type of theme parks or resorts are normally widely promoted outside of the region in which they are located aiming at not only attracting a wider national public but also to even reach the international market.³⁴
- (47) According to the information provided by the Norwegian Authorities there are no foreign owners present on the market for aqua parks in Norway. As a consequence it is the Authority's view that the aid to Bømlabadet will not harm or discourage the supply of aqua park facilities in Norway.³⁵

1.4 Conclusion

- (48) On the basis of the above, the Authority considers that the grant of NOK 12.3 million to Bømlabadet Bygg AS will not have an effect on trade between the contracting parties to the EEA agreement. The Authority therefore considers that the grant does not constitute state aid within the meaning of Article 61(1) of the EEA agreement.

2 Procedural requirements

- (49) Pursuant to Article 1(3) of Part I of Protocol 3, “the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision”.
- (50) Following pre-notification contacts, the Norwegian authorities submitted a notification of aid to Bømlabadet Bygg AS for the construction and development of the Bømlabadet aquapark in the Municipality of Bømlø, on 24 August 2012 (Event No 644917).

3 Conclusion

- (51) On the basis of the foregoing assessment, the Authority considers that the grant of NOK 12.3 million to Bømlabadet Bygg AS which the Norwegian authorities are planning to implement does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

³³ Sommarland is not a member of Badelandene.no BA.

³⁴ See the Dorsten Case page 4, and Commission decision SA.34466 (Cyprus) paragraph 23.

³⁵ Commission decision SA.33243 – (Portugal) Jornal da Madeira paragraph 42.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the grant of NOK 12.3 million to Bømlabadet Bygg AS 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 language version of this decision is authentic.

Decision made in Brussels, on 5 December 2012

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member