

NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

Communication from the EFTA Surveillance Authority published pursuant to Article 27(4) of Chapter II, Protocol 4 of the Surveillance and Court Agreement**(Case No 76958 — Color Line/Sandefjord Municipality)****Commitments offered by Color Line**

(2016/C 151/06)

1. Introduction

According to Article 9 of Chapter II of Protocol 4 to the Surveillance and Court Agreement ('SCA'), the EFTA Surveillance Authority (the 'Authority') may decide — in cases where it intends to adopt a decision requiring that an infringement is brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Authority in its Preliminary Assessment — to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Authority. According to Article 27(4) of Chapter II of Protocol 4 SCA, the Authority shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Authority.

2. Summary of the case

On 5 March 2015, the Authority initiated formal proceedings against Color Line AS, Color Transport AS and Color Group AS ('Color Line') concerning possible infringements of Articles 53 and/or 54 of the Agreement on the European Economic Area by entering into and/or upholding harbour agreements with Sandefjord Municipality granting long-term exclusive access, and/or protection for Color Line's sailing schedule to the potential detriment of competition in respect of the provision of short-haul passenger ferry services with tax-free sales between Norway and Sweden.

On 24 August 2015, Color Line, Fjord Line AS ('Fjord Line')⁽¹⁾, and Sandefjord Municipality entered into a settlement agreement (the 'Settlement') under Section 19 of the Norwegian Disputes Act. The Settlement has brought to an end the civil proceedings initiated by Fjord Line against Color Line and Sandefjord Municipality that, inter alia, have been pending before the District Court of Sandefjord, Norway. The Settlement sets out rights and obligations incumbent upon Fjord Line, Color Line and Sandefjord Municipality relating notably to sailing times from the Ports of Sandefjord (Norway) and Strömstad (Sweden), and access to certain infrastructure within the Ports of Sandefjord and Strömstad.

A copy of the Settlement was communicated to the Authority on 24 August 2015. The Authority subsequently made certain reservations to the Settlement with regard to the rights granted to Color Line and Sandefjord Municipality. In order to address these reservations, on 7 September 2015, Color Line entered into an agreement with Sandefjord Municipality which revised certain obligations and rights related to the attribution of sailing times from the port of Sandefjord.

Following commitments discussions with Color Line and Sandefjord Municipality, on 7 October 2015, the Authority adopted Preliminary Assessments within the meaning of Article 9(1) of Chapter II of Protocol 4 SCA, addressed to Color Line and Sandefjord Municipality respectively.

In its Preliminary Assessment to Color Line, the Authority took the view that Color Line has engaged in the following business practices that may violate Articles 53 and 54 of the EEA Agreement:

The harbour agreements (as before the settlement of 24 August and 7 September 2015) between Color Line and Sandefjord Municipality has prevented Color Line's competitors viable entry on the Sandefjord-Strömstad ferry route. Through Sandefjord Municipality's long term agreement with Color Line, and following an already excessively long period of exclusive access for Color Line, compared to the investments made, Color Line continued to reserve to itself the most attractive sailing times and a large part of the capacity in Sandefjord harbour for a very long period in time.

⁽¹⁾ Fjord Line is a new entrant in the market and the complainant in the present case.

Thus, by entering into the long-term harbour agreements with Sandefjord Municipality, as well as by upholding Color Line's purported rights under the harbour agreements, Color Line has prevented viable entry and expansion in the relevant market for short-haul passenger ferry services with tax-free sales on the Sandefjord – Strömstad route.

3. The main content of the offered commitments

Color Line does not agree with the Authority's description of its business practices or with the legal analysis in the Authority's preliminary assessment. It nevertheless offered commitments pursuant to Article 9(1) of Chapter II of Protocol 4 to the Surveillance and Court Agreement to meet the Authority's preliminary competition concerns in relation to the abovementioned business practices.

The commitments offered are the Settlement (of 24 August 2015) and the subsequent agreement between Color Line and Sandefjord Municipality (of 7 September 2015). The commitments offered by Color Line and by Sandefjord Municipality are thus the same.

The key elements of the commitments are as follows:

Sandefjord Municipality grants Fjord Line the right to operate ferry services at Sandefjord port until 31 December 2025. Color Line's right to operate a ferry service at Sandefjord port shall from 1 January 2020 be conditional upon Color Line being allocated sailing times, as described below.

As part of the implementation of the Settlement, the following sailing plan will apply for both Color Line and Fjord Line from 1 October 2015 until 31 December 2019:

| Ferry | Departure Sandefjord | Arrival Strömstad | Departure Strömstad | Arrival Sandefjord |
|------------|-------------------------|----------------------|------------------------|-----------------------|
| Color Line | 07:00 | 09:30 | 10:00 | 12:30 |
| Fjord Line | 08:30 | 11:00 | 12:00 | 14:30 |
| Color Line | 10:00 | 12:30 | 13:40 | 16:10 |
| Color Line | 13:30 | 16:00 | 17:00 | 19:30 |
| Fjord Line | 15:20 | 17:50 | 18:30 | 21:00 |
| Color Line | 17:00 | 19:30 | 20:00 | 22:30 |

This sailing plan has replaced all earlier decisions or agreements relating to sailing times.

As regard Color Line, the sailing times allocated to it above, shall only apply until 31 December 2019. Effective as of 1 January 2020, Color Line shall waive its entitlement under the in-court settlement to the sailing times allocated to it in the sailing plan above ⁽¹⁾.

Fjord Line on the other hand, shall have the right to continue with its sailings according to this plan until 31 December 2025.

By the end of 31 December 2019, Sandefjord Municipality shall allocate the sailing times operated by Color Line until the end of 2019, for the period from 1 January 2020 until 31 December 2025. This allocation shall be made in accordance with the laws and regulations applicable at the relevant time. The allocation of these sailing times shall be made on the basis of criteria set by the Municipality and announced no later than 1 March 2016, with an application deadline of 1 September 2016. The criteria shall safeguard fundamental competition, equal treatment and non-discrimination requirements, and shall be applied to existing and any new parties.

As of 1 January 2026, neither shipping company shall be entitled to use Sandefjord port for ferry services, if Sandefjord Municipality wishes to use the port for other purposes. If ferry services are to continue operating from the port after 31 December 2025, the Municipality shall set criteria for the allocation of sailing times by 31 December 2024.

⁽¹⁾ See the in-court settlement annex 1, where Color Line's sailing times are indicated in blue and green.

In the announcement of the criteria for the award (for the period 2020-2025) of those sailing times currently operated by Color Line ⁽¹⁾, the Municipality shall state that a shipping company which is allocated sailing times for that period, and which on the basis of this allocation has placed in service a materially rebuilt and specially adapted ship, or a new ship, shall have a preferential right to retain these sailing times for that ship for as long as the port is kept open for ferry services, albeit not beyond 31 December 2030.

The offered commitments are published in full in English on the Authority's website at:

www.eftasurv.int

4. Invitation to make comments

The Authority intends to adopt a decision under Article 9, Chapter II, Protocol 4 SCA making binding on Color Line the commitments summarised above and published on the internet, on the website of the Authority.

In accordance with Article 27(4), Chapter II, Protocol 4 SCA, the Authority invites interested third parties to submit their observations on the commitments. These observations must reach the Authority not later than one month following the date of this publication. Interested third parties are also asked to submit a non-confidential version of their comments, in which any information they claim to be business secrets and other confidential information should be deleted and replaced as required by a non-confidential summary or by the words 'business secrets' or 'confidential'.

Answers and comments should preferably be reasoned and should set out the relevant facts. If you identify a problem with any part of the proposed commitments, the Authority would also invite you to suggest a possible solution.

Observations can be sent to the Authority under reference number 76958 Color Line/Sandefjord Municipality either by email competition@eftasurv.int or by post, to the following address:

EFTA Surveillance Authority
Competition and State Aid Directorate
Rue Belliard/Belliardstraat 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

⁽¹⁾ This refers to the sailing times indicated by blue and green lines in the sailing plan in annex 1 in the in-court settlement (the sailing times currently operated by Color Line).