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FINANSDEPARTEMENT

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Comments from Norway on the letter of formal notice - Reporting obligations when hiring foreign contractors

1. Introduction

We refer to the Authority's letter of formal notice of 15 December 2016 concerning the Norwegian reporting obligations when contracts are awarded to foreign service providers. We also refer to the meeting between the Authority and the Norwegian Ministry of Finance on 6 February 2017, as well as previous correspondence and meetings on the matter.

The Ministry of Finance hereby submits its written comments to the letter of formal notice. It is the opinion of the Ministry that the reporting obligation is in conformity with Article 36 EEA. The obligation pursues a legitimate aim, and is both suitable and necessary for achieving that aim. Furthermore, the Services Directive finds no application in this case.

The structure of the present letter:
Item 2 contains some clarifications as to the legal basis and the scope of the reporting obligations.

Item 3 presents the Ministry of Finance's assessment of the reporting obligations and their conformity with Article 36 of the EEA Agreement.

Item 4 contains the Ministry's response to the questions raised by the Authority concerning 'branches' as opposed to tax treaty 'permanent establishments'.

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Item 5 explains the Ministry's view that Directive 2006/123 ("the Services Directive") does not cover the reporting obligations for tax purposes.

2. Preliminary remarks regarding the legal basis and the scope of the reporting obligations

At the outset, the Ministry would like to clarify certain aspects about the reporting obligations.

First of all, it should be noted that, as of 1 January 2017 a new Norwegian Tax Administration Act (TAA) took effect[1]. The provisions concerning tax assessment was transferred to the new act. However, this transition did not change the rules in question, and Section 7-6 in the new TAA contains the exact same wording as the repealed provision in section 5-6 of the former Act. Hence, the substantive content of the reporting obligations remains the same as before January 2017.

Secondly, the Ministry has noted that there appears to be some misconceptions in the letter of formal notice as regards the scope of the reporting obligations.

In paragraph 15 of its letter the Authority states the following:

> *"The obligation to report rests upon (1) the Norwegian entity (principal) that has awarded the contract to the non-Norwegian contractor, (2) any entity in the contract-chain above the principal, as well as (3) the non-Norwegian contractor itself. Thus the obligation to report one and the same contract may rest upon several entities, and they are all jointly and severally liable for carrying out the reporting."*

With regard to contracts related to the continental shelf/construction and building work, it is correct that the ultimate service recipient has a responsibility for making sure that the contractors down the contract chain actually fulfill their reporting obligations. We would like to stress, however, that the obligation to give information about the ultimate contractor above the contractor awarding the contract, is merely information aiming to help the tax authorities identify which contract chain the contract belongs to. Thus, it should be underlined that failure to give information about the ultimate contractor up in the contract chain will never lead to any penalties, fines or other reactions from the tax authorities.

With regard to *all other contracts*, the reporting obligation is only imposed on the ultimate service recipient *who is in control at the site on which the work is performed*, see TAA Section 7-6 paragraph 2. To illustrate, in a chain where entities A, B and C are Norwegian contractors, and entity D is a non-Norwegian contractor (contract awarded from C), and the work is performed at the site of B, B will be regarded as the ultimate

[1] LOV-2016-05-27-14

contractor, with a reporting obligation related to entity D. In this case, contractor A will not have any reporting obligations. C is also exempt from the reporting obligations, provided that the work is performed at the premises of B, where C does not have access. This would typically be the case in contracts of hiring out of labour.

3. The reporting obligations for foreign contractors and EEA Article 36

3.1 Introduction

The Authority has made the preliminary conclusion that the reporting obligations constitute a restriction, based on the premise that the burden of reporting to Norwegian authorities may prohibit, impede or render it less advantageous to perform services in Norway.

Notwithstanding that conclusion, the Ministry would emphasize that the restriction is *non-discriminatory*. It follows from case law, that discrimination can only arise through the application of different rules to comparable situations or the application of the same rule to different situations (C-279/93 Schumacker, paragraph 30). The Ministry recalls that, with regard to control measures (as the reporting obligation in question), the non-resident tax payer is, in principle, not in a situation comparable to the situation of a resident tax payer (C-279/93 Schumacker, paragraph 33-34 and C-315/13 De Clercq, paragraph 63). As far as we understand paragraphs 72-73 in the letter of formal notice, the Authority appears to be of the same opinion.

The Ministry now proceeds to demonstrate why the non-discriminatory reporting obligation pursues objectives which constitute overriding reasons of public interest (item 3.2) and why the different elements are suitable and proportionate (item 3.3).

3.2 The objectives behind the reporting obligations constitute overriding reasons of public interest

3.2.1 The aims pursued - overview

The Ministry submits that the reporting obligations are justified by the need of *ensuring the effectiveness of fiscal supervision and tax collection*. This aim has been considered an overriding reason of public interest in, *inter alia*, the cases of C-250/95 *Futura*, para. 31, C-72/09 *Rimbaud*, paragraph 33 and C-577/10 *Commission v. Belgium*, paragraph 44. In the case of *Futura* the Court explicitly stated that:

> *«A Member State may therefore apply measures which enable the amount of both the income taxable in that State and of the losses which can be carried forward there to be ascertained clearly and precisely».*

This was also reiterated in C-72/09 Rimbaud, paragraph 35. In addition to the said aim, the obligations also contribute to the prevention of tax fraud.

Furthermore, it should be recalled that those aims are to be assessed within an EEA context. As the Court has noted in many cases, the EEA states do not take part in the EU legislation on administrative cooperation within the taxation area. Due to these differences in the regulatory framework, other restrictions than between EU states could be justified. Reference is made to the case C-72/09 Rimbaud, para. 46-52 – followed up in later cases.

In the following, the Ministry of Finance will explain the background for the reporting rules, substantiating that the only objective is to ensure the effectiveness of fiscal supervision and tax collection, in order to make a correct tax assessment at the correct time for the correct tax payer. This pursuit of correct taxation, and the rules to safeguard this objective, are equally important in cross-border situations as in purely domestic situations.

3.2.2 The historic background

In paragraph 50 of the letter of formal notice, the Authority states the following:

> "*It* [the Norwegian reporting rules according to TAA section 7-6] *would rather seem to be a disguised deterrence from using services provided by non-Norwegian contractors.*"

From the Ministry of Finance's point of view this represents a rather severe allegation and we therefore find reason to counter this perception by giving a more comprehensive explanation of the purpose and the background of the reporting rules.

Due to a rapid increase in activity on the Norwegian continental shelf in the 1970s, Norway faced a need for skilled labour and know-how in the offshore sector and other connected sectors, *i.a.* the construction and building sector. Hence, during this period Norway experienced a substantial growth in the use of cross-border service contracts. The high number of foreign contractors (and contract chains) frequently shifting, created a challenge for the Norwegian tax authorities with regard to obtaining an overview of the activity and acquiring information from the foreign contractors. As a consequence of the complexity and interchangeability of the situation, the assessment of tax liability for the foreign entities and employees, and amongst other the collection of employers' withholding tax and social security contributions, became severely difficult.

This is thoroughly explained in the preparatory works of the relevant legislation, cf. Ot prp. Nr. 23 (1977-1978), especially chapter 1.4 – ("Opplysingsplikt for oppdragsgivere og oppdragstakere"). Therein, it is underlined, the most important challenge for the tax

authorities is to quickly get an overview of the conditions and take the necessary precautions. This is particularly important in case of foreign entities and employees working on temporary assignments. At the time they arrive in Norway, many circumstances may still be unclarified, *i.a.* the extent of the contract work and the duration of the stay for the single employee.

A working group on the reporting obligations had also described how entities often operated with intricate chains of entrepreneurs and intermediaries spreading out nationally and internationally, employing persons partly wandering from one country to another, and being replaced after a short period of time. It was also described how some contractors used their own employees, some used what appeared to be self-employed persons whereas some used persons employed in other companies. Salaries might be paid in Norway or abroad. Thus, it was concluded that an effective collection of direct and indirect taxes required that employer and employee information had to be available from the start-up of the activities.

In that connection, the working group described the need for new rules on unsolicited reporting from the principal service recipient in Norway on all parts of the engagement/chain of entrepreneurs with activities in Norway and on the continental shelf. They also found that in order for this information to be timely – improving the quality of the assessment of tax retentions, the advance tax and the social security contributions – the obligation on the part of the service recipient had to be linked to a subsidiary responsibility for the service recipient/employer.

Due to the special circumstances of temporality, complex contractual settings etc. as mentioned above, it was seen as of utmost importance that the tax authorities could receive the information from the principal service recipient. The principal recipient could then request the information from their contractors, and those contractors should request the relevant information from their sub-contractors. In this connection, the Ministry pointed out that the reporting obligation is limited to some few pieces of information, such as the employee's name, address and nationality.

It was also concluded that since there was a lack of rules on coordinated international withholding taxation and no possibilities of transferring final taxes directly between tax collection authorities in the different countries, the tax settlements were sometimes unreasonable, not taking into consideration any tax liability abroad.

It was also emphasized that reporting obligations was crucial in order to avoid situations where tax had to be paid both in Norway and in the home country of the employees. In this relation, it was seen as unfortunate if contractors were to withhold tax to Norway in situations where the relevant tax treaty, according to an advance 'subject to tax' assessment, would prohibit Norwegian taxation. Receiving information about the contract and the employees at an early stage would enable the tax authorities to evaluate the tax liability of the contractor and its employees in beforehand, and to

exempt the employer from the withholding tax and other obligations in cases where the relevant tax treaty implied no Norwegian taxation.

In 2004, the reporting obligations rules were amended to include all types of contracts in Norway, ref. Ot.prp. no. 77 (2003/2004), item 6.3. Then, in 2008, the reporting obligation was reduced to contracts which were performed at a site of which the service recipient was in control. This 2008 limitation concerned all contracts except for contracts on the continental shelf and within the construction and building sector.

3.2.3 The situation today

The underlying situation for imposing the responsibility on the service recipient, as stated in the preparatory works from 1977/78, are still highly relevant. Because these contracts often have a short duration, and the contractors often have no administrative body here, they will generally leave few traces of their presence in Norway. Contract payments and payments of employment income are often made to foreign bank accounts and their activity will therefore not be reflected through more traditional third party reporting, such as bank account balances, etc. Thus, the tax authorities will generally not receive any other information which confirms their presence in Norway.

The Ministry of Finance will also point out that the authorities of the EEA EFTA- States do not have the same opportunity for information collection and collaboration with other EEA states, as the EU states have within the Union.

By contrast, as regards physical or legal persons tax resident in Norway, the information necessary to identify the correct tax payer is regularly available through different sources and reporting obligations, such as the Register of Business Enterprises, and the National register of people resident in Norway and the NAV State Register on Employers and Employees ("the EE-register").

As a general rule, every employer (also foreign employers) who uses labour in order to perform business activities in Norway is obliged to register as an employer, in the EE-register cf. section 25-1 of the Social Security Act. However, resident employers have several incentives to register themselves and their employees, which the non-resident employer do not have. For one thing, in order to be able to report salary and to report/pay withholding tax for the employees, the employer and the employees have to be registered in the EE-register. In addition, the employer and the employees will not receive refunds or payments from the Norwegian social security scheme, such as sick pay, daily unemployment benefit etc., unless the employer and the employees are registered. The same incentives do not apply for the foreign employers/employees, as they may continue to pay/be paid from a foreign payroll, and the employees are in general exempt from the Norwegian social security scheme. Hence, they are not entitled to any benefits or refunds from the scheme.

In this respect, the Ministry would like to present some documentation of the need for ensuring more effective tax supervision in this area.

The Norwegian Auditor General stated in a survey of the taxation of foreign employees and businesses on temporary assignments in Norway from 2015, document 3:11 (2015-2016) in the chapter 7 Assessments, last section (our translation):

> *"Many foreign businesses on temporary assignments in Norway, fail to file a Norwegian tax return, which give the Tax Authorities more work with tax estimations and subsequent complaints. If there are no information from banks or the Currency register, there are few possibilities for the Tax Authorities to know whether these persons have left the country or are not declaring their labour. This situation is unfortunate because it result in revenue losses and distorts the competition for those that runs legitimate businesses and comply with the law."*

Furthermore, statistics from The Norwegian Directorate of Taxes also document the extent of non-compliance, among the group of taxpayers reported to COFTA, and thus, the need for third party reporting in this particular area:

For the income years 2012, 2013, 2014 and 2015, 31.73 percent, 33.94 percent, 37.54 percent and 35 percent, respectively, of the non-resident contractors failed to file any information about wages to their employees. By way of comparison, only 8.41, 8.19 and 8.22 percent, respectively, of other employers failed to file the same information within due time for the income years 2012-2014. Further, a significant number of these employers did actually file the information subsequent to a reminder. Thus, the number of resident employers that did not file any information is even lower (although the exact figures are not possible to establish).

For the income year 2014, 78.9 percent of all non-resident contractors (companies) filed a tax return, of which only 39.8 percent within due time and without extra notice. Non-resident contractors that, based on the previously reported information were deemed as not subject to taxes, are excluded from these figures. If these contractors were included, the share of contractors fulfilling their obligation to file a tax return amounts to 18 percent. By way of comparison, 94 percent of other companies (companies falling outside the scope of Section 7-6) filed a tax return.

As described above, the management of non-resident contractors and their employees raise special concerns for the Norwegian tax authorities, since the tax authorities have no overview of non-resident taxpayers at the outset. The extent of non-compliance by foreign service providers is well documented through statistics and other material. Furthermore, it is shown that the decision to let parts of the reporting obligation rest upon the service recipient, in addition to the contractor, *i.e.* create an alternative system of third party reporting. The aim of that system is to ensure that the required correct

information is provided to the tax authorities, one way or the other. In this way, it is clear that the reporting obligation pursues an effective fiscal supervision and tax collection. In addition thereto, it also combats tax evasion.

3.2.4. As to the Authority's submission that other aims are pursued

The Authority seems to suggest that the reporting obligation also pursues other aims. The Authority states in paragraph 43:

> *"The Norwegian Government has moreover admitted that the reporting obligation is also necessary to ensure that other obligations, such as the obligation for all service providers to register in the National Coordinated Register, are complied with."*

This is not a correct understanding of the link between the reporting obligation rules and the function of the registration in the Central Coordinating Register for Legal Entities, hereinafter referred to as the NCR.

According to the Central Coordinating Register for Legal Entities Acts, section 4, all non-resident contractors operating in Norway are obliged to register in the Central Coordinating Register. This applies irrespective of whether or not there is an obligation to report for tax purposes according to section 7-6 of the TAA.

In a functioning tax system, it is essential that any tax subject has a unique identity. In addition to the other purposes of the NCR, the organization number (company ID-number), assigned by the NCR, also functions as a tax identification number. Hence, the organization number is necessary in order for the entity to be assessed and listed in the tax roll, and for the entity to comply with reporting obligations. As a result of this, in cases where the entity has not obtained any organization number, the tax authorities have the authority to request for a preliminary registration in the NCR, ref. Section 10 in the Central Coordinating Register for Legal Entities Act, in order to enroll the entity in the tax roll. The condition is, however, again that the Authorities actually have knowledge of the entity's presence in Norway.

On this basis, the Ministry of Finance would like to stress that registration in the NCR, is not at all a purpose behind the reporting rules. It would in fact be more correct to say that it works the other way around, *i.e.* that one of the purposes behind the registration in the NCR is to provide the entity with a unique identity for tax purposes (enabling the authorities to identify the taxable entity).

3.3 The suitability and necessity of the reporting obligation

3.3.1 As to the law

After having established above that the reporting obligation indeed pursues the legitimate aim of an effective fiscal supervision and tax collection, and combating tax evasion, the Ministry now proceeds to show why the reporting obligation is suitable and necessary to that effect.

In this respect, the Ministry would like to reiterate some of the basic features of the necessity test. In the case of E-3/06 Ladbrokes the EFTA-court held that the test of necessity:

> «[...] *consists in an assessment of whether the* [restriction] *is functionally needed in order to achieve the legitimate objectives of the legislation at the level of protection chosen by the Contracting Party concerned, or whether this could equally well be obtained through other, less restrictive means* [...].» (paragraph 58)

Thus, an essential element in this test is that it respects the level of protection chosen by the state. See also C-447/08 and C-448/08 *Sjöberg*, paragraph 38. In this respect, the Ministry submits that Norway has chosen and indeed pursues a high level of effectiveness of fiscal supervision and tax collection.

Second, and following from the above, this means that if another EEA state has less strict rules (even no reporting obligation at all), that does not mean that the Norwegian reporting obligation per se can be found disproportionate. Indeed, the Court has emphasized this in many cases. See case C-36/02 *Omega*, para 38; case E-16/10 *Philip Morris Norway AS*, para. 80; and case E-17/14 ESA v. Liechtenstein, para 42. In the latter case, the Court stated (within the public health area):

> *"When assessing whether the principle of proportionality has been observed in the field of public health, account must be taken of the fact that the EEA States are free to determine the level of protection of public health which they wish to afford to the population. For example, the fact that one EEA State imposes less strict rules than another EEA State does not mean that the latter's rules are disproportionate"*

Third, the Ministry would point out that the necessity test does not prohibit a system which is easily managed and supervised by the authorities. In this respect, see inter alia case C-512/13 *Sopora*:

> *"While it is true that considerations of an administrative nature cannot justify a derogation by a Member State from the rules of EU law* [...], *it is also clear from the Court's case-law that Member States cannot be denied the possibility of attaining*

legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities [...]" (paragraph 33)

3.3.2 As to the Authority's submission that the reporting obligation is applicable irrespective of whether the income from the foreign contract or employee is subject to tax in Norway and irrespective of the duration of the contract

In paragraphs 39 and 40 the Authority states the following:

> *"First, the information at issue must be reported to COFTA irrespective of whether the foreign contractor or employees are subject to tax in Norway and irrespective of the duration of the contract.*
>
> *Therefore, as there is no direct link to the payment of taxes, Norway cannot claim that the reporting obligation is exclusively connected with taxation."*

Further, in paragraph 42 it the Authority states:

> *"The Authority considers however that its argument in paragraph 39 is not altered, as it concerns in particular the contracts which are not liable to tax in Norway despite of their value and/or duration."*

The misapprehension on the starting point of Norwegian tax liability is also reflected in paragraph 88 of the letter.

The Ministry would like to recap that all activities performed in Norway or at the continental shelf are taxable from day one, according to national Norwegian tax legislation, cf. the Norwegian Tax Act Section 2-3, *i.e.* both with regard to the foreign contractor and its employees. This tax liability includes even income from small contracts and contracts of short duration, and applies irrespective of the extent of the non-resident contractor's or employee's *final* taxation according to a tax treaty assessment, if any.

Modifications of this starting point may follow from the different provisions in the relevant tax treaties on avoidance of double taxation between Norway and the foreign contractor's and/or the employee's state of residence. The application and interpretation of the relevant provision(s) in the applicable tax treaty will determine the foreign contractor's/the employee's subject to tax in the final assessment. Thus, in order for the Norwegian tax authorities to assess whether a foreign contractor or a foreign employee is subject to tax in Norway, the authorities need to obtain information upfront on the relevant contract terms, *i.e.* type of contract, duration, place of work, number of employees, please see enclosed form FR 1199 part 1. For further elaboration regarding the need for such upfront information, please see points 3.2 and 3.3.3.

The reason smaller contracts and contracts of limited duration are encompassed in the reporting obligation is based on the fact that several small/shorter contracts often add up to larger contracts, of which income may be subject to tax according to the relevant tax treaty. For instance, a number of small contracts performed by one contractor – combined – may result in taxation for the contractor. Similarly, the employees working for a contractor may be subject to tax even if the contract does not trigger any tax for the contractor himself. By requiring reports of all contracts worth a minimum of NOK 10 000, the Norwegian tax authorities are better able to assess which contracts do involve taxation, alone or combined, and which do not.

Hence, it is important to receive information at an early stage to ensure fiscal supervision and effective tax collection, such as tax withholding and social security contributions. Furthermore, obtaining upfront relevant information about the contract will make it possible for the tax authorities to make a beforehand assessment of whether the taxation of the foreign entity/employees may be limited due to a relevant tax treaty. As it follows from the above, the tax treaty does not in itself change the fact that the relevant income is taxable in Norway according to national legislation, it just relieves the problem of possible double taxation (since the taxpayer might be taxable for the same income in his country of tax residence). If the investigation shows that the relevant tax payers are relieved from tax by reason of a tax treaty, the foreign entity will be exempted from other obligations, such as filing a company tax return and reporting/paying withholding tax to Norwegian authorities on the relevant employees' salary.

Against this background, there is definitely a need for tax reporting in advance, also in cases where the person or the company, after a sometimes complex legal assessment, ends up not being liable to tax in Norway due to the relevant provisions in a tax treaty.

3.3.3 Why it is suitable and necessary to impose the reporting obligation on a third party

3.3.3.1 Introduction

The Authority expresses doubts as to the necessity of the reporting obligations being imposed not only on the foreign contractor, but also on the Norwegian entity.[2]

The Ministry submits that this is both suitable and necessary for achieving the aims described above in Section 3.2. First, the Ministry would like to point out certain international trends with regard to the importance of third party reporting in a modern tax system (item 3.3.3.2). In this way, the Ministry will place the Norwegian reporting obligation in a wider context. Thereafter, the Ministry will return to the concrete assessment of the reporting obligation (item 3.3.3.3).

[2] Letter of formal notice, para. 89

3.3.3.2 The importance of third party information in a modern tax system
Many modern tax systems require specified third parties, such as employers and financial institutions, to report to the revenue body details of income paid to tax payers (and, if applicable, taxes withheld) over the course of a fiscal year. In countries where these sorts of arrangements are applied, the use of third party income reports has been highly effective in detecting unreported income.

As the third party reporting may serve different purposes and objectives, such as checking the accuracy of returns filed or detecting non-filers, this use has also led to the collection of substantial amounts of additional tax revenue.

Norway has a long tradition of requiring information from third parties, typically information on salary and other remuneration, financial income such as dividends, interest, capital gains, account balances etc. Such information are to be reported unsolicitedly according to Sections 7-2 and 7-3 of the TAA.

In addition, the tax authorities may request information from any third party if this information may have relevance for the tax assessment of any tax subject, ref. Section 10-2 of the TAA. For instance, under this provision the Norwegian tax authorities have requested information on all contracts and contractors in a contract chain – including Norwegian contractors – in a number of development projects, for instance during the construction of the main airport in Oslo.

The Ministry would like to point out that also in an international tax context, third party reporting has been regarded as an essential part of a modern tax system, acknowledging the effect it has in contributing to a more effective fiscal supervision.

The OECD has stated that as the world becomes increasingly globalized and cross-border activities become the norm, tax administrations need to work together to ensure that taxpayers pay the right amount of tax to the right jurisdiction. A key aspect for making tax administrations ready for the challenges of the 21st century is equipping them with the necessary legal, administrative and IT tools for verifying compliance of their taxpayers. Against that background, the enhanced co-operation between tax authorities is crucial in bringing national tax administration in line with the globalized economy.

Norway has strongly supported the work of the OECD in these matters and has been among the first countries to implement new tools to exchange information for tax purposes.

As a result of this work and similar processes, an increasing amount of third party information is shared internationally. Mechanisms such as the CRS (*Common Reporting Standard*) developed by the OECD and the bilateral FATCA agreements (*Foreign Account Tax Compliance Act)* originally developed by the United States, are relevant

examples in this connection. The Common Reporting Standard (CRS) was adopted by the OECD in 2014 and calls on jurisdictions to request from their financial institutions information on foreign clients and their accounts (*i.e.* third party reporting). Norway signed in 2015 a multilateral convention under OECD/Council of Europe to automatically exchange information within the CRS standards with other jurisdictions on an annual basis. The aim is to counteract tax evasion and tax fraud3. The CRS mechanism forms a part of the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (*Base Erosion and Profit Shifting*). The FATCA mechanism is, roughly speaking, the US version of the CRS, and is implemented bilaterally in treaties between the US and other states worldwide (also EU states).

These multilateral instruments are products of a growing concern related to the vast amounts of income being subject to non-taxation, as tax payers fail to comply with their obligations towards the tax authorities. They put comprehensive obligations on financial institutions *i.a.* to assess whether persons, companies and other entities are resident abroad, and to report their foreign clients' capital and income to the tax authorities in the state in which the institutions are resident. This information is then automatically forwarded by this state to the tax authorities of the other state, in accordance with the tax treaty.

Within the EU, this work has been brought even further, *i.a.* through the implementation of different versions of the so-called *DAC* (Directive on Administrative Cooperation, DAC, DAC2, DAC3 and DAC4). This directive builds on the OECD's common reporting standard, but has a broader scope as regards the types of income covered, such as income from employment, director's fees, life insurance products, pensions, and ownership of and income from immovable property (effective from 2015). From 1 January 2017 the exchange of information covers interest, dividends and similar types of income, gross proceeds from the sale of financial assets and other income, and account balances, are covered (amendment 2014, DAC2).

In light of this broad and increasing international cooperation, the Norwegian third party reporting rules are important, as they contribute in the fulfilment of the key objective of the international work, *i.e.* correct taxation, at the correct time and place.

3.3.3.3 The third party obligation is suitable and necessary

As commented in 3.2.2, due to the fact that the foreign entities/employees are present in Norway for only a limited period of time, and often with no administrative body here, they will generally leave few traces of their presence in Norway. For example, contract payments and payments of employment income are often made to foreign bank

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[3] On the OECD's website the CRS is described as follows: "*It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions*".

accounts and their activity will therefore not be reflected through more traditional third party reporting, such as information on bank account balances, etc.

Furthermore, as documented in item 3.2.3 through statistics, the non-compliance for this group is much higher than for resident service providers. As a result, in order to ensure and facilitate tax compliance, it is essential, at an early stage, to obtain information on their presence in Norway, as well as the background for their presence. For these reasons, the tax authorities cannot count solely on receiving information from the foreign entities, as this would be insufficient to serve the purpose of detecting - intentional or unintentional - non-filers.

Hence, third party reporting is crucial in this respect. In addition to the arguments above, it should be mentioned that the type of information required is of a limited character, *i.e.* type of contract, duration, place of work, number of employees, which must be assumed known and easily accessible for the service recipient (the principal). This assumption rests upon the fact that the service recipient is only obliged to report information on contracts concerning work performed at sites of which he is in control.

The Ministry of Finance would like to emphasize that as described in item 3.2, due to the fact that the foreign entity is not known to the tax authorities at the outset, information about the contract and the contractor from the service recipient is necessary. Third party reporting enables a correct assessment of whether the tax payer is subject to Norwegian tax and promotes a correct final allocation of taxes between Norway and the contractor's and/or employee's state of residence. Procedural rules governing the taxation process, including regulations of rights and obligations of tax payers as well as third parties, form an indispensable element of the Norwegian tax system, as it does in any other functioning modern tax system.

It is therefore essential that the Norwegian tax authorities receive information on the taxpayers at an early point in time, in order to develop and maintain the required overview of non-resident taxpayers, similar to the overview the authorities have of resident taxpayers. Such an overview cannot be established on the basis of other existing information sources. As explained the service recipient should have all relevant information about the contract and the employees working at a site under his control, and is therefore in the best position to provide the relevant information to the tax authorities. The reporting rules are only imposed on the service recipient in cases where he is in (or is supposed to be in) control of the site where the work is performed.

As the Norwegian service recipient – in addition to the contractor itself - is the entity most likely to have an overview of the contract chain and to acquire the information necessary to make an assessment of tax liability, the Ministry of Finance maintains that there is indeed a direct link between the recipient's reporting obligation and the taxation purposes it is meant to safeguard.

Although a foreign service provider may have a taxable presence in Norway (through a permanent establishment within the tax treaty meaning), it oftentimes does not have an administration capable of sustaining its obligations towards the Norwegian authorities, especially regarding contracts encompassed in activities *not* conducted through the PE. In addition, most foreign enterprises with a Norwegian PE for tax purposes only have operational personnel in Norway to perform a specific assignment (typically engineers and technicians). Administrative tasks are usually performed at the enterprise's main office abroad. It is therefore not practical nor appropriate to impose these obligations on the service provider. As the tax authorities have no information at the outset about the foreign entity's presence in Norway, it is not possible to inform the service provider about the reporting obligation upfront. In order to ensure that the reporting obligation is fulfilled, it is necessary to involve the service recipient. As a consequence of the reporting obligation, the service recipient will normally inform about the rules and transfer this responsibility to the service provider in their contractual relationship. Since the service recipient is responsible towards the tax authorities, he has the incentive to follow up that the obligations are fulfilled. Without such responsibility on the service recipient, it is reason to believe that the incentive to inform about the obligation will decrease, and the extent of non-compliance will increase.

According to practice, no reporting obligation will apply, in cases where that the foreign entity establishes a branch of a more permanent character in Norway. Regarding the term 'branch' for Norwegian legal purposes, please see item 4.

In the Ministry's view, the circumstances explained above substantiate that the third party reporting obligation does not go beyond the aim to ensure the interests of fiscal supervision and effective tax collection, as well as preventing tax evasion. The restriction is proportionate in cases where the tax payer has no permanent presence in Norway.

The same conclusion is drawn in the ECJ judgment C-498/10 (X NV), see paragraphs 42 and 49. The ECJ noted in paragraph 42 that "*in the case of service providers who provide occasional services in a Member State other than that in which they are established, and where they remain only a short period of time, a withholding tax at source constitutes an appropriate means of ensuring the effective collection of the tax due*".

Furthermore, the ECJ discussed whether that measure goes beyond what is necessary to ensure the effective tax collection. The ECJ noted in paragraph 49 that in the absence of withholding tax, the tax authorities would be "*likely to be required to impose an obligation on the service recipient, established on the territory of that State, to declare the service carried out by the non-resident service provider*". This reasoning by the ECJ supports the acceptance of the state's need for an effective instrument to make a correct tax assessment.

Hence, the Ministry of Finance maintains the view that the third party reporting obligation is also in compliance with the ECJ's practice, *e.g.* De Clercq C-315/13 and the joint cases C-53/13 and C-80/13.

3.3.3.4 Conclusion

Based on the above, the Ministry of Finance is of the opinion that it is both suitable and necessary within the EEA context to apply the reporting obligation following from Section 7-6 in the TAA on the service recipient.

3.3.4 As to the Authority's submission that the reporting obligations apply irrespective of whether the taxes were correctly payed by the service provider and/or the employees

In the letter of formal notice, paragraphs 53 and 93, the Authority argues that the reporting obligation must be fulfilled regardless of whether taxes were correctly paid by the contractor and/or its employees, and that penalties are only withdrawn if the entity proves that the contractor or employee has filed the tax return timely and the relevant tax obligations are met at the time of the discovery of the deficient reporting. The Authority argues that the service recipient is normally not in a position to prove so, whereas the information at issue is always at the possession of the tax authorities and therefore it seems that the reporting obligation goes beyond what is required for tax control purposes.

The Norwegian Ministry of Finance acknowledges that the service recipient's reporting obligation does not relieve the contractor from his ordinary obligation to file a tax return and a statement of income.

The upfront reporting serves as a means to detect possible tax payers and to make the authorities able to assess whether there could be a tax liability to Norway. The service provider's tax return and statement of income serve *i.a* as a means to determine the correct amount of tax.

While the third party reporting is required in connection with the commencement of the contract, the service provider's tax return will be filed the year following the income year. Thus, the third party reporting obligation is upfront any tax assessment and before any due income taxes.

The purpose of the reporting obligation is, as described above, to detect and evaluate any taxation rights according to a relevant tax treaty (if any) and to make sure that employer withholding tax and social security tax is reported monthly and paid timely (bi-monthly), in accordance with Norwegian law. Hence, the requirement that the contract should be reported within 14 days after the work in Norway has commenced. The tax authorities, rather than the taxpayer himself, are qualified to make the

assessment of taxability. It is the responsibility of any tax authority to ensure a correct allocation and assessment of taxes between the States.

It is correct, as stated in paragraph 93 in ESA's letter of formal notice, that the tax authorities may reduce or withdraw the penalties imposed on the service recipient. However, it should be noted that withdrawal of penalties applies regardless of how the information has been received by the tax authorities. Hence, it is not correct, as stated by the Authority, that the penalties may only be withdrawn if the service recipient proves that the service provider has fulfilled its tax obligations.

3.3.5 Why the extent of the reporting obligation is suitable and necessary

In the letter of formal notice, paragraph 95, the Authority questions the extent of the information required from the Norwegian service recipient, as well as the requirement to report by each entity in a contract-chain.

The reporting responsibility rests upon the service recipient and any entity in the contract chain above, limited to contracts on the continental shelf/construction and building work. For other contracts the reporting obligations only apply to the service recipient, provided he has control over the site on which the work is performed, see item 2 and 3.3.3.2. It is important to notice that the reporting obligation does not require that every entity in a contract chain reports the same contract; *i.e.* if one service recipient has reported a contract he has awarded, the recipients in the chain above him will be exempt from the reporting obligation on this contract. As mentioned above, it is common to include in the contractual provisions which entity handles the reporting obligations according to section 7-6 of the TAA.

We will also emphasize that, as described in item 3.2.3, it is a general rule that every employer (also foreign employers) who uses labour in order to perform business activities in Norway is obliged to register as an employer, in the "EE-register" cf. section 25-1 of the Social Security Act. However, the obligation to register the employees in the EE-register does not apply for non-resident employers with a reporting obligation according to section 7-6 of the TAA. In fact the employee reporting obligation in section 7-6 of the TAA serves as a substitute to the EE-registration for employees. There is a close and intended coherence between the resident and non-resident situations, as the reporting obligation in section 7-6 of the TAA represents the non-residents' alternative to the residents' general reporting obligation to the EE-Register. The coherence between the two systems is established to ensure that, on one hand, all employments are to be reported to the Norwegian Authorities, and, on the other hand, that no employment shall be reported more than once.

When it comes to the effectiveness of fiscal supervision, the Ministry of Finance will point out that the authorities of the EFTA-EEA states do not have the same opportunity for information collection and collaboration with other EEA states, as the EU states

have within the Union. This has been noted by the court, and it has been assumed that the different regulatory framework, can justify other restrictions within the EFTA-EEA states than within the EU where tax data is more available, see C-72/09 Rimbaud, paragraphs 46-52, which is also followed in other cases.

The fact that information about the contract has been reported according to Section 7-6 of the TAA does not mean that foreign entities and employees taxable in Norway (also according to the relevant treaty), can be exempted from the obligation to file a Norwegian income tax return. The information provided by the reporting entity does not include information on the person's income and deductions, which is essential for the tax authorities to make a final tax assessment for the entity and the employees

Under paragraph 96 in the letter of formal notice, the Authority states that the information necessary for tax purposes could and should be fulfilled with less restrictive means, and should first and foremost be collected from the service provider. Moreover, the Authority claims that it is not necessary to use third party reporting in cases where information about the service provider is known to the tax authorities, for example due to registration in the National Coordinating Register.

All entities conducting an activity in Norway are obliged to register in Norway, as described below. This obligation to register applies to both Norwegian and foreign entities, but will not in itself give the information necessary to serve the purposes of correct tax assessment.

The registers consist of both taxable and non-taxable companies. A company is not required to have an address or office in Norway in order to be obliged to register. Upon the completion of an entity's activity in Norway, no automatic de-registration will occur. Consequently, the register does not provide information on whether or not any activity has been carried out in Norway in the specific income year.

With regard to temporary based activity in Norway (*i.e.* activity which does not constitute a branch, see item 4.1.5), the tax authorities experience that foreign entities often fail their obligation to register in the Register of Business Enterprises and the Central Coordination Register for Legal Entities. Consequently, obtaining a complete tax roll solely based on information from these registries is not possible. Hence, in order to assess the question of taxing rights for these types of activities, third party reporting is required.

The Ministry of Finance, cannot see that the scope of the third party reporting obligation could be less restrictive without deteriorating the access to information necessary for assessing tax correctly and timely. Hence, we would strongly argue that the obligation does not go beyond the need to ensure fiscal supervision, prevent tax evasion and effective tax control.

In conclusion, the Ministry of Finance maintains the view that the reporting obligations for foreign contractors are in line with Article 36 of the EEA Agreement , as they fulfil legitimate objectives, are apt to ensure these objectives, and do not go beyond what is necessary to obtain the objectives.

3.3.6 Regarding sanctions against breach of the reporting obligation

The Authority has submitted comments to the facts that breach of the reporting obligation is sanctioned.

The Ministry would point out, that the reporting obligation is justified in a legitimate aim. In order to make the obligation effective, sanctions are in place. In the opinion of the Ministry, those sanctions do not go further than ensuring the effectiveness of the reporting obligation. This is in conformity with EEA law, see inter alia Joined Cases C-369/96 and C-376/96 Arblade, para. 38, C-243/01 Gambelli and C-290/04 Scorpio, para. 38.

3.4 Conclusion

In the above, the Ministry has shown that the reporting obligations in TAA Section 7-6 are justified in a legitimate aim, namely to ensure the effectiveness of fiscal supervision and tax collection. Furthermore, the Ministry has shown that they are both suitable and necessary to meet this aim.

4. Response to the questions raised in the Authority's follow-up letter to the package meeting in Oslo 27-28 October 2016 concerning branches and tax treaty PEs

4.1 General rules and obligations to establish a branch in Norway

4.1.1 Introduction

As described above, all entities conducting an activity in Norway, *e.g.* conducting business or hiring employees, are obliged to register in Norway. This registration obligation applies to both Norwegian and foreign entities.

As mentioned previously, Norway has a registration scheme consisting of a main register - the Central Coordinating Register for Legal Entities and several other connected registers (*e.g.* the Register of Business Enterprises, the NAV State Register on Employers and Employees, the MVA Register and the Tax Authorities' Register on Impersonal Taxpayers).

When registration is required in a connected register, such as the Register of Business Enterprises, registration in the Central Coordinating Register for Legal Entities is similarly required.

Upon registration in the Central Coordinating Register for Legal Entities the entity will receive an organisation number. This organisation number is used to identify the entity for reporting salary and withholding tax to the tax authorities, other public registers, as well as other service providers such as banks, insurance companies etc. This registration does not in itself trigger any tax liability or reporting obligations according to Section 7-6 of the Norwegian Tax Assessment Act (TAA).

The registers consist of both taxable and non-taxable companies. An entity is obliged to register regardless of whether or not the entity has an address or office in Norway. Upon the completion of an entity's activity in Norway, no automatic de-registration will occur. Consequently, the register does not provide information on whether or not there has been any activity in the specific income year.

4.1.2 When is a branch obliged to register in the "Register of Business Enterprises"?

As mentioned above, a foreign entity is obliged to register with the Register of Business Enterprises, provided that the entity is carrying out a "business activity" and that the business activity is "carried out in Norway". The entity does not have to be tax resident in Norway in order to be registered[4].

An entity is carrying out business activity when the activity is of an economic character with an intention to make profit. Moreover, the activity must be of a certain duration and extent. As a starting point, the duration must exceed 90 days and the turnover must amount to a minimum of NOK 50 000 throughout a 12 months period.
Whether a business is carried out in Norway depends on an overall assessment, where *i.a* the following factors may be taken into account:

- Is the business carried out from an administrative office in Norway?
- Is the entity presented as a Norwegian entity when doing business with customers?
- Are payments made to a Norwegian or a foreign bank account?
- Where are the contracts signed?
- Where is the business stock located?

(We reiterate that these registration assessment criteria do not coincide with the criteria for assessing of whether the income of the foreign entity is *taxable* in Norway.)

4.1.3 Regarding the term "branch"

The term "branch" is not defined in the Business Enterprise Registration Act, and the connected Register of Business Enterprises does not distinguish between a branch and other types of presence in Norway.

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[4] Lov 1985-06-21-78, § 2-1

If the presence in Norway of a foreign entity is of a more permanent character, *i.e.* the entity has an office with an administration in Norway, this could, based on an overall assessment, be considered to constitute such permanent presence that registration in the Register of Business Enterprises is triggered. For the purpose of defining such permanent presence, the entity is often called a "branch" (*"filial"* in Norwegian). It must be noted that the criteria to be regarded as a "branch" do not coinside with the criteria to constitute a "permanent establishment" as defined in Art. 5 of the OECD model tax convention.

Provided that a foreign entity is considered to have a presence of a more permanent character in Norway (that includes some sort of administrative functions), *i.e.* a branch, the entity will be treated equally to a Norwegian resident entity. The Norwegian service recipient will in such cases not be obliged to make any third party reporting under Section 7-6 of the TAA. This applies irrespective of the type of business activity, also in the case of service assignments such as on-site construction, assignments on the continental shelf, labour contracting etc.

In these cases, the branch will be able to report to the tax authorities on behalf of the foreign entity. All income deriving from contracts between the Norwegian service recipient and the foreign contractor are then to be included in the branch's accounting and tax report.

The Ministry agrees with the Authority that in these cases the branch is able to fulfil the foreign company's reporting obligations to the Norwegian Authorities. Hence, third party reporting is not required.

With regard to temporary activity in Norway (*i.e.* activity not constituting a branch as described above), the Ministry experiences that foreign entities often fail their obligation to register in the Register of Business Enterprises and the Central Coordinating Register for Legal Entities. Consequently, obtaining a complete tax roll solely based on information from these registries is not possible. Hence, in order to assess taxing rights for these types of activities, third party reporting is required.

Based on the above considerations, it is the opinion of the Ministry of Finance that the above practice is in compliance with the principles set out in the joint cases *C-53/13* and *C-80/13*.

4.2 Why the existence of a PE does not exempt the service recipient from the reporting obligation

As described above, the third party reporting obligations are limited to contracts involving a type of activity anticipated to have a temporary, rather than permanent duration. These contracts may vary in time and location, and the reporting obligations

apply regardless of whether the entity has a 'permanent establishment' in Norway within the tax treaty meaning of the term.

An entity which is deemed to have a Norwegian branch as described above, will, due to its characteristics, regularly be deemed to have a tax treaty PE in Norway. However, an entity deemed to have a tax treaty PE in Norway will not necessarily be deemed to have a branch here. As foreign entities with a PE in Norway would normally only have operational personnel (typically engineers and technicians) here when performing a specific assignment, administrative tasks are typically performed at the entity's main office abroad. Thus, such entities are not to be registered in the Register of Business Enterprises. Still, they are taxable in Norway according to the tax treaty.

As mentioned earlier, a foreign entity may have several contracts in Norway. Each contract must be assessed individually in order to settle whether Norway has a treaty right to tax the income. A PE cannot be expected to have an administration in Norway, enabling it to fulfil any reporting obligations with regard to all other contracts the ("parent") company may enter into. The service recipient, on the other hand, is in possession of all the relevant information pertaining to the contract signed with the contractors, and should be able to provide this information to the tax authorities.

Consequently, the Ministry maintains the view that in these cases, a third party reporting obligation is crucial, cf. Section 7-6 of the TAA, andthat the third party reporting obligation is in accordance with the ECJs practice, *e.g. De Clercq C-315/13*[5] and the joint cases *C-53/13* and *C-80/13*.

5. Directive 2006/123 - relevance

Through the elaborations above, the Ministry of Finance has explained the background and the features of the reporting rules, showing that the reporting obligations tailored to meet the special tax concerns when contracts are awarded to non-resident service providers, are purely based on tax considerations and do not go beyond what is strictly needed to safeguard the purpose of correct taxation.

Seen against this background, a discussion of the scope of the exemption in Article 2 paragraph 3 of Directive 2006/123/EC (the "Services Directive"), determining that this Directive "*shall not apply to the field of taxation*", would not be necessary. The Ministry's submissions under the assessment on Article 36, substantiating that the relevant reporting rules have their ambit well within the field of taxation, as well as the arguments leading to the conclusion that they do not go beyond what those taxation purposes require, would overlap the arguments under a discussion of the exemption for the tax field in the Services Directive.

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[5] *De Clercq and others*, C-315/13, EU:C:2014:2408

6. Concluding remarks

In line with the facts and arguments presented above, the Ministry of Finance is of the view that the Norwegian reporting obligations applicable when contracts are awarded to non-resident service providers are in compliance with EEA law, hereunder Article 36 on the freedom to provide services. We are at the Authority's disposal, should there be any issues the Authority would wish further enlightened or discussed.

Yours sincerely,

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Deputy Director General

Rino Lystad
Director Legal

Attachement: Ot.prp.Nr.23(1977-1978) chapter 1.4
Form FR 1199 part 1

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