

Case No: 69660  
Event No: 600895  
Decision No: 144/11/COL

EFTA SURVEILLANCE AUTHORITY DECISION  
of 19 May 2011

on the notified scheme for the temporary NO<sub>x</sub> tax exemption for undertakings  
encompassed by an environmental agreement with the State on the implementation of  
measures to reduce emissions of NO<sub>x</sub> in accordance with a predetermined environmental  
target

(Norway)

The EFTA Surveillance Authority (“the Authority”)

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61 (3) (c) thereof,

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(3) of Part II,

Whereas:

## I. FACTS

### 1. Procedure

The Norwegian authorities notified a scheme providing for a temporary exemption from nitrogen oxides (“NO<sub>x</sub>”) tax for undertakings which have entered into an environmental agreement with the State on the implementation of measures to reduce emissions of NO<sub>x</sub>, pursuant to Article 1(3) of Part I of Protocol 3 by letter of 21 March 2011 (Event No 591459).

### 2. Description of the proposed measures

The measure notified by the Norwegian authorities grants undertakings the possibility to benefit from a full exemption from the NO<sub>x</sub> tax where they have entered into environmental agreements with the Norwegian State under which they commit themselves collectively to reduce NO<sub>x</sub> emissions in accordance with a predetermined environmental target.

As of 1 January 2007, the Norwegian State introduced a tax per kilogram of emission of NO<sub>x</sub> on energy production delivery. In 2007, the tax was of NOK 15 per kilogram, in 2011 it is of NOK 16,43 per kilogram.

The NO<sub>x</sub> scheme 2008-2010 was approved by the Authority by Decision 501/08/COL of 16 July 2008.

On 14 December 2010, the Ministry of Environment concluded, on behalf of the Norwegian government, an environmental agreement with 15 business organisations on the implementation of measures to reduce emissions of NO<sub>x</sub>.

The scheme providing for the possibility for certain undertakings to be exempted from paying the NO<sub>x</sub> tax (“the NO<sub>x</sub> scheme”) covers the period 2011-2017.

The NO<sub>x</sub> scheme 2011-2017 is very similar to the NO<sub>x</sub> scheme which covered the period 2008-2010.

## 2.1 Description of the Norwegian Environmental Tax on emissions of NO<sub>x</sub>

The ratification by Norway of the Protocol to Abate Acidification, Eutrophication and ground-level Ozone of 30 November 1999 to the Convention on Long-Range Transboundary Air Pollution of 13 November 1979, (“the Gothenburg Protocol”) committed the Norwegian State to reduce its national emissions of NO<sub>x</sub> to an annual maximum by 2010 of 156 000 tonnes.<sup>1</sup> In order to fulfil its commitment to reduced national emissions under the Gothenburg Protocol, Norway introduced a NO<sub>x</sub> tax.

Section 1 of the resolution of the Norwegian Parliament (“the Storting”) on NO<sub>x</sub> emissions lays down the legal basis for the NO<sub>x</sub> tax and provides as follows:

*“As of 1 January 2011 and pursuant to the Act of 19 May 1943 No.11 concerning excise duties, an excise duty shall be paid to the State Treasury amounting to 16.43 kroner per kg for emissions of nitrogen oxides (NO<sub>x</sub>) during the production of energy from the following energy sources:*

- a) Propulsion machinery with a total installed capacity of over 750 kW,*
- b) Motors, boilers and turbines with a total installed capacity of more than 10 MW, and*
- c) Flares on offshore installations and on facilities on land.*

*The Ministry may regulate which emissions are subject to the excise duty on NO<sub>x</sub> emissions, and may formulate the basis for calculation of the duty.”*

The NO<sub>x</sub> tax therefore covers energy producing units within a variety of sectors including the following: domestic shipping (including fisheries), aviation, railway operations, land-based activities and off-shore activities on the Norwegian Continental Shelf.

## 2.2 The NO<sub>x</sub> scheme 2011-2017

The NO<sub>x</sub> scheme 2011-2017 is based on the conclusion of an environmental agreement between 15 business organisations representing enterprises emitting NO<sub>x</sub> (“the Business

---

<sup>1</sup> The Norwegian authorities have indicated that the Gothenburg Protocol and the EU Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants (“the NEC Directive”) are due to be revised which should lead to new NO<sub>x</sub> emission ceilings from 2020. In accordance with the Gothenburg Protocol and the NEC Directive, Norway’s total annual emissions of NO<sub>x</sub> shall not exceed 156 000 tons from 2010 onwards.

Organisations”)<sup>2</sup> and the Ministry of Environment on the implementation of NOx emission reducing measures in accordance with a predetermined environmental target.

The tax exemption was introduced in order to achieve a higher reduction in national emissions of NOx than would have been achieved by the mere application of the full tax rate.

### *2.2.1 National legal basis for the aid measure*

Section 2, sub-section (e), of the Storting’s resolution on taxes on emissions lays down the legal basis for the exemption from the NOx tax.

Section 2 provides as follows:

*“An exemption is made on the excise duty for emissions of NOx for:*

- a) (...)*
- b) (...)*
- c) (...)*
- d) (...)*
- e) sources of emissions that are regulated by an environmental agreement signed with the Norwegian government for initiating measures to reduce NOx that are implemented in accordance with established national environmental goals.*

*The Ministry may issue regulations limiting and imposing conditions on exemptions.”*

The proposed scheme is based on the conclusion of two agreements: the “NOx Agreement” (2.2.2) and the “Participant Agreement” (2.2.3).

### *2.2.2 The environmental agreement between the Norwegian State and the fifteen Business organisations (NOx Agreement)*

The NOx Agreement is a collective environmental agreement between fifteen business organisations representing undertakings emitting NOx and the Ministry of Environment on behalf of the Norwegian Government. The main objective of the NOx Agreement is to reduce annual emissions of NOx from sources covered by the Storting’s resolution on taxes on emissions by 16 000 tonnes for the period 2011-2017.<sup>3</sup>

The Business Organisations party to the NOx Agreement have committed themselves collectively to ensure the implementation of measures that will reduce their emissions of NOx by 16 000 tonnes by the end of 2017 regardless of whether this contributes to an over fulfilment of current international commitments. The NOx Agreement 2011-2017 does not provide for the possibility to adjust the reduction obligation downward due to changes in the Norwegian emission projections. The NOx Agreement however opens for renegotiation of the commitments from 2013 if higher reduction commitments are necessary in order for Norway to fulfil current international obligations.

---

<sup>2</sup> The Business Organisations that have entered into the NOx Agreement 2011-2017 are the same as the ones that had entered into the NOx Agreement 2008-2010 to which must be added KS Enterprises following the decision of the Storting to include waste incineration in the activities potentially benefiting from the tax exemption (see regulation of 25.11.2010 nr. 1535).

<sup>3</sup> See Article 2.1 of the NOx Agreement.

Article 1 of the NOx Agreement provides that a prerequisite for a continued NOx tax exemption is that the Business Organisations ensure that the emission reduction effect obtained under the NOx Agreement 2008-2010 is maintained throughout the entirety of the new agreement period.

The Business Organisations do not themselves produce emissions of NOx that are subject to the NOx tax. It is the undertakings which emit NOx who will join the scheme. Each individual undertaking wishing to join the scheme must therefore sign a Participant Agreement. It may either join the Participant Agreement which has already been signed or enter directly into a new specific environmental agreement with the Norwegian Ministry of Environment.

Pursuant to Article 2.7, the NOx Agreement is to be regarded as an environmental agreement that gives a basis for temporary exemptions from the NOx tax for undertakings that join the scheme through the Participant Agreement binding the Business Organisations and the participating undertakings. Undertakings that affiliate themselves with the NOx Agreement, receive the rights and obligations that are set forth in the NOx Agreement and the Participant Agreement.

According to Article 2.4 of the NOx Agreement, the Business Organisations shall establish the NOx Fund, which purpose it is to support the Business Organisations in fulfilling their obligations under the NOx Agreement. The Business Organisations shall through, the continued operation of the NOx Fund, carry out the tasks that follow from the NOx Agreement, the Participant Agreement and the statutes of the NOx Fund. The NOx Fund shall, *inter alia*, require on behalf of the Business Organisations, payment of a fixed fee per kg of emissions of NOx, and shall, on behalf of the Business Organisations, provide financial support for cost-efficient measures to reduce NOx. The NOx Fund shall be operated in accordance with the non-profit principle. The Norwegian State will have no right to control or issue instructions to the NOx Fund and will have no claim for representation on the Fund's governing bodies.

#### 2.2.2.1 Obligations of the Business Organisations

Article 3.1 of the NOx Agreement provides that the Business Organisations shall, through the operation of the NOx Fund, ensure that they fulfil the objectives of the NOx Agreement as set out in Article 2.1.

Any possible over-fulfilment of the annual reduction obligations in the NOx Agreement 2008-2010 shall be deducted from the reduction obligation in the NOx Agreement 2011-2017. Similarly, any possible under-fulfilment of the annual reduction obligations in the NOx Agreement 2008-2010 shall be added to the reduction obligation for 2011 in the NOx Agreement 2011-2017.

Article 3.2 also stipulates that the Business Organisations must achieve annual reductions in emissions based upon projections as follows:

- Measures implemented in 2011 that reduce annual NOx emissions by 3000 tonnes (at the latest by the first quarter of 2012)
- Measures implemented in 2012 that reduce annual NOx emissions by 2000 tonnes (at the latest by the first quarter of 2013)

- Measures implemented in 2013-2014 that reduce annual NO<sub>x</sub> emissions by 4000 tonnes (at the latest by the first quarter of 2015)
- Measures implemented in 2015-2016 that reduce annual NO<sub>x</sub> emissions by 4000 tonnes (at the latest by the first quarter of 2017)
- Measures implemented in 2017 that reduce annual NO<sub>x</sub> emissions by 3000 tonnes (at the latest by the end of 2017)

Article 3.3 provides that any possible over-fulfilment of the reduction obligation for each of the periods 2011, 2012, 2013-2014, 2015-2016 shall be deducted from the reduction obligation for the subsequent period. Any possible under fulfilment of the reduction obligation for one of these periods shall, if the NO<sub>x</sub> Agreement is not terminated or ended in another manner, be added to the reduction obligation for the subsequent period.

Furthermore, the Business Organisations shall ensure through the NO<sub>x</sub> Fund that implemented measures that are undertaken by the affiliated undertakings are operated in a manner that maintains the emission reduction effects at least until 31 December 2018.

Article 7 imposes detailed reporting obligations on the Business Organisations. They shall within 31 May of the years 2012-2017, provide the Climate and Pollution Agency with an overview of the measures implemented and contracts entered into during the previous year and the first quarter of the present year as well as an overview of the NO<sub>x</sub> emissions per sector (annual report). In addition, the Business Organisations shall within 31 May of 2012, 2013, 2015, 2017 and 2018, furnish a written report to the Climate and Pollution Agency and the Ministry of Environment concerning the fulfilment of the emission reduction obligation (status report). The Business Organisations shall provide a concluding report to the Ministry of Environment in 2018 indicating whether the total emission reductions have been achieved. Finally, they shall also provide a report in 2019 showing whether the total emission reduction obligations have been fulfilled.

According to Article 8 of the NO<sub>x</sub> Agreement, the Climate and Pollution Agency shall review the annual reports and status reports and control compliance with the reduction obligations for the periods 2011, 2012, 2013-2014, 2015-2016 and 2017.

Article 9.1 provides that every undertaking producing NO<sub>x</sub> emissions and which may undertake emission reductions may affiliate itself with the NO<sub>x</sub> Agreement by sending a Participant Declaration to the NO<sub>x</sub> Fund.

Article 9.2 provides that participation in the NO<sub>x</sub> Agreement and in the Participant Agreement gives the participating undertakings the right to exemption from the NO<sub>x</sub> tax.

#### 2.2.2.2 Obligation to pay tax in the event of a lack of fulfilment of the reduction

Article 9.4 provides that if the Climate and Pollution Agency finds that the participating undertakings have fulfilled less than 90% of their annual reduction obligation before the deadline, a tax obligation will arise for the relevant calendar year. The tax is due to be paid on 18<sup>th</sup> July of the following year.

For 2017, the tax obligation arises if the status report shows that the Business Organisations have fulfilled less than 100% of their annual reduction obligation within the deadline. The NO<sub>x</sub> tax shall be paid according to a declared quantity of emissions of NO<sub>x</sub>

for the preceding year from taxable sources for the period during which they have been exempted from the tax. The NOx tax rate shall be reduced by the percentage share of the annual emission reduction rate that has been fulfilled. The Climate and Pollution Agency shall decide which rate is to be applied by the undertakings liable to pay the reduced tax. This payment obligation means that if the Business Organisations fulfil 60% of the annual reduction obligation, the taxable source shall pay 40% of the ordinary NOx tax. As an upper limit, the payment to the NOx Fund and the NOx tax to be paid shall not exceed what the undertaking would have paid in ordinary tax if the exemption did not exist.

### 2.2.3 *The Participant Agreement*

The Participant Agreement creates rights and obligations between the individual undertakings and the Norwegian State. Participation in the NOx Agreement is confirmed through the issuance of a Participation Certificate by the NOx Fund. Undertakings receiving a Participation Certificate will be committed to the fulfilment of the obligations and benefit from the conditions provided in the NOx Agreement.

Instead of paying the entirety of the NOx tax to the Norwegian State, undertakings that are party to the NOx Agreement will pay a smaller amount to the NOx Fund. The level of the fees will be determined by the NOx Fund and not the State. The payments made by participating undertakings shall be paid into the NOx Fund, which shall, in turn, allocate financial support to some individual undertakings to support the implementation of emission reducing measures. The operation of the scheme is described in detail below.

Part I provides that by signing the Participant Agreement, the undertaking joins the NOx Agreement. Participation is confirmed through the issuance of a Participant Certificate by the NOx Fund. The undertaking is then committed to fulfilling the obligations and is granted the benefits set forth in the NOx Agreement and the Participant Agreement.

Part II, Article 2 provides that by joining the scheme, each individual undertaking is committed to fulfilling the following obligations *vis-à-vis* the Business Organisations and the NOx Fund:

- a) An obligation to pay the NOx Fund an amount (to be determined) per kilogram of NOx emissions;
- b) Formulation of a plan/application relating to NOx reducing measures for their own undertaking;
- c) Implementation of NOx reducing measures by their own undertaking;
- d) Participant undertakings must ensure that implemented measures that have been granted support from the NOx Fund during the period 2008-2010 are kept in operation;
- e) Reporting of reduced NOx emissions to the NOx Fund;
- f) Loyalty to the NOx Fund, its statutes and its decisions that affect their operations.

Pursuant to Article 4, each undertaking must formulate its own measures plan for NOx reductions. The measures plan containing the implementable, permanent and cost-effective measure shall be submitted to the NOx Fund within a period of two years

following the signing of this Participant Agreement. Participating undertakings are obliged to update their measure plan every other year.

Article 5 sets forth the administrative procedure according to which the NOx Fund determines which measures are to be granted support. Permanent measures yielding the largest NOx reduction in volume shall be granted priority. The NOx Agreement does not favour a specific technological solution.

Article 7 sets out the reporting obligations of participant undertakings.

Article 8 provides that in special circumstances, the NOx Fund may impose a coercive fine before a violation has been established, in order to ensure adequate pressure with regard to fulfilment for enterprises that are to implement and maintain the effect of measures during the NOx Agreement period. The coercive fine shall run from the date of commencement of the possible violation. The NOx Fund may revoke an enterprise's participant certificate if the undertaking significantly violates its obligations laid down in the Participant Agreement or in the NOx Agreement.

The NOx Fund may first revoke the Participant Certificate on the basis of a breach of contract if the participant undertaking fails to correct its non-compliance with the obligations stipulated within 30 days following a written notification relating to the violation. In the event of several notifications relating to violations from the NOx Fund, a shorter deadline for compliance may be stipulated.

Article 9 provides that in the event the NOx Fund should revoke an undertaking's Participant Certificate, the undertaking will lose its entitlements that follow from the NOx Agreement and the Participant Agreement as of that day. The undertaking will also have to repay all the support received from the NOx Fund if the support has not been spent on NOx reducing measures.

Article 11 lays down the obligation to pay tax in the event of a lack of fulfilment of the reduction obligation which mirrors the provision contained in Article 9.4 of the NOx Agreement (see above section 2.2.2.2).

### **2.3 Recipients**

All undertakings that are subject to the NOx tax may enter into the NOx Agreement with the Norwegian State by signing the Participant Agreement in order to be granted full relief from the tax.

### **2.4 Budget and duration**

The NOx Agreement provides that undertakings may benefit from a tax exemption for a maximum period of seven years, from 1 January 2011 until 31 December 2017. The Norwegian authorities have indicated that the NOx Agreement 2011-2017 contains two elements of retroactivity. Firstly, undertakings which affiliate themselves with the NOx Agreement 2011-2017 before the Authority's approval of the notification will have the right to a refunding of the NOx tax they have paid between the date they have signed the Participant Agreement and the date of the Authority's approval. Secondly, undertakings entering into the Agreement before 1 July 2011 will be refunded the tax they have paid during the period from 1 January 2011 until the date the Authority adopted its decision.

The Norwegian authorities have indicated that if all companies that have affiliated themselves with the NOx Agreement 2008-2010, choose to enter into the new NOx Agreement 2011-2017, the exemption will lead to a loss of tax revenue of NOK 1 390 million in 2011.

## II. ASSESSMENT

### 1. The presence of state aid

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.”*

In order to constitute state aid within the meaning of Article 61(1) EEA, a measure must meet four cumulative criteria. The measure must: (i) confer on recipients an economic advantage which is not received in the normal course of business, (ii) the advantage must be granted by the State or through state resources; (iii) the measure must be selective by favouring certain undertakings or the production of certain goods; and (iv) it must distort competition and affect trade between the Contracting Parties.

#### 1.1 Presence of state resources

The aid measure must be granted by the State or through state resources.

The Authority takes the view that through the grant of an exemption to participating undertakings, the Norwegian State renounces tax revenue which it would normally have received from those undertakings. The absence of these revenues represents a burden on state resources from charges that are normally borne from the budgets of participating undertakings.<sup>4</sup> A loss of tax revenue is equivalent to the consumption of state resources in the form of fiscal expenditure.<sup>5</sup>

#### 1.2 Favouring certain undertakings or the production of certain goods

The measure must favour certain undertakings or the production of certain goods.

The Authority considers that the measure is selective in nature due to the discretionary power of the Norwegian authorities as regards the actual implementation of the exemption.

According to the case law of the European Courts, even interventions which *prima facie* apply to undertakings in general may be selective, and accordingly be regarded as measures designed to favour certain undertakings or the production of certain goods.<sup>6</sup> That is the case in particular, where the administration called upon to apply a general rule has a discretionary power so far as concerns the application of the measure. The State Aid Guidelines on business taxation also make clear that the discretionary practices of some tax authorities may also give rise to measures that are caught by Article 61.

<sup>4</sup> Case C-156/98 *Germany v Commission* [2000] ECR I-6857, at paragraph 26.

<sup>5</sup> See inter alia Section 3(3) of the State Aid Guidelines on the application of state aid rules to measures relating to direct business taxation.

<sup>6</sup> Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 23 and 24, Cases T-92/00 and T-103/00 *Ramondin v Commission* [2002] ECR II-1385.



According to Section 2(e) of the Storting's resolution on taxes and emissions, an exemption is made on the excise duty for emissions of NO<sub>x</sub> for sources of emissions that are regulated by an environmental agreement signed with the Norwegian government for initiating measures to reduce NO<sub>x</sub> that are implemented in accordance with established national environmental goals. The wording of the Act does not however, indicate whether the State is obliged to enter into such agreements if certain conditions are fulfilled or the State enjoys discretion in that regard. In any event, the Act does not indicate what conditions would have to be fulfilled in order to conclude an agreement with the State.

The last sentence after section 2(e) of the Storting's resolution on the duty on NO<sub>x</sub> emissions provides that "*the Ministry may regulate the conditions, limitations and implementations of the exemptions*".

The Act therefore appears to give the State discretion with regard to whether it wishes to enter into such agreements.

The Ministry may therefore exercise its discretion to grant certain undertakings exemptions and not others. The proposed measures therefore favour undertakings to the exclusion of others and are accordingly, selective in nature.

### **1.3 Economic advantage**

As regards the requirement that a measure must confer an economic advantage, such an advantage may be provided through a reduction in undertakings' tax burdens in various ways, including a reduction in the tax base or total or partial reduction in the amount of tax or a deferment of tax liability. In the present case, undertakings that are usually subject to the NO<sub>x</sub> tax but benefit from an exemption under the proposed measures therefore receive an economic advantage.

### **1.4 Distortion of competition and effect on trade between Contracting Parties**

The aid measure must distort competition and affect trade between the Contracting Parties to the EEA Agreement.

The NO<sub>x</sub> tax concerns activities involving large ships or production of goods that compete internationally such as the offshore petroleum sector. Such undertakings will therefore be involved in trade between EEA States. The grant of support via tax exemptions to undertakings in such sectors will strengthen the position of recipients compared to other undertakings which are located in Norway or in other EEA countries and competing in such businesses.

The Authority therefore considers that the grant of financial support through the NO<sub>x</sub> tax exemption to undertakings operating in the above-mentioned sectors, may distort competition and affect trade.

## **2. Procedural requirements**

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*".

By submitting a notification of the scheme for the temporary NO<sub>x</sub> tax exemption for undertakings encompassed by an environmental agreement with the State on the

implementation of measures to reduce emissions of NO<sub>x</sub> in accordance with a predetermined environmental target with a letter dated 21 March 2011 (Event No 591459), the Norwegian authorities have complied with the notification requirement.

Article 2.8 of the NO<sub>x</sub> Agreement provides that it shall not give a right to a tax exemption prior to approval being granted by the Authority. By including such a provision in the NO<sub>x</sub> Agreement, the Norwegian authorities have complied with their stand still obligation.

The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

### 3. Compatibility of the aid

#### 3.1 The aid in the form of an exemption from environmental taxes must contribute to the improvement of the level of environmental protection

Article 61 (3)(c) of the EEA Agreement provides that aid to facilitate the development of certain economic activities may, where such aid does not adversely affect trading conditions to an extent contrary to the common interest of the Contracting Parties to the EEA Agreement, be found compatible with that Agreement.

The Authority has assessed the compatibility of the notified exemption of the NO<sub>x</sub> tax for undertakings that have entered into environmental agreements with the Norwegian State with Article 61(3)(c) of the EEA Agreement in conjunction with the Chapter of the Authority's Guidelines on State Aid for environmental protection ("the Environmental Guidelines").<sup>7</sup>

According to Article 151 of the Environmental Guidelines, aid in the form of an exemption from environmental taxes will be considered compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) of the EEA Agreement provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the tax reduction and exemption does not undermine the general objective pursued.

##### *3.1.1 The aid must contribute at least indirectly to an improvement of the level of environmental protection*

As regards fulfilment of the condition that the exemption contributes at least indirectly to an improvement of the level of environmental protection, the objective of the tax exemption and of the NO<sub>x</sub> Agreement is that the parties to the NO<sub>x</sub> Agreement commit themselves to reduce annual emissions of NO<sub>x</sub>. The 15 Business Organisations have committed themselves to ensure the implementation of measures which will reduce emissions of NO<sub>x</sub> by 16 000 tonnes by the end of 2017.

The Norwegian authorities have indicated that the NO<sub>x</sub> Agreement 2008-2010 has been an efficient measure for the reduction of NO<sub>x</sub> emissions. The Norwegian Climate and Pollution Agency has confirmed that the business organisations have complied with their emission reduction commitments in both 2008 and 2009. The current project plans for

---

<sup>7</sup> Available on the Authority's website at: <http://www.eftasurv.int/?1=1&showLinkID=16015&1=>

2010 and 2011 indicate that they will also comply with their obligations for the last period of the NOx Agreement 2008-2010.

The Norwegian authorities have indicated that the NOx Agreement 2008-2010 has led to a significant increase in the level of environmental protection by leading to the implementation of measures that go beyond emission reductions following from Community Standards and other internationally agreed standards that are applicable to Norway, by contributing to an expansion of delivery capacity for emission reduction measures, and by stimulating technological development.

The NOx Agreement 2008-2010 has provided further and more predictable reductions in emissions of NOx within the time frame of the NOx Agreement than what was the expected effect of the NOx tax.

The NOx Agreement 2011-2017 should have at least the same positive impact as the NOx Agreement 2008-2010. In addition to leading to a reduction in NOx emission levels, the NOx Agreement 2011-2017 will provide an incentive for undertakings to take the economic and operational risks involved in investing in new promising technological solutions, which have not yet been fully documented. For the purpose of securing long term effects on the emissions of NOx, the organisations will also establish contact with relevant research bodies. The NOx Agreement should thus contribute to the development of new technologies and enhance the launching of new technologies.

### *3.1.2 The tax exemption must not undermine the general objective pursued*

The tax exemption cannot be seen as undermining the general objective pursued by the NOx tax. Rather, the exemption pursues its general objective further. Indeed, the aim of the NOx tax is, by imposing a financial contribution proportionate to the pollution made, to encourage undertakings to take concrete measures to reduce NOx emissions. The possibility to be exempted from the NOx tax goes further as it encourages the undertakings to combine their financial resources in order to enable them to implement measures which on their own they could less easily afford, thus achieving a direct and long term reduction in NOx emissions. Should the collective target not be reached, the general objective of the NOx tax will in any event not be undermined as the tax will, in any case, be payable *pro rata*. The Authority therefore considers that the second condition mentioned above is also met.

The NOx Agreement 2011- 2017 with its explicit aim to provide a long term and enduring reduction of the emissions of NOx will contribute to a further development of new and better technological solutions and improve their accessibility.

Where the exemption concerns taxes that have not been harmonised within the Community, as is the case here, paragraph 154 of the Environmental Guidelines provides that the reductions or exemptions will be considered to be compatible with the functioning of the EEA Agreement for a period of ten years provided that the conditions set out in paragraphs 155 to 159 relating to necessity and proportionality are fulfilled.

## **3.2 The aid in the form of an exemption from environmental taxes must be necessary**

Previous case law of the European Courts has established that in order for a measure to be compatible with Article 87(3)(c) of the Treaty on the Functioning of the European Union

(“TFUE”) (corresponding to Article 61(3)(c) of the EEA Agreement), it must not only comply with one of the objectives set out in Article 87(3)(a), (b) or (d), but must also be necessary for the attainment of those objectives.<sup>8</sup>

This principle is also referred to at paragraph 27 of the Environmental Guidelines which provides as follows: “*state aid for environmental protection must result in the recipient of the aid changing its behaviour so that the level of environmental protection will be higher than if the aid had not been granted*”. (Emphasis added)

In addition, paragraph 158 of the Environmental Guidelines stipulates that three conditions must be met in order for the aid measure to be considered necessary. The three conditions are the following:

Firstly, the choice of the beneficiaries must be based on objective and transparent criteria, and the aid must be granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar situation.

The State has discretion with regard to which agreements it wants to enter into. However, once such an agreement has been made, emitting undertakings would benefit from the tax exemption. There are no additional conditions set, any undertaking emitting NOx may benefit from the exemption if it enters into a collective agreement with the State. All undertakings that have entered into environmental agreements with the State shall benefit from the tax exemption in the same manner.

The Authority considers that the first condition of paragraph 158 of the Environmental Guidelines is met on the basis that the possibility to enter into agreements is open to all sectors covered by the NOx tax and it is not restricted to any specific sector or industry.

The second and third conditions of paragraph 158 of the Environmental Guidelines provide that the environmental tax without reduction must lead to a substantial increase in production costs and that this increase cannot be passed on to customers without leading to important sales reductions.

In terms of the increase in production costs, the Norwegian authorities have stated that without reduction, the NOx tax would lead to substantial increases in production costs for undertakings in the majority of sectors affected by the tax.

The Norwegian authorities have indicated that the activities coming within the scope of the potential tax exemption are typically transport by ship or by plane, heavy engineering, or energy generation at an industrial scale in addition to oil and gas production. Such activities are generally subject to strong international competition.

In sectors such as fish and fish products, oil and gas and industrial products such as paper, metals, and building materials, Norwegian undertakings are not in a position to independently set the prices of their products. Due to their limited size and the presence of foreign undertakings on the various markets they would be price takers, *i.e.* they have in their business behaviour to take prices on their products as given on the international markets. This means that their possibilities are very limited to carry increased costs, such as a NOx tax, over in products prices. If a producer faces a fixed, exogenously set market

---

<sup>8</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 17 and case T-187/99, *Agrana Zucker und Starcke AC v Commission*, paragraph 74.

price, that means that the demand for his product is infinitely elastic. A small increase in price would seriously diminish any demand.<sup>9</sup>

Further evidence that the substantial increase in costs cannot be passed on is the fact that the proposal to introduce the notified regime was instigated by the industry itself. Originally, the Norwegian Government had proposed in the 2007 Fiscal Budget to introduce the tax without any option for environmental agreements. Only after pressure from the industry did the Parliament provide for the possibility to introduce such agreements. If it had been possible for the industry to pass on the tax to the customers, it would not have asked for the possibility to enter into agreements with the State.

In conclusion, in light of the above, the Authority considers that the second and third conditions of paragraph 158 of the Environmental Guidelines are met.

### **3.3 The aid in the form of an exemption from environmental taxes must be proportional**

Paragraph 159(c) of the Environmental Guidelines provides the framework for conducting the proportionality assessment of the proposed scheme. In order to fulfil the requirements of paragraph 159(c), the aid scheme must satisfy three conditions under (see below 5.3.1, 5.3.2 and 5.3.3). In addition, the undertakings must commit themselves to achieve environmental protection objectives which have the same effect as if point (a) or (b) of paragraph 159(c) or the Community minimum tax level were applied. These conditions are considered in turn.

#### *3.3.1 The agreements must be negotiated by each EFTA State and must specify the targets and fix a time schedule*

Pursuant to condition (i) of paragraph 159(c), the substance of the agreements must be negotiated by each EFTA State and must specify in particular the targets and fix a time schedule for reaching the targets. It follows from the description in Section 2.2 above, of the NO<sub>x</sub> Agreement of the targets and time schedules applicable, that the conditions set out in point (i) of paragraph 159(c) of the Environmental Guidelines are met.

#### *3.3.2 EFTA States must ensure independent and timely monitoring of the commitments concluded in these agreements*

Under condition (ii) of paragraph 159(c), the EFTA States must ensure independent and timely monitoring of the commitments concluded in these agreements. Regarding monitoring of the commitments, the NO<sub>x</sub> Agreement imposes various reporting obligations in the form of annual and status reports. It is the Climate and Pollution Agency which will review all the reports submitted.

The Authority therefore considers that the condition set out in point (ii) of paragraph 159(c) of the Environment Guidelines is met.

---

<sup>9</sup> Determination of oil prices, shipping air freight rates, energy prices, and various other product prices for undertakings benefiting from the tax exemption is largely outside the control of the undertakings benefiting from the tax exemption. This is particularly so for export industries. Undertakings competing on the domestic market with imports are to a substantial degree in the same position. There are therefore limited possibilities for increased costs as a result of the introduction of the NO<sub>x</sub> tax to be passed on to consumers in any substantial way.

### *3.3.3 The agreements must be revised periodically and stipulate effective penalty arrangements*

According to paragraph 159(c), the NOx Agreement must be revised periodically in the light of technological and other developments and must stipulate effective penalty arrangements.

The NOx Agreement 2011-2017 opens for renegotiations of the reduction commitments from 2013 if the emission inventories or updated emission projections for the coming years as provided by the Ministry of Finance and the Climate and Pollution Agency indicate that Norway's annual NOx emissions might exceed 156 000 tonnes, and changes are necessary in order to fulfil Norway's obligations under the Gothenburg Protocol and the EU's NEC Directive. The NOx Agreement does not however open for renegotiation if the reduction commitments result in an over fulfilment of current international commitments. It is only the Norwegian State represented by the Ministry of Environment that can initiate renegotiations.

In addition, the State, represented by the Ministry of Environment, may initiate a renegotiation of the NOx Agreement if new international renegotiations necessitate changes in the use of policy measures. If the State, represented by the Ministry of Environment, has initiated negotiations on the basis of the revision clauses, and the parties fail to agree on new obligations, the State or the Business Organisations may collectively terminate the NOx Agreement. In such a case, the duty to pay the NOx tax will start the first day of the first month following the termination.

Regarding the condition relating to penalty arrangements, a distinction should be made between the penalty arrangements in relation to the NOx Agreement and those in relation to the Participant Agreement.

Article 9.4 of the NOx Agreement provides that where the collective NOx emissions targets are not met, the undertakings will lose the benefit of the full tax exemption.

The loss of the benefit will be immediate only where the emission reduction amounts to less than 90% of the target. If emission reductions are between 90 and 100% of the target, the under-fulfilment will be carried over to the next year. At the end of the scheme, it will not be possible to carry over any under-fulfilment, and the tax will be due as soon as the collective target (including any under-achievement carried over from preceding years) is not reached.

The sanction is proportionate to the emission reduction obtained during that period (see above section 2.2.2.2). As an upper limit, the payment to the NOx Fund and the tax duty shall not exceed what the company would have paid as ordinary NOx tax. All undertakings will be held liable if the collective target is not met and will have to pay the outstanding NOx tax. In addition, any under achievement of the reduction obligation for one of the periods will lead to both an extra reduction obligation for the following year for all the undertakings and if the underachievement exceeds 10%, to an extra financial sanction for the individual undertakings.

Section 8 of the Participant Agreement provides that the NOx Fund may, in special cases, impose a coercive fine in relation to an individual obligation specified according to the Participant Agreement 2011-2017, in order to ensure adequate pressure on the

undertakings that are to implement measures during the NO<sub>x</sub> Agreement period, and to ensure that they operate measures implemented in the time period 2011-2017 in a way that ensures the emission reduction effect for the whole time period.

Furthermore, in addition to the coercive fine, where an undertaking fails to comply with its individual obligation, the Certificate of Participation may be withdrawn. The NO<sub>x</sub> Fund may first withdraw the Certificate of Participation on the basis of a breach of contract if the undertaking fails to correct its non-compliance with its obligations within 30 days following a written notification relating to the obligation from the NO<sub>x</sub> Fund. The undertaking will then lose the benefit of the NO<sub>x</sub> exemption and will have to repay the all support received from the NO<sub>x</sub> Fund not spent on NO<sub>x</sub> emission reducing measures. The undertaking will furthermore have to pay the NO<sub>x</sub> tax on the day the Certificate of Participation is withdrawn.

In relation to the proportionality of aid, paragraph 159(c) of the Environmental Guidelines provides that the undertakings party to the NO<sub>x</sub> Agreement must commit themselves to achieve environmental protection objectives which have the same effect as if point (a) or (b) of paragraph 159 or the Community minimum tax level were applied.

According to paragraph 159(b) of the Environmental Guidelines, the aid will be proportional if the undertakings pay at least 20% of the NO<sub>x</sub> tax, unless a lower rate can be justified in view of a limited distortion of competition.

The Authority has considered the scenario under which the participating undertakings pay 20% of the NO<sub>x</sub> tax. As discussed in section 2.2 above, the Norwegian State introduced a tax on emissions of NO<sub>x</sub> in order to encourage undertakings to take steps to reduce their emissions and introduce abatement technologies.

The most recent assessments by Det norske Veritas indicate that a reduction in annual emissions of about 17 000 tonnes may be achieved by implementing abatement measures at a socio-economic cost of NOK 3.30/ kg NO<sub>x</sub> reduced, corresponding to 20% of the current tax rate. Consequently, the effect of the commitment made collectively by the participating undertakings for the years 2011-2017 is foreseen to be much higher than the effect of paying 20% of the tax on NO<sub>x</sub> emissions.

### **3.4 Duration**

Paragraph 154 of the Environmental Guidelines provides that the maximum duration of a scheme considered compatible with Article 61(3)(c) EEA is of ten years.

Under the NO<sub>x</sub> Agreement 2011-2017, the undertakings may as a maximum be subject to a tax exemption for a period of seven years, from 1 January 2011 until 31 December 2017.

## **4. Cumulation**

The Norwegian authorities have indicated that the NO<sub>x</sub> Agreement contain provisions to ensure that the undertakings benefiting from the NO<sub>x</sub> exemption cannot cumulate the tax exemption with other forms of state aid.

## **5. Conclusion**

On the basis of the foregoing assessment, the Authority considers that the scheme for the temporary NO<sub>x</sub> tax exemption for undertakings encompassed by an environmental agreement with the State on the implementation of measures to reduce emissions of NO<sub>x</sub>

in accordance with a predetermined environmental target which the Norwegian authorities are planning to implement is compatible with the functioning of the EEA Agreement within the meaning of Article 61 of the EEA Agreement.

The Norwegian authorities are reminded about the obligation resulting from Article 21 of Part II of Protocol 3 in conjunction with Articles 5 and 6 of Decision No 195/04/COL to provide annual reports on the implementation of the scheme.

The Norwegian authorities are also reminded that all plans to modify this scheme must be notified to the Authority.

HAS ADOPTED THIS DECISION:

*Article 1*

The scheme for the temporary NO<sub>x</sub> tax exemption for undertakings encompassed by an environmental agreement with the State on the implementation of measures to reduce emissions of NO<sub>x</sub> in accordance with a predetermined environmental target is compatible with the EEA agreement.

*Article 2*

The implementation of the measure is authorised accordingly.

*Article 3*

This Decision is addressed to the Kingdom of Norway.

*Article 4*

Only the English language version of this decision is authentic.

Decision made in Brussels, on 19 May 2011.

*For the EFTA Surveillance Authority*

Per Sanderud  
*President*

Sabine Monauni-Tömördy  
*College Member*