

Case No: 70337
Event No: 730323
Dec. No: 36/15/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 4 February 2015

to close the case concerning state aid granted to publicly owned hospital pharmacies in
Norway

(Norway)

The EFTA Surveillance Authority (the “Authority”),

HAVING REGARD to:

The Agreement on the European Economic Area (the “EEA Agreement”), in particular to Article 62 and Protocol 26 thereof,

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 thereof,

Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular Article 19(1) of Part II,

WHEREAS:

- (1) By letter dated 19 July 2011,¹ the Authority initiated the procedure provided for in Article 17(2) of Part II of Protocol 3 with respect to the financing of publicly owned hospital pharmacies in Norway (the “Article 17(2) letter”). The Authority informed the Norwegian authorities of its preliminary view that the financing of publicly owned hospital pharmacies involves state aid that is incompatible with the EEA Agreement.
- (2) By letter dated 28 October 2011,² the Norwegian authorities responded to the Article 17(2) letter. The Authority and the Norwegian authorities discussed the case in a meeting on 29 November 2011. Following that meeting, the Norwegian authorities provided further comments to the Authority by letter of 12 March 2012.³
- (3) The public hospital pharmacies are funded by the Regional Health Authorities which in turn are funded by the Norwegian State through the State budget. One part of the activities conducted by public hospital pharmacies consists of retailing pharmaceutical products and non-pharmaceutical products on public hospital premises i.e., retail sale of products ‘over-

¹ Event No 590439.

² Event No 613439.

³ Event No 627783.

the-counter' to discharged patients and out-patients of the hospital and to the general public (the "retail activities"). This is an economic activity involving sale to the general public which is conducted in competition with private pharmacies.

- (4) In a decision dated 20 November 2013 (Decision No 460/13/COL), the Authority found that the financing system of public hospital pharmacies did not prevent the transfer of state resources meant for their non-commercial activities to their retail activities conducted in competition with private pharmacies. The Authority also found that the non-profit orientation on the public hospital pharmacies' retail activities did not meet the market investor test. Further, the Authority held that the tax exemption for the public hospital pharmacies, to the extent it covers income from the retail activities, was incompatible with the state aid rules of the EEA Agreement.
- (5) In its Decision of 20 November 2013, the Authority therefore concluded that cross-subsidisation of retail activities of the public hospital pharmacies, foregone profits and exemption from income tax for the retail activities of the public hospital pharmacies constituted existing state aid which is incompatible with the functioning of the EEA Agreement.⁴
- (6) The Authority proposed that the Norwegian authorities should take the following appropriate measures in order to ensure that no aid is granted in the future to the retail activities of the public hospital pharmacies:
 - In accordance with the Authority's practice, separate accounts should be kept for the retail activities of the public hospital pharmacies.
 - All costs, both direct and indirect, as well as an appropriate contribution to the common costs and revenues shall be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles. This shall also apply to the costs for rental of the retail premises.
 - The retail activities of public hospital pharmacies should be required to achieve profits comparable to what a private investor would expect from a similar undertaking.
 - The tax exemption for the activities of the public hospital pharmacies should be modified so that the tax exemption does not cover the retail activities of the public hospital pharmacies.
- (7) The Authority required the Norwegian authorities to implement the measures not later than 1 January 2015.
- (8) By letter dated 20 January 2014,⁵ the Norwegian authorities accepted the appropriate measures proposed by the Authority. The Norwegian authorities stated that they intended to implement the following measures:
 - Ensure that separate accounts will be kept for the retail activities of the public hospital pharmacies, and that accounting principles according to which separate accounts are maintained will be clearly established.

⁴ Article 1 of the Authority's Decision No 460/13/COL. The Decision is available on the Authority's website: <http://www.eftasurv.int/media/decisions/460-13-COL.pdf>.

⁵ Event No 696154.

- All costs, both direct and indirect, as well as an appropriate contribution to the common costs and revenues will be assigned and allocated on the basis of objectively justifiable accounting principles.
- The retail activities of the public hospital pharmacies will be required to achieve profits comparable to what a private investor would expect from a similar undertaking.

The Regional Health Authorities will be assigned the task of working out a detailed proposal on how these measures will best be implemented. The proposal should be presented to the Ministry of Health and Care Services within autumn 2014.

- Amend the Norwegian Tax Act,⁶ in order to make sure that publicly owned hospital pharmacies will be subject to taxation on income derived from retail activities. A legislative proposal would be presented to the Norwegian Parliament which should ensure that a relevant amendment to the Tax Act could take effect within the time limit set by the Authority.
- (9) By e-mail dated 12 May 2014,⁷ the Norwegian authorities informed the Authority that the amendments to the Tax Act were submitted on public consultation.⁸ Further, the Ministry of Health and Care Services informed the Regional Health Authorities about the measures to be implemented to comply with the Authority's appropriate measures concerning establishing separate accounts for the retail activities of the public hospital pharmacies, cost allocation and the profit requirement for the retail activities of public hospital pharmacies.
- (10) By e-mail dated 4 November 2014,⁹ the Norwegian authorities informed the Authority that the Norwegian Government had proposed a tax duty for the public hospital pharmacies in the State Budget of 2015,¹⁰ which will take effect as from the financial year of 2015. Furthermore, the Norwegian authorities informed the Authority that all four Regional Health Authorities have confirmed that the implementation of the appropriate measures are proceeding according to plan and will be finalized by 1 January 2015.
- (11) By e-mail dated 19 December 2014,¹¹ the Norwegian authorities informed the Authority that the tax duty for the public hospital pharmacies was introduced by the Norwegian Government in the State Budget for 2015. The proposal, which implies an amendment of the Norwegian Tax Act in Section 2-30 (1) letter g No 5,¹² was adopted by the Norwegian Parliament on 18 December 2014. Further, the Norwegian authorities informed the Authority that all four Regional Health Authorities have several times reported to the

⁶ The Norwegian Act of 26.3.1999 No 14 (the "Tax Act") .

⁷ Event No 708290.

⁸ https://www.regjeringen.no/nb/dokumenter/Horing---forslag-om-innforing-av-begrenset-skatteplikt-for-offentlig-eide-sykehusapotek/id758385/?regj_oss=10

⁹ Event No 728248.

¹⁰ The introduction of a tax duty on the public hospital pharmacies in the Tax Act must be adopted through the State budget. Prop. 1 LS (2014-2015), Proposition to the Parliament, Chapter 11 (<http://www.statsbudsjetten.no/Statsbudsjetten-2015/Dokumenter-NY/Budsjettdokumenter/Skatte--avgifts/Prop-1-LS/Del-3-Andre-lovsaker/11-Skatteplikt-for-sykehusapotekenes-publikumsutvalg/>).

¹¹ Event No 734675.

¹² Section 2-30(1) letter g No 5 of the Tax Act, as amended: "[...] Health authorities shall still pay tax on income related to the hospital pharmacies' sale to the public. [...]" (unofficial translation). In Norwegian: "[...] Helseforetak skal likevel svare skatt av inntekt knyttet til sykehusapotekenes publikumssalg. [...]".

Ministry of Health and Care Services that the work with the appropriate measures are progressing as planned with implementation by 1 January 2015.

- (12) The Authority considers that the changes to the legislative and regulatory framework of public hospital pharmacies in Norway comply with the appropriate measures proposed by the Authority and thereby are compatible with the functioning of the EEA Agreement.
- (13) On the basis of the above, the Authority concludes that there are no grounds for pursuing the matter further and has consequently decided to close the case.

The present decision is without prejudice to the possibility for the Authority to continuously assess existing aid schemes under Article 1(1) of Part I of Protocol 3 and to propose appropriate measures required by the progressive development or the function of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority records the Kingdom of Norway's acceptance of the appropriate measures proposed by the Authority in its Decision No 460/13/COL concerning state aid granted to public hospital pharmacies in Norway.

Article 2

There are no longer grounds for pursuing the case concerning state aid to Norwegian public hospital pharmacies. Therefore, the case is closed.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 4 February 2015.

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Frank Büchel
College Member