

Case No: 63912  
Event No: 418771  
Dec. No: 716/07/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 19 December 2007

to initiate the procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the Norwegian scheme on support for alternative, renewable heating and electricity savings in private households

(Norway)

THE EFTA SURVEILLANCE AUTHORITY<sup>1</sup>,

Having regard to the Agreement on the European Economic Area<sup>2</sup>, in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice<sup>3</sup>, in particular to Article 24 thereof,

Having regard to Article 1(2) of Part I and Articles 4(4) and 6 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines<sup>4</sup> on the application and interpretation of Articles 61 and 62 of the EEA Agreement, in particular the chapters on aid for environmental protection and aid for research and development and innovation,

Whereas:

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<sup>1</sup> Hereinafter referred to as "the Authority".

<sup>2</sup> Hereinafter referred to as "the EEA Agreement".

<sup>3</sup> Hereinafter referred to as "the Surveillance and Court Agreement".

<sup>4</sup> Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ 1994 L 231, EEA Supplements 03.09.94 No 32. The Guidelines were last amended on 3 May 2007, by College Decision 154/07/COL. Hereinafter referred to as "the State Aid Guidelines".

## I. FACTS

### 1. Procedure

By letter dated 13 October 2006 Varmeprodusentenes Forening<sup>5</sup> (the Association of heat producers) filed a complaint against The Kingdom of Norway (Ministry of Petroleum and Energy). The letter was received and registered by the Authority on 16 October 2006 (Event No 393383). Supplementary information was submitted by letter from the Complainant dated 19 October 2006. The letter was received and registered by the Authority on 26 October 2006 (Event No: 395451).

By letter dated 9 November 2006 the Authority forwarded the complaint to the Norwegian authorities for comments. The Norwegian authorities responded by letter, dated 15 January 2007, enclosed in a letter from the Norwegian Mission to the European Union, dated 17 January 2007, both received and registered by the Authority on 17 January 2007 (Event no: 406849).

By a letter dated 21 February 2007 the Complainant commented on the letter supplied by the Norwegian authorities. The letter was received and registered by the Authority on 23 February 2007 (Event No: 411186). Supplementary information which included a report from ECON and a letter was submitted by the Complainant dated 2 May 2007. The letter and the report were received and registered by the Authority on 3 May 2007 (Event No: 419979 and Event No 419977).

By email dated 14 November 2007, the supplementary information submitted by the Complainant was forwarded to the Norwegian authorities. The Norwegian authorities have not presented any comments as regards the Complainant's supplementary information.

### 2. Description of the contested measures

#### 2.1 Aid for alternative and renewable heating systems in private households

The alleged state aid concerns the implementation of an aid scheme for alternative, renewable heating and electricity saving measures in private households.

The scheme covers the following technologies: pellets stoves, pellets boilers, heat pumps in waterborne heating systems and electronic control systems for electric heating systems.

Wood-burning stoves are not covered by the aid scheme. According to the Norwegian authorities, wood-burning stoves are environmentally friendly heating systems. They are, however, not covered by the scheme because they do not have the ability to run continuously and thus reduce the consumption of electricity for heating to the same extent as the technologies entitled to support<sup>6</sup>.

A further specification of the criteria under which the products in question will be eligible for aid is given on Enova SF's website<sup>7</sup>. Enova SF is a public company owned by the Ministry of Petroleum and Energy.

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<sup>5</sup> Hereinafter referred to as "the Complainant".

<sup>6</sup> Letter from the Norwegian Ministry of Petroleum and Energy dated 15 January 2007, (Event no: 406849).

<sup>7</sup> <http://minenergi.enova.no/sitepageview.aspx?sitePageID=1062>.

## 2.2 The objective of the scheme

The scheme is aimed at giving households an incentive to invest in new environmentally friendly heating technologies which will convert or replace existing direct electric heating systems, and thus to contribute to the reduction of the use of electricity in private households<sup>8</sup>.

## 2.3 National legal basis for the scheme

The legal basis for the scheme is the State budget<sup>9</sup>. The scheme was proposed to the Parliament 15 September 2006 with a budget of 46 million NOK. The scheme's budget was later increased by 25 million NOK in the last revision of the state budget for 2006. The aid scheme will be administered by Enova SF.

## 2.4 Recipients

The scheme is targeted at private households (final consumers), which can apply for refunding of maximum 20 % of documented and eligible costs, limited to 4 000 NOK for pellets stoves and electronic control systems, and 10 000 NOK for heat pumps and pellets boilers.

## 2.5 Possible effects of the aid scheme

The complainant alleges that the support to private households may be regarded as constituting an indirect advantage for the producers and/or the importers of the heating technologies covered by the scheme. According to the complainant the support scheme will lead to an increase in demand for these products. Thus, the support scheme gives the producers and/or importers the opportunity to increase sales and profits. The complainant also alleges that the price for these products, due to the indirect advantage, may be increased.

The scheme will, according to the complainant, due to the reasons mentioned above, distort competition and affect trade between the EEA States.

## 3. Comments by the Norwegian authorities

The Norwegian authorities, in their comments on the complaint, have argued that the recipients of the support scheme are private households and not undertakings within the meaning of Article 61(1) EEA. Thus, for this reason the measure cannot be considered to constitute state aid. To support their view, the authorities refer to the Authority's decision of 3 May 2006, regarding the Norwegian Energy Fund, Commission Decision N158/02 and Commission Decision N369/05.

Furthermore, the Norwegian authorities argue that the scheme does not distort or threaten to distort competition since wood-burning stoves and the technologies entitled to support cannot be regarded as substitutable products and thus not within the same relevant product market. The Norwegian authorities define the market as *“those technologies which can replace electric heating and provide the same level of heating comfort as electric heating*

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<sup>8</sup> St. prp. No 82 (2005-2006), press release from the Ministry of Petroleum and Energy of 25 August 2006 and of 14 September 2006.

<sup>9</sup> It is not clear from the information available to the Authority whether the scheme is of limited duration.

during day and night, or in a more technical language, base load heating systems”<sup>10</sup>. Wood-burning stoves are by the Government classified as a supplementary heat source used in addition to the base load source. According to the Government, wood-burning stoves can therefore be characterised as peak-load heating systems.

On these grounds, the Norwegian authorities argue that the aid in question will not distort or threaten to distort competition, since there is no direct competition between the technologies covered by the scheme and wood-burning stoves.

## II. APPRECIATION

### 1. The presence of state aid

#### 1.1 State aid within the meaning of Article 61(1) EEA Agreement

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.”*

To be termed state aid within the meaning of Article 61(1) of the EEA Agreement, the following four cumulative conditions must be met: The measure must (i) be granted by the State or through State resources, (ii) confer a selective economic advantage on the recipients; (iii) distort or threaten to distort competition; and (iv) be liable to affect trade between the Contracting Parties to the EEA Agreement.

#### 1.2 Presence of state resources

The support scheme is financed by the Norwegian State over the state budget. The measures in question are therefore granted by the State through State resources.

#### 1.3 Selective economic advantage

For State support to constitute state aid within the meaning of Article 61(1) it must first grant an economic advantage on the recipients. Second, the aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”.

The first question to be analysed is therefore whether the scheme in question confers an economic advantage on undertakings<sup>11</sup>.

<sup>10</sup> Letter from the Norwegian Ministry of Petroleum and Energy dated 15 January 2007, (Event no: 406849), on page 5.

<sup>11</sup> Undertakings are for the purpose of Community competition law defined as entities engaged in economic activity, regardless of their legal status, see for instance the Court of Justice judgment in Case C-41/90 *Höfner* [1991] ECR I-01979, at paragraph 21.

The direct beneficiaries of the aid scheme in question are final consumers (Norwegian households), and not undertakings falling within the scope of Article 61(1). However, the scheme is aimed at promoting the sale of specific heating technologies<sup>12</sup>. It can therefore be asked whether the producers and/or importers of the technologies covered by the scheme benefit from an indirect economic advantage which may fall within the scope of Article 61(1).

It has been established through case-law and practice of the European Commission that State aid may be granted indirectly through a third party, even where the direct beneficiary does not constitute an undertaking for the purposes of Article 61 (1) EEA.<sup>13</sup> In Case C-156/98 *Germany v Commission*, the European Court of Justice held that a tax relief granted to individuals for profit made by sale of shares, provided that the profit was then used to acquire new shares in companies seated in Berlin or the new German Länder, constituted state aid within the meaning of Article 87(1) EC.<sup>14</sup> The Court of Justice found that the tax renunciation enabled the investors to take holdings in those undertakings on conditions that in tax terms were more advantageous. Similarly, in a recent decision the Commission held that aid granted to final consumers amounted to State aid within the meaning of Article 87(1) EC<sup>15</sup>. According to Article 4(1) of the 2004 Italian Finance Act, purchasers of TV decoders capable of receiving signals transmitted using terrestrial technology were entitled to a public grant of €150. The Commission found that the measure indirectly conferred an economic advantage upon television broadcasters operating on digital terrestrial and cable platforms and operators of the networks that carry the signal.

In accordance with the case law cited above, the question is whether the producers and/or importers of the heating technologies covered by the scheme are given an indirect economic advantage, i.e. whether the scheme has led to an increase in their sales and profit margins which they would not have had if the measure had not been put into effect.

By granting private households which purchase specific heating technologies a compensation/subsidy, the Norwegian Government may stimulate the sale of these products by giving the consumers an economic incentive to do so. As expressed in St. prp. No 82 (2005-2006) section 2 (“Tiltak rettet mot husholdninger”) the scheme is *inter alia* aimed at contributing to the spread of mature technologies that have limited spread in the market. The same is also expressed on the Enova website<sup>16</sup>. This may allow the producers and/or importers to increase their sales without lowering the price at which they sell their products. According to the complainant, it can also be observed that the demand for the products in question has risen after the scheme was put into effect.

The Authority therefore takes the preliminary view that the producers and/or importers of the heating technologies covered by the scheme may have obtained an economic advantage within the meaning of Article 61(1) EEA.

The next question to be analysed is whether the measure is selective, i.e. favours “*certain*” undertakings or the production of certain goods.

<sup>12</sup> St. prp. No 82 (2005-2006) page 1.

<sup>13</sup> Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163.

<sup>14</sup> Case C-156/98 *Germany v Commission* [2000] ECR I-6857.

<sup>15</sup> Commission decision of 24 January 2007 – only the Italian version is authentic.

<sup>16</sup> <http://minenergi.enova.no/sitepageview.aspx?sitePageID=1013&overrideArticleID=149> - “Støtten er en bonus til dem som går foran og viser ansvar for egen energibruk ved å ta i bruk teknologier som er tilgjengelige, men så langt ikke spesielt vanlige i allmenn bruk.”

The scheme in question does not apply generally to all undertakings in Norway. It is targeted at undertakings operating in the market for heating methods/technologies, and thus limited to one specific economic sector. The measure is therefore selective within the meaning of Article 61(1) EEA.

#### 1.4 Distortion of competition and effect on trade between contracting parties

To constitute state aid a measure must also distort or threaten to distort competition and effect trade between the Contracting Parties to the EEA Agreement.

The producers of the heating technologies covered by the scheme seem to operate in an European market.

Regarding one of the products covered by the scheme, pellets stoves, all but one producer is non-Norwegian and hence operates in more than one EEA State. The Norwegian producer, Bionordic, states on its homepage that "*Bionordic AS is developing high-efficient bioenergy products for the European market*".<sup>17</sup> When state aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid<sup>18</sup>.

In addition to intra-EEA competition between pellets stove producers and/or importers, there may be intra-EEA competition between pellets stove producers and/or importers and producers of other products. The aid scheme in question excludes from support, for example, other environmentally friendly heating technologies, such as traditional wood-burning stoves, even though the latter seem to fulfil similar needs for the consumers as the technologies covered by the scheme. Wood-burning stoves are for instance comparable to pellets stoves when it comes to size and design.

According to the complainant the cost savings due to less use of electricity is almost identical for wood-burning stoves and pellets stoves. The complainant also argues that the two technologies produce comparable heating effect, that the sale of pellets-stoves has increased significantly and that the sale of wood-burning stoves has declined after the scheme was put into effect. To support its view, the complainant *inter alia* refers to an evaluation report made by Nord Trøndelagforskning regarding a similar aid scheme put into effect by the Norwegian authorities in 2003<sup>19</sup>. Furthermore, the complainant has engaged the consultancy, ECON<sup>20</sup> to assess the economic effects of the scheme. ECON concludes that there is a degree of substitution between pellets stoves and wood-burning stoves. It also finds that the payments to consumers may have the same effects as payments made directly to the producers. This information indicates that the measure in question sets the producers covered by the scheme in a more favourable position to the detriment of other producers of environmentally friendly heating systems such as wood-burning stoves.

The Norwegian authorities dispute this analysis by the complainant. In their opinion, wood-burning stoves do not compete with the products covered by the scheme since they do not have the ability to run continuously and thus to reduce consumption of electricity

<sup>17</sup> See

<http://www.bionordic.no/index.php?NyheitNr=47&cat1=0&cat2=0&artrangering=Rangering&artrantype=A SC&la=EN>

<sup>18</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11.

<sup>19</sup> NTF-report 2005:2.

<sup>20</sup> ECON report 2007-040.

for heating to the same extent. According to the Norwegian authorities, wood-burning stoves can be regarded as a supplementary heating source, while the technologies covered by the scheme can be classified as base load heating systems which give the same heating comfort as electric heating.

Regardless of the competition between these two products, the producers of pellets stoves seem, as mentioned above, to compete in an European market and it may therefore distort competition and affect trade between contracting parties.

Furthermore, the other products covered by the scheme also seem to be produced by undertakings operating in the EEA market. Leading producers of for instance heat pumps are international companies like Panasonic, Mitsubishi Electric, Toshiba, Sanyo and Daikin.

The Authority therefore takes the preliminary view that the scheme distorts or threatens to distort competition and effect trade between the Contracting Parties to the EEA Agreement.

## **2. Procedural requirements**

Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, *“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”*.

The Norwegian authorities have not notified the Authority of any measures taken in relation to the support granted to households’ purchase of pellets stoves, heat pumps in water-born heating systems and control systems for electricity saving. Therefore, in the event that the Authority comes to the conclusion that the contributions given to households constitutes state aid within the meaning of Article 61(1) of the EEA Agreement, the Norwegian Authorities will be considered not to have respected the notification and stand still obligation pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

The grant of state aid within the meaning of Article 61(1) of the EEA Agreement, which has not been notified, constitutes unlawful state aid within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement. It follows from Article 14 in Part II of Protocol 3 the Surveillance and Court Agreement that the Authority shall decide that unlawful aid which is incompatible with the state aid rules under the EEA Agreement must be recovered from the beneficiaries unless it would be contrary to a general principle of law.

## **3. Compatibility of the aid**

Supposing that the contested funding constitutes state aid within the meaning of Article 61(1) EEA, it must be assessed whether it can be declared compatible with the functioning of the EEA Agreement.

In the Authority’s view, the support scheme does not seem to comply with any of the exemptions provided for in Article 61(2) or (3) (a) or (b) of the EEA Agreement. The question is therefore whether the aid can be justified under Article 61(3) (c). According to

this provision aid may be declared compatible with the common market if it "... *facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*".

The Authority will assess the support scheme according to Article 61(3) (c) of the EEA Agreement in conjunction with the Authority's State Aid Guidelines, in particular the chapters on aid for environmental protection and aid for research and development and innovation.<sup>21</sup>

It is to be noted that the Norwegian authorities have not specifically invoked this provision, nor have they provided any explanation of how the contested aid measure "*does not adversely affect trading conditions to an extent contrary to the common interest*".

However, in their comments on the complaint the Norwegian authorities refer to Commission Decision N369/05, where the Commission, *inter alia* held that aid granted to owners of dwelling houses for the conversion from direct-acting electro heat into district heating or heat pumps, could be authorised on the basis of point 30 of the Commission's Environmental Aid Guidelines<sup>22</sup>.

According to the Authority's State Aid Guidelines on environmental protection, investments in energy savings may qualify for an exemption from the general prohibition laid down in Article 61(1)<sup>23</sup>. What is meant by "energy savings" is further explained in the Guidelines section B (Definitions and scope). It follows from section B point 7 that energy-saving measures should be understood as meaning, among other things, action which enables companies to reduce the amount of energy used in their production cycle. The design and manufacture of machines which can be operated with fewer natural resources as such are not covered by the Authority's guidelines.

The indirect aid to producers and/or importers of certain heating methods/technologies are not directly covered by the above mentioned section of the Authority's State Aid Guidelines on environmental protection, since the aid will not contribute to the reduction of the amount of energy used in the producers and/or importers production cycle. In cases where the direct beneficiary is an undertaking, the Commission and the Authority have not normally assessed the indirect benefit to producers of environmentally friendly products or technologies, but assessed the aid under the Environmental Guidelines due to the application of the criteria therein on the direct beneficiary of the aid.<sup>24</sup> The Authority has doubts with regard to an application of the Guidelines to a scheme such as the present.

Against this background the Authority has doubts as to whether the Environmental Guidelines are applicable to the scheme.

For the same reasons, the Authority has doubts as to whether the scheme may be exempted directly under Article 61(3) (c).

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<sup>21</sup> An element in the assessment of the compatibility of the scheme would also be whether the scheme is of a limited duration. The Authority would normally not approve schemes with a duration exceeding 10 years. As mentioned in footnote 9 above, it is not clear from the information available to the Authority whether the scheme is of limited or unlimited duration.

<sup>22</sup> See point 30 of Commission Decision N369/05.

<sup>23</sup> Section C point 25 of the Environmental guidelines.

<sup>24</sup> See for example Commission Decision N369/05.

Finally, the Authority takes the preliminary view that the support scheme in question is not covered by the State Aid Guidelines' chapter on aid for research and development and innovation. The possible indirect aid to the producers of the heating technologies covered by the scheme do not fall within the research categories listed in the Guidelines Section 5.1.1 point 71 (fundamental research, industrial research or experimental development), as the products covered by the aid scheme are ready-developed technologies.

#### **4. Conclusion**

Based on the information submitted by the Norwegian authorities, the Authority has doubts whether the aid measure(s) constitute aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts whether these measures can be regarded as complying with Article 61(3) (c) of the EEA Agreement, in combination with the requirements laid down in the Authority's State Aid Guidelines on environmental protection and on aid for research and development. The Authority thus doubts that the above measures are compatible with the functioning of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1(2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Norwegian authorities to submit their comments within one month of the date of receipt of this Decision.

In light of the foregoing consideration, the Authority requires that, within one month of receipt of this decision, the Norwegian authorities provide all documents, information and data needed for assessment of the compatibility of the support scheme. It requests the Norwegian authorities to forward a copy of this letter to the potential aid recipients of the aid immediately.

#### **HAS ADOPTED THIS DECISION:**

##### Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Norway regarding the support scheme for alternative, renewable heating and electricity savings in private households.

##### Article 2

The Norwegian authorities are requested, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

The Norwegian authorities are required to provide within one month from notification of this decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version is authentic.

Done at Brussels, 19 December 2007

For the EFTA Surveillance Authority,

Per Sanderud  
President

Kristján Andri Stefánsson  
College Member