

Doc. No: 03-425-I
Ref. No: SAM030.02.002
Dec. No.: 16/03/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 5 February 2003
regarding amendment to the “SkatteFUNN” scheme concerning tax deduction for
R&D expenses
NORWAY

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area¹, 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 Justice², in particular to Article 24 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Authority’s Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement³, in particular Chapters 14⁴, and 17B⁵ thereof,

WHEREAS:

I. FACTS

1. The notification

By letter from the Ministry of Finance dated 29 November 2002, received and registered by the Authority on 5 December 2002 (Doc. No. 02-8834-A), the Norwegian Government notified, pursuant to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, an amendment to the existing “SkatteFUNN” aid scheme (“§ 16-40 of the Tax Law, Tax deduction for expenses for research and development (R&D) and Regulation relating to § 16-40 of the Tax Law”

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

³ Procedural and Substantive Rules in the Field of State Aid (State Aid Guidelines), adopted and issued by the EFTA Surveillance Authority on 19 January 1994. Published in Official Journal L 231, 03.09.1994. The Guidelines were last amended 18 December 2002 (not yet published).

⁴ Aid for Research and Development. The validity of the guidelines was extended by the Authority’s decision dated 26 July 2002 (145/02/COL) until 31 December 2005.

⁵ Application of State aid rules to measures relating to direct business taxation.

(“*Skatteloven § 16-40 Skattefradrag for kostnader til forskning og utvikling (FoU-fradrag)*” and “*Forskrift til skatteloven § 16-40*”).

The Norwegian Government also submitted additional information on the functioning of the already existing “SkatteFUNN” aid scheme (i.e. the rules which were adopted in line with the commitments given in the context of the notification of the original aid scheme).

By letter dated 21 January 2003 (Doc. No. 03-4-D), the EFTA Surveillance Authority acknowledged receipt of the notification. In this letter, the Authority informed the Norwegian Government that it considered the notification to be complete.

Pursuant to point 4.1.(1) of Chapter 4 of the Authority’s State Aid Guidelines, “Decision not to raise objections”, the Authority was therefore obliged to take a decision within two months from receipt of the complete notification (i.e. 5 February 2003).

2. The contents of the proposed amended aid measure

2.1 Description of the aid measure

“SkatteFUNN” aid scheme

By decision dated 25 September 2002, the Authority approved the “SkatteFUNN” aid scheme⁶ which was introduced in the State Budget for 2002⁷. Based on Section 16-40 of the Tax Law, companies fulfilling certain conditions and requirements laid down in the Tax Law and the Regulation to the Tax Law are entitled to deduct 18 per cent, or 20 per cent in the case of small and medium-sized enterprises, within the meaning of Chapter 10 of the Authority’s State Aid Guidelines, of R&D expenses related to an internal R&D project (limited to NOK 4 million, approximately € 550 000) or costs connected to the purchase of R&D services from an R&D institution (limited to NOK 8 million, approximately € 1.1 million). The scheme is currently limited to undertakings that fulfil two of the following three conditions:

- annual sales income is less than NOK 80 million (approximately €11 million);
- the enterprise has less than NOK 40 million (approximately € 5.5 million) on the annual balance sheet total;
- the enterprise has fewer than 100 employees.

In addition, and pursuant to Section 16-40 of the Tax Act and Section 16-40-4 in the Regulation to the Tax Law, a company is eligible for the tax deduction if the R&D project is approved by the Norwegian Research Council. For that purpose, enterprises have to submit an application to the Norwegian Research Council, which will examine whether the conditions for tax deduction are met, *i.a.* that the project is covered by the definition of R&D projects laid down in the Regulation, and that the project has an incentive effect.

⁶ Dec. No. 171/02/COL regarding tax deduction for expenses of research and development. Published in Official Journal, C 10, 16.01.2003.

⁷ “*Ot.prp. nr. 1 (2001-2002) Skatte-og avgiftsopplegget 2002 – lovendringer*”, Chapter 5.

The Authority assessed the “SkatteFUNN” aid scheme in relation to the provisions of the Authority’s State Aid Guidelines, Chapter 14, Aid for Research and Development. In the course of the proceedings, the Norwegian Government gave commitments to respect the specific notification requirements according to sector specific rules set out in Annex XV to the EEA Agreement, to adopt guidelines laying down rules for the assessment of the incentive effect of the R&D projects as required in the Authority’s R&D Guidelines (Chapter 14.7) and to adopt internal regulations concerning the process of application and evaluation of projects. According to the Authority’s assessment and based on the above-mentioned commitments, the Authority concluded that the “SkatteFUNN” aid scheme was compatible with the functioning of the EEA Agreement and decided, consequently, not to raise objections to the scheme.

Notified amendment and additional information

The notification at issue regards an amendment to Section 16-40 of the Tax Law. The proposed amendment implies that the current conditions regarding the size of the enterprises entitled to tax deduction will be deleted. Thus, all enterprises will be covered by the aid scheme.

Following the Authority’s approval of the initial “SkatteFUNN” aid scheme, the Norwegian Research Council adopted “Guidelines for assessing the incentive-effect of SkatteFUNN-projects”.

Furthermore, the Research Council adopted internal regulations concerning the process of application and evaluation of projects (“Description of the process for application and evaluation of SkatteFUNN-projects”). According to this document, the evaluation process is divided in two steps: Recommendation from Project Officers in the regional offices of The Norwegian Industrial and Regional Development Fund (SND) and decision by Project Officers in the Secretariat for SkatteFUNN in the Research Council of Norway. The SND Project officer will *i.a.* evaluate whether the project meets the definition of R&D-project, if the project represents an incentive for the enterprise to undertake R&D activities in addition to their normal day-to-day operation and whether the project needs to be notified according to sector specific rules set out in Annex XV to the EEA Agreement. The Project Officer in the Secretariat for SkatteFUNN will decide, based on the recommendation from the SND Project Officer and his/her own impression of the project whether the project meets the criteria for approval.

In addition, section 16-40-6(5) of the Regulation to the Tax Law was amended to clarify certain questions regarding cumulation.

All other aspects of the “SkatteFUNN” aid scheme remained unaltered.

2.2 Scope of application and aid beneficiaries

The aid scheme is not limited to specific sectors. The Research Council will ensure the respect of the sector specific rules as mentioned in Annex XV to the EEA Agreement, cf. Article 63 EEA and Part V of the Authority’s State Aid Guidelines, in particular the specific notification requirements, in accordance with the internal regulations concerning the application and evaluation of the projects.

The proposed amendment to Section 16-40 of the Tax Act implies that enterprises in all sectors shall be eligible for tax deduction of R&D expenses and, contrary, to the existing scheme, irrespective of the size of the undertaking.

The number of recipients is estimated to be approximately 2000 per year.⁸

2.3 Cumulation

The tax deduction may be combined with other public support measures. According to the provision in Section 16-40-6 (5) of the Regulation, the total aid received by each taxable company must not exceed the maximum applicable thresholds set out in point 14.5 of the Authority's State Aid Guidelines in Chapter 14. An auditor shall confirm that total public support does not exceed these limits. Following the Authority's approval of the initial scheme, Section 16-40-6 (5) of the Regulation to the Tax Law Regulation was amended so as to clarify that if the total amount of aid received by a taxable company exceeds the maximum applicable thresholds, the tax deduction will be reduced accordingly. Furthermore, it was clarified that aid from the European Community, which Norwegian enterprises might receive under the EEA Agreement, is regarded as public support in this respect.

2.4 Entry into force and duration

The amendment of the Tax Law will be applicable from fiscal year 2003 onwards. The law will not, however, be applied until the Authority has approved the amended aid scheme.

The amended aid scheme is not limited in time. It is, however, subject to the annual budgetary decisions of the Norwegian Parliament.

2.5 Budget

The annual loss in tax revenue is estimated to be approximately NOK 910 million (approximately € 124 million) per year.

II. APPRECIATION

1. The presence of State aid and notification formalities

According to Article 61(1) of the EEA Agreement

“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.”

⁸ This number was calculated by the Norwegian authorities on the basis of R&D-statistics from 1999, and does not include enterprises with fewer than 10 employees.

Furthermore, it is stated in Article 1(3) of Protocol 3 to the Surveillance and Court Agreement that:

“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. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

To be regarded as aid, the measure in question should satisfy every one of the four criteria set out in Article 61(1) of the EEA Agreement:

As the tax deduction reduces the enterprises’ tax burden, the measure confers on the undertakings an advantage that relieves them of charges that are normally borne from their budgets. The tax deduction involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. The notified aid is therefore funded by State resources in the meaning of Article 61(1) of the EEA Agreement.

Given that the amended aid scheme covers all sectors of the economy, the benefiting enterprises may be actually or potentially in competition with similar undertakings within the EEA. Consequently, the proposed aid may distort or threaten to distort competition and affect trade between the Contracting Parties.

Finally, the Authority assessed whether the amended aid scheme is specific or selective in that it favours certain undertakings or the production of certain goods.

According to Chapter 17B of the Authority’s State Aid Guidelines, “Application of State aid rules to measures relating to direct business taxation”, tax measures that are effectively open to all firms on an equal access basis, and that are not *de facto* reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect, are in principle general measures, and do not contain State Aid (cf. point 17B.3.1 of Chapter 17B of the Authority’s State Aid Guidelines).

Following the proposed amendment of the “SkatteFUNN” aid scheme, undertakings in all sectors, irrespective of their size, are eligible for the tax deduction for R&D expenses. This could indicate that the amended “SkatteFUNN” scheme could be regarded as a general measure.

However, the Authority notes that the tax deduction is only granted with respect to projects that have been assessed by the SND and assessed and approved by the Norwegian Research Council. Both bodies would seem to enjoy discretionary power when assessing the research character of the projects as well as the incentive effect of the support measure under the “SkatteFUNN” scheme. In light of these observations, the Authority considers that the scheme would not seem to qualify as a “general measure” within the meaning of point 17B.3.1. of Chapter 17B of the Authority's State Aid Guidelines.

Consequently, the scheme constitutes State aid in the meaning of Article 61(1) of the EEA Agreement.

The Norwegian authorities have, by notification of the proposed amendments to the “SkatteFUNN” aid scheme, fulfilled their obligation under Article 1(3) of Protocol 3 to the Surveillance and Court Agreement.

2. Application of the relevant State aid rules

2.1. Article 61(3) (c) EEA in combination with Chapter 14 of the Authority's State Aid Guidelines, “Aid for Research and Development”

The Authority has assessed whether the notified amended “SkatteFUNN” aid scheme can be regarded as compatible with the functioning of the EEA Agreement by virtue of Article 61(3)(c) of the EEA Agreement, in combination with Chapter 14 of the Authority’s State Aid Guidelines.

Except for the extension of the scheme to cover all undertakings irrespective of their size, the aid scheme remains unchanged compared to the original scheme. In its decision of 25 September 2002, the Authority concluded that the criteria and the intensities foreseen for the “SkatteFUNN” scheme reflected the requirements set out in the State Aid Guidelines, Chapter 14 for aid under Article 61(3) (c) of the EEA Agreement, and thus qualified for exemption under Article 61(3) (c) of the EEA Agreement. The applicability of the scheme to all undertakings does not, in the Authority’s view, alter the assessment regarding the compatibility of the aid scheme.

The Authority has also assessed whether the rules adopted by the Norwegian authorities following the commitments given in the context of the notification of the original “SkatteFUNN” aid scheme effectively ensure compliance with the requirements laid down in Chapter 14 of the Authority's State Aid Guidelines.

2.2 Incentive effect

When evaluating R&D projects, the Norwegian Research Council examines whether the aid serves as an incentive for firms to undertake R&D activities in addition to their normal day-to-day operations. Following the Authority’s decision of 25 September 2002, the Norwegian Research Council adopted guidelines for assessing the incentive effect of the projects.

The Authority is satisfied that with the adoption of these guidelines the “SkatteFUNN” aid scheme effectively ensures that aid in the form of tax deductions for R&D expenses is only granted where it has been demonstrated that the aid in question has an incentive effect and is on no account operating aid. Consequently, the Authority finds that the rules implementing the ”SkatteFUNN” aid scheme are in compliance with point 14.7. of Chapter 14 of the Authority’s State Aid Guidelines.

2.3 Cumulation of aid

According to the notification, tax deductions for R&D expenses granted under the “SkatteFUNN” aid scheme may be combined with other public support measures.

The Regulation on the Tax Law includes cumulation rules ensuring that the cumulated aid intensities do not exceed the maximum applicable aid thresholds as laid down in the Authority's State Aid Guidelines. Following the Authority's decision of 25 September 2002, the Regulation has been amended. The Authority observes that these rules now ensure that, in cases where the total public support received by a company exceeds the applicable aid ceiling, the tax deduction under the "SkatteFUNN" scheme will be reduced accordingly, and that aid received from EU Funds is deemed as aid in this respect.

The Authority therefore finds that the rules implementing the "SkatteFUNN" aid scheme ensure the effective respect of the aid limits laid down in Chapter 14 of the Authority's State Aid Guidelines.

3. Conclusion

The "SkatteFUNN" aid scheme continues to fulfil the requirements set out in Chapter 14 of the Authority's State Aid Guidelines. Therefore, the Authority concludes that the proposed amended "SkatteFUNN" aid scheme qualifies for exemption under Article 61(3) (c) of the EEA Agreement.

The Norwegian Government is reminded to submit separate simplified annual reports on the application of the "SkatteFUNN" aid scheme, in accordance with Chapter 32 and Annex IV to the Authority's State Aid Guidelines.

HAS ADOPTED THIS DECISION:

1. The Authority has decided not to raise objections to the proposed amendments to the "SkatteFUNN" aid scheme, as notified by the Norwegian Government by letter from the Ministry of Finance dated 29 November 2002 (Doc. No. 02-8834-A).
2. The Norwegian Government is obliged to submit a separate simplified annual report to the Authority on the application of the "SkatteFUNN" aid scheme.

Done at Brussels, 5 February 2003

For the EFTA Surveillance Authority

Einar M. Bull
President

Hannes Hafstein
College Member