EFTA SURVEILLANCE AUTHORITY

Doc.No. 02-5891 I
Dec.No. 172/02/COL
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EFTA SURVEILLANCE AUTHORITY DECISION

OF 25 SEPTEMBER 2002

TO PROPOSE APPROPRIATE MEASURES TO NORWAY
WITH REGARD TO STATE AID IN THE FORM OF
REGIONALLY DIFFERENTIATED SOCIAL SECURITY TAXATION
("GEOGRAFISK DIFFERENSIERT ARBEIDSGIVERAVGIFT")

(AID NO 95-010)

(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area[1], 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[2], in particular to Article 24 and Article 1 of Protocol 3 thereof,

Having regard to the Authority's State Aid Guidelines[3] on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

Having regard to the EFTA Surveillance Authority's Decision of 2 July 1998 with regard to state aid in the form of regionally differentiated social security taxation (Aid No. 95-010)[4],

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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, hereinafter referred to as the "State Aid Guidelines", adopted and issued by the EFTA Surveillance Authority on 19 January 1994. Published in Official Journal L 231, 03.09.1994, p.1, and EEA Supplement to the OJ No 32, 03.09.1994, p.1. The Guidelines were last amended on 26 July 2002, not yet published.

Having regard to the Judgment of the EFTA Court concerning the application for annulment of Decision No.165/98 COL of 2 July 1998 of the EFTA Surveillance Authority with regard to State aid in the form of regionally differentiated social security taxation (Norway) (Aid No. 95-010)[5],

Having regard to the EFTA Surveillance Authority's Decision of 22 September 1999 on the measures that the Norwegian Government intends to take in order to comply with the EFTA Surveillance Authority's decision of 2 July 1998 with regard to state aid in the form of regionally differentiated social security taxation (Aid No. 95-010)[6],

Having regard to the European Commission's Decision of 21 December 2000 on the Swedish reduced social contributions aid scheme[7],

WHEREAS:

I. FACTS

1. Introduction

On 22 September 1999 the EFTA Surveillance Authority decided[8] not to raise objections to the proposed new scheme of regionally differentiated social security contributions as notified by the Norwegian authorities. The system involved State aid in the meaning of Article 61(1) of the EEA Agreement, but the Authority found that the aid could be exempted according to Article 61(3)(c) of the EEA Agreement.

On 16 December 1999 the EFTA Surveillance Authority decided not to raise objections to a proposed system for regional aid in Norway, *i.e.* a proposal for a map of assisted areas and maximum aid intensities[9]. The decision concerned only regional aid for general investment and not aid measures falling under the notions of direct or indirect transport aid.

The European Commission decided on 21 December 2000[10] that a Swedish reduced social contributions aid scheme, as notified by the Swedish authorities, was incompatible with the common market.

By letter dated 4 June 2002 (Doc. No: 02-4189 D) the Authority informed the Norwegian authorities that it initiated a review of the Norwegian system of regionally

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4 Dec. No. 165/98/COL. OJ L 327, 03.12.1998, p. 1.

5 EFTA Court Case E-6/98, *The Government of Norway* v *EFTA Surveillance Authority* [1999] Report of the EFTA Court, p. 74.

6 Dec. No. 228/99/COL. OJ C 3, 06.01.2000, p.3, and EEA Supplement No 1, 06.01.2000.

7 OJ L 244, 14.09.2001, p. 32.

8 See footnote no 6.

9 Dec. No. 327/99/COL, OJ C 91, 30.03.2000, p. 6, and EEA Supplement No 15, 30.03.2000.

10 See footnote no 7.

differentiated social security contributions ("Geografisk differensiert arbeidsgiveravgift"). The letter referred to Chapter 7.4.1 of the Authority's State Aid Guidelines (Procedure in cases relating to existing aid) and requested the Norwegian authorities to submit all necessary information for a review of the existing system of geographically differentiated social security tax in Norway.

The Norwegian authorities submitted a response by letter from the Mission of Norway to the EU dated 22 July 2002, received and registered by the EFTA Surveillance Authority on the same date (Doc. No: 02-5586 A), describing *"the system of employer's contribution to the National Insurance Scheme and a translated version of the Resolution on rates for social security contributions".*

2. Description of the existing system of geographically differentiated social security tax in Norway

2.1 Overview

The social security tax (the employer's contribution to the National Insurance Scheme) is levied on salaries and other remuneration for work. This includes salaries and wages and other remuneration for work or commission (except when performed by self-employed persons), directors' fees, etc., benefits in kind and profits derived from the repayment of expenses and social benefits replacing salaries, etc. Benefits in kind and expenses covered by the employer are, however, only included to the extent they are subject to tax withholding by the employer. Also included are the employer's contribution to pension schemes and certain pension payments. The employer's contribution is levied on gross remuneration.

For the purpose of the social security tax Norway is divided in five geographical zones. The highest tax rate is 14.1 per cent in zone 1 that covers some 75 per cent of the population. In zone 5 that covers the very northernmost part of the country, the rate is zero. An overview of the geographical zones and tax rates is given in Annex 1 to this decision.

The contribution is related to the municipality of residence of each employee and not the location of the enterprise. Employers' contributions for employees in the central government administration are subject to 14.1 per cent tax, irrespective of where the employee is living. Salaries more than 16 times the basic amount of the National Insurance Scheme are subject to an additional contribution of 12.5 per cent on the excess amount. This additional contribution applies irrespective of where the employee lives or type of business.

As described below, certain types of business must pay the highest rate of 14.1 per cent, irrespective of where the employees live.

2.2 Sectors/activities subject to the highest tax rate

The highest tax rate of 14.1 per cent shall apply to the following enterprises, irrespective of the municipality in which the employee lives:

- enterprises producing electricity from hydropower,
- enterprises involved in extraction of crude oil or natural gas,
- enterprises providing one of more of the following services associated with oil or gas exploitation:
    - test or production drilling on contract,
    - service activities in connection with oil and gas exploitation,
    - drilling or well service on contract.
- enterprises excavating metal ore, except iron ore and iron ore containing manganese,
- enterprises excavating the industrial minerals nepheline cyenite and olivine,
- enterprises that build or repair self-propelled, ocean-going commercial vessels. These vessels are defined as follows:
    - Vessels of at least 100 GRT for transporting passengers or cargo,
    - Vessels of at least 100 GRT for special purposes,
    - Tugs of at least 365 kW,
    - Fishing vessels of at least 100 GRT intended for export to countries outside the EEA area,
    - Floating and movable unfinished hulls of the above vessels.
- enterprises that carry out major alterations to vessels such as those referred to above, if the vessel is above 1 000 GRT,
- enterprises producing ECSC steel,
- financial enterprises (as mentioned in section 1-4 of the Financial Institutions Act or section 7-1, cf. section 1-2, first paragraph, of the Securities Trading Act) if the enterprise has branches, is involved in cross-border activities or has established subsidiaries carrying out similar activities in other states within the EEA area,
- enterprises providing goods transport by road, and employing more than what correspond to 50 man-years,
- enterprises producing telecommunications services.

The enterprises described above that cannot benefit from the geographically differentiated social security tax, may receive *de minimis* aid. Employers' social security contributions will be based on lower rates as long as the difference between the social security contributions based on the highest rate and the social security contributions based on lower rates do not exceed NOK 270.000 for one year (EURO 100.000 over a three year period). When this limit is exceeded, the social security contributions will have to be based on the highest rate. This provision does not apply to ECSC steel and freight transport by road.

2.3 Duration of the scheme

The scheme will expire on 31 December 2003[11].

[11] See footnote no 6.

II. APPRECIATION

1. The existence of State aid

The EFTA Court stated in Case E-6/98, paragraph 43, that: *"the Norwegian social security contribution scheme constitutes State aid within the meaning of Article 61 EEA.*" For the purpose of assessing whether the present scheme involves State aid, it is noted that its main principles have not changed compared to the scheme assessed by the EFTA Court. As the present scheme satisfies all the conditions for the application of Article 61(1) EEA, the Authority takes the view that the scheme constitutes State aid.

Chapter 7.2(1) of the State aid Guidelines states *i.a.* that: *"Existing aid within the meaning of Article 1(1) of Protocol 3 to the Surveillance and Court Agreement includes: authorized aid, i.e. aid schemes or ongoing provisions of aid that have been authorized (see 4.2.(2) and 5.4.(2) or are deemed to have been authorized (see footnote1 to 4.1.(1)) by the EFTA Surveillance Authority."*

On 22 September 1999 the Authority decided not to raise objections to a notification from the Norwegian authorities concerning the measures that the Norwegian Government intended to take in order to comply with the EFTA Surveillance Authority's decision of 2 July 1998[12]. The Authority found that the aid could be exempted as regional aid (indirect transport aid) on the basis of Article 61(3)(c) of the EEA Agreement. Consequently, the current scheme is an existing aid scheme.

2. Procedure regarding existing aid schemes

Article 1(1) of Protocol 3 to the Surveillance and Court Agreement provides that: *"The EFTA Surveillance Authority shall, in co-operation with the EFTA States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement".*

Chapter 7.4.1.(1) and (2) of the State Aid Guidelines state that: *"Whenever the EFTA Surveillance Authority believes that existing aid may not be compatible with the progressive development or the functioning of the EEA Agreement, it begins a review by writing for information to the EFTA State concerned. The initiation of a review does not require operation of the aid scheme to be suspended. So far the EFTA Surveillance Authority has not laid down detailed internal procedural rules for the application of Article 1(1) of Protocol 3 to the Surveillance and Court Agreement. The only clear requirement that emerges from the paragraph is the obligation to co-operate with the EFTA State. The EFTA Surveillance Authority considers to fulfil this obligation by writing for information to the State concerned before it proposes "appropriate measures"".*

As mentioned above in point I.1, the Authority initiated a review of the Norwegian system of geographically differentiated social security tax by the letter to the

[12] See footnote no 6.

Norwegian authorities dated 4 June 2002 (Doc. No: 02-4189 D). In this letter the Authority said that the Norwegian system of regionally differentiated social security tax might no longer be compatible with the EEA Agreement. Against this background the Authority has decided to propose appropriate measures to Norway, introducing procedural requirements, as described in the following.

3. Reasons for adopting appropriate measures

The European Commission decided on 21 December 2000 to terminate the proceedings under Article 88(2) EC in respect of the Swedish reduced social contributions aid scheme, adopting a negative decision[13]. In view of the similarities between the Norwegian scheme and the Swedish scheme, and that there should be a level playing field within the EEA, the Authority considers that it is necessary to examine the compatibility of the Norwegian scheme, taking into account the Commission's decision.

The Authority also considers that increased trade in several sectors now makes it necessary to analyse compatibility issues in more detail.

Furthermore, the Authority considers it necessary to assess the geographical scope of the scheme in relation to the approved regional aid map for Norway.

As the present system of geographically differentiated social security tax expires by the end of 2003, it is not least important that measures taken by the Norwegian authorities concerning the system are communicated to the Authority as soon as possible.

Finally, the fact that the Authority adopted a flexible approach in its 1999 decision (on the system which now expires by the end of 2003) cannot be taken as a justification for approving a prolongation of the same system beyond 2003. In this context reference is made to a judgement by the European Court of Justice. The Court has ruled that the provisions applicable to State aid in a particular sector (in this case National Regional Aid), as set out by the European Commission in a communication on its policy in that area and accepted by the EC Member States, have a binding effect. They constitute a measure of general application and may not be impliedly amended by an individual decision, which cannot be subsequently relied upon, on the basis of the principles of equal treatment and protection of legitimate expectations, in order to justify a further infringement of those rules[14].

4. Is the existing Norwegian system of geographically differentiated social security tax compatible with the EEA Agreement?

The geographically differentiated social security tax scheme enables the Norwegian authorities to provide aid to individual companies without reference to any initial investment or job creation by the recipient firms, as required by Chapter 25.4.(6) and

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[13] See footnote no 7.

[14] ECJ Case C-313/90, *Comité International de la Rayonne et des Fibres Synthétiques and others* v *Commission of the European Communities* [1993] ECR I-1125.

(7) of the State aid guidelines on national regional aid. Such aid constitutes 'operating aid'. Operating aid may be considered compatible with the EEA Agreement only in exceptional circumstances.

One of two such exceptions is mentioned in Chapter 25.4.(27), National Regional Aid, of the State Aid Guidelines: *"In the regions of low population density qualifying either for exemption under Article 61(3)(a) or under 61(3)(c) on the basis of the population density test referred to in Chapter 25.3, paragraph (17), aid intended partly to offset additional transport costs*[15] *may be authorized under special conditions*[16]*. It is up to the EFTA State to prove that such additional costs exist and to determine their amount."*

Annex XI, Aid to offset additional transport costs in regions qualifying for exemption under Article 61(3)(c) on the basis of the population density test, of the State Aid Guidelines, furthermore states that the conditions to be met are *i.a.:*

- *"Aid may serve only to compensate for the additional cost of transport. The EFTA State concerned will have to show that compensation is needed on objective grounds. There must never be overcompensation. Account will have to be taken here of other schemes of assistance to transport.*
- *Aid may be given only in respect of the extra cost of transport of goods inside the national borders of the country concerned. It must not be allowed to become export aid.*
- *Aid must be objectively quantifiable in advance, on the basis of an aid-per-kilometre ratio or on the basis of an aid-per-kilometre and an aid-per unit – weight ratio, and there must be an annual report drawn up which, among other things, shows the operation of the ratio or ratios.*
- *The estimate of additional cost must be based on the most economical form of transport and the shortest route between the place of production or processing and commercial outlets. "*

The Authority considers that the present Norwegian geographically differentiated social security tax scheme does not satisfy the abovementioned conditions. Aid granted to an eligible undertaking depends on the size of its wage bill, which depends in turn on the number of persons employed and their salaries. As such, the amount of aid granted under the present scheme does not bear any relation to the additional transport costs actually incurred by a particular undertaking and is not calculated in line with the quoted provisions.

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15 Additional transport costs mean the extra costs occasioned by movements of goods within the borders of the country concerned. In no circumstances may such aid constitute export aid, nor must it constitute measures having an equivalent effect to quantitative restrictions on imports, within the meaning of Article 11 of the EEA Agreement.

16 With regard to the special conditions for regions qualifying for the Article 61(3)(c) derogation under the population density criterion, see Annex XI of the State Aid Guidelines. As for the other regions eligible for aid to offset in part additional transport costs, the conditions applicable are similar to those in Annex XI of the State Aid Guidelines.

In view of the above, the Authority concludes that the present geographically differentiated social security tax scheme does not qualify for the derogation provided for under Article 61(3)(c) EEA.

5. Proposal for appropriate measures

Pursuant to Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, the Authority proposes the following appropriate measures to Norway:

a) The Norwegian authorities shall take any legislative, administrative and other measures necessary to eliminate any State aid within the meaning of Article 61(1) EEA resulting from the system of regionally differentiated social security tax, or to render such aid compatible with Article 61 of the EEA Agreement,
b) The Norwegian authorities shall eliminate any such aid or render it compatible with effect from 1.1.2004 unless the Authority agrees to a later date should that be considered objectively necessary and justified by the Authority in order to allow an appropriate transition for the undertakings in question to the adjusted situation; and
c) The Norwegian authorities shall communicate to the Authority the relevant measures adjusting the aid scheme as soon as possible and in any event no later than 25 March 2003.

6. Acceptance of appropriate measures

The Norwegian authorities are requested to inform the Authority in writing within one month from receipt of this proposal that they accept, pursuant to Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, in its entirety this proposal for appropriate measures.

In case of non-acceptance, the Authority will proceed in accordance with Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority proposes to Norway, on the basis of Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, the following appropriate measures with regard to the State aid involved in the system of regionally differentiated social security tax ("Geografisk differensiert arbeidsgiveravgift"):

    a) The Norwegian authorities shall take any legislative, administrative and other measures necessary to eliminate any State aid within the meaning of Article 61(1) EEA resulting from the system of regionally differentiated social security tax, or to render such aid compatible with Article 61 of the EEA Agreement,

b) The Norwegian authorities shall eliminate any such aid or render it compatible with effect from 1.1.2004 unless the Authority agrees to a later date should that be considered objectively necessary and justified by the Authority in order to allow an appropriate transition for the undertakings in question to the adjusted situation; and
c) The Norwegian authorities shall communicate to the Authority the relevant measures adjusting the aid scheme as soon as possible and in any event no later than 25 March 2003.

2. The Norwegian authorities are requested to inform the Authority in writing within one month from receipt of this proposal that they accept, pursuant to Article 1(1) of Protocol 3 to the Surveillance and Court Agreement, in its entirety this proposal for appropriate measures.

3. This Decision is addressed to Norway.

Done at Brussels, 25 September 2002

For the EFTA Surveillance Authority

Einar M. Bull
President

Hannes Hafstein
College Member

ANNEX 1

Geographical zones and tax rates

- Zone I: 14.1 per cent tax.

This zone includes all municipalities not mentioned below under zone II-V.

- Zone II: 10.6 per cent tax.

This zone includes:

- in Nord-Trøndelag county, the municipalities of Meråker, Frosta, Leksvik, Mosvik, Verran,
- in Sør-Trøndelag county, the municipalities of Ørland, Agdenes, Rissa, Bjugn, Rennebu, Meldal, Midtre Gauldal, Selbu,
- in Møre og Romsdal county, the municipalities of Vanylven, Sande, Herøy, Norddal, Stranda, Stordal, Rauma, Nesset, Midsund, Sandøy, Gjemnes, Tingvoll, Sunndal, Haram, Aukra, Eide,
- in Sogn og Fjordane county, all municipalities,
- in Hordaland county, the municipalities of Etne, Ølen, Tysnes, Kvinnherad, Jondal, Odda, Ullensvang, Eidfjord, Ulvik, Granvin, Kvam, Modalen, Fedje, Masfjorden, Bømlo,
- in Rogaland county, the municipalities of Hjelmeland, Suldal, Sauda, Kvitsøy, Utsira, Vindafjord, Finnøy,
- in Vest-Agder county, the municipalities of Åseral, Audnedal, Hægebostad, Sirdal,
- in Aust-Agder county, the municipalities of Gjerstad, Vegårshei, Åmli, Iveland, Evje og Hornnes, Bygland, Valle, Bykle,
- in Telemark county, the municipalities of Drangedal, Tinn, Hjartdal, Seljord, Kviteseid, Nissedal, Fyresdal, Tokke, Vinje, Nome,
- in Buskerud county, the municipalities of Flå, Nes, Gol, Hemsedal, Ål, Hol, Sigdal, Rollag, Nore and Uvdal,
- in Oppland county, the municipalities of Nord-Fron, Sør-Fron, Ringebu, Gausdal, Søndre Land, Nordre Land,
- in Hedmark county, the municipalities of Nord-Odal, Eidskog, Grue, Åsnes, Våler, Trysil, Åmot.

- Zone III: 6.4 per cent tax.

This zone includes:

- in Nord-Trøndelag county, the municipality of Snåsa,
- in Sør-Trøndelag county, the municipalities of Hemne, Snillfjord, Oppdal, Røros, Holtålen, Tydal,
- in Oppland county, the municipalities of Dovre, Lesja, Skjåk, Lom, Vågå, Sel, Sør-Aurdal, Etnedal, Nord-Aurdal, Vestre Slidre, Øystre Slidre, Vang,
- in Hedmark county, the municipalities of Stor-Elvdal, Rendalen, Engerdal, Tolga, Tynset, Alvdal, Folldal, Os

- Zone IV: 5.1 per cent tax.

This zone includes:

- in Troms county, municipalities not included among those listed below under zone V,
- in Nordland county, all municipalities,
- in Nord-Trøndelag county, the municipalities of Namsos, Namdalseid, Lierne, Røyrvik, Namsskogan, Grong, Høylandet, Overhalla, Fosnes, Flatanger, Vikna, Nærøy, Leka,
- in Sør-Trøndelag county, the municipalities of Hitra, Frøya, Åfjord, Roan, Osen,
- in Møre og Romsdal county, the municipality of Smøla.

- Zone V: 0 per cent tax.

This zone includes:

- in Finnmark county, all municipalities,
- in Troms county, the municipalities of Karlsøy, Lyngen, Storfjord, Kåfjord, Skjervøy, Nordreisa and Kvænangen.