

Case No: 56310
Event No 335887
Dec. No: 298/05/COL

EFTA SURVEILLANCE AUTHORITY DECISION
OF 22 NOVEMBER 2005
ON THE PROPOSAL FOR REGIONALLY DIFFERENTIATED RATES
OF SOCIAL SECURITY CONTRIBUTIONS
FOR CERTAIN ECONOMIC SECTORS

(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY¹,

HAVING REGARD TO the Agreement on the European Economic Area², 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 Justice³, in particular to Article 24 thereof,

HAVING REGARD TO Article 1(2) in Part I and Articles 4(4), 6 and 7(5) in Part II in Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice,

HAVING REGARD TO the Authority's Guidelines⁴ on the application and interpretation of Articles 61 and 62 of the EEA Agreement,

HAVING REGARD TO the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement,

HAVING REGARD TO the EFTA Court's Judgment in Case E-6/98 the Government of Norway versus the EFTA Surveillance Authority⁵,

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ 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 of 03.09.94, EEA Supplements No 32. The Guidelines were last amended on 17.06.2005. Hereinafter referred to as the State Aid Guidelines.

HAVING REGARD TO the Authority's Decision No 172/02/COL of 25 September 2002 proposing appropriate measures with regard to the scheme of regionally differentiated social security contributions⁶ and to the letter from the Norwegian authorities dated 29 October 2002 accepting the appropriate measures,

HAVING REGARD TO the Authority's Decision No 218/03/COL of 12 November 2003 with regard to state aid in the form of regionally differentiated social security contributions⁷,

HAVING CALLED ON interested parties to submit their comments pursuant to the provisions cited above⁸,

WHEREAS:

I. FACTS

1. Procedure

Pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, the Norwegian authorities notified their intention to apply reduced rates of social security contributions to undertakings located in designated geographical Zones 2, 3 and 4 in Norway and active in certain economic sectors. The notification was sent by letter dated 26 April 2004 from the Norwegian Mission to the European Union, forwarding a letter from the Ministry of Trade and Industry together with a letter from the Ministry of Finance both dated 23 April 2004, received and registered by the Authority on 27 April 2004 (Event No 278992).

After various exchanges of correspondence and meetings between the Authority and the Norwegian authorities⁹, given the serious difficulties the Authority had to declare the notified measure compatible with Article 61 of the EEA Agreement, the Authority decided to initiate the procedure laid down in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement.

⁵ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76.

⁶ EFTA Surveillance Authority Decision No 172/02/COL. All EFTA Surveillance Authority's State Aid Decisions mentioned hereinafter can be found at the Authority's website: <http://www.eftasurv.int/fieldsofwork/fieldstateaid/stateaidregistry/>.

⁷ EFTA Surveillance Authority Decision No 218/03/COL, published in the OJ L 145 of 9.6.2005, pages 25-41.

⁸ EFTA Surveillance Authority Decision No 245/04/COL, published in the OJ C 60 of 10.03.2005, pages 9-25.

⁹ For more detailed information on the various correspondence between the Authority and the Norwegian authorities, reference is made to the Authority's Decision to open the formal investigation procedure, Decision No 245/04/COL, published in the OJ C 60 of 10.03.2005, pages 9-25.

The Authority's Decision No 245/04/COL of 6 October 2004 to initiate the formal investigation procedure was published in the Official Journal of the European Union and the EEA Supplement thereto¹⁰. The Authority called on interested parties to submit their comments.

By letter from the Norwegian Mission to the European Union dated 12 November 2004, the Norwegian authorities submitted their comments to the opening decision (Event No 299087). The Authority received no comments from interested parties.

2. Description of the proposed measure

a) Background

On the basis of the Norwegian Social Security Act of 28 February 1997 ("*Lov om folketrygd*"), all employers in Norway are subject to compulsory contributions to the national social security scheme. These contributions are calculated in relation to the gross salaries of employees and differentiated according to the place of residence of the employees. For this purpose, Norway is divided into five geographical zones. Zone 1¹¹ comprises the most central parts of the southern part of the country and covers 76.6 % of the total population in Norway. Zone 2¹² comprises less central parts of Southern Norway and covers 9.4% of the total population in Norway. Zone 3¹³ covers mostly certain mountain regions in Southern Norway with a coverage of 2.6% of the total population of

¹⁰ Published in the OJ C 60 of 10.03.2005, pages 9-25.

¹¹ This Zone includes all municipalities not mentioned below under Zones 2-5.

¹² 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, in Hordaland county, the municipalities of Etne, Ølen, Tysnes, Kvinnherad, Jondal, Odda, Ullensvang, Eidfjord, Ulvik, Granvin, Kvam, MoMidtre 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, Bømlø; 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.

¹³ 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.

Norway. Zone 4¹⁴ is made up of the most northern part of South Norway as well as North Norway south of Zone 5. Zone 4 covers 9.4% of the total population. Zone 5¹⁵ covers the very northernmost part of the country.

The Authority opened the formal investigation procedure with respect to the regionally differentiated social security contribution rates in Norway on 19 November 1997¹⁶. On 2 July 1998, the Authority adopted a decision¹⁷ in which it found that the system provided, through the State budget, a benefit to certain undertakings, which could not be justified on the basis of the general nature and character of the system and which distorted or threatened to distort competition within the European Economic Area¹⁸. The system had to be brought in line with the rules of the EEA Agreement.

On 2 September 1998, the Norwegian authorities brought an action under Article 36(1) of the Surveillance and Court Agreement before the EFTA Court requesting the annulment of the Decision of 2 July 1998.

The Court dismissed the application for annulment on 20 May 1999¹⁹ and upheld the Authority's decision. The Court confirmed that the system of differentiated social security contributions constituted state aid within the meaning of Article 61(1) of the EEA Agreement.

With a view to complying with the Authority's decision of 2 July 1998, the Norwegian authorities proposed new regulations on regionally differentiated social security contributions. On 22 September 1999, the Authority approved the new regulations for a limited period of time, not going beyond 31 December 2003²⁰.

On 21 December 2000, the European Commission took a negative decision concerning a reduced social security contributions aid scheme notified by Sweden²¹. In the decision, the Commission pointed out that Norway, by letter dated 27 July 2000, not only

¹⁴ 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.

¹⁵ This Zone includes in Finnmark county, all municipalities; in Troms county, the municipalities of Karlsøy, Lyngen, Storfjord, Kåfjord, Skjervøy, Nordreisa and Kvænangen.

¹⁶ Decision No 246/97/COL.

¹⁷ Decision No 165/98/COL.

¹⁸ Hereinafter referred to as the EEA.

¹⁹ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76.

²⁰ Decision No 228/99/COL.

²¹ Published in the OJ L 244 of 14 September 2001, page 32.

submitted comments to the decision to initiate the procedure regarding the Swedish case but also confirmed that it operated a similar scheme.

In light of the Swedish decision, the Norwegian system was thereafter discussed at several meetings between the Norwegian authorities and the Authority, as well as between the Authority and the European Commission. In view of the similarities between the Norwegian and the Swedish schemes and in order to assure a level playing field within the EEA, the Authority considered it necessary to examine the compatibility of the Norwegian scheme and initiated a formal review of the Norwegian system by letter to the Norwegian authorities dated 4 June 2002 (Doc. No: 02-4189 D).

In its Decision of 25 September 2002²², the Authority concluded that the regionally differentiated social security contributions scheme did not qualify for the derogation provided for under Article 61(3)(c) of the EEA Agreement and proposed the adoption of appropriate measures requesting the elimination of any incompatible aid involved in the system or to render it compatible with effect from 1 January 2004.

By letter from the Mission of Norway to the European Union dated 29 October 2002, received and registered by the Authority on 31 October 2002 (Doc. No: 02-7855 A), the Norwegian authorities accepted the appropriate measures.

In March 2003, the Norwegian authorities notified the Authority of a three-year transitional period, from 2004 to 2007, for the progressive adjustment of the rates of social security contributions applicable in Zones 3 and 4 (Doc. No: 03-1846 A). According to the notification, the rates of social security contributions would be as follows²³:

Table 1

	Rates 2003	Rates 2004	Rates 2005	Rates 2006	Rates 2007
Zone 1	14.1	14.1	14.1	14.1	14.1
Zone 2	10.6	14.1	14.1	14.1	14.1
Zone 3	6.4	8.3	10.2	12.1	14.1
Zone 4	5.1	7.3	9.5	11.7	14.1

²² Decision No 172/02/COL.

²³ Undertakings in certain economic sectors would pay the full rate of 14.1 % as they already did according to the scheme approved by the Authority's decision of 22 September 1999. The Norwegian authorities also informed the Authority about their intention to continue applying the rates for 2003 to the extent that that would be in compliance with the *de minimis* rule.

By letter dated 15 April 2003 (Doc. No: 03-2467 A), the Norwegian authorities had also notified a continuation of regionally differentiated social security contributions in Nord-Troms and Finnmark (Zone 5). This notification was withdrawn, however, by letter from the Norwegian Ambassador to the European Union dated 4 July 2003 (Doc. No: 03-4403 A) as the EFTA States, by common accord in the Standing Committee of the EFTA States on 1 July 2003 (No 2/2003/SC), and by reference to Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement, had decided that the present scheme in Zone 5 was compatible with the EEA Agreement due to the exceptional circumstances in this zone.

After opening the formal investigation procedure by a decision dated 16 July 2003²⁴ and in line with the EFTA Court's judgment in Case E-6/98²⁵, the Authority concluded that the reduced rates of social security contributions in Zones 2, 3 and 4 amounted to disbursement of aid. However, the Authority authorised the notified three-year transitional period for the regionally differentiated social security contributions in Zones 3 and 4 by Decision No 218/03/COL of 12 November 2003. In this decision, the Authority noted that without a transitional period, the increase in the social security payments would lead to adverse employment effects. The Authority observed that a gradual phasing out of the differentiated tax rates over a period of three years would mean that the annual cost increase for the undertakings would be spread over the period. On the contrary, an immediate abolishment of the current system would have implied a cost shock to the undertakings concerned. An appropriate transition period seemed advisable in order to mitigate the shock effects and give undertakings time to adjust to the new economic environment.

b) Description of the currently notified measure for regionally differentiated rates of social security contributions for certain economic sectors

(1) Description of the main features of the measure

In April 2004, the Norwegian authorities notified the Authority of their intention to apply, for certain economic sectors, from 1 January 2005 onwards and for an indefinite period of time, the regionally differentiated rates of social security contributions that existed until the end of 2003 in Zones 1, 2, 3 and 4. These rates are shown in Table 1 above for the year 2003. Zone 5 was kept outside the notification as the rate applicable there is zero following the Decision of the Standing Committee of the EFTA States No 2/2003/SC of 1 July 2003.

The notified measure will only be applicable to certain economic sectors which, according to the Norwegian authorities, are not exposed to competition from undertakings in other EEA States. The Norwegian authorities alleged that there was no

²⁴ Decision No 141/03/COL.

²⁵ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76.

trade effect in the economic sectors benefiting from the intended application of reduced social security rates. Therefore, the Norwegian authorities considered that the notified measure did not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

The Norwegian authorities assessed the exposure to competition on the basis of an economic report prepared by the independent consultancy firm ECON in cooperation with a Norwegian law firm (hereinafter: “the ECON report”). The following list of sectors supposedly not affected by competition from undertakings in other EEA States and accordingly covered by the notified measure was drafted on the basis of the assessment presented in the ECON report:

Table 2

NACE Code ²⁶	Zone 2	Zone 3	Zone 4
01.300 Growing of crops combined with farming of animals (mixed farming)	n.a. ²⁷	n.a.	0
22.120 Publishing of newspapers	0/2	0/2	0/2
22.210 Printing of newspapers	0/2	0/2	0/2
35.111 Building and repairing of ships and hulls more than 100 g.r.tons	0/2	0/2	0/2
35.113 Building and repairing of ships less than 100 g.r.tons	0/2	0/2	0/2
40.120 Transmission of electricity	0	0	0
45.110 Demolition and wrecking of buildings; earth moving	0	0	0
45.212 General construction of civil engineering works	0	0	0

²⁶ NACE list of sectors according to the classification of the Norwegian Statistical Office.

²⁷ In the table, the cipher 0 indicates that according to the Norwegian authorities there is no effect on trade in the relevant sector; the cipher 0/2 indicates that some undertakings of the given sectors within the actual zone are exposed to competition.

The reference “n.a.” means “not applicable”. It indicates that following the research made by the ECON report, there were no undertakings active in the given sector that would exceed the *de minimis threshold* within the relevant zone.

45.221 Tinsmith work	n.a.	n.a.	0
45.229 Other erection of roof covering and frames	n.a.	n.a.	0
45.230 Construction of motorways, roads, airfields and sport facilities	0	0	0
45.240 Construction of water projects	0	n.a.	n.a.
45.250 Other construction work involving special trades	0	0	0
45.310 Installation of electrical wiring and fittings	0	0	0
45.320 Insulation work activities	n.a.	n.a.	0
45.330 Plumbing	0	0	0
45.340 Other building installation	0	n.a.	0
45.442 Glazing	n.a.	n.a.	0
45.450 Other building completion	0	n.a.	0
45.500 Renting of construction or demolition equipment with operator	n.a.	0	0
50.200 Maintenance and repair of motor vehicles	0	0	0
50.301 Commission- and wholesale of motor vehicle, motor vehicle parts and accessories	0	n.a.	0
50.302 Retail sale of motor vehicle parts and accessories	0	0	0
50.500 Retail sale of automotive fuel	0	0	0
51.170 Agents involved in the sale of food, beverages and tobacco	n.a.	n.a.	0/2
51.180 Agents specializing in the sale of particular products or ranges of products	n.a.	n.a.	0

n.e.c.			
51.210 Wholesale of grain, seeds and animal feeds	0	0	0
51.220 Wholesale of flowers and plants	n.a.	n.a.	0
51.389 Wholesale of molluscs n.e.c.	n.a.	n.a.	0
51.390 Non-specialized wholesale of food, beverages and tobacco	n.a.	0	0
51.421 Wholesale of clothing	0	0	0
51.434 Wholesale of gramophone records, tapes, CD, DVDs and videos	n.a.	n.a.	0
51.460 Wholesale of pharmaceutical goods	n.a.	n.a.	0
51.477 Wholesale of sport goods, games and toys	0	n.a.	n.a.
51.479 Wholesale of household goods and personal goods n.e.c.	n.a.	n.a.	0
51.520 Wholesale of metals and metal ores	n.a.	n.a.	0
51.532 Wholesale of lumber	0	0	0
51.533 Wholesale of paints and varnish	n.a.	n.a.	0
51.539 Wholesale of construction materials n.e.c.	0	n.a.	0
51.561 Wholesale of paper and paperboard	0	n.a.	0
51.840 Wholesale of computers, computer peripheral equipment and software	0	0	0
51.850 Wholesale of other office machinery and equipment	n.a.	n.a.	0
51.872 Wholesale of shipping equipment and fishing tackle	n.a.	n.a.	0

51.900 Other wholesale	0	0	0
52.110 Retail sale in non-specialized stores with food, beverages or tobacco predominating	0/2	0/2	0/2
52.120 Other retail sale in non-specialized stores	0/2	0/2	0/2
52.220 Retail sale of meat and meat products	0	n.a.	n.a.
52.230 Retail sale of fish, crustaceans and molluscs	n.a.	n.a.	0
52.241 Retail sale of bread, cakes and flour confectionery	0	n.a.	0
52.271 Retail sale of health food	n.a.	n.a.	0
52.279 Retail sale of food, beverages and tobacco in specialised stores n.e.c.	n.a.	n.a.	0
52.310 Dispensing chemists	0	0	0
52.330 Retail sale of cosmetic and toilet articles	n.a.	n.a.	0
52.410 Retail sale of textiles	0	0	0
52.420 Retail sale of clothing	0/2	0/2	0/2
52.431 Retail sale of footwear	0	0	0
52.441 Retail sale of lighting equipment	n.a.	n.a.	0
52.442 Retail sale of china and glass ware	n.a.	n.a.	0
52.443 Retail sale of furniture	0/2	0/2	0/2
52.449 Retail sale of non electrical household articles n.e.c.	n.a.	0	0
52.451 Retail sale of electrical household appliances, and radio and television goods	0	0	0

52.453 Retail sale of musical instruments and musical notes	n.a.	n.a.	0
52.461 Retail sale of variety of hardware, paints and glass	0/2	0/2	0/2
52.463 Retail sale of paints and varnish	0	0	n.a.
52.464 Retail sale of wood	n.a.	n.a.	0/2
52.469 Retail sale of hardware, paints and glass n.e.c.	n.a.	0	0
52.481 Retail sale of watches, photographic and optical goods	n.a.	0	0
52.482 Retail sale of gold and silver ware	n.a.	0	0
52.483 Retail sale of sport goods, games and toys	n.a.	n.a.	0
52.484 Retail sale of flowers and plants	n.a.	n.a.	0
52.485 Retail sale of computers, office and telecommunication equipment	n.a.	n.a.	0
52.489 Retail sale in specialised stores n.e.c.	n.a.	0	0
52.612 Retail sale of textiles, clothes, footwear, travel accessories and leather goods via mail order houses	0	n.a.	n.a.
52.619 Other retail sale of specialised assortment of goods via mail order houses	0	n.a.	0
52.630 Other non-store retail sale	n.a.	n.a.	0
52.720 Repair of electrical household goods	n.a.	n.a.	0
55.301 Operation of restaurants and cafés	0	0	0
55.302 Operation of snack bars, salad bars and hot dog bars	n.a.	0	0
55.401 Pubs	0	0	0

55.510 Canteens	0	n.a.	0
55.520 Catering	0	n.a.	0
60.220 Taxi operation	n.a.	0	0
63.110 Cargo handling	0	n.a.	0
63.120 Storage and warehousing	n.a.	n.a.	0
63.211 Central agencies for goods and transportation procurement	0	0	0
63.212 Parking places and parking houses	n.a.	n.a.	0
63.213 Toll bar stations	n.a.	n.a.	0
63.219 Other services allied to land transport	0	0	0
63.221 Operation of harbours	n.a.	n.a.	0
63.229 Other supporting water transport activities	n.a.	n.a.	0
63.230 Other supporting air transport activities	0	0	0
63.302 Tourist offices	n.a.	0	0
63.401 Freight forwarding services	0	0	0
63.409 Other forwarding services	n.a.	n.a.	0
64.110 National post activities	0	0	0
64.120 Courier activities other than national post activities	n.a.	0	0
64.210 Fixed telecommunications carriers	0	n.a.	0
64.220 Mobile telecommunications carriers	0	n.a.	0
64.230 Internet service providers	n.a.	n.a.	0
64.240 Other telecommunication activities	n.a.	n.a.	0

65.120 Other monetary intermediation	0	0	0
65.220 Other credit granting	0	n.a.	0
65.239 Other security management	n.a.	n.a.	0
66.010 Life insurance	n.a.	n.a.	0
66.030 Non-life insurance	0	0	0
67.130 Activities auxiliary to financial intermediation	n.a.	n.a.	0
67.200 Activities auxiliary to insurance and pension funding	n.a.	0	0
70.111 House building cooperatives	n.a.	n.a.	0
70.112 Other development and sale of real estate	n.a.	n.a.	0
70.120 Buying and selling of own real estate	n.a.	0	0
70.202 Other letting of own property	0	0	0
70.310 Real estate agencies	n.a.	n.a.	0
70.321 Management of real estate on a fee or contract basis	n.a.	0	0
70.322 Caretaker services	n.a.	n.a.	0
71.110 Renting of automobiles	n.a.	n.a.	0
71.320 Renting of construction and civil engineering machinery and equipment	n.a.	n.a.	0
71.340 Renting of other machinery and equipment n.e.c.	n.a.	n.a.	0
71.400 Renting of personal and household goods n.e.c.	0	n.a.	0
72.500 Maintenance and repair of office, accounting and computing machinery	n.a.	n.a.	0

74.110 Legal activities	n.a.	n.a.	0
74.121 Accounting, book-keeping	0	0	0
74.122 Auditing	0	0	0
74.130 Market research and public opinion polling	n.a.	n.a.	0
74.140 Business and management consultancy activities	0	n.a.	0
74.203 Geological surveying	n.a.	n.a.	0
74.300 Technical testing and analysis	0	0	0
74.400 Advertising	0	n.a.	0
74.501 Labour recruitment of personnel	0	0	0
74.600 Investigation and security activities	0	0	0
74.700 Industrial cleaning	0	0	0
74.810 Photographic activities	n.a.	n.a.	0
74.820 Packaging activities	n.a.	n.a.	0
74.851 Secretarial activities	n.a.	0	0
74.852 Translation activities	n.a.	n.a.	0
74.871 Bill collecting, credit granting activities	n.a.	n.a.	0
74.877 Activities of fairs, exhibitions and congress organisers	n.a.	n.a.	0
74.879 Other business activities n.e.c.	0	0	0
75.110 General (overall) public service activities	0	0	0
75.120 Regulation of the activities of agencies that provide health care, education,	0	0	0

cultural services and other social services, excluding social security			
75.130 Regulation of and contribution to more efficient operation of business	0	0	0
75.140 Supporting service activities for the government as a whole	0	n.a.	0
75.220 Defence activities	0	0	0
75.230 Justice and judicial activities	0	0	0
75.240 Public security, law and order activities	0	0	0
75.250 Fire service activities	0	0	0
75.300 Compulsory social security activities	0	0	0
80.102 Primary and lower secondary education	0	0	0
80.103 Specialised education for handicap	0	0	0
80.210 General secondary education	0	0	0
80.309 Education at other colleges	n.a.	n.a.	0/2
80.410 Driving school activities	n.a.	n.a.	0
80.421 Folk high school education	0	0	0
80.423 Activities of adult education associations	n.a.	0	0
80.424 Activities of municipal music schools	n.a.	0	0
80.429 Other education	0	0	0
85.114 Rehabilitation institutions	0	0	0
85.116 Mental health hospitals for adults	0	0	n.a.

85.118 Nursing homes	0	0	0
85.121 General practitioners	n.a.	n.a.	0
85.122 Physicians, specialist other than psychiatrist	n.a.	n.a.	0
85.130 Dental practice activities	0	0	0
85.142 Physiotherapy services	n.a.	n.a.	0
85.143 School health services, maternal and child health care	0	n.a.	n.a.
85.144 Other preventive health care	n.a.	0	0
85.147 Ambulance services	0	0	0
85.149 Other health activities	0	0	0
85.200 Veterinary activities	0	0	0
85.311 Child welfare institutions	0	n.a.	n.a.
85.312 Institutions for alcoholic and drug addicts	0	0	0
85.319 Other social care institutions	n.a.	0	0
85.321 Home help services	n.a.	n.a.	0
85.322 Dwellings with accommodation for elderly and disabled	n.a.	n.a.	0
85.323 Child welfare services	0	n.a.	0
85.324 Social welfare services without accommodation for alcoholic and drug addicts	n.a.	0	0
85.325 Family counselling services	n.a.	n.a.	0
85.326 Municipal social service offices activities	n.a.	n.a.	0

85.327 Early childhood education and care institutions	0	0	0
85.331 School-age child care	n.a.	n.a.	0
85.333 Day care activities for elderly and disabled	n.a.	n.a.	0
85.334 Training for work activities for ordinary labour market	0	0	0
85.335 Permanent sheltered work activities	0	0	0
85.336 Social welfare organisations activities	n.a.	n.a.	0
85.337 Reception centres for asylum seekers	0	0	0
85.338 Employment/ training for work activities under the municipal health and social departments	0	n.a.	n.a.
85.339 Other social work activities without accommodation	n.a.	0	n.a.
90.010 Collection and treatment of sewage	0	n.a.	0
90.020 Collection and treatment of other waste	0	0	0
91.110 Activities of business and employers organizations	n.a.	0	0
91.200 Activities of trade unions	n.a.	n.a.	0
91.310 Activities of religious organizations	0	0	0
91.330 Activities of other membership organizations n.e.c.	0	n.a.	0
92.110 Motion picture and video production	n.a.	n.a.	0
92.130 Motion picture projection	n.a.	n.a.	0
92.200 Radio and television activities	0	n.a.	0

92.320 Operation of arts facilities	0	n.a.	0
92.330 Fair and amusement park activities	n.a.	n.a.	0
92.400 News agency activities	n.a.	n.a.	0
92.510 Library and archives activities	0	n.a.	0
92.521 Museum activities	0	0	0
92.522 Preservation of historical sites and buildings	n.a.	0	0
92.610 Operation of sports arenas and stadiums	0/2	0	0
92.621 Sport clubs and associations	0	0	0
92.629 Other sporting activities n.e.c.	n.a.	n.a.	0
92.721 Activities and adventure companies	n.a.	0	n.a.
92.729 Other recreational services n.e.c.	0	0	0
93.010 Washing and dry-cleaning of textile and fur products	0	0	0
93.020 Hairdressing and other beauty treatment	n.a.	0	0
93.030 Funeral and related activities	n.a.	n.a.	0
93.040 Physical well-being activities	0	0	0

On the basis of the ECON report, the Norwegian authorities have established the following criteria to differentiate between undertakings not subject to competition from undertakings located in other EEA States and those undertakings which are affected by EEA-wide competition, regarding the economic sectors marked with the ciphers 0/2:

- *NACE 22.120 and 22.210: publishing and printing of newspapers*

Due to language, culture and distance, the publishing and printing of local newspapers is considered to operate only in local markets. A newspaper is considered local as long as it is not nationwide.

- *NACE 35.111 and 35.113: building and repairing of ships and hulls over 100 tons and under 100 tons*

As long as the repair concerns ships operating in Norwegian waters or in acute difficulties, the given shipyards are considered to operate locally and thus not subject to competition from other EEA States.

- *NACE 51.170: agents involved in the sale of food, beverages and tobacco*

The Norwegian authorities have not provided any further explanation on the eligibility criteria applicable to undertakings of this sector. According to the ECON report, it was not possible to separate undertakings subject to competition from those which are not on the basis of the information available.

- *NACE 52.110: retail sale in non-specialised stores with food, beverages or tobacco predominating*

Undertakings that are located at a distance of more than 150 kilometres from competitors on the other side of the national border are considered not to be exposed to competition from other EEA States. According to the information submitted by the Norwegian authorities, the use of a critical distance of 150 km was established by identifying the nearest competitors situated on the other side of the border to undertakings with the standard industrial classification 52.110, non specialised retail sales. The competition conditions were considered with respect to undertakings located at varying distances from the nearest competitor on the other side of the border. On the basis of the conclusions of the ECON report, the Norwegian authorities stated that the probability that undertakings situated more than 150 km from a competitor are exposed to competition from undertakings in other EEA States is low. The Norwegian authorities acknowledge that whether there is actual competition depends on the assortment of goods offered.

- *NACE 52.120, 52.420 and 52.443: other retail sale in non-specialised stores, retail sale of clothing and retail sale of furniture*

Although the distance to competitors on the other side of the border is of significance, the Norwegian authorities acknowledge that it is difficult to determine an absolute and decisive limit between undertakings affected by intra-EEA trade and those which are not affected. Whereas undertakings located approximately 200 km from a relatively large shopping centre on the other side of the border are exposed to competition, according to the findings of the ECON report, undertakings located closer to the border, but without having any large shopping centre on the other side, are not exposed to competition. Nevertheless, following the same assessment as for NACE 52.110, the Norwegian authorities have explained in the notification that a distance of 200 km seems an appropriate objective criterion to determine the effect on trade for this sector.

- *NACE 52.461 and 52.464: retail sale of a variety of hardware, paints and glass and retail sale of wood*

The Norwegian authorities have explained that undertakings located at “*a very long distance to the national border*” are not exposed to competition from undertakings of other EEA States. On the basis of the information provided, “*a very long distance to the national border*” means that it would not be worth travelling back and forth in one day, whereby the distance depends on i.a. the road standard and traffic conditions. Undertakings situated in the counties Rogaland, Hordaland, Sogn og Fjordane and Møre og Romsdal can benefit from reduced social security rates since they are not exposed to competition from other EEA States. Undertakings in other counties are excluded.

- *NACE 80.309: education at other colleges*

The notification only covers adult education courses which are accordingly considered not to be affected by trade. As far as education at college or university level is concerned, the Norwegian authorities have indicated the cipher 2 meaning that the concerned activity is exposed to competition.

- *NACE 92.610: operation of sports arenas and stadiums*

An athletic club is considered to be local when it does not participate in the highest division in its branch of athletics. Other sports installations are considered to be local when they are mainly used by local clubs, the local population in the municipality and daytrip visitors, having no competitive offers in other EEA States.

(2) *The method used for the selection of undertakings covered by the notified measure of regionally differentiated rates of social security contributions*

The notified measure covers a number of economic sectors identified in the ECON report as listed above. The ECON report was based on the assessment of the competition interfaces (“*konkurransflater*”) between undertakings located in Zones 2, 3 and 4 in Norway and those in other EEA States. It contained a list of sectors supposedly not affected by competition from other EEA States.

For the manufacturing sector, the list of economic sectors not affected by competition from other EEA States was drafted on the basis of regional data on export and import figures to the relevant zones provided by Statistics Norway. As the Norwegian authorities have explained in the letter dated 12 November 2004, the occurrence of direct trade in nearly all manufacturing sectors (NACE 15 to NACE 37) led ECON to conclude that practically all these sectors may be affected by competition from undertakings in other EEA States. The Norwegian authorities have also explained that some very few sectors (publishing and printing of newspapers, building of ships) were nonetheless considered to

operate in local markets only based on the nature and the characteristics of these sub-sectors and not on an import/export analysis.

As regards undertakings in the services sector (NACE 50 to NACE 99), the exposure to competition was mainly examined on the basis of the knowledge of the market situation in the different business sectors and on interviews with a selection of enterprises in Zones 2, 3 and 4 in Norway.

There is neither an explicit reference to the method followed to determine the exposure of competition in the electricity, gas and water supply (NACE 40) nor in the construction sector (NACE 45), although a great number of the construction sub-sectors have been included in the notification.

According to the ECON report, purely local activities were not affected by intra-EEA trade. To be classified as a purely local activity in terms of the ECON report, two cumulative conditions had to be fulfilled by the relevant economic sector in the given area: The undertakings in the given sector do not participate themselves in cross-border activities and the specific activity located in the actual region is not capable of attracting customers from another location.

The report states that the identification of competition interfaces could be used to draft a proposal for rules that continue, as far as possible, the old scheme of reduced rates of social security contributions for economic sectors which are not in intra EEA-competition²⁸. The ECON report nevertheless does neither contain any proposal for rules as would normally be the case for an aid scheme nor is such a proposal made in the notification.

In the introduction to the report, ECON stated that there was not enough time or resources to conduct a thorough analysis of the competition relations within all the economic sectors covered by the report, and that this could lead to both underestimations and overestimations of the competition with undertakings in other EEA States²⁹. ECON was nonetheless of the opinion that a reasonable picture of competition between undertakings within the EEA could be drawn from the outcome of the report.

²⁸ Summary to the report: *“Kartleggingen skal kunne brukes til å utarbeide et forslag til regelverk som så langt som mulig viderefører ordningen med gradert arbeidsgiveravgift for bransjer eller vesentlige deler av bransjer som ikke er i konkurranse med virksomheter i andre EØS-land, og som dermed ikke påvirker samhandelen.”*

²⁹ Point 1.2 of the report: *“Det har verken vært tid eller ressurser til å gjennomføre en dyptgående analyse av konkurranseforholdene innen alle de bransjer som omfattes av rapporten. I de fleste tilfellene har vi måttet bygge på faglige vurderinger støttet av intervjuer med utvalgte bedrifter. Skjevheter i informasjonen kan derfor forekomme i våre vurderinger av enkeltbransjer. Imidlertid kan dette slå ut både i retning av å overvurdere konkurransen med andre EØS-land og å undervurdere den”*.

3. Concerns in the opening decision

On 6 October 2004, the Authority decided to open the formal investigation procedure on the proposal for regionally differentiated rates of social security contributions for certain economic sectors. The Authority considered that the proposed application of reduced social security rates in Zones 2, 3 and 4 covered a very broad range of economic sectors and undertakings. The notified measure replicated to a very large extent the former scheme of regionally differentiated and reduced rates of social security contributions, which was declared incompatible aid by the Authority³⁰.

The main difference between the formerly assessed scheme and the measure currently notified is a reduction in the number of economic sectors that could benefit from reduced rates. The ECON report had prepared a list of sectors which were allegedly not affected by intra-EEA trade on the basis of the assessment of the competition interfaces.

The Authority expressed doubts in the opening decision with regard to the method followed in the ECON report for collecting data, which did not seem systematic. The Authority was concerned that the ECON report produced only an incomplete picture of the status quo and that there was no thorough analysis of the future situation.

The Authority stressed its doubts as to whether the approach followed to determine whether there was intra-EEA trade effect in a given sector would comply with the requirements laid down in established case law regarding the understanding of the criterion “effect on trade” within the meaning of Article 61(1) of the EEA Agreement. Referring to case law, the Authority recalled in particular that, contrary to the approach followed by the ECON report, the fact that aid is granted in respect of purely local activities or to undertakings operating at solely local level does not by itself preclude the possibility of an effect on trade.

Moreover, the Authority had doubts whether the notified measure provided the necessary mechanisms to guarantee the absence of effect on trade in all instances since it did not contain any general safeguard to ensure the necessary legal and economic certainty in its application concerning the effect on trade. The Authority was concerned about the indefinite character of the measure which is unlimited in time and does not provide for a review clause of the criteria and conditions of application.

The Authority decided to open the formal investigation procedure, amongst others, to facilitate the task for Norway of clarifying and better substantiating whether the application of the notified measure would not have any effect on trade. Reference is made to the following section for the comments submitted by the Norwegian authorities.

³⁰ For further information, reference is made to Section I.2.a of this Decision, with special reference to the Authority’s Decisions No 172/02/COL and No 218/03/COL.

4. Comments by the Norwegian authorities

By letter dated 12 November 2004, the Norwegian authorities submitted their comments to the Authority's decision to open the formal investigation procedure. As far as the content of the notification is concerned, the Norwegian authorities clarified that regarding the standard industrial classifications 52.120 (other retail in non-specialised stores), 52.420 (retail sale of clothing) and 52.443 (retail sale of furniture), the notification covered undertakings located in all three zones included in the measure. Due to an inaccuracy, this was only indicated for undertakings in Zone 4.

Secondly, the Norwegian authorities explained that *“some economic sectors in one zone were notified as not exposed to competition whereas the same sectors in other zones were not included in the list. [...] The reason for this was that the ECON report found that for some economic sectors there were no undertakings that would exceed the de minimis threshold within the relevant zone. [...] However, for future purposes, if the wage costs of such undertakings should lead to an exceeding of the de minimis threshold, these undertakings will be considered in the same way as undertakings falling under the relevant sector notified in other zones.”*

Thirdly, the Norwegian authorities found that the line of arguments followed by the Authority in the decision to open the formal investigation procedure reflected a somewhat simplified understanding of the method of data collection used and the assessment done by ECON. In this respect, the Norwegian authorities stated that for undertakings in the manufacturing sector, the exposure to competition was examined on the basis of regional data on exports and imports. The Norwegian authorities clarified that the ECON report did not presuppose that the analysis of these figures may be sufficient to identify economic sectors not affected by competition from undertakings in other EEA States but sufficient to confirm that aid to a certain sector may actually affect trade.

As regards the undertakings in the service sectors, the Norwegian authorities argued that the exposure to competition was examined mainly on the basis of the knowledge of the market situation in the different business sectors and on interviews with a sample of enterprises. To be classified as a purely local activity, one condition was that undertakings in the relevant service sector itself did not participate in cross-border activities. However, this was not applied as a sufficient condition. The ECON report also evaluated whether the specific service activity located in a given region was capable of attracting customers from another location or EEA State. As regards a possible future situation, the interviewed firms were asked what they considered would be the effect on their customers' trade patterns if the price of the service rendered locally were to be increased by a specified percentage or if the price for the same service offered by firms located in the neighbouring Nordic countries were to be increased.

Fourthly, the Norwegian authorities considered that it was for the Authority to assess whether any of the sectors or beneficiaries covered by the notified measure may be

granted aid that does not affect trade between the Contracting Parties to the EEA Agreement.

II. APPRECIATION

1. Procedural requirements

The notified measure has not been put into effect. Hence, the Norwegian authorities have respected their obligations pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

2. The notified measure

The Norwegian authorities have notified their “*intention to continue as from 1 January 2005 the scheme of differentiated social security contributions applicable before 1 January 2004 for sectors not exposed to competition from undertakings in other EEA States.*” No concrete draft proposal for regulations or laws governing the application of the measure has been notified. The Norwegian authorities have notified a report on the basis of which they intend to reintroduce the old scheme of regionally differentiated and reduced rates of social security contributions in favour of certain sectors. Although it states that the identification of competition interfaces could be used to draft a proposal for rules, the ECON report does neither contain any proposal for rules as would normally be the case for an aid scheme nor is such a proposal made in the notification.

Based on the spare information submitted by the Norwegian authorities in the notification and during the formal investigation procedure, it seems that the Norwegian authorities want to continue (or reintroduce) the old system of regionally differentiated and reduced rates of social security contributions, but to limit its application to the sectors listed in the ECON report. It needs to be recalled that the old system of reduced rates of social security contributions was classified as an aid scheme³¹. The Authority sees no reason why the notified measure should not be classified as a scheme, although its scope of application has been narrowed down.

Following the definition laid down in Article 1(d) in Part II of Protocol 3 to the Surveillance and Court Agreement, an aid scheme is any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner. It also encompasses any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

³¹ Reference is made to the Authority’s Decision No 218/03/COL in which the Authority accepted a three-year transitional period for the abolition of regionally differentiated rates of social security contributions.

The notified measure refers to the application of regionally differentiated rates of social security contributions to any undertaking active in a number of sectors (more than 200 sectors are covered by the proposal) with respect to its employees residing in Zones 2, 3 and 4 in Norway. The application of reduced rates of social security contributions is not an individual award of aid to a single undertaking but a reoccurring event on a regular basis during an indefinite period of time in favour of an undefined number of beneficiaries. Hence, the notified measure has to be qualified as a scheme.

3. The scope of the present Decision

The following assessment only applies to the activities which are covered by the EEA Agreement. The Authority can not assess any activities which fall outside the scope of the Agreement such as, for instance, NACE Code 75.220 defence activities.

Furthermore, the Authority has no competence to scrutinise aid to undertakings exclusively carrying out activities related to products not covered by the EEA Agreement such as agricultural or fisheries products³². Amongst other examples, this is the case of NACE Code 01.300, growing of crops combined with farming of animals (mixed farming). Activities in sectors which fall outside the competence of the Authority to assess the existence of state aid are not subject to this decision³³.

4. The presence of state aid within the meaning of Article 61(1) of the 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.”

According to settled case-law, the classification as aid requires that all the four conditions set out in Article 61(1) of the EEA Agreement are fulfilled³⁴: 1) there must be an intervention by the State or through state resources; 2) it must confer a selective advantage on the recipients; 3) this intervention must distort or threaten to distort

³² See, *inter alia*, Articles 8(3), 17 to 20 and Protocols 3 and 9 of the EEA Agreement as well as Article 24 of the Surveillance and Court Agreement.

³³ See also Section 4 below.

³⁴ Case C-345/02 *Pearle BV, Hans Prijs Optiek Franchise BV, Rinck Opticiëns BV and Hoofdbedrijfschap Ambachten* [2004] ECR I-7139, paragraph 33, Case C-142/87 *Belgium v Commission* (‘Tubemeuse’) [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 68, and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74.

competition and 4) in order to be caught by the prohibition of Article 61(1) of the EEA Agreement, the aid measure must affect trade between the Contracting Parties.

The Norwegian scheme of reduced rates of social security contributions has been subject to several decisions taken by the Authority³⁵. The EFTA Court also assessed the scheme³⁶ and came to the conclusion that such a scheme constituted state aid.

As mentioned above, the current proposal intends to reintroduce the former scheme, the only difference being that the proposed scheme is narrowed down to certain sectors. It is the Authority's view that the Authority's conclusions and EFTA Court's findings with regard to the classification of the former scheme under Article 61(1) of the EEA Agreement apply equally to the present notified scheme with regard to three of the four cumulative criteria.

Thus, the notified scheme involves a consumption of state resources by way of income foregone by the State with the application of reduced rates of social security contributions. Further, the scheme confers a direct competitive advantage on undertakings in the favoured sectors and regions compared to undertakings located elsewhere or not covered by the notified sectors. In this context, the Authority would like to underline that a measure can only constitute state aid in as far as it concerns an undertaking which carries out an economic activity, that is, an activity consisting of offering goods and services in competition on a given market³⁷. The case law defines undertaking as *"every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed"*³⁸. Therefore, no state aid can be involved in non-economic activities such as purely state administrative activities, justice and judicial activities or in compulsory social security activities, amongst other examples. Thus this decision does not cover such activities.

The remaining question is therefore whether aid granted under the notified scheme, which is applicable to a certain number of sectors allegedly not exposed to competition from undertakings in other EEA States, has an effect on trade between the Contracting Parties.

a) Does the aid affect trade within the meaning of Article 61(1) of the EEA Agreement?

In order to be caught by the prohibition of Article 61(1) of the EEA Agreement, the aid measure must be liable to affect trade between the Contracting Parties to the EEA

³⁵ See Section I.2.a) of this Decision.

³⁶ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76.

³⁷ Joined Cases C-180/98 to C-184/98 *Pavlow and others* [2000] ECR I-6451, paragraph 75.

³⁸ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

Agreement. This provision does not distinguish between causes or objectives but defines state aid in relation to the effects³⁹.

In the following, the Authority will assess whether the limitations of the notified scheme to certain sectors hinders the aid from being capable of affecting trade between the Contracting Parties and hence brings it outside the scope of Article 61(1) of the EEA Agreement.

(1) The legal standard

According to the jurisprudence⁴⁰, whenever state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-EEA trade, the latter must be regarded as affected by that aid.

There is no threshold or percentage below which it may be considered that trade between the Contracting Parties is not affected⁴¹. According to settled case-law, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not, as such, exclude the possibility that intra-EEA trade might be affected⁴². Where a sector has a large number of small companies, aid potentially available to all or a very large number of undertakings in that sector can, even if individual amounts are small, have an impact on trade between the Contracting Parties to the EEA Agreement⁴³. Aid may also affect trade within the EEA even if the recipient undertaking does not itself participate in cross-border activities⁴⁴.

The character of the aid does not depend on the local or regional character of the services supplied or on the scale of the field of activity concerned⁴⁵. The local character of the activities of the beneficiaries of a measure constitutes one of the features to be taken into account in the assessment of whether there is an effect on trade but it is not sufficient to

³⁹ Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79.

⁴⁰ Case E 6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court page 76, paragraph 59; Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11.

⁴¹ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 81, Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005], not yet reported, paragraph 32.

⁴² Case C-71/04 *Administración del Estado v Xunta de Galicia* [2005] not yet reported, paragraph 41; Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 81; Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 28; Case C-142/87 *Belgium v Commission* (“*Tubemeuse*”) [1990] ECR I-959, paragraph 43; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 42.

⁴³ Case C-71/04 *Administración del Estado v Xunta de Galicia* [2005] not yet reported, paragraph 43; Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 64; and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 57.

⁴⁴ Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 86.

⁴⁵ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 77; Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] not yet reported, paragraph 33; Case C-71/04 *Administración del Estado v Xunta de Galicia* [2005] not yet reported, paragraph 40.

prevent the aid from having an effect on trade⁴⁶. This is because the granting of state support to an undertaking may lead to the internal supply being maintained or increased, with the consequence that the opportunities for other undertakings to penetrate the market of the EEA States concerned are reduced⁴⁷.

In the assessment of the effect on trade, the Authority is not required to determine the actual effect of an aid scheme but to examine whether it is liable to affect trade within the EEA⁴⁸. Thus, the criterion of the effect on trade has been traditionally interpreted in a non restrictive way to the effect that, in general terms, a measure is considered to be state aid if it is capable of affecting trade between the EEA States⁴⁹.

(2) *Assessment of the notified scheme*

According to the Norwegian authorities, the notified scheme covers approximately 75 % of the service sectors examined in the ECON report and a small part of the manufacturing sectors plus several sectors in the area of construction. According to the notification, these more than 200 economic sectors, with certain qualifications for 13 of them, are not exposed to any intra-EEA trade. For this reason, in the opinion of the Norwegian authorities, the notified scheme does not qualify as state aid within the meaning of Article 61(1) of the EEA Agreement.

- *The ECON report and the method used to chose the economic sectors covered by the scheme*

The notified scheme for regionally differentiated rates of social security contributions builds on the so-called ECON report, attached to the notification. However, according to the report, the purpose of the report is not to assess whether the scheme of regionally differentiated rates of social security contributions is in compliance with the EEA Agreement, but to assess the competition interfaces⁵⁰.

The Norwegian authorities have neither made further assessments in the notification nor have they presented any more precise definitions of conditions of competition in relation to other Contracting Parties. They have merely stated that the original rates of differentiated social security contributions shall be applied to undertakings in sectors

⁴⁶ Joined Cases T-298/97-T-312/97 e.a. *Alzetta a.o. v Commission* [2000] ECR II-2319, paragraph 91.

⁴⁷ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76, paragraph 59; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27; Joined cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 40, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 78.

⁴⁸ Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 49, and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44.

⁴⁹ Joined Cases T-298/97-T-312/97 e.a. *Alzetta a.o. v Commission* [2000] ECR II-2319, paragraphs 76-78.

⁵⁰ Point 1.1 of the report: "*Det inngår imidlertid ikke i formålet til den foreliggende rapport å foreta en vurdering av om den differensierte arbeidsgiveravgiften er i strid med EØS-avtalens bestemmelser. Rapporten er avgrenset til å kartlegge de relevante konkurranseflater.*"

deemed in the ECON report not to have any competition interfaces. They have not presented a legal text with provisions governing the application of the reduced rates of social security contributions.

The Norwegian authorities accept that potential misalignments in the information in the ECON report may occur in the evaluation of individual economic sectors which can “*most likely be equalized on an aggregate level*”⁵¹. However, the Authority cannot endorse this approach. An aid scheme must be precise enough to ensure that the application of its rules to any potential individual aid beneficiary does not infringe the rules of the EEA Agreement.

In the Authority’s opinion, the method for choosing economic sectors supposedly not affected by inter-state trade does not ensure that aid would not be granted to undertakings engaged in activities that would affect trade within the EEA.

The Authority questions the reliability of the information collected for the ECON report, which, in particular for the service sectors, was mainly based on the own knowledge of the market situation and on phone interviews with a selection of undertakings. The information gathered is not based on empiric evidence but has a rather subjective character. Furthermore, according to the information available to the Authority, the information collected does not seem to have been verified.

On the basis of the ECON report, an activity is considered to be purely local and not affected by intra-EEA trade if two conditions are fulfilled: undertakings in the relevant economic sector do not participate themselves in cross-border activities and the specific activity is not capable of attracting customers from another location.

However, the ECON report does not assess whether the criterion “effect on trade” in the meaning of Article 61(1) of the EEA Agreement would be fulfilled or not if aid is granted to undertakings in the different sectors listed. What is assessed is whether there is any direct competition in the sector and region concerned. As stated above, that the recipient of aid operates in a local market does not exclude that EEA trade is affected. Hence, that there are no competition interfaces according to the report does not mean that aid to undertakings active in these economic sectors would not affect trade between the Contracting Parties.

Thus, the method followed by the ECON report to identify economic sectors, which constitutes the basis for the notification of the current scheme of regionally differentiated rates of social security contributions, does not follow the parameters for the interpretation of the criterion “effect on trade” established by settled case law of the EFTA Court and the ECJ, as mentioned above.

⁵¹ See page 2 of the letter of the Norwegian authorities dated 23 April 2004 (Event No 279843).

- *The scheme itself*

The notified scheme covers a very broad and varied spectrum of undertakings⁵² active *inter alia* in the following economic sectors: shipbuilding, construction of motorways, roads, airfields and sport facilities, wholesale and retail trade, post and telecommunications, financial services, car rental, auditing, film production and radio and television activities.

In areas where secondary legislation has been adopted to open and regulate the establishment of the internal market, such as financial services (NACE 65), telecommunications (NACE 64), etc. or in areas which are subject to specific state aid rules, such as shipbuilding (NACE 35)⁵³, the Authority generally considers that the respective activity is not sheltered from intra-EEA trade.

Mobil telecommunication carriers (NACE 64.220), internet service providers (NACE 64.230) and courier activities other than national post activities (NACE 64.120) are prime examples of trans-border activities. Most of these activities are carried out by companies which operate internationally⁵⁴.

As far as the construction sector (NACE 45) is concerned, activities such as construction of motorways or of water projects must be carried out by highly specialised large undertakings which compete with other companies within the EEA⁵⁵.

In particular in some of the notified economic sectors, which are characterised by deregulation and liberalisation, a financial intervention of the State will often have an effect on trade.

Other economic sectors covered by the scheme have already been the object of state aid decisions clearly stating the existence of an effect on trade. This is, amongst others, the case of publishing of newspapers (NACE 22), a sector in which the Commission adopted a decision last year stating that: “[...] *there is trade between Member States in the publishing products concerned by the aid measures under review. Thus, the aid measures under review could distort competition between firms inasmuch as, for instance,*

⁵² According to the explanation of the Norwegian authorities in the notification, most, but not all, sectors in the manufacturing industry are supposed to be exposed to foreign competition and consequently not supposed to benefit from the currently notified reduced social security rates. However, undertakings in 75 % of all service sectors and in many sectors of construction are alleged not to be exposed to competition and trade within the EEA.

⁵³ Case C-71/04 *Administración del Estado v Xunta de Galicia* [2005] not yet reported, paragraph 47.

⁵⁴ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil a.o. v EFTA Surveillance Authority* [2005], not yet reported, paragraph 95.

⁵⁵ Furthermore, there is no explicit reference in the notification to the method followed to determine the exposure to competition in this sector, although a great number of the construction sub-sectors have been included in the notification.

*publishing firms can pursue their activity in different Member States, producing publications in different languages and compete for publishing rights and advertising.”*⁵⁶

Another example of a sector where state aid decisions have already been adopted establishing the existence of a trade effect is the wholesale sector (NACE 51)⁵⁷: *“the volume of trade in pharmaceutical and other related products [...] in 1991 [...] with the four EEA countries (Austria, Finland, Sweden, Norway) in these products exceed 2.7 billion ecus.”*

As shown in the examples above, undertakings in many of the sectors covered by this scheme are not only subject to but face competition from undertakings in other EEA States. Aid granted to undertakings active in these sectors will therefore have an effect on trade. Hence, the scheme involves state aid within the meaning of Article 61(1) of the EEA Agreement. In this respect, it should be emphasised that the Norwegian authorities have notified one single scheme for regionally differentiated rates of social security contributions which covers more than 200 sectors and not over 200 individual notifications, one per each sector.

In the letter of the Norwegian authorities dated 12 November 2004, it is briefly stated that *“it is for the Authority [...] to assess whether any of the notified economic sectors or beneficiaries may be granted aid that does not affect trade between the Contracting Parties to the EEA Agreement”*⁵⁸. However, when examining a scheme, the Authority must assess the general features of the scheme as such to ascertain whether it involves state aid within the meaning of Article 61(1) of the EEA Agreement. Settled case law of the ECJ has established that *“in the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies.”*⁵⁹. The EFTA Court has also endorsed this interpretation⁶⁰.

Hence, the Authority must assess the scheme as such. If the scheme as such provides for state aid within the meaning of Article 61(1) of the EEA Agreement, it is caught by this provision. The Authority is therefore not obliged to prove positively in each individual

⁵⁶ Commission Decision of 30.06.2004 on the measures notified by Italy in favour of the publishing industry.

⁵⁷ Commission Decision on the Greek scheme of aids in the pharmaceutical sector, financed by means of levies on pharmaceutical and other related products, state aid no C1A/92.

⁵⁸ See page 3 of the letter of the Norwegian authorities dated 12 November 2004 (Event No 299087).

⁵⁹ Case T-171/02 *Regione autonoma della Sardegna v Commission* [2005] not yet reported, paragraph 102; Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 18; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 48 and Case C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraph 24.

⁶⁰ Case E-6/98 *The Government of Norway v EFTA Surveillance Authority* [1999] Report of the EFTA Court, page 76, paragraph 57.

case falling under the scheme that the conditions of Article 61(1) of the EEA Agreement are fulfilled.

For the purpose of this Decision, furthermore, it is not feasible⁶¹ to establish whether the scheme is liable to affect trade regarding each of the more than 200 sectors it covers. According to settled case law, it must be ensured that trade will not be affected for single undertakings which may benefit from the scheme⁶². The Authority considers that it is impossible to ensure that all potential beneficiaries within each of the more than 200 notified NACE sectors are not - and will not be - exposed to trade within the meaning of Article 61(1) of the EEA Agreement.

There are other economic sectors which comprise activities often carried out at a local level. Regarding these sectors it can nonetheless not be excluded *a priori* that trade may be affected. By way of example, local service providers such as training centres or retail shops like supermarkets often belong to bigger chains that are in competition EEA-wide. Moreover, the ECJ has recently determined the existence of trade effect in the sector of dental practice activities (NACE 85)⁶³, a service which is typically delivered locally.

Although the existence of trade effect has usually been established, there are also some concrete examples in the Authority's and the Commission's decision practice where concrete aid awards in particular circumstances were considered not to have any effect on trade. This was the case, for example, in the Commission's Decisions on the Brighton Pier and the Dorsten swimming pool⁶⁴. The existence of trade effect has also been denied in the Authority's Decision on the establishment of private day-care facilities on public sites with subsidised real estate leasehold fees in Oslo⁶⁵. The common characteristic of these cases is that either they concern an individual aid award or a scheme ring-fenced with such clear, concise and tight limitations in the application and the potential beneficiaries that it could be ensured that no individual aid could be awarded which would have an effect on trade.

The ECON report, on the basis of which this scheme has been drafted, has mainly analysed the current situation of a number of economic sectors in Norway. However, the economy evolves and trade patterns may change. Thus, how the future situation will be and whether the results of the ECON report, on the basis of which the Norwegian authorities justify the absence of effect on trade, will be valid in the future remains unknown. Failing a review mechanism to adapt the granting of aid to new circumstances,

⁶¹ See in this context, Opinion of Advocate General Geelhoed in Case C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraph 40.

⁶² Case T-171/02 *Regione autonoma della Sardegna v Commission* [2005] not yet reported, paragraph 104.

⁶³ Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] not yet reported, paragraphs 29 and 32.

⁶⁴ Commission Decision on State Aid N 560/01 and NN 17/02 and Commission Decision on State Aid No N 258/2000, respectively.

⁶⁵ Authority's Decision No 291/03/COL OF 18 December 2003 regarding the establishment of private day-care facilities on public sites with subsidised real estate leasehold fees in Oslo.

it cannot be ensured that aid will not be granted in the future to a number of undertakings active in some of the listed economic sectors with an effect on trade. It must be noted in this context that the proposal for differentiated rates for social security contributions is unlimited in time.

The material coverage of the scheme is not sufficiently precise. The Norwegian authorities have most recently clarified the scope of the notification in their letter dated 12 November 2004, submitting comments on the initiation of the formal investigation procedure. Some sectors were notified as not exposed to competition in one zone since there are currently no undertakings in those sectors in the given zones which exceed the *de minimis* threshold. The Norwegian authorities have nevertheless explained that they will consider these undertakings in the same way as those falling under the relevant sector notified in other zones if, in the future, the wage costs of these undertakings exceed the *de minimis* threshold. These sectors were nevertheless not included in the notification as it was submitted to the Authority.

Moreover, there are no further specific criteria to select the eligible undertakings within the economic sectors included in the list identified in the ECON report since the notification only refers to sectors. The two cumulative criteria of geographic location and sectoral activity required to apply the reduced rates of social security contributions in a given sector are, in the opinion of the Authority, of too broad a nature. In line with the positive decisions mentioned above, a scheme must contain precise and clear criteria⁶⁶ to ensure that no aid is granted to any undertaking that would affect trade within the EEA.

On the basis of the information provided by the Norwegian authorities, the Authority therefore considers that the proposal for regionally differentiated rates of social security contributions is liable to affect trade between the Contracting Parties.

b) Conclusion

For the above mentioned reasons, the Authority concludes that the notified scheme of regionally differentiated rates of social security contributions for undertakings active in certain economic sectors constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

5. Compatibility of the aid

The Norwegian authorities argued in the notification that the proposal for regionally differentiated rates of social security contributions did not constitute state aid. After a preliminary assessment of the scheme, the Authority decided to open the formal investigation procedure given the serious doubts concerning not only the state aid character of the regionally differentiated rates of social security contributions but also

⁶⁶ Opinion of Advocate General Geelhoed in Case C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraph 45-46.

their compatibility with the state aid rules of the EEA Agreement. Notwithstanding the doubts expressed by the Authority in the decision to open the formal investigation procedure, the Norwegian authorities have not put forward any arguments concerning compatibility of the scheme.

The Authority is of the opinion that none of the derogations mentioned in Article 61(2) of the EEA Agreement can be applied to the case at hand.

Furthermore, the system of reduced rates of social security contributions cannot be considered compatible on the basis of Article 61(3) of the EEA Agreement. A reduction in the running costs of an undertaking such as the social security contributions constitutes operating aid. Such aid, given to undertakings in certain regions, is in principle prohibited.

The application of reduced rates of social security contributions cannot be considered within the framework of Article 61(3)(a) of the EEA Agreement since none of the Norwegian regions qualify for this provision which requires an abnormally low standard of living or serious underemployment.

The reduced rates of social security contributions do not promote the execution of an important project of common European interest or remedy a serious disturbance in the economy of a State, as it is requested for compatibility on the basis of Article 61(3)(b) of the EEA Agreement.

Concerning Article 61(3)(c) of the EEA Agreement, in its Decision No 218/03/COL of 12 November 2003, with regard to state aid in the form of regionally differentiated social security contributions, the Authority considered that a continuation of the Norwegian scheme would be incompatible with Article 61(3)(c) of the EEA Agreement and the State Aid Guidelines. For undertakings located in Zones 2, 3 and 4 which are active in the economic sectors listed in the notification, the notified measure implies a return to the rules which were declared incompatible aid by the Authority in 2002 for not qualifying for a derogation under Article 61(3)(c) of the EEA Agreement. The fundamental features of the notified scheme are the same as the ones of the scheme subject to the prior decision of the Authority. The only difference is the more restricted scope of application of the currently notified scheme which is limited to undertakings active in a list of over 200 predetermined sectors. In line with this Decision, the Authority confirms its prior assessment that the application of regionally differentiated rates of social security contributions is not compatible with the state aid rules of the EEA Agreement.

6. Conclusion

On the basis of the foregoing assessment, the Authority considers that the notified scheme of regionally differentiated rates of social security contributions for certain economic sectors constitutes state aid incompatible with the rules of the EEA Agreement.

According to the information available to the Authority, the notified scheme of regionally differentiated rates of social security contributions for certain economic sectors has not been implemented yet, i.e., no aid has been paid out to any of the potential beneficiaries of the scheme.

HAS ADOPTED THIS DECISION:

Article 1

The notified proposal for regionally differentiated rates of social security contributions for undertakings active in certain economic sectors which the Norwegian authorities are planning to implement constitutes state aid within the meaning of Article 61(1) of the EEA Agreement. The notified proposal is incompatible with Article 61 of the EEA Agreement.

Article 2

The notified proposal for regionally differentiated rates of social security contributions for undertakings active in certain economic sectors shall not be implemented.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

This Decision is authentic in the English language.

Done at Brussels, 22 November 2005.

For the EFTA Surveillance Authority,

Einar M. Bull
President

Kurt Jäger
College Member