

Case No: 62964
Event No: 443464
Dec. No: 447/07/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 10 October 2007

on the prolongation of the reduced electricity tax for the regions of Finnmark and
North Troms
(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(3) of Part I and Article 13 and Article 4(3) of Part II of
Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines⁴ on the application and interpretation of
Articles 61 and 62 of the EEA Agreement, and in particular the Chapter on Aid for
Environmental Protection,

Whereas:

I. FACTS

1. Procedure

By letter dated 14 September 2007 from the Norwegian Ministry of Government
Administration and Reform (Event No 441454), the Norwegian authorities notified a

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, EEA Supplements 03.09.94 No 32. The
Guidelines were last amended on 31 May 2007. Hereinafter referred to as the State Aid Guidelines.

prolongation of the reduced electricity tax for the regions of Finnmark and North Troms (Karlsøy, Kvænangen, Kåfjord, Lyngen, Nordreisa, Skjervøy and Storfjord), pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

2. Description of the proposed measures

On 30 June 2004, the Authority authorised in its Decision No 149/04/COL *inter alia* a reduced electricity tax rate for certain users in certain Norwegian regions⁵. The ordinary electricity tax rate was set at NOK 0,0967 NOK/kWh (0,0118 Euro)⁶. The reduced electricity tax applied to the regions of Finnmark and North Troms (Karlsøy, Kvænangen, Kåfjord, Lyngen, Nordreisa, Skjervøy and Storfjord) and was set at 0,0045 NOK/kWh.

This regional tax derogation was authorised by the Authority until 31 December 2006. The Authority found that the regional differentiation of the electricity tax, although having a regional objective, could be approved under the Authority's Guidelines on state aid for environmental protection. In this regard, the Authority also took note of the Commission Decisions NN 3/B/2001 and NN 4/B/2001, which allowed a similar regionally motivated tax derogation from the Swedish electricity tax⁷.

The Norwegian authorities has now notified a prolongation of the regional tax derogation.

2.1 Title and objective of the scheme

The notified scheme concerns the reduced electricity tax for the regions of Finnmark and North Troms. Its objective is to give undertakings in these regions a sufficient incentive to act in an environmentally friendly manner.

2.2 National legal basis for the aid measure

The national legal basis for the notified electricity tax reduction is the Norwegian Parliament's annual decision on the electricity tax (*Stortingets vedtak om forbruksavgift på elektrisk kraft*) as well as the regulation on excise duties (*Forskrift om særavgifter*).

2.3 Recipients

The tax reduction applies to the consumption of electricity which is used by undertakings outside the mining and manufacturing business in the above mentioned regions. Undertakings active in mining and manufacturing are covered by the authorization in the Authority's Decision No 149/04/COL, so that the notified regionally motivated tax derogation mainly concerns undertakings in the service sector.

The estimated number of aid beneficiaries is 4660⁸

⁵ The Authority's decision also dealt with a tax derogation for certain industries, which were likewise submitted to the reduced rate of 0,0045 NOK/kWh.

⁶ The conversion NOK/Euro is calculated according to the rate published for 2007 on the EFTA Surveillance Authority's webpage, which is set at 8.2224.

⁷ NN 3/B/2001 and NN 4/B/2001 Energy Tax Scheme, OJ C 189, 9.8.2003, p.6.

⁸ [The estimated number is based on the number of potential aid beneficiaries on 1 January 2006.](#)

2.4 Budget and duration

The tax derogation is notified for the period from 1 January 2007 until 31 December 2011, i.e. for five years.

The estimated foregone revenue resulting from the reduced electricity tax rate for business sectors other than mining and manufacturing is estimated to be NOK 70 million a year, judging from the past figures which showed that in 2005 and 2006 NOK 70 million were spent on this tax derogation yearly. Based on these figures, the overall budget would be approximately 350 million NOK

II. APPRECIATION

1. The presence of state aid

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

Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

1.1 Presence of state resources

The aid measure must be granted by the State or through state resources. The reduced tax rates for users in certain regions constitute a loss of tax revenues for the Norwegian State.

1.2 Favouring certain undertakings or the production of certain goods

Firstly, the aid measure must confer on the undertakings referred to by the notified electricity tax reduction advantages that relieve them of charges that are normally borne from their budget. Normally, the undertakings in the specified regions would have to pay the full electricity tax from their budget and consequently they enjoy an advantage from the notified tax derogation.

Secondly, the aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. As only certain undertakings located in the regions of the notified scheme can profit from the tax derogation, this criterion is fulfilled.

1.3 Distortion of competition and effect on trade between Contracting Parties

The aid measure must distort competition and affect trade between the Contracting Parties. The tax derogation strengthens the position of the undertakings profiting from it in relation to their competitors which are not located in these regions. As the tax derogation applies to all undertakings in the service sector and other sectors not belonging to the manufacturing

and mining sectors in the notified regions, at least some of them will also be active on markets within the EEA. The tax derogation therefore distorts competition and affects trade between the Contracting Parties.

1.4 Conclusion

The tax derogation constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

2. Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, *“the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision”*.

The Norwegian authorities did not notify the prolongation for the tax derogation in time to the Authority. The authorisation of the tax exemption by the Authority in its Decision No 149/04/COL already expired in December 2006. The Norwegian authorities only notified the prolongation in September 2007, while the aid continued to be paid out under the formerly authorised scheme. The aid paid out after 1.1.2007 is thus unlawful aid on procedural grounds.

The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

As a consequence, the deadlines for the Authority to take a decision according to Article 4(4) in Part II of Protocol 3 to the Surveillance and Court Agreement and Article 4(1) of Decision 195/04/COL do not apply.

3. Compatibility of the aid

The compatibility with the functioning of the EEA Agreement of those tax measures which have been found to constitute state aid within the meaning of Article 61(1) of the EEA Agreement will be assessed below. These measures will be analysed under Article 61(3)(c) of the EEA Agreement in combination with the Chapter in the Authority’s State Aid Guidelines dealing with aid for environmental protection (hereinafter referred to as “the Environmental Guidelines”).

According to section D.3.2 of the Environmental Guidelines (entitled “Rules applicable to all operating aid in the form of tax reductions or exemptions”), EFTA States might deem it necessary to make provisions for temporary exemptions from environmental taxes notably because of the absence of harmonisation at European level or because of the temporary risk of a loss of international competitiveness. However, these exemptions, which in general constitute operating aid, have to fulfil the requirements set out in the Environmental Guidelines⁹.

⁹ Section 42 of the Environmental Guidelines.

Section 44 of the Environmental Guidelines deals with the situation where a tax corresponds to a tax which is to be levied within the European Community as the result of a Community Directive. The Norwegian electricity tax corresponds to the electricity tax which is harmonised in the European Community as a consequence of the application of the Energy Tax Directive¹⁰. Section 44 a) of the Environmental Guidelines stipulates that if an EFTA State applies a tax rate higher than the minimum rate laid down in the Community Directive to certain products, and grants an exemption to certain firms, this may be justifiable, if the amount paid is at least equal to the minimum rate set by the Directive.

Section 46.1 of the Environmental Guidelines specifies the above in greater detail and sets out that when an EFTA State, for environmental reasons, introduces a new tax in a sector of activity, or on products in respect of which no corresponding European Community tax harmonisation exists, or the tax exceeds that provided for in Community legislation, exemption decisions covering a ten year period with no depreciation may be justified:

- a) when these exemptions are either conditional on the conclusion of agreements between the EFTA State concerned and the recipient firms, whereby the firms undertake to achieve environmental protection objectives, or
- b) when the amount effectively paid by the firms after reduction remains higher than the Community minimum (where a harmonised European Community tax exists – first indent) or when the amount paid constitutes a significant proportion of the national tax (where the tax does not correspond to a harmonised European Community tax – second indent).

These principles also apply to existing taxes according to section 46.2 of the Environmental Guidelines.

The envisaged normal electricity tax rate in Norway of 0,0967 NOK/kWh (approximately 0,0117 Euro/kWh) exceeds the minimum level envisaged for electricity as provided for by Annex I, Table C of the Energy Tax Directive (0,5 Euro/MWh, i.e. approximately 0,00412 NOK/kWh¹¹). The tax measures will consequently be analysed according to the above principles.

The reduced rate paid by the undertakings in Finnmark and North Troms is set at 0,0045 NOK/kWh. This rate is above the European Community minimum rate as stipulated in Annex I, Table C of the Energy Tax Directive. The Norwegian authorities have further confirmed that they will establish the annual conversion rate between NOK/Euro according to the principles set out in Article 13(1) of the Energy Tax Directive. This will prevent the Norwegian reduced tax level from falling under the European Community minimum. In light of the above, the Authority found in its previous Decision No

¹⁰ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ 2003, L 283, p.51.

¹¹ Calculated in kWh and converted into NOK, according to the conversion principles set out in Article 13(1) of Directive 2003/96/EC, i.e. at the conversion rate of 1 October 2003 of NOK/Euro 8,2325.

149/04/COL that the tax derogations met the requirements of section 46.1 b), first indent, of the Environmental Guidelines. The Norwegian authorities confirm that all parameters of the aid scheme authorised by the Authority in this decision have been kept and not been altered. Therefore, the Authority does not see any reason to deviate from the findings in its previous decision with regard to the now notified prolongation of the scheme.

The exemption under investigation is a derogation from an existing tax. As the Authority has found in its earlier decision, the tax in question has an appreciable positive impact in terms of environmental protection, so that section 46.2 a) of the Environmental Guidelines is also fulfilled. As the derogation was introduced when the new electricity tax came into force in 2004 in Norway, the conditions of section 46.2 b) are likewise fulfilled.

According to the Environmental Guidelines, exemptions covering a ten year period may be justified. The exemption entered into force 1 July 2004. The combined duration of the previous scheme and the prolongation will not exceed ten years and the condition regarding duration is therefore fulfilled.

In particular the Authority notes that the prolongation of the Swedish scheme, referred to by the Authority in its previous decision, has equally been prolonged until 31 December 2011¹².

5. Conclusion

On the basis of the foregoing assessment, the Authority considers that the derogation from the electricity tax for undertakings located in North Troms and Finnmark is compatible with the functioning of the EEA Agreement within the meaning of Article 61 of the EEA Agreement.

The Authority regrets, however, that the Norwegian authorities did not respect their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

The Norwegian authorities are reminded about the obligation resulting from Article 21 of Part II of Protocol 3 to the Surveillance and Court Agreement in conjunction with Article 6 of Decision No 195/04/COL to provide annual reports on the implementation of the scheme.

The Norwegian authorities are also reminded that all plans to modify this scheme must be notified to the Authority.

12 N 593/2005 – Sweden, Prolongation of the Regionally Differentiated Energy Tax for the Service Sector.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided not to raise objections to the notified prolongation of the reduced electricity tax in the regions of Finnmark and North Troms (Karlsøy, Kvænangen, Kåfjord, Lyngen, Nordreisa, Skjervøy and Storfjord).

Article 2

The implementation of the measure is accordingly authorised.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 10 October 2007

For the EFTA Surveillance Authority,

Per Sanderud
President

Kristján Andri Stefánsson
College Member