ESA | EFTA Surveillance Authority

Brussels, 15 December 2022
Cases No: 86109 and 87198
Document No: 1296418
Decision No 231/22/COL

Ministry of Trade, Industry and Fisheries
PO Box 8090
Dep 0032 Oslo
Norway

Subject: **Temporary amendments to the PTA (complaints)**

1 Summary

(1) The EFTA Surveillance Authority ("ESA") wishes to inform Norway that, having assessed the 12 June 2020 amendments ("the amendments" or "the measures")[1] to the Norwegian Petroleum Tax Act ("the PTA"),[2] it considers that the measures do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.[3] ESA has based its decision on the following considerations.

2 Procedure

(2) On 18 December 2020,[4] a complaint was lodged with ESA, alleging that the amendments involved unlawful State aid ("the first complaint").[5] On 26 January 2021,[6] ESA forwarded the first complaint to the Norwegian authorities and invited them to comment on it. On 23 February 2021,[7] the Norwegian authorities provided their comments.

(3) On 15 March 2021,[8] ESA informed the complainant that its complaint had been designated as a non-priority case, in line with paragraph 49 of ESA's Guidelines on Best Practise for the conduct of State aid control procedures ("the Best Practise Guidelines").[9]

(4) On 26 March 2021, ESA held a videoconference with the complainant. By letter dated 3 May 2021,[10] the complainant submitted supplementary information.

(5) By letter dated 15 July 2021,[11] a second complaint, by a different complainant, was lodged with ESA that addressed part of the amendments and also alleged

[1] Act of 19 June 2020 on amendments to the Act on Petroleum Tax.
[2] Act of 13 June 1975 on Petroleum Tax, as amended.
[3] Reference is made to Article 4(2) of the Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.
[4] Document No 1174118, No 1174119, No 1170521, No 1170518, No 1170519 and No 1170520.
[5] In ESA's case-handling system that complaint was allocated case number 86109. Please see section 3 for further information regarding the first complainant.
[6] Document No 1174117.
[7] Document No 1182627, No 1182620, No1182618, No 1182616, No 1182625 and No 1182623.
[8] Document No 1187424.
[9] OJ L 82, 22.3.2012, page 7.
[10] Document No 1296503, No 1296508, No 1296510 and No 1296511.

that these amendments involved unlawful State aid ("the second complaint").[12] On 20 July 2021,[13] ESA forwarded the second complaint to the Norwegian authorities and invited them to comment on it. On 24 August 2021,[14] the Norwegian authorities provided their comments.

(6) On 10 September 2021,[15] ESA informed the second complainant that its complaint had been designated as a non-priority case, in line with paragraph 49 of the Best Practise Guidelines.

(7) On 28 April 2022,[16] ESA provided the first complainant with its preliminary view that the amendments do not lead to aid in breach of the EEA State aid rules. On 11 May 2022,[17] ESA also provided the second complainant with its preliminary view that the amendments do not lead to aid in breach of the EEA State aid rules.

(8) On 30 May 2022,[18] the first complainant provided additional information on its complaint. By letter dated 7 June 2022,[19] ESA forwarded this additional information to the Norwegian authorities and invited them to comment on it.

(9) On 12 June 2022,[20] the second complainant provided additional information on its complaint. On 22 June 2022,[21] ESA forwarded this additional information to the Norwegian authorities and invited them to comment on it.

(10) By letters dated 1 and 5 July 2022,[22] the Norwegian authorities provided their comments to the additional information submitted by the first complaint.

(11) On 16 October 2022, the second complainant provided additional information to ESA.

3 The complainants

(12) The first complaint is submitted on behalf of a Norwegian political party, namely *Miljøpartiet De Grønne*. The second complainant is a private person.

(13) The amendments do not directly affect any commercial interests of neither the first nor the second complainant (collectively referred to as "the complainants" or "both complainants"). However, both complainants allege, *inter alia*, that the amendments involved unlawful State aid in favour of the gas and oil sector to the detriment of investments in renewable energy sources.

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[11] Documents No 1216098 (complaint form), and No 1216099 – 1216104 (Annexes I, II, IV, VII and VIII).
[12] In ESA's case-handling system the second complaint was allocated case number 87198. See section 3 for further information regarding the second complainant.
[13] Document No 1296388.
[14] Document No 1222876, No 1222884, No 1222882, No 1222880, No 1222878, No 1222888 and No 122874.
[15] Document No 1226244.
[16] Document No 1187425.
[17] Document No 1247136.
[18] Document No 1293722.
[19] Document No 1293040.
[20] Document No 1294681.
[21] Document No 1296388.
[22] Document No 1300871 and No 1300873.

4 Description of the measures

4.1 Overview of the petroleum taxation

(14) The PTA sets out the petroleum tax system that applies to revenues from subsea petroleum deposits.[23] The petroleum tax system consists of two interlinked elements: (i) the ordinary corporate income tax and (ii) the special tax.[24] In 2020, the ordinary corporate income tax amounted to 22% and the special tax amounts to 56%. The combination of these two elements make up the marginal petroleum tax rate of 78%.

(15) ESA notes that on 17 June 2022, the PTA was amended ("the 2022 amendments").[25] The 2022 amendments concern changing the special tax element of the petroleum tax to a cashflow tax and the related technical changes in tax rates to maintain a combined marginal tax rate of 78%.[26] The complainants do not argue that the 2022 amendments would as such result in State aid. Accordingly, ESA will not assess the 2022 amendments in the current decision.

4.2 Overview of the amendments

(16) Following the coronavirus outbreak and the oil price slump, the Norwegian authorities foresaw lower than expected investments on the Norwegian continental shelf. The amendments were proposed and adopted as a response to these developments.[27]

(17) The amendments entail:

(i) an immediate tax allowance, including a 24% uplift, in the special tax for costs on acquiring production facilities and pipelines ("investment costs"); and
(ii) a cash pay-out of the tax value of losses and unused uplift (paid out in a system of negative instalment tax).

(18) The amendments are of limited temporal application (collectively referred to as "the temporal application"):

(i) the immediate tax allowance and the 24% uplift apply to:
   a. investment costs incurred in 2020 and 2021;
   b. investments costs included in a Plan for Development and Operation ("PDO") or Plans for Installation and Operation of infrastructure ("PIO") or other related applications under Sections 4-2 and 4-3 of the Petroleum Act, submitted to the Ministry of Petroleum and Energy before 1 January 2023 and approved by the Ministry between 12 May 2020 and 1 January 2024 and incurred before planned production/operation start-up (according to the PDO/PIO); and

[23] Section 1 of the PTA.
[24] A description of the petroleum taxation in Norway is given in ESA's Decision No 018/19/COL of 20 March 2019 on cash refund of the tax value of petroleum exploration costs (OJ C 191 6.6.2019, page 137 and EEA Supplement nr 45, 6.6.2019, page 7), section 3.4.
[25] The Law on Amendments to the Petroleum Tax Act of 17 June 2022. See also the Proposal for the 2022 Amendments Prop. 88 LS (2021–2022).
[26] See also The petroleum tax system, available on www.NorwegianPetroleum.no, a site run in cooperation by the Ministry of Petroleum and Energy and the Norwegian Petroleum Directorate.
[27] Prop.113 L (2019-2020) *Midlertidige endringer i petroleumsskatteloven, Tilråding fra Finansdepartementet 12. mai 2020*, page 3. English translation by the Ministry of Finance.

(ii) the cash pay-out applies to tax losses and unused uplift incurred in 2020 and 2021.

(19) The immediate tax allowance corresponds to a full depreciation of investment costs in the year the investment costs incur. The immediate tax allowance temporarily replaced the ordinary depreciation rule, which allowed for investment costs to be depreciated over six years.

(20) The uplift is part of the determination of the base of the special tax, as the special tax is payable on net income corrected for uplift. The uplift is a percentage of the investment costs. The amendments increase the uplift to 24% in the first year, temporarily replacing an uplift of 5.2% per year the first four years. The uplift is unused for the part of the uplift that amounts to more than the net income.

(21) The cash pay-out allows for a pay-out of the tax value of losses and unused uplift. The cash pay-out is an alternative to carrying forward losses and unused uplift with interest, for petroleum companies not in a taxable position.

5 The complaints

5.1 The form of the alleged aid

(22) The complainants allege that the Norwegian State grants through the amendments unlawful State aid within the meaning of Article 61(1) of the EEA Agreement.

(23) More precisely, both complainants argue that the amendments, in particular the uplift element, amount to an investment subsidy of 13.44% of the investment cost (24% (the uplift) x 0.56% (the rate of the special tax)).

(24) Further, the first complainant estimates the amendments to be equivalent to a pre-tax subsidy of 59% of the investment cost. The first complainant also argues that the amendments provide for increased liquidity and represent a net tax relief.

(25) Both complainants emphasize that the amendments lack so-called tax neutrality. The second complainant explains that a neutral tax system requires symmetrical treatment of costs and income in net present value. It further explains that this is not the case for the amendments, as they result in the Norwegian State financing 91.44% (22% + 56% +13.44%) of the investment costs, while only receiving 78% (22% + 56%) of the net taxable profit. The first complainant further states that the amendments have the effect that projects that are unprofitable before tax can become profitable after tax (reference is made to an article by a professor emeritus[28]). The second complainant states that there is no economic justification for an uplift on a profit-based resource rent tax structured as a cash-flow tax. It points to that the uplift traditionally has been used to compensate for the fact that investments were depreciated over several years.

5.2 The beneficiaries

The alleged beneficiaries

[28] *Kraftig subsidiering av norsk petroleum*. *Samfunnsøkonomene nr* 5, 2022, pages 34-42.

(26) The complainants argue that the amendments favour petroleum companies (that is, petroleum companies taxable under the PTA) (collectively referred to as "the alleged beneficiaries"). According to the first complainant, the amendments favour the alleged beneficiaries to the detriment of companies active in petroleum production in EEA States other than Norway, and energy companies active in energy sectors other than petroleum. The second complainant considers that the amendments favour the alleged beneficiaries to the detriment of renewable energy companies and renewable based energy carriers in general.

The alleged alternative beneficiaries

(27) Alternatively, the first complainant argues that the amendments favour certain petroleum companies that benefit from the amendments (collectively referred to as "the alleged alternative beneficiaries") to the detriment of petroleum companies taxable under the PTA that do not, because of the amendments' temporal application and due to their beneficial effect on unprofitable or marginal fields.

6 Comments by the Norwegian authorities

(28) The Norwegian authorities consider that the amendments do not amount to a selective advantage and therefore do not constitute State aid. More precisely, the Norwegian authorities consider the amendments to form an integral part of the petroleum tax system and define the reference system as the PTA. According to the Norwegian authorities, the amendments are not selective as they apply to all petroleum companies according to objective criteria and there is no discriminatory derogation from the reference system.

(29) The Norwegian authorities also maintain that temporary amendments can be used by petroleum companies for several years and are not set for an overly short period and as such not selective. The amendments do not just cover eligible investments incurred in the income years 2020 and 2021, but also investments covered by PDOs and PIOs submitted before 1 January 2023 and approved before 1 January 2024 and incurred before planned production/operation start-up.[29]

(30) Further, the Norwegian authorities consider that the amendments are open to all petroleum companies making the investments in question and do not as such have the effect of specifically favouring certain petroleum companies. In that regard, the Norwegian authorities provided historical data and estimates on investments by a broad range of petroleum companies (small, medium, large; Norwegian, or other European Economic Area, as well as third countries).[30]

7 Presence of State aid

7.1 Introduction

(31) Article 61(1) of the EEA Agreement reads as follows: "[…] 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

[29] See also paragraph (18).
[30] See Documents No 1182625 and No 1182623.

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."

(32) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) a measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.

(33) ESA finds it appropriate to start the assessment with analysing the third condition, namely whether the amendments *selectively* favour the alleged beneficiaries or the alleged alternative beneficiaries.

7.2 Selectivity

7.2.1 Introduction

(34) A measure is deemed to be selective if it "favour[s] 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory".[31]

(35) As the Court of Justice has held on numerous occasions, if a measure constitutes an aid scheme rather than individual aid, it has to be established that "the measure, although it provides for an advantage that is of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity".[32]

De jure selectivity: the three – step analysis

(36) The selectivity of tax measures is normally assessed by means of a three-step analysis.[33] The first step is to identify the reference system. The second step is to determine whether a measure constitutes a derogation from that system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation (*prima facie* selectivity). If the measure does not constitute a derogation, the measure is not selective.

(37) If a measure is *prima facie* selective, it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective.[34]

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[31] Judgment of 8 November 2022, *Fiat Chrysler Finance Europe and Ireland* v *European Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 67; and Judgment of 16 March 2021, *European Commission* v *Republic of Poland,* C-562/19, EU:C:2021:201, paragraph 28.

[32] See, for instance, Judgment of 6 October 2021, *World Duty Free Group* v *European Commission,* C-51/19 P and C-64/19, EU:C:2021:793, paragraph 34. See also Judgment of 21 December 2016, *European Commission* v *World Duty Free Group* and *European Commission* v *Banco Santander and Santusa*, C-20/15 P and C-21/15, EU:C:2016:981, paragraph 55; and Judgment in *European Commission* v *Poland*, *supra*, paragraph 29.

[33] See ESA's Guidelines on the notion of State aid as referred to in Article 61(1) of the EEA Agreement ("the Notion of Aid") (OJ L 342, 21.12.2017, p. 35), paragraph 128.

[34] Notion of Aid, paragraph 128.

(38) In sections 7.2.2 and 7.2.3 below, ESA explains first why it considers that the selectivity of the amendments should be assessed by means of the three-step analysis, and thereafter assesses the selectivity of the amendments by applying that analysis.

De facto selectivity

(39) However, as stated in the Notion of Aid,[35] the three-step analysis cannot be applied in certain cases, taking into account the practical effects of the measure concerned. In certain exceptional cases it is not sufficient to examine whether a given measure derogates from the rules of the reference system. It is necessary also to evaluate whether the boundaries of the system of reference have been designed in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question.

(40) In section 7.2.4, ESA assesses also the potential *de facto* selectivity of the amendments, as regards both the alleged beneficiaries and the alleged alternative beneficiaries.

7.2.2 Applicability of the three-step analysis

(41) ESA understands the complainants to argue that the three-step analysis[36] should not be used for the selectivity assessment as the amendments allegedly amount to a subsidy. ESA disagrees and explains below why the three-step analysis should be applied for the selectivity assessment of the amendments.

(42) In Decision No 018/19/COL, like in its other decisions concerning PTA related measures,[37] ESA found that the assessed measures formed part of the petroleum tax system and that their selectivity should be assessed under the three-step analysis.[38]

(43) The immediate tax allowance and the uplift constitute a form of depreciation rules for forming the tax base. The cash pay-out of the tax value of losses and the unused uplift form an alternative to carrying forward losses and unused uplift with interest. The amendments are also set out in general terms and are not limited to one or more identified undertakings, but apply to petroleum companies taxable under the petroleum tax system as set out in the PTA. Hence, the amendments, similarly to the measure assessed in Decision No 018/19/COL, express the legislator's fiscal policy choices in petroleum taxation. The amendments are made to the PTA and thereby form an integral part of the Norwegian petroleum tax system. As a tax measure the amendments are therefore subject to the three-step analysis.

(44) Consequently, ESA takes the view that there is no reason to depart from its earlier decision-making practice also in assessing the selectivity of the amendments and applies the three-step analysis for that assessment.

[35] Notion of Aid, paragraph 129.
[36] See above paragraphs (36) and (37).
[37] See footnotes 24, *supra,* and 41, *infra*.
[38] Decision No 018/19/COL, paragraph 83.

7.2.3 De jure selectivity analysis: application of the three-step analysis to the measure

7.2.3.1 The reference system: the petroleum tax system as set out in the PTA

(45) The first complainant argues that should ESA apply the three-step analysis, the relevant reference system is broader than the petroleum tax system, as set out in the PTA. This claim appears to be based on the argument that the amendments result in the petroleum tax system not being neutral, amounting to subsidising the petroleum sector in Norway (see paragraph (25) concerning the neutrality properties of the tax).

(46) Instead of limiting the reference system to the PTA, the first complainant argues primarily (i) that the relevant reference system must include energy production in Europe, and supplementary (ii) that the reference system must include taxation of (renewable) energy production. The complainant appears to argue that different sources of energy are substitutable with one another from an economic point of view. However, following ESA's preliminary view expressed in its letter dated 28 April 2022, the complainant also claims that the reference system should be the one used by the Norwegian Ministry of Finance for its yearly assessment of tax expenditures and sanctions, presented in an appendix to the Government budget proposal. This assessment evaluates the neutrality properties of the PTA compared to a reference tax with the same neutrality properties as the ordinary income tax.

(47) The second complainant argues that the relevant reference system is the general Tax Act,[39] including the PTA. The second complainant also makes reference to the statements in the 2023 budgetary proposal concerning the advantageous nature of the uplift for investments and designing resource rent tax similarly to other industries.[40]

(48) ESA notes first that in all three earlier decisions concerning petroleum tax related measures, ESA concluded that the reference system for selectivity assessment was limited to the petroleum tax system, as set out in the PTA.[41] For the below reasons, ESA consider that that conclusion is also valid in assessing the selectivity of the amendments.

(49) A reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective.[42] The reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates.[43]

(50) Article 61(1) of the EEA Agreement does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in

[39] *Skatteloven,* law no. 14 of 26 March 1999.
[40] Prop. 1 LS (2022 –2023). *Skatter, avgifter og toll* 2023.
[41] ESA's Decision No 90/02/COL of 31 May 2002 concerning the Snøhvit project (OJ C 238, 3.10.2002, page 17 and EEA Supplement No 49, 3.10.2002, page 55); Decision No 411/06/COL of 19 December 2006 on depreciation rules of the Petroleum Tax Act at LNG facilities for the period of 2007-2013 (OJ C 111, 17.5.2007, page 22 and EEA Supplement No 23, 17.5.2007, page 6); and Decision No 018/19/COL.
[42] Notion of Aid, paragraph 133.
[43] Notion of aid, paragraph 134.

relation to their effects, independently of the technique used.[44] The Court of Justice has held that "[...] the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy, that discretion having, in any event, to be exercised in accordance with EU law. This includes, in particular, the choice of tax rate, which may be proportional or progressive, and also the determination of the basis of assessment and the taxable event."[45]

(51) Petroleum is a natural resource with inherent super profits. The petroleum industry displays a set of particular features: key revenue source, large upfront capital investment, long production period with very high sunk costs, pervasive uncertainty in prices and costs, and exhaustibility of non-renewable natural resources.[46]

(52) The PTA sets out a specific petroleum tax system consisting of two interlinked elements: (i) the ordinary corporate income tax and (ii) the special tax. It is designed to capture a large part of the excess return (resource rent) from the petroleum extraction specifically on the Norwegian continental shelf (see paragraph (14)). The amendments form part of that system.

(53) The petroleum tax system and the amendments apply to a particular group of tax payers, i.e. all resident and non-resident petroleum companies that carry out petroleum activities on the Norwegian continental shelf under a production license. Also, the jurisdiction of the Tax Act setting out normal corporate income tax rules does not extend to the Norwegian continental shelf.[47]

(54) Addressing the first complainant's references to the comparison with taxation of renewable energy, ESA maintains that renewable energy does not have risk levels and excessive return potential similar to petroleum extraction. ESA notes that the first complainant itself has argued and provided a graph on returns being significantly higher in the petroleum industry than in wind and hydropower.[48]

(55) The Petroleum Act sets out specific regulatory conditions, licensing terms (survey and production licenses) for petroleum extraction activities on the Norwegian continental shelf. Petroleum extraction licencing and taxation are also in the competence of specialised State agencies.[49] ESA reiterates that the PTA sets out a tax system that is specifically designed for the petroleum sector and to particular activities that take place on the Norwegian continental shelf, establishing a marginal tax rate of 78% that is considerably higher than in any other sector, including hydropower.[50]

(56) ESA notes that the neutrality properties of the amendments pointed out by the complainants (see paragraph (25)) do not change that conclusion. The

[44] Judgments in *European Commission* v *Hansestadt Lübeck*, paragraph 48 and C- 203/16 P, *Dirk Andres* v *European Commission*, EU:C:2018:505, paragraph 92.
[45] Judgment in *Commission* v *Poland*, *supra*, paragraph 38.
[46] See Decision No 018/19/COL, paragraph 88.
[47] Decision No 018/19/COL, paragraphs 31-33.
[48] Document No 1174118, page 18.
[49] See Decision No 018/19/COL, sections 3.2, 3.3. and 3.4.
[50] At the time of the introduction of the amendments, the special tax was applicable for hydropower at 37%. See Energy Facts, Norway, Taxation of electricity production; and the Norwegian Tax Administration, Ground rent income in power enterprises in 2020. See also Decision No 018/19/COL, paragraph 95.

amendments did not bring a change to the fact that the PTA sets out a tax system specifically designed to tax revenues from subsea petroleum deposits by a specific group of tax payers, irrespectively of the alleged non-neutrality of the amendments.

(57) In conclusion, ESA takes the view that the reference system for assessing the selectivity of the amendments is the petroleum tax system as set out in the PTA.

7.2.3.2 No derogation from the reference system (no *prima facie* selectivity)

(58) Identifying the reference system allows ESA to assess whether the amendments are *prima facie* selective, that is, whether they differentiate between economic operators that are, in light of the objectives intrinsic to the system, in a comparable factual and legal situation (see paragraph (36) concerning the three-step analysis).

The alleged beneficiaries

(59) Since ESA considers that the reference system for assessing the selectivity of the amendments is the petroleum tax system, as set out in the PTA, the alleged beneficiaries - as defined in paragraph (26) - cannot be argued to benefit from the measure compared to economic operators that are not in the scope of the reference system (i.e. companies that are not petroleum companies taxable under the PTA). Therefore, the amendments do not result in a derogation and are not selective as regards the alleged beneficiaries.

The alleged alternative beneficiaries

(60) The first complainant argues that should ESA consider that the reference system is the petroleum tax system, as set out in the PTA, the amendments are *prima facie* selective as regards the alleged alternative beneficiaries - as defined in paragraph (27) - because of the amendments' temporal application.

(61) For the following reasons, ESA is of the view that the amendments are not *prima facie* selective also with regard to the alleged alternative beneficiaries.

(62) ESA considers that setting out and amending generally applicable tax rules such as those relating to tax rates or tax base calculation (including depreciation), even if temporally limited, normally falls within the discretion of States, in accordance with their fiscal autonomy (see paragraph (50)).

(63) ESA notes that this is also the European Commission's approach as regards temporary tax measures, having recently stated that "Member States can decide to take measures applicable to all companies, for example wage subsidies and suspension of payments of corporate and value added taxes or social contributions. […] They fall outside the scope of State aid control and can be put in place by Member States immediately, without involvement of the Commission."[51]

(64) In order for the amendments to be *prima facie* selective, the petroleum companies unable to claim the benefit of the amendments, because of the temporal application, must be in a comparable factual and legal situation to those companies able to claim it, from the point of view of the objective of the PTA (see

[51] Communication from the Commission: Coordinated economic response to the COVID-19 Outbreak, 13.3.2020, COM(2020) 112 final, section 5.

paragraph (36) regarding the three-step analysis). ESA considers that the factual situation of petroleum companies investing or planning to invest, in a certain period of time (that is, within the temporal scope), is not comparable to the factual situation of petroleum companies investing or planning to invest in other time periods (that is, not within the temporal application).

(65) The Court has also held, regarding a tax measure that applied generally to all tax payers subject to some conditions, that "[t]he fact that only taxpayers satisfying those conditions can benefit from the measure cannot in itself make it into a selective measure."[52] The amendments apply generally to all petroleum companies that incur investment costs within the temporal application. The temporal application cannot in itself make the amendments *prima facie* selective.

7.2.4 No de facto selectivity

7.2.4.1 Alleged beneficiaries

(66) Although this argument does not seem to be presented by the complainants,[53] ESA has assessed the amendments and considers them not to amount to *de facto* selectivity as regards the alleged beneficiaries.

(67) The amendments form part of the petroleum tax system and are addressed to petroleum companies taxable under the PTA making particular investments (see paragraph (18)).

(68) As the petroleum extraction activities and other activities and their respective taxation is not comparable (see paragraphs (51) - (56)), ESA considers that amendments cannot be argued to discriminate in practice between companies in a comparable situation and not amounting to *de facto* selectivity.

7.2.4.2 Alleged alternative beneficiaries

Unprofitable or marginal fields

(69) As regards the alleged alternative beneficiaries, the first complainant argues the amendments to be selective due to their beneficial effect on unprofitable or marginal fields (see paragraph (27). For the reasons below, ESA does not agree with that argument and does not consider that the amendments would result into a *de facto* selective advantage for unprofitable or marginal fields.

(70) ESA notes first that it is not required to carry out an analysis of the potential aid granted in individual cases under the tax scheme. What must be analysed is the characteristics of the scheme.[54]

(71) The amendments are open to and benefit all fields/operators meeting objectively defined criteria resulting in the same financial effect for eligible petroleum companies, whether loss- or profit-making or break-even.

(72) The amendments' preparatory works also point to the amendments targeting the whole sector rather than a certain discernible group thereof (such as unprofitable

[52] Judgment of 29 March 2012, *3M Italia*, C-417/10, EU:C:2012:184, paragraph 42.

[53] Rather, the first complainant appears to refer to the difference in effect in connection with establishing the reference system and assessing the existence of derogation. See Document No 1174118, pages 17 and 18.

[54] See *Commission* v *Fútbol Club Barcelona*, *supra,* paragraph 65.

or marginal fields). According to the amendments' preparatory works,[55] the amendments are adopted in the context of the coronavirus outbreak and the oil price slump, *with even profitable investment projects deferred*.[56]

(73) According to the information submitted by the Norwegian authorities,[57] investments on the Norwegian continental shelf have been and are projected to be carried out by a broad range of petroleum companies (small, medium, large; Norwegian or other European Economic Area, as well as third countries), without estimating an exceptional increase in investments in any specific group. In addition, the amendments could result only in a relatively small increase in profitability and are based on a single percentage rate that is the same for all eligible petroleum companies and independent of the size of the investment.

Temporal limitation

(74) ESA reiterates that setting out and amending generally applicable tax rules, such as those relating to tax rates or tax base calculation (including depreciation), even if temporally limited, normally falls within the discretion of States, in accordance with their fiscal autonomy (see paragraph (62)).

(75) ESA considers that also the decision to limit the temporal scope of the amendments falls within that competence. The temporary investment costs deduction and uplift rules apply not just for investments incurred in 2020 and 2021, but also for the costs included in PDO/PIO or other related applications, submitted to the Ministry of Petroleum and Energy before 1 January 2023 and approved by the Ministry between 12 May 2020 and 1 January 2024 (see paragraph (18)). The period of applicability of the amendments was also pointed out by the Norwegian authorities in arguing that is it not overly short and the temporal application does not lead to selectivity (see paragraph (29)). ESA has no reasons to consider that time period to be overly brief, and accordingly does not consider that the temporal limitation of the amendments would lead to *de facto* selectivity. ESA notes that in the complaints or replies to the comments of the Norwegian authorities, the complainants have also not argued that the temporal scope is overly brief.

(76) In conclusion, ESA takes the view that the amendments are not *prima facie* selective neither as regards the alleged beneficiaries nor the alleged alternative beneficiaries, nor are the amendments *de facto* selective as regards unprofitable or marginal fields.

7.2.5 Conclusion

(77) ESA concludes that the amendments are neither selective towards the alleged beneficiaries nor towards the alleged alternative beneficiaries. Given that not all the conditions of Article 61(1) of the EEA Agreement are satisfied, the amendments do not constitute State aid within the meaning of that Article.

8 Conclusion

(78) On the basis of the foregoing assessment, ESA considers that the amendments do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

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[55] Prop.113 L (2019-2020), see paragraph (16) and footnote 27.
[56] *Idem*, page 3.
[57] See Documents No 1182625 and No 1182623.

(79) The Norwegian authorities[58] and the complainants have confirmed that their respective submissions and annexes thereto do not contain any business secrets or other confidential information that should not be published.

For the EFTA Surveillance Authority,

Arne Røksund
President
Responsible College Member

Stefan Barriga
College Member

Árni Páll Árnason
College Member

Melpo-Menie Joséphidès
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.

[58] Except for Documents No 1182625 and No 1182623 the details of which are not disclosed in the present decision.