

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

Subject: Employee share options 2022–2031

1 Summary

- (1) The EFTA Surveillance Authority (“ESA”) wishes to inform Norway that, having assessed the new employee share options tax scheme for start-up and growth companies (“the measure”), ESA considers that the measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement and decides not to raise objections¹ to the measure, as it is compatible with the functioning of the EEA Agreement, pursuant to its Article 61(3)(c).
- (2) ESA has based its decision on the following considerations.

2 Procedure

- (3) The Norwegian authorities notified the measure on 17 November 2021.²

3 Description of the measure

3.1 Objective

- (4) Start-up and growth companies³ may find it difficult to recruit and retain key employees, as such companies may struggle to finance competitive wages, compared to larger and more well-established companies. This is in part due to them in general not having the same access to capital as older and more well-established companies. Also, employees are often risk-averse and may consider a start-up and growth company an uncertain employer.
- (5) Shortage of skilled employees in start-up and growth companies impacts innovation, productivity, job creation and growth by restricting these companies in exploring their productive potential of innovation and ideas. This may result in profitable projects not being realised.
- (6) The objective of the measure is to enhance start-up and growth companies’ ability to recruit and retain key employees, by introducing more favourable taxation of employee share options. This includes to tax any benefit from such options when the employee realises the underlying shares and to tax such benefit as share

¹ Reference is made to Article 4(3) 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.

² Document Nos 1249143, 1249141, 1249135, 1249139, 1249133, and 1249137.

³ “Start-up and growth companies” refers to small and young companies with few employees, in a phase of establishing and developing their business. The criteria for being an eligible company under the measure are described in Section 3.4.2.

capital gain on the employee, instead of taxing the option benefit⁴ as employment income. It also includes to relieve the employer of the liability to pay social security contributions on the option benefit. Employee share options can be an alternative to wage payment.

- (7) The measure will repeal and replace the current tax scheme on employee share options, initially approved by [Decision No 225/17/COL](#).⁵

3.2 Description of the legal framework and the current scheme

3.2.1 Overview of tax treatment of income

- (8) In Norway, taxation of income is regulated by the Tax Act.⁶ Taxable income consists of income from (i) employment, (ii) capital, (iii) business, and (iv) pension. Subject to some exemptions, all taxable income is taxed as so-called general income at a rate of 22%, after deductions.
- (9) In addition to being taxed as general income, employment income is taxed as personal income. This includes a gross tax that consists of a progressive bracket tax and social contributions. The maximum tax rate on personal income is 24.4%, in addition to the tax rate on general income.
- (10) Capital gain from the sale of shares is, for personal taxpayers, taxed as general income, subject to deduction of a shielded amount (“shielding deduction”) and an upward adjustment of 1.44.
- (11) An employer is liable for social security contributions on its wage payment, including benefits in kind, to its employees.

3.2.2 Overview of standard tax treatment of share options

- (12) An employee share option is a right for an employee to buy shares for a predetermined price, in the company they are employed in (“option”). An option granted by the employer to an employee at a discount rate is a taxable benefit in kind.
- (13) This benefit is to be taxed when the employee exercises their right to buy shares, pursuant to the option (“exercise the option”). The taxable benefit is the difference between the market value of the shares when the option is exercised and the price paid for the shares (the agreed exercise price), including the option premium, if any (“the option benefit”).
- (14) The option benefit is taxed as employment income for the employee. Any subsequent gain from the shares after the option is exercised is to be taxed as share capital gain.
- (15) An employer is liable for social security contributions on the option benefit of its granted options.

⁴ The difference between the market value of the shares when the option is exercised and the price paid for the shares (the agreed exercise price), including the option premium, if any.

⁵ OJ C 88, 22.3.2018, p. 10, and EEA Supplement No 13, 8.3.2018, p. 3.

⁶ [LOV-1999-03-26-14](#) Lov om skatt av formue og inntekt (skatteloven)

3.2.3 Overview of the current employee share options scheme for small and young companies

- (16) By [Decision No 225/17/COL](#) dated 15 December 2017,⁷ ESA approved a scheme allowing for deferred taxation and social security contributions on employment income in the form of options, when the employees are offered options in small and young companies (“the current scheme”).
- (17) By [Decision No 079/19/COL](#) dated 20 November 2019,⁸ ESA approved a prolongation and amendments to the current scheme. By [Decision No 064/20/COL](#) dated 25 June 2020,⁹ ESA approved additional amendments to the current scheme. The current scheme is approved until 31 December 2029.
- (18) Under the current scheme, the option benefit is to be taxed when the employee realises the underlying shares or after a specific period of time (“the realisation date”), instead of already when the employee exercises the option.
- (19) At the realisation date, any gain accrued by the employee on the shares is taxed as employment income, up to and including the amount of the option benefit. Any gain above the option benefit is to be taxed as a share capital gain. If the actual gain is lower than the option benefit, the taxation is limited to the amount of the gain. If there is no gain, there will be no taxation.
- (20) The employer is only liable for social security contributions on the gain taxed as employment income on the employee, at the realisation date. Consequently, an employer may be liable for less social security contributions than under the standard tax treatment, depending on the share value when the shares are realised by the employee.

3.2.4 Evaluation of the current employee share options scheme for small and young companies

- (21) According to the Norwegian authorities, the use of the current scheme has been very moderate, based on reporting from companies to the Norwegian Tax Authority in March 2021 regarding options granted in the years 2018 to 2020.¹⁰
- (22) Evaluation and feedback indicate that this is due to the scheme being too complicated, and that it may cause liquidity challenges for employees when exercising the option. If the option benefit is above NOK 1 million when the option is exercised, the employee must pay taxes of the excess amount. At this time, as opposed to what would be the case for cash-based remuneration, the benefit has not yet materialised.
- (23) Moreover, the Norwegian authorities consider that it is not only the smallest and youngest start-up and growth companies that experience difficulties in recruiting and retaining key employees because of liquidity constraints. Such difficulties also apply to larger companies in a phase of growth, most of which are excluded from the current scheme. Larger companies in a phase of growth may need to reinvest a large portion of their earnings, in order to carry out planned projects and continue to grow. The Norwegian authorities have highlighted that both Sweden

⁷ OJ C 88, 22.3.2018, p. 10, and EEA Supplement No 13, 8.3.2018, p. 3.

⁸ OJ C 23, 23.1.2020, p. 5, and EEA Supplement No 3, 23.1.2020, p. 2.

⁹ OJ C 323, 1.10.2020, p. 9, and EEA Supplement No 63, 1.10.2020, p. 1.

¹⁰ From 2018 until 2020, a total of 418 options were granted to 355 employees.

and the United Kingdom have in place schemes for employee share options that are open for considerably larger companies than under the current Norwegian scheme.

3.3 Functioning of the measure

- (24) The measure introduces more favourable taxation on eligible options, for eligible employees and employers, than under the current scheme and the standard tax treatment of options. The goal of the measure is also to make the scheme easier to understand and administer for the employer and the employee. Moreover, more companies are eligible under the measure than under the current scheme.
- (25) The functions of the measure are (i) to tax any benefit from the option when the employee realises the underlying shares, (ii) to tax any benefit from the option as share capital gain on the employee, instead of taxing the option benefit as employment income, and (iii) to relieve the employer of the liability to pay social security contributions on that benefit.
- (26) Technically, the option benefit as such is not taxed under the measure. Instead, the option benefit is consumed in the calculation of the taxable capital gain when the employee realises the underlying shares. The taxable gain is the difference between the sales price and the price paid for the underlying shares (the agreed exercise price), including the option premium and other costs, if any.
- (27) The taxable gain is to be taxed in accordance with the general rules for share capital gain.¹¹ Hence, no part of the gain is taxed as employment income, and consequently the employer is not liable for social security contributions on the gain. The shielding deduction is given, calculated based on the agreed exercise price, for the period the employee holds the shares. Gains within the shielding deduction are not taxable on the employee. Gains above the shielding deductions are increased by the upward adjustment and taxable as a part of the general income. Any loss is deductible in general income.
- (28) The measure will repeal and replace the current scheme. Transitional rules will be introduced to transfer options already granted under the current scheme to the measure. Special conditions will apply for options granted between 13 October 2021 (the date the state budget for 2022, including the measure, was proposed to the Norwegian parliament) and 31 December 2021.

3.4 Eligibility criteria

3.4.1 General

- (29) In order to benefit from the measure (i) the employer, (ii) the employee and (iii) the option must fulfil certain eligibility criteria.

3.4.2 Eligible employers (companies)

- (30) The employer granting the options must meet the following requirements:
- (i) The employer must be a Norwegian private limited liability company, or a corresponding foreign company that originates from a state within the European Economic Area and has a permanent establishment in Norway.

¹¹ See the Tax Act, Section 10-30 and following sections

- (ii) The employer cannot be listed on a public market for large established companies.
 - (iii) The employer must not employ more than 50 full-time equivalent employees, on average during the fiscal year preceding the year of granting the option.
 - (iv) The employer's net turnover and balance sheet cannot exceed NOK 80 million, the fiscal year preceding the year of granting the option.
 - (v) The employer cannot be older than ten years at the time of granting the option.
 - (a) For companies established by a non-taxable conversion from one company form to another, the relevant age is the age of the original company. The same applies for companies established by a demerger.
 - (b) For companies that have been parties to a merger, the relevant age is the age of the oldest company.
 - (vi) The employer cannot be controlled by a public body at the time of granting the option. This means that 25% or more of the shares or voting rights of the shares of the company cannot be directly or indirectly controlled by one or more public bodies.
 - (vii) The employer cannot operate within the coal- and steel sectors.
 - (viii) The employer cannot be mainly engaged in passive capital investment.¹²
 - (ix) Only a maximum of 30% of the employer's total wage costs can be related to banking or financing activities, insurance activities, sales of real estate, raw materials or financial instruments, long-term rental premises or homes, legal advice, auditing or accounting.¹³
 - (x) The employer must not be in economic difficulties within the meaning of Article 2(18) of [the General Block Exemption Regulation](#),¹⁴ or have outstanding claims for repayment of illegal state aid, at the time of granting the options.
- (31) An employer cannot grant new options under the measure if it has granted options under the measure that have a total value of their underlying shares of more than NOK 60 million.
- (32) If the employer is a member of a group of companies,¹⁵ the eligibility criteria set out in this section must be met by all companies in the group. All companies in the group must be private limited liability companies. The eligibility criteria relating to the employer apply correspondingly to foreign companies equivalent to private

¹² A company is generally considered to be "mainly" engaged in capital investments if more than 10% of its activity is passive capital investments. However, the limit of 10% is only the starting point of the assessment. According to Norwegian authorities, in addition to being unlikely to be exposed to capital constraints because of market failure, such companies do not contribute to industrial and commercial development to the same extent as companies in other sectors.

¹³ According to Norwegian authorities, these industries are excluded so as to better target the measure to the market failure. These industries are less likely to be exposed to capital constraints due to market failure than industries eligible under the measure.

¹⁴ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

¹⁵ As defined in [LOV-1997-06-13-44](#) Lov om aksjeselskaper (aksjeloven), Section 1-3.

limited liability companies, provided that the foreign company is domiciled within the EEA or a country with which Norway has an agreement that contains an article on information exchange, and the company is taxable pursuant to the Taxation Act Section 2-3, first paragraph, letter b.

3.4.3 Eligible employees

- (33) A private individual (“the employee”) receiving the option must meet the following requirements:
- (i) The employee must work for the employer granting the option, for a minimum of 25 hours a week on average on a yearly basis, from receiving the option to exercising the option.
 - (ii) The employee can neither alone nor together with related parties¹⁶ directly or indirectly control more than 5% of the shares or voting rights in the company in the allotment year, or the two previous years. If the employer granting the option is part of a group of companies, the assessment of whether the employees fulfil the criteria must be based on all the companies in the group.
 - (iii) The employee cannot hold options where the underlying shares have a value of more than NOK 3 million at the time of receiving the option.

3.4.4 Eligible options

- (34) The option must meet the following requirements:
- (i) The option must be granted to the employee on 1 January 2022 or later.
 - (ii) The option must give the employee the right to obtain shares in the employing company.
 - (iii) The option cannot be sold, gifted or otherwise transferred to another person or company.
 - (iv) The agreed exercise price cannot be set below the fair market value of the underlying shares at the time of the granting of the option.
 - (v) The option cannot be exercised sooner than three years, and no later than ten years, after the granting of the option.

3.5 National legal basis and aid granting authority

- (35) The legal basis of the measure is to be adopted by the Norwegian parliament. The legal basis will be found in Section 5-14 of the Tax Act, and a complementary administrative regulation.¹⁷ The aid granting authority is the Norwegian Ministry of Finance.

3.6 Number of beneficiaries, duration and budget

- (36) The Norwegian authorities estimate that approximately 60 000 companies will be eligible under the measure. This corresponds to about half of all Norwegian non-financial limited liability companies with employees. However, the Norwegian authorities estimate that the eligible companies only have employed around 18% of the employees in Norwegian non-financial limited liability companies.

¹⁶ As defined in [LOV-1997-06-13-44](#) Lov om aksjeselskaper (aksjeloven), Section 1-5(1).

¹⁷ [FOR-2021-09-07-2693](#), forskrift til utfylling og gjennomføring mv. av skatteloven av 26. mars 1999 nr. 14, Section 5-14-12.

- (37) The Norwegian authorities have notified the measure for the income year of 2022 until and including the income year of 2031.
- (38) The overall long-term effects of the measure are estimated to be an annual revenue loss of about NOK 20 million. For the period 2022–2031, this corresponds to NOK 200 million. The revenue loss stem from foregone social security contributions and reduced income tax.

3.7 No overlap with other schemes

- (39) The Norwegian authorities have confirmed that aid granted under the scheme is not related to any costs that could be eligible for other state aid.

4 Presence of state aid

4.1 Introduction

- (40) 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.”
- (41) The qualification of a measure as aid within the meaning of this provision requires the following cumulative conditions to be met: (i) the 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.

4.2 Presence of state resources

- (42) The measure must be granted by the State or through state resources.
- (43) The measure involves state resources, as the relief from social security contributions on the option benefit constitutes foregone revenues of the State which would, absent the measure, be due. Further, the measure results in less revenue to the State from income tax on option benefits, compared to the taxation on options absent the measure.
- (44) The measure is imputable to the State as it is introduced through a legislative act.

4.3 Conferring an advantage on an undertaking

- (45) The measure must confer on undertakings an advantage that relieves them of charges that are normally borne from their budget.
- (46) The favourable income taxation directly concerns only employees, who are private individuals. As they are not undertakings, Article 61(1) of the EEA Agreement does not apply to them.
- (47) However, the relief from social security contributions concerns eligible employers, which constitute undertakings. The relief from social security contributions confers a direct advantage on these employers, as it mitigates the charges which are normally included in their budget when paying employment income. Further, the favourable income taxation on their employees confers an indirect advantage on the employers, as the value of their remuneration in the form of options to the

employee increases for their employees. Therefore, the measure confers on undertakings an advantage that relieve them of charges that are normally borne from their budget.

4.4 Selectivity

- (48) The measure must be selective in that it favours “certain undertakings or the production of certain goods”.
- (49) The tax advantage benefits only those undertakings eligible in accordance with the criteria set out above under section 3.4.2. Accordingly, certain types of undertakings are excluded, based on their size, age or the type of activity they carry out. Therefore, the measure is selective.

4.5 Effect on trade and distortion of competition

- (50) The measure must be liable to distort competition and to affect trade between the Contracting Parties to the EEA Agreement.
- (51) The measure will strengthen the position of the eligible undertakings compared with that of its competitors. Further, at least some of the eligible undertakings are active in markets that are open for EEA-wide competition and trade. Therefore, the measure is liable to distort or threaten to distort competition and affect trade between the Contracting Parties.

4.6 Aid scheme

- (52) ESA notes that the legal basis of the measure is an act which does not require further implementing measures for the granting of the aid, and which identifies the beneficiaries in a general and abstract manner.¹⁸ The aid is therefore granted on the basis of an aid scheme.

4.7 Conclusion

- (53) In the light of the above assessment, ESA concludes that the measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.

5 Lawfulness of the aid

- (54) Pursuant to Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“Protocol 3”): “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.”
- (55) The Norwegian authorities have notified the measure and have yet to let it enter into force. They have therefore complied with the obligations under Article 1(3) of Part I of Protocol 3.

6 Compatibility of the aid

6.1 Introduction

- (56) In derogation from the general prohibition of state aid laid down in Article 61(1) of the EEA Agreement, aid may be declared compatible if it can benefit from one of

¹⁸ See Article 1(d) of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“Protocol 3”).

the derogations enumerated in the Agreement. The Norwegian authorities invoke Article 61(3)(c) EEA as the basis for the assessment of the compatibility of the aid measure.

- (57) Article 61(3)(c) EEA provides that ESA may declare compatible “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”. Therefore, in order to declare the aid compatible, first, the aid must be intended to facilitate the development of certain economic activities or of certain economic areas and, second, the aid must not adversely affect trading conditions to an extent contrary to the common interest.¹⁹
- (58) Under the first condition, ESA examines how the aid facilitates the development of certain economic activities or areas. Under the second condition, ESA weighs up the positive effects of the aid for the development of said activities or areas and the negative effects of the aid in terms of distortions of competition and adverse effects on trade.
- (59) For most cases, these conditions are outlined in ESA’s state aid guidelines. However, in this case there are no existing state aid guidelines applicable to the measure at hand. ESA will therefore assess the measure directly under Article 61(3)(c) of the EEA Agreement.

6.2 Facilitation of development of certain economic activities or areas

6.2.1 Economic activities or areas supported

- (60) Under Article 61(3)(c) of the EEA Agreement, in order to be considered compatible, the measure must contribute to the development of certain economic activities or areas.
- (61) The measure aims at enhancing start-up and growth companies’ ability to recruit and retain key employees. By introducing favourable taxation on options, the measure addresses the difficulties for start-up and growth companies in financing competitive wages due to shortage of capital and low liquidity, see paragraph (4) above. The measure therefore contributes to developing the economic activities of start-up and growth companies, and allow them to explore their productive potential of innovation and ideas.
- (62) In view of the above, ESA considers that the measure constitutes aid to facilitate the development of certain economic activities, as required by Article 61(3)(c) of the EEA Agreement.

6.2.2 Incentive effect

- (63) State aid is only compatible with the functioning of the EEA Agreement if it has an incentive effect, and so effectively facilitates the development of certain economic activities. To establish whether the measure has an incentive effect, it must be demonstrated that it changes the behaviour of the undertakings concerned in such a way that it engages in an activity which it would not carry out without the aid or which it would carry out in a restricted or different manner.

¹⁹ Judgment of 22 September 2020, *Austria v Commission (Hinkley Point C)*, C-594/18 P, EU:C:2020:742, paragraphs 18–20.

- (64) Since the measure seeks to enhance start-up and growth companies' ability to recruit and retain key employees, it may help these companies carry out projects that absent the measure would not be undertaken, see paragraph (5) above. Further, granting options to employees incentivises them to work on increasing the value of the underlying shares.
- (65) In view of the above, ESA considers that in the absence of the measure, start-up and growth companies would not to the same extent explore their potential for producing profitable projects, and consequently the development of their economic activities would not be facilitated to the same extent. Therefore, the measure has an incentive effect.

6.2.3 Compliance with relevant EEA law

- (66) If a state aid measure, the conditions attached to it (including its financing method when the financing method forms an integral part of the state aid measure), or the activity it finances entail a breach of relevant EEA law, the aid cannot be declared compatible with the functioning of the EEA Agreement.²⁰
- (67) ESA has no indications that the measure, the conditions attached to it, or the activity it finances entail a breach of relevant EEA law.

6.3 Whether the aid adversely affects trading conditions to an extent contrary to the common interest

6.3.1 Introduction

- (68) ESA has not only identified positive effects of the planned aid for the development of the abovementioned economic activities, but also possible negative effects that the aid may have in terms of distortions of competition and adverse effects on trade. These positive and negative effects must then be weighed up.

6.3.2 Markets affected by the aid

- (69) The market directly affected by the measure is the Norwegian labour market. Further, the measure affects the economic activities of start-up and growth companies in the industries included in the measure.

6.3.3 Positive effects of the aid

- (70) The aid contributes to the development of the economic activities of start-up and growth companies, see paragraphs (61) to (62) above.
- (71) Further, the measure has the potential to promote competition in the labour market and help to improve the efficient matching of labour resources to productive economic activities, by increasing the ability of start-up and growth companies to offer competitive remuneration to employees. This may increase competition, since it will give companies greater potential to develop, market and commercialise their products and services, and may therefore lead to growth in overall economic productivity.

²⁰ Judgments of 19 September 2000, *Germany v Commission*, C-156/98, EU:C:2000:467, paragraph 78; 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraphs 94–116; 22 September 2020, *Austria v Commission (Hinkley Point C)*, C-594/18 P, EU:C:2020:742, paragraph 44; 14 October 2010, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 51–51.

6.3.4 Limited negative effects of the aid

6.3.4.1 Introduction

- (72) Article 61(3)(c) EEA requires an assessment of any negative effects on competition and on trade. The aid must not adversely affect trading conditions to an extent contrary to the common interest.

6.3.4.2 Necessity of the aid

- (73) A state aid measure is necessary if it is targeted towards situations where aid can bring about a material improvement that the market cannot deliver itself.
- (74) Shortage of capital and liquidity issues make it difficult to offer competitive wages. Further, employment in start-up and growth companies is associated with higher risk than employment in larger, more well-established companies. Moreover, according to the Norwegian authorities, it may, for outsiders, be difficult to assess risk and expected returns on investing or taking employment in start-up and growth companies. This way, asymmetric information in both the capital and labour market presents challenges for start-up and growth companies in recruiting and retaining key employees.
- (75) The current scheme addresses the same market failure, though only for smaller and younger undertakings than under the measure. A further demonstration of this market failure can be found in ESA's [Decision No 225/17/COL](#),²¹ paragraphs 61–70.
- (76) Moreover, in [Decision of 26 June 2017 in Case No SA.47144 \(2016/N\) Sweden](#), the European Commission concluded that Swedish authorities had demonstrated “the existence of a market failure in the form of asymmetric information that prevents an efficient matching of labour resources to economic needs of small business”.²²
- (77) Against this background, ESA considers that the measure addresses a market failure, and therefore is needed in order to allow start-up and growth companies to offer competitive remuneration to employees compared to larger, more well-established companies. By addressing the market failure, the measure enables profitable projects that absent the measure would not have been realised.

6.3.4.3 Appropriateness of the aid

- (78) EEA EFTA States can make different choices with regard to policy instruments, and state aid control does not impose a single way to intervene in the economy. However, state aid under Article 61(1) EEA can only be justified by the appropriateness of the particular instrument chosen to contribute to the development of the targeted economic activities or areas.
- (79) ESA normally considers that a measure is an appropriate instrument where the EEA EFTA State can demonstrate that alternative policy options would not be equally suitable to contribute to the development of economic activities or areas, and where it can demonstrate that alternative, less distortive, aid instruments would not deliver equally efficient outcomes.

²¹ OJ C 88, 22.3.2018, p. 10, and EEA Supplement No 13, 8.3.2018, p. 3.

²² See paragraph 43.

- (80) The measure is, like the current scheme, designed to enhance eligible undertakings' abilities to recruit and retain employees. In [Decision No 225/17/COL](#),²³ ESA concluded, based on information from the Norwegian authorities on the suitability of other policy instruments than the current scheme, that the current scheme is appropriate to remedy the market failure preventing efficient matching of labour resources to economic needs of young and small companies, see paragraphs 73–78 in [Decision No 225/17/COL](#).
- (81) ESA takes the view that the same considerations concerning appropriateness apply for this measure. Fiscal measures aimed at addressing possible access to finance market challenges, such as liquidity constraints, will not be sufficiently focussed and concentrated on the eligible undertakings' specific problems of recruiting and retaining key employees. Moreover, a general regulatory measure would be less efficient and cause, in economic terms, "deadweight losses" (that is loss of economic efficiency), as such a measure would not be targeted specifically at start-up and growth companies. Furthermore, the measure has additional advantages compared to other instruments, such as increasing the incentive for eligible undertakings to use options as a form of remuneration, which would motivate employees to create share value.
- (82) According to the Norwegian authorities, the use of the current scheme has been very moderate, and the difficulties in recruiting and retaining key employees because of liquidity constraints apply also to larger undertakings than those eligible under the current scheme, see paragraphs (21) and (23) above. Accordingly, ESA considers that the current scheme would not deliver equally efficient outcomes as the measure.
- (83) In view of the above, ESA considers that state aid granted through the measure is the appropriate instrument to facilitate the development of the economic activities of start-up and growth companies.²⁴

6.3.4.4 Proportionality of the aid

- (84) State aid is proportionate if the aid amount per beneficiary is limited to the minimum needed to incentivise the additional investment or activity in the area concerned.
- (85) The measure contains some safeguards to limit the aid granted to employers.
- (86) First, the tax advantage from the measure materialises only when the employee exercises the option, which normally only happens where the share price exceeds the agreed excise price.
- (87) Second, the amount of options awarded is the result of bargaining between employers and their (prospective) employees. While employees may prefer higher remuneration, employers have incentives to minimise costs. This helps reduce the aid to the minimum necessary.
- (88) Third, the measure has a cap on the total value of underlying shares for which an employee can hold options (NOK 3 million), and for which an employer can grant

²³ OJ C 88, 22.3.2018, p. 10, and EEA Supplement No 13, 8.3.2018, p. 3.

²⁴ In [Decision of 26 June 2017 in Case No SA.47144 \(2016/N\) Sweden](#), the European Commission considered a Swedish share option tax scheme, similar to the measure, as an appropriate instrument, see paragraph 51.

options (NOK 60 million). Further, the aid amount is limited as the agreed exercise price cannot be set below the fair market value of the underlying shares at the time of the granting of the option.

- (89) Finally, the measure has eligibility criteria for the employers to ensure the aid is targeted at a well-defined restricted set of companies which typically face difficulties in recruitment and retention of key employees, see paragraph (4) above. Larger and more well-established companies not eligible under the measure do not suffer from the market challenges to the same degree, and would normally be able to compete successfully in the labour market by offering competitive remuneration without aid. Therefore, the measure is unlikely to discourage investments by large companies.
- (90) ESA also notes that the aid granted under the measure is not related to any costs that could be eligible for other state aid. The qualifying criteria effectively preclude any abuse or cumulation with other aid schemes for the same eligible costs.
- (91) Therefore, ESA considers the measure to be proportionate, ensuring that any aid is limited to the minimum necessary to remedy the market failure.

6.3.4.5 Conclusion on limited negative effects

- (92) In light of the above arguments, and of the fact that the aid is granted as a relatively small relief from otherwise burdensome tax liabilities, ESA concludes that any negative effects of the aid on competition and on trade are limited.

6.3.5 *Balancing positive and negative effects of the aid*

- (93) For the aid to be compatible with the functioning of the EEA Agreement, the limited negative effects of the aid measure in terms of distortion of competition and adverse impact on trade between Contracting Parties must be outweighed by positive effects, in terms of contribution to the facilitation of the development of economic activities or areas. It must be verified that the aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (94) On the negative side of the balance, ESA notes that the measure is liable to strengthen the position of start-up and growth companies in Norway, as opposed to their competitors. However, as concluded above, ESA considers that the distortion of competition and the effect on trade between contracting parties will be limited.
- (95) On the positive side of the balance, ESA considers that by increasing the ability of start-up and growth companies to offer competitive remuneration to their employees, competition may actually increase, as those companies will have greater potential to develop, market and commercialise their products and services. This may lead to growth in overall economic productivity.
- (96) Based on the above considerations, ESA concludes that the positive effects of the measure outweigh possible distortions of competition and adverse impact on trade. Therefore, the aid does not unduly affect trading conditions to an extent contrary to the common interest.

6.4 Transparency

- (97) According to the general transparency requirement, only aid granted in a transparent manner can be approved on the basis of Article 61(3)(c) of the EEA

Agreement. The Norwegian authorities have committed to publishing information about the aid granted in accordance with the general transparency requirement. The information will be made available on a central website.²⁵

7 Conclusion

- (98) On the basis of the foregoing assessment, ESA considers that the employee share options tax scheme for start-up and growth companies constitutes state aid with the meaning of Article 61(1) of the EEA Agreement. Since ESA has no doubts that aid is compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c) it has no objections to the implementation of the employee share options tax scheme for start-up and growth companies.
- (99) The Norwegian authorities have confirmed that the notification does not contain any business secrets or other confidential information that should not be published.

For the EFTA Surveillance Authority,

Bente Angell-Hansen
President
Responsible College Member

Högni S. Kristjánsson
College Member

Stefan Barriga
College Member

For Melpo-Menie Joséphidès
Countersigning as Director,
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*This document has been electronically authenticated by Bente Angell-Hansen,
Catherine Howdle.*

²⁵ <https://data.brreg.no/rofs/eng>