DET KONGELIGE
FINANSDEPARTEMENT

Royal Ministry of Finance

The Minister of Finance

The European Commission
Margrethe Vestager
Rue de la Loi
1049 Brussel

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Undertaking in economic difficulty – challenges related to the definition

The Norwegian Ministry of Finance hereby contacts the European Commission regarding a concern for the Ministry in a specific state aid matter.

1 Background

The Norwegian Ministry of Finance refers to the general exclusion in the state aid rules that applies to undertakings in difficulties. The exclusion is based on the premise that companies in financial distress should reorganise their operations or in other ways solve their economic problems. Further, it is not in the common interest to support these companies and thus preserve their unprofitable activities with state aid, that is, ultimately, likely to be lost. The exclusion therefore rests on the likelihood that the business will run out of business in the short and medium term, if not reorganised. The exclusion is meant to safeguard the effectiveness of public spending and to avoid granting aid in circumstances that may distort competition. Undertakings in difficulties are therefore normally only eligible for aid to compensate for damage caused by exceptional occurrences and rescue and restructuring aid under strict conditions due to its potentially distortive effects.

The relevant definition applies horizontally throughout the legal framework for state aid. Given this overarching scope, it is important that the definition is better in line with its objective than it is today.

The Norwegian Ministry of Finance has experienced that the applicable criteria also capture financially viable companies, which is contrary to the objective of the rule. In

Office address: Akersg. 40 Telephone: +47 22 24 41 00 Telefax: +47 22 24 95 14
Postal address: PO Box 8008 Dep, N-0030 Oslo, Norway
Org. no.: 972 417 807

Norway, tax concessions are the main state aid instrument, representing more than 78 percent of all aid expenditure in 2019. As a result, Norway has gained extensive experience with the applicable criteria, especially in accordance with the deduction scheme for companies with research and development projects and the scheme for regionally differentiated social security contributions scheme. This experience may be useful in the processes of revising the relevant regulations and guidelines.

We are aware that the General Block Exemption Regulation (GBER) currently is under revision and further that the current guidelines on State aid for rescuing and restructuring non-financial undertaking in difficulty must be renewed before 2024. Against that background, the Norwegian Ministry of Finance hereby presents certain initial concerns related to the definition of an "undertaking in difficulty". We are also aware that concerns related to the criteria have been raised in previous revisions by various stakeholders.

2 Definition of the term "undertaking in difficulty"

The intent of the provision is to prohibit companies that are in financial distress or in need of support to survive from receiving state aid. Our experience is that some companies captured by the current definition should be regarded as financially viable. A revision should in our view consider criteria that more precisely cover companies which de facto are dependent on support for survival.

In particular, there is a concern related to the requirement that businesses cannot have accumulated losses in excess of half of their subscribed share capital. To lose half of the share capital is not unusual for startup companies (even those with on-going businesses for more than three years) and does not necessarily imply that they are in difficulties. The definition is also based on the history of losses, which does not necessarily reflect the current financial position of the company.

Another problematic point is that these are general rules that apply equally within the internal market, yet rest on national accounting rules that may differ between countries. This implies that the rule can have different outcomes in similar cases due to differences in national accounting rules. For example, according to Norwegian accounting rules, the book value of assets can be set more conservatively with reference to historic cost. This may imply that undertakings under these rules more easily will be captured by the exclusion in Norway compared to undertakings in a jurisdiction that has accounting and valuation rules that are more market based.

Based on this, the Norwegian Ministry of Finance encourages the European Commission to thoroughly consider the suitability of the definition of the term "undertaking in difficulties" in light of the objective of the rule.

We would appreciate the opportunity to discuss this matter in a meeting with the Commission in the autumn of 2022.

Yours sincerely,

Trygve Slagsvold Vedum

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