



ROYAL NORWEGIAN MINISTRY OF
TRADE, INDUSTRY AND FISHERIES

EFTA Surveillance Authority

Your ref

Our ref

Date

Case no. 73703

20/8570-3

3 May 2021

Ex-officio investigation of the corporate income tax exemptions and public sector guarantees

The Ministry of Trade, Industry and Fisheries (hereinafter 'the Ministry') refers to the letter dated 19.11.2014 from the EFTA Surveillance Authority (the "Authority") regarding an ex-officio investigation of the corporate income tax exemptions laid down in Section 2-30 (1) (b), (c), (e), (4) and (g), (5) of the Norwegian Tax Act.

In the letter the Authority refers to previous cases the Authority has dealt with, in which the compatibility of certain individual corporate income tax exemptions laid down in Section 2-30 (1) of the Norwegian Tax Act of 1999 (the "Tax Act"), with EEA State aid rules was an issue.

These were complaints regarding parking services, broadband services, harbours, waste management and services provided by the Norwegian public dental health care services. These exemptions raised concerns because the entities at stake according to the Authority, benefitted from tax exemptions not only when they engaged in public, non-economic tasks, but also when they carried out economic activities in the market.

In order to address these concerns, the Authority initiated an existing aid procedure¹ in accordance with Article 17 (1) of Part II of Protocol 3 to the Surveillance Authority and Court Agreement, by raising questions about the compatibility of the tax exemptions under section 2-30 (1), (b), (c) and (g) (5) of the Tax Act with EEA state aid rules¹. In 2015 the Authority chose to broaden the assessment of the case to include the compatibility with the state aid

¹ Letter dated 12 July 2013 from the EFTA Surveillance Authority (the "Authority") titled "Subject: Article 2-30 (1) of the Norwegian Tax Act- initiation of review of an existing aid measure- request for information according to Article 17 (1) 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"

Postal address
Postboks 8090 Dep
0032 Oslo
postmottak@nfd.dep.no

Office address
Kongens gate 8
www.nfd.dep.no

Telephone
+47 22 24 90 90
Org. nr.
912 660 680

Department
Department of
Competition Policy,
Company Law and
Economic Analysis

Reference
Kristin Seehusen
+47 22 24 66 26

rules of the public sector guarantees together with the public sector tax exemptions.²

The Authority's preliminary view in 2013 was that tax exemptions constitute state aid within the meaning of Article 61 (1) of the EEA Agreement when public entities engage in economic activities. According to the Authority, the public entities involved in economic activities benefit from a clear tax advantage over privately held companies as these exemptions reduce the charges that are normally included in the operating costs of an undertaking carrying out commercial activities.

Further, the Authority's preliminary view in 2015, was that the economic activities carried out by the relevant public entities also benefit from free explicit (or implicit) open-ended state guarantees ("public sector guarantees"). According to the Authority, by facilitating access to credit on beneficial terms, the free public sector guarantees provide advantages to the relevant entities that are not enjoyed by other market players.

In order to address these concerns, the Authority's proposed in 2015 that the Norwegian authorities should introduce an obligation upon public entities to set up separate legal entities for all their economic activities, which would thus be subject to income tax and ordinary bankruptcy and/or other insolvency rules.³

First, the Norwegian Authorities would like to underline that its starting point is that well-functioning markets and strong competition is essential in order to boost productivity and economic growth. Generally, the Government has the intention to ensure a level playing field for both private and public institutions when competing in the same market. Furthermore, we would like to point out, that the rules on state aid apply as Norwegian law.

However, the Norwegian authorities considered this joint case to raise several important questions that had to be assessed carefully. Among these, is that states have a sovereign right to design the structure of the State organisation. In Norway we have a well-established and constitutional principle of local self-government. The European Charter of Local Self - Government also lays down a principle of local self-government⁴. Moreover, Article 125 of the EEA Agreement states clearly that the Agreement in no way shall prejudice the rules of the Contracting Parties governing the system of property ownership. Furthermore, the Norwegian authorities wanted to investigate the scope of economic activity performed by public bodies, and the economic consequences, including consequences for local competition, of the Authority's proposal. Thus, the comprehensive scope and effects the preliminary proposal for appropriate measures put forward by the Authority, warranted a

² Letter dated 14 July 2015 from the EFTA Surveillance Authority (the "Authority") titled " Subject: Case 73703- Public sector tax exemptions - Guarantees"

³ Letter dated 15 December 2015 from the EFTA Surveillance Authority (the "Authority") titled "Subject: Review of general tax exemptions under Article 2-30 (1) of the Norwegian tax act and of the public sector guarantees – Letter pursuant to Article 17 (2) 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 "

⁴ [CETS 122 - European Charter of Local Self-Government \(coe.int\)](http://coe.int)

thorough examination. Norwegian authorities have therefore thoroughly evaluated the actual situation related to the Authority's concerns and the Authority's proposals.

First, in June 2016, the Norwegian Authorities established a working group led by professor Hjelmeng (*"Hjelmengutvalget"*) to assess the issues raised by the case at hand. The working group submitted its report with suggested measures not only to solve the current case, but also non-required measures which could be considered desirable to introduce in order to foster fair competition in January 2018. The Authority was informed of the report in a letter of 16 February 2018.

In addition, Norwegian Authorities ordered a report from Oslo Economics to survey the extent of economic activity in the public sector, and to perform an economic analysis of the Authority's and Hjelmengutvalget's proposals. Important findings were that:

- Municipalities run a large number and a variety of economic activities. These are however on a small economic scale, but there are certain exceptions. Activities with moderate to high turnover and a certain competitive surface are e.g handling of industrial waste, parking services and fitness centres.
- The county municipalities and the state operate fewer economic activities than the municipalities, but they are of somewhat greater size. These activities are however, already separated into separate legal entities (companies) or there are separate accounts between the economic and non-economic activities. The economic activity seems to be closely linked to the public authorities' areas of responsibility and non-economic activity.

Surveys also show that municipalities as a main rule, already organise economic activity of a certain size, as separate legal entities.

The report is attached to this letter.

Based on these investigations, the Norwegian authorities find that the scope of economic activity performed by public bodies is rather limited. Economic activity of larger size is as a main rule already organised in separate legal entities that pay taxes and are subject to the rules of bankruptcy or are organised in way that complies with the state aid rules. Examples are maritime security courses provided in the market by schools, dentists that provide non-economic dentistry for the counties as well as providing dentistry for the general public (economic activity) and waste handling services.

In the public discussions raised by this case, there has been a lot of focus on activities that the Norwegian authorities consider to be non-economic and therefore outside the scope of this joint case. Examples are kindergartens, after-school care (SFO in Norwegian), public cultural schools, and care for the elderly.

What seems to be left is minor economic activity, usually linked to the public bodies non-economic activities. These activities are generally too small and localised to affect intra-EEA trade, and thus fall outside the scope of the state aid rules. An example is local swimming pools. The investigations have shown that the proposals from the Authority of separate legal entities, may cause the municipalities to stop providing these services since the proposal will be burdensome to comply with. The consequence of this may be that the citizens will no longer have access to the service provided, because there is not a market to sustain the activity, or that the only competition to a private provider will disappear and thus decrease the competition in the market (and give the private provider the opportunity to charge monopoly prices). This will possibly cause an economic loss. However, in some instances, the fact that the public body provide the service might have the effect that there is no room for a private provider of the same service. However, this is a national issue, as these cases will generally fall outside the state aid rules. But the Norwegian authorities would like to point out that we are aware of this.

The investigations have also indicated that in some sectors, the cause of the competition issues is not the fact that the entities are not subject to tax or subject to the bankruptcy rules. Economies of scale is a factor that often lead to unlevel competition, but this is however not illegal according neither to the competition rules nor state aid rules. One of the sectors generating the most complaints to the Authority, the waste handling sector, is already organised so that it complies with the state aid rules. Entities performing economic activity within this sector are subject to tax, and mostly also the bankruptcy rules. However, there might be that economies of scale play a part.

Based on the above reasoning, the Norwegian authorities are therefore of the opinion that the Authorities proposals are not needed nor desirable in order to solve the issues at hand. The Norwegian authorities view it as disproportionate given the limited scope of economic activity, to introduce a general regulation with obligations upon public bodies to set up separate legal entities for their economic activities which would thus be subject to income tax and other ordinary bankruptcy and/or other insolvency rules, based on the evaluation above.

The investigations and the complaints the Authority have received, indicate that there are certain sectors that should be investigated further. And that there might be a need to regulate some of them specifically in order to ensure compliance with the state aid rules. Some sectors already identified by the Norwegian authorities are harbours, parking, broadband and waste handling. Waste handling is as already stated above, regulated, but as it is a sector generating a lot of complaints, it is necessary to take a further look. We are of the opinion that a more targeted approach will deal more efficiently with the issues raised by the Authority.

The Norwegian authorities would appreciate a dialogue with the Authority regarding which sectors that warrant further evaluation.

Yours sincerely

Monica Wroldsen
Deputy Director General

Kristin Seehusen
Adviser

This document is signed electronically and has therefore no handwritten signature