

Brussels, 20 March 2019  
Case No: 81036  
Document No: 895902  
Decision No: 018/19/COL

Ministry of Trade, Industries and Fisheries  
PO BOX 8090 Dep  
0032 Oslo  
Norway

**Subject: Cash refund of the tax value of petroleum exploration costs**

**1 Summary**

- (1) The EFTA Surveillance Authority (“the Authority”) wishes to inform Norway that, having assessed the annual cash refund of the tax value of petroleum exploration costs (“the annual cash refund” or “the measure”) under the Norwegian petroleum tax system, it considers that the measure does not constitute state aid<sup>1</sup> within the meaning of Article 61(1) of the EEA Agreement.
- (2) The Authority has based its decision on the following considerations.

**2 Procedure**

- (3) By letter dated 21 August 2017, Bellona (“the complainant”), an environmental non-profit organisation, lodged a complaint<sup>2</sup> against the annual cash refund. The complainant argues that the measure constitutes unlawful state aid.
- (4) The Norwegian authorities submitted their comments to the complaint on 22 September 2017. By letter dated 7 December 2017,<sup>3</sup> the Authority requested further information from the Norwegian authorities. By letter dated 9 February 2018,<sup>4</sup> the Norwegian authorities replied to the information request.
- (5) The Authority discussed the case with the Norwegian authorities at the annual package meeting in Oslo on 29 September 2017 and at a meeting in Brussels on 12 January 2018.
- (6) On 11 January 2018, the Authority met with the complainant to discuss the complaint. The complainant sent additional information by emails of 18, 25 and 28 May 2018.<sup>5</sup>
- (7) By letter dated 18 June 2018, the Authority requested further information from the Norwegian authorities. By letter dated 29 August 2018, the Norwegian authorities replied to the information request. The complainant sent additional information by email dated 21 November 2018.<sup>6</sup> On 13 December 2018, the Norwegian authorities submitted comments

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<sup>1</sup> 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.

<sup>2</sup> Documents No 870573 and 870574.

<sup>3</sup> Document No 880791.

<sup>4</sup> Document No 897524.

<sup>5</sup> Documents No 914493, 915178 and 916224.

<sup>6</sup> Document No 1039409.

on the complainant's submission of 21 November 2018.<sup>7</sup> On 25 January 2019, the Norwegian authorities submitted additional information by email.<sup>8</sup>

### 3 Description of the annual cash refund

#### 3.1 Introduction to the petroleum sector in Norway

- (8) According to Section 1-1 of the Petroleum Act,<sup>9</sup> the Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management. "Petroleum" is defined as all liquid and gaseous hydrocarbons existing in their natural state in the subsoil, as well as other substances produced in association with such hydrocarbons.<sup>10</sup> According to the Petroleum Act, the management of Norwegian petroleum resources shall be carried out with a long-term perspective, for the benefit of the Norwegian society as a whole.<sup>11</sup>
- (9) The Petroleum Tax Act ("the PTA") sets out the petroleum tax system that applies to revenues from subsea petroleum deposits.<sup>12</sup>
- (10) According to the Norwegian authorities, petroleum extraction can be divided into the following four successive phases: exploration, development, production and closure.<sup>13</sup> In the decision, the Authority refers to these phases together as "extraction" or "petroleum extraction".
- (11) The Norwegian authorities have explained that extraction does not take place within the Norwegian territorial sea. This is due to the fact that there is no geological possibility for discovering petroleum deposits this close to the Norwegian coast. Therefore, the Authority refers to petroleum extraction on the Norwegian continental shelf.
- (12) Petroleum extraction on the Norwegian continental shelf can be carried out only by petroleum companies under a production license<sup>14</sup> (see Section 3.2). Certain other activities relating to petroleum extraction on the Norwegian continental shelf can be carried out by non-petroleum companies acting under a survey license<sup>15</sup> (see Section 3.3).

#### 3.2 Activities of petroleum companies under a production license

- (13) Petroleum companies act on the basis of a production license, issued under the Petroleum Act. Production licenses are issued by the Ministry of Petroleum and Energy. The Ministry issues a production licence on the basis of the criteria and conditions laid down in the Petroleum Act (Section 3-5) and the Petroleum Regulation<sup>16</sup> (Sections 10 and 11). The criteria include, for instance, acreage, location, duration, work obligations, relevant technical expertise, financial capacity and experience on the Norwegian continental shelf. Conditions are based on consideration for national security, public order, public health, transport safety, environment protection, protection of biological resources and national treasures of artistic, historic or archaeological value, the safety of the facilities and the

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<sup>7</sup> Document No 1043474.

<sup>8</sup> Document No 1048922.

<sup>9</sup> [LOV-1996-11-29-72](#). The Norwegian Petroleum Directorate has made available an [unofficial English translation](#).

<sup>10</sup> Section 1-6 of the Petroleum Act.

<sup>11</sup> Section 1-2 of the Petroleum Act.

<sup>12</sup> The petroleum tax system is described in more detail in Section 3.4.

<sup>13</sup> These four phases are further explained in Section 3.2.

<sup>14</sup> In Norwegian: *utvinningstillatelse*.

<sup>15</sup> In Norwegian: *undersøkelsestillatelse*.

<sup>16</sup> [FOR-1997-06-27-653](#).

employees, systematic resource management (e.g. production rate or the optimization of the production activities) or the need to ensure fiscal revenues.

- (14) A production license gives an exclusive right to survey, exploration drill<sup>17</sup> and produce petroleum in areas covered by the license (Section 3-3 of the Petroleum Act). The production license holders (i.e. the petroleum companies) become the owners of the petroleum produced. The licenses are issued for an initial period of up to ten years that can be extended.
- (15) According to Section 10-12 of the Petroleum Act, a production license may be transferred to another qualified petroleum company. The transfer is subject to the consent of the Ministry of Petroleum and Energy also in case of other direct or indirect transfers, including assignment of shareholdings and other ownership shares, which may provide decisive control of a licensee. The Petroleum Regulation sets out the criteria that the Ministry bases its decision on (e.g. technical competence and financial capacity).
- (16) In the exploration phase, the petroleum resources are mapped. If a commercially viable discovery is made, the activities under a particular production license enter a new phase with the aim of developing the field (e.g. pipelines or onshore terminals).
- (17) Following a decision to develop a field, the production license holder must submit a Plan for Development and Operation to the Ministry of Petroleum and Energy, describing the development of the petroleum deposit and the operation (production) phase, including a production plan. During the field development phase, the production of a discovery is planned and the installations and infrastructure is designed and built.
- (18) The life span of the production phase of a field varies greatly, from a few to more than 40 years. Each year, the production licence holders must apply for a renewal of their production licenses to the Ministry of Petroleum and Energy.
- (19) At the closure phase, operations that are no longer profitable are closed down and offshore facilities are removed and disposed.
- (20) Petroleum extraction is associated with high risk and high capital requirements. Uncertainty (risk) of any petroleum deposit discoveries is particularly high in the exploration phase. Until a field is developed and starts producing, the costs are high and exceed the income. Typically, the investments are irreversible and the costs are sunk, if no petroleum is discovered. In addition, there is uncertainty about oil and gas prices and the sustainability of investment and operating costs.
- (21) Over the last ten years, average annual investments in the petroleum sector have been around NOK 170 billion. In the 2018 national budget,<sup>18</sup> the present value of the future revenues from the petroleum sector are estimated at NOK 4 500 billion (in 2017 values). The Norwegian State's portion is estimated at NOK 3 900 billion, or almost 87% of the estimated future revenues from the sector.
- (22) The number of petroleum companies acting under a production license has considerably increased between 2000 and 2016. There has been a noticeable hike after 2006, in particular as regards small and medium-sized companies but also European companies

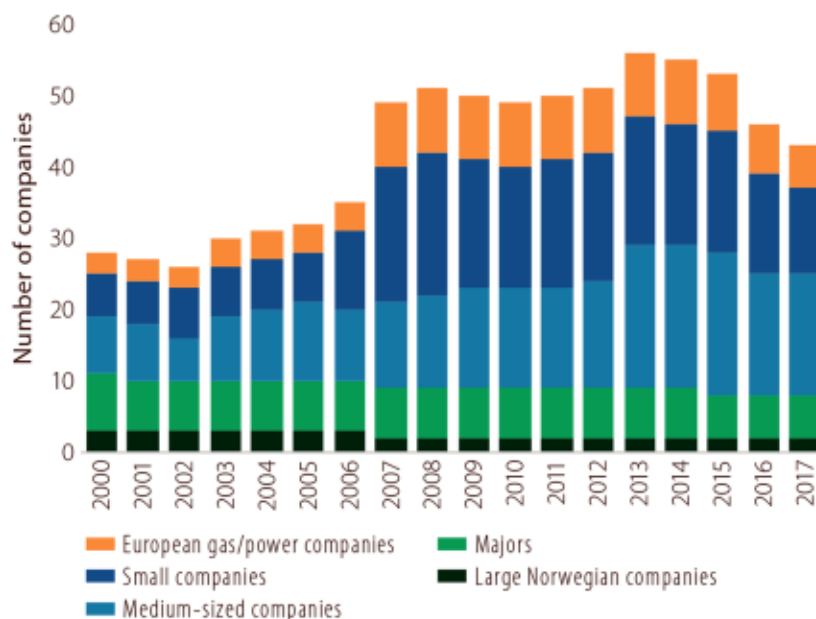
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<sup>17</sup> Exploration drilling is drilling of wildcat and appraisal wells, as well as operation and use of a facility to the extent it is used for the purpose of exploration drilling (Section 1-6 f) of the Petroleum Act).

<sup>18</sup> [Nasjonalbudsjettet 2018, Meld. St. 1](#), page 33.

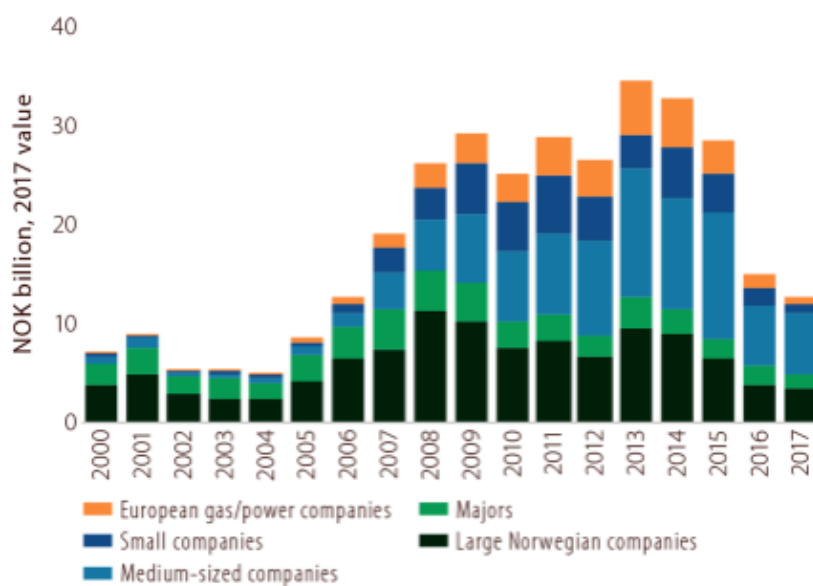
(table 1). A wide range of petroleum companies hold production licenses (European, small, medium-sized, large international and large Norwegian companies).

Table 1 – Number of petroleum companies holding production licenses<sup>19</sup>



- (23) As regards exploration by production license holders, statistics published by the Norwegian authorities show an increase in exploration costs between 2005 and 2013, followed by a decrease (table 2). The increase of exploration costs took place across petroleum companies of different size and origin. The decrease in exploration investments followed the oil price slump in 2014.

Table 2 – Investment in exploration by company category (licensees)<sup>20</sup>

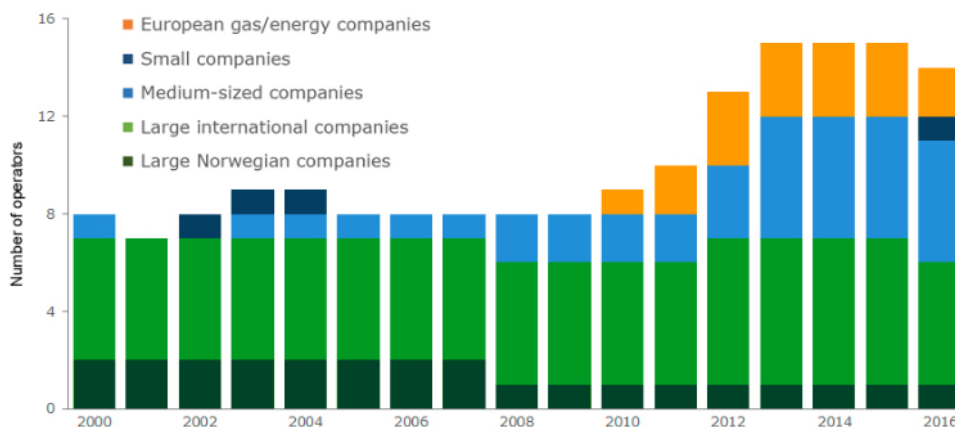


<sup>19</sup> [Resource Report 2018](#) by the Norwegian Petroleum Directorate.

<sup>20</sup> [Resource Report 2018](#) by the Norwegian Petroleum Directorate.

- (24) As regards petroleum companies with extraction activities in the production phase, statistics also show an increase in the number of Norwegian and foreign production license holders (table 3).

Table 3 – Petroleum companies operating fields on stream<sup>21</sup>



### 3.3 Activities of non-petroleum companies under a survey license

- (25) Seismic data collection companies act on the Norwegian continental shelf and acquire marketable seismic data under a survey license. Such companies acquire data with a view to selling it to the petroleum companies (i.e. production license holders).
- (26) A survey license is issued by the Norwegian Petroleum Directorate under Section 2 of the PTA and the Petroleum Regulation. Survey activity is defined as geological, petrophysical, geophysical, geochemical and geotechnical activities, including shallow drilling, as well as operation and use of a facility to the extent it is used for the purpose of survey activity.<sup>22</sup>
- (27) A survey license is granted for a period of three calendar years unless otherwise stipulated. The license is not exclusive and several companies may be entitled to conduct surveys in the same area. Differently from a production license, a survey license does not entail the right to exploration drill, nor to produce petroleum, nor the ownership right over the produced petroleum. A survey license also does not give any preferential right when production licences are granted.

### 3.4 Petroleum taxation in Norway

- (28) Norway introduced the petroleum tax system in 1975 with the adoption of the PTA.<sup>23</sup>
- (29) The PTA sets out a specific petroleum tax system designed to capture a large part of the excess return (resource rent) from the petroleum extraction on the Norwegian continental shelf.
- (30) The petroleum tax system also applies to pipeline transportation of petroleum, even if transportation does normally not have a potential for extraordinary profits (resource rent). As explained by the Norwegian authorities, pipeline transportation was included in the

<sup>21</sup> [Resource Report 2017](#) by the Norwegian Petroleum Directorate.

<sup>22</sup> Section 1-6 e) of the Petroleum Act.

<sup>23</sup> [LOV-1975-06-13-35](#). The Ministry of Finance has made available an [unofficial English translation](#). The Petroleum Tax Act should not be confused with the Petroleum Act, referred to in paragraph (8) above.

petroleum tax regime already in 1975 to eliminate the risk that the licensees would shift profit from the extraction of petroleum to the pipeline transportation that they own by stipulating high tariffs, and thereby reducing the tax base subject to petroleum tax. Furthermore, in 1991 the PTA was amended and processing was added to the petroleum tax system to clarify that the tax system applies to a petroleum company's income from processing petroleum owned by other petroleum companies.<sup>24</sup>

- (31) The petroleum tax system applies to petroleum extraction on the Norwegian continental shelf by petroleum companies holding a production license, resident or non-resident. The petroleum tax system does not apply to the activities on the Norwegian continental shelf of non-petroleum companies acting under a survey license, whether resident or non-resident. The latter are taxable under the normal corporate income tax rules set out in the Tax Act.<sup>25</sup>
- (32) The Norwegian authorities have explained that the PTA has a dual purpose. First, it sets out the petroleum tax system. Second, the PTA extends the jurisdiction of the Tax Act to other activities on the Norwegian continental shelf (for instance, service and supplier industry, such as companies that collect seismic data and serve as input providers to the petroleum extraction). The jurisdiction of the Tax Act does not extend to the Norwegian continental shelf.<sup>26</sup> The extension of the jurisdiction of Tax Act by the PTA allows covering revenues of non-resident companies from the Norwegian continental shelf. However, these other, non-petroleum companies remain taxable only under the Tax Act and do not fall under the petroleum tax system.
- (33) Under the PTA, the petroleum tax system consists of two interlinked elements – the ordinary corporate income tax (e.g. in 2017 at 24% and in 2018 at 23%) and the special tax (e.g. in 2017 at 54% and in 2018 at 55%). The combination of these two elements make up the marginal petroleum tax rate of 78%. There have been several reductions in the ordinary tax rate. However, the special tax rate has been adjusted so the marginal tax rate of 78% has remained unchanged since the general tax reform in 1992.
- (34) The petroleum tax system is based on the taxation of overall net income from petroleum extraction on the Norwegian continental shelf. Deductions are allowed for all relevant costs, including costs associated with exploration, research and development, financing, operations and decommissioning. Investments are written off using straight-line depreciation over six years from the year the expense was incurred.
- (35) Consolidation between fields is allowed. This means that a petroleum company's losses from activities under one production license (incl. exploration costs) can be written off against the company's income from operations under another production license. If a tax payer has activities taxable under the petroleum tax system (taxation at 78%) and those that fall under the ordinary tax system (taxation at 23% in 2018), the income and costs must be allocated accordingly.
- (36) After deducting all the relevant costs, the net income from petroleum extraction used to calculate the general corporate income tax element is also the basis for calculating the special tax element.<sup>27</sup> In addition, an uplift of 5.3% (in 2018) of the cost price of operating

<sup>24</sup> See the preparatory works to the amendment act, Ot.prp. nr. 12 (1991-92).

<sup>25</sup> [LOV-1999-03-26-14](#).

<sup>26</sup> As confirmed by tax literature ("Skatterett for næringsdrivende", Gyldendal Rettsdata, 2017, page 84 and "Norsk Bedriftsskatterett", Gyldendal Rettsdata, 2018, page 1027).

<sup>27</sup> Section 5 of the PTA.

assets is used over a period of four years. The uplift is used to shield the normal return from special tax and deducted when calculating the special tax element. The table below, submitted by the Norwegian authorities, illustrates the calculations:

Table 4

Sales income
- Operating costs
- Capital depreciation for investments (6 years)
- Net financial costs
- (Deficits from previous years)
<b>= tax base for general corporate income tax, subject to 23% tax rate</b>
- Uplift (extra depreciation for investments, 5.3% for 4 years)
- (Excess uplift from previous years)
<b>= tax base for special tax on petroleum activities, subject to 55% tax rate</b>

### 3.5 The 2002 and 2005 amendments to the PTA

#### 3.5.1 Introduction

- (37) The PTA was amended in 2002 and 2005. The Norwegian authorities explained that the main objective of the amendments was to tax the extraordinary profit (resource rent) of petroleum companies in a tax neutral manner, in order not to distort the incentives to continue investing on the Norwegian continental shelf. According to the Norwegian authorities, a neutral tax system requires symmetrical treatment of costs and income in net present value terms, i.e. all relevant costs can be deducted against the same tax rate as the income is taxed. The amendments followed the Norwegian Official Report on Taxation of petroleum activity<sup>28</sup> that had identified several non-neutralities in the petroleum tax system as applicable to petroleum extraction under production license.

#### 3.5.2 The 2002 amendment

- (38) Since the 2002 amendment to the PTA, petroleum companies that are not in a tax-paying position can add interest to losses carried forward, including the unused uplift (Section 3c of the PTA). According to the Norwegian authorities, the amendment was introduced to allow the companies to maintain the full (net present) value of the tax deductions. The proposal on amending the PTA<sup>29</sup> considered that expenses would be greater than the income for new companies entering the Norwegian continental shelf. That would not enable those companies getting into a tax paying position and they would therefore record

<sup>28</sup> The Norwegian Official Report on Taxation of petroleum activity (NOU 2000:18), in Norwegian: *Skattlegging av petroleumsvirksomhet*.

<sup>29</sup> Proposal No 86 (2000–2001) on the Amending Act to the Act of 13 June 1975 No 35 relating to the Taxation of Subsea Petroleum Deposits, etc. (Petroleum Taxation Act), Section 1.2 (*Ot.prp. nr. 86 (2000-2001) Om lov om endringer i lov 13. juni 1975 nr. 35 om skattlegging av undersjøiske petroleumsføremøster mv. (petroleumsskatteloven)*). See also Report to Parliament No 2 (2003-2004) Revised National Budget (2004), Section 5.3 (*St.meld. nr. 2 (2003-2004) Revidert nasjonalbudsjett (2004)*).

losses to be deducted against profits in later years, in the event that the exploration was successful. In order to address the difference in the treatment of companies in a tax paying position and those who are not, the Norwegian authorities introduced interest rates in the loss carry forward system and the possibility of the losses being sold and transferred during the cessation of the petroleum activities.

### 3.5.3 The 2005 amendment

- (39) In 2005, the PTA was amended to allow refund of the tax value of exploration costs, i.e. the annual cash refund, which is the measure covered by the complaint dealt with in this decision.
- (40) The 2005 PTA amendment introduced to the petroleum tax an element of cash flow taxation. A cash flow tax is applied as a fixed share of a company's non-financial cash flow, be it positive or negative. Thus, the tax base is the annual difference between cash inflow and outflow. For a cash flow tax to be neutral, it implies that periods of net positive and negative cash flows are treated symmetrically. This means that in periods of net negative cash flow, a "negative tax" is required, i.e. a payment by the state to the company (the tax rate multiplied by the negative net cash flow).<sup>30</sup> The annual cash refund makes the Norwegian petroleum tax system similar to a cash flow tax which would offer immediate deductions.<sup>31</sup>
- (41) This cash flow tax element was introduced under Section 3c of the PTA to make the tax rules more tax neutral and further facilitate investments on the Norwegian continental shelf by achieving equal and neutral tax treatment of all petroleum companies.<sup>32</sup>
- (42) The annual cash refund is an alternative to carrying losses forward with interest. Whereas the Tax Payment Act<sup>33</sup> generally prohibits the pledging of tax claims,<sup>34</sup> the pledging of claims based on the annual cash refund is as an exception and allowed.<sup>35</sup> The refund of the tax value of uncovered losses can also be applied for after discontinuation of the activities.
- (43) The annual tax refund is limited to the tax value of direct and indirect expenses incurred in the exploration. Such exploration costs are typically related to the acquisition of geological data through seismic or geophysical collection, the conduct of relevant geological and geophysical studies and the analysis of data, the drilling of exploration wells and evaluation of possible petroleum deposits and the preparation of a development and operation plan of the petroleum fields. Non-eligible costs include marketing costs, costs for company establishment, costs for preparation of license applications, area fees, pre-qualification costs, costs related to acquisition of licenses and funding costs.

<sup>30</sup> Christiansen, V., og A. Sandmo (1983). Et nytt prinsipp for bedriftsbeskatning. [Statsøkonomisk Tidsskrift 97\(2\), 81–108](#), pages 89-90; [The Norwegian Official Report on Taxation of petroleum activity \(NOU 2000:18\)](#), in Norwegian: Skatting av petroleumsvirksomhet, page 293 and the EY Report for the European Commission "Experiences with cash-flow taxation and prospects." Taxation Papers, Working Paper No 55 – 2015, 12 May 2015 (the "EY Report"), p. 17.

<sup>31</sup> The EY Report, pages 138 and 140.

<sup>32</sup> Proposition to the Parliament. [Ot. prp. nr. 1](#) (2004–2005), in Norwegian: *Skatte- og avgiftsopplegget 2005 - lovendringer*.

<sup>33</sup> [LOV-2005-06-17-67](#).

<sup>34</sup> Section 10-1(2) of the Tax Payment Act.

<sup>35</sup> Section 10-1(3) of the Tax Payment Act. The pledging rules for the annual cash refund were first introduced in 2007 and were initially enacted in the PTA.



- (44) The annual tax refund value is determined by multiplying the deductible expenses in ordinary income and in the special tax base by the applicable tax rates for the year in which the exploration expenses are incurred.
- (45) The Norwegian authorities have presented the table below to illustrate the tax treatment of petroleum exploration costs after the 2002 and 2005 amendments to the PTA:

Table 5

Exploration costs		100				
Tax rate (23%+55%)		78%				
Interest/discount rate		2%				
	Present value	Year 1	Year 2	Year 3	Year 4	Year 5
<b>Company 1 in a tax paying position</b>	78	78				
<b>Company 2 with losses carried forward with interest</b>	78	78	79.56	81.15	82.77	84.43
<b>Company 3 with the annual cash refund</b>	78	78				

- (46) As explained by the Norwegian authorities, all three companies have exploration costs 100 in year 1. With a tax rate of 78%, the tax value of the exploration costs is 78. A company in a tax paying position can deduct the tax value of the exploration costs, whereas a company with losses can carry them forward with interest, until sufficient income arises in year 5. However, the present value of the tax deductions remains the same in both cases, i.e. 78. The third company receives a cash refund in year 1 at the same value of the exploration costs, i.e. at the value of 78.

#### 4 Arguments of the complainant

- (47) According to the complainant, the annual cash refund provision, as introduced to the PTA in 2005, is in breach of Article 61(1) of the EEA Agreement. The complainant deems the measure to be discriminatory *vis-à-vis* petroleum activities other than exploration and also other energy sectors (renewable energy such as wind or solar).
- (48) The complainant argues that the annual cash refund is unique in the EEA and should not be seen as a regular tax measure in the form of a tax deduction from taxable income. The annual cash refund thus constitutes a cash grant covering the operating expenses of undertakings, independently of whether these undertakings will ever have sufficient income to deduct the costs. In the renewable energy sector, large investments are required, with income being generated only in the long run. The complainant claims that measures granted to undertakings in a specific sector of the economy are normally considered selective. This is corroborated by the fact that an annual cash refund claim can be pledged, although national tax payment rules prohibit pledging of tax claims.

- (49) The complainant refers to the Norwegian SkatteFUNN scheme.<sup>36</sup> According to the complainant, the SkatteFUNN scheme is designed similarly to the annual cash refund. The Authority concluded that the SkatteFUNN scheme constitutes state aid as it favours certain undertakings.
- (50) The complainant also refers to the Authority's practice regarding CO<sub>2</sub> tax exemptions as examples of sectoral aid. The complainant argues that these decisions are examples of measures that were considered selective for applying only to undertakings in a specific sector.
- (51) In the complainant's view, the measure should be assessed under the regular selectivity test, i.e. not the three-step selectivity test normally used for tax measures.
- (52) Should the three-step selectivity test apply, the complainant argues that the reference system would be the petroleum tax system. The complainant refers to petroleum as a natural resource with inherent super profits. According to the complainant, the petroleum tax system differs in many ways from the system of regular business taxation, both with regard to tax advantages and burden. For instance, petroleum companies are taxed at a considerably higher tax rate than companies subject to the ordinary corporate income tax.
- (53) The annual cash refund is limited to exploration costs of petroleum companies not in a tax paying position. Petroleum companies that are not in a tax paying position, but perform different activities (e.g. upstream petroleum activities in development and production phases), or petroleum companies carrying out exploration activities in a tax paying position are not covered by the measure. The complainant refers to the different phases of petroleum extraction due to the presence of several different upstream companies on the Norwegian continental shelf and their diverse participation in different production license groups. The complainant argues that the annual cash refund benefits only companies that carry out exploration activities and are not in a tax paying position. According to the complainant, the measure entails a derogation from the reference system and should be considered as *prima facie* selective under the three-step selectivity test.
- (54) Concerning a possible justification under the three-step selectivity test, the complainant argues that the annual cash refund seeks to incentivise a certain economic activity (exploration). This incentive may lead to higher tax revenues for the state. However, increasing an economic activity and potentially achieving higher tax revenues should be considered as external policy objectives. According to the complainant, there is no tax logic, i.e. symmetry or correlation at the level of the individual tax payer, as the annual cash refund simply addresses liquidity disadvantages.

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<sup>36</sup> See the Authority's Decisions [No 249/01/COL](#) of 18 July 2001 on a new aid scheme: "Research and Development (R&D)-projects in enterprises" (not published), [No 171/02/COL](#) of 25 September 2002 regarding tax deduction for expenses of research and development (OJ C 10, 16.1.2003, p. 12 and EEA supplement No 3, 16.1.2003, p. 10), [No 16/03/COL](#) of 5 February 2003 regarding amendment to the "SkatteFUNN" scheme concerning tax deduction for R&D expenses (OJ C 127, 29.5.2003, p. 34 and EEA supplement No 25, 29.5.2003, p. 5), [No 366/06/COL](#) of 29 November 2006 regarding amendments to the "SkatteFUNN" scheme concerning tax deduction for R&D expenses (OJ C 126, 7.6.2007, p. 18 and EEA supplement No 27, 7.6.2007, p. 3), [No 249/15/COL](#) of 24 June 2015 on the evaluation plan for the block exempted SkatteFUNN aid scheme (OJ C 81, 16.3.2017, p. 7 and EEA supplement No 16, 16.3.2017, p. 1). See also the GBER information sheet [44/2014/R&D&I](#), Tax credit scheme for research and development projects.

- (55) Regarding the element of advantage, the complainant argues that the annual cash refund for the petroleum exploration costs should not be considered as payment for services as the state, in its capacity as tax collector, cannot be viewed as a market operator that may trade tax benefits for future gains.

## 5 Comments by the Norwegian authorities

- (56) The Norwegian authorities argue that the annual cash refund does not constitute state aid pursuant to Article 61(1) of the EEA Agreement, as it does not confer an advantage on the beneficiaries nor is it selective by nature.
- (57) As regards advantage, the Norwegian authorities argue that the introduction of the annual cash refund in 2005 equalised the tax terms amongst the companies in a tax paying position and those that are not in a tax paying position. The measure has thus remedied the liquidity disadvantage element of the loss carry forward system and has secured full tax refund of exploration costs with the same (net present) value (i.e. 78%) and at the same point in time for all petroleum companies.
- (58) As regards selectivity, the Norwegian authorities disagree with the complainant that the annual tax refund should be assessed as a subsidy in a specific sector. The annual cash refund is an integrated part of the petroleum tax system. Therefore, the measure must be assessed under the three-step selectivity analysis.
- (59) Regarding the identification of the reference system, the Norwegian authorities submit that the reference system should be the PTA. The Norwegian authorities base this conclusion on the following main considerations.
- (60) The petroleum tax regime should not distort the companies' incentives to invest on the Norwegian continental shelf. One must take into account the total petroleum tax rate of 78%. This total rate has remained unchanged since 1992, even with fluctuations as regards the tax bases for the general corporate income tax and the special tax for petroleum activities. In 1992, general corporate income tax was reduced from 50.7% to 28% and the PTA was increased from 30% to 50%. Subsequently, the general corporate income tax was gradually reduced from 28% in 2013 to 23% in 2018 and the special tax for petroleum activities was correspondingly gradually increased from 50% to 55% respectively, leaving the marginal tax rate at 78%. The fact that this tax consists of two elements (in 2018: 23% general corporate income tax and 55% special tax for petroleum activities) does not materially affect the substantive parts of the petroleum tax system.
- (61) Moreover, the petroleum company's net income from the petroleum activity is ring-fenced against income and costs from other activities. The ring-fencing applies to all income and costs subject to the tax rate of 78% under the PTA. Other activities that are neither petroleum extraction nor pipeline transportation, are subjected to the general corporate income tax (in 2018 at 23%). Companies that are engaged in both types of activities must keep separate accounts.
- (62) A special petroleum tax administration (the Oil Taxation Office) was established in 1975, in order to manage the taxation of petroleum companies, audit the tax returns and control the eligibility of costs for a cash refund or to be carried forward with interest. The Oil Taxation Office's assessments may be appealed to the Appeals Board on Petroleum Tax. The Oil Taxation Office and the Appeals Board assess both the general corporate income tax part of 23% and the special tax part of 55% for petroleum activities.

- (63) Finally, the special tax rules for the petroleum activity laid down in the PTA (i.e. Sections 3, 4 and 7 to 10) apply to both tax elements at a total tax rate of 78%. It cannot thus be argued that the general corporate income tax element of 23%, by being included in the total tax rate of 78% under the PTA, represents a derogation from the reference system. On the contrary, this inclusion is an inherent element of the tax regime for petroleum exploration costs in Norway.
- (64) As regards the inclusion of the general corporate income tax in the annual cash refund, the Norwegian authorities submit that this inclusion is in any case within the nature and logic of the petroleum tax system. The petroleum tax system aims to establish a neutral resource rent tax. A neutral tax system requires symmetrical treatment of costs and income, i.e. all relevant costs can be deducted against the same tax rate as the income is taxed. Under the PTA, the state annually covers 78% of the exploration costs that are incurred in a year from companies in a tax paying position. In order to achieve tax neutrality as regards companies that are not in a tax paying position, the state covers the tax value (i.e. 78%) of the exploration costs incurred in a given year through the annual cash refund or loss carried forward with interest.
- (65) Furthermore, the inclusion of the general corporate income tax element in the PTA does not imply that the reference system should be the Tax Act covering, for comparison purposes, all companies active in all business sectors of the economy that are not in a tax paying position and carry thus losses forward. This would mean that petroleum companies that are not in a tax paying position would be compared to companies subject to the general corporate income tax, disregarding the specific features of the PTA (e.g. a high tax rate to an activity characterised by the potential for extraordinary profit due to the exploitation of natural resources on the Norwegian continental shelf). Further, only companies awarded a production licence are permitted to extract petroleum. Such an activity cannot be compared to the tax treatment of losses in the Tax Act that applies to business activities in general and at a considerably lower tax rate (23% in 2018).

## 6 Presence of state aid

### 6.1 Introduction

- (66) 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”.

- (67) The qualification of a measure as aid within the meaning of this provision requires that the measure must: (i) be granted by the state or through state resources; (ii) confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) be liable to distort competition and affect trade. The Authority will start its assessment with the selectivity analysis of the annual cash refund.

## 6.2 Selectivity

### 6.2.1 Preliminary remarks: selectivity assessment of fiscal measures

- (68) As the Authority has set out in paragraph 156 of its Guidelines on the notion of state aid (“the NoA”),<sup>37</sup> EEA States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production. Nonetheless, EEA States must exercise this competence in accordance with EEA law.
- (69) To fall within the scope of Article 61(1) of the EEA Agreement and fulfil the criteria of selectivity, a measure must “favour certain undertakings or the production of certain goods”. Hence, not all measures which favour economic operators fall under the notion of aid, only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors. Advantages resulting from general measures applicable without distinction to all economic operators do not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.<sup>38</sup>
- (70) As explained in the NoA, it is normally easy to conclude that a measure has a selective character when EEA States adopt *ad hoc* positive measures benefiting one or more identified undertakings.<sup>39</sup> However, the situation is usually less clear when EEA States adopt broader measures applicable to all undertakings fulfilling certain criteria.<sup>40</sup> In that situation, it is for the Authority to establish that the measure, although it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity.<sup>41</sup> A measure is selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.<sup>42</sup>
- (71) In case of tax advantages, selectivity should normally be assessed by means of a three-step analysis.<sup>43</sup>
- (72) In applying the three-step analysis, the system of reference must first be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators that are, in light of the objectives intrinsic to the system, in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system by differentiating between comparable economic operators, it is not selective. However, if it does (and therefore 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

<sup>37</sup> [OJ L 342, 21.12.2017, p. 15](#) and EEA Supplement No 82, 21.12.2017, p. 1.

<sup>38</sup> Judgment in *Air Liquide Industries Belgium*, C-41/05, EU:C:2006:403, paragraph 32 and the case law cited. See also Joined Cases E-17/10 and E-6/11 *Liechtenstein v ESA* [2012] EFTA Ct. Rep. 114, paragraph 53 and the case law cited.

<sup>39</sup> The NoA, paragraph 126 and the case law cited.

<sup>40</sup> The NoA, paragraph 127.

<sup>41</sup> See judgment of 30 June 2016, *Belgium v Commission*, C- 270/15 P, EU:C:2016:489, paragraphs 49 and 50.

<sup>42</sup> Judgments in *Comunidad Autónoma de Galicia and Retegal v Commission*, C-70/16 P, ECLI:EU:C:2017:1002, paragraph 61 and *Commission v Hansestadt Lübeck*, C- 524/14 P, EU:C:2016:971, paragraph 58.

<sup>43</sup> The NoA, paragraph 128.

general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 61(1) of the EEA Agreement.<sup>44</sup>

### 6.2.2 Applicability of the three-step selectivity analysis

- (73) The complainant argues that the annual cash refund is comparable to a subsidy with the aim of increasing a specific economic activity. According to the complainant, the measure should be assessed according to what the complainant refers to as the regular selectivity test. Moreover, the complainant argues that according to that test measures granted only to undertakings in a specific sector of the economy are normally considered selective.
- (74) Here, the Authority understands the complainant to argue that a measure concerning a particular sector must be presumed to be selective.
- (75) The Authority disagrees. For the following reasons, the Authority considers that the selectivity of the measure should be assessed under the three-step selectivity analysis, as a fiscal measure forming part of the petroleum tax system, and that the measure cannot be presumed to be selective.
- (76) As to the latter, according to the Court's settled case-law,<sup>45</sup> the fact that a measure is sectoral is not sufficient to make a measure selective, and there is no presumption of selectivity. The judgments of the Court in *Hansestadt Lübeck* and *Comunidad Autónoma de Galicia and Retegal* both dealt with sectoral measures (airport charges at the Lübeck airport, and digitisation and extension of terrestrial television network in Spain, respectively). The Court found in these judgments that it is necessary to determine a particular legal regime and thereafter assess whether a measure favours 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.
- (77) As to the former, i.e. the measure constitutes a fiscal measure forming part of the petroleum tax system, cash flow taxation is a well-known concept in tax literature dating back to at least 1948.<sup>46</sup> Cash flow taxation is also known in the EU and OECD-Member States as shown by the EY Report,<sup>47</sup> which specifically refers to the Norwegian petroleum tax. According to the EY Report, while the basic structure of the petroleum tax derives from the general corporate income tax, the petroleum tax system also includes cash flow tax elements.<sup>48</sup>
- (78) The objective of a tax regime for an extractive industry, such as petroleum, is to capture the resource rent without distorting the incentives of petroleum companies to invest and continue exploring the natural resources. The annual cash refund is available to petroleum companies that are not in a taxable position with extraction activities under a production license in the exploration phase. Under the PTA, the annual cash refund is an alternative to carrying the losses forward with interest as regards exploration costs. Thus, the annual cash refund enacted by the PTA constitutes a material fiscal element of the Norwegian petroleum tax system as explained in Sections 3.4 and 3.5.

<sup>44</sup> The NoA, paragraph 128.

<sup>45</sup> Judgments in *Comunidad Autónoma de Galicia and Retegal*, paragraph 58 and *Commission v Hansestadt Lübeck*, paragraph 41 and the case-law cited.

<sup>46</sup> IMF Working Paper, "[Identical Twins? Destination-Based Cash-Flow Taxes Versus Consumption Taxes with Payroll Subsidies](#)", Carton, Corugedo and Hunt, WP/17/276, 14.12.2017, page 3.

<sup>47</sup> See footnote 31.

<sup>48</sup> *Idem*.

- (79) Moreover, the Norwegian petroleum tax system, as established by the PTA, applies 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. As explained in Section 3.2, petroleum companies must apply for a production licence to the Ministry of Petroleum and Energy and the licenses are awarded pursuant to the terms of the Petroleum Act and the Petroleum Regulation.
- (80) The complainant further claims that the annual cash refund is similar to the SkatteFUNN scheme. The Authority disagrees. The SkatteFUNN scheme was designed to grant aid in the form of additional tax deductions to support research and development. More precisely, aid is granted in the form of tax credits, i.e. additional deductions from a company's payable tax. The amount of additional deductions is calculated as a percentage of a company's deductible R&D expenditure. The percentage to calculate the additional deduction differs for small, medium-sized and large enterprises.<sup>49</sup> Differently from the SkatteFUNN scheme, the annual cash refund does not set out any additional deductions. The annual cash refund concerns the tax treatment of costs incurred by companies that are not in a tax paying position, complementing rules on the tax treatment of costs incurred by companies that are in a tax paying position (deduction), and other rules on the tax treatment of costs incurred by companies that are not in a tax paying position (loss carry forward with interest). In its Decision No 171/02/COL, the Authority found the SkatteFUNN scheme to be selective, because the additional deductions were limited to undertakings of a certain size. Following removal of the size related restrictions, the Authority concluded in its Decision No 16/03/COL that the measure was selective, because of the discretionary powers of the granting authority. Such limitations, as regards the eligible taxpayers and the discretion of the authority managing the system, do not exist in the current case.
- (81) The complainant also argues that the Authority's previous practice on CO<sub>2</sub> tax exemptions provides examples of selective measures as they applied only to undertakings in specific sectors (see paragraph (50) above). The Authority disagrees with the complainant. In its decisions concerning CO<sub>2</sub> tax exemptions,<sup>50</sup> the Authority did not consider the measures to be selective simply because the measures concerned a particular sector. The Authority considered the measures to be selective because the exemptions applied to only some of the sectors or products covered by the CO<sub>2</sub> tax. As the Authority explained in its Decision No 342/09/COL, in assessing whether a measure is selective or amounts to a general measure, the Authority must identify the system of reference, i.e. it must compare the position of undertakings who receive the benefit of the exemption, with that of any other undertakings that are in the same legal and factual situation, but do not receive the benefit.
- (82) The complainant has also argued that because of the right to pledge tax claims arising from the annual cash refund, the annual cash refund should be seen as a subsidy rather than a tax measure. The Authority disagrees with the complainant. Allowing a company to pledge a tax claim is a policy choice of the legislator. Pledging takes place between private parties. The terms of pledging, as set out in the Tax Payment Act, do not change the terms

<sup>49</sup> See the Authority's Decisions No [171/02/COL](#), [16/03/COL](#), [366/06/COL](#) and [249/15/COL](#).

<sup>50</sup> See the Authority's Decisions [No 370/04/COL](#) of 15 December 2004 regarding a notification of state aid in form of temporary reduction of CO<sub>2</sub> tax on mineral oils and basic heating oil tax for the paper and pulp industry (OJ C 90, 14.4.2005, p. 9 and EEA Supplement No 18, 14.4.2005, p. 2), [No 502/08/COL](#) of 16 July 2008 on CO<sub>2</sub> tax exemption and reduced heating oil tax rate (OJ C 297, 20.11.2008, p. 12 and EEA Supplement No 69, 20.11.2008, p. 2) and [No 342/09/COL](#) of 23 July 2009 on an exemption from the Norwegian CO<sub>2</sub> tax on gas and LPG on the use of gas for purposes other than the heating of buildings rate (OJ L 226, 1.9.2011, p. 12 and EEA Supplement No 49, 8.9.2011, p. 1).

of the measure (in particular, timing and amount). Any potential pledging by the undertakings that are subject to the petroleum tax system does not change the financial burden on the state.

- (83) In view of the above, the Authority considers that the annual cash refund is a tax measure and should be assessed under the three-step selectivity analysis.

### 6.2.3 Selectivity analysis of the annual cash refund

#### 6.2.3.1 Introduction

- (84) The annual cash refund is set out in the PTA in general terms and is not limited to one or more identified undertakings. It is therefore for the Authority to assess whether the measure, notwithstanding that it could confer an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or on certain sectors of activity.<sup>51</sup>

#### 6.2.3.2 Identification of the reference system

- (85) The appropriate 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. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system”.<sup>52</sup>
- (86) The Authority has already assessed selectivity of petroleum tax measures in two decisions.<sup>53</sup> In both decisions, the Authority concluded that the reference system is the PTA.
- (87) The Authority has no reason to depart from its previous practice, and the complainant and the Norwegian authorities agree that the reference system is the PTA. However, the case at hand concerns a measure that is directed at costs of exploration, a phase of petroleum extraction. The Authority therefore considers that the reference system for assessing the selectivity of the annual cash refund are the rules of the PTA on the treatment of extraction costs of petroleum companies.
- (88) 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. Tax regimes for an extractive industry may display distinctive features that aim to maximize the value of the revenues for the government, without however deterring the investment decisions of the companies.<sup>54</sup> Petroleum extraction in Norway also takes place in a specific geographical area, the Norwegian continental shelf.

<sup>51</sup> Judgment in *Commission v World Duty Free Group*, C-20/15 P, ECLI:EU:C:2016:98, paragraph 62.

<sup>52</sup> The NoA, paragraph 133.

<sup>53</sup> The Authority’s Decisions [No 90/02/COL](#) of 31 May 2002 concerning the Snøhvit project (OJ C 238, 3.10.2002, p. 17 and EEA Supplement No 49, 3.10.2002, p. 55), page 13 and [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, p. 22 and EEA Supplement No 23, 17.5.2007, p. 6), page 6.

<sup>54</sup> See also “*Fiscal Regimes for Extractive Industries: Design and Implementation*”, IMF, 2012, pages 10-11.



- (89) The Norwegian authorities have chosen a fiscal regime for petroleum extraction based on the principles of the general corporate income tax, with cash flow tax elements aiming to achieve tax neutrality (annual cash refund and loss carry forward with interest).
- (90) Petroleum companies holding a production license and being in a tax-paying position are taxed at an aggregate tax rate of 78% (in 2018 comprised of the 23% general corporate income tax and the 55% special tax for petroleum activities). All petroleum companies whose petroleum activities under a production license are in the exploration phase, and that are not in a tax-paying position can either carry forward the loss with interest or apply for the annual cash refund. The complainant agrees that the petroleum tax system differs from the system of regular business taxation, both with regard to tax advantages and tax burden.
- (91) Direct taxation falls within the competence of the EFTA States. They alone have the competence to devise the systems of corporate taxation, which they consider the best suited to the needs of their national economic circumstances.<sup>55</sup> Therefore, even if Norway has decided to base the petroleum tax system partly on the general corporate income tax principles, this does not mean that the reference system should include the general corporate income tax and all business sectors that are subject to it. The Authority reiterates that “the EEA States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various sectors of the economy [...] in accordance with EEA law”.<sup>56</sup>
- (92) 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 relation to their effects, independently of the technique used.<sup>57</sup> The main objective of the Norwegian petroleum tax system is to tax resource rent using a high marginal tax rate. Under the petroleum tax system, the tax base (income from petroleum extraction) is taxed twice. The ordinary tax base is calculated according to the PTA and taxable at 23% (in 2018). The special tax base taxable at 55% (in 2018) is an additional tax on the same income, corrected for uplift, and any deduction of this special tax is not allowed for calculating any other income tax (Section 5 of the PTA). Furthermore, the petroleum tax system aims to ensure tax neutrality by introducing a cash flow tax element (see Section 3.5.3).
- (93) Even if the two elements of the tax are calculated separately, the special tax on petroleum extraction is calculated on the basis of the net income from petroleum extraction that is also used to calculate the general corporate income tax element. Hence, the method of calculating the petroleum tax by taxing the tax base twice is an integral part of the petroleum tax system. The Authority also considers that the annual cash refund can achieve the objective of tax neutrality only if its calculation includes the general corporate income tax (see table 1 above). Hence, the reference system should not be broader than the PTA even if, as a matter of technique, the tax base for the petroleum tax is calculated on the basis of the net income tax principle that is also used in ordinary corporate income tax calculation.

<sup>55</sup> Judgment in E-06/98 *The Government of Norway v ESA* [1999] EFTA Ct. Rep. 74, paragraph 34; Judgment in *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 97.

<sup>56</sup> The NoA, paragraph 156.

<sup>57</sup> Judgments in *European Commission v Hansesstadt Lübeck*, paragraph 48 and C- 203/16 P, *Dirk Andres v European Commission*, ECLI:EU:C:2018:505, paragraph 92.

- (94) The complainant also argues that the annual cash refund is discriminatory as energy from renewable sources (e.g. wind and solar) does not benefit from it. The Authority notes that renewable energy generation (including in on- and offshore wind) takes place under different economic and regulatory circumstances, and is subject to normal corporate income tax rules (23% tax rate in 2018). Renewable energy does not have risk levels and excessive return potential similar to petroleum extraction. The Petroleum Act and the PTA set 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.<sup>58</sup>
- (95) The Norwegian authorities have imposed an additional special tax rate on hydro energy, 35.7% in 2018.<sup>59</sup> However, this does not mean that taxation of hydro energy should be included within the reference system for the purposes of a state aid assessment of the annual cash refund. 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, and tax rates of other sectors are not, as such, relevant for identifying the reference system. Neither Norway nor the complainant has argued that the reference system should be identified more broadly than the petroleum tax system as set out in the PTA.
- (96) In conclusion, renewable energy taxation is not part of the reference system and therefore not relevant for assessing the selectivity of the measure. The Authority considers that the same arguments apply equally to other extractive industries that are not covered by the PTA.
- (97) For the sake of completeness, the Authority reiterates that the PTA has a dual purpose (see paragraph (32)). In addition to setting out the petroleum tax system, it extends the jurisdiction of the Tax Act to allow taxation of revenues of non-resident companies from activities other than petroleum extraction. This is the case for the service and supply industry, which consists of companies that assist the petroleum companies in their activities on the Norwegian continental shelf (e.g. the service and supplier industry and the seismic data collection companies that operate under a survey license).<sup>60</sup> However, it does not mean that these other activities fall under the petroleum tax system. These other activities are taxable under normal corporate income tax rules rather than the petroleum tax system. The effect of the extension of the jurisdiction of the Tax Act by the PTA is that all non-petroleum activities on the Norwegian continental shelf are taxable under the Tax Act, whether carried out by resident or non-resident companies.
- (98) The petroleum tax system applies, besides petroleum extraction, to pipeline transportation and processing of extracted petroleum. As explained in Section 3.4, pipeline transportation was included in the petroleum tax system to eliminate the risk of reducing the tax base subject to petroleum tax by shifting profits from extraction to pipeline transportation and processing. Processing was added to the petroleum tax system in 1991 to clarify that the tax system includes income from processing petroleum owned by other petroleum companies. The annual cash refund concerns petroleum exploration, a phase of petroleum extraction. Consequently, the Authority considers that pipeline transportation and processing of petroleum are not as such relevant for the state aid assessment of the measure, which relates to petroleum extraction alone.

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<sup>58</sup> See Sections 3.2, 3.3. and 3.4.

<sup>59</sup> [Nasjonalbudsjettet 2018, Meld. St. 1](#), page 91. See in this regard [LOV-1999-03-26-14](#) (the Tax Act), Section 18-3.

<sup>60</sup> Sections 3.3 and 3.4.

- (99) In view of the above, the Authority considers that the reference system against which the *prima facie* selectivity of the annual cash refund is to be assessed is the taxation of petroleum extraction under the petroleum tax system as set out in the PTA, and in particular the rules of the PTA on the treatment of extraction costs of petroleum companies (see also paragraph (87)).
- (100) Identifying the reference system allows the Authority to assess whether the annual cash refund is *prima facie* selective, i.e. whether the measure differentiates between economic operators that are, in light of the objectives intrinsic to the system, in a comparable factual and legal situation (see paragraph (72)).
- (101) The annual cash refund applies to petroleum companies with exploration costs that are not in a tax paying position. The Authority assesses first whether the measure differentiates between petroleum companies that have exploration costs, but are not in a tax paying position, compared to petroleum companies with exploration costs that are in a tax paying position. Second, the Authority assesses whether the measure differentiates between petroleum companies that have exploration costs, but are not in a tax paying position, and petroleum companies, which are also not in a tax paying position, but have costs from other phases of extraction (development, production and closure).

#### 6.2.3.3 Analysis of the *prima facie* selectivity of the annual cash refund

- (102) A measure that benefits only one economic sector or some of the undertakings active in that sector is not necessarily selective. The Court has held that a condition for the application or the receipt of tax aid may be grounds for a finding that that aid is selective, if that condition leads to a distinction being made between undertakings despite the fact that they are, in the light of the objective pursued by the tax system concerned, in a comparable factual and legal situation, and if, therefore, it represents discrimination against undertakings which are excluded from it.<sup>61</sup> In order to carry out the comparison, it is necessary to assess the effects of the measure.<sup>62</sup>
- (103) The annual cash refund applies to petroleum companies that are not in a tax paying position and is therefore not available to petroleum companies in a tax paying position. The measure is also limited to exploration costs and does not apply to costs related to other phases of petroleum extraction (development, production and closure). According to the complainant, the measure is selective because of these limitations.
- (104) For the reasons set out below, the Authority considers that the annual cash refund is not selective.

#### 6.2.3.4 *Prima facie* selectivity of the measure as regards petroleum companies with exploration costs that are not in a tax paying position compared to petroleum companies with exploration costs that are in a tax paying position

- (105) The PTA establishes specific, substantive tax rules that apply to petroleum companies' revenues from petroleum extraction on the Norwegian continental shelf (Section 3.4). The petroleum tax system applies to petroleum companies in a tax paying position, as well as to petroleum companies that are not in a tax paying position.

<sup>61</sup> Judgment in *Finanzamt B v A-Brauerei*, C-20/15 P, ECLI:EU:C:2018:1024, paragraph 22 and the case law cited.

<sup>62</sup> Judgment in *European Commission v Hansestadt Lübeck*, paragraph 49.

- (106) The measure is limited to petroleum companies with exploration costs that are not in a tax paying position. Therefore, the Authority needs to assess whether these companies are, in light of the objective pursued by the petroleum tax system, in a comparable factual and legal situation to petroleum companies that are in a tax paying position.
- (107) The PTA sets out the petroleum tax system as a net income tax, i.e. the tax base is calculated by deducting costs from revenues. In a net income tax system, a company in a tax paying position can deduct costs precisely because of this position. In turn, a company that is not in a tax paying position cannot deduct costs. Hence, other tax accounting techniques such as loss carry forward are made available to companies not in a tax paying position.
- (108) As regards loss carry forward, the Court has considered it to be a general rule rather than a derogation.<sup>63</sup> Loss carry forward rules can be discriminatory if they differentiate between companies that are not in a tax paying position (e.g. differences based on company type or sector of activity). That type of differentiation was also the subject matter of the Court's judgment in *Dirk Andres*.<sup>64</sup> However, introducing a generally applicable loss carry forward rule that applies to all companies that are not in a tax paying position does not mean that companies in a tax paying position are discriminated against. Furthermore, the Authority has previously considered that tax measures of a purely technical nature, such as loss carry forward rules, do not constitute state aid, provided that they apply without distinction to all firms and to the production of all goods.<sup>65</sup>
- (109) The annual cash refund is, similarly to loss carry forward, limited to companies not in a tax paying position. Companies in a tax paying position can, because of their situation, deduct the same costs from revenues. Due to the absence of a net loss, the possibility of carrying losses forward is moot for companies in this situation. The Authority therefore considers that, similarly to loss carry forward, the annual cash refund does not, by itself, discriminate against companies in a tax paying position.
- (110) The difference in the situation of companies in a tax paying position and those that are not, is also exemplified in table 5. Petroleum companies in a tax paying position deduct exploration costs from revenues at a tax rate of 78%. Those not in a tax paying position could either receive an annual cash refund at the same rate of 78% or carry the losses forward with interest.
- (111) The information provided by the Norwegian authorities and the preparatory works of the 2005 PTA amendment show that the purpose of the annual cash refund is to introduce a cash flow tax element to the petroleum tax and achieve equal and neutral tax treatment of all petroleum companies.<sup>66</sup>
- (112) Hence, it is a natural consequence of the tax regime that the annual cash refund (as well as loss carry forward with interest) only applies to those undertakings that are not in a tax

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<sup>63</sup> Judgment *Dirk Andres*, paragraph 103.

<sup>64</sup> The Court's judgment in *Dirk Andres* concerns a corporate tax rule restricting the right for loss carry-forward to prevent the acquisition of 'empty-shell companies' for the purpose of reducing tax liabilities. The restriction contained an exception related to the restructuring of the loss-making entity. The Court had to assess whether the exception from the restriction constituted a selective advantage to companies that met the terms of the exception.

<sup>65</sup> The Authority's previous guidelines on the application of state aid rules to measures relating to direct business taxation ([OJ L 137, 8.6.2000, p. 20](#) and EEA Supplement No 26, 8.6.2000, p. 10), Section 17B.3.1.

<sup>66</sup> See Section 3.3.

paying position, given that these companies cannot deduct costs from revenues when declaring their profits for tax purposes. Conversely, petroleum companies that are in a tax paying position deduct the exploration costs from the revenues at the rate of 78% and the question of either carrying the losses forward with interest or applying for the annual cash refund cannot arise.

- (113) Therefore, the fact that the petroleum companies that are in a tax paying position cannot receive the annual cash refund (nor can carry the losses forward with interest) does not entail that these undertakings are being discriminated against. The companies in a tax paying position are in a different factual and legal situation as they have taxable revenues, and the costs, including the exploration costs, are already taken into account in the tax assessment by being deducted from the revenues.

6.2.3.5 *Prima facie* selectivity of the measure as regards petroleum companies that are not in a tax paying position with exploration costs compared to petroleum companies that are not in a tax paying position with costs from other phases of extraction (development, production and closure)

- (114) As explained in Sections 3.1 and 3.2, although petroleum extraction on a particular field can be divided into different phases, extraction is based on a single production license. A production license gives an exclusive right to survey, exploration drill and produce petroleum in areas covered by the license. Whereas extraction under one production license can be at the stage of exploration, extraction under another license may have gone through that phase and reached the stage of development or production.
- (115) Excess return (resource rent) is possible once petroleum extraction under a particular production license has reached the production phase. In turn, production is only possible after the completion of exploration and development phases. Hence, exploration forms an integral and indispensable part of petroleum extraction under any production license.
- (116) A production license or a controlling interest in a petroleum company holding the license can be transferred, subject to the consent of the Ministry of Petroleum and Energy.<sup>67</sup> Corporate mergers and acquisitions are a normal part of business activities. Even if a license may be transferred, this does not change the fact that exploration is an indispensable part of petroleum extraction that must be carried out under any production license, if production occurs.
- (117) Petroleum extraction (including exploration, development and production) is carried out by a broad range of petroleum companies (such as medium-sized, large, Norwegian and European).<sup>68</sup> The number of the petroleum companies and their diversity have increased after 2005. Therefore, if anything, the effect of the measure seems to have been to increase competition on the Norwegian continental shelf rather than to confer any advantage exclusively on certain undertakings or on certain sectors of activity.
- (118) The Authority considers that since exploration is an integral part of petroleum extraction and must be carried out under any production license if production is to occur, the measure does not have the effect of conferring an advantage on certain petroleum companies over others, even if it is limited to the exploration phase of petroleum extraction. Petroleum exploration is insofar an indispensable phase under the production license, and the measure is available to all petroleum companies that are not in a tax paying position.

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<sup>67</sup> See paragraph (15).

<sup>68</sup> Section 3.1 and tables 1 to 3.

#### 6.2.4 Conclusion as regards *prima facie* selectivity of the annual cash refund

(119) In view of the above, the Authority considers that the annual cash refund is not selective, as it does not discriminate between petroleum companies that are not in a tax paying position and that have exploration costs, and petroleum companies that are in a tax paying position or petroleum companies that are not in a tax paying position and have costs from other phases of extraction (development, production and closure).

#### 6.2.5 Justification by the nature and general scheme of the tax system

(120) As explained in paragraph (72), 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 and will thus fall outside the scope of Article 61(1) of the EEA Agreement.

(121) The Authority concluded in Section 6.2.4 that the annual cash refund is not selective, for the reasons set out in Sections 6.2.3.4 and 6.2.3.5. However, even if the measure would be found to be *prima facie* selective, it would be justified by the nature or general scheme of the reference system, and thus not be selective.

(122) Norwegian authorities are entitled to devise the petroleum tax system as a partly cash flow tax based tax system (paragraph (40)). Norwegian authorities have the right to decide on the economic policy that they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production (paragraph (68)).

(123) Tax neutrality is an objective inherent in the petroleum tax system. Therefore, even if the measure would be found to be *prima facie* selective, the measure would be justified as it seeks to establish tax neutrality, and stems from the nature and general scheme of the petroleum tax system of which it forms part.

### 6.3 Conclusion concerning the presence of aid

(124) It follows from the above that the arguments raised by the complainant concerning the alleged selectivity of the annual cash refund are unfounded.

(125) The Authority further concludes that the annual cash refund does not confer a selective advantage on the undertakings concerned. Given that not all the conditions of Article 61(1) of the EEA Agreement are satisfied, the annual cash refund does not constitute state aid within the meaning of that Article.

## 7 Final conclusion

(126) On the basis of the foregoing assessment, the Authority considers that the annual cash refund does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

For the EFTA Surveillance Authority,

Yours faithfully,

Bente Angell-Hansen

Frank J. Büchel

Högni Kristjánsson

President  
Responsible College Member

College Member

College Member

Carsten Zatschler  
Countersigning as Director,  
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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*