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Decision No 079/19/COL

Ministry of Trade, Industry and Fisheries
P.O. Box 8090
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Norway

Subject: Amendments and prolongation of the employee share options tax scheme

1 Summary

- (1) The EFTA Surveillance Authority (“the Authority”) wishes to inform the Norwegian authorities that, having assessed the notified amendments and prolongation of the employee share option tax scheme (“the measures”), it considers that the measures constitute state aid within the meaning of Article 61(1) of the EEA Agreement and decides not to raise objections¹ to the measures, as they are compatible with the functioning of the EEA Agreement, pursuant to Article 61(3)(c) thereof.
- (2) The Authority has based its decision on the following considerations.

2 Procedure

- (3) The Norwegian authorities notified the measures by letter dated 30 October 2019.²

3 Description of the scheme and the notified measures

3.1 The employee share option tax scheme

- (4) By [Decision No 225/17/COL](#),³ the Authority approved a scheme, which allowed for deferred taxation and social security contributions of employees’ income, when the employees are offered share options (“the employee share option tax scheme”). An employee share option is a right for the employees to buy shares in the company they are employed in. Under the approved scheme, employees are taxed at the moment of realisation⁴ of the shares, instead of when the shares are purchased.⁵
- (5) Pursuant to the scheme, the employer’s liability for corresponding social security contributions are also deferred. For example, if the share value decreases between purchase and realisation of the shares, the taxation of the employer will be lower than it would have been under the general system. Consequently, the

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 No 1094496 (with two Annexes, Documents No 1094498 and 1094492).

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

⁴ “Realisation” means the sale of the shares, or taxation after a specified time period has passed.

⁵ “Purchase” means the time at which an employee exercises their right to buy shares.

employer may pay lower social security contributions than under the general system if the share value decreases. If the share value increases, the employer will only be liable for social security contributions up until the amount of the option benefit. The option benefit is the difference between the market value and the price paid by the employee for the share.

- (6) The goal of the employee share option tax scheme is to better enable young and small companies to recruit and retain employees.⁶ Such companies may not have the same access to capital as older and larger companies. Hence, young and small companies may find it more challenging to finance competitive wages. Moreover, employees are often risk-averse and may consider a young and small company an uncertain employer. Young and small companies may therefore find it difficult to recruit and retain employees.
- (7) The general conditions of the employee share option tax scheme are described in [Decision No 225/17/COL](#).

3.2 The notified amendments and prolongation

- (8) The notification concerns two proposed amendments to the current scheme as well as a two-year extension of the duration of the scheme.
- (9) Under the current scheme, the granting company can have a maximum of ten employees in the year preceding the year of granting the option. The Norwegian authorities intend to raise this maximum number of employees in the granting company to twelve. An increase from ten to twelve employees in the companies will increase the number of companies that qualify under the scheme from around 36 000 to around 37 000.⁷ The number of employees in the companies that qualify will increase from around 107 000 to around 117 000.⁸
- (10) The Norwegian authorities also propose to increase the maximum option benefit that each employee can obtain under the scheme from NOK 500 000 to NOK 1 million.
- (11) Finally, the Norwegian authorities intend to prolong the scheme by two years. The current scheme was due to expire on 31 December 2027. The duration of the amended scheme will be from 1 January 2020 until 31 December 2029.

3.3 Objective

- (12) The Norwegian authorities' proposals are *inter alia* a result of recommendations from the Commission on Capital Supply (*Kapitaltilgangsutvalget*)⁹ and comments received through a public inquiry.
- (13) The signal from the companies operating in the market was that the scheme should include larger companies. However, the Norwegian authorities considered that it is also important for an expansion of the scheme not to undermine the competitive advantage that the scheme can provide to young and small companies. Raising the maximum number of employees to twelve is thus meant

⁶ For the eligibility criteria of the scheme, see section 3.3 of [Decision No 225/17/COL](#).

⁷ For the eligibility criteria of the scheme, see section 3.3 of [Decision No 225/17/COL](#).

⁸ These estimates are based on Statistics Norway's accounting statistics for non-financial companies from 2016.

⁹ See Report [NOU 2018:5](#).

to accommodate some of the demand from the market whilst at the same time maintaining the scheme as a well-targeted instrument.

- (14) According to the Norwegian authorities, by increasing the “option benefit” under the scheme, the economic incentive for each employee will increase. This will make the scheme more effective as a vehicle to recruit and retain key employees. An increase in the option benefit will also enhance the direct economic link between the employee’s gain and the growth in the market value of the company and thereby increase the incentive for the employee to contribute towards the growth of the company.
- (15) Finally, according to the Norwegian authorities, the longer duration is necessary, as the challenges, the scheme is meant to facilitate, are deemed to be enduring. In addition, the eligible transactions covered by the scheme take effect over several years. Options must first be granted, then they must be held for at least three years before being exercised (i.e. when the shares are purchased). Realisation of the shares, or the occurrence of a “taxation event”, may then happen as late as five years after the options are exercised. Taxation may therefore take place quite some time after options are granted.

3.4 National legal basis and aid granting authority

- (16) The national legal basis of the scheme is section 5-14 of the Norwegian Tax Act,¹⁰ and section 5-14-12 of a complementary administrative regulation, adopted by the Norwegian authorities.¹¹ The aid granting authority is the Ministry of Finance.

3.5 Budgetary implications

- (17) The following table shows the Norwegian authorities’ estimates of the long-term budgetary effects of the scheme in NOK million, for options in each year, throughout the duration of the scheme as amended:

Year	Current scheme	Scheme as amended	Difference
2018	50	(50)	–
2019	100	(100)	–
2020	150	285	135
2021	200	380	180
2022	250	475	225
2023 (phase-in completed)	300	570	270
2024	300	570	270
2025	300	570	270
2026	300	570	270
2027	300	570	270
2028		570	(570)
2029		570	(570)

- (18) The total scheme, as amended, is thus estimated to result in a long-term revenue loss of NOK 5 130 million during the period from 2020 to 2029. The long-term effect (approximately “net present value”) on revenues from each of the years during the phasing-in period, is lower than the long-term effects from each year when phasing-in is completed. The reason is that not all employees are eligible for options in the phasing-in period.

¹⁰ [LOV-1999-30-26-14](#) Lov om skatt av formue og inntekt (skatteloven).

¹¹ [FOR-1999-11-19-1158](#) Forskrift til utfylling og gjennomføring mv. av skatteloven.

4 Presence of state aid

(19) 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.”

(20) The qualification of a measure as aid within the meaning of this provision therefore 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) be liable to distort competition and affect trade.

(21) The Authority has concluded that the employee share option tax refund scheme constitutes state aid within the meaning of Article 61(1) of the EEA Agreement.¹² There is nothing in the current notification which alters this conclusion.

(22) The scheme involves state resources, as the deferred and possibly reduced social security contributions constitute foregone revenues by the State, which would, absent the scheme, be due. It is also imputable to the State as it is introduced through a legislative act. The deferred and possibly reduced social security contributions confer direct advantages on the eligible companies, as they may mitigate charges which are normally included in their budget. The scheme only favours certain undertakings, and is therefore selective. The aid granted will strengthen the position of the eligible companies compared with that of their competitors. Furthermore, at least some of the eligible companies are active in markets that are open for EEA-wide competition and trade. The Authority therefore concludes that the measure is liable to distort competition and to affect trade between the Contracting Parties. On this basis, the Authority concludes that the notified measures constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

5 Procedural requirements

(23) 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.”

(24) The Norwegian authorities have submitted a notification of the amendments to the scheme, and they will not enter into force until 1 January 2020. Norway has therefore complied with the obligations under Article 1(3) of Part I of Protocol 3.

¹² [Decision No 225/17/COL](#) (OJ C 88, 22.3.2018, p. 10, and EEA Supplement No 13, 8.3.2018, p. 3).

6 Compatibility

- (25) The Authority can declare state aid compatible with the functioning of the EEA Agreement under its Article 61(3)(c) provided that certain compatibility conditions are fulfilled.
- (26) In this case, there are no state aid guidelines applicable to the measure at hand. The Authority will therefore assess the measure directly under Article 61(3)(c) of the EEA Agreement.
- (27) The Authority concluded in [Decision No 225/17/COL](#) that the current employee share option tax scheme is compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c). The notified amendments and the prolongation of the scheme do not alter those conclusions.
- (28) The notified amendments, i.e. the increase from a maximum of ten to twelve employees in eligible companies, and the increase of the option benefit that each employee can obtain from NOK 500 000 to NOK 1 million, are proportionate and represent an appropriate balance between addressing the concerns from the market and maintaining the scheme as a well-targeted instrument towards its goal. The increase of the option benefit will make the scheme more effective as a vehicle to recruit and retain key employees and increase the incentive for the employees to contribute towards the growth of the eligible companies. Moreover, the amendments are proportionate when compared with limits set out in a similar scheme in Sweden, which has been approved by the European Commission.¹³ Furthermore, the Authority considers that the notified prolongation is appropriate, given the challenges which it is meant to facilitate and the nature of the eligible transactions that are covered by the scheme, which take effect over several years.

7 Transparency

- (29) 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 publish information about the aid granted in accordance with the general transparency requirement. The Norwegian authorities will publish the full text of the aid scheme and make the necessary disclosures on a central website.¹⁴

8 Conclusion

- (30) On the basis of the foregoing assessment, the Authority considers that the measures constitute state aid within the meaning of Article 61(1) of the EEA Agreement. Since no doubts are raised, this aid is compatible with the functioning of the EEA Agreement pursuant to its Article 61(3)(c). The Authority has no objections to the implementation of the measures.

For the Authority, acting under [Delegation Decision No 068/17/COL](#),

¹³ See Commission Decision in SA.47114 (Sweden) Tax reduction of employee share options (OJ C 254, 4.8.2017, p 1). There the maximum number of employees in the eligible companies was set at 50 and the maximum share option granted was set at SEK 3 million (approx. NOK 2.8 million) per employee.

¹⁴ The information will be available on the following website: <https://data.brreg.no/rofs/>.

Yours faithfully,

Bente Angell-Hansen
President
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For Carsten Zatschler
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*This document has been electronically authenticated by Bente Angell-Hansen,
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