Kehotus huomautusten esittämiseen valvonta- ja tuomioistuinsopimuksen pöytäkirjassa 3 olevan I osan 1 artiklan 2 kohdan mukaisesti valtiontuesta, joka liittyy Norjassa tietyille osuuskunnille myönnettäviin veroetuuksiin

(2008/C 96/06)

EFTAn valvontaviranomainen aloitti valvontaviranomaisen ja tuomioistuimen perustamisesta tehdyn EFTA-valtioiden sopimuksen, jäljempänä 'valvonta- ja tuomioistuinsopimus', pöytäkirjassa 3 olevan I osan 1 artiklan 2 kohdassa tarkoitetun menettelyn 19. joulukuuta 2007 tehdyllä päätöksellä N:o 719/07/KOL, joka on toistettu todistusvoimaisella kielellä tätä tiivistelmää seuraavilla sivuilla. Jäljennös päätöksestä on toimitettu tiedoksi Norjan viranomaisille.

EFTAn valvontaviranomainen kehottaa EFTA-valtioita, EU:n jäsenvaltioita ja muita asianomaisia lähettämään kyseistä toimenpidettä koskevat huomautuksensa kuukauden kuluessa tämän tiedonannon julkaisemisesta seuraavaan osoitteeseen:

EFTA Surveillance Authority
Registry
Rue Belliard 35
B-1040 Brussels

Huomautukset toimitetaan Norjan viranomaisille. Huomautusten esittäjä voi pyytää kirjallisesti henkilöllisyytensä luottamuksellista käsittelyä. Tämä pyyntö on perusteltava.

TIIVISTELMÄ

MENETTELY

Norjan viranomaiset ilmoittivat 28. kesäkuuta 2007 päivätyllä kirjeellä EFTAn valvontaviranomaiselle valvonta- ja tuomioistuinsopimuksen pöytäkirjassa 3 olevan I osan 1 artiklan 3 kohdan mukaisesti suunnitellusta verolain muutoksesta. Norjan viranomaiset aikoivat muuttaa verolakia myöntääkseen tietyille osuuskunnille tuloverotukseen liittyvän edun. Ilmoituksen mukaan kyseiset osuuskunnat voivat vähentää omaan pääomaan tehdyt sijoitukset tuloistaan ja näin pienentää tuloveropohjaa.

Käytyään asiasta kirjeenvaihtoa Norjan viranomaisten kanssa EFTAn valvontaviranomainen on päättänyt käynnistää muodollisen tutkintamenettelyn osuuskuntia koskevasta verovähennyksestä.

TOIMENPITEEN ARVIOINTI

Yritysten tulovero on Norjassa yleensä 28 prosenttia, ja sitä sovelletaan myös yhtiön omaan pääomaan tehtäviin sijoituksiin. Osakesijoitukset eivät kuitenkaan muodosta vastaanottavalle yritykselle verotettavaa tuloa, vaan sijoituksen tekijän katsotaan maksaneen veron. Siten esimerkiksi osakeyhtiömuotoiset yritykset voivat korottaa osakepääomaansa vastaanottamalla verottomana osakkeenomistajiensa tai muiden tahojen tekemiä osakesijoituksia. Sen sijaan osuuskunnat eivät voi hyödyntää tätä mahdollisuutta, sillä osuuskuntia koskevan Norjan lain mukaan ne eivät voi laskea liikkeeseen osakkeita tai myöntää muita pääomatodistuksia tai arvopapereita. Lisäksi osuuskuntien avoimen jäsenyyden periaatteen katsotaan rajoittavan niiden pääomasijoitusten suuruutta, joita osuuskunnat voivat pyytää jäseniltään.

Valtion vuoden 2007 talousarviossa Norjan viranomaiset ehdottivat tukijärjestelmää, jossa osuuskunnille myönnetään erityisiä verovähennyksiä. Kyseisessä järjestelmässä maa- ja metsätalouden ja kalastuksen alalla toimivat osuuskunnat, kuluttajaosuuskunnat ja asuntorahastot voivat saada vähennystä yhtiöverosta omaan pääomaan tehtyjen sijoitusten pohjalta. Vähennys voi olla enintään 15 prosenttia vuotuisista nettotuloista, ja se tehdään ainoastaan niistä tuloista, joita osuuskunnat saavat jäsentensä kanssa käymästään kaupasta. Järjestelmän tarkoituksena on myöntää osuuskunnille veroetuus sen takia, että niiden katsotaan olevan vaikeampi saada oman pääoman ehtoista rahoitusta kuin muiden yritysten.

Valvontaviranomainen katsoi alustavasti Norjan viranomaisten toimittamien tietojen pohjalta, että tuloverovähennykset saattavat olla ETA-sopimuksen 61 artiklan 1 kohdassa tarkoitettua tukea.

Norjan viranomaisten mukaan ehdotetussa järjestelmässä ei ole kyse edun myöntämisestä osuuskunnille, vaan sen tarkoituksena on ainoastaan hyvittää haitat, joita osuuskunnille aiheutuu lainsäädännöstä. Norjan viranomaisten mielestä osuuskunnille myönnettävällä veroetuudella pyritään kattamaan ne ylimääräiset kustannukset, joita osuuskunnille aiheutuu siitä, että ne eivät voi järjestää osakeantia tai myöntää muita pääomatodistuksia tai arvopapereita. Lisäksi osuuskunnille myönnettävä tuki ei Norjan viranomaisten mukaan ylitä valtiolle siitä aiheutuvaa aineetonta etua. Tältä osin Norjan viranomaiset viittaavat osuuskuntien edistämisestä Euroopassa 23. helmikuuta 2004 annettuun komission tiedonantoon neuvostolle, Euroopan parlamentille, Euroopan talous- ja sosiaalikomitealle sekä alueiden komitealle (KOM(2004) 18). EFTAn valvontaviranomainen huomauttaa, että Norjan viranomaiset eivät ole kyenneet menettelyn tässä vaiheessa näyttämään toteen sitä, että tuella ainoastaan kompensoitaisiin osuuskunnille aiheutuvia haittoja. Tämän perusteella valvontaviranomainen epäilee, että ehdotetusta järjestelmästä aiheutuu etua sen soveltamisalaan kuuluville yrityksille.

Norjan viranomaiset väittävät lisäksi, että järjestelmä ei ole valikoiva, koska tietyille osuuskunnille myönnetyt veroetuudet ovat oikeutettuja Norjan yleisen verojärjestelmän perusteella. Norjan viranomaisten mukaan ehdotettu järjestelmä merkitsee sitä, että yleinen menettely, jossa yritykset voivat kerätä oman pääoman ehtoista rahoitusta vastaanottamalla verottomia osakesijoituksia, ulotetaan koskemaan myös osuuskuntia. Norjan tekemässä ilmoituksessa esitetään, että ehdotetun järjestelmän soveltamisalaan kuuluvat osuuskunnat voivat hyötyä erityisestä verovähennyksestä, jota ei myönnetä esimerkiksi osakeyhtiöille. Vähennystä perustellaan osuuskuntien vaikeuksilla hankkia oman pääoman ehtoista rahoitusta. Edellä mainitut seikat eivät kuitenkaan liity toisiinsa. Tuloveroa peritään tuloista, joita yritys saa tavanomaisesta liiketoiminnasta, kun taas osakesijoituksia ja muita pääomasijoituksia ei Norjan lain mukaan luokitella tuloiksi. Edellä esitetyn pohjalta EFTAn valvontaviranomainen epäilee, että ilmoitettu toimenpide ei ole oikeutettu Norjan yleisen verojärjestelmän perusteella. Lisäksi ehdotettu verovähennys koskisi ainoastaan tiettyjä osuuskuntia, kun taas EFTAn valvontaviranomainen olettaa käytössään olevien tietojen pohjalta, että samat ongelmat oman pääoman ehtoisen rahoituksen hankkimisessa koskevat myös muita osuuskuntia.

Norjan viranomaiset väittävät myös, että tuki ei vääristä tai uhkaa vääristää kilpailua, sillä se ainoastaan poistaa kilpailuhaitat, jotka tällä hetkellä rasittavat osuuskuntia. Koska järjestelmä vähentää sen soveltamisalaan kuuluvien osuuskuntien maksamia tuloveroja, EFTAn valvontaviranomainen epäilee, että järjestelmä vääristää tai uhkaa vääristää kilpailua.

EFTAn valvontaviranomainen epäilee, että toimenpiteeseen ei voida soveltaa mitään ETA-sopimuksen 61 artiklassa luetelluista poikkeuksista.

PÄÄTELMÄ

Edellä esitetyn perusteella EFTAn valvontaviranomainen on päättänyt aloittaa ETA-sopimuksen pöytäkirjassa 3 olevan 1 artiklan 2 kohdan mukaisen muodollisen tutkintamenettelyn. Asianomaisia kehotetaan esittämään huomautuksensa kuukauden kuluessa siitä päivästä, jona tämä päätös on julkaistu *Euroopan unionin virallisessa lehdessä*.

EFTA SURVEILLANCE AUTHORITY DECISION

No 719/07/COL

of 19 December 2007

to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the proposed scheme concerning tax benefits for cooperative societies

(Norway)

THE EFTA SURVEILLANCE AUTHORITY ([1]),

Having regard to the Agreement on the European Economic Area ([2]), in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ([3]), in particular to Article 24 thereof,

Having regard to Article 1(2) of Part I and Articles 4(4) and 6 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines ([4]) on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular the Guidelines on business taxation,

Whereas:

I. FACTS

1. Procedure

By letter dated 28 June 2007 from the Norwegian Ministry of Government Administration and Reform, received and registered by the Authority on 29 June 2007 (Event No 427327) and letter from the Ministry of Finance dated 22 June 2007, received and registered by the Authority on 4 July 2007 (Event No 428135), the Norwegian authorities notified the proposed amendments to the rules on taxation of cooperative companies contained in Section 10-50 of the Tax Act, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement. As it was only the cover letter from the Ministry of Government Administration and Reform that was received by the Authority on 29 June 2007, the Authority considers the notification to have been submitted on 4 July 2007. This was communicated to and agreed upon by the Norwegian authorities by an e-mail dated 10 August 2007 (Event No 433019). According to the notification, the scheme is notified for reasons of legal certainty.

By letter dated 4 September 2007 (Event No 433067), the Authority requested additional information from the Norwegian authorities.

By letter dated 28 September 2007 from the Norwegian Ministry of Government Administration and Reform, forwarding a letter from the Ministry of Finance of 28 September 2007, received and registered by the Authority on the same day (Event No 444538), the Norwegian authorities requested an extension of the deadline to reply. By letter dated 1 October 2007 (Event No 444790), the Authority met this request.

By letter dated 16 October 2007 from the Norwegian Ministry of Government Administration and Reform, forwarding a letter from the Ministry of Finance of 16 October 2007, received and registered by the Authority on the same day (Event No 447272), the Norwegian authorities replied to the Authority's information request.

By letter dated 10 December 2007 (Event No 456448), the Authority according to Article 4(5) in Part II of Protocol 3 to the Surveillance and Court Agreement asked the Norwegian authorities for an extension of 2 days of the deadline to take a decision according to paragraphs 2-4 of the same Article. By letter dated 12 December 2007 from the Norwegian Ministry of Government Administration and Reform, received and registered by the Authority on the same date (Event No 457226) the Norwegian authorities met this request.

2. Description of the proposed measure

2.1. *Background*

In 1992, the Norwegian authorities introduced a scheme concerning special tax deductions for cooperatives. According to the scheme, cooperatives within the agricultural and fisheries sectors as well as consumer cooperatives were entitled to incorporate tax deductions on the basis of allocations to equity capital. Other forms of cooperatives were not covered by the scheme.

The deduction was limited to maximum 15 % of the annual net income, and taken solely from the part of the income deriving from trade with the members of the cooperative. A deduction corresponding to the maximum allowed would imply a reduction from the normal corporate tax rate of 28 % to 23,8 % ([5]). According to the Proposal by the Norwegian Government of 29 September 2006 ([6]), the aim of the scheme was to grant a fiscal advantage to the cooperatives on the basis that the cooperatives were considered to have a more difficult access to equity capital than other undertakings.

([1]) Hereinafter referred to as 'the Authority'.
([2]) Hereinafter referred to as 'the EEA Agreement'.
([3]) Hereinafter referred to as 'the Surveillance and Court Agreement'.
([4]) Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, EEA Supplement No 32, 3 September 1994. The Guidelines were last amended on 3 May 2007. Hereinafter referred to as 'the State Aid Guidelines'.

([5]) Cf. Section 12.2 of the Proposal by the Norwegian Government of 29 September 2006 (*Ot. prp. nr. 1 (2006-2007) Skatte- og avgiftsopplegget 2007 — lovendringer*).
([6]) *Ot. prp. nr. 1 (2006-2007) Skatte- og avgiftsopplegget 2007 — lovendringer.*

The scheme was abolished as of the fiscal year 2005. However, in relation to the State Budget for 2007, the Norwegian authorities proposed to reintroduce the scheme in a slightly amended form.

2.2. *The cooperative movement in Norway*

According to the notification, the cooperatives in Norway are described in the Article '*Cooperative Law in Norway — Time for Codification?*' ([1]). According to the Article, there are four big cooperative sectors in Norway, namely agriculture, fisheries, consumer and housing. The cooperatives in the agricultural sector are undertakings involved in activities such as processing, sale, purchasing of agricultural products and goods used for agricultural production (fertilisers, machines etc.), breeding, credit and insurance. In the fisheries sector cooperatives have the exclusive right to first-hand sale of all kinds of fish and shellfish, except farmed fish. Furthermore, the consumer cooperatives in Norway operate 1 300 stores (supermarkets, building materials dealers etc.), and have more than 900 000 members. Finally, housing is an important cooperative sector in Norway with more than 652 000 cooperative members and 256 000 dwellings owned by cooperatives. In addition to these traditional cooperatives, there are cooperatives in many other parts of the economy, such as transport and energy supply, but also health care, schools, media etc.

In the notification, the Norwegian authorities describe a cooperative as a company which is owned by its members, cf. Section 1 of the Act on cooperative societies ([2]). The members' liabilities are limited to any membership fee or deposit that may have to be paid according to the memorandum of association. The surplus of the cooperative may only be allocated to the members according to the members' transactions with the company, cf. Sections 26-30 and 135 of the Act on cooperative societies. The membership deposits may only be increased by a return according to an interest rate set with a mandatory maximum, cf. Section 30 of the Act on cooperative societies.

2.3. *Norwegian rules on corporation tax and the cooperatives*

The general income tax for undertakings in Norway is 28 %. The tax also applies when the income is added to the company's equity capital. However, the Norwegian Supreme Court has concluded that share deposits are not taxable income for the receiving company ([3]). The reason is that the contributions are deemed to have been previously taxed as the contributor's income. Hence, whereas an undertaking has to pay 28 % tax on equity financed through the undertaking's own income, no tax is paid with regard to deposits from the shareholders or the public. It follows from the above that undertakings which are organised as limited companies etc. may increase their equity capital by receiving non-taxable share deposits from their shareholders or from the public.

Cooperatives, however, do not have this possibility as they, according to the Norwegian law on cooperatives, cannot issue shares to the public or issue other capital certificates or securities. Furthermore, it is considered that the principle of open membership limits the size of capital contributions that the cooperatives can claim from their members.

According to the notification, the obligations and limitations imposed on the cooperatives by law are seen by the Norwegian authorities as essential and inherent in the cooperative principles. Hence, the Norwegian authorities consider that the lifting of these restrictions would violate fundamental cooperative principles. The Norwegian authorities point out that the Norwegian act on cooperative companies may be stricter at this point than the legislation on cooperatives in other European States. As an example, the Norwegian authorities refer to Article 64 of the Council Regulation on the Statute for a European Cooperative Society ([4]), according to which the cooperative may provide for the issuing of securities other than shares which may be subscribed both by members and non-members.

2.4. *Objective of the scheme*

According to the notification, the cooperative societies must be upheld due to the public interest of maintaining undertakings based on principles such as democracy, self-help, responsibility, equality, equity and solidarity as an alternative to limited companies. Thus, in order to ensure the public, intangible interest of maintaining the cooperative societies as an alternative to the limited companies, there is a need to compensate the cooperatives for the disadvantage they otherwise suffer compared with other companies. The objective of the proposed scheme is to offset some of these disadvantages related to capital supply.

2.5. *The proposed measure*

The notified measure is laid down in a new Section 10-50 of the Tax Act.

The first paragraph of the Tax Act reads as follows:

> '*Cooperative societies may claim deduction in their income for additional payments to the members according to Section 27 of the Act on cooperative societies* [([5])]. *In addition, deduction may be granted for allocations to equity capital up to 15 % of the income. Deduction is only granted with regard to income deriving from trade with the members. Trade with members and equivalent trade must appear in the accounts and must be substantiated*' ([6]).

'*Equivalent trade*' is defined in paragraph 3 of Section 10-50 of the Tax Act as fishermen's sales organisations purchase from members of another fishermen's sales organisation provided that certain conditions are fulfilled, purchase by an agricultural cooperative from a corresponding cooperative in the aim to regulate the market and purchase imposed by a State authority.

([1]) '*Cooperative Law in Norway — Time for Codification?*' by Tore Fjørtoft and Ole Gjems-Onstad, published in '*Scandinativan Studies in Law*', Volume 45 — Company Law, 2003, pages 119-138.
([2]) Act of 29 June 2007 No 81 *Lov om samvirkeforetak (samvirkelova)*.
([3]) Rt. 1917 page 627 and Rt. 1927 page 869.
([4]) Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (OJ L 207, 18.8.2003, p. 1).
([5]) The first sentence of the provision is not relevant for the notified scheme.
([6]) Unofficial translation by the Authority. The original Norwegian text is as follows: '*(1) Samvirkeforetak kan kreve fradrag i inntekten for etterbetalinger til medlemmene etter samvirkeloven § 27. I tillegg kan det gis fradrag for avsetning til felleseid andelskapital med inntil 15 prosent av inntekten. Fradrag gis bare i inntekt av omsetning med medlemmene. Omsetning med medlemmene og likestilt omsetning må fremgå av regnskapet og kunne legitimeres.*'.

It follows from the provision that deduction is only granted with regard to income deriving from trade with members and equivalent trade. Hence, no deduction is granted in income from trade with others.

The Norwegian authorities estimate that the loss in tax revenue resulting from the scheme will amount to between NOK 35 million and NOK 40 million (approximately EUR 4-5 million) for the fiscal year 2007.

2.6. *Beneficiaries*

The scheme is proposed to apply to the cooperative societies indicated in paragraphs 2 and 4-6 of the proposed Section 10-50 of the Tax Act.

It follows from the provisions referred to above that the notified scheme mainly includes certain consumer cooperatives ([1]) and cooperatives active within the agriculture, fisheries and forestry industries. Furthermore, cooperative building societies which are covered by the Act on cooperative building societies ([2]) may also benefit from the tax deduction ([3]). Other forms of cooperatives are not covered by the scheme.

3. **Comments by the Norwegian authorities**

The Norwegian authorities have stated that the scheme has been notified to the Authority for reasons of legal certainty. The Norwegian authorities claim that the scheme cannot be supposed to constitute State aid within the meaning of Article 61(1) of the EEA Agreement. This seems to be based on three different lines of argumentation.

Firstly, the Norwegian authorities argue that the scheme does not confer any advantage on the cooperatives. In this regard, the Norwegian authorities argue that the general principle laid down in the *Altmark* doctrine ([4]), referred to by the Norwegian authorities as the market investor principle, '*must apply where the measure consists of advantages given to the recipient to cover the extra costs for the undertaking to fulfil obligations imposed on it and by which the State in return is given an intangible benefit of public interest*' ([5]). According to the Norwegian authorities, this should in any case apply where the obligation imposed is external to the interests of the undertakings concerned. The Norwegian authorities claim that the principle laid down in the *Altmark* judgement should apply in this case even though '*the Norwegian authorities are not of the opinion that the notified scheme is in line with the Altmark judgement or compatible with the Authority's Guidelines on State Aid in the Form of Public Service Compensation*' ([5]).

The obligation imposed on the cooperatives is in this case the prohibition for cooperatives to issue shares or other capital certificates or securities in order to strengthen their equity capital, restrictions which the Norwegian authorities consider as essential. The intangible benefit is the public interest of keeping up and safeguarding the cooperative companies as alternatives to limited companies and other organisational forms.

The Norwegian authorities argue that the case law on which the Authority's Public Service Compensation Guidelines is based '*does not rule out that the market principle is applicable to payments to compensate obligations imposed in order to ensure intangible benefits for the public*' ([5]). The Norwegian authorities in this regard refer to the Opinion of Advocate General Fennelly in Case C-251/97 ([6]).

The Norwegian authorities go on to say that the obligation imposed on the cooperatives is wholly external to the interest of the cooperatives as it does not bring them any advantage as regards their competitive or market position. The obligation implies a loss in profit for the cooperatives as their equity may not be optimal. The Norwegian authorities claim that the advantage granted to the cooperatives by the scheme does not exceed this loss, or at any rate does not exceed the intangible benefit received by the State.

Secondly, the Norwegian authorities argue that the scheme is not selective. The Norwegian authorities observe that all companies with limited liability may increase their equity by receiving deposits and issue shares or other securities to the investors. Although share deposits constitute an economic advantage for the companies, the deposits are not subject to taxation for the receiving company.

The cooperatives are not permitted to receive equity from external investors or members by issuing shares or other kinds of capital certificates or securities. According to the Norwegian authorities, '*the notified scheme is based on the same logic as the general rule of regarding equity or share deposits as non-taxable income. By the allocation as equity of an amount eligible under the scheme, the amount is deemed as already taxed and not as taxable income for the company*' ([7]). The Norwegian authorities furthermore point out that the tax deduction can only be made on income deriving from trade with members and some other associates.

In essence, the Norwegian authorities argue that the tax benefit for the cooperatives is justified by the nature or general scheme of the Norwegian tax system. In particular, the Norwegian authorities claim that the proposed scheme implies that '*the general system of equity financing for corporations by receiving non-taxable deposits is made applicable also to the cooperative societies*' ([8]).

([1]) According to paragraph 2a of Section 10-50, the provision only applies to cooperatives where more than 50 % of the regular turnover is related to trade with the members.
([2]) Act of 6 June 2003 No 38 *Lov om bustadbyggjelag (bustadbyggjelagslova)*.
([3]) This is an expansion of the scheme compared to the scheme in force until 2005, cf. Section I.2.1 above.
([4]) Case C-280/00, *Altmark Trans GmbH*, [2003] ECR I-7747.
([5]) Section 1 of the letter from the Ministry of Finance dated 16 October 2007 (Event No 447272).
([6]) Opinion of Advocate General Fennelly in Case C-251/97, *French Republic v Commission*, [1999] ECR I-6639.
([7]) Section 4 of the letter from the Ministry of Finance dated 16 October 2007 (Event No 447272).
([8]) Section VI of the letter from the Ministry of Finance dated 22 June 2007 (Event No 428135).

Thirdly, the Norwegian authorities argue that the measure does not distort or threaten to distort competition in a way contrary to Article 61(1) of the EEA Agreement, as the scheme is aimed at compensating the disadvantage for the cooperatives when it comes to access to equity capital. The difficulty for cooperatives with regard to capital supply, itself, according to the Norwegian authorities, implies a distortion of competition at the expense of the cooperatives. The objective of the scheme is to counter this distortion and thereby presumably improve the efficiency of the markets in question.

As an additional point, the Norwegian authorities refer to the Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe ([1]). The Norwegian authorities in particular refer to Section 3.2.6 of the Communication where the Commission i.a. states:

> *'Some Member States (such as Belgium, Italy and Portugal) consider that the restrictions inherent in the specific nature of cooperative capital merit specific tax treatment: for example, the fact that cooperatives' shares are not listed, and therefore not widely available for purchase, results almost in the impossibility to realise a capital gain; the fact that shares are repaid at their par value (they have no speculative value) and any yield (dividend) is normally limited may dissuade new memberships. In addition it is to be mentioned that cooperatives are often subject to strict requirements in respect of allocations to reserves. Specific tax treatment may be welcomed, but in all aspects of the regulation of cooperatives, the principle should be observed that any protection or benefits afforded to a particular type of entity should be proportionate to any legal constraints, social added value or limitations inherent in that form and should not lead to unfair competition.'*

The Norwegian authorities claim that the notified scheme is in accordance with the EEA State aid rules and the principles expressed by the Commission in the Communication.

II. ASSESSMENT

1. Scope of the Decision

As set out in Section I.2.6 above, the potential beneficiaries under the scheme are mainly certain consumer cooperatives, cooperatives active within the agriculture, fisheries and forestry industries and cooperative building societies.

Article 8 of the EEA Agreement defines the scope of the Agreement. It follows from paragraph 3 of Article 8 that:

> *'Unless otherwise specified, the provisions of this Agreement shall apply only to:*
>
> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
>
> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.'*

([1]) COM(2004) 18 of 23 February 2004.

On this basis, the agriculture and fisheries sectors to a large extent fall outside the scope of the State aid rules of the EEA Agreement.

Hence, this Decision applies to the proposed tax concession for cooperative societies, but it does not deal with cooperatives active in the agriculture and fisheries sectors to the extent that the activities of these cooperatives fall outside the scope of the State aid rules of the EEA Agreement.

2. The presence of State aid

State aid within the meaning of Article 61(1) of the EEA Agreement

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.'*

The Authority will in the following examine whether the conditions laid down in Article 61(1) of the EEA Agreement are fulfilled in the present case and whether, consequently, the notified measure constitutes State aid.

2.1. *Presence of State resources*

The aid measure must be granted by the State or through State resources. According to the notified scheme, the cooperatives mentioned in Section 10-50 of the Tax Act will be entitled to a special form of tax deduction. Hence, these cooperatives may deduct allocations to equity capital from their income. The tax deduction implies that the tax payable by the cooperatives covered by the scheme is reduced. Hence, the measure constitutes a loss of tax revenues for the Norwegian State, estimated by the Norwegian authorities to amount to between approximately NOK 35 and 40 million (approximately EUR 4-5 million) for the fiscal year 2007. Consequently, State resources are involved.

2.2. *Favouring certain undertakings or the production of certain goods*

2.2.1. Advantage

The aid measure must confer on the cooperatives advantages that relieve them of charges that are normally borne from their budgets.

As referred to above, the proposed tax deduction implies that the tax payable by the cooperatives covered by the scheme is reduced. Thereby, the measure relieves them of charges that are normally borne from their budgets.

However, the Norwegian authorities argue that the proposed tax deduction does not confer an advantage on the cooperatives because the tax deduction must be regarded as compensation for the obligations imposed on the cooperatives by law, and in particular the prohibition for cooperatives to issue shares or other capital certificates or securities in order to strengthen their equity capital. The Norwegian authorities go on to argue that the said prohibition is inherent in the legal form of cooperatives. Furthermore, the issue of safeguarding the cooperatives, with the legal restrictions and obligations imposed on them, as an alternative to companies organised as limited companies, etc., is of public interest.

It is the Authority's understanding that the Norwegian authorities consider that the proposed aid is a part of a bargain whereby the State, on the one hand, achieves that the cooperatives in their current form are safeguarded. The cooperatives, on the other hand, obtain compensation for the disadvantages with regard to equity capital imposed on them by law in the form of a tax concession.

The Norwegian authorities refer to the Opinion of Advocate General Fennelly in Case 251/97 ([1]) to justify their argumentation, and in particular argue that the obligations imposed on the cooperatives are wholly external to the interests of the cooperatives themselves. The obligations are only advantageous for the State, and the cooperatives should therefore be compensated for their services.

The Norwegian authorities have referred to the market investor principle as a justification for the scheme in the notification. It is the opinion of the Authority that in this case the market investor principle cannot be applied, simply because the notified measure is a fiscal measure which, as the Authority sees it, has nothing to do with the State's possible behaviour as a market investor.

The question remains whether the State may grant compensation for disadvantage of the cooperatives with regard to equity capital without this amounting to State aid within the meaning of Article 61(1) of the EEA Agreement ([2]).

First, the Authority will examine whether the prohibition for cooperative societies to issue shares or other capital certificates or securities is a service of general economic interest and therefore whether the *Altmark* doctrine ([3]) may apply.

In the *Altmark* judgement, the European Court of Justice ([4]) concluded that '*where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty*' ([5]).

In the *Altmark* judgement the Court of Justice set up four conditions which have to be complied with in order for such compensation to escape classification as State aid in a particular case ([6]). First, the recipient undertakings must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, if the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost for the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

Based on the information available to it, the Authority is uncertain whether the Norwegian authorities argue that the service of general economic interest involved is the interest of safeguarding the cooperatives with their present obligations and restrictions or more specifically the prohibition for cooperative societies to issue shares or other capital certificates or securities. At this stage of the proceedings, the Authority has not been presented with any argument that would permit it to conclude that any of these alternative definitions can be classified as a service of general economic interest. In this regard, the Authority notes that for Article 59(2) of the EEA Agreement to apply, what needs to constitute a public service is the actual activities performed by the undertakings concerned. In other words, that a given company structure is seen as beneficial does not in itself constitute a public service within the meaning of that provision.

In any event, even if the obligation for the cooperatives had been considered to be a service of general economic interest, the criteria for compensation set out in the judgment of the Court of Justice in the *Altmark* case must apply if the measures at hand were not to be covered by Article 61(1) of the EEA Agreement.

However, the Norwegian authorities expressly state that they do not consider the notified aid scheme to be in line with the *Altmark* judgement. The Authority in this regard also refers to the information submitted by the Norwegian authorities whereby they have i.a. calculated neither the costs incurred on the cooperatives by offering the alleged public service nor the advantage for the cooperatives resulting from the tax concession.

On this basis, the Authority has reached the preliminary conclusion that the *Altmark* doctrine does not apply to the present case.

([1]) Opinion of Advocate General Fennelly in Case C-251/97, *French Republic v Commission*, cited above.
([2]) Cf. paragraph 20 of the quoted Opinion.
([3]) Cf. Case C-280/00, *Altmark Trans GmbH*, cited above.
([4]) Hereinafter referred to as 'the Court of Justice'.
([5]) Cf. paragraph 87 of the Judgement.
([6]) Cf. paragraphs 89-93 of the Judgement.

Second, the Authority will examine whether it can be concluded that the proposed scheme does not involve an advantage for the cooperatives covered by it on the basis that the aid is granted in order to compensate the cooperative for structural disadvantages ([1]).

The Norwegian authorities claim that the cooperatives are disadvantaged in comparison to other undertakings, i.a. limited companies, when it comes to access to equity capital. However, the Norwegian authorities have not provided detailed information describing the situation of cooperatives in relation to other companies which demonstrates that the possible disadvantage with regard to equity capital is not offset by other elements in the regime on cooperatives in Norway. The Norwegian authorities confine their argumentation to the situation of the cooperatives with regard to equity capital.

Furthermore, it has not been accepted, either in the case-law of the European Courts or in the practise of the Commission, that a measure does not confer an advantage on the undertaking in question merely because it compensates a 'disadvantage' suffered by the undertaking ([2]).

Against this background, and on the basis of the lack of justification provided by the Norwegian authorities, the Authority doubts that the aid proposed to be granted to the cooperatives can be regarded not to constitute an advantage for them on the basis that they suffer from a structural disadvantage.

Third, the Norwegian authorities claim that the notified scheme is in accordance with the EEA State aid rules and the principles expressed in Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe ([3]). The Norwegian authorities in particular refer to Section 3.2.6 of the Communication, where the Commission i.a. states that specific tax treatment of cooperatives may be welcomed.

At this stage of the proceedings, the Authority is in doubt as to what extent the Communication can provide the legal basis for concluding that the notified scheme does not confer an advantage on the cooperatives covered by it. In this regard, the Authority in particular refers to Section 3.2.7 of the Communication, which reads as follows:

> *'Cooperatives that carry out economic activities are considered as "undertakings" in the sense of Articles 81, 82 and 86 to 88 of the European Community Treaty (EC). They are therefore subject in full to European competition and State aid rules, and also to the various exemptions, thresholds and de minimis rules. There are no grounds for special treatment of cooperatives in the general competition rules; however certain aspects of their legal form and structure should be taken into account on a case-by-case basis, as previous decisions and rulings have demonstrated.'*

Against this background, the preliminary conclusion of the Authority is that the proposed tax concession implies an advantage for the cooperatives covered by the scheme.

2.2.2. Selectivity

The aid measure must be selective in that it favours '*certain undertakings or the production of certain goods*'.

The proposed scheme only covers certain cooperatives as specified in the draft Section 10-50 of the Tax Act. These cooperative societies are entitled to a deduction of up to 15 % in the part of their income deriving from trade with their members. Thus, the tax base of these undertakings is reduced, and thereby also their income tax. This tax rule deviates from the normal rules on income tax payable by undertakings in Norway. On this basis, the proposed scheme appears to be selective in that it favours certain undertakings.

However, the Norwegian authorities argue, in essence, that the tax benefit for the cooperatives is justified by the nature or general scheme of the Norwegian tax system ([4]). In particular, the Norwegian authorities claim that the proposed scheme implies that '*the general system of equity financing for corporations by receiving non-taxable deposits is made applicable also to the cooperative societies*' ([5]).

According to Section 3.4 of the Authority's Guidelines on business taxation ([6]), certain differential measures whose economic rationale makes them necessary to the smooth functioning and effectiveness of the tax system might not constitute State aid. In such cases, the measure would no longer be considered selective ([7]).

Against this background, the Authority has to examine whether the logic underlying the tax exemption could justify a differentiation between the cooperatives covered by the proposed scheme and other undertakings. As the exemption constitutes a derogation from the income tax, this tax will be the general system against which the logic of the derogation must be measured. In other words, the Authority will examine whether the logic of the tax exemption for cooperatives is in line with the objectives of the income tax itself.

According to the proposed scheme, certain cooperatives will be entitled to a deduction in their income whereas companies which are organised as limited companies etc. will not be entitled to the same tax deduction. Thus, if a cooperative and a limited company use their own income to add to their equity capital, the cooperative covered by he proposed scheme will benefit from a tax deduction which is not open to the limited company.

([1]) It has been recognized that structural disadvantages may, in certain specific situations, be offset by aid measures. Cf. Case T-157/01, *Danske Busvognmænd v Commission*, [2004] ECR II-917, where the aid was granted in order to compensate a company for the costs of replacing the status of the officials employed by it with the status of employees on a contract basis, comparable to the employees of its competitors.

([2]) Cf. i.a. the Commission's Decisions in Case C-2/2006, *OTE* paragraph 92.

([3]) COM(2004) 18 of 23 February 2004, cf. Section I.3 above.

([4]) Case 173/73, *Italy v. Commission*, [1974] ECR 709.

([5]) Section VI of the letter from the Ministry of Finance dated 22 June 2007 (Event No 428135).

([6]) The Authority's Guidelines on the application of State aid rules to measures relating to direct business taxation.

([7]) EFTA Court's judgment in Joined Cases E-5/04, E-6/04 and E-7/04, *Fesil and Finnfiord, the Kingdom of Norway, PIL and others v the EFTA Surveillance Authority*, [2005] EFTA Court Reports, p. 117 and Case C-143/99, *Adria-Wien Pipeline GmbH*, [2001] ECR I-8365.

The Norwegian authorities claim that the deduction on the part of the cooperatives is justified on the basis of their difficult access to equity capital. However, the there is no link between the two components in the argumentation of the Norwegian authorities. Income tax is a tax levied on a company's income from normal trade whereas share deposits and other equity deposits are not qualified as income according to Norwegian tax law ([1]). Hence, at this stage of the procedure, the Authority is in doubt as to whether the different rules applicable to cooperative societies and other undertakings in relation to equity deposits can justify discrimination with regard to the rules on income tax.

Already on this basis, the Authority is in doubt as to whether the measure can be regarded as justified by the nature or general scheme of the Norwegian tax system. However, as an additional point, the Authority notes that the notified tax deduction for cooperatives is not proposed to cover all cooperatives in Norway. On the contrary, the scheme is only proposed to cover certain cooperative societies as defined in the draft Section 10-50 of the Tax Act. On the basis of the information submitted by the Norwegian authorities, the Authority assumes that the difficulties concerning access to equity capital explained above are valid also for other cooperatives than he ones proposed to be covered by the scheme.

Against this background, the preliminary conclusion of the Authority is that the tax deduction for cooperatives does not seem to be justified by the nature or general scheme of the Norwegian tax system. It is therefore the preliminary conclusion of the Authority on the basis of the information available to it that the measure notified by the Norwegian authorities is selective.

2.3. *Distortion of competition and effect on trade between Contracting Parties*

The aid measure must distort competition and affect trade between the Contracting Parties. The tax deduction strengthens the position of the cooperatives in relation to their competitors which are organised differently. The tax deduction applies to all main forms of cooperatives, and at least some of them are also active on markets within the EEA. In this regard, the Authority mentions that the consumer cooperative Coop NKL BA is part of the Coop Nordic Group, which is the largest market participant in the retail food industry in Scandinavia ([2]).

The Norwegian authorities argue that the aim of the scheme is to counter the existing competitive disadvantage for the cooperatives when it comes to access to equity capital. On this basis they maintain that the scheme does not distort or threaten to distort competition.

The Authority notes that the effect of the scheme is to reduce the income tax of the cooperatives covered by the scheme compared to other companies. Thereby, the competitive position of the cooperatives is strengthened. The fact that the cooperatives have certain obligations according to Norwegian law which are not imposed on i.a. limited companies is not decisive in this regard.

Against this background, the preliminary conclusion of the Authority is that the tax deduction is likely to distort competition and affect trade between the Contracting Parties.

2.4. *Conclusion on the presence of State aid*

On the basis on the information set out above, the Authority has reached the preliminary conclusion that the notified scheme concerning tax concessions for cooperative societies in Norway constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

3. **Procedural requirements**

Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, '*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*'.

The Norwegian authorities have complied with the notification requirement by submitting notification of the new Section 10-50 of the Tax Act by letters dated 28 June 2007 and 16 October 2007 and by not implementing the scheme until it possibly would be approved by the Authority.

The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

4. **Compatibility of the aid**

Support measures caught by Article 6l(l) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement.

The derogation laid down in Article 6l(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision.

The aid can furthermore not be justified under Article 61(3)(b) of the EEA Agreement, as the aid is not given to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Norway.

The aid in question is not linked to any investment. It simply reduces the costs which companies would normally have to bear in the course of pursuing their day-to-day business activities and is consequently to be classified as operating aid. Operating aid is normally not considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement.

On the basis of the information available to it, the Authority is of the opinion that none of the Authority's Guidelines apply to the scheme.

([1]) Cf. Section I.2.3 above.
([2]) '*Cooperative Law in Norway — Time for Codification?*' by Tore Fjørtoft and Ole Gjems-Onstad, cf. footnote 7 above.

In the notification, the Norwegian authorities claim that the notified scheme is in accordance with the EEA State aid rules and the principles expressed in Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe ([1]).

At this stage of the proceedings, the Authority doubts that the Communication can be understood as arguing that State aid measures such as the notified scheme should be considered to be compatible with the State aid rules of the EEA Agreement ([2]).

Against this background, the Authority is of the preliminary opinion that the Communication does not provide a basis for concluding that the scheme is compatible with the State aid provisions laid down in the EEA Agreement.

On this basis, the preliminary conclusion of the Authority is that the notified scheme does not qualify for derogation under Article 61(2) or (3) of the EEA Agreement and is therefore not compatible with the Agreement.

5. **Conclusion**

Based on the information submitted by the Norwegian authorities, the Authority cannot exclude the possibility that the aid measure constitutes aid within the meaning of Article 61(1) of the EEA Agreement. Furthermore, the Authority has doubts that the measure can be regarded as complying with Article 61(3)(c) of the EEA Agreement. The Authority thus doubts that the notified measure is compatible with the functioning of the EEA Agreement.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority is obliged to open the procedure provided for in Article 1(2) of Part I of Protocol 3 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measure in question is compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, requests the Norwegian authorities to submit their comments within **one month** of the date of receipt of this Decision.

In light of the foregoing consideration, the Authority requires that, within **one month** of receipt of this Decision, the Norwegian authorities provide all documents, information and data needed for assessment of the compatibility of the notified scheme concerning tax benefits for cooperative companies,

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement against Norway regarding the proposed scheme concerning tax benefits for cooperative companies.

Article 2

The Norwegian authorities are requested, pursuant to Article 6(1) of Part II of Protocol 3 to the Surveillance and Court Agreement, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

The Norwegian authorities are invited to provide within one month from notification of this Decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Kingdom of Norway.

Article 5

Only the English version is authentic.

Done at Brussels, 19 December 2007.

For the EFTA Surveillance Authority

Per SANDERUD	Kristján Andri STEFÁNSSON
President	*College Member*

([1]) COM(2004) 18 of 23 February 2004.
([2]) Cf. citation in Section II.2.2.1 above.