

## IV

*(Other acts)*

## EUROPEAN ECONOMIC AREA

## THE EEA JOINT COMMITTEE

## EFTA SURVEILLANCE AUTHORITY DECISION

No 191/08/COL

of 17 March 2008

**on unpaid labour in relation to research and development activities (Norway)**THE EFTA SURVEILLANCE AUTHORITY <sup>(1)</sup>,

provided for in Article 1(2) of Part I and Article 6 of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Agreement on the European Economic Area <sup>(2)</sup>, in particular to Articles 61 to 63 and Protocol 26 thereof,Having called on interested parties to submit their comments pursuant to that provision <sup>(3)</sup>,

Whereas:

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

## I. FACTS

## 1. PROCEDURE

Having regard to Article 1(2) and (3) of Part I and Articles 4(4), 6 and 7(4) of Part II of Protocol 3 to the Surveillance and Court Agreement,

By letter dated 14 October 2005 from the Norwegian Mission to the European Union, forwarding a letter from the Norwegian Ministry of Trade and Industry, dated 5 October 2005, both received and registered by the Authority on 17 October 2005 (Event No 346675), the Norwegian authorities notified, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, a proposal for a new scheme for State aid to support unpaid labour in relation to research and development activities. The proposed scheme is referred to in the following as the 'Unpaid R&D Labour Scheme'.

Having regard to the Authority's State Aid Guidelines <sup>(4)</sup> on the application and interpretation of Articles 61 and 62 of the EEA Agreement, in particular the section on research and development and innovation aid,

By letter dated 8 March 2006 (Event No 364666), and following various exchanges of correspondence <sup>(6)</sup>, the Authority informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 6 of Part II of Protocol 3 to the Surveillance and Court Agreement in respect of the Unpaid R&D Labour Scheme and invited them to submit their comments on the decision.

Having regard to Decision No 59/06/COL of the Authority of 8 March 2006 to initiate the formal investigation procedure

<sup>(1)</sup> Hereinafter referred to as the 'Authority'.

<sup>(2)</sup> Hereinafter referred to as the 'EEA Agreement'.

<sup>(3)</sup> Hereinafter referred to as the 'Surveillance and Court Agreement'.

<sup>(4)</sup> Procedural and Substantive Rules in the Field of State Aid — Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, and EEA Supplement No 32, 3.9.1994, p. 1. The Guidelines were last amended by Decision No 154/07/COL of the Authority of 3 May 2007. Hereinafter referred to as the 'State Aid Guidelines'.

<sup>(5)</sup> OJ C 258, 26.10.2006, p. 28, and EEA Supplement No 53, 26.10.2006.

<sup>(6)</sup> For more detailed information on the correspondence, reference is made to Decision No 59/06/COL to open the formal investigation procedure, a summary of which is published in OJ C 258, 26.10.2006, p. 28, and EEA Supplement No 53, 26.10.2006. The full decision is published on the website of the Authority: [www.eftasurv.int](http://www.eftasurv.int)

By letter dated 19 April 2006 from the Norwegian Mission to the European Union, forwarding letters from the Ministry of Government Administration and Reform and the Ministry of Trade and Industry, dated 11 and 7 April 2006 respectively, the Norwegian authorities submitted their comments. The letter was received and registered by the Authority on 20 April 2006 (Event No 370829).

Decision No 59/06/COL to initiate the formal investigation procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto <sup>(7)</sup>. The Authority called on interested parties to submit their comments. The Authority received no comments from interested parties.

Finally, in a letter submitted electronically on 15 February 2008 by the Ministry of Government Administration and Reform (Event No 465311), the Norwegian authorities consolidated information transmitted as a result of informal contact both via telephone and electronic mail during the course of 2007 and January 2008.

## 2. DESCRIPTION OF THE PROPOSED MEASURE

### 2.1. THE OBJECTIVE, LEGAL BASIS AND OPERATION OF THE UNPAID R&D LABOUR SCHEME

#### Objective

It appears from legislative preparatory works that the overall objective of the Unpaid R&D Labour Scheme is to stimulate increased investment in research and development activities, particularly by small companies such as entrepreneurs and one-man enterprises <sup>(8)</sup>. More specifically, the objective of the new scheme is to stimulate efforts by individuals in research and development oriented companies which, in the start-up phase, are often dependent on labour resources that cannot be paid for. Research and development oriented companies are considered by the Norwegian authorities to be important for the purposes of value creation derived from research as well as for innovation.

On a more detailed level, the Norwegian authorities have explained that the introduction of the Unpaid R&D Labour Scheme was motivated by the fact that under the existing 'Skattefunn Scheme' <sup>(9)</sup>, it is not possible to support unpaid labour in

relation to research and development activities undertaken by entrepreneurs and one-man enterprises due to the fact that the Skattefunn Scheme is a tax deduction scheme <sup>(10)</sup>. In this respect the authorities have explained that under the Skattefunn Scheme, aid is granted to research and development activities in the form of a tax deduction (or tax credit) whereby an amount, corresponding to a percentage of the eligible costs, is deducted from the amount due in tax by the company. However, the Norwegian authorities considered that it would not be in compliance with general tax legislation to deduct, from the amount to be paid in tax, an amount which is not based on *actual* eligible costs but rather on unpaid labour, i.e. 'costs' which have not been incurred in the sense that no salary has been paid out and nothing is reflected in the accounts of the business. On this basis it was considered that unpaid labour could not qualify as an eligible cost under the Skattefunn Scheme.

It is against this background that the Norwegian authorities proposed to set up the Unpaid R&D Labour Scheme, under which financial support is to be awarded to unpaid labour in relation to research and development activities in the form of grants which are exempt from tax. As such the Norwegian authorities consider the Unpaid R&D Labour Scheme as a correction or supplement to the existing Skattefunn Scheme.

In the notification, the Norwegian authorities also explained that many companies have projects that were approved under the Skattefunn Scheme but in relation to which they were subsequently prevented from benefiting from the tax deduction (or had to repay an amount corresponding to a tax deduction already received) due to the fact that the projects involved unpaid labour. The Norwegian authorities had therefore decided to introduce a 'Compensation Scheme' for the purposes of compensating companies for financial losses caused to their research and development projects during the years between 2002-2004 as a result of the fact that unpaid labour could not be covered by the Skattefunn Scheme <sup>(11)</sup>. In its decision to open the formal investigation procedure in respect of the Unpaid R&D Labour Scheme the Authority took the view that aid granted to undertakings under the Compensation Scheme would qualify as *de minimis* aid under the 'de minimis Regulation' <sup>(12)</sup>. The Compensation Scheme did not form part of the formal investigation procedure.

<sup>(10)</sup> The terms used by the Norwegian authorities for the company forms mentioned are 'gründerselskaper' and 'enkeltpersonforetak'.

<sup>(11)</sup> On 2 July 2006 the Norwegian authorities adopted Royal Decree No 123 on the implementation of the Compensation Scheme: 'Forskrift om kompensasjon for ulønnet arbeidsinnsats i Skattefunn-godkjente forsknings- og utviklingsprosjekter for inntektsårene 2002, 2003 og 2004'. See also a description in section 3.9 of St. prp. nr. 65 (2004-2005).

<sup>(12)</sup> Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30) which has been incorporated into point 1(e) of Annex XV to the EEA Agreement.

<sup>(7)</sup> Publication details are cited in footnote 6 above.

<sup>(8)</sup> Section 3.9 of St. prp. nr. 65 (2004-2005).

<sup>(9)</sup> The Skattefunn Scheme was approved by the Authority in its Decision No 171/02/COL of 25 September 2002 and amendments to the Skattefunn Scheme were approved by the Authority in its Decision No 16/03/COL of 5 February 2003.

### Legal basis

In the original proposition on the fiscal budget from the Norwegian Government to the Norwegian Parliament<sup>(13)</sup>, which was followed up by a Recommendation from a Parliamentary Committee to the Parliament<sup>(14)</sup>, the Government proposed to earmark a total of NOK 70 million for both the Unpaid R&D Labour Scheme and the Compensation Scheme<sup>(15)</sup>. Pending the approval by the Authority no funds have been paid out under the Unpaid R&D Labour Scheme but the Norwegian authorities have explained that the annual budget for the scheme is expected to be maximum approximately NOK 50 million<sup>(16)</sup>.

In parallel with the adoption of the original budget for the Unpaid R&D Labour Scheme, the Norwegian Parliament adopted, on 17 June 2005, a proposal amending the Norwegian Act on Taxation of wealth and income by introducing provisions on tax treatment and ceilings in respect of funding to be awarded under the Unpaid R&D Labour Scheme (hereinafter referred to as the 'Tax law on the Unpaid R&D Labour Scheme')<sup>(17)</sup>.

Aside from the adoption of the budget and the Tax law on the Unpaid R&D Labour Scheme, the Norwegian Ministry of Trade and Industry has issued draft guidelines on the implementation of the Unpaid R&D Labour Scheme<sup>(18)</sup> (hereinafter referred to as the 'Guidelines on the Unpaid R&D Labour Scheme'). The draft guidelines provide that 'Norges forskningsråd' (the Norwegian Research Council) will be the body responsible for administering and implementing the scheme.

### Operation of the Unpaid R&D Labour Scheme — eligible projects

It appears from the Guidelines on the Unpaid R&D Labour Scheme that eligible projects must involve research and development activities performed by individuals who are not

receiving any pay or other compensation for their labour. Individuals who receive payment by means of other public sources are not covered<sup>(19)</sup>.

According to the Guidelines on the Unpaid R&D Labour Scheme, eligible projects are:

- (i) those that involve planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. They cover the creation of components of complex systems, which is necessary for such research, notably for generic technology validation, to the exclusion of prototypes as covered by option (ii);<sup>(20)</sup> and
- (ii) those that aim at providing new information, knowledge or experience which is presumed to be of use to the enterprise in connection with the development of new or better products, services or production methods. Moreover, activities where results from industrial research are transferred into a plan, a project or a design for new enhanced products, services or production processes, as well as the development of a first prototype or pilot project that cannot be commercially exploited are also eligible activities under the scheme<sup>(21)</sup>.

The Norwegian authorities have stated that these definitions of eligible research and development projects are identical to the definitions of eligible research and development projects under the existing Skattefunn Scheme. In fact, in practice the Norwegian authorities refer to eligible projects under the Unpaid R&D Labour Scheme as projects which meet the 'Skattefunn criteria' or have been approved under the Skattefunn Scheme<sup>(22)</sup>.

<sup>(13)</sup> Section 3.9 of St. prp. nr. 65 (2004-2005), Chapter 928, item 71.

<sup>(14)</sup> Section 10.1.1.2 of Innst. S. nr. 240 (2004-2005), Chapter 928, item 71.

<sup>(15)</sup> The budget was approved by the Parliament on 17 June 2005. During 2006-2007 NOK 35 million has been granted under the Compensation Scheme.

<sup>(16)</sup> This is an estimate and hence not reflected in any legal texts.

<sup>(17)</sup> Lov 2005-06-17 nr 74: Lov om endringer i lov 26. mars 1999 nr. 14 om skatt av formue og inntekt (skatteloven). The Government's proposal to the Parliament is in section 14.1 of Ot. prp. nr. 92 (2004-2005) and refers to the original budget proposition in St. prp. nr. 65 (2004-2005). The proposal was supported in a Recommendation from the Finance Committee in the Parliament, see section 15.1 of Innst. O. nr. 125 (2004-2005).

<sup>(18)</sup> The draft guidelines on Unpaid R&D Labour Scheme is an administrative instruction issued on the basis of internal regulations on the management of finances within the State entitled 'Reglement for økonomistyring i staten' and 'Bestemmelser om økonomistyring i staten'.

<sup>(19)</sup> Section 6 of Part III.6.A in the Standard Notification Form and Section 3 of the Guidelines on the Unpaid R&D Labour Scheme.

<sup>(20)</sup> The notification cross-referred to the Skattefunn Scheme but only specifically mentioned the type of project listed under (ii) below and it was therefore not clear whether other types of project were nevertheless included in the scope of the Unpaid R&D Labour Scheme. However, by e-mail dated 12 March 2008 (Event No 469276), the Norwegian authorities confirmed that the type of research and development described in (i) above is covered by the Scheme.

<sup>(21)</sup> Section 6 of Part I in the Standard Notification Form and Section 3 of the Guidelines on the Unpaid R&D Labour Scheme. However, ordinary business oriented product development not having the character of research is not covered, for example projects that have a continuing character or include modification of methods without requiring the development of new knowledge or the use of existing knowledge in new ways, are of an organisational character, or consist of inquires, etc.

<sup>(22)</sup> Section 3 of the Guidelines on the Unpaid R&D Labour Scheme and Section IX of the Tax law on the Unpaid R&D Labour Scheme.

As mentioned above, the Unpaid R&D Labour Scheme will be administered and implemented by the Norwegian Research Council. The latter body is also the secretariat and the administering body assessing whether projects are eligible under the Skattefunn Scheme<sup>(23)</sup>. The Norwegian authorities have explained that the fact that eligible research and development activities are defined in the same manner under both the Skattefunn Scheme and the Unpaid R&D Labour Scheme, and that the administering body, assessing whether the projects qualify as eligible, is the same under both schemes, means that for the purposes of implementation the two schemes are closely coordinated. In this regard the intention is that applicants applying for support for eligible research and development activities need only complete one single application form in which the applicant has the option to select whether support is sought for paid and/or unpaid labour in relation to the relevant research and development activity<sup>(24)</sup>. Moreover, financial support to be granted under the Unpaid R&D Labour Scheme will be taken into account when applicants also request support under the Skattefunn Scheme and overall aid will be subject to the maximum limit for support under the latter scheme<sup>(25)</sup>. In fact, according to the Norwegian authorities the only difference between the two schemes is the type of eligible costs (*i.e.* paid as opposed to unpaid labour) and the form in which support is granted (*i.e.* a tax deduction as opposed to a tax-free grant).

In addition, the Norwegian authorities have stated that in order to qualify as eligible projects under the Unpaid R&D Labour Scheme projects may not have started prior to the application for support<sup>(26)</sup>.

## 2.2. RECIPIENTS

In the notification, the Norwegian authorities explained that the Unpaid R&D Labour Scheme would be open to all tax payers with tax liability in Norway, including all undertakings, irrespective of their size, sector and region<sup>(27)</sup>. Undertakings participating jointly in a co-operation project may also benefit from the Scheme<sup>(28)</sup>.

The Norwegian authorities explained that the reason that the Unpaid R&D Labour Scheme included medium-sized and large

companies was to keep it in conformity with the conditions of the Skattefunn Scheme (which is open to all undertakings regardless of size). The Norwegian authorities stated, in this context, that '[t]his is also why there is no formal discrimination against larger companies in the Unpaid R&D Labour Scheme's definition of beneficiaries' (emphasis added)<sup>(29)</sup>.

However, the Norwegian authorities have also made it clear that, in practice, the Unpaid R&D Labour Scheme is intended to target only entrepreneurs and one-man enterprises: 'Even if the scheme includes enterprises of all sizes, the very nature of the scheme (support for unpaid labour) implies that the incentive effect will be most significant for entrepreneur-firms and one-man enterprises'<sup>(30)</sup>. In the same vein the authorities have stated that the Unpaid R&D Labour Scheme is '... primarily targeting newly established technology-based companies with no ability to pay salaries to the individuals performing the R&D activity' and '[a]s the Unpaid R&D Labour Scheme shall give support to unpaid labour performed by R&D personnel not receiving salary or other compensation for the labour, the scheme will not be relevant for ordinary medium-sized and large companies'<sup>(31)</sup>.

On this basis the Norwegian authorities have stated that 'Companies with an annual turnover or an annual balance sheet total corresponding to the ESA definition of medium-sized companies will in practise not receive support for unpaid labour'<sup>(32)</sup>. The authorities have added that 'Larger companies generally use employed and paid R&D personnel to perform the actual R&D activity in a Skattefunn-project' and '[t]he costs of paying these employees will be eligible for tax-refund in the Skattefunn Scheme, and such companies will therefore neither have need nor basis for applying for subsidy from the Unpaid R&D Labour Scheme'<sup>(33)</sup>.

Finally, the Norwegian authorities have stated that since the maximum limit for support to an eligible project is the same whether support is granted exclusively in the form of a tax deduction under the Skattefunn Scheme, or by a combination of a tax deduction and a grant under the Unpaid R&D Labour Scheme, there is no incentive for large companies to obtain support from both schemes.

As a result, by letter dated 15 February 2008 (Event No 465311), the Norwegian authorities informed the Authority that 'the scheme is formally restricted to the Authority's definition of small and micro companies'.

<sup>(23)</sup> Section 3.9 of St. prp. nr. 65 (2004-2005), Section 14.1 of Ot. prp. nr. 92 (2004-2005) and the introduction to the Guidelines on the Unpaid R&D Labour Scheme. Although 'Innovasjon Norge' previously 'Statens nærings- og distriktsutviklingsfond' is also involved in the administration of the Skattefunn Scheme it has a subordinate role only.

<sup>(24)</sup> Section 7 of the Guidelines on the Unpaid R&D Labour Scheme.

<sup>(25)</sup> See further Section 2.3 on 'Eligible costs and aid intensity' below.

<sup>(26)</sup> E-mail dated 12 March 2008 from the Norwegian authorities (Event No 469275).

<sup>(27)</sup> See also Section 3.9 of St. prp. nr. 65 (2004-2005) where it is stated that the Unpaid R&D Labour Scheme is addressed to one-man enterprises, limited liability companies and other types of companies.

<sup>(28)</sup> In this case the project costs are allocated to participants in proportion to their share of participation.

<sup>(29)</sup> Letter dated 10 January 2006 from the Norwegian authorities (Event No 356994).

<sup>(30)</sup> Section 8.1 of Part III.6.A of the Standard Notification Form.

<sup>(31)</sup> See footnote 29.

<sup>(32)</sup> See footnote 29.

<sup>(33)</sup> See footnote 29.



### 2.3. ELIGIBLE COSTS AND AID INTENSITY

#### *Eligible costs*

The Norwegian authorities have notified that under the Unpaid R&D Labour Scheme eligible expenditure consists of the unpaid labour costs in relation to an eligible project <sup>(34)</sup>. In terms of identifying the appropriate hourly rate(s) for the unpaid labour, the Norwegian authorities have explained that as formal qualifications of an individual are not always reflected in the ability to carry out research and development projects it is difficult to identify separate rates which correspond to relevant education, experience and field of work. It was therefore decided to use one common hourly rate for the calculation of support under the Unpaid R&D Labour Scheme.

The hourly rate proposed by the Norwegian authorities is based on calculating 1,6 % of the nominal annual industrial worker's salary for 2005 (NOK 348 300) <sup>(35)</sup>, resulting in an hourly rate of NOK 557,28 which, for simplicity, was rounded off to NOK 500. The hourly rate of NOK 500 may be subject to adjustment by the Ministry of Trade and Industry on the basis of general wage developments.

The methodology of calculating the hourly rate (as 1,6 % of the nominal annual salary) has been developed by the Norwegian Research Council. In this regard the Norwegian authorities have explained that an hourly rate for labour can, in fact, be easily established simply by reference to the average annual salary (based on statistics) and the average annual working hours. However, in order to simplify the grant of support for research and development activities the Norwegian Research Council wanted to go further. It developed therefore a methodology according to which the hourly rate includes not only (i) pure salary costs, but also (ii) 'other operating costs' calculated on a per employee basis and consisting of (a) social costs related to salary (such as pension and social security etc.); (b) costs of equipment use per employee (e.g. use of telephone, computer/IT equipment, copy machine etc.); (c) general overhead costs of electricity, heating, office rent, canteen & service personnel and temporary use of supporting staff; and (d) rent/purchase of instruments and office supplies.

The hourly rate for 'unpaid labour' covers therefore not only pure salary costs but also 'other operating costs' on a per employee basis <sup>(36)</sup>.

<sup>(34)</sup> Section 6 of Part III.6.A of the Standard Notification Form.

<sup>(35)</sup> See NOU: 2004:14 entitled 'Om grunnlaget for inntektsoppgjørene', which is a report on a review of the background for establishing salary levels in public statistics issued by a body established by the Government. According to the report, the average annual industrial worker's salary (for full time employees) for 2003 was NOK 319 600. Taking account of annual salary growth estimated at 4,4 % between 2004 and 2005 (which corresponds to the annual salary growth between 2002 and 2003) the average annual industrial worker's salary for 2005 was estimated at NOK 348 300. The reason for this approach was that at the time of notification in 2005 these were the best data available. By comparison, NOU: 2007:3 shows that the average industrial worker's salary for 2006 turned out to be NOK 355 600.

<sup>(36)</sup> While the level of such 'other operating costs' is therefore calculated on a per employee/hour basis, the fact that such costs are actually incurred is verified via invoices, as explained below.

In order to establish the methodology the Norwegian Research Council undertook a review of the accounts of a number of Norwegian companies which showed that, on average, annual operating costs are 1,8 times higher than annual salary costs (including social costs) <sup>(37)</sup>. After having corrected the annual salary costs for the fact that they included social costs (corresponding to 40 % of the salary), the average operating costs turned out to be 2,52 times higher than pure salary costs. By dividing this figure by the annual average of working hours (1 500) <sup>(38)</sup>, operating costs, measured on an hourly basis, were found to be 1,68 % (rounded off to 1,6 %) times the annual pure salary costs. Accordingly, the methodology is that the hourly rate for unpaid labour (covering both pure salary costs and 'other operating costs') is calculated as 1,6 % of the relevant annual salary.

The Guidelines on the Unpaid R&D Labour Scheme provide that eligible unpaid labour costs are subject to a fixed ceiling of NOK 2 million annually per undertaking <sup>(39)</sup>.

Finally, as regards control measures, the unpaid labour and other project costs must be certified by an accountant for each grant application <sup>(40)</sup>. While evidence of the incurrence of 'other operating costs' is verified via invoices, the Norwegian authorities have explained that as there is no evidence of reported hours of unpaid labour, companies are required to record the date, task, number of hours spent and the name of the relevant individual. In projects with more than one individual, the records must be signed both by the individual having carried out the unpaid labour and the individual responsible for the project. Moreover, the reported number of hours may be reduced by the Norwegian Research Council if it is revealed during the procedure that the declared number of hours is incorrect.

#### *Aid intensity*

The Guidelines on the Unpaid R&D Labour Scheme provide that grants awarded under the Scheme are subject to the thresholds set out in Section 16-40 of the Norwegian Act on Taxation of wealth and income <sup>(41)</sup>. That provision is the basis for the Skattefunn Scheme and provides that aid intensities of up to 20 % in the case of small and medium-sized enterprises (SMEs) are acceptable.

<sup>(37)</sup> The review was carried out in 1990 on the basis of a number of companies of different sizes.

<sup>(38)</sup> Following corrections for illness, maternity leave etc.

<sup>(39)</sup> Section 3 of the Guidelines on Unpaid R&D Labour Scheme. It appears from Section 3.9 of St. prp. nr. 65 (2004-2005) that the ceiling is basically 50 % of the maximum limit for costs (in relation to projects carried out by the undertaking itself) under the Skattefunn Scheme (NOK 4 million).

<sup>(40)</sup> Section 4 of the Guidelines on the Unpaid R&D Labour Scheme.

<sup>(41)</sup> Section 3 of the Guidelines on the Unpaid R&D Labour Scheme.

In the notification, the Norwegian authorities submitted information on gross aid intensities of 27,8 % for SMEs <sup>(42)</sup>. Support under the Unpaid R&D Labour Scheme is paid in the form of a grant corresponding to 20 % of eligible costs <sup>(43)</sup>. However, in addition, by virtue of the Tax law on the Unpaid R&D Labour Scheme, the grants are exempt from corporate tax, the rate of which is currently 28 %. A tax-free grant of 20 % of eligible costs therefore corresponds to a taxable grant of 27,8 % of those costs. The gross aid intensity is therefore 27,8 %.

The grants awarded under the Unpaid R&D Labour Scheme are considered in conjunction with aid received under the Skattefunn Scheme and support under the former is included when calculating the limits under the latter. Under the Skattefunn Scheme, the total amount of support for SMEs may not exceed 20 % of eligible costs which may not be in excess of NOK 4 million per undertaking per year. Where the total amount of financial support would exceed the limits set forth under the Skattefunn Scheme, the tax deduction will be reduced accordingly. The Norwegian authorities have clarified that these limits are, however, without prejudice to the fact that the costs attributed to unpaid labour must in any event be within the abovementioned ceiling of NOK 2 million per undertaking per year. Finally the authorities have explained that in cases where a project receives grants under the Unpaid R&D Labour Scheme and public support from other sources, other than the Skattefunn Scheme, which together exceed the limit for total support, a reduction in the support granted under the Unpaid R&D Labour Scheme will be made.

#### 2.4. BUDGET AND DURATION

As mentioned above, the Norwegian authorities envisage that the future budget for the Unpaid R&D Labour Scheme will be maximum approximately NOK 50 million on an annual basis.

The Unpaid R&D Labour Scheme was notified as being unlimited in time. However, by letter dated 15 February 2008 (Event No 465311), the Norwegian authorities stated that the maximum duration of the Scheme would be linked to the duration of the current State Aid Guidelines on aid for Research and Development and Innovation (hereinafter referred to as the 'R&D&I Guidelines'), which expire on 31 December 2013. The Norwegian authorities are aware that a longer duration of the Unpaid R&D Labour Scheme requires a new notification.

### 3. GROUNDS FOR INITIATING THE PROCEDURE

The Authority opened the formal investigation procedure on the basis of the preliminary finding that the Unpaid R&D

Labour Scheme involves State aid which it doubted could be considered compatible with the EEA Agreement. One of the concerns of the Authority was whether the aid intensities under the Unpaid R&D Labour Scheme could exceed those set forth in the State Aid Guidelines <sup>(44)</sup>. Indeed, grants which may be awarded under the Unpaid R&D Labour Scheme are tax exempt and a change in the tax rate may therefore result in a higher gross aid intensity. Moreover, since the costs of 'unpaid labour' are not in fact incurred the Authority doubted whether they could qualify as eligible costs under those Guidelines. In this regard the Authority took account of the fact that under the Sixth Community Research Framework Programme, support for 'unpaid' labour was not allowed. Finally, the Authority had concerns as to the necessary incentive effect.

#### 4. COMMENTS BY THE NORWEGIAN AUTHORITIES

The Norwegian authorities have clarified that if the tax rate increases, the grant under the Unpaid R&D Labour Scheme will, if necessary, be reduced to ensure that the aid intensity does not exceed the maximum aid intensities fixed under the R&D&I Guidelines. The Norwegian authorities base this statement on the last paragraph of Section 3 of the Guidelines on the Unpaid R&D Labour Scheme which, translated into English, provides that '[w]hen considering total public funding to the project, the grant [for unpaid labour] is accounted for in the same manner as the tax deduction. If total public funding for the project exceeds [the ceiling] for permitted aid according to the ESA rules the tax deduction will be reduced. If support to unpaid labour in and of itself results in exceeding the limit for total aid permitted the grant for unpaid labour will be reduced' <sup>(45)</sup>.

In relation to the statement that '[p]hysical persons may not charge any labour costs in relation to their personal involvement in the project', contained in the Sixth Community Research Framework Programme, the Norwegian authorities have argued that the term 'physical persons' refers to employed personnel in universities/colleges receiving a salary from the research institution (as opposed to a one-man company). Since such persons are in any event not eligible for support under the Unpaid R&D Labour Scheme the Norwegian authorities consider the reference to the Sixth Community Research Framework Programme to be irrelevant.

With respect to the proposed hourly rate, the Norwegian authorities have pointed out that the point of departure for

<sup>(42)</sup> Section 7 of Part III.6.A of the Standard Notification form.

<sup>(43)</sup> The Norwegian authorities have stated that in view of the fact that the ceiling for eligible unpaid labour costs is NOK 2 million, and that the aid intensity is 20 % for SMEs, the grant ceiling in absolute figures would be NOK 400 000 on an annual basis. Section 3 of the Guidelines on the Unpaid R&D Labour Scheme and Section 6 of Part I in the Standard Notification form.

<sup>(44)</sup> The previous State Aid Guidelines on Research and Development were replaced by new guidelines on Research and Development and Innovation as of 7 February 2007. At the time of the decision to initiate the formal investigation procedure with respect to the Unpaid R&D Labour Scheme the previous guidelines were applicable. However, since the substantive rules relevant for the assessment of the present case have remained largely the same, the legislative change is therefore not commented on any further in the following.

<sup>(45)</sup> Translation by the Authority.

calculating the hourly rate of NOK 500 is the nominal annual industrial worker's salary, which is much lower than the nominal annual salary for research and development personnel. Since the education level in one-man companies and entrepreneurs generally corresponds to the higher level of education of research and development personnel, the calculation of the hourly rate for the purposes of the Unpaid R&D Labour Scheme could have been based on the higher salary for civil engineers. For 2005 this amounted to NOK 460 000 or NOK 530 000 (depending on whether employees have five or ten years experience) resulting in an hourly rate of NOK 772,80 or NOK 890,40 <sup>(46)</sup>. On this basis the Norwegian authorities have argued that, by proposing an hourly rate calculated on the basis of the much lower nominal annual salary for industrial workers, the hourly rate is therefore kept to a minimum.

As to the incentive effect the Norwegian authorities argue that since cash is a major problem for early-phase start-ups, an incentive effect will automatically be present for the scheme's major target group, namely small entrepreneurs and one-man companies.

## II. ASSESSMENT

### 1. THE PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 61(1) OF THE EEA AGREEMENT

Article 61(1) of the EEA Agreement provides that:

'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.'

To constitute State aid within the meaning of Article 61(1) of the EEA Agreement a measure must satisfy the following four cumulative criteria: (i) the measure must confer on recipients an economic advantage which is not received in the normal course of business; (ii) the advantage must be granted by the State or through State resources; (iii) the measure must be selective by favouring certain undertakings or the production of certain goods; and (iv) the measure must distort competition and affect trade between Contracting Parties. In the following it is examined whether the four cumulative criteria are met in the present case.

#### 1.1. ECONOMIC ADVANTAGE

The measure must confer on recipients an economic advantage which is not received in the normal course of business.

<sup>(46)</sup> Source: Salary statistics issued in 2007 by the Norwegian association for individuals with a higher degree in engineering, 'TEKNA'.

Under the Unpaid R&D Labour Scheme the Norwegian authorities will award financial grants to tax payers, including undertakings. The undertakings receiving such grants therefore receive an economic advantage, i.e. a grant, which they would not have received in their normal course of business.

Moreover, the grants are exempted from corporate tax. The tax exemption relieves recipients from a charge that is normally borne out of their budgets, such that the exemption represents a further economic advantage, in addition to the grant itself.

#### 1.2. PRESENCE OF STATE RESOURCES

The measure must be granted by the State or through State resources.

The grants awarded under the Unpaid R&D Labour Scheme are financed by the Ministry of Trade and Industry and are therefore financed by the State.

Moreover, with respect to the exemption of grants from corporate tax, a tax exemption implies that the State foregoes tax revenue and a loss of tax revenue is equivalent to consumption of state resources in the form of fiscal expenditure <sup>(47)</sup>.

#### 1.3. FAVOURING CERTAIN UNDERTAKINGS OR THE PRODUCTION OF CERTAIN GOODS

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

In the notification it was stated that funding under the Unpaid R&D Labour Scheme would be available to all undertakings irrespective of their size, sector and region.

In Decision No 16/03/COL of 5 February 2003, authorising the extension of the Skattefunn Scheme to all undertakings, irrespective of their size and sector <sup>(48)</sup>, the Authority found that the body administering and implementing the Skattefunn Scheme (the Norwegian Research Council) enjoyed discretionary powers for the purposes of assessing the research character of the projects and the incentive effect of the support measure.

<sup>(47)</sup> Section 3(3) of the State Aid Guidelines on the application of State aid rules to measures relating to business taxation.

<sup>(48)</sup> Although not explicitly mentioned funding was also granted irrespective of region.

In view of the above and the fact that the criteria for determining the eligibility of projects under the Skattefunn Scheme and the Unpaid R&D Labour Scheme are the same and are assessed by the same administering body, i.e. the Norwegian Research Council, the Authority takes the view that the latter enjoys discretionary powers also for the purposes of implementing the Unpaid R&D Labour Scheme. In this regard the Authority recalls that the European Court of Justice has held that discretionary powers enjoyed by the public authorities, administering a financial support scheme, means that the scheme is, *de facto*, selective<sup>(49)</sup>. As a result, the Authority concludes that such a scheme would, *de facto*, be selective.

Indeed, statements by the Norwegian authorities to the effect that while '... there is no formal discrimination against larger companies in the Unpaid R&D Labour Scheme's definition of beneficiaries' (emphasis added), '[c]ompanies with an annual turnover or an annual balance sheet total corresponding to the ESA definition of medium-sized companies will in practice not receive support for unpaid labour' confirm that the Norwegian Research Council would have used its discretionary powers to preclude larger companies from support in practice.

The assessment set out above would be equally valid for the exemption from corporate tax enjoyed by recipients of grants under the Unpaid R&D Labour Scheme.

Therefore, during the course of the formal investigation procedure, the Norwegian authorities decided to formally limit the Unpaid R&D Labour Scheme to micro and small companies in line with the definitions given thereof in the State Aid Guidelines on aid to SMEs<sup>(50)</sup>. The Scheme is therefore selective.

#### 1.4. DISTORTION OF COMPETITION AND EFFECT ON TRADE BETWEEN CONTRACTING PARTIES

The measure must distort competition and affect trade between the Contracting Parties.

<sup>(49)</sup> See Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 23 and 24; Case C-200/97 *Ecotrade v AFS* [1998] ECR I-7907, paragraph 40; and Case C-295/97 *Piaggio v Iftalia* [1999] ECR I-3735, paragraph 39.

<sup>(50)</sup> Letter dated 15 February 2008 from the Norwegian authorities (Event No 465311). According to Section 2.2 of the State Aid Guidelines on aid to micro, small and medium-sized enterprises (SMEs), a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million, and a micro enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million. Ownership structures may exclude the qualification of small and micro companies as set out in the State Aid Guidelines on aid to SMEs.

The Unpaid R&D Labour Scheme applies to all sectors of the economy established in Norway. In view of the fact that, for the year 2006, exports to the EU represented about 82 % of total exports from Norway, whereas imports from the EU represented approximately 69 % of total imports to Norway, there is extensive trade between Norway and the EU<sup>(51)</sup>.

In such circumstances, the Authority considers that the grant of support and the connected tax exemption under the Unpaid R&D Labour Scheme will strengthen the relative position of recipients compared to undertakings located in other EEA countries and competing in similar sectors or businesses. Furthermore, based on the formal exclusion of larger companies from the Scheme, the position of small and micro companies receiving support under the Scheme will be reinforced. The Unpaid R&D Labour Scheme is therefore to be regarded as affecting trade and distorting or threatening to distort competition.

#### 1.5. CONCLUSION

In light of the above, the Authority concludes that the grant of support, including the tax exemption, under the Unpaid R&D Labour Scheme constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

### 2. 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'.

By means of a letter dated 14 October 2005, the Norwegian authorities notified the Unpaid R&D Labour Scheme. According to preparatory legislative works the Unpaid R&D Labour Scheme may enter into force only following a notification to, and approval by, the Authority<sup>(52)</sup>. Therefore, the authorisation by the Norwegian authorities of the entry into force of the Tax law on the Unpaid R&D Labour Scheme and the final adoption of the draft Guidelines on the Unpaid R&D Labour Scheme are both conditional upon the prior approval of the scheme by the Authority<sup>(53)</sup>.

<sup>(51)</sup> The relevant statistics have been issued by 'Statistisk Sentralbyrå' and are entitled 'Utenrikshandel med varer, årsserier 2006' (Table 17 'Import etter handelsområder, verdensdeler og land' for 2001-2006 and Table 18 'Eksport etter handelsområder, verdensdeler og land' for 2001-2006). The statistics are available at: [http://www.ssb.no/emner/09/05/nos\\_utenriks/](http://www.ssb.no/emner/09/05/nos_utenriks/)

<sup>(52)</sup> Section 14.3 of Ot. prp. nr. 92 (2004-2005) which refers to Section 3.9 of St. prp. nr. 65 (2004-2005).

<sup>(53)</sup> Section 15.1 of Innst. O. nr. 125 (2004-2005) and Section 14.3 of Ot. prp. nr. 92 (2004-2005) which refers to Section 3.9 of St. prp. nr. 65 (2004-2005).



In these circumstances, the Authority considers that the Norwegian authorities have respected the notification and standstill obligations pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

### 3. COMPATIBILITY OF THE AID

As the conclusion of the Authority is that the Unpaid R&D Labour Scheme involves State aid, it has to be examined whether the scheme may be considered compatible with the functioning of the EEA Agreement under Article 61(2) or (3) of the EEA Agreement.

#### 3.1. COMPATIBILITY WITH ARTICLE 61(2) OF THE EEA AGREEMENT

None of the exceptions under Article 61(2) of the EEA Agreement apply in this case as the Unpaid R&D Labour Scheme is not aimed at the objectives listed in that provision.

#### 3.2. COMPATIBILITY WITH ARTICLE 61(3) OF THE EEA AGREEMENT

A State aid measure is considered compatible with the functioning of the EEA Agreement under Article 61(3)(a) of the EEA Agreement when it is designed to promote economic development where the standard of living is abnormally low or where there is serious underemployment. However, as no such areas are defined in the regional aid map of Norway, this provision does not apply <sup>(54)</sup>.

Moreover, the exception in Article 61(3)(b) of the EEA Agreement does not apply since the State aid granted under the Unpaid R&D Labour Scheme is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Norway.

However, the exception laid down in Article 61(3)(c) of the EEA Agreement which provides that State aid may be considered compatible with the common market where it facilitates the development of certain economic activities or of certain economic areas and does not adversely affect trading conditions to an extent contrary to the common interest, may be applicable.

<sup>(54)</sup> Decision No 226/06/COL of 19 July 2006 on the map of assisted areas and levels of aid in Norway.

In the following the Authority considers the compatibility of the Unpaid R&D Labour Scheme with the functioning of the EEA Agreement under Article 61(3)(c) of the EEA Agreement on the basis of the R&D&I Guidelines.

### *Aid for R&D&I*

According to the R&D&I Guidelines, compatibility of aid pursuant to Article 61(3)(c) of the EEA Agreement is generally assumed provided the conditions set out in Section 5 of those Guidelines are fulfilled and the aid constitutes an incentive to engage in more research and development pursuant to Section 6 of the Guidelines <sup>(55)</sup>.

Section 5 of the R&D&I Guidelines lists different types of research and development, such as 'fundamental research', 'industrial research' and 'experimental development' and indicates the aid intensities which apply to each category of research.

It appears from Section 2.2 subparagraph (f) of the R&D&I Guidelines that 'industrial research' means 'the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components of complex systems, which is necessary for the industrial research, notably for generic technology validation, to the exclusion of prototypes as covered by [experimental development] point (g)'. Subparagraph (g) of the same Section provides that 'experimental development' is defined as 'the acquiring, combining, shaping and using of existing scientific, technological, business and other relevant knowledge and skills for the purpose of producing plans and arrangements or designs for new, altered or improved products, processes or services. These may also include, for example, other activities aiming at the conceptual definition, planning and documentation of new products, processes and services. The activities may comprise producing drafts, drawings, plans and other documentation, provided that they are not intended for commercial use. The development of commercially usable prototypes and pilot projects is also included where the prototype is necessarily the final commercial product and where it is too expensive to produce for it to be used only for demonstration and validation purposes. In case of a subsequent commercial use of demonstration or pilot projects, any revenue generated from such use must be deducted from the eligible costs'.

The Authority considers that the descriptions of eligible projects under the Unpaid R&D Labour Scheme, set out above in Section 2.1 of Part I hereof, are in line with the descriptions given of 'industrial research' and 'experimental development' in Section 2.2 subparagraphs (f) and (g) of the R&D&I Guidelines.

<sup>(55)</sup> Paragraphs 29 and 30 of Section 1.4 of the R&D&I Guidelines.

### (i) Aid intensities

According to Section 5.1.2 of the R&D&I Guidelines, the permissible gross aid intensity for industrial research and experimental development are fixed at 50 % and 25 %, respectively, of eligible costs. Moreover, according to Section 5.1.3 where the aid is given to SMEs (as defined in the Annex to the block exemption Regulation on aid to SMEs) an extra 10 (medium-sized) or 20 (small) percentage points may be granted <sup>(56)</sup>. This brings the permissible aid intensity up to 60 % (medium-sized) or 70 % (small) of eligible costs in the case of industrial research. In the case of experimental development the maximum aid intensity becomes 35 % (medium-sized) or 45 % (small).

While the Norwegian authorities have notified aid intensities both for SMEs and large companies under the Unpaid R&D Labour Scheme, it is recalled that the Norwegian authorities have decided to limit the scheme to cover only micro and small companies. Hence only the aid intensity for SMEs (20 %) is relevant. The grant is tax exempt at the current rate of 28 %. The gross aid intensity is therefore 27,8 % <sup>(57)</sup>. The maximum aid intensity for micro and small companies under the Unpaid R&D Labour Scheme is therefore at an acceptable level by reference to Section 5 of the State Aid Guidelines on R&D&I.

Were the corporate tax rate to be increased, the total gross aid intensity would increase correspondingly. However, in this regard, the Norwegian authorities have clarified that even if the tax rate increases, the Guidelines on the Unpaid R&D Labour Scheme require that grants do not exceed the aid intensity resulting from the application of the State Aid Guidelines. Since the Unpaid R&D Labour Scheme is limited to micro and small companies the relevant maximum ceiling is therefore 70 % for industrial research and 45 % for experimental development based on the current R&D&I Guidelines. The Authority accepts that if the corporate tax rate is raised the total aid intensity for micro and small companies under the Unpaid R&D Labour Scheme may increase up to these maximum levels.

In conclusion the Authority approves the aid intensity applicable to micro and small companies of 27,8 % and notes that this may, as a result of an increase in the corporate tax rate,

<sup>(56)</sup> Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33), as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 (OJ L 63, 28.2.2004, p. 22). Both Regulations have been incorporated into point 1(f) of Annex XV to the EEA Agreement. The definition contained therein corresponds to the definition in the State Aid Guidelines on aid to SMEs (see Section 1.3 in Part II hereof).

<sup>(57)</sup> Receiving a grant of 20 % of costs free of tax corresponds, at a tax rate of 28 %, to receiving 27,8 % of costs gross (28 % of 27,8 = 7,8 to be 'paid' in taxes and 20 left as the grant).

rise to 70 % for industrial research and 45 % for experimental development. The Norwegian authorities have informed the Authority that the Guidelines on the Unpaid R&D Labour Scheme will be formally modified in order to reflect both the general limit for each category of research and the maximum level up to which aid may be increased following a rise in the tax rate <sup>(58)</sup>.

### (ii) Eligible costs

Section 5.1.4 of the R&D&I Guidelines sets out a list of costs which are to be regarded as eligible for the purposes of calculating the aid intensity. Such cost items include, amongst others, (i) personnel costs which cover the costs of researchers, technicians and other support staff employed solely for the research activity; (ii) additional overheads incurred directly as a result of the research project; and (iii) other operating expenses, including costs of materials, supplies and similar products incurred directly as a result of the research activity <sup>(59)</sup>.

#### *Community Research Framework Programme — labour costs*

Section 5.1.4 of the R&D&I Guidelines does not elaborate on whether personnel costs may cover the costs of unpaid labour. However, the Authority considers that guidance for interpreting the term as used in the State Aid Guidelines can be obtained by examining how this term is being used in the context of the so-called Community Research Framework Programme <sup>(60)</sup>.

As stated in the decision to initiate the formal investigation procedure, under the Sixth Framework Programme financial support from the Community for unpaid labour costs could not be obtained. Part B.II.22.3 of Annex II to the General Model Agreement, used for the purposes of granting support under the Sixth Framework Programme, stated that '[p]hysical persons may not charge any labour cost in relation to their personal involvement in the project' and in Part B.II.19.1(a) it appeared that eligible costs 'must be actual, economic and necessary for the implementation for the project'. In this context the European Commission adopted the view that if the value of the labour costs could not be identified and registered in the books of the company, it could not be charged to the Framework Programme either. In line with this the Authority, in its decision to open the formal investigation procedure in relation to the Unpaid R&D Labour Scheme, expressed doubts as to whether unpaid labour costs could qualify as eligible costs within the meaning of the R&D&I Guidelines.

<sup>(58)</sup> A statement in the Guidelines on the Unpaid R&D Labour Scheme that the maximum aid intensities are as stated in the R&D&I Guidelines is insufficient.

<sup>(59)</sup> They correspond to subparagraphs (a) personnel costs; (e) additional overheads and (f) other operating expenses of Section 5.1.4 of the R&D&I Guidelines.

<sup>(60)</sup> The Community Research Framework Programme is the Community's main instrument for research funding in Europe and is referred to in the Community Framework for State aid for Research and Development and Innovation (OJ C 323, 30.12.2006, p. 1).

However, the Seventh Framework Programme has now been adopted and provides that, under certain conditions, support can be requested for costs which are not 'actual' <sup>(61)</sup>. In this regard the standard grant agreement used by the European Commission (the General Model Agreement on support under the Seventh Framework Programme) states that, notwithstanding the general requirement that eligible costs must be actual, 'beneficiaries may opt to declare average personnel costs if based on a certified methodology approved by the Commission and consistent with the management principles and usual accounting practices of the beneficiary. Average personnel costs charged to this grant agreement by a beneficiary having provided a certificate on the methodology are deemed not to significantly differ from actual personnel costs' <sup>(62)</sup>.

In the relevant guidance documents, it is explained that the abovementioned rule, which is referred to as the '*average personnel costs method based on a certified methodology*', allows (i) physical persons assimilated to a SME; and (ii) SME owners who do not receive a salary for their work for the SME, the possibility to apply and receive support for their work efforts in relation to R&D projects. While there is no explicit requirement as to which methodology should be used, it is clear from the guidance documents that, under the Community programme, a '*certified methodology*' means that an auditor has to certify the methodology forming the basis for calculating the value of the work efforts or 'labour costs' (that is, effectively, the hourly rate).

In relation to acceptable methodologies, the Authority first observes that the guidance in relation to physical persons makes reference to a methodology for identifying the hourly rate by means of income (e.g. tax declarations) <sup>(63)</sup>. However, particularly in light of the guidance by the European Commission in the case of SME owners not receiving a salary and unable to show any trace of their labour costs in the accounts of the company, which indicate that costs can be calculated using estimates, the Authority considers that the reference to an income-based methodology is not sufficient to automatically exclude the use of alternative methodologies. The aim under the Seventh Framework Programme is to allow the value of the work efforts made in respect of the R&D project to be calculated. There is no explicit requirement that the potential beneficiary receives any income in relation to that activity. On this basis the Authority has taken the view that, for both (i) and (ii) above, the presence of income is not in and of itself a condition for being eligible for support and that other methodologies for determining an hourly rate may be acceptable.

<sup>(61)</sup> Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) (OJ L 412, 30.12.2006, p. 1).

<sup>(62)</sup> Part B.II.14.1(g) of Annex II to the General Model Agreement on support under the Seventh Framework Programme. The text of the Agreement is available on the website of DG Research: <http://ec.europa.eu/research/index.cfm>

<sup>(63)</sup> According to Article II.12.3 'Non-eligible costs', p. 42 of the 'Guide to Financial Issues relating to FP7 Indirect Actions' (prepared for interpreting the Model Grant Agreement under FP7), such individuals can opt to 'declare average personnel costs based on a certified methodology approved by the Commission and based on their income (e.g. tax declarations) as recognised by national law (usually fiscal law)'.

Turning to the methodology proposed by the Norwegian authorities, the Authority observes, as a preliminary point, that the approach of calculating 1,6 % of nominal annual salary identifies an hourly rate which includes not only a labour cost element but also an element of 'other operating costs'. So, although the purpose of the present analysis is to verify whether the labour costs are eligible, it is also necessary, in order to be able to draw a final conclusion on whether the methodology is acceptable, to verify whether the element relating to 'other operating costs' qualifies as an eligible cost under the R&D&I Guidelines. These two elements are therefore addressed separately below.

#### 'Unpaid' labour costs

With respect to the costs attributable to unpaid labour, this element of the methodology is simply defined by reference to wage statistics. Indeed, the proposed methodology implies that the labour cost element is equivalent to what would have been the result if the hourly rate would have been identified by dividing annual average working hours by the nominal annual industrial worker's salary, as it appears from statistics for 2005. The labour cost element for an industrial worker's salary corresponds to an hourly rate of NOK 232,20 (348 300/1 500).

The Authority considers that an hourly rate which is defined by reference to official wage statistics (for 2005) ensures that the labour cost element is not inflated. Moreover, the fact that the hourly rate is determined by reference to the annual industrial worker's salary (as opposed to the much higher salary of, say, a civil engineer) means that the labour cost element is kept at a relatively low level <sup>(64)</sup>. Finally, the fact that the reported unpaid labour hours must be co-signed by the project manager and be certified by an accountant for each grant application ensures the presence of an audit control which is in line with — or even stricter than — the audit certification referred to in the General Model Agreement under the Seventh Framework Programme <sup>(65)</sup>. Finally, the Authority notes that, in addition, control is also exercised by the Norwegian Research Council, which verifies that the declared numbers are not manifestly incorrect.

In these circumstances the Authority concludes that the identification of the unpaid labour cost element in the methodology for determining the hourly rate is acceptable. The unpaid labour costs, considered in isolation, therefore qualify as eligible personnel costs within the meaning of the R&D&I Guidelines.

<sup>(64)</sup> The annual industrial worker's salary of NOK 348 300, as opposed to the civil engineer's salary of NOK 460 000 (or NOK 530 000), results in an hourly rate of NOK 500, as opposed to NOK 772,80 (or NOK 890,40) if based on the methodology. The labour cost element corresponds to NOK 232,20 for industrial workers compared to NOK 333,33 or NOK 353,33 for civil engineers.

<sup>(65)</sup> Indeed a control of each individual case is similar to, or even stricter than, a one-off audit control of the methodology.

### *'Other operating costs'*

The Authority considers that the description of 'other operating costs' under the Unpaid R&D Labour Scheme (set out in Section 2.3 of Part I hereof) corresponds to eligible costs in the form of 'additional overheads' and/or 'other operating expenses' in subparagraphs (e) and (f) of Section 5.1.4 of the R&D&I Guidelines. The level of the operating costs is calculated automatically on an hourly basis per employee in relation to the salary of an industrial worker — rather than being based on the cost level stated in invoices<sup>(66)</sup>. However, the operating cost element under the methodology has been calculated on the basis of the company review carried out by the Norwegian Research Council. This ensures that the level of operating costs is realistic. Moreover, the share of operating costs is calculated on the basis of the low salary of the industrial worker and the operating cost element remains at a fixed maximum on an hourly basis. On this basis, and taking into account that the actual incurrence of operating costs is verified via invoices as part of the audit control, the Authority considers that the proposed methodology constitutes an acceptable manner of identifying the level of 'other operating costs' and they therefore qualify as eligible costs under the R&D&I Guidelines.

### *Conclusion on methodology*

In conclusion, the Authority considers that, based on the change in principle under the Seventh Framework Programme, unpaid labour costs may qualify as eligible costs, depending on the methodology chosen for identifying the hourly rate. As appears from the above, the Authority considers that under the methodology proposed by the Norwegian authorities, the manner in which the level of both the labour cost element and the operating cost element is fixed, is acceptable. Hence, the methodology is approved and the costs qualify as eligible under the R&D&I Guidelines. This conclusion is also in line with the position taken by the Authority in 2002 in its decision on the Skattefunn Scheme, in the context of which the Authority approved an identical methodology for determining (the level of) eligible costs<sup>(67)</sup>.

Although the proposed methodology implies that one single hourly rate is applied even if the potential beneficiaries under the scheme may vary in size, it is recalled that the Norwegian authorities have decided to limit the scheme to micro and small companies and the potential beneficiaries therefore represent a rather homogeneous group. The Authority therefore approves of the use of one common rate.

### **(iii) Incentive effect**

According to Section 6 of the R&D&I Guidelines an incentive effect is automatically considered to be present where the aided

R&D&I project has not started before the application for support, the aid beneficiary is a SME and the aid amount is below EUR 7,5 million per project per SME<sup>(68)</sup>.

As appears from above, the Norwegian authorities have limited the Unpaid R&D Labour Scheme to small and micro companies. Moreover, in view of the fact that eligible costs under the Unpaid R&D Labour Scheme are subject to a fixed ceiling of eligible costs of NOK 2 million annually per undertaking and that the applicable aid intensity is 27,8 %, the maximum value of aid granted per undertaking in any one year would be NOK 556 000 (approximately EUR 70 500), which is far below the abovementioned maximum limit. Even taking account of a maximum aid intensity of up to 45 % (which may be triggered by an increase in the tax rate), the maximum aid amount is NOK 900 000 (approximately EUR 114 000), which is still far below the maximum limit stipulated in the R&D&I Guidelines<sup>(69)</sup>.

Finally, the Norwegian authorities have confirmed that support under the Scheme will not be given if research projects have been started prior to the application for support.

On this basis the Authority considers that grants which may be awarded under the Unpaid R&D Labour Scheme therefore have an incentive effect pursuant to Section 6 of the R&D&I Guidelines.

### **(iv) Duration**

The Unpaid R&D Labour Scheme was notified by the Norwegian authorities as being of indefinite duration. However, the Norwegian authorities have agreed to formally limit the duration of the scheme to 31 December 2013, which is also the expiry date of the current R&D&I Guidelines. On this basis the Authority considers the duration of the scheme to be acceptable.

## **3.3. CONCLUSION ON THE COMPATIBILITY OF THE SCHEME WITH THE EEA AGREEMENT**

As appears from the above the Authority considers that both the projects and cost elements under the Unpaid R&D Labour Scheme qualify as eligible under the R&D&I Guidelines. Since the Scheme is limited to small and micro companies, aid intensities are in line with those Guidelines, an incentive effect has been demonstrated and the duration of the scheme has been limited in line with the Guidelines, the Authority has taken the view that the Unpaid R&D Labour Scheme is compatible with the functioning of the EEA Agreement.

<sup>(66)</sup> The operating costs element represents NOK 267,80, which is the difference between the combined hourly rate and the labour cost element: NOK 500 – NOK 232,20 = NOK 267,80.

<sup>(67)</sup> Decision No 171/02/COL of 25 September 2002, as amended by Decision No 16/03/COL of 5 February 2003.

<sup>(68)</sup> Paragraphs 122-124 of the R&D&I Guidelines.

<sup>(69)</sup> Indeed a limitation per undertaking is stricter than a limitation per project. Moreover, even if an undertaking were to receive funding under the Scheme for the same project up to the maximum on an annual basis for the entire duration of the Scheme, the ceiling of EUR 7,5 million is still not reached.



#### 4. DECISION

On the basis of the foregoing assessment the Authority considers the Unpaid R&D Labour Scheme to be compatible with the EEA Agreement subject to the following conditions.

- (a) The scope of the Unpaid R&D Labour Scheme is limited to micro and small companies as defined in the State Aid Guidelines on aid to SMEs;
- (b) The total aid intensity for micro and small companies is 27,8 %, which may increase as a result of a possible increase in the corporate tax rate (in which case the applicable ceilings are maximum 45 % for experimental development and 70 % for industrial research); and
- (c) The duration of the Scheme does not extend beyond 31 December 2013, the date on which the current R&D&I Guidelines expire.

The Norwegian authorities are reminded of their obligation to provide annual reports on the implementation of the Scheme as stipulated in Article 21 of Part II of Protocol 3 to the Surveillance and Court Agreement in conjunction with Article 6 of Decision No 195/04/COL of 14 July 2004.

The Norwegian authorities have stated that the hourly rate applied under the Unpaid R&D Labour Scheme can be adjusted based on salary developments. In this regard, the Authority reminds the Norwegian authorities of their obligation to notify, pursuant to Article 1 of Part 1 of the Surveillance and Court Agreement, any changes qualifying as amendments within the meaning of Article 1 of Part II of Protocol 3 to the Court and Surveillance Agreement <sup>(70)</sup>,

HAS ADOPTED THIS DECISION:

#### Article 1

The Unpaid R&D Labour Scheme which the Norwegian authorities are planning to implement constitutes State aid

within the meaning of Article 61(1) of the EEA Agreement, but can be declared compatible with the functioning of the EEA Agreement on the basis of Article 61(3)(c) of the EEA Agreement and the R&D&I Guidelines and subject to the conditions set out in Article 2 below.

#### Article 2

The Unpaid R&D Labour Scheme is limited to micro and small companies as defined in the State Guidelines on aid to micro, small and medium-sized enterprises (SMEs) and the maximum total aid intensity is 27,8 %, which may be increased in case of a possible increase in the corporate tax rate (in which case the maximum applicable ceilings are 45 % for experimental development and 70 % for industrial research). The duration of the Unpaid R&D Labour Scheme is limited to 31 December 2013.

#### Article 3

The Norwegian authorities shall inform the EFTA Surveillance Authority, within two months of notification of this Decision, of the measures taken to comply with it.

#### Article 4

This Decision is addressed to the Kingdom of Norway.

#### Article 5

Only the English version is authentic.

Done at Brussels, 17 March 2008.

*For the EFTA Surveillance Authority*

Per SANDERUD  
President

Kurt JAEGER  
College Member

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<sup>(70)</sup> Unless the changes would qualify for notification under the simplified procedure according to Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement (OJ L 139, 25.5.2006, p. 37).