

## INFORMATIE OVER DE EUROPESE ECONOMISCHE RUIMTE

## TOEZICHTHOUDENDE AUTORITEIT VAN DE EVA

**Uitnodiging om opmerkingen te maken overeenkomstig artikel 1, lid 2, van deel I van Protocol nr. 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie over staatssteunvraagstukken**

(2016/C 236/10)

Door middel van Besluit nr. 489/15/COL, dat na deze samenvatting in de authentieke taal is weergegeven, heeft de Toezichthoudende Autoriteit van de EVA de Noorse autoriteiten in kennis gesteld van haar besluit tot inleiding van de procedure van artikel 1, lid 2, van deel I van Protocol nr. 3 bij de Overeenkomst tussen de EVA-staten betreffende de oprichting van een Toezichthoudende Autoriteit en een Hof van Justitie ten aanzien van de bovengenoemde steunmaatregel.

Belanghebbenden kunnen hun opmerkingen over de betrokken maatregel binnen één maand vanaf de datum van de bekendmaking indienen bij:

Toezichthoudende Autoriteit van de EVA  
Griffie  
Belliardstraat 35  
1040 Brussel  
BELGIË

De opmerkingen zullen ter kennis van de Noorse autoriteiten worden gebracht. Een belanghebbende die opmerkingen maakt, kan, met opgave van redenen, schriftelijk verzoeken om vertrouwelijke behandeling van zijn identiteit.

## SAMENVATTING

**Procedure**

De Noorse autoriteiten hebben de regeling inzake regionaal gedifferentieerde socialezekerheidsbijdragen 2014-2020 overeenkomstig artikel 1, lid 3, van deel I van Protocol nr. 3 bij brief van 13 maart 2014 aangemeld<sup>(1)</sup>. Op basis van die aanmelding en de daarna verstreekte informatie<sup>(2)</sup> heeft de Autoriteit de aangemelde steunregeling bij Besluit nr. 225/14/COL van 18 juni 2014 goedgekeurd.

In zijn arrest van 23 september 2015 in zaak E-23/14, Kimek Offshore AS/ESA<sup>(3)</sup>, heeft het EVA-Hof het besluit van de Autoriteit (gedeeltelijk) nietig verklaard.

Bij brief van 15 oktober 2015<sup>(4)</sup> heeft de Autoriteit de Noorse autoriteiten om informatie verzocht. Bij brief van 6 november 2015<sup>(5)</sup> hebben de Noorse autoriteiten op het verzoek om informatie geantwoord.

**Beschrijving van de maatregel**

Het doel van de algemene regeling inzake gedifferentieerde socialezekerheidsbijdragen als zodanig is om de ontvolking van de minst bevolkte regio's in Noorwegen af te remmen of te voorkomen door de werkgelegenheid te stimuleren. De regeling voor exploitatiesteun compenseert de arbeidskosten door de tarieven voor de socialezekerheidsbijdragen in bepaalde geografische gebieden te verlagen. In de regel varieert de steunintensiteit naargelang van het geografische gebied waar de bedrijfseenheid is geregistreerd. Volgens de Noorse wet moeten ondernemingen subeenheden registreren voor elke aparte bedrijfsactiviteit die wordt uitgeoefend<sup>(6)</sup>. Als een onderneming verschillende soorten bedrijfsactiviteiten uitoefent, moeten aparte subeenheden geregistreerd worden. Bovendien moeten aparte eenheden geregistreerd worden als de activiteiten op verschillende geografische locaties uitgeoefend worden.

<sup>(1)</sup> Documenten nrs. 702438-702440, 702442 en 702443.

<sup>(2)</sup> Zie punt 2 van Besluit nr. 225/14/COL, online beschikbaar op: [http://www.eftasurv.int/media/state-aid/Consolidated\\_version\\_-\\_Decision\\_225\\_14\\_COL\\_NOR\\_Social\\_Security\\_contributions\\_2014-2020.pdf](http://www.eftasurv.int/media/state-aid/Consolidated_version_-_Decision_225_14_COL_NOR_Social_Security_contributions_2014-2020.pdf)

<sup>(3)</sup> Nog niet gepubliceerd.

<sup>(4)</sup> Document nr. 776348.

<sup>(5)</sup> Documenten nrs. 779603 en 779604.

<sup>(6)</sup> Wet inzake het coördinerende register voor rechtspersonen (LOV-1994-06-03-15).

Als uitzondering op de algemene regel inzake registratie is de regeling ook van toepassing op ondernemingen die buiten het in aanmerking komende gebied geregistreerd zijn als zij werknemers ter beschikking stellen in het in aanmerking komende gebied en als hun werknemers binnen het in aanmerking komende gebied mobiele activiteiten verrichten (voor de toepassing van dit besluit worden dit „ambulante diensten” genoemd). Dit is de vrijstellingsregeling die in dit besluit wordt onderzocht. De nationale rechtsgrond voor de regeling als zodanig is punt 23-2 van de nationale wet op de sociale verzekering <sup>(1)</sup>. De nationale rechtsgrond voor de vrijstelling wordt gevormd door deel 1, lid 4, van het besluit nr. 1482 van het Noorse parlement van 5 december 2013 inzake de vaststelling van het belastingtarief e.d. in het kader van de nationale wet op de sociale verzekering.

De vrijstelling is alleen van toepassing wanneer de werknemer de helft of meer van zijn of haar werkdagen in het in aanmerking komende gebied werkt. Voorts is het verlaagde tarief alleen geldig voor het gedeelte van het werk dat daar wordt verricht.

### Beoordeling van de maatregel

De Autoriteit moet nagaan of de vrijstellingsregeling verenigbaar is met de werking van de EER-overeenkomst op grond van artikel 61, lid 3, onder c), in overeenstemming met de richtsnoeren van de Autoriteit inzake regionale steunmaatregelen 2014-2020 (hierna de „richtsnoeren regionale steun” genoemd) <sup>(2)</sup>.

Regionale steun kan alleen daadwerkelijk bijdragen aan de economische ontwikkeling van achterstandsgebieden indien deze wordt toegekend om aan te zetten tot aanvullende investeringen of economische activiteiten in die gebieden <sup>(3)</sup>. Regionale exploitatiesteun kan alleen onder artikel 61, lid 3, onder c), van de EER-overeenkomst vallen indien deze wordt verleend om specifieke of blijvende handicaps aan te pakken waarmee ondernemingen in achterstandsgebieden te kampen hebben <sup>(4)</sup>.

Het lijkt geen twijfel dat het geografische toepassingsgebied van de regeling als zodanig beperkt is tot achterstandsgebieden. De werkingssfeer van dit besluit is beperkt tot de vrijstellingsregeling. Het is de vraag of die regeling, die inhoudt dat ondernemingen die buiten de achterstandsgebieden geregistreerd zijn en onder de regeling vallen, in aanmerking kunnen komen voor steun in het kader van de regeling voor zover zij in de achterstandsgebieden economische activiteiten verrichten, verenigbaar is met de staatssteunregels. Met andere woorden: worden met de vrijstellingsregeling specifieke of blijvende handicaps aangepakt waarmee ondernemingen in achterstandsgebieden te kampen hebben?

Het is aan de Noorse autoriteiten om aan te tonen dat zonder de vrijstellingsregeling het risico op ontvolking bestaat <sup>(5)</sup>. De Noorse autoriteiten hebben de voordelen van de vrijstellingsregeling voor lokale ondernemingen benadrukt. Zij krijgen, tegen lagere kosten, toegang tot gespecialiseerde arbeidskrachten die anders niet beschikbaar zouden zijn. Bovendien leidt de vrijstellingsregeling tot meer concurrentie tussen ambulante diensten in de in aanmerking komende gebieden, wat ook gunstig is voor lokale ondernemingen (andere dan de ondernemingen die ambulante diensten verlenen), omdat het door de lagere kosten voor ambulante diensten aantrekkelijker en rendabeler wordt om in het in aanmerking komende gebied een bedrijf te runnen. Het gebruik van steun in het kader van de regeling is een indirect instrument in de zin dat het wordt gebruikt om de kosten voor de tewerkstelling van werknemers te verlagen als maatregel om de ontvolking af te remmen of te voorkomen. Het idee is dat de arbeidsmarkt de voornaamste bepalende factor is voor waar mensen wonen.

De Noorse autoriteiten hebben voorts betoogd dat de ondernemingen die buiten het in aanmerking komende gebied zijn geregistreerd, af en toe werknemers in de in aanmerking komende gebieden tewerkstellen. In dat geval zorgen de ondernemingen voor banen die, hoewel ze van meer tijdelijke aard zijn, toch bijdragen aan een stijging van het looninkomen in de in aanmerking komende gebieden. Dit stimuleert ook de economische activiteit. Voorts halen de Noorse autoriteiten aan dat werknemers die tijdelijk in het in aanmerking komende gebied verblijven, lokale goederen en diensten kopen en zo bijdragen aan de plaatselijke economie. Dit geldt met name voor werknemers die voor een korte of middellange periode op die plaats verblijven, omdat zij waarschijnlijk in hotels overnachten, in restaurants eten enz. De Noorse autoriteiten ramen dat het steunbedrag dat uit de vrijstellingsregeling voortvloeit twee procent van de totale steun voor 2015 bedraagt, maar zij benadrukken dat dit een onzekere raming is. Twee procent komt overeen met ongeveer 19 miljoen EUR <sup>(6)</sup>. De Autoriteit verzoekt de Noorse autoriteiten om preciezere informatie over het financiële effect van de regeling.

Afgezien van de bovenstaande algemene opmerkingen hebben de Noorse autoriteiten niet aangetoond dat in het gebied in kwestie zonder de vrijstellingsregeling het risico op ontvolking bestaat. De Autoriteit is van mening dat de effecten van een maatregel meer moeten inhouden dan een kleine stijging van de tijdelijke werkgelegenheid en de uitgaven in het in aanmerking komende gebied om te voldoen aan de vereisten van de richtsnoeren regionale steun. Op basis hiervan verzoekt de Autoriteit de Noorse autoriteiten om meer inlichtingen te verstrekken en zo aan te tonen dat zonder de vrijstellingsregeling het risico op ontvolking bestaat.

<sup>(1)</sup> LOV-1997-02-28-19.

<sup>(2)</sup> PB L 166 van 5.6.2014, blz. 44 en EER-supplement nr. 33 van 5.6.2014, blz. 1.

<sup>(3)</sup> Punt 6 van de richtsnoeren regionale steun.

<sup>(4)</sup> Punt 16 van de richtsnoeren regionale steun.

<sup>(5)</sup> Punt 43 van de richtsnoeren regionale steun.

<sup>(6)</sup> Op basis van de aangemelde begroting 2013, zie punt 49 van Besluit nr. 225/14/COL van de Autoriteit.

Wat betreft de effecten op de mededinging en het handelsverkeer van de vrijstellingsregeling betogen de Noorse autoriteiten dat die vrijstellingsregeling een gelijk speelveld creëert voor alle ondernemingen die actief zijn in de achterstandsgebieden, omdat ze in gelijke mate van toepassing is op alle in de EER gevestigde ondernemingen. Daardoor garandeert ze dat ongerechtvaardigde negatieve gevolgen voor de mededinging worden vermeden. De Autoriteit is van mening dat dit een positief element is in het licht van de punten 3 en 53 van de richtsnoeren regionale steun. De ondernemingen die in het in aanmerking komende gebied zijn geregistreerd, kunnen echter in het algemeen meer structurele moeilijkheden ondervinden dan de ondernemingen die louter op niet-permanente basis werknemers naar dat gebied sturen om er te werken. De Noorse autoriteiten voeren aan dat ondernemingen die buiten het in aanmerking komende gebied geregistreerd zijn, een concurrentienadeel kunnen ondervinden ten opzichte van plaatselijke ondernemingen, onder meer door de kosten voor vervoer en logies van personeel. De Noorse autoriteiten hebben geen gegevens of verdere argumenten verstrekt ter staving van deze veronderstelling. De Autoriteit verzoekt de Noorse autoriteiten om verder te verduidelijken waarom de vrijstellingsregeling geen ongerechtvaardigde negatieve gevolgen voor de mededinging heeft en om meer informatie in te dienen om dit te staven.

De Noorse autoriteiten hebben benadrukt dat het duidelijk is dat de vrijstellingsregeling een stimulerend effect heeft. Het stimulerende effect van steun kan niet louter worden verondersteld. Hoewel het niet nodig is afzonderlijke bewijsstukken te verstrekken van het feit dat steun in het kader van een regeling voor elke begunstigde op individuele basis een stimulans vormt om een activiteit uit te oefenen die hij anders niet zou hebben verricht, moet het stimulerende effect ten minste gebaseerd zijn op gefundeerde economische theorieën. Het is niet voldoende om enkel te verwijzen naar een vermeende evidentie. Het is weliswaar juist dat de vrijstellingsregeling voor ondernemingen die buiten de in aanmerking komende gebieden geregistreerd zijn, de arbeidskosten voor ambulante diensten in de in aanmerking komende gebieden vermindert, maar de Noorse autoriteiten hebben geen bewijsmateriaal of argumenten aangebracht voor het feit dat mag worden verwacht dat, zonder de steun, het niveau van de economische activiteit in het betrokken gebied of de betrokken regio aanzienlijk zou zijn afgenomen als gevolg van de problemen die de steun moet aanpakken<sup>(1)</sup>.

De Noorse autoriteiten hebben uitgelegd dat ondernemingen die ambulante diensten verlenen tot op zekere hoogte sub-eenheden kunnen registreren in het in aanmerking komende gebied. Meer nog, zij zijn verplicht dat te doen als ten minste één werknemer in een ander gebied voor de moedereenheid werkt en de onderneming daar kan worden bezocht.

De Noorse autoriteiten voeren aan dat er zonder de vrijstellingsregeling voor ambulante diensten in het in aanmerking komende gebied een ongerechtvaardigd verschil in behandeling zou zijn naargelang de dienstverrichter al dan niet een subeenheid in het in aanmerking komende gebied heeft.

Ten eerste is het de Autoriteit niet duidelijk wat het vereiste dat „ten minste één werknemer in een ander gebied voor de moedereenheid werkt en de onderneming daar kan worden bezocht”, inhoudt. De Autoriteit verzoekt de Noorse autoriteiten daarom om dit te verduidelijken.

Ten tweede is het beginsel van gelijke behandeling een algemeen beginsel van het EER-recht. Dit kan echter niet op zichzelf als grondslag dienen om de vrijstellingsregeling te rechtvaardigen. De vrijstellingsregeling moet zelf verenigbaar zijn met de werking van de EER-overeenkomst.

Conclusie: door het gebrek aan relevante informatie, zoals hierboven beschreven, heeft de Autoriteit twijfels over de verenigbaarheid van de vrijstellingsregeling met de werking van de EER-overeenkomst.

## EFTA SURVEILLANCE AUTHORITY DECISION

No 489/15/COL

of 9 December 2015

### opening a formal investigation into the exemption rule for ambulant services under the scheme on differentiated social security contributions 2014-2020

(Norway)

The EFTA Surveillance Authority ('the Authority'),

HAVING REGARD to:

the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Article 61,

Protocol 26 to the EEA Agreement,

the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24,

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

<sup>(1)</sup> Punt 71 van de richtsnoeren regionale steun.

Whereas:

## I. FACTS

### 1. Procedure

- (1) The Norwegian authorities notified the regionally differentiated social security contributions scheme 2014-2020 pursuant to Article 1(3) of Part I of Protocol 3 by letter of 13 March 2014 <sup>(1)</sup>. On the basis of that notification and information submitted thereafter <sup>(2)</sup>, the Authority approved the notified aid scheme by its Decision No 225/14/COL of 18 June 2014.
- (2) By its judgment of 23 September 2015 in case E-23/14 *Kimek Offshore AS v ESA* <sup>(3)</sup> the EFTA Court annulled, in part, the Authority's decision.
- (3) By letter dated 15 October 2015 <sup>(4)</sup>, the Authority requested information from the Norwegian authorities. By letter dated 6 November 2015 <sup>(5)</sup>, the Norwegian authorities replied to the information request.

### 2. The scheme as such is not the subject of the formal investigation

- (4) By its judgment the EFTA Court partly annulled the Authority's decision approving the aid scheme. The aid scheme as such is not subject to the renewed scrutiny carried out by the Authority in the present formal investigation. The subject of this formal investigation is merely the part of the scheme (an exemption rule for ambulant services) for which the Authority's approval was annulled.

### 3. The scheme

#### 3.1 Objective

- (5) The objective of the general scheme on differentiated social security contributions as such is to reduce or prevent depopulation in the least inhabited regions in Norway, by stimulating employment. The operating aid scheme offsets employment costs by reducing the social security contribution rates in certain geographical areas. As a main rule, the aid intensities vary according to the geographical area in which the business unit is registered. The rules on registration are explained in greater detail below.

#### 3.2 National legal basis

- (6) The national legal basis for the scheme as such is Section 23-2 of the National Insurance Act <sup>(6)</sup>. This provision sets out the employer's general obligation to pay social security contributions calculated on the basis of gross salary paid to the employee. According to paragraph 12 of that section, the Norwegian Parliament may adopt regionally differentiated rates, as well as specific provisions for undertakings within certain sectors. Thus, it is the National Insurance Act, in conjunction with the annual decisions of the Norwegian Parliament, that forms the national legal basis for the scheme.
- (7) For further detail on the aid scheme as such, reference is made to the Authority's Decision No 225/14/COL.

#### 3.3 Rules on registration

- (8) As a main rule, aid eligibility depends on whether a business is registered in the eligible area. As noted above, the main rule of the scheme is that aid intensities vary according to the geographical area in which the business is registered.
- (9) Norwegian law requires undertakings to register sub-units for each separate business activity performed <sup>(7)</sup>. If an undertaking performs different kinds of business activities, separate sub-units must be registered. Moreover, separate units must be registered if the activities are performed in different geographical locations.
- (10) According to the Norwegian authorities, the 'separate business activity' criterion is met when at least one employee carries out work for the parent unit in a separate area, and the undertaking may be visited there. Each sub-unit forms its own basis for the calculation of the differentiated social security contribution, depending on their registered location. Thus, an undertaking registered outside the area eligible for aid under the scheme will be eligible for aid if, and in so far as, its economic activities are performed within a sub-unit located within the eligible area.

<sup>(1)</sup> Documents No 702438-702440, 702442 and 702443.

<sup>(2)</sup> See paragraph 2 of Decision No 225/14/COL, available online: [http://www.eftasurv.int/media/state-aid/Consolidated\\_version\\_-\\_Decision\\_225\\_14\\_COL\\_NOR\\_Social\\_Security\\_contributions\\_2014-2020.pdf](http://www.eftasurv.int/media/state-aid/Consolidated_version_-_Decision_225_14_COL_NOR_Social_Security_contributions_2014-2020.pdf)

<sup>(3)</sup> Not yet reported.

<sup>(4)</sup> Document No 776348.

<sup>(5)</sup> Documents No 779603 and 779604.

<sup>(6)</sup> LOV-1997-02-28-19.

<sup>(7)</sup> The Act on the Coordinating Register for Legal Entities (LOV-1994-06-03-15).

### 3.4 *Ambulant services – the measure under scrutiny*

- (11) By way of exemption from the main rule on registration, the scheme also applies to undertakings registered outside the eligible area where they hire out workers to the eligible area and where their employees are engaged in mobile activities within the eligible area (for the purposes of this decision, this is referred to as ‘ambulant services’). This is the exemption rule under scrutiny in the decision at hand. The national legal basis for that exemption is provided for by section 1(4) of the Norwegian Parliament’s Decision No 1482 of 5 December 2013 on determination of the tax rates etc. under the National Insurance Act for 2014.
- (12) The exemption applies only when the employee spends half or more of his working days in the eligible area. Further, the reduced rate is only applicable for the part of the work carried out there. As a principal rule, the tax registration period is one calendar month.
- (13) This entails that if an employee of an Oslo-registered entity (Oslo is in Zone 1, an ineligible zone, where the rate therefore is the standard 14,1 %) completes 60 % of his work one calendar month in Vardø (which is in Zone 5 where the applicable rate is 0 %) and the rest in Oslo, the undertaking will be eligible for the zero-rate on the salary to be paid for the work carried out in Vardø, but not for the work carried out in Oslo.

### 4. The judgment of the EFTA Court

- (14) The EFTA Court annulled the Authority’s decision in so far as it closed the preliminary investigation as regards the aid measure in section 1(4) of the Norwegian Parliament’s Decision No 1482 of 5 December 2013 on determination of the tax rates etc. under the National Insurance Act for 2014. Section 1(4) is drafted in such a way as to conflate, together with the exemption rule (which is the subject of the present decision), an anti-circumvention measure designed to prevent undertakings from claiming aid under the scheme by virtue of simply registering their business within an area with a lower rate of social security contributions, even if they then proceed to conduct ambulatory activities or hire out their employees to work in an area with a higher rate. The anti-circumvention measure is not subject to the present procedure <sup>(1)</sup>.

### 5. Comments by the Norwegian authorities

- (15) The Norwegian authorities argue that the exemption rule for ambulant services is compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c) and that it is in line with the Authority’s Guidelines on Regional State Aid for 2014-2020 (the RAG) <sup>(2)</sup>.
- (16) The Norwegian authorities have explained that the exemption rule accounts for about two percent of the total aid granted under the scheme for 2015. They stress that this calculation is based on uncertain estimates.
- (17) The Norwegian authorities have explained that in Norway, access to employment is the most influential factor when it comes to peoples’ choice of residence. The social security contribution is as a main rule calculated on the basis of the rate applicable in the zone in which the employer is considered to carry out business activity. This rule is based on the premise that only undertakings performing economic activity in the eligible area should receive aid, and only to the extent that they are performing business activities in that area. This is a fundamental premise for the aid scheme.
- (18) Where a company is registered, is not, and should not be, decisive. There are many sectors that frequently provide ambulant services. As an example, it would be too burdensome to require all construction firms to register their activities locally wherever they were to carry out work in order to be eligible for reduced social security rates. Neither Article 61(3)(c) nor the RAG or the GBER <sup>(3)</sup> contain requirements on where regional aid beneficiaries need to be registered. A formalistic approach where the registered location of the beneficiary is decisive in all cases has no basis in Article 61(3)(c). To the contrary, it would be difficult to reconcile with the RAG which focusses on whether the aid promotes economic activity in disadvantaged areas and not whether beneficiaries are registered within the area covered by the scheme. The underlying realities, i.e. whether the undertaking carries out economic activity within the eligible area, should be decisive. Furthermore, undertakings performing ambulant services can to some extent register sub-units in the eligible area. In the absence of the exemption rule for ambulant services in the eligible area, there would be an unjustified difference in treatment depending on whether the service providing undertaking had established a sub-unit in the eligible area.

<sup>(1)</sup> See Order of the EFTA Court of 23.11.2015 in Case E-23/14 INT *Kimek Offshore AS v ESA* (not yet reported).

<sup>(2)</sup> OJ L 166, 5.6.2014, p. 44 and EEA Supplement No 33, 5.6.2014, p. 1.

<sup>(3)</sup> The General Block Exemption Regulation (GBER). Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), incorporated into the EEA Agreement by EEA Joint Committee Decision No 152/2014 (OJ L 342, 27.11.2014, p. 63 and EEA Supplement No 71, 27.11.2014, p. 61) at point 1j of Annex XV to the EEA Agreement.

- (19) The Norwegian authorities contend that the exemption rule contributes to an objective of common interest in a number of ways. They firstly note that undertakings in the eligible area can access, at a lower cost, specialised labour that would otherwise not be available. Secondly, the rule leads to increased competition between ambulant services in eligible areas. This is beneficial for local undertakings, other than those providing ambulant services, as lower costs for ambulant services make it more attractive and more profitable to run a business in the eligible area. Thirdly, employees with a temporal stay in the eligible area will buy local goods and services and thereby contribute to the local economy. This applies in particular to employees commuting to the location especially in the short or medium term as they are likely to stay in hotels, eat in restaurants etc. Fourthly, undertakings located in central areas may also hire personnel residing in the area where the ambulant services are performed. Even if the jobs are temporary in nature, they will contribute to increased wage income in the eligible regions, which also stimulates economic activity. Finally, undertakings registered outside the eligible zone may have a competitive disadvantage compared to local firms due to *i.a.* costs of transporting and lodging of personnel.
- (20) In the view of the Norwegian authorities, it is evident that the exemption rule has an incentive effect as it reduces labour costs for ambulant services.
- (21) Finally, the Norwegian authorities stress that the exemption rule creates a level playing field for all undertakings active in the disadvantages areas. The rule applies equally to any EEA-based undertaking. This ensures that undue adverse effects on competition are avoided.

## II. ASSESSMENT

### 1. The presence of state aid

- (22) 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.'*
- (23) This implies that a measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement if the following conditions are cumulatively fulfilled: (i) there must be an intervention by the state or through state resources, (ii) that intervention must confer a selective economic advantage on the recipients, (iii) it must be liable to affect trade between EEA States and (iv) it must distort or threaten to distort competition.
- (24) In Decision No 225/14/COL, the Authority concluded that the scheme on differentiated social security contributions 2014-2020 constitutes an aid scheme. The Authority refers to its reasoning in paragraphs 68-74 of that decision. The exemption rule for ambulant services is part of the provisions providing for that aid scheme. It increases the scope of the scheme in the sense that it widens the circle of potential beneficiaries to undertakings that are not registered in the eligible areas. As with the other aid granted under the scheme, extending the scheme to the undertakings registered outside of the eligible areas results in state resources conferring selective advantages on undertakings. These advantages are liable to affect trade and distort competition.

### 2. Procedural requirements

- (25) Pursuant to Article 1(3) of Part I of Protocol 3: *'the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. ... The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision'*.
- (26) The Norwegian authorities implemented the exemption rule after the Authority approved it by Decision No 225/14/COL. With the annulment of the Authority's approval of the rule by the EFTA Court, the aid has become unlawful.

### 3. Compatibility of the aid

- (27) The Authority must assess whether the exemption rule is compatible with the functioning of the EEA Agreement on the basis of its Article 61(3)(c) in line with the RAG.
- (28) The exemption rule for ambulant services entitles undertakings that are not registered in the eligible area to benefit from reduced social security charges when and to the extent that they carry out economic activities in the registered area. Neither Article 61(3)(c) EEA nor the RAG (nor the regional aid rules in the GBER) formally require that regional aid beneficiaries are registered in the assisted areas.
- (29) Regional aid can be effective in promoting the economic development of disadvantaged areas only if it is awarded to induce additional investment or economic activity in those areas<sup>(1)</sup>. Regional operating aid can only fall under Article 61(3)(c) EEA if it is awarded to tackle specific or permanent handicaps faced by undertakings in disadvantaged regions<sup>(2)</sup>.

<sup>(1)</sup> Para. 6 of the RAG.

<sup>(2)</sup> Para. 16 of the RAG.

- (30) There is no question that the geographical scope of the scheme as such is restricted to disadvantaged regions. The scope of this decision is limited to the exemption rule. The question is whether that rule, which entails that undertakings registered outside the disadvantaged regions covered by the scheme can benefit from aid under the scheme to the extent that they carry out economic activities in the disadvantaged regions is compatible with the state aid rules. In other words, does the exemption rule tackle specific or permanent handicaps faced by undertakings in the disadvantaged regions?
- (31) It is for the Norwegian authorities to demonstrate the risk of depopulation in the absence of the exemption rule<sup>(1)</sup>. The Norwegian authorities have underlined the benefits of the exemption rule for local undertakings. They can access, at a lower cost, specialised labour that would otherwise not be available. Moreover, the exemption rule leads to increased competition between ambulant services in the eligible areas, which again is beneficial for local undertakings (other than those providing ambulant services) since lower costs for ambulant services make it more attractive and more profitable to run a business in the eligible area. The use of aid under the scheme is an indirect tool in the sense that it is used to reduce the cost of employing workers as a measure to reduce or prevent depopulation. The idea is that the labour market is the most important factor influencing where people live.
- (32) The Norwegian authorities have further argued that the firms registered outside the eligible area occasionally will hire workers in the eligible areas. Thereby the firms will provide jobs that, although of a more temporary nature, will nevertheless contribute to increased wage income in the eligible regions. This also stimulates economic activity. The Norwegian authorities furthermore argue that employees who temporarily stay in the eligible area will buy local goods and services and thereby contribute to the local economy. This applies in particular to employees commuting to the location especially on short or medium term as they are likely to stay in hotels, eat in restaurants, etc. The Norwegian authorities have estimated the amount of aid resulting from the exemption rule to be two percent of the total aid for 2015 which they stress is an uncertain estimate. Two percent amounts to approximately EUR 19 million<sup>(2)</sup>. The Authority invites the Norwegian authorities to provide more precise information about the financial effect of the rule.
- (33) Apart from the above remarks of a general nature, the Norwegian authorities have not demonstrated the risk of depopulation of the relevant area in the absence of the exemption rule. It is the view of the Authority that a measure, in order to meet the requirements of the RAG, must have effects exceeding a marginal increase of temporary employment possibilities and spending in the eligible area. On this basis, the Authority invites the Norwegian authorities to provide more information to demonstrate the risk of depopulation in the absence of the exemption rule.
- (34) In terms of effect on competition and trade of the exemption rule, the Norwegian authorities argue that the exemption rule creates a level playing field for all undertakings active in the disadvantaged areas as it applies equally to any EEA-based undertaking. The consequence is that it ensures that undue adverse effects on competition are avoided. It is the view of the Authority that this is a positive feature in light of paras. 3 and 53 of the RAG. However, the undertakings registered within the eligible area may, in general, face more permanent difficulties than the undertakings that merely send their employees to work in the area on a non-permanent basis. The Norwegian authorities argue that undertakings registered outside the eligible zone may have a competitive disadvantage compared to local firms due to *i.a.* costs of transporting and lodging of personnel. The Norwegian authorities have not presented any data or further reasoning to back up this assumption. The Authority invites the Norwegian authorities to further clarify why it is that the exemption rule does not have undue adverse effects on competition and to submit further information to back this up.
- (35) The Norwegian authorities have stressed that it is evident that the exemption rule has an incentive effect. Incentive effect of an aid cannot merely be assumed. While it is not necessary to provide individual evidence that aid under a scheme provides each beneficiary with an incentive, on an individual basis, to carry out an activity it would not otherwise have carried out, the incentive effect must, at the least, be based on sound economic theory. It is not sufficient merely to refer to an alleged obviousness. While it is true that the exemption rule for companies registered outside the eligible areas reduces labour costs for ambulant services in the eligible areas, the Norwegian authorities have not provided evidence or arguments to the effect that it is likely that, in the absence of aid, the level of economic activity in the area would be significantly reduced due to the problems that the aid is intended to address<sup>(3)</sup>.
- (36) The Norwegian authorities have explained that undertakings performing ambulant services to some extent can register sub-units in the eligible area. Moreover, they are required to do so when at least one employee carries out work for the parent unit in a separate area, and the undertaking may be visited there.
- (37) The Norwegian authorities argue that in the absence of the exemption rule for ambulant services in the eligible area, there would be an unjustified difference in treatment depending on whether the service providing undertaking had established a sub-unit in the eligible area.

<sup>(1)</sup> Para. 43 of the RAG.

<sup>(2)</sup> Based on the notified 2013 budget, see para. 49 of the Authority's Decision No 225/14/COL.

<sup>(3)</sup> Para. 71 of the RAG.

- (38) Firstly, it is not clear to the Authority what the requirement that 'at least one employee carries out work for the parent unit in a separate area, and the undertaking may be visited there' entails. The Authority therefore invites the Norwegian authorities to clarify this.
- (39) Secondly, the the principle of equal treatment is a general principle of EEA law. However, this cannot in and of itself serve as a basis to justify the exemption rule. The exemption rule must itself be compatible with the functioning of the EEA Agreement.
- (40) In conclusion, the absence of the relevant information, as described above, leads the Authority to have doubts about the compatibility of the exemption rule with the functioning of the EEA Agreement.

#### 4. Conclusion

- (41) As set out above, the Authority has doubts as to whether the exemption rule for ambulant services under the scheme on differentiated social security contributions 2014-2020 is compatible with the functioning of the EEA Agreement.
- (42) Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open a formal investigation procedure is without prejudice to the final decision of the Authority, which may conclude that the measure is compatible with the functioning of the EEA Agreement.
- (43) The Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Norwegian authorities to submit, by 10 January 2016 their comments and to provide all documents, information and data needed for the assessment of the compatibility of the measure in light of the state aid rules.
- (44) The Authority reminds the Norwegian authorities that, according to Article 14 of Part II of Protocol 3, any incompatible aid unlawfully granted to the beneficiaries will have to be recovered, unless this recovery would be contrary to a general principle of EEA law, such as the protection of legitimate expectations.

HAS ADOPTED THIS DECISION:

#### *Article 1*

The formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 is opened into the exemption rule for ambulant services under the scheme on differentiated social security contributions 2014-2020.

#### *Article 2*

The Norwegian authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure by 10 January 2016.

#### *Article 3*

The Norwegian authorities are requested to provide by 10 January 2016, 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 language version of this decision is authentic.

Done in Brussels, on 9 December 2015

*For the EFTA Surveillance Authority*

Sven Erik SVEDMAN  
*President*

Helga JÓNSDÓTTIR  
*College Member*