



## ORDER OF THE COURT

11 December 1998

*(State aid – Suspension of operation of a measure)*

In case E-6/98R

**The Government of Norway**, represented by Ingvald Falch, the Office of the Attorney General (Civil Affairs), acting as Agent, and Jan Bugge-Mahrt, Assistant Director General, Royal Ministry of Foreign Affairs, acting as Co-agent,  
*applicant,*

v

**The EFTA Surveillance Authority**, represented by Håkan Berglin, Director, Legal and Executive Affairs, acting as Agent,  
*defendant,*

**APPLICATION** under Article 40 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the “Surveillance and Court Agreement”) and Article 80 of the Rules of Procedure, for an interim measure in the form of suspension of the application of Decision No. 165/98/COL of the EFTA Surveillance Authority of 2 July 1998, with regard to State aid in the form of regionally differentiated social security contributions.

*Grounds*

- 1 On 2 July 1998, the EFTA Surveillance Authority rendered a decision (Decision No. 165/98/COL, hereinafter the “Decision”), in which it found that the scheme of regionally differentiated contribution rates for employers under the Norwegian social security system, was incompatible with the Agreement on the European Economic Area (hereinafter variously “EEA” and “EEA Agreement”).
- 2 By an application lodged at the Court Registry on 2 September 1998, the Government of Norway brought an action under the first paragraph of Article 36 of the Surveillance and Court Agreement for annulment of the Decision.
- 3 By a document lodged at the Court Registry on 16 November 1998, and pursuant to Article 40 of the Surveillance and Court Agreement, the Government of Norway applied for suspension of the application of the Decision until the Court had delivered its judgment in the main case.
- 4 The EFTA Surveillance Authority submitted its observations on the application on 24 November 1998.
- 5 Pursuant to Article 80 of the Rules of Procedure, the President referred the application to the Court.
- 6 An oral hearing was held at the Court on 10 December 1998, where Mr Falch and Mr Berglin spoke on behalf of the Parties and answered the questions of the Court.

*The Decision*

- 7 Under the National Insurance Act of 28 February 1997 (*Folketrygdloven*), all persons working in Norway are subject to a compulsory insurance scheme under which employees and employers pay social security contributions, calculated on the basis of gross salaries. The scheme covers benefits such as pensions, rehabilitation, medical care, wage compensation and unemployment benefits. Contributions to the scheme are collected in the form of a tax on income.
- 8 A system of regionally differentiated tax rates for employers was introduced in 1975, dividing the country into five tax zones for the purpose of the scheme:

Zone 1: Central municipalities in southern Norway	14.1 per cent
Zone 2: Rural districts in southern Norway	10.6 per cent
Zone 3: Coastal area mid-Norway	6.4 per cent
Zone 4: Northern Norway (except zone 5)	5.1 per cent
Zone 5: Spitzbergen/Finmark/Northern part of Troms	0 per cent

- 9 In a letter dated 16 June 1995, the EFTA Surveillance Authority asked the Norwegian Government to submit full details on the existing scheme for social security taxation in Norway, in particular on the system of regionally differentiated social security contributions paid by employers, with a view to examining the compatibility of the system with Article 61 of the EEA Agreement.
- 10 The Norwegian Government responded in a letter of 19 September 1995.
- 11 In the period between the spring of 1996 and the spring of 1997, the EFTA Surveillance Authority and the Norwegian authorities held a number of informal meetings aimed at elucidating the nature of the Norwegian scheme for social security taxation.
- 12 Concluding that the scheme of regionally differentiated social security contributions in Norway involved State aid within the meaning of Article 61(1) that could not be upheld under Article 61(3) EEA, the EFTA Surveillance Authority, in a letter dated 14 May 1997, proposed appropriate measures to Norway, in accordance with Article 1(1) of Protocol 3 to the Surveillance and Court Agreement. These measures were, however, not adopted by the Norwegian Government.
- 13 Following formal investigation proceedings, on 2 July 1998, the EFTA Surveillance Authority rendered its above-mentioned Decision, in accordance with Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.
- 14 The operative part of the Decision reads:

“1. The system of regional differentiation of employers’ social security contributions in Norway is incompatible with the EEA Agreement in so far as,

a) it applies to activities not referred to in point b) below, unless it is confined to areas which have been notified to the Authority and found eligible for regional transport aid,

b) it allows for the following kind of enterprises to benefit from the lower social security contribution rates applied in zones 2-5,

- enterprises engaged in Production and distribution of electricity (NACE 40.1)

- enterprises engaged in Extraction of crude petroleum and gas (NACE 11.10)

- enterprises engaged in Service activities incidental to oil and gas extraction excluding surveying (NACE 11.20)

- enterprises engaged in Mining of metal ores (NACE 13)

- enterprises engaged in activities related to the extraction of the industrial minerals Nefeline syenite (HS 2529.3000) and Olivine (HS 2517.49100)
  - enterprises covered by the act referred to in point 1b of Annex XV to the EEA Agreement (Council Directive 90/684/EEC on aid to shipbuilding)
  - enterprises engaged in production of ECSC steel,
  - enterprises with more than 50 employees engaged in Freight transport by road (NACE 60.24)
  - enterprises engaged in the Telecommunications (NACE 64.20) sector
  - enterprises having branch offices established abroad or otherwise being engaged in cross-border activities related to the following sectors, namely, Financial intermediation (NACE 65), Insurance and pension funding (NACE 66), and Services auxiliary to financial intermediation (NACE 67), with the exception of branch offices only providing local services.
2. For the system of regionally differentiated social security contributions from employers to be adapted in such a way that it would become compatible with the rules on regional transport aid as reflected in the Authority's State Aid Guidelines and allow the Authority to carry out its surveillance functions in accordance with Article 1 of Protocol 3 to the Surveillance and Court Agreement, in addition to the adjustments required by points 1 (a) and (b) of this decision, the following conditions would have to be complied with:
- a) The applicability of the system would have to be limited in time, not going beyond 31 December 2003. Before that time, a request for extension may be submitted for examination by the Authority.
  - b) The Norwegian Government would be required to submit detailed annual reports on the aid scheme in accordance with the format indicated in Annex III of the State Aid Guidelines. As foreseen in Chapter 32 of the State Aid Guidelines, those reports would have to cover two financial years and be submitted to the Authority not later than six months after the end of the financial year. The first report is to be submitted before 1 July 2000.
  - c) In accordance with the rules on regional transport aid, the detailed annual reports would have to show, in addition to information required according to point (b), the operation of an aid-per-kilometre ratio, or of an aid-per-kilometre and an aid-per-unit ratio.
  - d) The detailed annual reports would also have to contain, in addition to information required according to points (a) and (c), the estimated amounts of indirect compensation for additional transport costs in the form of lower social security contributions received by enterprises in the sectors covered by special notification requirements (motor vehicle industry, synthetic fibre industry and non-ECSC steel industry).

- e) For production covered by the specific sectoral rules related to synthetic fibres, motor vehicles and non-ECSC steel, the Norwegian Government would have to notify the Authority of any recipients of aid benefiting from the lower social security contribution rates in zones 2-5.
- f) The Norwegian authorities would have to introduce specific rules to ensure that overcompensation due to the cumulation of regional transport aid from different sources will not occur.
3. Norway shall take the necessary measures to ensure that the aid which the Authority has found incompatible with the functioning of EEA Agreement is not awarded after 31 December 1998 and, where applicable, that the conditions in point 2 of this decision are complied with. It shall inform the Authority forthwith of the measures taken.
4. This decision is addressed to Norway. The Norwegian Government shall be informed by means of a letter containing a copy of this decision.”

*Arguments of the Parties*

- 15 In support of its application for interim measures, the *Government of Norway* has referred to its submissions in the main action: first, that the system at issue is part of the general tax system in Norway and sufficiently general in nature so as not to involve State aid favouring certain undertakings within the meaning of Article 61(1) EEA; secondly, that the EFTA Surveillance Authority acknowledges that not all the aid covered by the Decision affects trade between Contracting Parties and that it warrants the annulment of the Decision, and that the EFTA Surveillance Authority has failed to decide which parts of the system, or aid granted under the system, infringe Article 61(1) EEA. Thirdly, the Government of Norway submits that the EFTA Surveillance Authority has not provided an adequate statement of reasons on the points identified above.
- 16 As to the urgency of the measure, the Government of Norway submits that the amendments required in the Decision are substantial and would have to be prepared thoroughly, from a legal, administrative and economic standpoint, and that the effects of the required changes might be extensive. The Government of Norway states that the scope of the Decision makes the case unique compared with more traditional State aid cases, which usually affect one or a few undertakings. In this case, the scope is so wide and general that it is impossible to predict with any certainty what effect it will have on society if the Decision is to be implemented on 1 January 1999.

- 17 The Government of Norway has presented certain evidence on selected sectors supporting its submission that it would have grave consequences for companies if the maximum social security tax rate was to be applied. The Government of Norway maintains that it is established beyond doubt that many jobs will be endangered if the Decision is implemented on 1 January 1999. In some instances, the future of local communities may be jeopardized if enterprises terminate their activity or move their operations. The damage caused to the employees, as well as the consequences for unemployment and recession in the local communities, would most likely be serious and irreparable.
- 18 The Government of Norway further submits that there are no weighty arguments against suspension of the application of the Decision for the short period until the Court has given judgment in the main case.
- 19 *The EFTA Surveillance Authority* submits that the Government of Norway clearly falls short of establishing a *prima facie* case for granting an interim measure.
- 20 The EFTA Surveillance Authority submits that no evidence has been provided of imminent risk of serious and irreparable damage to Norway and that there is a manifest lack of any causal link between the damage referred to by the Government of Norway and the implementation of the Decision. The EFTA Surveillance Authority notes in particular that it does not follow from the decision that maximum rate contributions should be required from all employers.
- 21 As the Government of Norway has, in the view of the EFTA Surveillance Authority, failed to establish a *prima facie* case and to show an imminent risk of serious and irreparable damage to its interests, the EFTA Surveillance Authority argues that a balance of the various interests involved is not needed. However, if this were to be carried out, the EFTA Surveillance Authority notes that the interest against which the granting of a suspension is to be weighed is the interest of competitors in undertakings presently benefiting from the aid.

#### *Findings of the Court*

- 22 Pursuant to Article 40 of the Surveillance and Court Agreement, actions brought before the Court do not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.
- 23 Pursuant to Article 80(2) of the Rules of Procedure, an application for suspension of application shall state the subject-matter of the proceedings, the circumstances

giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for.

- 24 Although the Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow the jurisprudence of the Court of Justice of the European Communities (hereinafter the “ECJ”) with regard to the interpretation of the main part of that Agreement, the Court finds it relevant to consider such jurisprudence of the ECJ with regard to corresponding provisions of the EC Treaty. See the Court’s decision in Case E-1/94 *Restamark*, at paragraph 24.
- 25 The ECJ and the Court of First Instance have consistently held, that suspension of the operation of an act may be ordered if it is established that such an order is *prima facie* justified in fact and in law and that it is urgent in the sense that, in order to avoid serious and irreparable damage to the its interests, it must be made and take effect before a decision is given in the main action. Where appropriate, the competing interests involved have to be weighed up (see *inter alia* Joined Cases C-239/96 R and C-240/96 R *United Kingdom v Commission* (1996) ECR I-4475, at para. 31).
- 26 As regards the first requirement, the *prima facie* justification of such an order, the Court notes that the issues in the present case are the questions whether and to what extent a general social security system in part financed by regionally differentiated contributions from employers contravenes Article 61 EEA on State aid. The Court further notes that this case is the first to raise the issue whether a system as such falls under the State aid regime of the EEA Agreement. It is sufficient to state that the action for annulment raises complex questions of law which call for an in-depth consideration and that the application cannot be said to be wholly unjustified. The Court finds, therefore, that the application cannot be rejected on the ground that the Government of Norway has not established a *prima facie* case for accepting the measure.
- 27 As regards the urgency of the measure, according to relevant case law of the ECJ, the Government of Norway must show serious and irreparable damage to its interests, a criterion which does not allow damage caused to economic operators to be taken into account (see *inter alia* Case-32/89 R *Greece v Commission* (1989) ECR 987, at para. 16.). The Court notes, however, with regard to the nature of the damage which may be invoked by a Contracting Party, that States are responsible for interests, in particular those of an economic and social nature, which are regarded as general interests at a national level. They may, therefore, invoke damage affecting a whole sector of their economy, in particular when the contested decision may entail unfavourable repercussions at the level of employment or similar matters of concern to the population (see Case C-280/93 R *Germany v Commission* (1993) ECR I-3668, at para. 27).

- 28 The Court has considered the argument of the Government of Norway that, because of the wide and general scope of the Decision, the exact consequences are not easily assessed. The Court finds, in the circumstances of this case, that the burden of proving that serious and irreparable damage may be occasioned by the immediate application of the Decision must consequently be eased.
- 29 The Government of Norway has argued that implementing the Decision may have serious and irreparable consequences for certain sectors of the economy, and in particular certain regions, affecting not only the enterprises but also the local communities through unemployment and recession. In light of the aim of the system, which is undisputedly of a political and social nature, and in light of the possibility of serious imminent consequences for the national interest, the Court finds that the application cannot to be rejected on the ground that the urgency of the measure has not been shown.
- 30 Finally, the Court notes that the disputed system with a regionally differentiated social security taxation was established in 1975 and has since been operated in Norway. While the Court does not underestimate the importance of the interest of economic operators within the European Economic Area, the Court finds, in balancing the interests at hand, that given the relatively short time until a final decision in the case can be reached and the extensive legal, administrative and economic preparation necessary to comply with the Decision, and because of its wide and generally formulated scope, it is in this case justified to grant the interim measure applied for.
- 31 Consequently, the Court holds, on the basis of Article 40 of the Surveillance and Court Agreement that the operation of the Decision shall be suspended until the final judgment of the Court is delivered.
- 32 The parties have not asked for costs in relation to this application.



On those grounds,

THE COURT

hereby orders:

**The application of Decision No. 165/98/COL of the EFTA Surveillance Authority of 2 July 1998 is suspended until the Court has delivered its judgment in the main action.**

Bjørn Haug

Thór Vilhjálmsson

Carl Baudenbacher

Luxembourg, 11 December 1998.

Gunnar Selvik  
Registrar

Bjørn Haug  
President