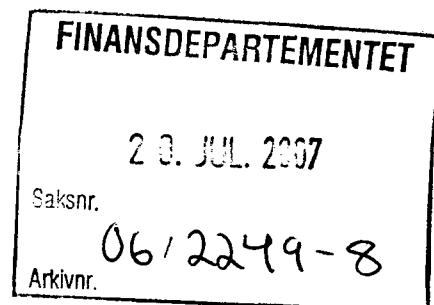




DET KONGELIGE FORNYINGS-
OG ADMINISTRASJONSDEPARTEMENT

Finansdepartementet
Postboks 8008 Dep
0030 OSLO



Deres referanse
06/2249 SL EB

Vår referanse
200604002-/HSK

Dato
19. juli 2007

Oversendelse av brev fra ESA med spørsmål til 0% merverdiavgift på salg av aviser

EFTAs Overvåkingsorgan (ESA) har til behandling en klage fra Magasin- og Ukepresseforeningen hvor det påstås at publikasjoner som nyter godt av 0% merverdiavgift mottar offentlig støtte.

ESAs foreløpige vurdering er at ordningen med 0% merverdiavgift innebærer offentlig støtte til publikasjoner i strid med EØS-avtalen artikkel 61. Norske myndigheter gis nå anledning til å kommentere ESAs foreløpige vurdering og til å svare på konkrete spørsmål som stilles i brevet. Brevet fra ESA følger vedlagt.

Vi ber om at Finansdepartementet utformer et svarbrev til ESA innen svarfristen 18. august 2007.

Med hilsen

Steinar Undrum (e.f.)
avdelingsdirektør

Helene Holth Skatvedt
rådgiver

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Brussels, 17 July 2007
Case No: 60647
Event No: 422043

EFTA SURVEILLANCE
AUTHORITY

Dear Sir/Madam,

**Subject: State aid: zero-rated VAT on newspapers
- Letter according to Article 17(2) in Part II of Protocol 3 to the
Surveillance and Court Agreement**

I. FACTS

1. Procedure

By letter dated 25 August 2006, Magasin- og Ukepresseforeningen (the Norwegian Weekly Press Association, hereinafter referred to as the "complainant") filed a complaint with the Authority regarding an alleged grant of aid to publications benefiting from a zero-rating for output VAT under the Norwegian VAT legislation. The letter was received and registered by the Authority on the same day (Event No 385379).

By letter dated 15 December 2006 (Event No 403529), the Competition and State Aid Directorate (hereinafter referred to as "CSA") forwarded the complaint to the Norwegian authorities and invited them to comment thereon.

By fax dated 31 January 2007 from the Norwegian Ministry of Government Administration and Reform, forwarding a letter from the Ministry of Finance dated 29 January 2007, received and registered by the Authority on 31 January 2007 (Event No 408279), the Norwegian authorities replied to CSA's invitation to comment.

By fax dated 22 March 2007, Mediebedriftenes Landsforening (the Norwegian Media Businesses' Association, hereinafter referred to as "MBL") commented on the matter under examination on the basis of a copy of the complaint which they had procured for themselves.

2. Legal framework relating to VAT and zero-rating in Norway

Value Added Tax was introduced in Norway with effect from 1 January 1970 by virtue of the Act relating to Value Added Tax of 19 June 1969 No. 66 (hereinafter referred to as the "VAT Act").¹

¹ lov av 19. juni 1969 om merverdiavgift.

Persons engaged in trade or business, whose taxable supplies exceed a prescribed threshold, are liable to register with the VAT authorities and must charge VAT on the goods or services they supply. The general rule is that registered persons may deduct 'input VAT' (the VAT paid by them for goods or services for use in their business) and this is generally done by setting it off against the 'output VAT' collected by them as a result of sales to their customers. Where the input VAT paid exceeds the output VAT collected, repayment can be claimed from the VAT authorities.

In Norway, the normal rate charged as VAT is 25% of the taxable base (the price of the goods or service before tax). The rate is stipulated annually by the Parliament. Two reduced rates apply: VAT is charged at 14% on foodstuffs and at 8% for certain specified services. Certain supplies are exempt from VAT; this means that the supplier of such goods and services is not permitted to charge output VAT on those supplies. The input tax paid by the suppliers of exempt goods and services is borne in full by them. A final category of goods and services are 'zero-rated' (output VAT is charged at 0%). The provisions of the VAT Act apply in full to such supplies, including the provisions relating to deduction of input VAT.

3. Description of the contested provisions

3.1 Zero-rated VAT and the supply of newspapers and periodicals

According to section 16 and 17 of the VAT Act, certain specified supplies are zero-rated. By virtue of section 16(7) and (8), this zero-rating applies to the supply of newspapers and periodicals but not magazines. Thus, the sale of newspapers and periodicals is subject to 0% VAT, whereas VAT is charged on magazines at the normal rate of 25%.

The concept 'newspaper', as used in section 16(7) of the VAT Act, is defined in accordance with the definition of the concept 'daily press' formulated by the State and Press Committee appointed in 1966 (the Hellerud Committee) to assess measures to maintain a differentiated daily press, in its recommendations of 28 September 1967. According to this definition, the following publications are defined as a 'newspaper':

- publications which are members of the Norske Avisers Landsforbund (National Federation of Norwegian Newspapers) and publish at least two editions per week;
- other publications which, due to their regular publication (at least two editions a week), give information to the public about topical matters and are sold in accordance with public price schedules;
- publications which, although published only once a week, fulfil the other conditions mentioned above and are based on political or idealistic ideas.

In 2001, the National Federation of Norwegian Newspapers was replaced by MBL, which has a much wider membership. The Norwegian Tax Directorate has therefore stated that it is no longer sufficient to be a member of that association. Thus, according to administrative practice, for a publication to be defined as a newspaper it must provide information of general public interest, such as politics, economics and cultural matters. In deciding whether a publication falls to be zero-rated for VAT or not, the amount of this so-called 'relevant news' is therefore decisive.

Pursuant to section 16(8) of the VAT Act, periodicals which are supplied at least 80% to subscribers or are distributed to members of a society, or whose content is predominantly political, literary or religious are zero-rated for VAT.²

3.2 The objective of the zero-rating on newspapers and periodicals

According to the Norwegian authorities, the supply of newspapers and periodicals is zero-rated for VAT in order to protect the speech community³ and information pluralism in Norway on the one hand and to avoid restricting the expression of public opinion and damaging cultural assets⁴ on the other hand.

3.3 National legal basis for the zero-rating for VAT of newspapers and periodicals

The zero-rating for VAT of newspapers and periodicals is provided for in section 16, paragraphs 7 and 8, respectively, of the VAT Act.

3.4 Recipients

All publications sold in Norway, whether foreign or Norwegian, which fulfil the conditions described above in 3.1 benefit from the zero-rating on output VAT.

3.5 Possible effect of the differentiated VAT rates

The complainant alleges that the zero-rating for VAT of newspapers may be regarded as constituting an indirect advantage for the undertakings benefiting from that rate as compared with competing publications that have to charge the consumers VAT. The complainant further alleges that the position of the newspaper publications can be regarded as having been made stronger than that of magazine publications. Thus, according to the complainant, zero-rating may have distorting effects on competition and may affect trade between the EEA States

4. Comments by the Norwegian authorities

By fax dated 31 January 2007 from the Norwegian Ministry of Government Administration and Reform, forwarding a letter from the Ministry of Finance dated 29 January 2007, the Norwegian authorities submitted comments on the complaint in the present case.

The Norwegian authorities provided a general overview of the Norwegian VAT system, described above, as well as the zero-rate applied to the sale of newspapers and periodicals. In this respect, they highlighted that the Norwegian VAT provisions are based on the same basic principles as those laid down in the VAT legislation applicable in the EU Member States. The Norwegian authorities then commented on the allegations made in the complaint.

² According to the Norwegian authorities, the content of, for example, Newsweek, Time and Der Spiegel is deemed to be 'predominantly political, literary or religious', whereas Life and Paris Match, for example, are considered not to fulfil that condition.

³ The Norwegian authorities assert that the preparatory works to section 16(7), Cf. Ot.prp. nr. 17 (1968-69) Om lov om alminnelig omsetningavgift og særskilt avgift på visse varer og tjenester (merverdiavgiftsloven) and Ot.prp. nr. 31 (1969-70) Om lov om endringer i lov om merverdiavgift, show that the Government considered that in a minor speech community, such as in Norway, it is justified to exempt newspapers from the burden of VAT.

⁴ In the bill sent to Parliament, reference was made to the view of the press organs that VAT on newspapers might restrain the expression of public opinion and damage cultural assets.

The Norwegian authorities asserted that the differentiated VAT rates on newspapers/periodicals as compared to magazines are in compliance with the provisions of the EEA Agreement. In support of this position, the authorities recalled the existence of different rates under the EU VAT legislation (including zero-rates by way of individual temporary derogation), and invoked the fact that several EU Member States apply reduced VAT rates to the supply of newspapers, with some even applying a zero-rate. They also highlighted that the zero-rating applies to all newspapers sold in Norway, whether foreign or Norwegian, and that no VAT is levied on the import of newspapers.

Finally, the Norwegian authorities alleged that, for example, in Belgium and Denmark the same situation exists with regard to differentiated VAT rates as between newspapers and magazines.⁵

5. Comments by MBL

By fax dated 22 March 2007, MBL submitted comments to the Authority relating to the complaint at hand. In that letter, MBL stated that the zero-rating for VAT of newspapers is not in breach of the EEA rules on state aid since the criteria for the application of Article 61(1) EEA are not fulfilled.

First, MBL submitted that no advantage exists since the contested provisions do not primarily benefit newspaper undertakings but rather consumers. Second, it asserted that newspapers and weekly press (magazines) are not competing products and that, therefore, the condition that competition must be distorted is not fulfilled. Third, MBL argued that the zero-rating for VAT does not affect trade between EEA States. It considered that, contrary to what the complainant claims, a parallel cannot be drawn between the decision of the European Commission in case relating to State aid no. C 63/03⁶ and the case at hand; Case C 63/03 concerned direct aid measures in favour of undertakings which moreover only applied to publications in the Italian language whereas the case at hand concerns non-discriminatory measures in favour of consumers. Finally, MBL asserted that, in the event that the zero-rating for VAT constitutes aid under Article 61(1) EEA, it falls under the scope of Article 61(3)(c) EEA, since the aim is to preserve information pluralism, which is an objective enshrined in the Charter of Fundamental Rights of the European Union, and the alleged aid measure is suitable and proportionate to this aim.

⁵ Cf. chapter V of Doc/1829/2006 of the European Commission "VAT Rates Applied in the Member States of the European Community - Situation at 1st September 2006". CSA notes from the table in chapter II of that document that a clear differentiation between the treatment of newspapers and what are referred to in the table as "periodicals" is only evident in the case of Denmark.

⁶ Commission Decision of 30 June 2004 on the measures notified by Italy in favour of the publishing industry (State aid no. C 63/03, OJ 2006 L 118, p. 8).

II. ASSESSMENT

1. The presence of state aid within the meaning of Article 61(1) EEA

1.1 Introduction

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.”

As a preliminary point, it must be noted that, as a general rule, the tax system of an EFTA State is not covered by the EEA Agreement. It is for each EFTA State to design and apply a tax system according to its own choices of policy. However, the application of a tax measure, such as the zero-rating of the supply of newspapers and periodicals, may be of such a nature as to bring the measure within the scope of Article 61(1) EEA. In this respect, Article 61(1) EEA does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.

As demonstrated below, an examination of the contested provisions would appear to lead to the preliminary conclusion that all of the elements of the definition of state aid within the meaning of Article 61(1) EEA are present.

1.2 Presence of state resources

To constitute aid, a measure must be granted by the State or through State resources.

Since the State is foregoing income which would normally devolve to the public purse, a zero-rate for output VAT may be regarded as granted by the State or through State resources.

1.3 Favours certain undertakings or the production of certain goods

First, to constitute aid, a measure must confer on the recipients, in this case newspaper publications, an economic advantage. This condition can be fulfilled by relieving the publisher of charges that are normally borne from its budget.

It is true that those who benefit from the zero-rate are first and foremost the consumers who pay a lower price for the newspaper. However, the complainant alleges the existence of an indirect competitive advantage to the extent that, assuming identical costs, the undertakings benefiting from the zero-rated VAT on their sales are in a position to charge less for their product than the competing product.

While CSA has some doubts as to whether an indirect advantage, should one be found to exist, suffices for the purposes of Article 61(1) EEA, the wording of that provision would appear not to exclude such an interpretation. On the contrary, a recent decision by the European Commission concerned a formal investigation opened precisely as a result of an

alleged indirect advantage for, *inter alia*, the producers of digital decoders via a subsidy to consumers for the purchase of the same.⁷

As stated in that decision, quantification of an indirect advantage may not be easy. However, CSA notes that this difficulty, relevant only in the event that illegal and incompatible aid is to be recovered, does not alter the qualification of a measure as an 'advantage'.

Second, to constitute aid, a measure must be selective in that it favours "*certain undertakings or the production of certain goods*".

The Norwegian VAT legislation would appear to fulfil this condition to the extent that the favourable rate only applies to certain publications.

1.4 Distortion of competition and effect on trade between Contracting Parties

Finally, to constitute aid, a measure must distort competition and affect trade between the Contracting Parties.

Some newspapers, and in particular the weekend supplements, have similar editorial content to that of magazines. It follows that these newspapers could be alternatives for a number of readers and are possibly in direct competition with magazines. Therefore, it would appear that the possibility for newspaper publications to charge a lower price than magazine publications strengthens the position of the former and thus has the potential to distort competition between these two types of publications and affect trade between the States in which they are established.

Indeed, the complainant states that the Norwegian Competition Authority has repeatedly found such distortion to be present. In its statement of 6 August 1999 it concluded that weekly magazines and single copy sale newspapers sometimes have similar content and may therefore compete in the same market, both with respect to readers and advertisers. The Norwegian Competition Authority queried whether the two types of publication should therefore be subject to the same level of VAT.

However, the information submitted by MBL suggests the contrary based on a report which concludes that the two types of publication are not in competition with one another.

At this stage, CSA is of the view that it cannot be excluded that competition between these two types of publication is distorted. In addition, the sectoral nature of the measure may, in itself, pose a problem both because of its selective nature and to the extent that any rate differential may lead to economic distortions.⁸

As regards effect on trade, it must be noted that there is no language criterion inherent in the contested provisions; sales in Norway of newspapers, whether foreign or Norwegian, benefit from a zero-rating for VAT. However, the complainant alleges that foreign interests in national operators or foreign operators on the domestic market are normally enough to establish such an effect. CSA is of the view that, insofar as publishing houses

⁷ Commission Decision of 24 January 2007 on the State aid implemented by the Italian Republic for the subsidised purchase of digital decoders (OJ 2007 L 147 p. 1).

⁸ For a discussion on the application in the EU Member States of VAT rates other than the standard rate and their impact on the functioning of the internal market, see the Communication of the Commission of 5 July 2007 (COM (2007) 380 final).

can, and do⁹, pursue their activity in different Contracting Parties, producing publications in different languages and competing for advertising, it cannot be excluded that the contested provisions, which lower the cost base for the undertaking benefiting therefrom, have an effect on trade between Contracting Parties.

The recent practice of the European Commission would also appear to indicate that the market for press publications is not exclusively domestic.¹⁰ Since such is the case in the European Union, there seems to be no reason why it should be any different also vis-à-vis the EFTA States.

2. Procedural requirements

Pursuant to Article 1(1) in Part I of Protocol 3 to the Surveillance and Court Agreement, *“the EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement”*.

Article 1(b)(i) in Part II of that Protocol defines existing aid as *“all aid which existed prior to the entry into force of the EEA Agreement”*. Section V of Part II of Protocol 3 governs the procedure regarding existing aid.

It would appear from the information provided by the Norwegian authorities that the zero-rating of VAT on newspapers has been applied since the VAT Act came into force in 1970. On that basis, the preliminary conclusion of CSA is that the contested provisions, to the extent that they satisfy the definition of aid, constitute existing aid.

3. Compatibility of the aid

Supposing that the contested provisions constitute aid within the meaning of Article 61(1) EEA, it must be assessed whether, as a result of the derogations in Article 61(2) and (3) EEA or other relevant rules, they can be declared compatible with the functioning of the EEA Agreement.

None of the situations foreseen in Article 61(2) EEA can be applied to the present case.

Neither paragraphs (a), nor (b) of Article 61(3) EEA appear to apply to the present case.

Next, it may be questioned whether the protection of cultural assets amounts to facilitating the development of certain economic activities, within the meaning of Article 61(3)(c) EEA. However, the Norwegian authorities have not specifically invoked this provision, nor have they provided any explanation of how the contested provisions *“do not adversely affect trading conditions to an extent contrary to the common interest”*.

⁹ On the one hand, Schibsted (VG, TV2, Aftenposten, Aftonbladet(Swedish)) is active abroad and is represented in 20 different countries. On the other hand, foreign magazines (for example Time, Paris Match etc) are distributed in Norway and, as highlighted by the Norwegian authorities, do not qualify for the zero-rating on VAT.

¹⁰ See, for example, Commission Decision of 30 June 2004, referred to above at footnote 6, Commission Decision of 16 June 2004 on the distribution of certain journals and periodicals in Denmark (State aid no. N 631/2003), in particular at point 15 and footnote 11 which reads as follows: *“It should also be remarked that the potential cross-border dimension of publishing in certain circumstances, even if in national language, has been established by the Council in Resolution 2001/C73/03 concerning price setting in book markets [...]”*, and Commission Decision of 16 May 2006 on subsidies to weekly newspapers in Denmark (State aid no. N 25/2006), at point 21.

In this context, it must be noted that the promotion of cultural and heritage conservation is not specifically referred to in the EEA Agreement. In any event, the cultural derogation contained in Article 87(1)(d) of the EC Treaty has been interpreted restrictively and would appear not to cover the promotion of democratic debate and the diffusion of information.¹¹

Indeed, on the basis that the contested provisions are intended, according to the Norwegian authorities, to protect information pluralism (it being feared that VAT on newspapers might restrain the expression of public opinion and damage cultural assets), CSA acknowledges that there are no existing frameworks or guidelines applicable to the assessment of measures such as those in the case at hand.

It would therefore appear to CSA that any assessment of compatibility with the functioning of the EEA Agreement must be carried out on the basis of Article 61(3)(c) EEA, referred to above. The extent to which the zero-rating of newspapers and periodicals, as defined in the VAT Act, adversely affects trading conditions must be examined. It must be ascertained that any adverse effect is outweighed by the advantages of the system and is not of such extent as to be contrary to the common interest.

CSA is not in possession of the information necessary to carry out such an assessment and the Norwegian authorities have not contended that the adverse effect, if any, of the zero-rating for VAT of newspapers and periodicals is of such little effect as to be in no way contrary to the common interest. CSA is therefore not in a position to conclude that the contested provisions are compatible with the functioning of the EEA Agreement.

4. Conclusion and invitation to comment

Based on the information submitted by the Norwegian authorities, CSA cannot exclude the possibility that the contested measures constitute aid within the meaning of Article 61(1) EEA. Furthermore, CSA doubts that these measures can be regarded as complying with Article 61(3)(c) EEA. The preliminary conclusion of CSA is therefore that the contested provisions constitute aid within the meaning of Article 61(1) EEA and cannot be declared to be compatible with the functioning of the EEA Agreement.

Consequently, the Authority is required, pursuant to Article 17(2) in Part II of Protocol 3 to the Surveillance and Court Agreement, to inform you of its preliminary view. In accordance with that Article, the Norwegian authorities are hereby invited to comment on CSA's preliminary assessment **within one month** of receipt of this letter.

The Norwegian authorities are, in particular but not exclusively, invited to provide all information necessary:

- to conclude the assessment of the elements of the definition of aid and whether the various types of publication are in competition with one another. In this respect, any relevant statements by the Norwegian Competition Authority would be useful; and
- to make a full compatibility assessment in the event that the presence of aid is confirmed.

¹¹ See, for example, Commission Decision of 16 June 2004, referred to at footnote 10 above. See, by contrast, Commission Decision of 17 July 2006 (State aid no. N 1/2006) and three Commission Decisions of 11 December 2006 (State aid no. N 660/2006, N 663/2006 and N 664/2006), which do fall under the cultural exception.

If the Authority does not receive, within the stipulated time, information which is of such a nature as to alter the preliminary assessment of CSA, it will be required to act in accordance with the procedure laid down in Article 18 in Part II of Protocol 3 to the Surveillance and Court Agreement and propose appropriate measures in respect of the aid concerned.

Yours faithfully,



Amund Utne
Director
Competition and State Aid Directorate