

**The Norwegian cash refund of the tax
value of petroleum exploration costs**

- the

question of selectivity in practice,

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Complaint

- Norway is granting NOK 10 billion in unlawful state aid to undertakings engaging in petroleum exploration

Procedure

Bellona, “interested party”?

- EU side - procedural regulation of 2015, *locus standi*
- EFTA side - not yet implemented, no rules on *locus standi*, ESA has to deal with complaints from parties that are not interested parties
- Still waiting for the procedural regulation

- No aid decision, 20 March 2019
- Not appealed before the EFTA Court

Substance

Petroleum Extraction

- Four successive phases

1. • Exploration

2. • Development

3. • Production

4. • Closure



Licensing regime

- Production license
 - **Necessary** for extracting petroleum
 - Gives **exclusive right** to survey, exploration drill and produce petroleum in areas covered by the license
 - License holder becomes **owner** of the petroleum produced
 - **Transferable** (subject to the approval of the Ministry of Petroleum)

Economic snapshot

- NOK 170 billion invested annually
- NOK 4500 billion present value of future revenues
- NOK 3900 billion portion of the Norwegian State

Petroleum Tax Act (PTA)

PTA

- Introduced in 1975
- Aim to capture excess profit (resource rent)

PTA

- A tax on overall net income
 - Deductions, allowed for all relevant costs
 - Investments, written off on 6 year, straight-line depreciation
 - Consolidation between fields allowed
- 23% Ordinary corporate income tax (2018)
- 55% Special tax (2018)
- 78% Total (2018, unchanged since 1992)

PTA 2002 amendment

- Companies in non-tax paying position can add interest to losses carried forward
- Allow companies to maintain the full (net present) value of tax deductions
- Beneficial for new entrants

PTA 2005 amendment

- Refund of the tax value of exploration costs
- The measure challenged by the complainant
- Introduced an element of cash flow taxation
 - Positive and negative cash flows are treated symmetrically
 - When eligible exploration costs exceed consolidated company income (all income) - a negative tax - payment by the state to the company
- Applies to the entire 78% tax base
- Alternative to carrying losses forward with interest
- Beneficial for new entrants

Complaint

- Discrimination of other:
 - petroleum activities (not exploration)
 - energy sectors (renewable - onshore and offshore wind & solar)
- Unique in EEA, not a regular tax measure, should not be assessed as such. A grant covering operating expenses, regular selectivity test, not three-step test for tax measures
- If three-step test, reference system is petroleum tax system. Prima facie selective, benefits non-profit making companies in exploration phase. No justification on the basis on an intrinsic logic. Higher tax revenue for the state is an external policy objective

ESA assessment of selectivity, three-step test

Applicability

- Applicability - three-step analysis applies
- The European courts have accepted the application of the three-step analysis to sectoral measures (airport charges in Lübeck)
- Cash flow tax is a well-known concept in tax literature
- Tax-like. Applies across the board to all companies with certain characteristics, rights-based, tax authorities have limited discretion

Application, identification of the reference system

- Tax is competence of the EEA States
- Particular sector. Extraction of a natural resource with super profits. Large upfront investments, long production period, high sunk costs, finite resource
- Maximise public good (tax revenue), whilst retaining investment incentives
- Differs from regular tax. In incentive and in burden
- PTA sets out regime specifically designed for petroleum sector. PTA has a wider geographical scope than the Norwegian tax act (continental shelf). Other energy sectors, other economic and regulatory circumstances. Special resource tax on hydropower, separate reference system
- PTA refers to Tax Act. Legislative technique not decisive. Does not mean that reference framework consists of the two acts

Application, *prima facie* selectivity, 1st comparison group

- Exploration, undertakings not in tax position v those in tax position
- Is the tax reimbursement a *prima facie* advantage for the companies not in a tax position?
- No
 - Similar system of loss carry forward is a normal feature of tax systems (Dirk Andres v Commission, C-203/16 P). Undertakings making net profits have no (net) losses to carry forward. No difference in treatment
 - Same should apply for tax reimbursement under a cash flow tax

Applicability, *prima facie* selectivity, 2nd comparison group

- Exploration v other phases
- Is the cash refund an advantage for undertakings in the exploration phase, versus those active in other phases?
- No
 - Necessary, integral & indispensable part of petroleum extraction
 - Numerous undertakings active on the Norwegian continental shelf. Increase since 2005