BELLONA

Oslo, 21 August 2017

Complaint regarding the Norwegian Petroleum Taxation Act of 1975, as amended in 2005 with regards to the up-front cash flow reimbursement scheme for all direct and indirect exploration expenses

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1. Background and introduction

Subsidies to fossil fuels are amongst the main obstacles to reaching the goal of limiting climate change to 2 degrees Celsius. Over the past years, Norway has paid 35 billion Norwegian kroner (NOK) yearly in tax reimbursement to the petroleum sector, a figure that does not include other advantageous deduction measures.

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Parallel to the international United Nations negotiations on climate change, OECD countries have undertaken extensive efforts to reduce subsidies to consumption and production of fossil fuels. In 2009, OECD Member States unanimously adopted a call for "domestic policy reform, with the aim of avoiding or removing environmentally harmful policies that might thwart green growth, such as subsidies: to fossil fuel consumption or production that increases greenhouse gas emissions."

Similarly, the G-20 countries initiated the "Friends of Fossil Fuels Subsidy Reform" (FFFSR) with a view to advocating reform of inefficient fossil fuel subsidies on a global scale. In addition to G-20 countries, the FFFSR Group holds members from eight other countries including Norway.

In April 2015, the European Commission adopted its Guidelines on State aid for environmental protection and energy 2014-2020, providing rules for specific sectors and methods for granting state aid. The guidelines were subsequently adopted by the EFTA Surveillance Agency (ESA/the Authority) as customary under the Agreement on European Economic Area (EEA). These guidelines form the basis for this complaint.

The Norwegian tax regime for oil and gas exploration consists of a wide range of advantageous write off and deduction schemes. The Bellona Foundation[1] (Bellona) believes that in addition to the specific provision of this complaint, the accumulative effects of the collective amount of measures merits scrutiny by the Authority considering their distorting effects compared to tax regimes of other competing energy sources.

This complaint focuses on the specific provision regarding the up-front cash flow reimbursement of search activities (leterefusjonsordningen), which Bellona deems to be in breach of Article 61 of the EEA Agreement.

In this complaint, Bellona seeks to test the compliance of the specific provisions of the Norwegian Petroleum Taxation Act providing cash-flow revenue streams to companies engaged in search activities for oil and gas with Article 61 of the EEA Agreement, in light of both the EU Guidelines on State aid for environmental protection and energy and the Authority's Guidelines on the notion of State aid.

[1] The Bellona Foundation is an independent non-profit organization established to identify and implement sustainable environmental solutions to combat climate change, reach ecological understanding, protect nature as well as the environment and human health around the world. In addition to the main office in Oslo, Bellona has three international offices in Brussels (Belgium/EU), Murmansk (Russia) and St. Petersburg (Russia).

2. The Norwegian tax regime for petroleum exploration: the up-front cash flow reimbursement scheme

2.1 Background for introducing the cash flow reimbursement scheme

The up-front cash flow reimbursement scheme for search activities was introduced to the Norwegian Parliament in the government's proposition Ot.prp. nr. 1 (2004-2005).

The amendment proposal referred to the arguments put forward in the government's white paper St. mld. 38 (2001-2002), "About oil and gas activities", stressing the need to increase exploration in existing petroleum fields, increase search activities, reduce cost levels and further develop competence of the petroleum industry cluster.

The government drew particular attention to the petroleum sector being Norway's most important industry and creating large resources to fund the Norwegian welfare society. Continuing this level of activity would allow Norway to produce oil for another fifty years as a minimum, and natural gas in a hundred years perspective. In addition, the government focused on the Norwegian petroleum industry's potential internationally.

Another key argument put forward by the government for reaching efficient exploration of the petroleum resources was to ensure competition and industrial diversity on the Norwegian continental shelf. Equal tax conditions for new and existing operators was therefore regarded necessary.

The specific 2005 amendments to the Petroleum Taxation Act can be found here.

2.2 OECD view

In its efforts to establish inventories and transparency in subsidies devoted to fossil energy, the OECD has compiled an inventory of tax practices in key member and non-member countries. In its Inventory of estimated budgetary support and tax expenditures for fossil fuels from 2011, the OECD concludes that immediate write-off of exploration and development costs is considered a preferential treatment.

Moreover, the report states in its description of tax expenditures for resource extraction and the importance of the broader fiscal regime that "A present-value calculation would thus show a positive transfer from the government to the companies benefitting from such provisions."[2]

The OECD states that if such provisions prevent deduction of interest costs and other financing charges from taxable income, the scheme *may not* necessarily constitute a preferential treatment. It further states that such schemes, referred to as "cash-flow taxation", are *theoretically* equivalent to more common tax systems where the objective is to levy a neutral business tax.

As described in the OECD report, energy in Norway is subject to several environmental tax measures. A CO_2 tax was introduced in 1991 to the offshore petroleum sector. Considered as a deductible operating cost for income tax purposes, the net effect of CO2 tax is lower that its gross amount. The Norwegian offshore petroleum sector is also subject to the EU Emissions Trading System (ETS), but in order to avoid double taxation, the ETS is subtracted from the national CO_2 tax.

2.3 The different schemes under the tax regime for petroleum exploration

Under the Petroleum Taxation Act, companies with taxable income can deduct 78 percent of all direct and indirect exploration costs off of their taxes. Since 2005, companies that do *not* have taxable income have been reimbursed for the value of this tax benefit directly in cash. It is this up-front cash flow reimbursement that Bellona deems to be in breach of the ESA Guidelines on State aid to environmental protection and energy.

It is to be noted that the government hares symmetrically in both profits and losses from exploration and production of petroleum products; income from oil and gas production is taxed at a rate of 24 and 54 per cent - the latter being a special resource tax, and the former the ordinary corporate income tax.

In addition to the up-front cash flow reimbursement, the petroleum industry also enjoys several other favourable taxation provisions. For general income tax purposes, depreciation expenses are calculated according to rules that are unique to the petroleum industry; the expenses incurred in acquiring pipelines and production facilities can be completely written off in a straight line over six years, starting from the year when the investment was made. This can be done by up to 16.66 percent annually.

[2] Box 2.5: Tax expenditures for resource extraction and the importance of the broader fiscal regime, Inventory of estimated budgetary support and tax expenditures for fossil fuels, OECD 2015.

The tax base for calculating a special resource tax is the ordinary income-tax base, from which cost uplift is deduced. The cost uplift implies that the petroleum industry is allowed to write off as much as 30 per cent of the value of depreciable operating assets as of 2005 in straight line over four years, starting from the year when the investment was made, i.e. up to 7.5 per cent annually.

If a company incurs losses in a given year, these losses can be carried forward (with interest, since 2002). If oil and gas companies terminate their activities in Norway with losses, the government will reimburse the tax value of those losses. Since 2005, oil and gas companies reporting a loss for tax purposes can also obtain a reimbursement of the tax value (excluding financial expenses).

3. From 'tax model' to 'business model'

Of the 74 petroleum companies listed in the tax registry list for 2015, only twenty companies were in a tax situation. The remaining companies received payments of a total of 13 billion NOK from the Norwegian state. Since the specific provision entered into force in 2005 and through 2015, the Norwegian state has paid a total of 91.3 billion NOK to companies without any other income.

Figures from The Norwegian Petroleum Tax Office show that Maersk Oil Norway AS did not pay any tax in Norway during the period 2006-2015. Maersk received 4.8 billion NOK from the Norwegian state during the same period. Similarly, BG Norway received 5.3 billion NOK and Suncor Energy Norway AS 4.7 billion NOK during this same period.

North Energy AS received a total of 2.7 billion NOK from the government during the period 2007-2016 without having discovered an operational field. Another company, Spike Exploration AS, received 2 billion NOK over a three-year period from 2012–2015.

The leading consulting and strategy company KPMG describes on its home page that "This is a relatively unique provision. The (tax) provision makes it easier for new companies to establish on the Norwegian continental shelf without first having to purchase production in order to compete on relatively equal terms as companies that are already in a fiscal position. *(«Dette er en relativt unik ordning. Ordningen gjør det lettere for nye selskap å etablere seg på norsk sokkel uten først å måtte kjøpe produksjon for å konkurrere på noenlunde lik linje med selskap som allerede er i skatteposisjon».)*

KPMG furthermore says that it is possible to pledge (pantsette) an amount according to the tax value, which allows for the expenses related to search activities to be covered by bank financing with up to 78 per cent. *(«mulig å pantsette utbetalingen av skatteverdien, noe som medfører at leteutgifter kan belånes med opp til 78 %.»)*

Dr. Helge Ryggvik, professor at the Centre for Technology, Innovation and Culture at the University of Oslo has expressed (in Norwegian) that petroleum companies are now being established with specifically dedicated legal structures with a view to placing themselves in a position to benefit from the cash-flow tax scheme. “Most of the oil-mosquitos have been and are speculating to benefit from the scheme, as I see it. They have not discovered any oil or gas of considerable meaning, but have nevertheless received state aid at billion kroner levels.” (Bellona’s translation.)

4. The up-front cash flow reimbursement scheme for the petroleum sector as discriminatory vis-a-vis tax regimes for renewable energy

Bellona believes that the cash flow scheme has a discriminatory effect towards investments in the energy sources that the society is highly in need of.

Increased production and consumption of energy from renewable sources, such as wind and sun power, are highly demanded in order for Europe and the world to reach the goals of the Paris Agreement of a maximum 2 degrees Celsius temperature change – with the aim of limiting it to 1.5 degrees Celsius.

Through the cash flow scheme, the petroleum sector can earn vast income from day one without taking enormous investment risks. In the renewable sector, on the other hand, large investments are required, with income being generated only over the long run.

The Norwegian-Swedish green electricity certificate scheme has no direct bearing on the cash flow reimbursement scheme. Under this market based support scheme, electricity producers are awarded one certificate per MWh renewable electricity that is generated for a period of 15 years. Electricity suppliers and certain consumers are obliged to buy these certificates and thus ensure added income for producers investing in electricity generation from renewable energy sources.

If anything, the support element in the electricity certificate scheme is illustrative of the incremental support provided to the renewable sector compared to that of oil and gas. An offshore floating wind power installation on the Norwegian Continental Shelf belongs to the ordinary corporate tax scheme of 24 per cent. This wind energy project will not benefit from the advantageous cash flow scheme with a view to exploring fossil energy sources close by.

In an integrated energy marked, such separate and vastly different tax and support incentives results in a considerable distortion of competition between the two energy sources.

5. Lack of proper notification of state aid

According to the EEA agreement, Norway is obliged to notify ESA about favourable tax incentive schemes, particularly those that can have unintentional consequences.

The EU and ESA guidelines on state aid specifically note that such state aid schemes shall be notified and cleared before they enter into force. In case ESA does not approve the scheme, the state is obliged to demand reimbursement for the amount considered illegal aid.

Bellona cannot see that the Norwegian government has notified the Norwegian petroleum tax provisions to ESA. Bellona therefore asks ESA to require that all illegal support granted since the scheme entered into force in 2005 be reimbursed to the Norwegian government.

6. Legal arguments - why Bellona considers that the up-front cash flow reimbursement scheme constitutes incompatible state aid

Article 61(1) of the EEA Agreement defines State aid as *"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 […], in so far as it affects trade between Contracting Parties"*.

The reimbursement scheme in the present case is clearly granted to undertakings and financed through state resources. It is potentially, in terms of aid amounts, the biggest aid scheme in Norway with numerous beneficiaries, national and foreign undertakings in the oil and gas industry. Thus, there can be no doubt that the scheme potentially affects competition and EEA trade within the meaning of Article 61.

The issue that warrants an in-depth assessment is whether the reimbursement scheme involves selective advantages.

6.1 Selectivity - introduction

The European courts have over the years developed a special selectivity test for measures that mitigate the normal charges of undertakings, typically advantages granted within the scope of national tax provisions.

The test is described in the Authority's Guidelines on the notion of State aid at Paragraph 127:

> *127. The situation is usually less clear when EEA States adopt broader measures applicable to all undertakings fulfilling certain criteria, which mitigate the charges that those undertakings would normally have to bear (for instance, tax or social security exemptions for undertakings fulfilling certain criteria).*
>
> *128. In such cases, the selectivity of the measures should <u>normally</u> be assessed by means of a three-step analysis…* (underlined here.)

The reimbursement scheme is a part of the Norwegian Petroleum Taxation Act. However, the mere fact that the provisions on reimbursement are located in this act does not, in Bellona's view, entail that the provision should be assessed under the "normal" three-step analysis.

In Bellona's view, that test should only be applied to real tax advantages, i.e. provisions that regulate the tax burden of taxable persons.

The reimbursement provisions subject to the present complaint are certainly not regular tax provisions. On the contrary, they differ from regular tax provisions both in terms of **content** and **applicability**.

The cash grant reimbursement system is in its form and content a subsidy and not a tax advantage. The system pursues the expressed objective of increasing a certain economic activity in Norway, namely exploration for new oil and gas resources, in particular for small companies under establishment with limited capital. Reference is made to the preparatory works, Ot.prp. nr. 1 (2004-2005) Section 14.2.2 where the Ministry also describes the objective behind the legislative amendments in the following manner:

> *"An important element of a neutral petroleum tax system is that the tax rules do not prevent from a socioeconomic point of view, the desired exploration on the Norwegian shelf"* (Bellona's translation.)

The expressed objective behind the scheme, both when it was introduced in 2005 and later when the government decided to continue the scheme, is that it creates incentives for extensive search activities for new oil and gas reserves. It goes without saying that with more search activities,

more profitable resources to exploit may be discovered and this could in turn increase the taxable income for the state.

The scheme partly relieves the undertakings of the normal, inherent economic risk connected to search activities, namely that the search does not reveal sufficient natural resources to be exploited with sufficient surplus. This is a known and familiar risk in a number of activities linked to exploitation of natural resources.

As described above, the provisions provide for the possibility to obtain reimbursement, by a cash grant, to all companies that operate on the Norwegian shelf of their exploration expenses. The reimbursement system in Norway, as shown above, entails that many economic operators for years have benefitted from direct payments from the Norwegian state without ever becoming taxable in Norway.

These cash grants/direct payments entail that the state covers the operating expenses of the undertakings without any certainty of ever being able to recoup the expenses through a subsequent taxation. This entails in Bellonas's view that the grants should be assessed as subsidies and not as tax deductions. A tax deduction is normally only granted as a deduction in taxable income. From a tax point of view, the system therefore appears as *prima facie* unusually advantageous.

Such cash grants, in particular to non-taxable persons, are to Bellona's knowledge highly unusual in any given tax system, see also the description by KPMG above. Tax deductions of expenses to generate income are normally only given by means of deduction in taxable income. The normal way to ensure deductibility is to enable the tax payer to postpone tax deductions until the tax payer has sufficient income.

Bellona appreciates that oil and gas exploration and exploitation from the search phase till production may take a long time. This may justify the possibility to transfer such deductions over a longer time period than for other economic activities where the route to taxable income is shorter. Most tax systems have examples of such provisions. But to Bellona's knowledge, few if any has a system of yearly cash grants, independent of whether the tax payer is, or ever will be, taxable in that jurisdiction, and ever have sufficient income to deduct the expenses.

There is in other words an inherent lack of symmetry or tax logic in the system with no correlation between the grants to the individual companies and their future taxable income. The lack of symmetry in the system stems from the objective of the scheme, which is not built on the nature and logic of a normal tax system. It is built on a wish to increase a certain economic activity in Norway, namely exploration activities. The fact that such an increase in these activities may

ultimately entail a socioeconomic gain by way of higher tax revenue for the Norwegian state does not entail that the subsidies should be viewed as tax provisions. The same objective of socioeconomic gain is pursued by many other state aid schemes, such as R&D&I, regional schemes and even rescue and restructuring aid.

In Bellona's view, the cash grant reimbursement scheme should therefore not be assessed as a tax based advantage, as this could entail that operating aid schemes to benefit certain business sectors such as here, could be introduced in all sectors subject to specific tax reference systems. Bellona assumes that this concern is the reason for the Authority's reservation in the Guidelines on the notion of State aid Paragraph 128: "*the selectivity of the measures should **normally** be assessed by means of a three-step analysis"*. As explained above, the reimbursement scheme is in no way a normal tax deduction rule.

In Bellona's view the scheme in question should therefore be assessed according to the regular selectivity test. According to that test, measures granted only to undertakings in a specific sector of the economy are normally considered selective. This must, in particular, apply to the oil and gas sector that competes with other energy sectors. The Authority's previous practice regarding exemptions from CO2 tax provides several examples thereto.

In the alternative, if the Authority should consider the reimbursement scheme as tax advantages, the question of selective advantage should be assessed according the special test established by case law and reiterated in the Authority's notion of aid guidelines page 37 onwards. However, in Bellona's view, also under that test the measure should be considered selective within the meaning of the state aid rules.

6.2 Selectivity - the 3-step test for tax matters

The selectivity analysis for tax matters is described in the Authority's notion of aid guidelines Paragraph 128:

> *… First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. Assessing whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is prima facie selective.*

There is probably basis for considering the petroleum tax system as such as a separate reference system. Exploitation of these natural resources, with the inherent super profits may justify the existence of a separate reference framework limited to the petroleum act. Moreover, the petroleum tax system differs in many ways from the system of regular business taxation, both with regard to tax advantages and burden. For instance, the tax rate is sufficiently higher than for other companies that are subject to ordinary business taxation.

The question is then whether a derogation exists within the Petroleum Taxation Act reference system. The cash grants for companies that are not taxable in Norway, is limited to specific exploration activities. Other companies subject to the petroleum tax system that perform different activities are not granted similar advantages. Therefore, the system of cash grants to non-taxable persons appears also prima facie selective under the three-step test.

The question is therefore whether the derogation may be justified by the nature and logic of the tax system, cf. Guidelines on the notion of State aid Paragraph 128:

> *If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is prima facie selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system. If a prima facie selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 61(1) of the EEA Agreement.*

As explained above, to Bellona's knowledge, the cash reimbursements applicable to non-taxable persons that perform the specific exploration activities are indeed unusual in any tax system.

In order to assess the possible justification based on nature and logic, the starting point should be the objective of the measure and whether the said objective justifies derogation from the reference tax system. The test is further explained in Paragraph 138 of the notion of aid guidelines:

> *A measure which derogates from the reference system (prima facie selectivity) is non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent schemes necessary for the functioning and effectiveness of the system. In contrast, it is not possible to rely on external policy objectives which are not inherent to the system.*

As mentioned above, the system seeks to provide special incentives for specific economic activities consisting of exploration for oil and gas in Norway. This economic objective is to inflate the said exploration activities and thus make sure more oil reserves are discovered. That may in turn - ultimately - lead to socioeconomic gains, including higher tax revenue.

This desired "domino effect" of the scheme can only be characterised as an external policy objective. The end result of potential higher tax revenue for Norway does not derive directly from the reference system. Rather, it hinges on numerous, subsequent economic activities, i.e. production and sale of petroleum products, carried out later and by other legal entities than the non-taxable exploration companies that received the cash grants. Indeed, any argument that cash grants to non-taxable companies, i.e. outside the scope of the Petroleum Taxation Act, could be considered as an intrinsic or inherent part of that tax system, should be immediately rejected.

In Bellona's view, the desire for such increase in economic activity and hopefully higher total tax revenue should be considered as *external policy objectives* that are not possible to rely on. If such objectives could be relied on, then any aid scheme to increase economic activities on national soil would be justifiable since the aid ultimately could lead to a total increase in the state's tax revenue.

Thus, the possible nature and logic justification is not applicable to subsidies for which there is no tax logic, i.e. symmetry or correlation on the level of the individual tax payer. The pursuit of the external policy objective of boosting a certain economic activity as in this case, does not fall within the category of measures that *derive directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent schemes necessary for the functioning and effectiveness of the system*.[3]

Reference is also made to Paragraph 139 that lists typical examples of measures that may be justifiable based on the nature of a tax system. The measure at hand does clearly not belong in this category.

Bellona would finally submit that the measure in question should neither be accepted as non-selective. Rejecting the measure as non-selective would be in line with the case law referred to in Paragraph 129f of the notion of aid guidelines. The reimbursement system has as mentioned been designed in a clearly arbitrary or biased way, so as to favour non-taxable undertakings that perform exploration activities. This unusual advantage is only granted to such companies and is

[3] Reference is also made to a consistent string of case law regarding direct taxation and free movement. An overview of this case law can be found at:
https://ec.europa.eu/taxation_customs/sites/taxation/files/20170720_court_cases_direct_taxation_en.pdf
The European Court of Justice has required strict correlation and symmetry on the level of the taxpayer in order to accept justification grounds based on tax logic arguments.

not a result of an underlying, general logic applicable to all other non-taxable undertakings which for the purposes of experiencing similar problems of non-deductible expenses are in a comparable situation with regard to the underlying logic of the system in question.

6.3 Market remuneration or service of general economic interest

Once the state aid nature of the scheme has been established, the Norwegian authorities may invoke arguments that the reimbursement scheme should be considered as payment for services which the Norwegian economy will ultimately gain from. Payment for services may escape the state aid rules either if the payment can be viewed as market based payment for regular services, or marked based payment for SGEI.

However, even though creating incentives for search activities is based on an economic interest for the Norwegian state, Bellona does not believe that the reimbursement can be viewed as market based acquisition of an exploration service by the state.

The state, in its capacity as tax collector, cannot be viewed as a market operator that may trade tax benefits for future gain. Such arguments have been submitted by the Norwegian government, but as far as Bellona knows these have consistently been rejected by the Authority. The most prominent example is the Mongstad case, Decision 503/08/COL, in which the Norwegian government submitted that the investment in CO2 capture and storage technology would increase the future value of the oil and gas resources and therefore in the long run be profitable for the state due to its numerous economic interests in the oil and gas sector, including tax revenue.

These arguments were rejected by the Authority in Section 1.2 of the Mongstad decision.[4] In Bellona's view the Authority should continue to reject such arguments that blur the line between the public, regulatory role of the state and its non-related commercial transactions.

The second possible basis for considering the reimbursement of expenses as payment for a service outside the scope of the state aid rules, would be the Altmark principle and the SGEI framework. Alternatively, the framework may be invoked to justify the state aid.

[4] In Bellona's view, subsequent case law, in particular the EDF case, does not give any reason to reconsider the Authority's classification of the Norwegian state's role as tax collector. In EDF the ECJ merely objected to the Commission's lack of assessment as to whether the French state acted as a market operator when it decided to grant EDF new capital through the decision not to claim outstanding taxes. The judgment supports that a public owner of company may use public law instruments and still be assessed under the market operator principle. It does not lend any support to a notion that the state as tax collector as such is a market operator that may forego tax or give cash grants to certain operators in order to (hopefully) increase future tax revenue from the same or other operators.

For the Altmark principle to apply, the search activities in question must be possible to define as a service of general economic interest and the remuneration would have to be calculated and paid according to the Altmark test. None of these conditions are fulfilled here.

The search activities are not services provided to the population of Norway. The activities are carried out as commercial activities in a market in competition with other operators. Thus, the market may provide the services in question. The interest for the Norwegian population is merely of an uncertain and indirect nature through (hopefully) higher tax revenue.

Neither is the remuneration calculated according to the Altmark principles. There is no advance assessment of the remuneration – instead, the companies get a fixed per cent of their expenses reimbursed. Finally, the operators are not selected in accordance with the fourth Altmark criterion.

Thus, in Bellona's view there is no basis for considering the reimbursement of oil companies' exploration expenses as commercial, marked based payment for services to the Norwegian population.

The objective of the measure is a classic state aid objective, namely to increase a certain economic activity in Norway. The fact that the measure is open both for national and foreign operators is in Bellona's opinion not significant. The point is that the measure inflates the economic activities carried out in Norway, something that has a number of potential positive repercussions/effects in the national economy. The exploration activities require advanced equipment and numerous supporting activities, many of which are provided by other Norwegian businesses and, ultimately, higher oil and gas production and therethrough higher tax income for Norway.

It is as mentioned above obvious that the subsidies have cross border distortive effects. They both increase the output and reduce the costs of oil and gas production in Norway. The products in question are sold in international markets – several EU States are indeed significant buyers. Moreover, the incentives to carry out exploration activities in Norway naturally comes at the expense of the carrying out of such activities in other EEA States since the normal, inherent risk of not finding exploitable resources to a large degree are assumed by the Norwegian state. Other EEA States that do not assume such economic risks for operators in their territories will be less attractive.

In conclusion, Bellona submits that the reimbursement scheme entails state aid within the meaning of Article 61 EEA. Bellona sees no basis for finding that the operating aid in question can be considered justified.

6.4 Procedure

The reimbursement scheme was introduced in 2005 and is therefore new aid. As mentioned above, it was never notified to the Authority and therefore constitutes unlawful aid.

It follows from Article 10 to Protocol 3 SCA, that:

> *Where the Authority has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.*

Bellona is aware of the recent amendments to the EUs state aid procedural rules that enables the Commission to require a more specific legal interest in order to be obliged to act on a complaint. As these rules have not yet entered into force in the EEA Agreement, the procedure should be carried out in accordance with applicable Protocol 3.

The fact that this complaint has been launched by an environmental organisation should in any event not refrain the Authority from conducting a thorough investigation. The scheme in question is potentially the biggest unlawful aid scheme ever addressed in Norway, potentially also in the EEA as a whole. The complaint concerns the main economic activity in Norway which is oil and gas, and the potential distortive effects in the EEA market are indeed significant.

Bellona hopes that the Authority also after the entry into force of the revised Protocol 3 SCA, will continue to investigate unlawful aid, even if the information does not stem from a "competitor" of the beneficiaries under the scheme. Limiting investigation to complaints launched by such competitors only would indeed be unfortunate as it is unlikely that the Authority will ever receive such complaints in this specific sector.

It is in this connection noticeable that the Authority since 1994, as far as Bellona is aware, has conducted few, if any extensive state aid investigations of unlawful aid in Norway's most important economic sector, oil and gas. The only state aid case Bellona knows of was the Snøhvit case, which was initiated by a complaint from Bellona, which in turn forced Norway to notify an amended scheme. [5]

[5] The Commission has however initiated several competition cases in the Norwegian oil and gas sector, something that underlines the importance of the sector in an EEA perspective.

The Norwegian oil and gas sector is a sector where the state has considerable powers and is to be found at all sides of the table, as regulator, tax authority, grantor of licences and, of course, economic operator itself through its public companies and shareholding. The absence of complaint cases more than indicates that other, private operators do not risk to file complaints. Either because they themselves benefit from the aid, or because they fear that launching complaints may have serious repercussions for future business. The relevant authorities grant all concessions/licences and select, through the exercise of discretionary decisions, to a large extent all operators that may perform the various economic activities. Bellona believes this is an important reason for the lack of complaints.

Despite the huge national interest at stake, Bellona trusts that the Authority will conduct its investigation in an independent and efficient manner. Bellona is prepared to assist the Authority with any additional information or clarifications that may be requested.

Best regards, on behalf of the Bellona Foundation,

Frederic Hauge

Founder and President

The Bellona Foundation