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Reply to letter of formal notice to Norway for failure to comply with obligations under the EEA rules on free movement of capital

Reference is made to the EFTA Surveillance Authority's (the Authority) letter of formal notice dated 21 November 2012 concerning the Norwegian regulations on registration taxes for borrowed private motor vehicles registered in another EEA State and used in Norway by Norwegian residents.

In a letter dated 15 May 2012 the Authority invited the Norwegian Government to explain whether or not it considers the national legislation and practice on registration taxation to be in compliance with the EEA agreement. The background for this was a ruling passed by the EU Court 29 April 2012 on the use of borrowed foreign registered vehicles in the Netherlands.

The Ministry of Finance replied in letter dated 18 June 2012 that the Dutch law on tax on cars and motorcycles differs from the Norwegian legislation which to some extent gives Norwegian residents the possibility to use foreign registered vehicles made available to them free of charge in Norway.

In the letter of formal notice the Authority expresses that the Norwegian regulations are in breach of Article 40 of the EEA Agreement. The Authority has invited the Norwegian Government to submit its observations on the matter within two months of the receipt of the letter. The deadline has later been postponed until 21 February 2013.

Relevant national law

Vehicles used in Norway must as a main rule be registered in the Norwegian vehicle

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register and the Norwegian taxes must be paid. The taxes in question are VAT on the customs value, Registration Tax and the scrap vehicle deposit. Vehicles registered in Norway are also subject to the Annual Vehicle Duty. The basis for the taxation is the yearly parliamentary resolutions, Act of 18 June 1965 No. 4 on road traffic, Act of 19 June 1959 No. 2 on tax for motor vehicles and boats as well as relevant regulations. The rules apply irrespectively of the status of the user as owner, loaner, renter or leaser.

The possibility of using foreign registered vehicles in Norway without having to pay the national taxes is regulated in Regulation of 20 June 1991 No. 381 on the exemption from import duties and taxes for importation and temporary use of foreign registered motor vehicles in Norway (subsequently referred to as the Regulation). Exceptions are made from the liability to pay the taxes and to declare the vehicles to the Customs Authorities when crossing the border. Vehicles covered by the Regulation are not required to be registered in the Norwegian motor vehicle register.

The Regulation has two main categories of persons allowed duty-free use of the vehicles. A person resident outside the country can use foreign registered vehicles here without further limitations. Norwegian residents may use such vehicles free of charge according to the exceptions listed in article 5. Among these are the rules on short term use of foreign registered cars. The Customs Region can according to this article give permission to short term use of foreign registered vehicles in Norway in exception cases.

If a person not meeting the requirements according to the Regulation is controlled by the Customs Authorities he or she must pay VAT on the customs value, Registration Tax and the scrap vehicle deposit as well as an administrative fee. A certain practice for duty free exportation has been established where the use of vehicle has been of a shorter duration and the person has not previously violated the Regulation.

The *van Putten* ruling

In the *van Putten* ruling the EU Court gave an interpretation of Article 63 TFEU (corresponding to Article 40 EEA) on free movement of capital with respect to the levy of a registration tax by an EU Member State for borrowed private motor vehicles registered in another EU Member State and used in the first Member State by persons residing in that state.

The Court found that the issue of cross border lending of a vehicle free of charge constitutes a capital movement within the meaning of Article 63 TFEU. In the view of the Court, the situation described above must be considered as a loan agreed between citizens residing in different EEA States and a loan is identified as a capital movement under heading XI of Annex I to Directive 88/361.

The Court also found that the levy of a full registration tax for the aforementioned category of motor vehicles amounts to a restriction on the free movement of capital as

cross border loans free of charge are taxed, while loans of a motor vehicle for use free of charge are not subject to that tax where the vehicle is already registered in the domestic motor vehicle register. As a result, the registration tax is liable to make cross border capital movements less attractive.

In the letter of formal notice the Authority therefore concludes that, by maintaining the set of rules which provide that persons permanently resident in Norway may, in principle, only borrow a foreign registered motor vehicle from a private individual and use that vehicle temporarily in Norway provided they pay VAT on the customs value, Registration Tax and the scrap vehicle deposit in full on first use in Norway, Norway has failed to fulfil its obligation arising from Article 40 of the EEA Agreement.

The Ministry's assessment

As accounted for above, according to Norwegian law a person resident in Norway can as a main rule not use foreign registered vehicles in Norway. Certain exceptions do however apply. Among these are Article 5 (g) of the Regulation. In accordance with this article the Customs Region may give Norwegian residents permission to short term use of foreign registered vehicles in Norway in exception cases. According to administrative practise, the Article is interpreted strictly and permission is not granted if there is, in practise, an opportunity to use a Norwegian registered car. As a result such permissions are rarely granted. The Ministry consequently acknowledges that the possibilities for Norwegian residents to use borrowed foreign registered motor vehicles in Norway are limited and that the relevant Norwegian rules may be too strict.

Regarding the follow up of the ruling in the *van Putten* case, the Ministry observes that the Norwegian rules regulating the use in Norway by residents of borrowed private motor vehicles registered in another EEA state concur to a large degree with the regulations of other European countries, the main rule generally being that residents should use domestically registered vehicles. As far as the Ministry is aware, the follow up of the ruling and the effects it may have on national regulations are still under consideration in affected European countries.

The *van Putten* ruling raises a number of questions regarding the practical application of the various elements of the Court's assessment which in many ways still is unploughed ground. Some of the challenges have been touched upon in previous correspondence with the Authority in the case regarding foreign registered rental cars. Furthermore, the ruling touches upon vital elements of the regulatory regime for and the taxation of motor vehicles. Possible changes to the present regime would have to be duly adjusted to ensure consistency and inner context. As the enforcement of these rules must for all practical purposes be carried out on an ad hoc basis, the verifiability of the use of a borrowed car is vital to prevent abuse. Targeting the rules to the primary objective of preventing abuse without unduly affecting the temporary use that, according to *van Putten*, is to be allowed without registration is another challenge. The

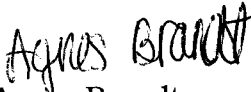
operationalization of the allowed duration of the temporary use as defined by the Court, is another. Guidance on alternate regulations in this area is sparse.

The Ministry has asked the Directorate of Customs and Excise for assistance in assessing the ruling and considering possible changes to the Regulation. Unfortunately, given the complex and comprehensive task of deciphering the *van Putten* ruling and exploring the possible consequences for Norwegian legislation, we have yet to finish this assessment. The Ministry would welcome any input the Authority may have on the challenges elaborated above. Furthermore, we would express our preference for a dialogue with the Authority on the way forward.

The Ministry will revert to the Authority before the end of April 2013 and give a thorough account for our work on this matter and the timeframe for a possible implementing process.

Yours sincerely,


Elisabeth Berge
Deputy Director General


Agnes Brandt
Adviser

Copy: The Directorate of Customs and Excise
The Ministry of Foreign Affairs
The Ministry of Justice,
The Attorney-General