DET KONGELIGE
FINANSDEPARTEMENT

Royal Ministry of Finance

EFTA Surveillance Authority
Rue Belliard 35
1040 Brussels, Belgium

Your ref	Our ref	Date
Case No: 81437	17/5203 -	13.12.2019

Norwegian excise duty on chocolate and sugar products

1 INTRODUCTION

Reference is made to previous correspondence with the Authority concerning the excise duty on chocolate and sugar products. Reference is also made to the video conference between the Authority and Norwegian authorities 31 May 2018.

The subject of existing and new aid was discussed in the video conference 31 May 2018. The Authority informed Norwegian authorities that they were reviewing previous adjustments to the excise duty on chocolate and sugar products, with particular attention on the adjustments in 1998.

This letter primarily addresses the subject of existing and new aid, see item 4 concerning the legal basis for the assessment of the adjustments, item 5 concerning adjustments in 1998, item 7 concerning adjustments in 2018 and item 8 concerning alterations in the legal basis. The Ministry would, in addition, present some remarks regarding the excise duty on chocolate and sugar products in order to put the 1998 adjustments in a broader context, see items 3 and 6, and some general remarks concerning the case, see item 2 and 9.

Postal address
P.O Box 8008 Dep
NO-0030 Oslo, Norway
postmottak@fin.dep.no

Office address
Akersg. 40

Telephone
+47 22 24 90 90
Org. no
972 417 807

Tax Law Department
Telephone +47 22 24 44 31/33
Telefax +47 22 24 27 16

2 GENERAL REMARKS

2.1 Introduction

The Ministry would, at the outset, recall that we do not consider the excise duty on chocolate and sugar products to constitute state aid. The tax is primarily fiscally motivated, i.e. the purpose is to provide tax revenue for the Treasury.

It is the Ministry's view that it is within Norwegian authorities′ competence to decide which products to tax and which products not to tax, provided the scope of the tax is set out without discrimination and in a non-arbitrary manner. In other words, it is not within the Authority's competence to limit the taxation competence of the Norwegian Parliament, as long as the taxes are in line with the objectives of the internal market as set out in article 1 in the EEA Agreement. This follows from the principle of conferral and the principle of proportionality. The two principles are fundamental principles of Union law, and follow for the EU side from article 5 in the Treaty of European Union. However, it is the view of the Ministry that the Authority does not have wider limits to impose measurements on Norway than the Commission has on EU member states. Thus, the Authority must also act within the principles in state aid cases. Under the principle of conferral, the Commission (i.e. the Authority) can only act within the said limits of the competences that have been conferred upon it. Under the principle of proportionality, the action of the Commission (i.e. the Authority) must be limited to what is necessary in order to achieve the objectives of the Treaties. The fact that the enforcement of the rules of state aid are subject to the general principles of Union law is also stated in the Council Regulation 2015/1589 article 16.

The Ministry would like to draw the Authority's attention to the recent decision by the Commission in the case concerning the Danish taxation of saturated fat in certain food products. Opposite from the opening decision, the Commission concluded that the tax was not state aid.[1]

The Ministry would also like to draw attention to the Danish chocolate tax, which has strong similarities with the Norwegian excise duty on chocolate and sugar products. In connection with an amendment in the Danish tax base from 2017, an assessment of possible state aid issues was addressed. The Danish authorities stated that neither the ECJ nor the Commission has taken a stance in the matter of whether excise duties, which are outside the area of harmonised excise taxes (alcohol, tobacco and energy products), constitute state aid when the excise duties have no specific purpose beyond the fiscal. Following this, the Danish authorities stated that it is undoubtedly the general point of departure that Member States outside the harmonized area are free to

[1] JOCE L/264/209

impose excise duties, i.e. taxes on certain categories of goods.[2] This reflects the Norwegian stance on the matter.

The Parliament´s taxing competence is one of the important bastions of a democracy and is conferred upon to the Parliament in the Norwegian Constitution. The Norwegian Parliament has every year since 1922 adopted the excise duty on chocolate and sugar products.

In conclusion, it is undoubtedly a strong point of departure that the Norwegian authorities have the competences to impose excises duties on goods of their choice.

2.2 The tax is not clearly arbitrary

The Ministry reiterates its fundamental view that the excise duty on chocolate and sugar product is compatible with state aid rules. It is well argued in the letter to the Authority dated 19 January 2018 that the contested tax scheme (the excise duty on chocolate and sugar products) does not constitute state aid. In addition to those arguments, the Ministry would like to elaborate its view on the fact that the contested tax scheme is not designed in a "clearly arbitrary" manner.

The contested tax scheme is designed to comprise products that are considered sweets for immediate consumption. This has been the overall criteria for determining the scope of the tax since its introduction in 1922, see item 3.

In order to illustrate that the excise duty is not designed in an arbitrary way, the Ministry would, in the following, comment on why Snickers ice cream, baked figures of marzipan, and Hockey Pulver are not within the scope of the excise duty in question.

It has been claimed that it is arbitrary that the product Snickers bar is taxed and not the product Snickers ice cream bar. However, the taxed product is a chocolate bar whereas the non-taxed product is an ice cream. The excise duty is not a tax on unhealthy products or sugar, but a tax on specific products, i.e. sweets for immediate consumption. This indicates that it is not illogical that two products, which in one aspect seem similar, are taxed differently. The Ministry does not think that it is arbitrary not to tax ice cream through an excise duty on sweets for immediate consumption. Ice creams are typical deserts. In addition, even though the products look similar, they are not really substitutes. The Ministry would also like to stress that ice creams are seasonal goods. Thus, the potential distortion of competition between Snickers bar and Snickers ice cream bar is negligible.

---

[2] Forslag til Lov om ændring af chokoladeafgiftsloven, lov om forskellige forbrugsafgifter, kildeskatteloven, spiritusafgiftsloven, øl- og vinafgiftsloven og forskellige andre love, frensat 16. november 2017 av skatteministeren

In regards to the example with the figures made of marzipan made by the complainant (Hval)[3], the Ministry would like to stress that those are legally considered two different products. The ones that are baked are legally considered a cake and thus not taxed, as cakes are not subject to the excise duty. To repeat one self, the excise duty is not a tax on unhealthy products or sugar, but a tax on sweets for immediate consumption. As mentioned above, it is the Parliament's competence to decide which products to tax or not to tax, i.e. the Parliament can decide not to tax cakes. For the sake of completeness, the Ministry would like to item out that any differing tax treatment of the two items relied upon by Hval has been highly disputed and have found their solution through judiciary, cf. LB-2007-65145 and LB-2010-12206

The last example of a non-taxed product the Ministry will comment on in this letter is Hockey Pulver. Hockey Pulver is a powder. Powder products are not subject to the excise duty in question. Powder products are not primarily seen as sweets for immediate consumption, and are usually not meant for consumption without being added another product, e.g. water or milk. Powder is usually a household product. The Ministry is of the view that if the product Hockey Pulver was taxed, it would create an undesired border line to other non-taxed powder products, such as dip powder and instant cacao powder.

In the opinion of the Ministry, all the examples show that the delimitation of the taxable products to sweets for immediate consumption has been consistently applied, and that the examples merely illustrate the effects of the delimitation, se below.

A final general remark relates to the discretion for the EEA States in determining which products to tax. The Ministry would like to stress that excise duties on chocolate and sugar products are not harmonized within the EU. It is recognized that the Member States and the EEA States thus have a wide discretion in selecting taxable products.

In this regard, the Ministry refers to the joint cases C-236/16 and C-237/16 (ANGED), where Spanish authorities had imposed a tax on large distribution establishments according, in essence, to their sales area. Establishments whose public sales area did not exceed 500 m^2 and those whose public sales area exceeded that threshold, but whose basis of assessment did not exceed 2 000 m^2, were exempted from the tax. The Court found that this did not constitute state aid. Reference is made to paragraph 38-39, where the Court held:

> *"in the absence of EU rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors (judgment of 15 November 2011,*

[3] Complaint from Hval sent to ESA 17 January, page 18, figure 3 and 4.

Commission and Spain v Government of Gibraltar and United Kingdom, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 97).

As recalled by the Commission in paragraph 156 of its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1), 'Member States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production ... in accordance with Union law'.

Regarding border line cases and the use of thresholds, AG Kokott pointed out in her Opinion to ANGED[4]:

"A feature of thresholds is that the question can always be asked why, for example, 1 000 m² or 3 000 m² was not adopted in the law rather than the chosen 2 000 m². However, this question arises with any threshold and, in my view, can only be answered by the democratically mandated legislature. Contrary to the view taken by the Commission, the legislature is not required to prove empirically how it fixed the threshold and it also does not matter whether, in the Commission's view, the threshold is credible or even 'right', as long as it is not manifestly erroneous. That is not the case here.

A higher threshold would perhaps be a less onerous measure, but would not be equally appropriate from the point of view of the Member State. […]."[5]

The Court concurred, and held in ANGED :

"The determination of the threshold and of the methods for calculating the basis of assessment comes within the discretion of the national legislature and is based, in addition, on technical, complex assessments that the Court only has limited powers to review."[6]

To sum up, the Ministry will underline that an excise duty on certain products consequently will imply that other products fall outside the scope of the tax. The products falling outside the tax might be very different from the taxed product or only slightly different. In the opinion of the Ministry, the fact that there are products that in one aspect might be considered similar to the taxed product, cannot block the possibility to introduce a tax, *as long as the threshold is not manifestly erroneous*.

In the opinion of the Ministry, it is almost impossible to avoid certain border line situations when drafting a tax. The Court confirms in ANGED that "the determination

[4] Ppinion of Advocate General Kokott delivered on 9 November 2017, Joined Cases C-236/16 and C-237/16 (ANGED)
[5] Paragraphs 55-56.
[6] Paragraph 43.

of the threshold and of the methods for calculating the basis of assessment comes within the discretion of the national legislature". It is the Ministry's understanding that the Courts reasoning concerning the discretion of national authorities in tax matters should also apply to the case at hand. It should make no difference for the reasoning whether the threshold concerns the size of sale areas or e.g. the amount of chocolate in biscuits.

Insofar as the general delimitation is based on a consistent criterion, i.e. sweets for immediate consumption, the mere fact that otherwise seemingly substitutes are treated differently for the purposes of the tax simply serve to illustrate the delimitation of the tax scheme. In this respect, the examples served by the complainant have no different value for the argument than the case of two different sales areas of 499 square metres and 501 square metres, respectively, would have for the Spanish tax scheme dealt with in ANGED, irrespectively of their being obviously substitutable in many respects. Hence the examples in themselves do not render the tax scheme clearly arbitrary, unless they would serve to prove that something which genuinely is a sweet for immediate consumption nonetheless were to be exempt, which they do not.

3 RELEVANT ASSESSMENTS BEFORE 1998

The excise duty on chocolate and sugar products was introduced in 1922. At that time, it was considered a fiscal tax on luxury items, or at least not necessary products. The taxed products were found to be used especially as sweets and candy for pleasure (by young people and children).[7] The taxed products were chocolate and all kinds of chocolate products, cacao products ("kakoapreparater") ready to be consumed immediately with the exemption of cacao powder, liquorice and liquorice products, marzipan mass and marzipan products of any kind including confectionary, and drops and other sugar-based sweets ("sukkertøi").[8]

The Supreme Court had the occasion to assess the scope of the excise duty in 1955 in a case concerning whether it included coconut macaroons.[9] The fact that they nearly entirely were made from sugar was not always sufficient in order to be subject to the excise duty, the Supreme Court held. Weight should also be given to whether the product "had the character of a product for pleasure, i.e. sweets, rather than as food…".

The Supreme Court went on to address the borderline issues that inevitably arise when determining the more detailed scope of the tax. What the Supreme Court held in 1955 is still relevant: "One would always have a borderline area that no enumeration would

[7] Ot.prp. nr. 7 (1922) p 1: « …«godter» og «slikkerier» som nytelsesmiddel …» The Parliament agreed, see Innst. O I 1922

[8] Ot.prp. nr. 7 (1922) p. 11 (see art. 2)

[9] Rt-1955-1

fully cover, and it is exactly in this borderline area that the Ministry has the competence to determine whether a product is taxable or not."

The Ministry finds that these older sources illustrate that the tax already at an early stage was targeted at sweets.

Before 1 April 1998, the taxable products were defined mainly in the Parliament´s resolution. Regulation 26 November 1979 No 2 contained some further provisions, inter alia for biscuits, cocoa products and almond masses.

According to the Parliament´s resolution for 1997 section 1, excise duty on chocolate and sugar products etc. was levied on (unofficial translation):

1. Chocolate and sugar products
2. Coating and filling compound of chocolate in bakery products and ice cream which is imported from abroad and which is not liable to tax according to no. 1, according to the Ministry´s further provisions.

In the Parliament´s resolution section 2 chocolate and sugar products were defined as:

a) Chocolate products of any kind, cocoa mass, cocoa butter and cocoa products of any kind. Cocoa powder and household products containing cocoa are exempted from the tax according to the Ministry´s further provisions.
b) Liquorice, liquorice juice and liquorice products of any kind, including products without added sugar or sweetener
c) According to the Ministry´s further provisions, masses made of i.e. almonds, nuts and other pips and products which are mainly made from such masses.
d) Sugar products of any kind, e.g. assorted chocolates, hard candy, dragees, pralines, tablets, pastilles and such, chewing gum, also without added sugar or sweetener, candied products, including candied berries, fruits and fruit peel, except candied lemon peel for use by households, bakeries, confectioner´s shops. However, candied lemon peel and marmalade and similar products are taxable if the product is shaped as bars, fingers, figures etc.

There were some additional regulations, for instance regarding masses, applicable before 1998 (and before the entry into force of the EEA Agreement in 1994). They included a general tax exemption for almond masses and other comparable masses used as ingredients in the production of cakes, biscuits etc., as introduced in 1973, see St. prp. no 1 (1972-73) pp. 10-11. This adjustment was inspired by the Swedish tax at that time, which was also meant to cover finished goods ("färdigvaror"), including figures etc. made of almond masses, but not the masses as such ("masse i bulk").[10]

[10] See Proposal from a Committee on chocolate and sugar products 1970 at p. 14, with reference to official Swedish documents.

Moreover, cocoa powder and household products containing cocoa (including cocoa masses) were exempted under section 2 letter a) cited just above.

In addition, other sugar products that are typical household products, such as ordinary sugar and icing sugar, have never fallen within the scope of the excise duty on chocolate and sugar products. Such sugar is levied the excise duty on sugar with NOK 8.05 per kilo (2019). Sugar used as an ingredient when producing other products (for instance chocolate and sugar products) is exempted from the tax.

The products were taxed regardless of the sugar content. "Sugar products of any kind" with no added sugar, were also taxed cf. letter D of the regulation cited above.

In sum, these aspects illustrate that the scope of the tax was, before the entry into force of the EEA Agreement, chocolate and other sweets for immediate consumption.

4 LEGAL BASIS FOR THE ASSESSMENT OF THE ADJUSTMENTS

A few adjustments have been made in the excise duty on chocolate and sugar products since the entry into force of the EEA Agreement, see item 5 and 7.

For the case that the Authority is of the opinion that the excise duty in question constitutes state aid, the Ministry will, in the following items, present its argumentation on why the adjustments in the excise duty do not alter the aid into new aid.

First, it is relevant to establish the legal basis for this assessment. It follows from Protocol 3 to the Surveillance and Court Agreement (SCA) that «Existing» aid is inter alia aid that "existed prior to the entry into force of the EEA Agreement", and that "new aid" is inter alia "alterations to existing aid". [11] The question is then, what constitutes "alterations" in this regard.

The complainant (Hval) cites in the complaint art. 4 of the Authority's Decision No 195/04/COL of 14 July 2004 (hereafter "Decision"), which defines an alteration to existing aid as "any change, <u>other than modifications of a purely formal or administrative nature</u> which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market". However, it is the view of the Ministry that this Decision is not relevant for the assessment of whether aid schemes existing prior to the EEA Agreement has been altered to new aid.

The legal basis for the Decision is art. 27 in Part II of Protocol 3 of SCA. In article 27 the Authority is conferred the power to "adopt implementing provisions concerning the form, content and other details <u>of notifications</u>…", and not the power to adopt

[11] Cf. Article 1(b)(i) of Section I of Part II of Protocol 3 of SCA

provisions concerning when existing aid is altered into new aid. The Decision can, in the view of the Ministry, only be seen as a procedural rule on when to use the simplified notification procedure. This is supported by the headline to the article, “Simplified notification procedure for certain alterations to existing aid”.

Thus, the distinction between existing aid and new aid follows only in the legislation from Protocol 3 of SCA. This is supported by case law. The Decision is not mentioned in ECJs ruling in C-6/12 *P OY*, the Authority’s Dec. No: 519/12/COL concerning Oslo Sporveier or No 179/15/COL concerning Aust-Agder, all concerning aid existing prior to the EEA Agreement.

Thus, the answer to what constitutes “alterations” in Protocol 3 of SCA must be found and developed in case law. However, case law concerning notified aid is, in the view of the Ministry, not relevant for the assessment in the case at hand due to the fact that art. 4 in the Decision only applies to notified aid.

In the Dec. No: 519/12/COL concerning Oslo Sporveier the Authority addresses the question of what constitutes an alteration with the effect that existing aid is altered in to new aid:
"Moreover, as Advocate-General Trabucchi pointed out in his Opinion in Van der Hulst, modifications are substantial *<u>if the main elements of the system have been changed</u>, such as the nature of the advantage, the purpose pursued with the measure, the legal basis, the beneficiaries or the source of the financing."* (Emphasis added)

In order for an event to alter the aid into new aid, the event must change the main elements of the system. See in this regard No SA.25338, where the commission found that *“the new law has not fundamentally modified the existing corporate tax exemption”*[12]. See also No. SA.38393 where the Commission stated: “*Sur la base des informations disponibles, l’exonération fiscale de l'impôt des sociétés en faveur des ports était applicable avant 1958 et n'a pas été modifiée en substance depuis lors. Par conséquent, la mesure est considérée comme un régime d'aide existant.”*[13]

The threshold for when aid existing prior to the EEA Agreement is altered into new aid is thus much higher than “modifications of a purely formal or administrative nature”.

Other relevant case law will be commented on following the description of the adjustments in the excise duty on chocolate and sugar products.

[12] No SA.25338, Paragraph 102
[13] No. SA.38393, paragraph 123

5 ADJUSTMENTS IN 1998

5.1 Introduction

The Ministry is of the view that the excise duty has not undergone modification of substantial character; hence, the scheme is *existing* aid, for the case that the scheme is found to constitute aid. In order to illustrate this, the Ministry will in the following describe and comment on the modifications in 1998 and the reasons for them, see item 5.2 and 5.3.

Before 1998, the excise duty on chocolate and sugar products was considered difficult to administer both for the taxable persons and for the tax authorities. Consequently, some adjustments were made with effect from 1 April 1998. The intention was to clarify and simplify the tax liability to create a more user-friendly tax. The purpose and general scope of the tax was not altered[14] and the adjustments were considered to be primarily of a technical character, as set out in item 6.12 of St.prp. nr. 1 (1997-1998) Skatte-, avgifts- og tollvedtak (previously sent the Authority).

The proposed adjustments were considered not to have any mentionable revenue consequences, which further can illustrate that the adjustments were not supposed to imply material amendments of any significance.

The revenue from the excise duty in the period before and after 1998 indicates that this was indeed a correct assessment. Bearing in mind that one must use such numbers with caution, as there may be many different reasons for a tax to increase or decrease,[15] it is notable that the total revenue from the tax was close to the same in the two years before the adjustment (1996 and 1997) as in the two years after the adjustment (1999-2000). Table 4.1 shows this revenue for the period 1996-2000 in running NOK and in set NOK from 2000. The latter figures are the relevant as they are adjusted for price adjustments.[16]

Table 4.1. Revenue from the chocolate and sugar tax 1996-2000, MNOK (running and in NOK 2000)

Year	**1996**	**1997**	**1998**	**1999**	**2000**
NOK million	714	743	781	785	789
NOK million (2000-prices)	824	837	860	844	822

[14] Regarding the purpose and general scope, see also item 4.3 below
[15] Such as amendments in consumer preferences, economy, health campaigns, duty free regulations etc.
[16] The Ministry is not aware of reasons for the increase in 1998, but this increase is in any event insignificant.

5.2 Reference to the customs tariff

From 1 April 1998, the description of the taxable chocolate and sugar products was moved from the Parliament´s resolution to the Regulation, now Regulation 11 December 2001 No 1451 concerning excise duties chapter 3-17. Further, the definition of taxable products was converted to a reference to certain numbers in the custom tariff or Combined Nomenclature (CN codes). Since the CN codes are a globally recognized tool for classification of goods, a legal reference to CN codes was intended to provide a clear and simple instrument for the users and to make the tax easier to manage for the tax authorities.

References to the CN codes are regarded as practical tools to distinguish between tax rates etc. for goods. Both the VAT directive and the directives for the harmonised excise taxes utilise references to the CN codes. The taxable codes were with a few exemptions equivalent to the previous definitions[17]. Connecting the tax liability to the customs tariff was hence considered to be of primarily technical adjustment. It is clearly stated in St.prp nr. 1 (1997-1998) Skatte-, avgifts- og tollvedtak that the reference to CN codes were an adjustment of a technical nature and that the intention was to make the tax system more predictable for the taxable persons.

5.3 Other adjustments

As a part of the technical revision, some minor changes were made in the tax base. These adjustments were made to clarify the scope of the tax as a tax on sweets for immediate consumption and to ensure that imported and domestically produced products were levied equal tax, se item 5.3.1 – 5.3.3. The adjustments concerned minor groups of products and did not have revenue consequences, as also set out in item 5.1.

5.3.1 Masses etc.

Most sugary masses were in practise already exempted the excise duty before 1998 due to the exemption for almond and comparable masses. From 1 April 1998, the exemption concerned sugary masses in general[18].

Also, most masses containing cacao were already exempted due to the exemption for household products containing cacao[19], though the exemption before 1998 inter alia did not apply to products with a fat content above 26 pct.; that concerned especially chocolate spread. From 1 April 1998, the exemption concerned all masses containing cacao.

[17] Cf. Consultation letter 6 November 1997, page 5, comments to article 1.
[18] cf. Consultation letter 6 November 1997, page 6, and cf. Parliament´s resolution for 1997 art. 3, 2. Paragraph, and Regulation from 1990, no. 611, article 6. See also item 3.
[19] cf. Regulation from 1990, no. 611, article 5. See also item 3.

Masses shaped as bars, sticks, balls, figures and the like were still within the scope of the excise duty.

In addition, powder products containing cacao were mainly exempt from the excise duty before 1998 due partly to the exemption for cacao powder, and partly to the exemption for household products containing cacao[20]. From 1 April 1998, the exemption comprised powder products containing cacao in general.

The above mentioned adjustments were made to clarify and simplify the exemptions and make them easier to manage[21].

The background for the adjustments was an intention to primarily tax "typical chocolate products as finished goods" - and not for instance masses etc. used to prepare finished goods or for a large part used in the households for instance as sandwich spread ("pålegg")", c.f. page 55-56 in St.prp. nr. 1 (1997-1998) Skatte-, avgifts- og tollvedtak.

Again, this illustrates that the clarification in 1998 was fully in line with the existing purpose and overall scope of the tax. Masses are not sweets for immediate consumption but household products or raw materials, and are therefore outside the scope of the tax.

5.3.2 Candied fruits

In 1998, candied fruits were taken out of the scope of the excise duty. The reason was that candied fruits were not regarded as sweets[22]. This could have been different when the tax was introduced as there since then have been a change in consumer preferences and product development.

5.3.3 Biscuits

Before 1998, biscuits were taxed if subject to one of three categories:

1. the biscuit was fully covered (with the exemption of the bottom) by mass of chocolate (cacao) and/or sugar, or
2. the biscuit was partly covered and/or had an in-between layer of the before mentioned masses and the total weight of the mass exceeded 50 pct. of the total weight of the biscuit, or
3. the biscuit contained cacao and was partly covered or/and had an in-between layer of the masses.

After 1 April 1998, biscuits containing cacao were taxed the same way as other biscuits, thus only the first two categories for taxation were continued.

---

[20] cf. Regulation from 1990, no. 611, article 5.

[21] Page 55-56 in St.prp. nr. 1 (1997-1998) and Consultation letter 6 November 1997

[22] Consultation letter 6 November 1997, page 6

5.3.4 Chocolate in ice cream and bakery products

Before 1998, chocolate in imported ice cream and bakery products were liable to the excise duty on chocolate and sugar products. The background for the rule was originally that Norwegian producers should not have a competitive disadvantage, as the chocolate produced on the national market was subject to the duty. In practice, however, experience showed that the domestic producers could use chocolate that was defined as a household product and were therefore outside the scope of the tax. The tax on chocolate in imported ice cream and bakery products was consequently abolished because it in practice might constitute a discriminatory measure to the disadvantage of imported products. Reference is made to page 55-56 in St.prp. nr. 1 (1997-1998) Skatte-, avgifts- og tollvedtak.

The adjustment must be seen as an improvement of the tax to make it consistent and secure equal tax treatment of imported and domestic produced products.

5.4 Assessment of the adjustments

As demonstrated above, the main scope of the excise duty on chocolate and sugar products is ordinary chocolate bars and sweets that anyone can buy in any kiosk or store for immediate consumption. The adjustments in 1998 concerned just a minor part of the taxable products and contributed to improve the tax as a tax on sweets.

The alterations were mainly technical adjustments in the tax with the purpose of clarifying and updating the scope of the tax, making it more logical and consistent and thereby making it easier to understand and apply for the taxable persons and the tax authorities. The changes reduced a possible discrimination between domestic and foreign produced products. The purpose and general scope of the tax was not altered, and the adjustments did not change the proceeds from the duty.

On this background, the adjustments must be seen as minor, and primarily technical adjustments in the excise duty and not modifications, which change the substantial character of the scheme.

Consequently, if the tax should be seen as implying state aid, the 1998 adjustments did not alter the aid from existing to new aid.

This also reflects the view of NHO Mat og Drikke[23].

In comparison, the Ministry would like to draw the Authority's attention to the judgement of the ECJ in C-492/17, where the court found that an alteration in a system financing German public broadcasting did not constitute an alteration to existing aid with the consequence that it should be notified to the Commission under Article 108(3)

---

[23] Cf. NHO Mat og Drikke's complaint to ESA 13 December 2017, eg. Section 5.2.

TFEU[24]. The financing system in this case had existed before Germany's entry in to the EU. Back in 2007, the Commission had classified the broadcasting fee as existing aid[25], thus the Article 4(1) of Regulation No 794/2004 was relevant for the assessment in this case, and the change was assessed in relation to the assessment of the system made by the Commission in 2007[26]. Hence, the assessment on what constitutes an alteration with the effect that the aid is altered into new aid can at least not be stricter in the present case concerning the excise duty on chocolate and sugar products, which has not been assessed by the Authority previously.

The change in the financing system consisted in replacing a broadcasting fee payable on the basis of possession of a receiving device by a broadcasting contribution payable in particular on the basis of occupation of a dwelling or business premises. [27]

In the assessment if the change entailed a "*substantial*" alteration, the court inter alia highlighted that the alteration *"did not affect the constituent elements of the system of financing German public broadcasting"* [28] , that the objective pursued by the system of financing was not changed, and the fact that the alteration "*pursued essentially an objective of simplifying the conditions of levying the broadcasting contribution*"[29].

This also applies to the adjustments in the excise duty on chocolate and sugar products: the adjustments did not affect the constituent elements of the tax scheme, the objective was not changed, and the intention was to clarify and simplify the tax liability to create a more user-friendly tax, see description above.
Further, the change in the financing system was, in the view of the Ministry, of more substantial character than the adjustment in the excise duty on chocolate and sugar products described above.

As a closing point, the Ministry would point out that it would indeed seem as somewhat paradoxical if an improvement of the delimitation of a scheme would entail the greater degree of scrutiny and remedies that the procedure pertaining to new aid would entail, as compared to the procedure pertaining to existing aid.

6 TAXABLE PRODUCTS

As set out in item 5.2, the scope of the tax has since 1998 been linked to the customs tariff with four main categories of products and a residual category of "other" products. In the tables below, the Ministry provides the amount of excise duties on registered

[24] C-492/17, paragraph 67
[25] C-492/17, paragraph 22
[26] C-492/17, paragraph 59
[27] C-492/17, paragraph 67
[28] C-492/17, paragraph 59 and 66
[29] C-492/17, paragraph 60 and 64

taxable entities in 2017, and for comparison the first available year (1999), in order to illustrate what kind of products are the typical products under the scope of the tax. The tables are limited to *registered* entities, as tax paid by *unregistered* entities has been difficult to obtain for the different categories of products in previous years. Despite this, the numbers provide a reasonable overview of the total tax within the different categories.

Table 6.1 shows fixed excise duty on chocolate and sugar products on registered taxable entities in 2017, based on the categories as set out in the regulation on excise duties section 3-17-1.

Table 6.1. Fixed duty on chocolate and sugar products on registered taxable entities in 2017. NOK

Tax group	Amount (NOK)
100 (sugar products according to § 3-17-1 letter a no.1-4)	262 354 581
200 (chocolate products according to § 3-17-1 letter b no.1-4)	611 561 593
300 (biscuits according to § 3-17-1 letter c no. 1-2)	2 477 642
400 (sugar-free products according to § 3-17-1 letter d no. 1-3)	19 858 742
500 (other products according to § 3-17-1 letter e)	2 098 251
Total	**898 350 809**

Source: The Norwegian Tax Administration

According to the National Account, revenue from excise duty on chocolate and sugar products amounted to 1 411 MNOK in 2017. Thus, table 6.1 covers approximately 64 pct. of the revenue from the excise duty. As can be seen from the table, fixed excise duty is almost entirely imposed on the categories sugar products (29.2 pct.) and chocolate products (68.1 pct.). The remaining products are mainly sugar-free products (2.2 pct.). This illustrates that some of the challenges raised in the present case, relate to products that are of minor importance for the tax as a whole, e.g. biscuits with chocolate.

Consumer preferences have shifted the last decades, but the overall picture has been that products in the two main categories – sugar products and chocolate products under what is today letter a) and b) of section 3-17-1 – have been clearly dominant. Table 6.2 shows the tax from registered entities for the same categories of products in 1999, which is the first year with statistics based on these four categories set out in today's regulation.

Table 6.2. Fixed duty on chocolate and sugar products on registered taxable entities in 1999. NOK

Tax group	Amount (NOK)
100 (sugar products, today § 3-17-1 letter a no.1-4)	455 284 428
200 (chocolate products, today § 3-17-1 letter b no.1-4)	275 673 463
300 (biscuits, today § 3-17-1 letter c no. 1-2)	4 503 755
400 (sugar-free products, today § 3-17-1 letter d no. 1-3)	5 605 700
500 (other products, today § 3-17-1 letter e)	n.a.
Total	**741 067 346**

Source: The Norwegian Tax Administration

As can be seen from the table, fixed excise duty is almost entirely imposed on the categories sugar products and chocolate products, but at that time with sugar products as the largest category (61.4 pct. and 37.2 pct., respectively). The remaining categories amounted to only 1.4 pct. Except for the shift from sugar products to chocolate products, the main adjustment is the increase in tax on sugar-free products.

7 ADJUSTMENTS IN 2018

The Ministry once again recalls that we do not consider the excise duty on chocolate and sugar products to constitute state aid. For that case that the Authority concludes otherwise, the Ministry will, in the following, present its argumentation on why the adjustments in the rate of the excise duty do not alter the aid into new aid.

7.1 Not "new aid"

In 2018, there were no amendments to the material scope of the excise duty on chocolate and sugar products. However, the rate of the excise duty was increased by 83 pct. in nominal terms 1 January 2018, from NOK 20.19 per kilogram in 2017 to NOK 36.92 per kilogram in 2018.

If the tax was completely passed on to the consumers, the tax increase of NOK 16.73 per kilogram increased the *average* price on chocolate and sugar products by approximately 8.7 pct. in nominal terms.[30] In this calculation, it is taken into account that it is 15 pct. VAT on the excise duty. Even though average prices will be different from the effect on individual products, the calculation shows that the tax increase as a whole by no means was as dramatic as the increase in the tax rate might indicate. The increase was reversed with effect from 1 January 2019.

[30] Assumed that that the average price on chocolate and sugar products was approximately NOK 220 per kilogram in 2017.

When aid is provided under statutory provisions existing prior to the entry of force of the EEA Agreement, the question of whether existing aid has been altered to new aid cannot be assessed according to the scale of the aid. Whether alterations of such aid regimes lead to emergence of a new aid, must be determined by reference to the provision providing for it, cf. C-44/93 *Namur-Les assurances du crédit* paragraph 28. As pointed out by the ECJ in C-6/12 *P OY*, alterations of aid regimes existing prior to the entry of force of the EEA Agreement, may «in some circumstances» lead to classifying such a regime as new aid, provided that the scope of the regime has been extended. The scope has not been extended due to the increase of the rate of the excise duty.

Accordingly, in the Ministry's view, the increase of the excise duty rate seems not relevant when assessing whether the tax regime on chocolate and sugar products has been altered from existing to new aid. Instead, case law suggests that the crucial point is whether the modification is substantial. The Ministry is not aware of any examples where aid schemes, which existed prior to the EEA Agreement, have been found altered to new aid merely due to an increase in the rate of an excise duty. The complainant (Hval) refers in its argumentation to C-138/09 *Todaro* and the Commission's decision concerning the Danish modification of NOx tax allowance (SA.34298). However, the Ministry is of the view that these cases have no relevance in the case at hand. This is because both cases concern alterations to *authorised* aid. Schemes of state aid that existed prior to the EEA Agreement have not been limited by an authorisation.

As argued above in item 4, the Ministry does not find article 4 of the ESA's implementing decision No. 195/04/COL relevant for the assessment of whether aid schemes existing prior to the EEA Agreement has been altered to new aid. Thus, the 20 pct. guideline in the article is not applicable. To support this, the Ministry will point out following:

First, the 20 pst. guideline seems applicable only to *authorised aid*. In this respect, the Ministry refers to the preamble of the decision. It states that amendments below 20 pct. of the original budget *“are unlikely to affect the Authority's original assessment of the compatibility»*. In the same vein, the ECJ in case C-510/16 *Carrefour Hypermarchés* interpreted the concept of “budget of an aid scheme” as «*the amounts available to the body responsible for granting aid for that purpose, as notified to the Commission by the Member State concerned and approved by the Commission*». By comparison, the Ministry is not aware of any case law in which the ECJ has applied the 20 pct. guideline to aid schemes existing prior to the entry of force of the EEA Agreement, cf. inter alia C-6/12 *P OY*. Hence, there is no case law supporting that the 20 pct. guideline is applicable also to aid schemes existing prior to the EEA Agreement.

Second, the percent increase of the rate is not necessarily the same as the increase of the original budget. It does not seem possible in the case at hand to calculate the value of the original aid budget, because the aid in the scheme is the loss of state revenue.

Thus, to be able to calculate the original aid budget one at least need to know who the beneficiaries are, i.e. the producers of products that should have been taxed in order for the excise duty not to be state aid. Hence, the Ministry agrees with the complainant (Hval) on the fact that the 20 pct. guideline is inapplicable in the case at hand[31]. In the Ministry's view, the said guideline does not at all seem suitable to assess whether aid schemes existing prior to the EEA Agreement have been altered into new aid. The understanding of the Ministry is that the main purpose of the 20 pct. guideline is to provide a safety margin to the Member States for fluctuations in the budgets of aid schemes notified to and authorised by the Authority. As to aid schemes existing prior to the EEA Agreement, there is no budget which has been examined and approved by the Authority. The Ministry is of the view that Norwegian authorities must have discretion in order to increase the rate of the excise duty in an aid scheme that existed prior to the EEA Agreement, without the consequence being that it alters the aid to new aid. In any other way, the rate would de facto decrease over time.

In the Ministry's view, the procedure set out in art. 17 and 18 of Protocol 3 of the SCA seems to be the correct remedy to address increase of rates to an excise duty that existed prior to the EEA Agreement, provided, of course, that the Authority considers such an increase to be incompatible with the internal market. In art. 18, concerning proposal for appropriate measures, it follows that the Authority inter alia can propose *"…introduction of procedural requirements…"* The measures pertaining to existing aid apply only forward[32], and are considered by the Ministry as the right approach for the Authority in this case. On the other hand, the Authority should not decide a threshold for a rate increase which has the retroactive effect of altering the aid from existing to new aid. If so, the Ministry would not have been given the opportunity to notify the alteration at the correct time, because the Ministry did not know which threshold with retroactive effect the Authority might set later.

In comparison, see the Commission's decision in the cases No SA.25338, No. SA.38393. No. SA.38469, No. SA.33828, and No. SA38398. The Commission proposes appropriate measures in all the named cases, which all concern existing aid.

In conclusion, it is the opinion of the Ministry that the increase of the excise duty rate seems to be of no relevance when assessing whether the tax regime has been altered from existing to new aid. Increase of the rate of the excise duty is relevant only to the assessment of whether the existing aid scheme is no longer compatible with the internal market. As to the distinction between new and existing aid, however, it is the Ministry's view that the applicable rule for aid schemes existing prior to the entry of force of the EEA Agreement is whether the material scope of the tax regime has been substantially amended.

---

[31] Complaint from Hval sent to ESA 17 January 2018, page 9

[32] See also in this regard Decision No 179/15/COL, paragraph 174, SA.38469, paragraph 59, and A.33828 paragraph 193.

As stated in item 3 above, the overall criteria for determining the scope of the tax has been the same since 1922. In particular, after the entry of force of the EEA Agreement, there has been no substantial amendments to the material scope of the tax, cf. item 5 above. This also applies to the adjustments in 2018, in which it was merely the rate of the excise duty that was increased, whereas the material scope of the tax regime remained unchanged. Accordingly, the increase of the rate of the excise duty did not alter the aid from existing to new aid, given that the excise duty should be seen as implying state aid.

7.2 If "new aid"

If the Authority anyhow concludes that the rate increase in 2018 does alter the aid from existing to new, the Ministry would like to stress that it is only the alteration as such, i.e. the rate increase, that is liable to be classified as new aid, not the excise duty as such. When assessing if the whole aid scheme is altered into new aid or just the alteration as such, the crucial point is whether the alteration is clearly severable from the initial scheme or not, cf. T-195/01, paragraph 109.

> *"Accordingly, it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme."* [33]

An increase in the rate of the excise duty is clearly severable from the rest of the excise duty. Thus, it is only the increase of the rate in 2018 as such, which constitutes an unlawful state aid scheme. The rest of the excise duty, i.e. the rate minus the increase in 2018, does not constitute an unlawful state aid scheme. The increase was reversed from 1 January 2019, thus no part of the excise duty from 2019 and forward constitute an unlawful state aid scheme.

8 ALTERATIONS IN THE LEGAL BASIS

The Ministry is of the view that the fact that the Parliament annually has adopted the excise duty in question is in no way relevant with respect to the distinction between existing and new aid. The excise duty has been *applicable* since the entry into force of the EEA Agreement, cf. the definition of existing aid in Article 1(b)(i) of Section I of Part II of Protocol 3 of SCA:

> *"All aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement…"* (Emphasis added).

[33] T-195/01, paragraph 111

The fact that the legal basis of the excise duty has been moved to another regulation does not alter the existing aid into new aid; as such a change is of a purely formal nature.

9 INITIATING THE FORMAL INVESTIGATION PROCEDURE

For the case, that the Authority is of the opinion that the excise duty in question raises doubts to the compatibility with the functioning of the EEA Agreement, and the Authority decides to initiate the formal investigation procedure, the Ministry encourages the Authority to take into account the effect de facto of the opening of the investigation procedure when *modelling* the opening decision. The effect de facto of the opening of the investigation procedure indicates that the amount of doubt must be reflected in the opening decision. If not it can be contrary to the principle of proportionality, see item 2.

Consequently, the Ministry encourages the Authority to reflect the amount of doubt in a possible opening decision.

10 CONCLUSION

The Ministry maintains that the excise duty on chocolate and sugar products do not constitute state aid according to art. 61(1) of the EEA Agreement. This is well supported by the judgment in C-237/16 (ANGED).

If, however, the Authority concludes otherwise, the Ministry maintains that the adjustments in 1998 and 2018 in the excise duty do not alter the existing aid into new aid. Hence, the excise duty does not constitute unlawful state aid.

Please do not hesitate to contact us if any further information is needed.

Yours sincerely,

Omar G. Dajani
Director General

Frédéric Wilt
Deputy Director General

This document has been signed electronically and it is therefore not signed by hand.