EFTA Surveillance Authority
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BE-1040 Brussels
Att.: Competition and State Aid Directorate

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Ref.: 3823360.3-143821 GARLEN/HAGAKS
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COMPLAINT REGARDING INCOMPATIBLE STATE AID STEMMING FROM THE NORWEGIAN CHOCOLATE AND SUGAR LEVY

1 Introduction and summary

On the 13 December 2017 NHO Mat og Drikke filed a complaint to the Competition and State Aid Directorate of the EFTA Surveillance Authority ("the Authority"), alleging that the recently adopted and implemented increases of the Norwegian chocolate/sugar and non-alcoholic drinks levies constitute unlawful state aid ("Chocolate and Sugar Levy" or "the Levy").

Advokatfirmaet Steenstrup Stordrange DA ("SANDS") represents the chocolate and confectionary manufacturer Hval Sjokoladefabrikk ASA ("Hval") in this matter. Hval is member of Norsk Sjokoladeforening which again is member of NHO Mat og Drikke.[1] Hval subscribes to and endorses the above-mentioned complaint from NHO Mat og Drikke.

In this complaint Hval therefore supports the finding that the Norwegian Chocolate and Sugar Levy[2] constitutes incompatible state aid, as producers of comparable products not subject to the Levy receives a competition distorting advantage as the State foregoes tax revenue from them. Importantly, however, Hval also contends that the Authority cannot limit its review to the 1 January 2018 levy rate increase.

Hval therefore files this supplementary complaint, requesting the Authority to:

[1] Hval and its products are referred to several times in Item 2 of NHO Mat og Drikke's complaint letter.
[2] As Hval does not manufacture and sell any products subject to the non-alcoholic drinks levy, this complaint only concerns the chocolate and sugar levy, *i.e.* the chocolate and sugar levy imposed by Section 3-17-1 of the Regulation No 1451 of 11 December 2001 on special levies (hereinafter the "Special Levies Regulation") in combination with the Norwegian Parliament's annual decisions concerning special levies, cf. Section 75a of the Norwegian Constitution and Section 1 of Act No 11 of 1993 concerning special levies ("the Special Levies Act").

- Firstly: Find that the Chocolate and Sugar Levy – in its entirety and not only the above-mentioned rate increase – constitutes incompatible state aid pursuant to Article 61 EEA. In the opinion of Hval, the increase of the Levy rate cannot be considered in separation from the scope and content of the Levy itself. Also, Hval considers that the compatibility review of the Levy should be unaffected by its classification as "existing" or "new aid (see Items 2, 3 and 4).[3]

- Secondly: Find that the Levy – again in its entirety – must be considered "new" (and "unlawful") aid from 1998, alternatively 2002[4], and in any event by 1 January 2018[5], at the latest, due to the substantial alterations made to its legal basis, system, product scope and content since the entering into force of the EEA Agreement in 1994 (see Item 3).

- Thirdly: Adopt any and all relevant measures in order to have the state aid abolished for the future and to remedy any historic distortion of competition.

    - To the extent parts or the entire Levy is considered as incompatible "new" aid, Hval requests the Authority to adopt measures in accordance with the procedure regarding "unlawful aid", cf. Section III (Articles 10 to 15) of Part II of Protocol 3 of the Surveillance and Court Agreement ("SCA") (see Item 5.2).

    - To the extent parts or the entire Levy is considered as incompatible "existing" aid, Hval requests the Authority to adopt measures in accordance with the procedure regarding "existing aid schemes", cf. Section V (Articles 17 to 19) of Part II of Protocol 3 of the SCA (see Item 5.2).

For the sake of good order we mention that the products affected by the Levy fall inside the product scope defined by Article 8(3) of the EEA Agreement.[6] That applies both to the products being subject to the Levy and comparable products falling outside the scope of the Levy (and thus effectively being beneficiaries of the aid). These products are listed in Table I of Protocol 3 to the EEA Agreement, cf. Article 8(3)(b) EEA.[7]

[3] It follows implicitly from the above that also Hval is of the opinion that the Levy constitutes state aid in the meaning of Article 61(1) EEA. In Item 2 of the complaint letter Hval presents supplementary argumentations concerning the selectivity criterion.
[4] The Special Levies Regulation entered into force on 1 January 2002.
[5] A Levy rate increase implies that the economic advantage for manufacturers of certain comparable products increases correspondingly and that the Norwegian State's levy income is even further reduced, due to all the comparable products not included by the Levy.
6 Cases E-1/16 Synnøve Finden, paragraph 57; E-12/16 Marine Harvest, paragraph 66.
7 See various HS Heading numbers like e.g. 1704, 1806, 1905, 2008, 2105 (ice cream with or without cocoa).

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2 The Levy implies state aid in the meaning of Article 61(1) EEA – supplementary remarks concerning the selectivity criterion

2.1 Introductory remarks

Hval fully subscribes to NHO Mat og Drikke's assessment and conclusions concerning the presence of state aid, as presented by Item 4 of NHO Mat og Drikke's complaint letter. In other words, Hval fully agrees that all the cumulative constitutive criteria of Article 61(1) EEA are fulfilled so that the Levy implies state aid in the meaning of Article 61(1) EEA.

Nevertheless, Hval finds it appropriate to convey certain supplementary arguments concerning the selectivity criterion. By this Hval does not intend to address the selectivity criterion's application to the Levy in an exhaustive manner, but rather, as indicated above, to supplement NHO Mat og Drikke's account on certain points.

2.2 Facts relevant for the three step selectivity analysis of the Levy – products in a comparable factual legal and factual situation to the products taxed by the Levy

The second step of the traditional three step selectivity analysis of indirect taxation measures requires a consideration of whether the potential aid measure, assessed in light of the reference system identified in the first step of the analysis, entails discrimination between undertakings in a comparable factual and legal situation.

The facts relevant to that analysis is adequately and comprehensively set out in Items 2.2.2, 2.2.3 and Annex I of NHO Mat og Drikke's complaint letter. Hval's further considerations concerning the selectivity of the Aid Scheme can therefore be undertaken in light of those facts.

However, Hval will also present certain facts having relevance for the assessment under the selectivity criterion. As these facts also have bearing on the compatibility assessment, Hval will instead present those facts under the compatibility assessment below.

2.3 Supplementary considerations concerning step 2 of the selectivity analysis

2.3.1 Step 2 assessment will be undertaken in light of the reference system identified by step 1

As regards step 1 of the analysis, Hval agrees with NHO Mat og Drikke that the relevant system of reference comprise the Levy itself, *i.e.* the products subject to the Levy as well as all products not falling under the Levy but which nevertheless are in a comparable factual and legal situation in light of the Levy's objective.

To include all sufficiently comparable products in the reference system, despite the fact that many of these products fall outside the Levy`s scope, is consistent with the case-law of the Court of Justice of the European Union ("CJEU"). In case C-487/06 *British Aggregates*, where the CJEU set aside the Court of First Instance` judgment, the Advocate General held:

> *"[…] The analysis of the Court of First Instance focuses on the formal aspects of the measure in question, such as the legislative technique used by the national authorities. In terms of the impact on competition, however, there is no great difference between, on the one hand, the imposition of a general tax with an exemption for certain beneficiaries and, on the other hand, the imposition of a tax on certain taxable persons to the exclusion of others who are in a comparable situation. Here, too, it seems to me that the judgment under appeal departs from an approach focused on an analysis of the effects of the measure.*[8]*"* [our underlining]

Our further assessment under step 2 of the analysis will therefore take place in light of the reference system identified by NHO Mat og Drikke in their step 1 analysis.

2.3.2 The selective Aid Scheme of the Levy must be distinguished from non-selective general measures

In decision No 064/17/COL the Authority concluded that the Norwegian air passenger tax did not amount to state aid as the selectivity criterion was not fulfilled. As an integrated part of its step 2 analysis, the Authority noted that selective measures must be distinguished from general measures open to all satisfying certain conditions.[9] The Authority found that the air passenger tax, which only levied a tax on first journey leg flights departing from Norway, not transit or transfer passenger, did not differentiate between undertakings in a comparable factual and legal situation (assessed in light of the primarily fiscal objective of the tax).[10] According to the Authority, the differing consequences of the air passenger tax just followed from the business model of the airlines and that the application of the air passenger tax was independent of that, effectively meaning that the Authority considered the exemptions of the air passenger tax to be a general measure open to all satisfying certain criteria.

Such a finding cannot be extended to the Levy.

Only certain specifically determined products are subject to the Levy, cf. Section 3-17-1 of the Special Levies Regulation which, by reference to the customs tariff, specifically defines the product scope of the Levy. The products/undertakings subject to the Levy cannot just adjust its business model or make any other adaptation in order to fall outside the Levy. In other words; an exemption from the Levy is not open for all satisfying certain criteria.

Hence, Hval submits that the Aid Scheme, which the Levy implies, must be regarded as a selective measure, not a general measure open for all satisfying certain conditions. Hval contends that manufacturers of products subject to the Levy are in a comparable factual and legal situation to manufacturers of products which from a consumer perspective are sufficiently interchangeable so that the products are in a competitive relationship with each other, meaning that a selective advantage is conferred upon the products/undertakings falling outside the Levy.[11]

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[8] Case C-487/06 British Aggregates, AG opinion, paragraph 100, see also paragraphs 98 and 99.
[9] The Auhtority's decision No 064/17/COL, paragraph 33.
[10] The Auhtority's decision No 064/17/COL, paragraphs 34 and 37.
[11] The Auhtority's decision No 064/17/COL, paragraph 37; joined cases C-2015 P and C-21/15 P *Commission v World Duty Free Groups SA,* paragraphs 59, 60, 68, 69, 85 and 86.

The Authority`s decision No 150/15/COL concerning a Norwegian VAT exemption scheme for electric vehicles is illustrative in that respect. The Authority found the zero VAT scheme selectively favoured indirect beneficiaries, for example manufacturers and dealers of electric cars, ahead of manufacturers and dealers of conventional cars which the Authority assumed were in competitive relationship with each other.[12]

2.3.3 Not decisive that the circle of products favoured by the Aid Scheme is not sharply defined

Neither NHO Mat og Drikke nor Hval have attempted to sharply define which products or undertakings can be considered in a comparable factual and legal situation to the products/undertakings subject to the Levy, i.e. the products/undertakings favoured by the Aid Scheme and thus effectively the beneficiaries of the aid.

Also for the Authority it suffices to conclude that certain products/undertakings in a comparable factual and legal situation are favoured.[13] In order for the Authority to determine whether the selectivity criterion is fulfilled, it is thus not necessary for the Authority to accurately identify those products/undertakings.[14] In any event, the history of the Levy also demonstrates that the Norwegian government has over the years made substantial alterations to the personal scope, i.e. the products targeted by the Levy.

2.4 Supplementary considerations concerning step 3 of the selectivity analysis

2.4.1 Introduction

Hval also submits that the arbitrary and discriminatory product scope of the Levy, conferring selective advantage upon products in a comparable factual and legal situation, is not justified by the nature or the general scheme of the system of reference.

By presenting these supplementary submissions to NHO Mat og Drikke's complaint letter, Hval intends to clarify – in light of the Authority's assessment in the Norwegian air passenger tax case – that the primarily fiscal nature of the Levy does not imply that it can be considered justified by the nature or the general scheme of the system of reference.[15] In addition we also point out that the same conclusion must be reached even if the Levy had pursued public health objectives, which is does not.

2.4.2 The legal implications of considering the Levy motivated primarily by fiscal objectives

Just like in the case concerning the Norwegian air passenger tax (the Authority's) decision No 064/17/COL, the levy at hand should be considered to primarily have a fiscal objective.[16] In NOU 2007:8,

[12] The Authority`s decision No 150/15/COL, paragraphs 94 to 96.
[13] Joined cases C-2015 P and C-21/15 P *Commission v World Duty Free Groups SA,* paragraphs 70 to 72 and 77 to 80.
[14] That could be different at a potential recovery phase.
[15] For the sake of comprehensiveness we point out that the objective of the aid is only relevant under step 3 of the selectivity assessment (possible justification by the nature or the general scheme of the reference system) and under the compatibility assessment of state aid, cf. case C-487/06 *British Aggregates,* AG opinion, paragraphs 85 to 87.
[16] The Authority's decision No 064/17/COL, paragraphs 45 to 47.

the report from a working group that assessed Norwegian special levies, the background for the Levy was described as follows:

> *"The levy rate is decided based on fiscal objectives. Thus, the levy rated is not decided with the aim to price any damaging effects stemming from the consumption of chocolate or other goods subject to the levy. The levy is therefore considered a fiscal levy, although it also is considered that it may have positive health effects."*[17] [office translation]

In light of the primarily purely fiscal objective, the Authority found that the exemptions to the air passenger tax were in line with the nature and logic of the reference system as it contributed to avoid double taxation in certain instances.[18] The need to avoid double taxation is listed in paragraph 139 (see also paragraph 138) of the Authority's Notion of Aid ("NoA") Guidelines, as an example of a valid objective which possibly can be considered as necessary for the functioning and effectiveness of a tax and levy system.[19]

As regards the Levy and its arbitrary product scope excluding many products which consumers are likely to consider as substitutes, no similar valid justification can be presented, cf. the indicative list of NoA paragraph 139.

And if the Norwegian Government later invokes *e.g.* "administrative manageability" as a justification, arguing for example that the arbitrary product scope of the Levy is a consequence of management needs, such a submission must be rejected as disproportionate.[20] Also with a less arbitrary and discriminatory product scope it would be perfectly possible for the Norwegian Government to attain the same objectives of ensuring state revenues as well as administrative manageability.

Although there always may be challenges defining the concrete limits of the product scope (a challenge common to almost all drafting of legislation), the objectives of ensuring fiscal revenues and administrative manageability would not be affected by the inclusion of comparable products into the scope of the Levy. The administrative manageability would probably be quite unaffected by a product scope change. A change in product scope could either take place via the inclusion of more custom tariff numbers or via exhaustively defining the product scope of the Levy directly in the Special Levies Regulation without making references to the customs tariff. Until 1998 the product scope of the Levy was defined independently of the customs tariff (see our account below).

Hence, if administrative manageability was invoked as a justification for the arbitrary and discriminatory product scope of the Levy (following from the arbitrary customs tariff numbers which the product scope of the Levy consist of), Hval submits that any such management motivated measures go beyond what is necessary and are, at the same time, inconsistent with the fiscal objective of the Levy.[21]

[17] Item 7.3.4, page 65 of NOU 2007:8 «En vurdering av særavgiftene». As a basis for the description it is referred to relevant documents sent from the Government to the Parliament.
[18] The Authority's decision No 064/17/COL, paragraph 53.
[19] The Authority's decision No 3/17/COL concerning Guidelines on the notion of State aid.
[20] See NoA, paragraph 140 and paragraph 56 of the Authority's decision No 064/17/COL.
[21] See NoA, paragraph 140.

2.4.3 The legal implications of considering the Levy as motivated primarily by public health objectives

Assuming that the Levy was motivated by public health objectives a similar step 3 analysis would lead to the same conclusion, *i.e.* that the arbitrary and discriminatory scope of the Levy – which excludes many equally unhealthy products that are perceived by consumers as inter-changeable substitutes – implies that the derogations from the Levy would be both disproportionate and inconsistent with any public health objectives.[22] Thus, the Levy can also not be justified by the nature or general scheme of the reference system based on the Levy being motivated by public health objectives.

3 The Levy constitutes «new aid» due to significant and material alterations since 1994

3.1 Introduction

Under this item Hval contends that the Chocolate and Sugar Levy has undergone such material and substantial changes since 1994 that it must be classified as new aid from 1998 onwards, alternatively from 2002 or in any event from 1 January 2018. These changes to the Levy are substantial and have impacted its scope and content in a manner which makes it impossible to review the individual alterations as separable from the Levy itself. As a consequence, the Levy must be considered "new aid" in its entirety from the above mentioned dates.

The Chocolate and Sugar Levy existed prior to Norway's accession to the EEA Agreement in 1994. It follows from Article 1(b)(i) of Section I of Part II of Protocol 3 of SCA that the notion of «existing» aid includes aid which already *"existed prior to the entry into force of the EEA Agreement"*. However, it also follows from Article 1(c) of Section I of Part II of Protocol 3 of SCA, that the definition of "new aid" comprises "alterations to existing aid".

It also follows from the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part ll of Protocol 3 SCA (the "Implementing Decision") that for the purposes of Article 1(c) in Part II of Protocol 3 SCA:

> *"an alteration to existing aid is <u>any change</u>, other than <u>modifications of a purely formal</u> or administrative nature <u>which cannot affect the evaluation of the compatibility of the aid measure</u> with the common market. An increase in the original budget of an existing aid scheme by up to 20% is not considered an alteration to existing aid."* [underlining added]

According to case law, alterations in "existing aid" will become "new aid" when the level of the aid changes, the group of recipients is either enlarged or reduced, a condition for receiving the aid is altered or the legal basis for the aid is changed.[23] In the following, we will demonstrate that:

- the Levy rate has been increased significantly, leading to a substantial increase in the aid granted to all comparable undertakings which are exempted from the Levy (see Item 3.2),

[22] See *e.g.* the Authority`s decision No 150/15/COL, paragraphs 105 to 108, including the quote at paragraph 108 from paragraphs 85 to 87 of case C-487/06 *British Aggregates*.
[23] Case C-44/93 *Namur-Les Assurances du Crédit*, paragraphs 28 and 35.

- the legal basis for the Chocolate and Sugar Levy has been altered repeatedly since 1994, including through the adoption of annual parliamentary decisions and new regulations (see Item 3.3),

- the Levy's system, product scope and number of aid beneficiaries has been changed materially since 1994 (see Item 3.4),

- these alterations will each be sufficient on their own, for finding that the Levy has changed from existing to new aid and that this change in legal status pertains to the Levy in its entirety (see Item 3.5).

3.2 Alterations made to the Levy's rate

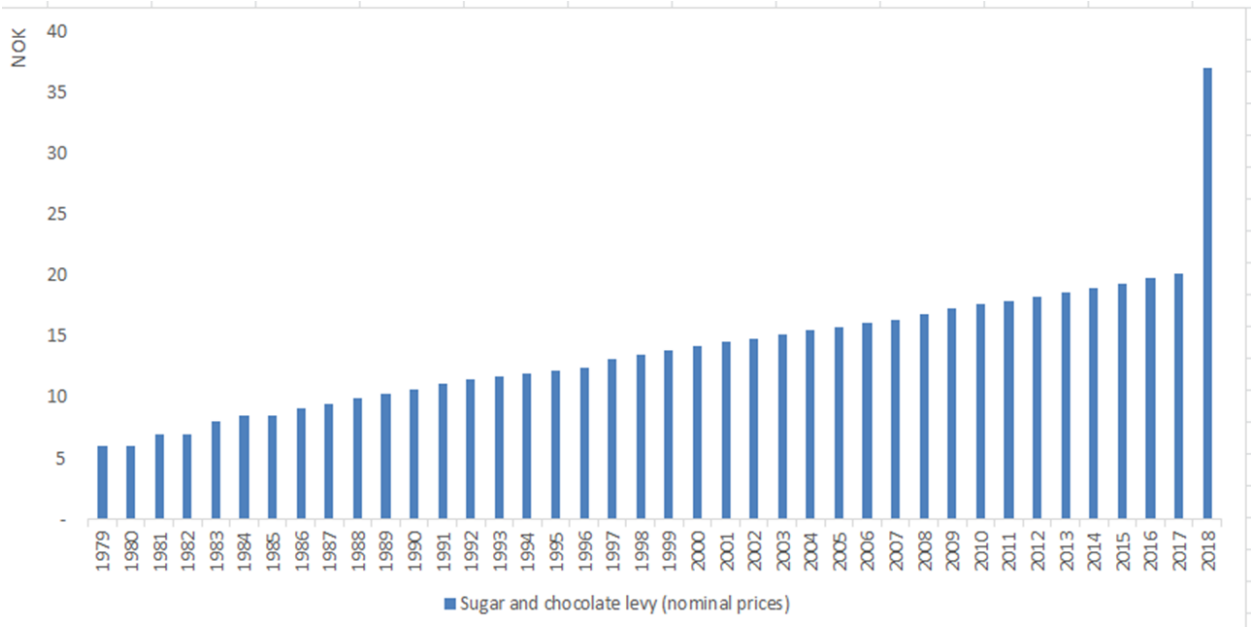
In light of NHO Mat og Drikke's complaint it is sufficient to point out that the parliamentary decision of 12 December 2017, which took effect on 1 January 2018, implies an 83% increase of the Levy. Although that does not necessarily lead to a corresponding increase in the "imaginary budget" of the Aid Scheme – *i.e.* the Norwegian State's income loss due to the exemption of comparable product categories from the Levy – it clearly also triggers a significant increase in the "imaginary budget" of the Aid Scheme.

As we do not know the numbers of aid beneficiaries and the amount of relevant products they put on the market, we do not know the exact "imaginary budget" of the Aid Scheme. Therefore, the 20% guideline in the Authority's Implementing Decision seems wholly inapplicable based on the facts available. There is no direct link between the 83% rate increase and the 20% guideline of the Implementing decision as these two numbers express different parameters (rate increase vs. budget increase of an aid scheme).

The CJEU and the European Commission have in several cases put emphasis on increases in the aid amounts/levels when assessing whether an alternation constitutes "new" aid, cf. *Keller*, C-138/09 *Todaro* and the European Commission's opening decision in the case concerning a Danish NOX tax (SA.34298). As also pointed out by Item 5.3 of NHO Mat og Drikke's complaint letter, the latter case (SA.34298) has much similarity with the rate increases of the Levy, as an environmental tax rate increase consequently lead to an increased economic advantage (aid) to the sole undertaking which qualified for a reduced tax (as it was only levied on parts of their emissions).

The Levy rate increases appear likely to affect the Authority's "evaluation of the compatibility of the aid measure with the common market", as these alternations clearly are capable of having "effect [...] on undertakings or their competitive relationship", cf. the Authority's Implementing Decision. Against this background, Hval submits that also the Levy rate increases adopted since 1994, including the significant increase taking effect as of 2018, constitute "new" aid.

Fig. 1: *Illustrates the increase of the Levy as adopted via the annual parliamentary budgetary decision. The bar to the right shows the giant leap taken by the 83 % rate increase as of 2018.*



3.3 Alterations made to the legal basis of the Levy

As a point of departure, it should be noted that the Levy could not take effect (each year) without the Parliament's annual budgetary decisions, as these decisions are only given validity/applicability for the coming budgetary year. This follows from Section 75 a) of the Norwegian Constitutional Act ("Grunnloven"). Hence, without the annual decision by the Parliament expressly setting out that the undertakings should pay the Levy for another year, no obligation to pay the Levy would exist. The very existence and scope of the Levy as a revenue generating mechanism for the State therefore depends on an annual pro-active decision taken by the Parliament. If the Parliament remained passive with respect to the Levy, or altered its scope in its annual decision, it would in whole or in part cease to exist.

Therefore, although the Levy has been adopted by the annual budgetary decisions by all consecutive Parliaments since 1994, despite being proposed abolished by the Governments draft budget for the budget year 2006 (which the parliamentary majority changed in order to maintain the Levy), there has in some years been significant political debate as to its existence. The fact that the Levy is imposed anew each year by the Parliament's annual budgetary decisions, and that its existence, scope and size therefore depends on an active decision being made each year, is clearly relevant with respect to the distinction between "existing" and "new aid". At least up to 1998 when the relationship between the annual parliamentary decisions and the statutory legal basis of the Levy was altered (see description below), also the product scope and reach of the Levy was directly subject to the Parliament's annual budgetary decisions.

Moreover, and in addition to the annual Parliament decision adopting the Levy for each year, the legal basis for the Levy has also changed several times since 1994. Upon the entering into force of the EEA

Agreement on 1 January 1994, the legal basis for the Levy was Regulation No 611 of 1 August 1990 on Chocolate and Sugar Goods ("1990 Chocolate and Sugar Goods Regulation"). With effect as of 1 April 1998 several substantive alterations were made via the adoption of amendments to the 1990 Chocolate and Sugar Goods Regulation. Before that date the product scope of the Levy had in part been directly defined via annual parliamentary decisions and partly via some specifying clarifications made by Sections 4 to 6 of the 1990 Chocolate and Sugar Goods Regulation (described in more detail below). Other amendments were made with effect as of 1 January 1999.

Further; the Special Levies Regulation was adopted in 2001 and took effect on 1 January 2002. The Levy's legal basis was then moved to Section 3-17-1 of the Special Levies Regulation, as the latter repealed the 1990 Chocolate and Sugar Tax Regulation. Even after 2002 Section 3-17-1 of the Special Levies Regulation, which is still the Levy's statutory legal basis, has been amended several times, *i.e.* in 2013, 2015 and 2017. Thus, even apart from the annual decisions on the Levy's scope, rate and existence being made by the Parliament, the legal basis has therefore been altered several times since 1994.

Figure 2 below shows the amendments made to the statutory legal basis of the Levy since 1 January 1994.

Fig 2: *Shows the amendments made to the statutory legal basis of the Levy since 1 January 1994*

Regulation	**Date of entry into force**	**Description**	**Substantive amendments**
Regulation No 611 of 1 August 1990 on Chocolate and Sugar Goods ("**1990 Chocolate and Sugar Goods Regulation**")	16 July 1990	In force at the date of entering into force of the EEA Agreement on 1 January 1994. The Product scope of the Levy was in part directly defined via annual parliamentary decisions and partly via some specifying clarifications made by Sections 4 to 6.	
Regulation No 274 of 27 March 1998 on amendments to the 1990 Chocolate and Sugar Goods Regulation	1 April 1998	Amendments to the 1990 Chocolate and Sugar Goods Regulation.	Significant amendments to the product scope of the Levy: 1) Product scope to be defined via reference to product category numbers of the customs tariff nomenclature. 2) The following products were removed from the product scope; marzipan/sugar mass and chocolate not shaped as bars, sticks, balls, and figures and the like, candied fruit, chocolate used in ice cream and chocolate integrated in imported ice cream and imported cakes/pastries.
Regulation No 1088 of 24 November 1998 on amendments to the 1990 Chocolate and Sugar Goods Regulation	1 January 1999	Amendments to section 1 of the 1990 Chocolate and Sugar Goods Regulation.	Certain types of chewing gum were exempted from the product scope of the Levy.
Regulation No 1451 of 11 December 2001 on Special Levies ("**Special Levies Regulation**")	1 January 2002	The Special Levies Regulation was adopted, and repealed the 1990 Chocolate and Sugar Goods Regulation.	The Levy's legal basis was moved from the 1990 Chocolate and Sugar Goods Regulation to Section 3-17-1 of the Special Levies Regulation.
Regulation No 1286 of 13 December 2012 on amendments to the Special Levies Regulation etc.	1 January 2013	Amendment to section 3-17-1 of the Special Levies Regulation	One product category number was removed from the Regulation and another product category number was included.
Regulation No 1766 of 16 December 2014 on amendments to the Special Levies Regulation	1 January 2015	Amendment to section 3-17-1 of the Special Levies Regulation	Pastilles were included in the product scope of the Levy in addition to candy drops.
Regulation No 2378 of 20 December 2017 on amendments to the Special Levies Regulation	1 January 2018	Amendment to section 3-17-1 of the Special Levies Regulation The Levy was increased by 83% following a Parliamentary decision.	Amendments concerning the Levy's applicability to pastilles, candy drops and chewing gum.

3.4 Alterations made to the Levy's system, product scope and circle of aid beneficiaries

In case C-44/93 *Namur-Les Assurances du Crédit* the Court of Justice of the European Union ("CJEU") held that *"[w]hether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it",* including the issue of whether any alternations *"affect the system of aid established by that legislation".*[24]

Today next year's Levy rate is set out by the Norwegian Parliament, based on Section 75a of the Norwegian Constitution and Section 1 of the Special Levies Act. Currently, the product scope of the Levy is defined by the Section 3-17-1 of the Special Levies Regulation. Section 3-17-2 a) of the latter defines the calculation basis of the Levy; stating that the Levy is calculated based on the new weight of the product.

However, both the legal basis of the Levy as well as its system and product scope has been altered in the period between 1994 and 2018.

With effect as of 1 April 1998 several substantive alternations were made via the adoption of amendments to the 1990 Chocolate and Sugar Goods Regulation:

Before that date the product scope of the Levy had in part been directly defined via annual parliamentary decisions and partly via some specifying clarifications made by Sections 4 to 6 of the 1990 Chocolate and Sugar Goods Regulation.

Annex 1:	The Chocolate and Sugar Goods Regulation applicable before 1 April 1998
Annex 2:	Example of annual parliamentary decision before 1 April 1998 (decision concerning 1997)
Annex 3:	The Chocolate and Sugar Goods Regulation applicable after 1 April 1998
Annex 4:	Example of parliamentary decision after 1 April 1998 (decision concerning 1999)
Annex 5:	Extract from "St.prp. nr 1 (1997-1998)" concerning the Levy
Annex 6:	Extract from "Budsjett-innst.S. nr. 1 (1997-1998) concerning the Levy
Annex 7:	Consultation paper of 1997 proposing the 1998 amendments including table listing substantive changes of product scope

The 1998 amendment was not only technical in the sense that the whole definition of the Levy's product scope was moved to the 1990 Chocolate and Sugar Goods Regulation, meaning that only the rate provision remained in the annual parliamentary decisions (previously the Parliament decisions also addressed the scope of the Levy). It also constituted an amendment in the sense that the product scope of the Levy was defined via reference to particular product category numbers of the customs tariff nomenclature. This was more than just a change of legal drafting technique. It also provided for changes to the product scope of the Levy.

By the 1998 amendment marzipan and chocolate not shaped as bars, sticks, balls, and figures or similar were removed from the product scope of the Levy. An alteration which for example implied that rolls of marzipan purchased at a grocery store were no longer subject to the Levy, while marzipan figures (*e.g.* pigs) remained taxed.

Another consequence of the 1998 product scope amendment was that chocolate used in ice cream was also carved out from the scope of the Levy. The 1998 amendment also repealed a special provision which

[24] C-44/93 *Namur-Les Assurances du Crédit,* paragraphs 28 and 35.

had made chocolate integrated in imported ice cream and imported cakes/pastries subject to the Levy. Furthermore, the 1998 amendment removed candied fruit from the product scope of the Levy, despite the fact that many candied fruit products have very high levels of sugar and is clearly used by consumers as a snack product.

In the context of the Aid Scheme, the removal of certain product categories from the scope of the Levy is effectively the same as expanding the circle of aid beneficiaries, as the Aid Scheme thus will provide an economic advantage favoring even more product categories and comparable producers.

Take for example ice cream, which in Norway is a commercially important product category, triggering considerable sales revenues. Alongside Finland Norway is the European country with the most ice cream consumption per capita. The 1998 alteration fully exempted ice cream products and ice cream manufacturers from the Levy, thus effectively also including them in the circle of aid beneficiaries.

Also the amendment exempting marzipan not shaped into figures implies the granting of aid to a commercially important product category which via that alteration was given an economic advantage compared to the products which continued to be subject to the Levy also after the 1998 amendment.

In "vedlegg 2" to Annex 7, the consultation paper proposing the 1998 amendments, a table shows all changes proposed by the consultation paper. This table also specifically highlights the substantive changes proposed, including the removal of several products from the product scope of the Levy.[25]

Above we have analysed the alterations in light of the *"provisions providing for it"*, and showed that these alternations *"affect the system of aid"* established by the regulations and parliamentary decisions, cf. paragraphs 28 and 35 of *Namur-Les Assurances du Crédit*.

Clearly, these alterations are not just of a "*purely formal or administrative nature"*, cf. the Authority's Implementing Decision. By also removing certain product categories from the scope of the Levy and by that effectively expanding the Aid Scheme's circle of aid beneficiaries, we consider it likely that both the 2002 and 1998 alterations would have affected the Authority's "*evaluation of the compatibility of the aid measure with the common market",* as these alterations clearly were capable of having *"effect […] on undertakings or their competitive relationship".*[26]

Furthermore, in Advocate General Trabucci's opinion in case 51/74 *Flower bulbs* (at page 105) it was held, when addressing what aspects should be taken into account when assessing whether an alteration to "existing aid" qualifies as "new aid", that it should be examined whether

> *"any of the basic features of the previous system of aid[.] [have changed], as would be the case if, for example, there had been changes in the aims pursued, <u>the basis on which the levy was made, the persons and bodies affected</u> or, generally, the source of its finances, or whether, on*

[25] For products removed from the product scope of the Levy the table uses the reference *"Avgiftsplikt utgår"*. Note that as regards the consultation paper's proposal to also remove biscuits with chocolate filling or cover from the scope of the Levy, the ministry did not endorse that proposal (evident from Annex x, the extract from St.prp. nr 1 (1997-1998)).

[26] Opinion of Advocate General Mancini in case C-91/83 *Heineken*, section 5, where the Advocate General compare alternations which may affect the competitive relationship between undertakings with merely formal alternations *"which do not pose a threat to the freedom of competition"*. It should also be noted that the alternations impact on the Authority's compatibility evaluation is likely to be even further influenced by the many levy rate increases, including the big rate increase as of 2018. The impact of the rate increases will be further addressed below.

> *the other hand, their application was confined merely to introducing adjustments of minor importance, provided for in the basic system".* [our underlining]

As our account above has showed, the 2002 and 1998 alterations were not just of an administrative nature or minor importance, the legal basis and its product scope/circle of beneficiaries were directly affected by the alterations. In case T-35/99 *Keller*, regarding the assessment of whether an alteration amounted to a reclassification into "new" aid, emphasis was specifically put on the fact that changes to the national regulation forming the legal basis of an aid scheme had *"entailed an increase in the number of potential recipients of the aid scheme at issue".*[27]

In a recent text book *Bacon* has in general terms, with several references to case-law, stated that *"increases in the potential beneficiaries [...] have been found to constitute new aid".*[28] In light of the assessment above, Hval thus submits that the alterations made to the system and product scope of the Levy, which has expanded the circle of aid beneficiaries, must lead to the Chocolate and Sugar Levy being classified as new aid.

3.5 The alteration is substantial and inseparable – turning the entire Levy into "new" aid

Above, Hval has argued that the rate increases, the changes to the legal basis and the alterations made throughout the years to the Levy's scope, system and aid beneficiaries, implies that the Levy has gone from "existing aid" to "new aid" in its entirety.

It follows from joined cases T- 195/01 and T-207/01 *Commission v Gibraltar* that the point of departure is that *"only the alteration as such that is liable to be classified as new aid".* Yet, in the same judgment the CJEU modifies that by setting out that *"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".*[29]

In case T-527/13 *Italy v Commission* it is specified that *"in the event that the alteration affects the actual substance of the existing aid or existing aid scheme, that measure is transformed <u>as a whole</u> into new aid or into a new aid scheme".*[30] [our underlining]

Against this legal backdrop, Hval firstly contends that the new elements introduced by the many alterations to the Levy are <u>not</u> clearly severable from the pre-EEA Agreement Aid Scheme. Instead, Hval considers that the alterations should rather be seen as inseparably linked to the very substance of the pre-EEA Agreement Aid Scheme.

Take for example the alterations to the product scope of the Levy, removing some product categories from its scope. Obviously, those alterations cannot be separated from the residual parts of the Levy. It also appears clear that such an alteration, concerning which products shall be subject to the Levy – effectively

[27] Case T-35/99 *Keller*, paragraph 62.
[28] Kelyn Bacon, European Union Law of State Aid, Third Edition, page 447, Oxford University Press.
[29] Joined cases T- 195/01 and T-207/01 *Commission v Gibraltar,* paragraphs 109 and 111.
[30] T-527/13 *Italy v Commission*, paragraph 75. The recent appeal case of *Italy v Commission*, case C-467/15, which set aside the General Court's judgement, does not affect the legal point quoted from paragraph 75.

has the effect of making new product categories into beneficiaries of the Aid Scheme – and therefore affects the very substance of the *"original scheme"*.

Similarly, the Levy rate increases cannot be separated from the rest of the Levy scheme. The Levy and its rate are levied as an inseparable whole. The rate increase alterations, including the recent 83% increase, cannot be extracted and be given a separate assessment as severable "new" aid; the rate increase is inseparably connected to the "principal" amount applicable before the recent increase. Consequently, the rate increase alterations also affect the very substance of the Aid Scheme, as it was before the entry into force of the EEA Agreement.

In light of the case-law referred to above, as well as the facts concerning the Levy and the alterations made to it, Hval thus contends that the alterations made to it are substantial, meaning that the entire Levy should be considered as transformed into "new" aid. In any event, to the extent the Authority concludes that the alterations made to the Levy does not imply "new" aid, the entire Levy shall be classified as "existing" aid and as a whole considered incompatible.

4 Compatibility of the aid

4.1 The Levy must be considered incompatible with the EEA Agreement

4.1.1 Introduction

Regardless of whether state aid is classified as "new" or "existing" aid the Authority must assess whether aid nevertheless can be considered justified as aid compatible with the functioning of the EEA Agreement.[31] Hval submits that the Aid Scheme (the Levy) should not be considered compatible with the functioning of the EEA Agreement. Furthermore, Hval cannot see that the conclusion of the compatibility assessment should differ depending on whether the Aid Scheme is classified as "new" or "existing" aid.[32]

4.1.2 The Authority's compatibility review must address the entire Levy, not just the increase

In its complaint letter NHO Mat og Drikke emphasises that its complaint *"is only directed against the increase[.] due to take effect on 1 January 2018"*. It is imperative for Hval to convey that the compatibility assessment of the Levy should focus on the entire Levy as a whole, not only the increase that took effect on 1 January 2018.

[31] See the three paragraphs of Article 1, Part I of Protocol 3 SCA, Article 1(f) of Part II of Protocol 3 SCA (the definition of "unlawful" ("new") aid, referring to Article 1(3) of Part I of Protocol 3 SCA), Article 62 EEA (concerning "existing" aid). See also Article 4(4) of Part II of Protocol 3 SCA. The latter provision is also applicable under the procedure concerning "unlawful" aid, cf. Article 13(1) of Section III of Part II of Protocol 3 SCA. Via Article 19(2) of Section V of Protocol 3 SCA, Article 4(4) of Part II of Protocol 3 SCA is also made applicable for any proceedings against "existing" aid. The competence to decide whether state aid is compatible with the EEA Agreement rests exclusively with the Authority. See e.g. case C-143/99 *Adria-Wien*, paragraph 29 and 30.

[32] The substantive content of the compatibility test/requirement does not differ depending on whether the aid is «existing» or new. See for example Item 3 of the Authority's decision 236/02/COL, proposing appropriate measures concerning the Act on State Enterprises ("Lov om statsforetak").

To Hval it appears unlikely that a compatibility assessment of the Levy potentially could lead to the conclusion that the 2018 increase is incompatible, while the Levy (level) as it stood before the increase could be considered compatible. Hval builds that submission on the following arguments:

The 2018 increase only reinforces both the aid amount and consequently the competitively distortive effects of the Levy. In terms of negative competitive effects, it is the existence of the Levy as such, which is the main and basic problem, *i.e.* the Levy as it stood before 1 January 2018. The 2018 increase is just the "icing on the cake", meaning that an abolishment of just the increase would not tackle the main distortive elements of the Levy.

In that context it is recalled that the Levy does not constitute "authorised" aid, *i.e.* it has not previously been approved by the Authority. In an imaginary situation where the pre-2018 Levy had been authorised by the Authority it would have been adequate to focus the current compatibility assessment on whether the rate increase has shifted the aid from being compatible to incompatible. In the case at hand the Authority has not previously assessed the compatibility of the Aid Scheme. Hval therefore requests that the Authority's compatibility assessment must focus on the Levy in its entirety, not only the rate increase that took effect on 1 January 2018.

In Item 6 of NHO Mat og Drikke's complaint letter – *i.e.* the section concerning compatibility – NHO Mat og Drikke does not at all address the fact that its complaint limits itself to request the Authority to address the 2018 rate increase. The concrete content of Item 6 of NHO Mat og Drikke's complaint letter is therefore not in conflict with Hval's complaint. Against that background, Hval can in general subscribe to the compatibility consideration presented by NHO Mat og Drikke's complaint letter. Yet, in the following Hval will present some supplementary facts and considerations related to each steps of the "balancing test" under Article 61(3)(c).[33]

4.1.3 The Levy does not pursue a legitimate objective of common interest

It follows from our account above that the Levy is to be considered a fiscal Levy. Hence, its primary objective is to collect revenue for the Norwegian State. Hval submits that a fiscal levy constituting state aid i.a. due to its selective nature cannot be considered to pursue a legitimate objective of common interest.

Any justification of (*prima facie*) selective exemptions from fiscal levies must instead be sought under step 3 of the selectivity criterion analysis (see Item 2.4 above), with references to case-law and the Authority's decision in the case concerning the Norwegian air passenger tax. At the compatibility stage there appears to be very little room for justifying aid measures where the aid measure are exemptions from fiscally motivated levies.

Even if the Levy was considered to be motivated by public health objectives (in whole or part), Hval submits that it cannot survive a compatibility test, cf, the assessment following below.

[33] Hval is not aware of any state aid guidelines that could provide a basis for finding the Aid Scheme compatible and will therefore not address that further.

4.1.4 Does not satisfy the necessity condition – arbitrary and inconsistent incitements

Seen from a public health perspective which measures the healthiness of different food products based on their various content of sugar and fat, the product scope of the Levy appears completely arbitrary and inconsistent. Clearly, the Levy thus cannot be able to affect and have incentive effect on the consumers' purchasing patterns in a consistent manner. The Levy is therefore incapable of attaining any such public health objectives.

The legal consequence of that should be that the Aid Scheme is not considered to comply with the necessity (incentive effects) conditions of the compatibility assessment.

Items 2.2.2, 2.2.3 and Annex I of NHO Mat og Drikke's complaint letter substantiates this lack of consistency with numerous examples of equally «unhealthy» products which regardless of the similarity with taxed products fall outside the Levy. For illustrative purposes we present the following illustrations:

Fig. 3: *The chocolate box at the top of the image shows a version of Hval's marzipan whales that is not subject to the Levy due to it being oven baked for five seconds. It is not fully covered by chocolate. The chocolate box at the bottom of the image shows Hval's unbaked fully chocolate covered whales that are subject to the Levy.*

Fig 4: *The pig at the top of the image is the version oven baked for five seconds and not fully covered by chocolate. That is not subject to the Levy. The pig below which is unbaked and covered by chocolate is covered by the Levy.*

Fig 5: *Hval's chocolate «Fargeplett» is filled with coloured chocolate balls. This is subject to the Levy.*

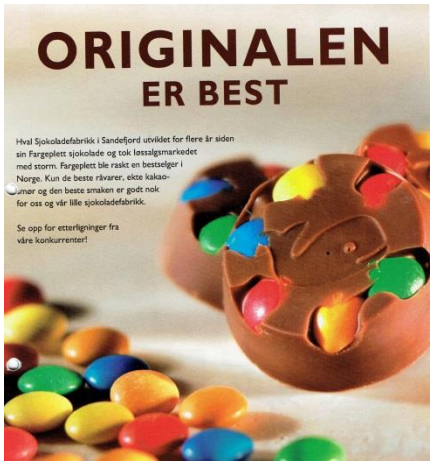


Fig 6: *A competitor's sweet biscuits filled with similar coloured chocolate balls are not subject to the Levy.*

Except for the slightly differing degree of chocolate cover, the marzipan products in figures 3 and 4 have the exact same nutritional content and taste. From a consumer point of view they must be considered as perfect substitutes. Nevertheless, the products are treated differently in terms of the scope of the Levy.

Similarly, the products in figures 5 and 6 should hardly be rated very different from a nutritional point of view.

Obviously, as illustrated above, the incentive effects of the Levy is at best inconsistent and unsatisfactory when these and other products which are interchangeable in terms of nutritional content and effect are treated fundamentally different by the Levy, *i.e.* falling either completely inside or outside the Levy.

4.1.5 Does not satisfy the proportionality requirement

4.1.5.1 The Norwegian Government has acknowledged that the Levy distorts competition between comparable products

A consequence of the arbitrary and discriminatory product scope of the Levy is its anti-competitive effects. When assessing the proportionality of the Aid Scheme any positive public health effects it may have, must be assessed against the Levy's far-reaching competition distortive effects.

Against that legal background we address some statements suggesting that the Norwegian Government is well aware of both the Levy's arbitrary boundaries as well as the competition distortive effects it causes between comparable product categories.

In Item 9.3.4 (page 104 and 105) of NOU 2007:8 it is stated that:

> *"The chocolate and sugar goods levy causes problems concerning the definition of its limits as it treats different forms of sweets and snacks differently. <u>This affects the demand for goods subject to the levy and close substitutes not encompassed by the levy</u>. The chocolate and sugar levy is thus not designed in accordance with the principles for optimal fiscal levies, which would imply that fiscal levies as little as possible should cause demand distortions."* [our underlining]

In Items 9.3.7 (page 106 and 107) and 10.3.4 (page 124 and 125) the working group moved on to propose that the Levy should be repealed and replaced by a general sugar levy based on the actual content of <u>added</u> sugar in the product:

> *"The working group means that the levy on chocolate and sugar goods [...] should be replaced by a more general levy on sugar [either based on] sugar content or concerning sugar as input factor".*

In St.prp. nr. 1 (1997-98) «Skatte-, avgifts- og tollvedtak» (**Annex 5**), the proposal sent by the Norwegian Government to the Parliament concerning the latter's annual special levies decision, the Government acknowledges that the Levy may have distortive effects on competition between comparable product categories. When referring to the process leading to the 1998 alteration, the Government states that, due to a short time frame, *"it has not been undertaken a complete assessment of the competitive aspects of the levy in relation to products that potentially could be subject to the levy – e.g. snacks products."*

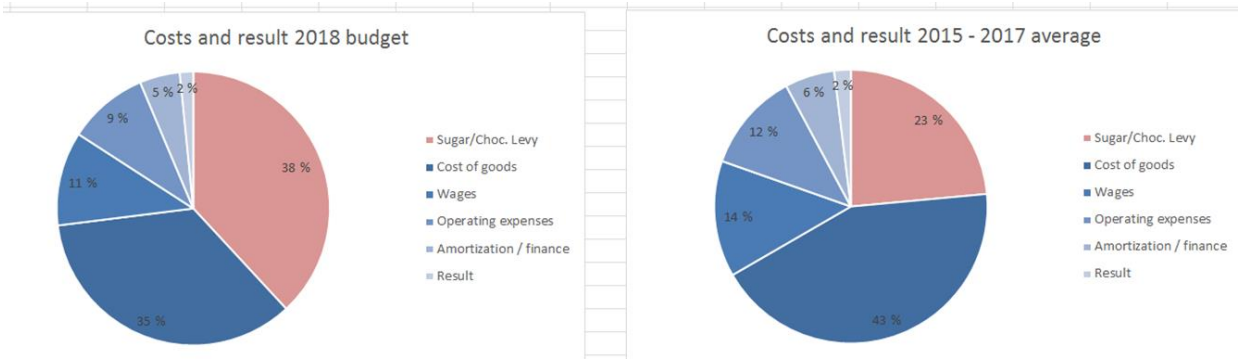
From the relevant parliamentary committee's handling of the Government's proposal it is evident that a large minority of the members takes the view that the Levy should be repealed in its entirety. These committee members, inter alia, referred to *"the great problems concerning <u>distortion of competition between related products</u> depending on whether they fall inside the scope of the levy or not",* cf. Budsjett-innst.S. nr. 1 (1997-1998) (**Annex 6**). [our underlining]

4.1.5.2 The Levy produces direct negative competition distortive effects – triggers substantial relative costs for undertakings subject to the Levy and no costs for exempted undertakings

The arbitrary and discriminatory product scope of the Levy produces a direct and substantial competition distortion between products/undertakings subject to the Levy and products/undertakings in a comparable factual and legal situation falling outside the Levy.

This competition distortion can be illustrated by the high relative share of a manufacturer's costs that can be attributed to the Levy. The Levy now amounts to 38% of Hval's variable costs. Before the 83% Levy increase taking effect from 2018, the Levy's share of Hval's variable costs was at average 23% (see figure 7 below where this is illustrated in relation to Hval's other variable costs).

Fig. 7



Knowing that products/undertakings in a comparable factual and legal situation are fully relived from these Levy costs, this cost gap indeed illustrate the corresponding competition advantage the Levy thus confers upon the exempted products/undertakings. Needless to say; the Levy has great direct impact on the competitive relationship between products/undertakings subject to the Levy and products/undertakings in a comparable factual and legal situation not being subject to the Levy.

This significant anti-competitive cost side gap also illustrates the far-reaching effects of the Levy and further substantiates that it is difficult to see the Levy as anything but incompatible.

4.1.5.3 Operating aid over an indefinite time period is normally not accepted

For the undertakings favoured by the aid, *i.e.* products/undertakings in a comparable factual and legal situation not subject to the Levy, the aid can undisputedly be labelled as operating aid granted for an indefinite time period. That itself gives the Aid Scheme a very far-reaching character. In practice it is hardly possible to imagine that such operating aid can be found compatible.

In the Authority's former guidelines for direct taxation, the compatibility assessment section states that *"operation aid is in principle prohibited. The Authority authorises it at present only in exceptional cases*

and subject to certain conditions […]".[34] Even if those guidelines had been directly applicable to the Levy (the Levy concerns *indirect* taxation), Hval struggles to see that there should be any greater leeway for operation aid in the context of special levies.

For the products/undertakings in a comparable factual and legal situation that are favoured by the selective advantage produced by the arbitrary product scope of the Levy, such time-indefinite operating aid will in reality imply a fiscal advantage, as these undertakings are relieved from the financial burden the Levy otherwise would imply. In *Sanchez Rydelski* (editor) *Di Bucci* states that operating aid over an unlimited period is *"generally impossible to clear […] as incompatible with the Common Market, because it will not be possible to establish a clear link between the aid and a given project nor to determine whether the advantage is proportionate to a contribution to the attainment of an objective of common interest."*[35]

5 Procedural aspects

5.1 Introductory remarks

While reiterating that Hval requests the Authority to address the entire Levy, not just the increase that took effect on 1 January 2018, Hval can subscribe to NHO Mat og Drikke's account concerning the Authority's obligation to open a formal investigation if it – after its preliminary examination – finds that it has doubts or serious difficulties in establishing that the aid is compatible with the EEA Agreement, cf. Article 4(4) and 6(1) of Part II of Protocol 3 SCA.[36]

In light of the distinction between "existing" and "new" aid, Hval nevertheless considers it appropriate to set out some specifications:

5.2 Procedural paths for "new" and "existing aid

Hval has alleged that the alterations to the Levy made by the Norwegian Government have turned the entire Levy into "new" aid. Against that background it appears appropriate that the Authority examine the "new" and "unlawful" aid under the procedure for "unlawful" aid foreseen by Section III (Articles 10 to 15) of Part II of Protocol 3 SCA.

If the Authority concludes – later on, subsequent to have initiated the formal proceedings referred to above, cf. Article 13 of Section III of Part II of Protocol 3 SCA – that the Levy implies "unlawful" aid (as it was put into effect in contravention of the notification/stand-still obligation), Article 14 of Section III of Part II of Protocol 3 SCA will come into play. The latter provision concerns the recovery of aid.

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[34] The Authority's decision No 149/99/COL introducing guidelines on the application of state aid rules to measures relating to direct business taxation […].
[35] "The EC State Aid Regime: Distortive Effects of the State Aid on Competition", edited by *Michael Sanchez Rydelski,* Cameron May Ltd. 2006. See page 85 in Section written by *Di Bucci.*
[36] It is noted that when reviewing «existing» aid any decision to initiate formal proceedings pursuant to Article 4(4) and 6(1) of Part II of Protocol 3 SCA are not taken until after the EEA State, potentially, has not accepted a formal recommendation to accept appropriate measures. This follows from Article 19(2) of Section V of Protocol 3 SCA, read in light of Article 18 of the same section.

If the Authority at any stage concludes that parts of or the entire Levy constitutes "existing" aid, the "existing" aid should be reviewed in accordance with the procedure regarding "existing aid schemes", cf. Section V (Articles 17 to 19) of Part II of Protocol 3 SCA.

If the Authority considers that the "existing" aid scheme is not compatible with the functioning of the EEA Agreement it shall inform the EFTA State of its preliminary view and invite it to submit comments. Thereafter the Authority may adopt a formal recommendation proposing appropriate measures, before it, if those measures are not accepted by the EFTA State, may initiate formal proceedings pursuant to Article 4(4) and 6(1) of Part II of Protocol 3 SCA. The latter follows from Article 19(2) of Section V of Part II of Protocol 3 SCA.

Above Hval has given reasons for why it finds it difficult to see that the Levy could be considered compatible with the EEA Agreement.

6 Closing remarks

By this complaint Hval supplements the previous complaint from NHO Mat og Drikke. Hval requests the Authority not to limit its examination to the Levy increase which took effect on 1 January 2018. Instead, Hval requests the Authority to review the entire Levy as whole.

Should the Authority be in need for any additional information from Hval in order to process this complaint, Hval remains at the Authority's disposal and will within short be able to submit any additional information desired. Hval is also available for the Authority if the latter should desire any meetings, be it in person or via phone of video conference.

Yours sincerely
Advokatfirmaet Steenstrup Stordrange DA

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Advokat | Partner	Advokat | Partner	Senioradvokat